TRADE LEGALISM AND INTERNATIONAL RELATIONS THEORY: AN ANALYSIS OF THE WORLD TRADE ORGANIZATION

G. RICHARD SHELL†

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† Associate Professor of Legal Studies and Management, the Wharton School of the University of Pennsylvania.

I gratefully acknowledge research support from both the Huntsman Center for Global Competition and Innovation and the Wharton Department of Legal Studies. Professors William Alford (Harvard Law School), Curtis Reitz (University of Pennsylvania Law School), and my Wharton colleagues Thomas W. Dunfee, Susan Freiwald, Steve Kobrin, Bruce Kogut, Ann Mayer, Philip Nichols, and Eric Orts read earlier drafts of the piece and provided many useful criticisms and suggestions. I also benefited from comments made by participants at the Faculty Seminar of the University of Connecticut School of Law, where I presented a preliminary version of this Article. Finally, I would like to thank the Program on Negotiation at Harvard Law School, where, as Visiting Scholar during the 1993-1994 academic year, I conducted much of the research that is reflected in this Article.

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INTRODUCTION

With the approval by the United States and other major trading countries of the Uruguay Round revisions to the General Agreement on Tariffs and Trade (GATT),¹ the world is poised to

1. GATT Secretariat, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, reprinted in 33 I.L.M. 1125, 1143 [hereinafter Final Act]. The U.S. Congress approved implementing legislation for the new trade agreement at a lame duck session in December 1994, opening the way for ratification by all 124 GATT signatory states. See David E. Sanger, *Senate Approves Pact to*

enter a new stage in global economic integration. The Uruguay Round agreements will lower global tariffs by over \$700 billion² while increasing world income by an estimated \$510 billion per year.³ Most controversially, they call for an entirely new legal system for international trade dispute resolution that some say will greatly erode traditional concepts of state sovereignty.⁴

Under the Uruguay Round agreements, GATT member states have created two powerful new trade institutions: the World Trade Organization (WTO)⁵ and a trade "supercourt"⁶ called the WTO

Ease Trade Curbs; A Victory for Clinton, N.Y. TIMES, Dec. 2, 1994, at A1, A22. The GATT as originally signed in 1947 is found in General Agreement on Tariffs & Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187. See *infra* notes 34-39 and accompanying text.

2. Sanger, *supra* note 1, at A22 (reporting that the Clinton administration estimates that global tariffs will go down by \$744 billion).

3. The GATT Secretariat has projected these gains, measured in 1992 dollars, to occur by the year 2005. *A \$510 Billion Boost to World Income*, FOCUS: GATT NEWSLETTER (GATT Secretariat, Geneva, Switzerland), Nov. 1994, at 2 (citing GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND—MARKET ACCESS FOR GOODS AND SERVICES: OVERVIEW OF THE RESULTS (1994)). This figure is an increase from the Secretariat's prior estimate that the increase in world income as a result of the Uruguay Round would be \$230 billion. GATT Secretariat, *An Analysis of the Proposed Uruguay Round Agreement, with Particular Emphasis on Aspects of Interest to Developing Countries*, MTN.TNC/W/122, at 41 (Nov. 29, 1993). The Uruguay Round agreement also extends GATT treatment for the first time to trade in services, sets a 10-year timetable for eliminating the world quotas on the sale of certain agricultural products and textiles, and creates a structure to harmonize intellectual property laws among trading states. Alan Riding, *Seven Years of Struggle End as 109 Nations Sign Trade Accord*, N.Y. TIMES, Apr. 16, 1994, at A1, A48 (noting that Uruguay Round reduced import barriers "by an average of 40 percent" and embraced "for the first time such areas as agriculture, textiles and financial services," including a 10-year phase-out of the Multi-Fiber Arrangement); Sanger, *supra* note 1, at A22.

4. See John Harwood, *GATT Backers Are Given Edge in the Senate*, WALL ST. J., Dec. 1, 1994, at A3 (quoting Senator Robert Byrd as stating that the World Trade Organization (WTO) will be "a Tyrannosaurus" that will "ransack" U.S. laws); Ralph Nader, *WTO Means Rule by Unaccountable Tribunals*, WALL ST. J., Aug. 17, 1994, at A12 (arguing that the proposed WTO dispute resolution process "would be a staggering rejection of our due process and democratic procedures"); Sanger, *supra* note 1, at A22 (reporting that opponents of the new GATT agreement in the United States sought to defeat the deal by arguing that the WTO "would become an all-powerful bureaucracy, able to undercut American sovereignty").

5. Final Act, *supra* note 1, art. 1, reprinted in 33 I.L.M. at 1144; see Miquel Montaña i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 141-59 (1993) (giving a general description of the new WTO legal system). The WTO officially commenced operations on January 1, 1995. David E. Sanger, *U.S. Threatens \$2.8 Billion of Tariffs on China Exports*, N.Y. TIMES, Jan. 1, 1995, at 14.

6. Cf. Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L.

Appellate Body.⁷ The WTO is an umbrella organization for trade policymaking, surveillance, and reporting.⁸ The Appellate Body oversees the work of all dispute resolution panels interpreting the GATT and associated trade codes.⁹ Appellate Body decisions, as well as decisions of dispute resolution panels if parties elect not to appeal to the Appellate Body, are formally binding under international law for signatory states unless all the states (including those that win their cases) vote unanimously to overrule them. As a practical matter, this rule means that WTO dispute resolution decisions will automatically "come into force as a matter of international law in virtually every case."¹⁰ The new "judges of international trade"¹¹ thus have jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk imposition of trade sanctions.¹²

REV. 1016, 1019, 1025 (1985) (book review) (arguing against a proposal to create a trade "supercourt" within the GATT).

7. Final Act, *supra* note 1, pt. 2, Annex 2, art. 17, *reprinted in* 33 I.L.M. at 1236-37. The dispute resolution provisions of the Uruguay Round, including the articles governing the Appellate Body, are contained in Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act, *supra* note 1, pt. 2, Annex 2, *reprinted in* 33 I.L.M. at 1226-44 (1994) [hereinafter Understanding].

8. The WTO will oversee a variety of international economic agreements, including the GATT, *supra* note 1, pt. 2, Annex 1A, *reprinted in* 33 I.L.M. at 1154-66, agreements related to trade in services, *id.* Annex 1B, *reprinted in* 33 I.L.M. at 1168-96, a treaty regarding intellectual property rights, *id.* Annex 1C, *reprinted in* 33 I.L.M. at 1197-225, and a number of "Plurilateral Trade Agreements," *id.* Annex 4.

9. Understanding, *supra* note 7, art. 17(1), *reprinted in* 33 I.L.M. at 1236.

10. John H. Jackson, *Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda*, in *MANAGING THE WORLD ECONOMY* 131, 141 (Peter B. Kenen ed., 1994). Under the new procedures, the WTO will establish a Dispute Settlement Body (DSB) composed of all WTO member countries to oversee the dispute resolution process. Final Act, *supra* note 1, art. 4(3), *reprinted in* 33 I.L.M. at 1145. When not all WTO members have signed the agreement in dispute, such as the "Plurilateral Agreements" contained in Part 2, Annex 4, only those states that have signed the agreement will be allowed to vote in the DSB. Understanding, *supra* note 7, art. 2(1), *reprinted in* 33 I.L.M. at 1226. The DSB will have the power to reverse decisions of the Appellate Body, or of dispute panels if no appeal is taken, but only by unanimous vote. *Id.* arts. 16(4), 17(14), *reprinted in* 33 I.L.M. at 1235, 1237. The WTO dispute regime is so formally legalistic that the treaty provides for binding arbitration as an alternative to the panel and appeal process. *Id.* art. 25(1), *reprinted in* 33 I.L.M. at 1242 (stipulating that arbitration is available as an alternative to the panel procedure to "facilitate the solution of certain disputes that concern issues that are clearly defined by both parties"). When arbitration is selected, the parties must "agree to abide by the arbitration award," and other member states may participate only with permission of the disputants. *Id.* art. 25(3), *reprinted in* 33 I.L.M. at 1242.

11. Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 50, 67 (Julian D.M. Lew ed., 1987).

12. Understanding, *supra* note 7, art. 22, *reprinted in* 33 I.L.M. at 1239-41. Under

This new international dispute resolution system marks a dramatic departure from past international trade practice. Formerly, winning plaintiffs were required to obtain approval from the GATT Council before dispute settlement panel decisions were final and effective, and losing defendants had the formal right to veto panel decisions at the GATT Council stage. In addition, there was no court of appeals and no mechanism for authorizing retaliation short of obtaining the affirmative votes of all GATT signatories.¹³ Indeed, in the entire history of the GATT, there was only one instance when the organization formally authorized a complaining country to withdraw trade benefits in retaliation for a defendant's violation of GATT rules.¹⁴

Within the legal academy, the new WTO system represents a stunning victory for international trade "legalists"¹⁵ in their running debate with trade "pragmatists"¹⁶ over how international trade dispute resolution should be structured. Pragmatists have supported formally nonbinding methods of dispute resolution based on their belief that such systems provide the best means of coping with power relationships between countries. A diplomatic approach to dispute resolution, say pragmatists, renders trade politically sustainable in a rapidly changing world economy.¹⁷ For their part, legalists have advocated the creation of rule-based trade tribunals that can move world trade toward a governance system

the new WTO rules, losing defendants may attempt to negotiate a settlement involving payment of compensation to winners rather than change their trade policies. *Id.* art. 22(2), reprinted in 33 I.L.M. at 1239. If no such mutual agreement can be reached, the winner may seek approval from the DSB to withdraw treaty benefits in the amount of the nullification and impairment it has suffered. *Id.* The amount and shape of these trade sanctions is subject to a separate WTO dispute resolution procedure. *Id.* art. 22(6)-(7), reprinted in 33 I.L.M. at 1240-41.

13. Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in HANDBOOK OF GATT DISPUTE SETTLEMENT 3, 36 (1991).

14. *Id.* at 7 n.7; see Netherlands Measures of Suspension of Obligations to the United States, Nov. 8, 1952, GATT BISD 1st Supp. 32 (1953).

15. Trimble, *supra* note 6, at 1017.

16. *Id.*; see also OLIVIER LONG, LAW AND ITS LIMITS IN THE GATT MULTILATERAL TRADE SYSTEM 71 (1985) (stating that "the primary objective of [the GATT] dispute settlement procedures is not to decide who is right and who is wrong . . . but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible"); *id.* at 73 ("[L]egalism does not contribute to trade liberalization . . .").

17. Fred L. Morrison, *The Future of International Adjudication*, 75 MINN. L. REV. 827, 838 (1991) (arguing that "the relative success of the GATT mechanism has been because of, not in spite of, its recognition of a political role in the process").

based on "the rule of law."¹⁸ They have argued that rule-based adjudication systems are fairer to both rich and poor nations and provide predictability and stability in the otherwise anarchic and volatile field of international trade.¹⁹

The creation of the WTO dispute resolution system opens a new stage in the debate regarding trade legalism. This debate will now focus on normative differences among legalists that have been largely submerged while legalist advocates have pressed for creation of a global trade adjudication system.²⁰ The coming debate will center both on efforts to reform the WTO and on the way WTO judges should approach the task of adjudication within the new legal system. These debates will not be merely matters of academic interest within international law circles; as global trade accelerates, billions of dollars and thousands of jobs may hang on the way this discussion evolves.

Drawing on international relations, economic, and legal theory,²¹ this Article conceptualizes and then critiques three competing normative approaches to, or models of, WTO trade legalism. These embrace differing and sometimes conflicting visions of the proper functions of a world trade governance system. The three legalist models I present are the Regime Management Model,²²

18. George M. Berrisch, *The Establishment of New Law Through Subsequent Practice in GATT*, 16 N.C. J. INT'L L. & COM. REG. 497, 500 (1991) (stating that the dispute resolution system reforms negotiated during Uruguay Round establish "the GATT system as a system governed by the rule of law").

19. ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW xli-xlii (1991) (discussing need for a "paradigm shift" in international trade law from "coexistence" to "integration" among states through the use of "rule-oriented" legal processes).

20. John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE 93, 98 (1978).

21. This Article owes a particular debt to the work of Kenneth Abbott and Ann-Marie Slaughter Burley (formerly Ann-Marie Burley) for rendering the international relations literature accessible to legal scholars. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989) [hereinafter Abbott, *Modern International Relations Theory*]; Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501 (1985) [hereinafter Abbott, *The Trading Nation's Dilemma*]; Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111 [hereinafter Abbott, *The Uruguay Round and Dispute Resolution*]; Ann-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Ann-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

22. See *infra* notes 139-236 and accompanying text.

the Efficient Market Model,²³ and the Trade Stakeholders Model.²⁴ Each of these is grounded in an international relations theory of trade policy, each regards international trade policy formation as influenced, if not dictated, by domestic politics, and each has profoundly different implications for the operation of the WTO legal system.

The Regime Management Model derives from "regime theory"²⁵ in the international organization literature of political science. Regime theory assumes that states are the primary actors in the international system and that states are motivated to achieve a set of sometimes conflicting, self-interested goals, such as wealth enhancement, power, and domestic political control. This model views trade treaties as "contracts" among sovereign states that help them resolve potentially conflicting interests over these diverse goals. Additionally, binding, rule-oriented trade adjudication is an enforcement mechanism by which states solve a multiparty "prisoner's dilemma"²⁶ arising out of trade contracts.

Legalists favoring the Regime Management Model see the WTO legal system as a means to generate legitimate normative standards around which states will bargain with one another to gain wealth through more open trade while retaining the control they need to achieve the domestic political objectives that call for limiting trade. Regime-oriented legalists assert that international legal rules can induce states to negotiate "in the shadow of the law" rather than purely on the basis of power relationships even though international law lacks a centralized police power.²⁷ The WTO's authority to announce binding trade standards backed by a credible threat of economic retaliation will, these legalists hope,

23. See *infra* notes 237-316 and accompanying text.

24. See *infra* notes 360-405 and accompanying text.

25. See Burley, *supra* note 21, at 217-19.

26. See *infra* notes 157-58 and accompanying text.

27. Jackson, *supra* note 20, at 99 (arguing that the rule-oriented approach to resolving trade disputes involves negotiation "by reference to what [parties] would expect an international body would conclude about the action of the transgressor in relation to its international obligations"). When parties bargain "in the shadow of the law," they must take into account not only their relative power positions and interests, but also their predictions about how tribunals will interpret rules in particular cases. When the rules are clear enough, they become bargaining chips favoring the side with the better legal endowments. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (discussing how legal rules confer "bargaining endowments").

level and order the playing field of international trade between states.²⁸

The Efficient Market Model of legalism derives from a combination of the foreign relations theory of "liberalism" and rigorous application of neoclassical economic free trade doctrines embodied as rules of law. Under liberalism, nations are not conceived of as autonomous, self-maximizing actors, nor are they the ultimate subjects of international law. Rather, private actors are the "essential players in international society who, in seeking to promote their own interests, influence the national policies of States."²⁹ Pure free trade theory, meanwhile, posits that business firms, consumers, and workers all benefit most when states subject themselves to the competitive rigors of the global market under the economic doctrine of comparative advantage. As seen by the Efficient Market Model, the WTO is part of an emerging "global business civilization"³⁰ that transcends states and requires its own, semiautonomous legal system to operate effectively.³¹

28. These goals were often invoked by current and former U.S. trade bureaucrats in their arguments supporting congressional approval of the WTO. See *Hearings on General Agreement on Tariffs and Trade (GATT) Before the Senate Comm. on Commerce, Science and Transportation*, Federal News Service, June 16, 1994, available in LEXIS, Legis Library, Fednew File (testimony of U.S. Trade Rep. Michael Kantor) [hereinafter *GATT Hearings*] ("From time to time, we will get into disputes with other countries. They will challenge our trade practices and we will challenge theirs. But that does not mean we lose our sovereignty. It does mean that we need a strong, effective, and fair dispute settlement process."); Julius L. Katz, *GATT Is Threatened by the Squeamish . . .*, WALL ST. J., Aug. 30, 1994, at A10 (arguing that Congress should approve the WTO because "[i]f we expect other countries to observe international trading rules, we must also be prepared to observe the rules we helped to write" and noting that "the WTO ensures that member countries agree to the obligations of all of the agreements, not just those they like").

29. Linda C. Reif, *Multidisciplinary Perspectives on the Improvement of International Environmental Law and Institutions*, 15 MICH. J. INT'L L. 723, 738 (1994) (book review) (characterizing Ann-Marie Slaughter Burley's theory of liberalism).

30. Susan Strange, *The Name of the Game*, in SEA CHANGES: AMERICAN FOREIGN POLICY IN A WORLD TRANSFORMED 238, 260 (Nicholas X. Rizopoulos ed., 1990) [hereinafter *Strange, The Name of the Game*]:

By the end of the 1980s, a metamorphosis of the international political economy had begun: the old, close relationship between state, civil society, and economy is in the process of being replaced by a new relationship between authority and economy, and between authority and society. A global business civilization had emerged

According to Strange, this "civilization" is composed of millions of individual economic actors held together in a "complex network or web of transnational, bilateral bargains—bargains between corporations and other corporations, between corporations and governments, and between governments." Susan Strange, *Protectionism and World Politics*, 39 INT'L ORG. 233, 234 (1985) [hereinafter *Strange, Protectionism*].

31. As Professor Strange has put it, "When states . . . try to use their power to

Legalists advocating the Efficient Market Model see binding international trade rules as instruments with which to achieve efficient international capital and consumer markets by eliminating needless government interference and intrusion in international trade.³² Ideally, this model would give businesses direct access to both supranational and domestic dispute resolution machinery to enforce international trade rules and reduce the legal transaction costs of global trade.

Both the Regime Management Model and, to an even greater extent, the Efficient Market Model seek to promote trade over other domestic and transnational values. The third model presented here, the Trade Stakeholders Model, offers an alternative vision of the interplay between trade and other social policies. This model emphasizes broader participation in trade adjudication, democratic processes for resolving trade conflict, and open dialogue regarding the goals of economic trade. Like the Efficient Market Model, the Trade Stakeholders Model is based on liberalism's insight that individuals, not states, should be the primary subjects of international law. Unlike the Efficient Market Model, the Trade Stakeholders Model sees trade legalism as an opportunity for domestic and transnational interest groups of all kinds, non-business as well as business, to participate with nations in the activity of constructing common economic and social norms that will make global trade a sustainable aspect of a larger transnational society.

With its emphasis on participatory norms, the Trade Stakeholders Model has much in common with the civic republicanism recently advocated by legal scholars such as Cass Sunstein for the

influence where and how international production takes place, they find they cannot direct, as with trade. They can only bargain." Strange, *The Name of the Game*, *supra* note 30, at 243; see also Meinhard Hilf, *Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures*, in *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* 285, 321 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988) (arguing that in an interdependent world economy "[s]tates are beginning to loose [sic] their freedom to act as they want" and that "[i]nternational economic integration, influenced by a multitude of uncontrollable [sic] actors, entails a loss of sovereignty").

32. PETERSMANN, *supra* note 19, at 210-21; Jan Tumlr, *Need for an Open Multilateral Trading System*, 6 *WORLD ECON.* 393, 406 (1983) (stating that "international [trade] rules represent a truer expression of the national interest of all the countries concerned than the mass of national [economic] legislation").

U.S. legal system.³³ Ultimately, all of the domestic and transnational political forces with a stake in trade policy deserve "places at the table"—including standing to litigate cases—in domestic and international trade governance systems. According to this view, the WTO legal system has the potential to serve as a forum for articulating global norms on such issues as global welfare, labor rights, environmental protection, and other trade-related issues that are frequently marginalized when trade discussions focus narrowly on technical issues such as subsidies, tariffs, and non-tariff barriers. Substantial institutional reforms will be needed, however, before the Trade Stakeholders Model can be used as a blueprint for future jurisprudential developments and systemic reforms within the WTO.

The three legalist models for the World Trade Organization are preliminarily summarized in Table 1.

TABLE 1
Models of International Trade Legalism

	Types of Parties with Standing	Theories Underlying Model
Regime Management Model	States	Realism and Regime Theory
Efficient Market Model	States and Businesses	Foreign Relations Liberalism and Free Trade Theory
Trade Stakeholders Model	States and All Trade Stakeholders	Foreign Relations Liberalism and Republican Theory

The Article is organized as follows. Part I provides background information concerning the history, structure, and negotiation process underlying the WTO dispute resolution system. Part II discusses two foundations for any discussion of trade governance: free trade theory and the foreign relations theory of real-

33. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-48 (1985); see *infra* notes 369-74 and accompanying text.

isin. I then present the two currently dominant approaches to legalism, the Regime Management Model and the Efficient Market Model. For each of these two, the Article discusses the theoretical bases of the model, gives some empirical examples of the model in operation in existing transnational society, and demonstrates how the model can help us understand international trade jurisprudence as practiced by trade adjudicators.

Part III uses the Regime Management Model and Efficient Market Model of trade legalism to investigate three questions about the new WTO system. First, what normative visions underlie and help explain the structures of the new WTO legal system? Second, what sort of dispute resolution system reforms are people who hold these visions likely to demand as global economic integration proceeds into the twenty-first century? Third, what kind of justice can participants expect from this new legal system?

Part IV explores shortcomings exhibited by both the Regime Management Model and the Efficient Market Model. I conclude that for the WTO system to achieve stability as well as legitimacy as a representative institution, innovative political processes and adjudicative techniques reflecting the values of the Trade Stakeholders Model will need to be developed. I describe the Trade Stakeholders Model, give examples of the model in operation, demonstrate how the model can be applied jurisprudentially, and argue for reforms within the WTO that are consistent with the model's vision.

I. BACKGROUND

Before undertaking an in-depth analysis of the WTO dispute resolution system, one must understand the system's history and former structure. This Part first reviews the GATT dispute resolution mechanism as it existed prior to the Uruguay Round agreements. Next, it discusses the negotiation process that generated the proposals for change. Finally, it describes the operation of the new WTO system.

A. *The GATT Dispute Resolution System: From Diplomatic Dispute Settlement to Nonbinding Arbitration*

The General Agreement on Tariffs and Trade was originally negotiated in 1947 by twenty-three countries³⁴ as a provisional trade agreement to lower tariffs in conjunction with the establishment of three global economic institutions: the International Trade Organization (ITO), the International Monetary Fund (IMF), and the World Bank.³⁵ Collectively, the designs for these institutions came out of the Bretton Woods conference of July 1944³⁶ and were intended to bolster trade and stabilize the world economy in the wake of World War II.³⁷ Both the IMF and the World Bank came into existence as a direct result of the conference,³⁸ but Congress refused to approve the ITO, and it was eventually abandoned,³⁹ leaving the GATT as the legal structure within which world trade policies would be developed.⁴⁰ The demise of the ITO meant, among other things, abandoning the ITO's consensus-based dispute resolution system, which included resort to the International Court of Justice for "advisory opinions"⁴¹ and a binding arbitration option outside the ITO for disputing ITO members.⁴²

The provisional nature of GATT's early history shaped its dispute resolution processes, which began as a diplomatic system of dispute settlement and gradually evolved into a rule-oriented but

34. JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 5 (1990) [hereinafter JACKSON, *RESTRUCTURING GATT*].

35. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 31-37 (1989) [hereinafter JACKSON, *WORLD TRADING*].

36. PETERSMANN, *supra* note 19, at 246.

37. ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM & WORLD TRADE DIPLOMACY* 5 (2d ed. 1990).

38. PETERSMANN, *supra* note 19, at 246.

39. JACKSON, *WORLD TRADING*, *supra* note 35, at 34.

40. *Id.* at 15. The GATT took legal effect through the "Protocol of Provisional Application," under which GATT is applied as a treaty obligation under international law. *Id.* at 13-14. The Protocol permitted the executive branches of the signing states to implement the GATT without seeking legislative approval by giving "grandfather rights" to trade legislation existing in 1947 that was inconsistent with the GATT. *Id.* at 14. These grandfather rights exist to the present day. *Id.*

41. HUDEC, *supra* note 37, at 28-30.

42. *Id.* at 31 n.18. The ITO Charter provided that such arbitration decisions "shall not be binding for any purpose on the Organization." *Id.* (quoting ITO CHARTER art. 93(2)).

formally nonbinding arbitration scheme. As negotiated in 1947, GATT contained only a few paragraphs devoted to dispute settlement. The most important of these was article 23, which permitted the "Contracting Parties" (i.e., the collective of GATT signatory states, which also acted as the GATT "Council"⁴³) to make rulings on complaints by states. Article 23 also authorized suspension of GATT obligations whenever a state was determined to have caused "nullification and impairment" of benefits under the treaty⁴⁴ through its trade policies or actions.⁴⁵

In the early years of the GATT, the contracting parties handled disputes by acting jointly or by setting up working groups of diplomatic representatives to investigate complaints.⁴⁶ In 1955, however, the GATT Secretariat established dispute resolution panels of three to five experts to act as independent arbitrators to facilitate dispute resolution. The GATT used this general arbitration framework for disputes until the WTO came into existence in 1995.⁴⁷ Between 1955 and 1995, the GATT system gradually grew more "legalistic" and professional,⁴⁸ but it remained formally nonbinding.⁴⁹

Under the article 23 process as it existed prior to the establishment of the WTO, a state could complain that its benefits under GATT had been nullified and impaired by the action of another state.⁵⁰ If efforts at consultation and attempts to negotiate a mutually satisfactory solution failed,⁵¹ the Council would

43. The Contracting Parties set up the "Council" in 1960. JACKSON, *WORLD TRADING*, *supra* note 35, at 48. The Council consisted of representatives of all GATT members who wished to participate and met monthly in Geneva. *Id.*

44. It is worth noting that "nullification and impairment" under article 23 did not depend on the actual breach of a treaty obligation, although the vast majority of complaints over the years involved allegations that members had violated the GATT. JACKSON, *RESTRUCTURING GATT*, *supra* note 34, at 62.

45. *Id.* at 62-63.

46. *Id.* at 63.

47. *Id.*

48. One of the most important innovations was the establishment in 1981 of a permanent GATT Office of Legal Affairs. PETERSMANN, *supra* note 19, at xxix.

49. For a general description of the various modifications in panel procedures that have been implemented since 1955, see JACKSON, *RESTRUCTURING GATT*, *supra* note 34, at 61-65.

50. The clearest and most realistic description of how the GATT dispute system worked in practice can be found in a work by a former GATT official. See Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, 4 J. INT'L ARB. 53 (1987).

51. *Id.* at 60-62.

convene a GATT panel of experts from countries not involved in the dispute.⁵² The chairman of the GATT Council, in consultation with the parties and with the help of the Secretariat's staff, selected the panel to hear the dispute.⁵³

The panel took evidence, heard argument, and eventually issued a written decision responsive to the complaint. In an interesting deviation from both international arbitration and Anglo-American legal traditions, the GATT Secretariat, in particular the Office of Legal Affairs, played a strong role in the decisionmaking process.⁵⁴ Representatives from the Office of Legal Affairs attended all panel meetings, provided guidance on GATT caselaw, expressed views to panelists, and even drafted opinions to "improv[e] their legal reasoning."⁵⁵ The panel then submitted its decision to the GATT Council for adoption. At this point even one vote—including the vote of the party that lost the case—could block approval of the decision and prevent it from becoming "GATT law."⁵⁶

B. *The Political Dynamics of Reform: Fear and Loathing of Unilateral Trade Sanctions*

The GATT system, which processed nearly 250 complaints between 1947 and 1992,⁵⁷ underwent a radical transformation as a result of changes negotiated in the Uruguay Round. These changes

52. *Id.* at 63–64.

53. *Id.* at 65.

54. Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 485 (1994) (noting that the GATT "secretariat has played an important—sometimes decisive—role" in panel proceedings and describing how members of both the economic and legal staffs have "sat with the panelists, prepared drafts of the findings of fact, and in some instances drafted the dispositive parts of the panel reports"); Plank, *supra* note 50, at 76.

55. JACKSON, *RESTRUCTURING GATT*, *supra* note 34, at 65.

56. Although one might think that no state could ever "win" a case in such a system, the relational pressures within the world trading community and the flexible nature of GATT compliance processes led to mutually acceptable solutions to trade problems in most cases. ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW* 273–355 (1993) (providing a detailed statistical profile of 207 GATT complaints filed between 1948 and the beginning of 1990 and concluding that 77% of the rulings (68 out of 88) found that the complaint was justified and that in 60 of those 68 cases (88%) there was either full or partial satisfaction of the claim); JACKSON, *RESTRUCTURING GATT*, *supra* note 34, at 65–69 (summarizing the process and results of GATT dispute settlement, including the "precedent effect" of panel reports); Plank, *supra* note 50, at 88–92 (describing the process by which panel reports were adopted and their influence on dispute settlement).

57. HUDEC, *supra* note 56, at 273–355, 357.

are the result of complex interactions between states at the international level and between private businesses and governments at the domestic level. The main players in the reform movement were the United States, the European Union, and domestic export industries within these two GATT powers.

The United States and Europe are frequent antagonists in trade matters and historically have disagreed regarding the need for a strong, binding system of dispute resolution for the GATT.⁵⁸ In part, this disagreement has been philosophical, reflecting domestic cultural differences between the United States and Europe. The United States, comfortable with the notion of a strong legal system serving as a unifying force within its federal system, has viewed the GATT primarily as a "legal" organization. The Europeans, used to seeking negotiated, power-based solutions to differences among European states, have thought of the GATT as a "diplomatic" institution.⁵⁹ In addition, the United States has tended to be a plaintiff in GATT cases, leading it to favor reforms that would bring more pressure on losing defendants to comply with panel rulings.⁶⁰ Again by contrast, Europe has been slower to reduce trade barriers and has tended to be a GATT defendant, particularly in the area of agriculture. Europe has thus enjoyed the right to delay or veto panel decisions that go to the GATT Council for approval.⁶¹

As a result of frustration with the GATT dispute resolution system and the urgent need to open European, Japanese, and other foreign markets in the context of a growing trade deficit, American business interests in the 1980s began lobbying U.S. trade policymakers to take "unilateral" action to suspend trade benefits to GATT trading partners not living up to their treaty obligations.⁶² The statutory vehicles for unilateral action were sec-

58. Mora, *supra* note 5, at 128-33.

59. *Id.* at 129, 131 (noting that the United States has tended to approve a "legalist" view of the GATT and Europe has tended to emphasize "negotiation or conciliation").

60. *Id.* at 129 (stating that no state has initiated more GATT dispute procedures than the United States).

61. *Id.* at 131-33 (stating that Europe favored consensus procedure in the GATT in part to protect its agricultural policies that were frequently attacked in GATT proceedings).

62. Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 1* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (discussing the combination of export lobbying interests and economic ideology that provided "the momentum for the market

tion 301,⁶³ "Super 301,"⁶⁴ and "Special 301,"⁶⁵ all of which are parts of the Trade Act of 1974, as amended.⁶⁶

Under section 301, private business groups may petition the Office of the U.S. Trade Representative (USTR) to investigate whether a foreign government has unfairly blocked access to a foreign market.⁶⁷ If the USTR finds the complaint meritorious, the statute requires the government to undertake negotiations, file appropriate complaints, and take other actions to persuade the foreign government to change its protectionist practices.⁶⁸ Ultimately section 301 gives the President authority to retaliate against foreign protectionist practices by various unilateral measures, including trade sanctions.⁶⁹ Significantly, while the filing of GATT complaints was a part of the section 301 process, there was no requirement that the United States await the final results of GATT dispute resolution proceedings before taking unilateral action.⁷⁰ The resulting use of section 301 as a unilateral trade weapon⁷¹

opening thrust in the U.S. trade policy" represented by section 301).

63. Trade Act of 1974, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411(a) (1988)).

64. 19 U.S.C. § 2420(a)-(b) (1988); Elizabeth K. King, *The Omnibus Trade Bill of 1988: "Super 301" and Its Effects on the Multilateral Trade System Under the GATT*, 12 U. PA. J. INT'L BUS. L. 245 (1991).

65. 19 U.S.C. §§ 2242(a), 2412(b)(2) (1988); Judith H. Bello & Alan F. Holmer, "Special 301": Its Requirements, Implementation, and Significance, 13 FORDHAM INT'L L.J. 259, 259 (1989-1990).

66. 19 U.S.C. §§ 2411-2416 (1988). See generally Bhagwati, *supra* note 62 (discussing the history of § 301 and U.S. trade policy). Partly in response to the U.S. adoption of various § 301 provisions, the European Union in 1984 adopted its own analogous unilateral trade weapon, Council Regulation 2641/84, and began using it against the United States and other trading partners for alleged "illicit" trade practices against EU exporters. See Wolfgang W. Leirer, *Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84*, 20 N.C. J. INT'L & COM. REG. 41, 44 (1994).

67. 19 U.S.C. § 2412(a) (1988). The USTR may also initiate an investigation on its own initiative. *Id.* § 2412(b); Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL'Y INT'L BUS. 263, 285 (1991-1992).

68. 19 U.S.C. § 2413(a) (1988).

69. The USTR determines whether a sanction is appropriate and what that sanction should be, but the President has the last word on whether to impose the sanction. *Id.* § 2411(a)(1); John H. Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1585 (1984).

70. Indeed, § 301 sanctions may be imposed even when the foreign action in question is not a breach of the GATT or any other international obligation. JACKSON, *WORLD TRADING*, *supra* note 35, at 105-06.

71. Alan Sykes has analyzed nearly 90 § 301 and related complaints brought between

against foreign governments and industries outside the legal framework of the GATT upset many U.S. trading partners⁷² and became a major issue in the Uruguay Round.⁷³

As it became clear that section 301 was a target for foreign trade negotiators, Congress let it be known that the weak GATT dispute resolution system made section 301 a necessity and that no revisions of section 301 could be expected unless there were major changes in the dispute resolution process.⁷⁴ It is not clear whether this bargaining move was made in hopes that European and other nations would back away from demands that the United States scuttle section 301 or whether Congress made a sincere effort to frame a bargaining quid pro quo. In either case, events took an unexpected turn as four interests converged to support a proposal for a new WTO system for dispute resolution when the Uruguay Round moved toward its conclusion in the late 1980s and early 1990s.

First and most importantly, there was a general desire by all nations to stem the growing reliance on unilateral threats and trade sanctions and replace this free-for-all with a stable dispute resolution system that could be relied on to eliminate protectionist trade rules.⁷⁵ This movement coincided with the historical U.S. position favoring legalism based on U.S. interests as a GATT plaintiff seeking a stronger, more binding system.

1975 and 1991. Sykes, *supra* note 67, at 318–30; see also Warren Maruyama, *Section 301 and the Appearance of Unilateralism*, 11 MICH. J. INT'L L. 394, 397 (1990) (calling § 301 the "Schwarzenegger of U.S. Trade Law").

72. Leirer, *supra* note 66, at 44–45 (noting that Europeans were especially upset because nearly one quarter of all section 301 cases had been aimed at Europe).

73. Mora, *supra* note 5, at 130–31, 134–36; Sykes, *supra* note 67, at 265; Transcript of Discussion Following Presentation by Kenneth W. Abbott, in 1992 COLUM. BUS. L. REV. 151, 154 (remarks of Professor Hudec) (stating that "the pressure of Section 301" was responsible for the "dramatic" changes in the WTO dispute resolution proposals and that "[w]hat you see in this dispute settlement response is an answer that GATT will do what Section 301 asks to be done").

74. Robert E. Hudec, *Dispute Settlement*, in COMPLETING THE URUGUAY ROUND 180, 192 (Jeffrey J. Schott ed., 1990) ("Congress is demanding a 'great leap forward' in GATT dispute settlement as the price for correcting section 301."); Sykes, *supra* note 67, at 267 (noting that the retaliation feature of section 301 makes strategic sense in light of the "imperfections of dispute resolution under GATT"); Alan O. Sykes, "Mandatory Retaliation" for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 324 (1990).

75. 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992), at 2761–62 (Terrence P. Stewart ed., 1993) [hereinafter THE GATT URUGUAY ROUND].

Second, based on proposals floated by the United States,⁷⁶ the Negotiating Group on Dispute Resolution,⁷⁷ Professor John H. Jackson,⁷⁸ and others, GATT chairman Arthur Dunkel circulated a Draft Final Act to the Uruguay Round to serve as a focal point for final negotiations as the round came to a conclusion.⁷⁹ These recommendations turned the old GATT voting system on its head by making all decisions of dispute resolution panels binding unless the GATT Council voted unanimously to overrule them.⁸⁰ Such a rule effectively meant that all GATT dispute resolution panels would be binding, because winning plaintiffs would have to vote to overturn their own victories. To add a measure of assurance that these binding decisions would be carefully considered and consistent, the Negotiating Group also recommended the establishment of a permanent trade court to hear appeals from dispute resolution panel decisions. While the full story of how these recommendations arose remains to be told, one prominent commentator has stated that the "momentum of legal development" within the elite community of GATT professional participants was an important factor.⁸¹

76. 2 *id.* at 2765.

77. Negotiating Group 13 dealt with dispute resolution issues and was chaired by Ambassador Julio A. Lacarte-Muro of Uruguay and Ambassador Julius Katz of the United States. 2 *id.* at 2726.

78. JACKSON, *RESTRUCTURING GATT*, *supra* note 34. Professor Jackson's study was sponsored by the Royal Institute of International Affairs and, in arguing for the establishment of a "World Trade Organization," became a "seminal work" in the debates that took place prior to the final agreements of the Uruguay Round. Gardner Patterson & Eliza Patterson, *The Road from GATT to MTO*, 3 MINN. J. GLOBAL TRADE 35, 41 (1994).

79. GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Dec. 20, 1991, GATT Doc. MTN.TNC/W/FA.

80. *Id.* Annex S, ¶ 14.4.

81. HUDEC, *supra* note 56, at 365 (stating that the "momentum of legal development" within the GATT community was a force leading to reform). Interestingly, a stronger GATT system promises these participants gains in status as advocates, judges, and commentators. Burley & Mattli, *supra* note 21, at 55 ("[S]upranational actors are . . . not immune to utilitarian thinking. They seek unrelentingly to expand the mandate of their own institutions to have a more influential say in [supranational] affairs."). It is also worth noting that Ernst-Ulrich Petersmann, an outspoken free trade advocate, acted as secretary for the Negotiating Group on Dispute Resolution. Ernst-Ulrich Petersmann, *Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT*, in *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS*, *supra* note 31, at 323. Petersmann, a former head of the GATT Office of Legal Affairs, was a devoted student of the renowned conservative economist and philosopher F.A. Hayek at Freiburg University. PETERSMANN, *supra* note 19, at xxix, xxxi. In his trade policy writings, Petersmann has called for the United States

Third, other major GATT players, notably Europe, discovered that they could use the GATT dispute resolution machinery to advance their trade interests, so they swung into the legalist camp. Responding to aggressive use of the GATT dispute resolution system by the United States and others, Europe changed its litigation strategy within the GATT and filed a series of claims as a GATT plaintiff, acquiring a new appreciation for the plaintiff's perspective within the GATT system.⁸² Europe followed this move with a change in its bargaining position on dispute resolution,⁸³ throwing its weight in favor of the proposal for a binding system, provided that the United States would curtail its use of section 301 in trade disputes. With the Dunkel Draft's strong recommendations for strengthening the GATT dispute resolution system on the table, Europe also realized that the traditional U.S. "legalist" orientation would make it difficult for the United States to oppose these reforms and insist on maintaining its unilateral right to use section 301.⁸⁴ As Europe had correctly anticipated, the United States found it impossible to credibly withdraw from its legalist position just because it found itself being a defendant in an increasing number of GATT cases. The most the United States could do was argue for reform of the existing closed nature of GATT panel proceedings⁸⁵ and insist on language prohibiting WTO dispute

and other trading states to adopt constitutional amendments that would enshrine the "right to trade" as a protected constitutional liberty. *Id.* at xxvi (arguing for binding free trade rules to "constitutionally" constrain the "discretionary trade policy powers of government[]") so as "to protect the equal freedoms and property rights of domestic citizens").

82. Mora, *supra* note 5, at 134 (stating that during the 1980s Europe filed more cases than it had in all its previous GATT history).

83. As recently as 1988, Europe had argued that binding arbitration within the GATT would not be proper because interpretations of treaties cannot apply to parties without their consent. 2 THE GATT URUGUAY ROUND, *supra* note 75, at 2742.

84. Mora, *supra* note 5, at 134-35 (noting Europe's realization that "[a] binding dispute settlement mechanism would deprive the US of the arguments traditionally made to defend the maintenance of Section 301"); Patterson & Patterson, *supra* note 78, at 53 (commenting, based on information from U.S. trade negotiators, that Europe's support for the WTO was "based on its belief that the [W]TO would do away with section 301").

85. The United States was not successful in opening up the GATT dispute resolution process to public scrutiny, but the U.S. Trade Representative has testified in Congress that he is continuing to press for reforms in this area. *GATT Hearings*, *supra* note 28 (testimony of U.S. Trade Rep. Michael Kantor) (stating that one of the major issues for the United States vis-à-vis the GATT dispute resolution system "is the lack of transparency in GATT panel proceedings, the failure to make briefs public, the not allowing these proceedings to be held in public, not allowing non-governmental organizations to

resolution tribunals from adding to or diminishing the substantive rights of signatory states.⁸⁶

Finally, developing countries, which had long sought to level the GATT playing field with the larger industrial democracies, swung over to the legalist position. These countries gave their support to the proposal for strengthening the role of dispute resolution processes within the GATT structure because they thought a stronger dispute system would give them additional leverage in negotiating with wealthier states over protectionist laws that limited their ability to export to these states.⁸⁷

C. *The WTO Dispute Resolution System*

The WTO officially came into existence on January 1, 1995.⁸⁸ The new WTO legal system differs from its GATT predecessor in five major ways. First, all dispute settlement procedures under the GATT, the Subsidies Code, and a variety of other trade-related agreements are brought under a single dispute resolution process overseen by a institution called the WTO "Dispute Settlement Body."⁸⁹ This ends the potential for forum-shopping within the WTO that exists under current GATT rules.⁹⁰

Second, there are strict timetables for processing disputes⁹¹ and substantial changes in the rules governing the adoption of

participate under proper circumstances" and noting that "[w]e're trying to change that [and] have been very aggressive in pursuing that").

86. See *infra* note 122 and accompanying text.

87. See David M. Trubek, *Protectionism and Development: Time for a New Dialogue?*, 25 N.Y.U. J. INT'L L. & POL. 345, 364-65 (1993) (contending that less developed countries may be seeking "greater enforcement of the basic principles and disciplines the developed countries have officially endorsed" as they come to recognize that "non-discriminatory access to developed country markets may be more desirable than preferential treatment").

88. See Sanger, *supra* note 5, at 14.

89. The Dispute Settlement Body has a shifting set of members consisting of representatives of signatory countries to the particular code or treaty that is the subject of the dispute. This structure of governance is necessary because different treaties overseen by the WTO have different signatories. Final Act, *supra* note 1, pt. II, Annex II, art. 2(1), reprinted in 33 I.L.M. at 1226.

90. See Patricia Kalla, Note, *The GATT Dispute Settlement Procedure in the 1980s: Where Do We Go from Here?*, 5 DICK. J. INT'L L. 82, 92 (1986) (noting that former GATT practice involved procedures under six disparate dispute mechanisms adopted by nine codes at the Tokyo Round).

91. The rules stipulate that cases should be disposed of within twelve months of establishing a panel if the case is appealed and within nine months if no appeal is filed. Understanding, *supra* note 7, art. 20, reprinted in 33 I.L.M. at 1237-38.

dispute resolution panel reports. The first stage of the panel process closely resembles the old GATT system described above and involves the convening of a panel,⁹² the taking of evidence, and the rendering of an opinion.⁹³ In sharp contrast to the old GATT system, however, a WTO panel decision "shall be adopted [by the Dispute Settlement Body (DSB)] unless a party to the dispute formally notifies the DSB of its decision to appeal [to the WTO Appellate Body] or the DSB decides by consensus not to adopt the report."⁹⁴ Thus, dispute resolution decisions will be formally binding on WTO signatory states unless the winner of the case can be persuaded to vote to overrule its own victory.

Third, as indicated above, the WTO procedures provide for appeals from panel decisions to a new global trade institution, the WTO "Appellate Body." The Appellate Body is a permanent, seven-member trade court that will oversee the work of all dispute resolution panels, regardless of the treaty or code that is the subject of the dispute. Judges will be appointed by the DSB to serve four-year terms,⁹⁵ and the court will sit in three-judge panels.⁹⁶ Each judge may be reappointed once.⁹⁷ According to the Uruguay Round agreements, Appellate Body judges are to be people "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government."⁹⁸

92. The proposed rules state that panelists shall be drawn from a list 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 [WTO] Member or of a contracting party to 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.

Id. art. 8(1), reprinted in 33 I.L.M. at 1231.

93. *Id.* arts. 12-15, reprinted in 33 I.L.M. at 1233-35. The WTO Secretariat is specifically authorized by the rules to assist panels, "especially on the legal, historical and procedural aspects of the matters dealt with." *Id.* art. 27(1), reprinted in 33 I.L.M. at 1243.

94. *Id.* art. 16(4), reprinted in 33 I.L.M. at 1235.

95. *Id.* art. 17(2), reprinted in 33 I.L.M. at 1236. The procedures are not clear as to the actual appointment method. However, the WTO and its Dispute Settlement Body have the same membership, Final Act, *supra* note 1, pt. 2, art. 4(1)-(3), reprinted in 33 I.L.M. at 1145, and are charged to act by consensus whenever possible, *id.* art. 9(1), reprinted in 33 I.L.M. at 1148; Understanding, *supra* note 7, art. 2(4), reprinted in 33 I.L.M. at 1227.

96. Understanding, *supra* note 7, art. 17(1), reprinted in 33 I.L.M. at 1236.

97. *Id.* art. 17(2), reprinted in 33 I.L.M. at 1236.

98. *Id.* art. 17(3), reprinted in 33 I.L.M. at 1236.

There is no formal requirement that these judges be lawyers or that they occupy their Appellate Body positions on a full-time basis.⁹⁹ In an effort to gain acceptance for court rulings from less developed states, the new WTO procedures stipulate that "[t]he Appellate Body membership shall be broadly representative of membership in the WTO."¹⁰⁰ There is no guarantee that the United States or any other single WTO member will have one of its nationals on the Appellate Body.

The Appellate Body has full authority to review the legal interpretations in the panel decision.¹⁰¹ Once the Appellate Body has issued its opinion, the decision is binding unless the Dispute Settlement Body votes unanimously to overrule it.¹⁰² This means the winning party may veto any attempt by other nations to reject a particular decision.

Given the "consensus to overrule" requirement for panel and Appellate Body decisions, states disappointed by legal rulings may be tempted to turn to WTO "legislative" mechanisms to reverse judicial decisions. As currently structured, these mechanisms are extremely cumbersome. One such mechanism is to propose a formal amendment to the relevant treaty.¹⁰³ Most important GATT provisions, including the dispute resolution provisions,¹⁰⁴ however, cannot be amended without unanimous consent of all WTO members.¹⁰⁵ Another possibility would be to propose that WTO member states approve an "interpretation" of the treaty that reverses an interpretation issued by the Appellate Body.¹⁰⁶ The WTO Charter provides that "interpretations" can be adopted with less than a consensus vote, but it further stipulates that the interpretation procedure "shall not be used in a manner that would

99. This has led critics to warn that these judges may be plagued by conflicts of interest as they pursue professional careers at the same time as they sit as judges for the WTO. Nader, *supra* note 4, at A12.

100. Understanding, *supra* note 7, art. 17(3), reprinted in 33 I.L.M. at 1236.

101. *Id.* art. 17(6), reprinted in 33 I.L.M. at 1236 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

102. *Id.* art. 17(14), reprinted in 33 I.L.M. at 1237 ("An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report . . .").

103. Final Act, *supra* note 1, pt. 2, art. 10, reprinted in 33 I.L.M. at 1149-50.

104. *Id.* art. 10(8), reprinted in 33 I.L.M. at 1150.

105. *Id.* art. 10(2), reprinted in 33 I.L.M. at 1149 (listing provisions that require unanimous consent to amend).

106. *Id.* art. 9(2), reprinted in 33 I.L.M. at 1148.

undermine the amendment provisions in Article X.”¹⁰⁷ Thus, in the end, the “consensus to overrule” requirement embodied in the dispute resolution provisions is buttressed by the amendment and interpretation procedures.

The fourth major change from the old GATT processes involves what happens to a final decision after it is approved by the Dispute Settlement Body. The WTO rules expressly stipulate that the defendant must comply with the decision within “a reasonable period of time.”¹⁰⁸ The WTO is empowered to engage in active surveillance of compliance measures to assure that the defendant takes the required steps to remedy its violation.¹⁰⁹ If the disputing parties disagree about what constitutes a “reasonable period of time” for compliance, they may resort to binding arbitration over this issue.¹¹⁰ If there is further disagreement about actions taken to comply, the aggrieved state may resort to the original panel for a ruling.¹¹¹ Eventually, failing a resolution of the dispute by satisfactory compliance, the complaining state must negotiate with the defendant to determine what amount of “mutually acceptable compensation” would be appropriate.¹¹² If the parties cannot reach an agreement on compensation, the plaintiff may request authority from the Dispute Settlement Body to withdraw concessions,¹¹³ subject to the right of the defendant to demand arbitration regarding the appropriate level of retaliation.¹¹⁴ Once any arbitration over the appropriate sanction is complete, the plaintiff may withdraw concessions in an amount consistent with that authorized by the arbitrators and “equivalent to the level of the nullification and impairment”¹¹⁵ suffered.¹¹⁶ There is no appeal

107. *Id.*

108. *Id.* art. 21(3), reprinted in 33 I.L.M. at 1238. In general a “reasonable period of time” for compliance is not to exceed fifteen months “from the date of adoption of a panel or Appellate Body report.” *Id.*

109. *Id.* art. 21(6), reprinted in 33 I.L.M. at 1239.

110. *Id.* art. 21(3)(c), reprinted in 33 I.L.M. at 1238.

111. *Id.* art. 21(5), reprinted in 33 I.L.M. at 1238. A ruling on this issue must be issued on an expedited, 90-day calendar. *Id.*

112. *Id.* art. 22(2), reprinted in 33 I.L.M. at 1239.

113. *Id.* The DSB must approve this request unless it votes unanimously to reject it. *Id.* art. 22(6), reprinted in 33 I.L.M. at 1240.

114. *Id.*

115. *Id.* art. 22(4), reprinted in 33 I.L.M. at 1240.

116. As always, the Dispute Settlement Body may vote unanimously to reject the request. *Id.* art. 22(7), reprinted in 33 I.L.M. at 1240-41:

to the Appellate Body from a panel determination regarding appropriate retaliation, and a consensus vote of the Dispute Settlement Body would be needed to overturn such a determination.

Thus, the WTO dispute resolution system provides an adjudication mechanism both to resolve the merits of the dispute and to enforce the trade sanction for noncompliance. This latter aspect of the system is important because, until now, the essentially pragmatic structure of the GATT led it to formally approve a trade sanction on only one occasion, in the early 1950s.¹¹⁷ The new system essentially provides an adjudicative system by which the WTO may place its full weight behind such retaliation.

The fifth and final innovation of the WTO legal system takes the form of a pledge by WTO members to refrain from unilateral action in the global trade arena. In a clear attempt to address concerns about the use of domestic legislative schemes such as section 301, article 23 of the dispute resolution procedures stipulates that states shall not make any unilateral determinations that treaty violations have occurred¹¹⁸ or that more than a reasonable period of time has passed for compliance¹¹⁹ "except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding."¹²⁰ In addition, states pledge to follow the WTO procedures regarding suspension of concessions and not to impose sanctions unless they are approved by the Dis-

The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

117. Netherlands Measures of Suspension of Obligations to the United States, *supra* note 14; William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 60 (1987) (noting that the GATT Council has authorized retaliation only once in its history under article 23).

118. Understanding, *supra* note 7, art. 23(2)(a), *reprinted in* 33 I.L.M. at 1241.

119. *Id.* art. 23(2)(b), *reprinted in* 33 I.L.M. at 1241.

120. *Id.* art. 23(2)(a), *reprinted in* 33 I.L.M. at 1241. A major confrontation over whether article 23 bars recourse to § 301 is already in the making. Both the European Union and Japan have signaled that they view § 301 as illegal under the Uruguay Round agreements. SERVICES OF THE EUROPEAN COMM'N, REPORT ON THE UNITED STATES BARRIERS TO TRADE AND INVESTMENT 7 (1994) (arguing that U.S. efforts to renew "Super 301" are inconsistent with WTO provisions); GOVERNMENT OF JAPAN, 1994 REPORT ON UNFAIR TRADE POLICIES BY MAJOR TRADING PARTNERS 259 (1994) (arguing that U.S. attitude of "pursuing market opening in bilateral negotiations backed by the threat of sanctions is not compatible with the multilateral trade system of the GATT/WTO").

pute Settlement Body.¹²¹ Supplementing this mandate to use and follow the WTO dispute resolution system procedures are provisions regarding the jurisdiction of both dispute resolution panels and the Appellate Body. These provisions admonish these tribunals not to "add to or diminish the rights and obligations provided in the covered agreements."¹²² Just exactly who is to have final authority for determining when a state has acted inappropriately under article 23 or when the Appellate Body has added to or diminished the rights and obligations of WTO member states is not specified, and consequently the outlines of future, major institutional disputes between the Appellate Body and various WTO member states over the scope of Appellate Body jurisdiction are clearly visible in these rather vague, politically charged provisions.

II. CONTENDING VISIONS OF LEGALISM IN INTERNATIONAL TRADE: THE REGIME MANAGEMENT MODEL AND THE EFFICIENT MARKET MODEL

This Part takes a deeper look at the reasons why the world trade dispute resolution system has turned toward legalism in the WTO Charter. It first discusses the general background against which all trade legalism has developed: neoclassical free trade theory and the foreign relations theory of realism. It proceeds to construct, describe and discuss the two legalist models that most directly combined to support the creation of the WTO: the Regime Management Model and the Efficient Market Model.

A. *Baseline Concepts in International Trade: Free Trade Theory and Realism*

All legalist conceptions of international trade governance share a common intellectual heritage. All are premised on the desirability of reaping at least some of the rewards to be gained from open trade between economic actors in world markets and all are elaborations of or reactions to the classic foreign relations theory of "realism."¹²³ Before describing the two legalist models

121. Understanding, *supra* note 7, art. 23(2), reprinted in 33 I.L.M. at 1241-42.

122. *Id.* art. 19(2), reprinted in 33 I.L.M. at 1237. Indeed, even the DSB itself, which is made up of all WTO members, cannot add to or diminish the rights provided in the covered agreements. *Id.* art. 3(2), reprinted in 33 I.L.M. at 1227.

123. For some of the classic texts espousing the international relations theory of realism, see ROBERT GILPIN, *U.S. POWER AND THE MULTINATIONAL CORPORATION: THE*

that will contend for dominance within the WTO, therefore, it is worth pausing to review the conceptual background against which both are set.

1. *Free Trade Theory.* Economic free trade theory is essentially a positive account of how global trade "maximize[s] real economic welfare"¹²⁴ through "exchange between nations based on underlying differences of comparative advantage."¹²⁵ All legalist models presume that economic free trade theory and the doctrine of comparative advantage are roughly accurate accounts of the means by which international trade creates global wealth. Further, all accept to greater or lesser degrees the empirical assumption that liberal world trade policies in place since the end of World War II have been responsible for a great deal of the world's prosperity during this period.¹²⁶

Susan Strange has summarized the logic of economic free trade theory as follows:

Liberal economists believe that the individual pursuit of private gain is consistent with the general welfare of society, since the hidden hand of the market ensures that the producer will make what the consumer wants and at the lowest price, or else he will go out of business. Transposing the coincidence of individual and collective interest from the national to the international level, . . . the pursuit of national interests by individual states is consistent with the general welfare of international society—or, in short, . . . the world economy will be well served if each indi-

POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT (1975); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1973); HANS J. MORGENTHAU, *SCIENTIFIC MAN VS. POWER POLITICS* 187-203 (1946); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485 (1988). The modern version of realism was a reaction against the "legalistic-moralistic" tradition of Woodrow Wilson in the early part of the 20th century. See GEORGE KENNAN, *AMERICAN DIPLOMACY* 95 (expanded ed. 1984); Burley, *supra* note 21, at 207-08. Wilson believed strongly in the potential for international cooperation through a combination of democracy, international organization, and formal law. However, the failure of Wilson's efforts to promote international peace through his Fourteen Points and the League of Nations, and the formalistic, metaphysical positivism exhibited by much international legal thinking gave rise to the rival theory of realism discussed in the text.

124. Benjamin J. Cohen, *The Political Economy of International Trade*, 44 INT'L ORG. 261, 271 (1990).

125. FRANKLIN R. ROOT, *INTERNATIONAL TRADE AND INVESTMENT* 41-42 (6th ed. 1990); Cohen, *supra* note 124, at 261.

126. JAGDISH BHAGWATI, *PROTECTIONISM* 7-9 (1988).

vidual government or state observes the law of comparative costs and sells on the world market what it produces best.¹²⁷

Under the doctrine of comparative advantage, global wealth increases if each state specializes in producing and exporting those goods and services that it is most efficient at producing.¹²⁸ The state may then import everything else. This specialization occurs most efficiently through open, competitive markets that accurately price goods and services, enabling the producers in each country to discover what they are comparatively good at producing.

2. *The Foreign Relations Theory of Realism.* While economic free trade theory provides an account of how wealth increases through global trade, the foreign relations theory of realism explains how states behave in their relations with other states. Realism views states as the primary actors in world affairs and treats all states as autonomous, self-interested, and animated by the single-minded pursuit of power. The interstate competition for power, in turn, creates a world that is characterized by anarchy. In such an anarchic world, international law is "but a collection of evanescent maxims or a 'repository of legal rationalizations,'"¹²⁹ and international cooperative arrangements have an unstable existence. States that do not vigilantly protect their vital interests by taking a cautious (or even a duplicitous) approach to cooperation are severely penalized.¹³⁰ Fueled by the savage experiences of World War II and the Cold War, realism has dominated interna-

127. Strange, *Protectionism*, *supra* note 30, at 238. Under free trade theory, there is a "coincidence of national and global welfare objectives" and "adjustment costs and risks" are either assumed away or are "unimportant." *Id.*

128. JACKSON, *RESTRUCTURING GATT*, *supra* note 34, at 8-14 (discussing David Ricardo's classic explanation of the doctrine of comparative advantage and his argument that nations are better off both individually and collectively with a policy of free trade than with any other trade policy); EDWIN MANSFIELD, *ECONOMICS: PRINCIPLES, PROBLEMS, DECISIONS* 357-58 (7th ed. 1992).

129. Burley, *supra* note 21, at 208 (quoting Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 138 (Karl W. Deutsch & Stanley Hoffman eds., 1968)); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT'L L.* 260, 260 (1940) (accusing international legalists of attempting to "exorcise social evils by the indefatigable repetition of magic formulae").

130. Grieco, *supra* note 123, at 485, 488.

tional relations theory since 1945 and continues to be an important influence in contemporary political science and rhetoric.¹³¹

3. *The Paradox of Free Trade Governance.* The problem of international trade governance arises because economic free trade theory and realism are not compatible. On the one hand, international trade is useful to provide jobs, wealth, and economic stability for most states, and states that do not prosper economically fall behind in the race for international power. On the other hand, to gain wealth through international trade, states must lower economic barriers and other protective barriers that are necessary, according to realist theory, to protect states' vital interests against possible aggression from power-seeking rivals. Thus, trade means that states must cooperate in ways that expose them to potential economic and security threats.

International trade governance systems structured along realist assumptions thus reflect a deep ambivalence of purpose. First, these systems assume that a state will comply with international trade regulators and adjudicators only when it is in the state's immediate self-interest to do so.¹³² Giving international tribunals the power to render "binding" awards is therefore illusory at best and misleading at worst. Second, the use of rigidly binding adjudication can actually be destructive to international relations. Such procedures force what are essentially political disagreements between power-maximizing states into the legal straitjacket of formal adjudication, leaving the states ill-equipped to surface, join, and resolve the real problems and interests that have caused the dispute.¹³³ Realist dispute resolution processes thus encourage explicit, power-based bargaining that leaves states legally free (as realists believe they are free in fact) to exercise discretion based on their national interests.

The earliest GATT dispute resolution system reflected the contradiction between realism and free trade through its use of diplomatic working parties rather than adjudicatory tribunals to discuss trade differences.¹³⁴ Even as the GATT system became more procedurally complex and adjudicatory, it retained an essen-

131. *Id.* at 485.

132. Conversely, if it is in a state's interest to comply with a tribunal ruling, compliance will take place whether or not the system stipulates that the decision is binding.

133. LONG, *supra* note 16, at 71-73.

134. See *supra* note 46 and accompanying text.

tially realist character by empowering GATT defendants to veto dispute resolution panel decisions when they came to the GATT Council for approval.¹³⁵ In an early article on GATT jurisprudence, Robert E. Hudec summed up the realist approach to trade dispute resolution quite well:

The key to understanding the GATT legal system is to recognize that GATT's law has been designed and operated as an instrument of diplomacy. Although the GATT legal system has many points in common with domestic models, the thing which sets it apart from others is the overriding concern for "flexibility"—the insistence that the law's coercive pressures be applied in a controlled fashion which allows room for manoeuvre at every stage of the process. To achieve this flexibility, the GATT has developed forms and techniques which work to suppress the law's natural instinct for final decisions. Adjudication . . . [is] not the terminal event[] one is accustomed to look for in more conventional legal systems. . . . One must expect to find, therefore, that GATT law will be of rather uneven quality, varying from issue to issue and, significantly, from time to time.¹³⁶

It is these assumptions about the purpose and limits of trade dispute resolution that the new WTO procedures have shattered. States are assumed to be ready to comply with binding tribunal decisions under the new system. Moreover, the system is expressly

135. See *supra* notes 47–49 and accompanying text. Needless to say, realists are deeply opposed to the new WTO procedures. Phillip R. Trimble's views on GATT dispute resolution are characteristic of trade scholars who embrace realism. See Trimble, *supra* note 6. Trimble is "deeply skeptical of notions of international community and world values," *id.* at 1028, and accordingly troubled by the idea of applying "the rule of law" to the GATT, *id.* at 1017 (noting Trimble's "reservations" regarding appeals to the "rule of law" for the GATT). He argues that the creation of a trade "supercourt" would threaten to attenuate the required "solid connection" between international trade law and the political interests of the major trading states that make up the world trading community—a connection that helps trade norms acquire the acceptance needed to be sustainable in a realist world. *Id.* at 1025. According to Trimble, legalistic trade proposals cannot be squared with "a coherent theory of power that is acceptable to the relevant political communit[ies]" and ignore the deep-seated "distrust of international supervision" that makes state compliance, especially by the United States, problematic. *Id.* at 1027. Finally, Trimble doubts that judges from a variety of cultures applying necessarily vague rules could ever transcend the narrow boundaries of economic logic and theory to achieve predictable decisions that would also be politically acceptable. *Id.* at 1029.

136. Robert E. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE 615, 665 (1970).

designed to yield a definitive, timely, legalistic termination to disputes between states over trade.

B. *Two Normative Theories of Legalistic Trade Dispute Resolution*

If the new trade legalism embodied in the WTO reflects anything, it is a decline in the belief that classical foreign relations realism accurately describes the way modern trading states behave. The neoclassical economic model of comparative advantage is also under pressure, but most see it as still offering the best description of how international trade creates wealth.¹³⁷ Modern versions of legalism thus share a belief that states seek something in international affairs in addition to naked power, most notably wealth and domestic stability.¹³⁸ Legalist accounts of international trade dispute resolution conflict, however, because they reflect deep disagreements among scholars regarding the theoretical international relations construct that should replace realism as the dominant explanation of state conduct in world affairs. In essence, the WTO arrived before scholars had reached any clear consensus over what theory, if any, should replace realism. This lack of consensus will drive future debates over legalism within the WTO and other international institutions.

1. *The Regime Management Model: Solving a Prisoner's Dilemma with a Contract Among Sovereign States*

a. *Description of the model.* The Regime Management Model of international trade adjudication takes its cue from the international relations theory of "regimes."¹³⁹ Like realism, regime theory treats states as autonomous actors in the international arena and focuses on state behavior as the key variable in analyzing international relations. Unlike realism, however, regime theory seeks to explain why self-interested states in an anarchic world do,

137. See generally Jagdish N. Bhagwati, *Challenges to the Doctrine of Free Trade*, 25 N.Y.U. J. INT'L L. & POL. 219 (1993) (discussing challenges to the doctrine of free trade).

138. The legalist theories to be constructed in the text are to be distinguished from the legalist idealism of Woodrow Wilson, which was grounded in a notion that states would voluntarily submit themselves to a rule of law in order to secure on the international level the same ideals of democracy that nations like the United States cherish at the domestic level. See *supra* note 123.

139. See *supra* note 25 and accompanying text.

in fact, cooperate with one another.¹⁴⁰ Regime theory is a relatively recent intellectual development. In the 1970s, international organization scholars studying global institutions such as the GATT and the IMF were convinced that the behavioral assumptions of realism were essentially correct and that states acted primarily out of self-interest.¹⁴¹ The most widely accepted realist account of global economic cooperative arrangements, hegemony theory,¹⁴² however, did not provide a convincing description of how these institutions worked. Under hegemony theory, the United States, acting in its own self-interest after World War II, served as a political and economic guarantor of liberalized trade for a world of equally self-interested states, much as had the British in the late nineteenth century. However, in the 1970s and early 1980s, the GATT and the IMF persisted as viable institutions¹⁴³ even though U.S. influence as an economic and political hegemon had declined.¹⁴⁴

Scholars conceived regime theory as an answer to the perceived weaknesses in realist accounts of international cooperation. Regime theory combines the egoistic assumptions of realism with the insights of game theory to explain how international arrangements thrive in an anarchic world not dominated by any one national power or world government.¹⁴⁵ In sharp contrast with realism, which emphasizes the anarchic tendencies of state behavior, regime theory points to rules, norms, law, and implicitly effective

140. Realism and regime theory thus both observe the same degree of cooperation, noncooperation, war, and peace among states, but regime theory sees the widespread instances of cooperation and peace as the interesting phenomenon whereas realism is preoccupied with the possibility of noncooperation and war. See ROBERT O. KEOHANE, *AFTER HEGEMONY* 67 (1984) (arguing that governments acting as "rational egoists" may involve themselves in "the formation of institutionalized arrangements, containing rules and principles, which promote cooperation"). Thorough summaries of regime theory that go well beyond the example of trade regimes can be found in the international law literature. See Abbott, *Modern International Relations Theory*, *supra* note 21, at 338-42; Slaughter, *supra* note 21, at 227-28.

141. Burley, *supra* note 21, at 218. Regime theorists argue that cooperation makes it possible for egoistic states to achieve their objectives by acting with "strategic rationality" to exploit opportunities for mutual gain. Abbott, *Modern International Relations Theory*, *supra* note 21, at 351.

142. See KEOHANE, *supra* note 140, at 9.

143. See Burley, *supra* note 21, at 218.

144. See KEOHANE, *supra* note 140, at 8-10; Robert Kuttner, *Managed Trade and Economic Sovereignty*, in *INTERNATIONAL TRADE: THE CHANGING ROLE OF THE UNITED STATES* 37, 52 (Frank J. Macchiarola ed., 1990).

145. See Burley, *supra* note 21, at 218.

dispute resolution systems as defining characteristics of mechanisms that make international cooperative arrangements work.¹⁴⁶

Regime theory also departs from realism in its account of what motivates states in the international arena. As noted above, realism assumes that the acquisition and maintenance of power is the primary relevant motivation of states.¹⁴⁷ Regime theorists hold that states pursue a variety of goals in addition to power, including wealth, political stability, domestic distributional objectives,¹⁴⁸ and even cultural autonomy.¹⁴⁹ While hegemony theory may have provided a useful explanation for the origins of post-World War II economic regimes such as the World Bank, the IMF and the GATT, regime theorists believe that the wealth and stability gained from participating in these regimes have now become a sufficient reason for states to comply with regime norms without a hegemon to exert pressure toward compliance.¹⁵⁰

146. In the regime literature, regimes are defined by "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983).

147. Abbott, *Modern International Relations Theory*, *supra* note 21, at 349.

148. Just because international trade produces increased wealth does not mean that this wealth will be spread evenly within a given society. Indeed, it can lead instead to greater inequality between the rich and the poor. *See generally* ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADE OFF* (1975) (arguing that society faces a choice between economic equality and efficiency); Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CAL. L. REV. 1599, 1599-1606 (1993) (discussing effect of economic globalization on domestic income distribution and the implications of a disappearing middle class in combination with expanding groups of poor and wealthy citizens).

149. Cohen, *supra* note 124, at 272; *see also* Abbott, *Modern International Relations Theory*, *supra* note 21, at 350 (noting that states sometimes pursue "quality of life goals" in addition to power); Lea Brilmayer, *Trade Policy: The Normative Dimension*, 25 N.Y.U. J. INT'L L. & POL. 211, 216-17 (1993) (noting that free trade may undermine a "particular way of life" and that in some countries there is a "general interest in preserving local culture which extends beyond the narrow economic benefit to certain sectors"); Thomas R. Howell, *Trade Protection: Rethinking the American Perspective*, 25 N.Y.U. J. INT'L L. & POL. 251, 251-55 (1993) (arguing that developing new technologies, preserving a "way of life," and preserving a "national economic autonomy" motivate trade policies).

150. Abbott, *Modern International Relations Theory*, *supra* note 21, at 363 (noting that once a cooperative norm is in place, violation of it makes defections by others more costly because it leads "ultimately to the loss of a valuable institution"). Agreements that depend on future benefits from a relationship for their stability are called "self-enforcing agreements." *See* L.G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27, 27 (1980); Beth V. Yarbrough & Robert M. Yarbrough, *Cooperation in the Liberalization of International Trade: After Hegemony, What?*, 41 INT'L ORG. 1, 25 (1987).

John Gerard Ruggie has explained that post-World War II trade structures like the GATT gained a foothold in international life because they were based on what he has called an "embedded liberalism compromise."¹⁵¹ Domestically, each state must balance the interests of groups that seek protection from foreign imports¹⁵² against the interests of exporters and others that favor expanded free trade.¹⁵³ States wish to accommodate the needs of exporters because trade contributes to domestic employment and income. At the same time, states are extremely wary of free trade because it can have unwanted redistributive effects within their domestic economies that may cause political repercussions.¹⁵⁴ Global trade institutions like the GATT persist, argues Ruggie, because free trade liberalism is "embedded" within an international framework that recognizes the need for states to exercise politi-

151. John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393 (1982).

152. Declining and noncompetitive domestic producers typically oppose free trade. See Charles K. Rowley & Robert D. Tollison, *Rent-Seeking and Trade Protection*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT 141, 151-52 (Heinz Hauser ed., 1986) (contending that protectionism is a result of political activity by uncompensated "losers" from free trade, including declining and noncompetitive domestic producers). The same is true for groups associated with declining producers, such as organized labor. Tim Lang & Colin Hines, *GATT: The Pitfalls Amid the Promise*, N.Y. TIMES, Apr. 17, 1994, Business Section, at 13 (calling for "undoing GATT" to prevent "massive unemployment in the developed world"). Ruggie's "embedded liberalism" perspective on the GATT does not account for groups such as communitarians and ultranationalists that also oppose free trade on grounds unrelated to economic self-interest. HERMAN E. DALY & JOHN B. COBB, JR., FOR THE COMMON GOOD 233-35 (1989) (arguing that free trade threatens to erode local communities in order to promote a nonexistent "world community"); Patrick J. Buchanan, *GATT Challenges U.S. Sovereignty*, BOSTON HERALD, May 4, 1994, at 35 (criticizing the proposed WTO dispute resolution provisions and stating that "[w]hether it be foreign aid, or free trade, intervention or not, what is imperative is that only Americans decide America's destiny").

153. Groups favoring free trade include multinational firms, large banks, exporters, domestic industries that rely on imported factors of production, and price-conscious consumers. See Kuttner, *supra* note 144, at 51 (noting that U.S.-based banks and multinational corporations both favor liberal trade); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Trade Rules*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT, *supra* note 152, at 243, 245 (noting that gainers from free trade include consumers, processing industries, and exporters); Bob Davis, *Trade Accord Gets Consumer Group's Backing*, WALL ST. J., May 12, 1994, at A4 (reporting on the endorsement of the WTO by Consumers Union, publisher of *Consumer Reports*).

154. Charles Lipson, *The Transformation of Trade: The Sources and Effects of Regime Change*, 36 INT'L ORG. 417, 425-26 (1982).

cal control over the distributional consequences of global economic change.¹⁵⁵

International political economist Robert Keohane has pointed out that world trade institutions embodying Ruggie's notion of "embedded liberalism" are inherently unstable because the compromise on which they rest exposes states to a classic "iterated"¹⁵⁶ prisoner's dilemma.¹⁵⁷ Trading states "can benefit from mutual cooperation, but each can gain more from double-crossing the other[s]—that is, from 'defection.'"¹⁵⁸ Regime theorists postulate that state policymakers achieve their biggest payoffs within a trade regime if they can deliver the best of both worlds to their domestic constituencies: free access to foreign markets for their exporters and protection at home for their producers and workers.¹⁵⁹ If all countries engage in absolute protection, however, all lose the benefits of trade because export markets close, leaving each state locked within its own domestic market.¹⁶⁰ The goal for

155. See *id.* at 421; Ruggie, *supra* note 151, at 393.

156. KEOHANE, *supra* note 140, at 75; Ruggie, *supra* note 151, at 393. It is important to the regime theorists' analysis that the play of the prisoner's dilemma be iterated over an indefinite number of decisional "rounds" so that possible long-run gains from cooperation can be weighed in the calculus against the more concrete short-run gains to be achieved through defection in any one round. *Id.*

157. The prisoner's dilemma is one of the most powerful analytic tools in social science for the investigation of problems of human cooperation. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 28 (1984) ("The iterated Prisoner's Dilemma has become the *E. coli* of social psychology."). The original scenario depicted two prisoners charged with committing a crime but held in different cells. Police investigators approach each prisoner with the same set of choices: confess or remain silent. If either prisoner confesses and the other remains silent, the confessing prisoner goes free and the silent prisoner is sentenced to five years based on the testimony of the confessing prisoner. If both confess, they each receive a three-year sentence. If both remain silent, they each receive a one-year sentence. The problem is that neither prisoner knows what the other prisoner is going to do. If one prisoner remains silent, there is a risk that he will receive the worst result: five years in jail. Yet confessing may bring a higher jail term than if both remain silent. The safest choice is to confess, but the prisoners are both better off if they can trust each other to remain silent. See Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2022 n.50 (1987).

158. KEOHANE, *supra* note 140, at 67.

159. Regime theorists' view of states' welfare functions conflicts with the neoclassical economic position that states are *individually* as well as collectively better off implementing a free trade strategy that subjects their producers to global competitive discipline. See JACKSON, *WORLD TRADING*, *supra* note 35, at 8–14; *supra* notes 127–28 and accompanying text.

160. Bruno S. Frey & Heinz Buhofer, *Integration and Protectionism: A Comparative Institutional Analysis*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT, *supra* note 152, at 167, 170–71 (arguing that "multilateral" trade agreements "create a classical Prisoner's

trading nations, then, is to devise reciprocal trading arrangements¹⁶¹ under which all markets open just enough so that states can achieve what W.M. Corden has called the "conservative social welfare function:" trade-induced economic growth accompanied by the avoidance of "any significant absolute reductions in real incomes of any significant section of the community."¹⁶² Trade agreements must also take account of realist concerns over possible changes in the relative distribution of international economic power brought about by trade.¹⁶³ Keohane asserts that international trade agreements like the GATT act "like contracts"¹⁶⁴ to structure carefully circumscribed, reciprocal, multilateral relationships in ways that cut through this prisoner's dilemma and make patterns of cooperation possible.

International trade dispute resolution mechanisms provide vital support for trade regimes by giving states the means to police

Dilemma situation in which it is advantageous for every government to be uncooperative and to break the rules by maintaining and/or imposing trade barriers").

161. Reciprocity is an important, basic principle in international trade treaties. HUDEC, *supra* note 37, at 23 ("The concept of balanced exchange was central [to the GATT negotiations]. The appearance of a sound bargain was usually regarded as essential to the political support of such agreements . . .").

162. See W.M. CORDEN, *TRADE POLICY AND ECONOMIC WELFARE* 107 (1974). The conservative welfare function is grounded in an assumption that "increases in income are given relatively low weights [in the state's decisionmaking process] and decreases very high weights." *Id.* John H. Jackson, a leading U.S. legal commentator on the GATT, has argued that international trade governance is principally a problem of "'managing' interdependence." JACKSON, *WORLD TRADING*, *supra* note 35, at 4. On the one hand, there is the need to create the conditions for trade liberalization. *Id.* at 8 (describing the theory of "liberal trade" as the "starting point" of any discussion of international trade policy). On the other hand, there are problems created by free trade, such as "unscrupulous entrepreneurs [seeking] to evade national government regulation," *id.* at 5, and concerns of distributive justice and domestic economic stability, *id.* at 18.

163. Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* 116, 117-18 (David A. Baldwin ed., 1993); see JACKSON, *WORLD TRADING*, *supra* note 35, at 18-19 (noting the need for states in international trade regimes to protect national security and address legitimate fears of overdependence on foreign trade).

164. KEOHANE, *supra* note 140, at 89; see Nicholas G. Onuf, *Global Law-Making and Legal Thought*, in *LAW-MAKING IN THE GLOBAL COMMUNITY* 1, 23 (Nicholas G. Onuf ed., 1982) (noting that international law scholars have drawn an analogy "between a treaty and a contract in municipal law" using the "customary rule, *pacta sunt servanda*"); Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1584-86 (1991) (discussing regime theory and stating that international treaties are "relational contracts"); Sykes, *supra* note 67, at 270 (referring to treaties like the GATT as "contracts" among nations).

violations of the "contractual" obligations that arise from trade treaties. Just as domestic courts provide assurance for contracting parties that promises in private transactions will be kept, international tribunals with jurisdiction to declare when promises in trade treaties have been breached force states considering defection from their trade bargains to weigh the risk that their actions will be publicly disclosed.¹⁶⁵ In addition, international trade dispute resolution systems reduce transaction costs within the regime, provide states with valuable information, and make the overall operation of the regime more predictable.¹⁶⁶

The Regime Management Model of international trade dispute resolution builds on the image of trade treaties as "contracts among sovereign states" that help stabilize cooperative trade systems. The model reflects regime theory in two important respects. First, states are the key actors in a Regime Management Model dispute resolution system, and, consistent with the realist foundations of regime theory, states use the dispute resolution system to maintain their control over trade policy as well as to police trade bargains. In a Regime Management Model system, states monopolize the judicial process by which judgments are rendered. Thus, such systems utilize centralized, international tribunals that limit standing to states only. The use of centralized tribunals also enables states to draw adjudicators from the elite group of international lawyers and bureaucrats whose professional identities and training makes them sensitive to the diplomatic aspects of trade problems.¹⁶⁷ International adjudicators, in contrast with domestic judges, can be expected to understand the usages, customs, and interpretations that evolve among trading states, to give effect to the accumulated "practice"¹⁶⁸ of trade agreements, and to pre-

165. See JACKSON, *WORLD TRADING*, *supra* note 35, at 112 (arguing that international trade dispute resolution systems serve the needs of nations in a complex, mixed-motive bargain by, among other things, "publicly designating (or threatening to do so) the 'wrongdoer' in an international dispute").

166. *Id.* (noting that dispute resolution systems provide "predictive guidance about the application of a rule" to future disputants); KEOHANE, *supra* note 140, at 89-95.

167. Regime Management Model adjudicators tend to be drawn from an elite group of international lawyers, economists, and diplomats, all of whom share a common understanding of trade economics, if not politics. See, e.g., Abram Chayes & Antonia H. Chayes, *On Compliance*, 47 INT'L ORG. 175, 190 (1993) (noting that a consensus among "knowledgeable professionals about the legal rights and wrongs" of an international dispute often exists and leads to resolution of a dispute); Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977) (describing role of elites in interpretation and development of principles of international law).

168. Berrisch, *supra* note 18, at 497; Smith, *supra* note 165, at 1588-89 (noting that

serve for states the balance between domestic political control and free trade summarized in Ruggie's concept of the "embedded liberalism compromise."¹⁶⁹

Second, a Regime Management Model dispute resolution system is rooted in realist beliefs about state motivation and must find ways to assert transnational cooperative norms within a framework that assumes states will act to protect their power. International law as interpreted and enforced by international adjudicators provides such a balance in trade disputes.¹⁷⁰ Regime Management Model dispute resolution systems therefore feature binding adjudication based on international, as opposed to domestic, legal norms. In a world without a formal central enforcement authority,¹⁷¹ trade regulation under international legal norms provides states with needed flexibility.¹⁷² This flexibility would disappear in a system under which treaty obligations automatically became enforceable as domestic law within the domestic courts because states would confront their own municipal "rule of law" norms regarding compliance.¹⁷³

"traditional evidence of the intent of the parties at the time of [treaty] ratification provides much less guidance about the rights and duties imposed by a dynamic [international] obligation" than does the "contemporary practice of the parties").

169. See *supra* note 151 and accompanying text.

170. At present, GATT treaty obligations do not have direct effect in domestic legal systems. Hilf, *supra* note 31, at 290 ("Under no national legal system are GATT rules considered to be directly applicable.").

171. Robert H. Bork, *The Limits of "International Law,"* NAT'L INTEREST, Winter 1989-1990, at 3, 4 (noting that when nations violate international law, "[n]o police force goes into action, no grand jury indicts, no petit jury sits, no verdict is announced by a court or, if one is, the convicted party ignores it"). The lack of enforcement does not necessarily undercut the character of international law as "law." Anthony D'Amato, *What 'Counts' as Law,* in LAW-MAKING IN THE GLOBAL COMMUNITY, *supra* note 164, at 86, 86. Lack of enforcement does direct attention to nonlegal as well as legal incentives for compliance within international dispute systems.

172. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 195 (1972) (arguing that states always retain the option of refusing to perform an international obligation and incurring a violation of international law). As John H. Jackson has argued, the "spectrum of utilities" brought to international trade by states argues against rules' being "rigidly applied" in ways that might "damage the broader international trading system." JACKSON, *WORLD TRADING*, *supra* note 35, at 113; see also Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 21, at 11 (noting arguments for Uruguay Round's emphasis on flexible settlement). Regime-oriented systems of dispute resolution thus find ways to implement trade agreements that preserve "play in the joints" for special circumstances or the recognition of the need for a new rule." JACKSON, *WORLD TRADING*, *supra* note 35, at 110.

173. For this reason, systems seeking to advance the cause of compliance with international law often recommend that international norms or judgments be given direct effect

Table 2 summarizes the attributes of the Regime Management Model.

TABLE 2
Regime Management Model

	Types of Parties with Standing	Theories Underlying Model	Purpose of Dispute Resolution System	Source of Law for Enforcement Purposes
Regime Management Model	States	Realism and Regime Theory	Balance States' Interests in Free Trade and Autonomy	Inter-national

b. The model in action. The Regime Management Model is not just a hypothetical construct. Rather, various international treaty systems reflect the characteristics of the model and seek to implement the normative goals underlying it. As indicated by the controversy that attended ratification of the WTO,¹⁷⁴ the notion of a binding system for resolving trade disputes is relatively novel. However, there are other areas of international cooperation broadly related to commerce that provide illustrations of the Regime Management Model in action.

Perhaps the best example in a commercially related field is the International Civil Aviation Organization (ICAO), established under the Convention on International Civil Aviation.¹⁷⁵ This con-

in domestic legal systems. See, e.g., Note, *Judicial Enforcement of International Law Against Federal and State Governments*, 104 HARV. L. REV. 1269 (1991).

174. See *supra* note 4 and accompanying text.

175. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter CICA]. See generally PAUL S. DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 273 (1987) (describing interaction of states and legal entities in international aviation). The ICAO is organized under the overall jurisdiction of the United Nations. See *id.* at 274 ("Today, the ICAO is one of the largest specialized organizations of the United Nations."). Another good example of an international treaty regime that fits within the Regime Management Model is the United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc.

vention, which has been signed by some 176 states,¹⁷⁶ provides a basis for states to cooperate regarding air transport services and standards.

The ICAO exhibits many of the characteristics of a Regime Management Model governance system. First, the ICAO serves as a "contract among sovereign states" designed to achieve gains from cooperation without sacrificing more state autonomy than is absolutely necessary to secure these gains. Article 1 stipulates that the "contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."¹⁷⁷ In the development of international civil aviation, however, states recognize that cooperation "on the basis of equality of opportunity" is desirable so that "every contracting State has a fair opportunity to operate international airlines."¹⁷⁸

Second, in an effort to maintain their monopoly over international civil aviation policy, only states—not airlines, passenger groups, unions, or others with an interest in how states regulate air transport—have standing under the convention to participate in the ICAO governance structure. Moreover, only states have standing to appear before international tribunals to adjudicate disputes under the convention.

Third, signatory states agree to refer disputes that cannot be successfully negotiated to a neutral international tribunal, whose decision "shall be final and binding"¹⁷⁹ under international law.¹⁸⁰ If the disputing states have accepted the Statute of the

A/CONF.62/122, reprinted in 21 I.L.M. 1261. Under this convention, states agree to binding dispute resolution, *id.* art. 296, reprinted in 21 I.L.M. at 1324, under one of four possible neutral procedures, including resort to the International Court of Justice or to a tribunal especially set up under the convention itself to resolve disputes, *see id.* art. 287, reprinted in 21 I.L.M. at 1322–23.

176. M.J. BROWN & D.J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 152 (10th ed. Supp. 1993).

177. CICA, *supra* note 175, art. 1, 61 Stat. at 1180, 15 U.N.T.S. at 296.

178. *Id.* art. 44(f), 61 Stat. at 1193, 15 U.N.T.S. at 326.

179. *Id.* art. 86, 61 Stat. at 1205, 15 U.N.T.S. at 354.

180. Disputants must first resort to the ICAO Council before appealing to an arbitral tribunal. *Id.* art. 84, 61 Stat. at 1204, 15 U.N.T.S. at 352; DEMPSEY, *supra* note 175, at 293. At the Council stage, the disputants are disqualified from voting on their own case. *Id.* There are 33 members on the Council, chosen according to their importance to international civil aviation and geographical parity. No member of the Council has veto power. *Id.* The Council acts by majority vote. CICA, *supra* note 175, art. 52, 61 Stat. 1196, 15 U.N.T.S. at 332. Between 1947 and 1987 only three disputes were adjudicated before the ICAO Council. DEMPSEY, *supra* note 175, at 295.

International Court of Justice, then they resort to that court.¹⁸¹ Otherwise, the convention provides for an ad hoc arbitration procedure.¹⁸² If states fail to abide by their obligations under the convention, their voting power in the governance structure "shall" be suspended,¹⁸³ and "[w]here the Council concludes that an airline is not conforming to a final decision, member states shall not allow the carrier to pass through their airspace."¹⁸⁴

c. *The Regime Management Model and trade jurisprudence.* Theories of international relations that help explain the structures and intended purposes of trade-related dispute resolution systems also yield important insights into the basic jurisprudential approaches adopted by panelists in deciding actual cases. The vagueness of many provisions in trade treaties gives adjudicators significant interpretive discretion.¹⁸⁵ In exercising this discretion, adjudicators face choices among competing policy perspectives that reflect, among other things, the needs of the states that established these tribunals and the interests of groups below the nation-state level. When purely definitional analysis does not dictate an obvious answer to a dispute, adjudicators' final decisions are shaped in important ways by their understandings of the political and economic purposes their tribunals are designed to serve in the world economy.

The paradigmatic image of the trade treaty in the Regime Management Model is that of a "contract among sovereign states."

181. CICA, *supra* note 175, arts. 85-86, 61 Stat. at 1204-05, 15 U.N.T.S. at 352-54.

182. *Id.* art. 85, 61 Stat. at 1204, 15 U.N.T.S. at 352-54.

183. *Id.* art. 88, 61 Stat. at 1205, 15 U.N.T.S. at 354. Were the signatory states to object to a tribunal ruling, they could amend the convention by a two-thirds vote. Furthermore, the same group voting on the amendment may provide that "any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention." *Id.* art. 94, 61 Stat. at 1206-07, 15 U.N.T.S. at 359-60.

184. DEMPSEY, *supra* note 175, at 293-94; *see also* CICA, *supra* note 175, art. 87, 61 Stat. at 1205, 15 U.N.T.S. at 354.

185. GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION 365 (1986) ("Many diverse interests must be accommodated [in trade treaties], with the result that political documents or treaties that flow from such negotiations are often conflicted or confusing."); Chayes & Chayes, *supra* note 167, at 188-92 (stating that ambiguity in trade treaties exists because language is "unable to capture meaning," because meanings change over time as circumstances change, and because "[i]ssues that are foreseen often cannot be resolved at the time of treaty negotiation and are swept under the rug with a formula that can mean what each party wants it to mean").

A regime-oriented jurisprudence, therefore, could be expected to rely heavily on traditional notions of contract enforcement and interpretation. The *type* of contract envisioned by a trade regime, however, is of a special, "relational" sort.¹⁸⁶ States do not enter trade regimes as "one-shot" deals in a faceless, commercial market.¹⁸⁷ Instead, a relatively small number of states enter trade treaties for the purpose of creating what Edwin Smith has called "dynamic obligations."¹⁸⁸ States enter such relationships knowing from the beginning that the relationships will require adaptation "to uncertain or unpredictable circumstances."¹⁸⁹ Regime-oriented adjudicators are therefore likely to interpret trade treaties as contracts embedded in long-term relationships, relationships that must be taken into account in reading the treaty's terms. When treaty obligations are both textually clear and feasible, regime-oriented adjudicators might engage in strict rule enforcement even in difficult political circumstances because enforcing rules as written is an excellent way of supporting and generating confidence in a long-term contractual regime.¹⁹⁰ On the other hand, faced with vague terms or obligations that, if interpreted too literally, might threaten the stability of the regime, regime-oriented adjudicators might show a studied concern for "regime maintenance"¹⁹¹ and the "political 'management' of trade disputes."¹⁹²

A case that exemplifies the concern of Regime Management Model trade adjudicators for "regime maintenance" is the famous *Wheat Flour*¹⁹³ GATT dispute. The United States brought the

186. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 64-70 (1980); Ian R. Macneil, *Relational Contracts: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (discussing relational thought and its effects on law and society).

187. Smith, *supra* note 164, at 1589-91 (discussing differences between domestic contract law and international treaty law and noting that "formalized obligations and sanctions may provide a critical adhesive" between "total strangers within a diverse national economy" whereas the "small number of states enhances the importance of reputation as a limiting factor upon state actions").

188. *Id.* at 1549.

189. *Id.*

190. Scott, *supra* note 157, at 2050-53; Keith A. Palzer, Note, *Relational Contract Theory and Sovereign Debt*, 8 NW. J. INT'L L. & BUS. 727, 756-58 (1988).

191. James M. Lutz, *GATT Reform or Regime Maintenance: Differing Solutions to World Trade Problems*, J. WORLD TRADE, Apr. 1991, at 107, 114.

192. Petersmann, *supra* note 81, at 324.

193. European Economic Community—Subsidies on Exports of Wheat Flour, GATT Doc. SCM/42, GATT BISD 31st Supp. 259 [hereinafter *Wheat Flour*]. The text of the report can be found in *GATT Dispute Panel Report on U.S. Complaint Concerning EC*

Wheat Flour case against the European Community (EC) in 1981 under the Subsidies Code negotiated in the Tokyo Round in 1979.¹⁹⁴ The general purpose of this code was to limit the power of states to gain unfair competitive advantages for locally produced goods by subsidizing production of these products and thus artificially reducing their price on the world market. The GATT prohibits subsidies that result in "more than an equitable share of world export trade in [the subsidized] product" going to the country granting the subsidy.¹⁹⁵

The subsidy for wheat alleged to have violated these provisions was part of the EC's "Common Agricultural Policy" in place since the 1960s. As such, the subsidy was central to the political stability of the EC. In challenging this subsidy, the United States "pointed a dagger at one of the key elements of the EC agricultural program," threatening to "smother [the EC] under an ever-growing pile of surplus products" and potentially requiring either "radical change in prices or production modalities."¹⁹⁶ The EC responded to the U.S. challenge with every defense it could muster, from accusations of falsified U.S. data to claims that the United States had reneged on a promise to drop all section 301 complaints in return for European agreement to include agriculture in the Subsidies Code.¹⁹⁷

The dispute was put to a GATT panel, which focused on what the signatory nations had meant by the phrase "more than equitable share." The United States claimed the phrase meant any historical "increase in market share that could be causally tied"¹⁹⁸ to the EC's export subsidy, which was introduced in

Subsidies to Wheat Farmers, 18 Int'l Trade Rep. (BNA) No. 22, at 899-916 (Mar. 8, 1983). See HUDEC, *supra* note 56, at 147-51 (discussing facts of *Wheat Flour*); William H. Boger III, *The United States-European Community Agricultural Export Subsidies Dispute*, 16 LAW & POL'Y INT'L BUS. 173 (1984) (discussing two disputes between the United States and European Economic Community regarding wheat exports); Massimo Coccia, *Settlement of Disputes in GATT Under the Subsidies Code: Two Panel Reports on E.E.C. Export Subsidies*, 16 GA. J. INT'L & COMP. L. 1 (1986).

194. See WINHAM, *supra* note 185, at 219-23.

195. GATT art. 16(3), 4 GATT BISD 26 (1989). Article 10(2)(a) of the Subsidies Code elaborates on this provision, declaring that "'more than an equitable share of world export trade' shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind developments in world markets."

196. HUDEC, *supra* note 56, at 148.

197. *Id.* at 148-49.

198. *Id.* at 149.

1959.¹⁹⁹ The EC argued that the term should be read as “a truce against using export subsidies to change the status quo division of the market” as of the end of the Tokyo Round in 1979.²⁰⁰ Neither side was able to demonstrate what market shares a truly free market in wheat would have produced during either time period. Indeed, the EC argued that agricultural subsidies had been distorting the world price of wheat since 1893.²⁰¹

Faced with this politically charged dispute over an ambiguous text and given the lack of a free market baseline from which to measure “more than equitable” deviations, the panel rejected the complaint and ruled that the legal term at issue was too imprecise to be applied to world wheat trade.²⁰² The decision, which was criticized by some free trade commentators as violating the panelists’ duties to the world trading community²⁰³ and which some have argued was responsible for a complete breakdown of the Subsidies Code,²⁰⁴ is clearly understandable in the light of realist foreign relations theory.

The panel in the *Wheat Flour* case had three choices. First, it could have ruled that the EC had violated the GATT and precipitated a severe political crisis threatening the stability of both the GATT world trading system and the EC. Second, it could have ruled affirmatively that the EC had not violated the rule, setting a pro-subsidy precedent that would have undercut the obvious intentions of the parties in addressing the subsidy issue in the Tokyo

199. *Id.*

200. *Id.*

201. *Id.* at 148.

202. Specifically, the panel stated that it

was unable to conclude as to whether the increased share has resulted in the EC “having more than an equitable share” in terms of Article X, in light of the highly artificial levels and conditions of trade in wheat flour, the complexity of developments in the markets, including the interplay of a number of special factors, the relative importance of which it is impossible to assess, and, more importantly, the difficulties inherent in the concept of “more than equitable share.”

Wheat Flour, *supra* note 193, ¶¶ 4.5–4.6, reprinted in 18 U.S. Export Weekly (BNA) at 899.

203. William J. Davey, *The WTO/GATT World Trading System: An Overview*, in HANDBOOK OF GATT DISPUTE SETTLEMENT, *supra* note 13, at 7, 47 (“[T]he panel was criticized by some for having abdicated its responsibility . . .”).

204. *Id.* (“Indeed, one result of the decision was that dispute settlement under the Subsidies Code broke down completely during the 1980s as one or more signatories blocked the adoption of all subsequent panel reports issued under the Code’s dispute settlement provisions . . .”).

Round and thus weakening the GATT. The panel chose the third option: to rule that the dispute was nonjusticiable under the legal standard that the parties had stipulated, essentially saying that the issue was still too politically charged to be appropriately removed from the realm of realist political bargaining to the realm of legal interpretation.²⁰⁵

Given the panel's unhappy alternatives and the vagueness of the legal standard with which to work, the panel's decision signaled that political progress was needed before legal decision-making would help. This is a highly useful role for trade adjudicators to fill in a realist system.²⁰⁶ In fact, the dispute over agricultural subsidies between the United States and the EC persisted over the decade following the decision and led to further negotiated modifications of agricultural policy in the Uruguay Round.²⁰⁷

Another striking example of Regime Management Model jurisprudence concerns two GATT cases, both arising out of the famous "Tuna/Dolphin" dispute.²⁰⁸ More than anything else, these cases demonstrate how Regime Management Model adjudicators attempt to balance free trade norms with the sovereignty interests of regime members, shifting this balance as it becomes clear that prior interpretations are placing stress on the regime structure.

In these cases, two separate GATT panels declared invalid a U.S. ban on imports of tuna that had been caught using methods that kill large numbers of dolphins. The decisions have been criticized by environmentalists as demonstrating that the GATT dis-

205. I. Garcia Bercero, *Trade Laws, GATT and the Management of Trade Disputes Between the US and the EEC*, 5 Y.B. EUR. L. 149, 168-70 (1985).

Faced with difficult problems of rule interpretation on which the GATT community lacks a consensus, a panel may either decline to make a ruling (wheatflour) or risk reaching conclusions that will prove unacceptable to a large number of GATT members (pasta, citrus). In both cases, the determination of the independent body is unlikely to be accepted and the question will be referred to the political institutions

Id. at 169.

206. Some commentators have argued that the United States was to blame for the *Wheat Flour* decision because its "overly legalistic view of the GATT" led it to expect the dispute resolution process to create consensus when there was none. See Boger, *supra* note 193, at 215.

207. HUDEC, *supra* note 56, at 150-51.

208. Report of the Panel, United States—Restrictions on Imports of Tuna, GATT Doc. DS29/R, June 1994, reprinted in 33 I.L.M. 839 [hereinafter 1994 Report]; General Agreement on Tariffs and Trade: Dispute Settlement Panel, Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, reprinted in 30 I.L.M. 1594 [hereinafter 1991 Report].

pute resolution machinery is biased toward free trade ideology and "stacked against effective solutions to environmental problems."²⁰⁹ In fact, the decisions were driven by concerns for multilateral rule implementation as much as by the policy of free trade.

In response to public concern regarding declining dolphin and whale populations, the United States enacted the Marine Mammals Protection Act (MMPA) in 1972.²¹⁰ The MMPA requires the United States to embargo fish and fish products harvested using harvesting methods that cause the incidental taking of marine mammals in excess of a numerical quota set by the statute. For countries that permit "purse seine" driftnet fishing methods, which have a high incidence of dolphin taking,²¹¹ this ban can be avoided only if the country can show that the tuna or other fish it wishes to sell in the United States were not caught with driftnets.²¹² These standards on driftnet fishing methods apply to United States as well as foreign fishermen.²¹³

Pursuant to the MMPA, the Secretary of Commerce in 1988 imposed a ban on yellowfin tuna imported from Mexico and several other countries because these tuna had been caught using driftnet methods that violated the statute. Mexico responded in 1990 by seeking relief from the ban through the GATT dispute resolution process, alleging that the ban was a quantitative restriction on the importation of Mexican-caught tuna that violated article 11.²¹⁴ The United States did not deny that its law imposed quantitative restrictions on imported tuna. It argued, however, that the MMPA functioned as an "internal regulation" on tuna that treated domestic and foreign "like products" in a nondiscriminatory way at the U.S. border and was therefore legal under article 3(4)²¹⁵ and

209. Patti A. Goldman, *Restructuring the Trade and Environment Debate: In Search of a Neutral Forum and Neutral Principles*, 49 WASH. & LEE L. REV. 1279, 1280 (1992).

210. 16 U.S.C. § 1371 (1988 & Supp. II 1990).

211. Mather H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098, 2121 (1992).

212. 16 U.S.C. § 1371(a)(2).

213. *Earth Island Inst. v. Mosbacher*, 746 F. Supp. 964, 967 (N.D. Cal. 1990), *aff'd*, 929 F.2d 1449 (9th Cir. 1991).

214. GATT CHARTER art. 11(1) provides, in relevant part, that "[n]o prohibitions or restrictions[,] . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party"

215. *Id.* art. 3(4) provides,

Note Ad article 3.²¹⁶ Alternatively, the United States argued that sections (b) and (g) of article 20, which permit national laws that are, respectively, "necessary to protect human, animal or plant life or health"²¹⁷ or required for the "conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,"²¹⁸ exempted the ban.

The panel found that the ban violated the article 11 bar to quantitative restrictions and was not excused by any of the exceptions advanced by the United States. First, the panel analyzed article 3(4) and *Note Ad* article 3 and found that the MMPA did not directly address itself to tuna as a product within the U.S. market. Rather, the ban related to the method or process by which tuna was harvested outside the United States. The MMPA's effort to protect dolphins in international waters could therefore not be interpreted as a U.S. "internal regulation" directed at tuna products.²¹⁹

With respect to the GATT exceptions for protection of "animal . . . life" and "conservation of exhaustible resources," the panel applied a simple, bright-line test of territoriality. In the panel's view, these exceptions to the GATT were designed to permit countries to protect animal life and resources within their own jurisdictions, not anywhere in the world. To extend state regulatory power beyond this boundary would threaten the GATT as a regime because the "General Agreement would then no longer con-

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

216. *Id.* art. 3 provides,

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article 3(1)] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article 3(1)] and is accordingly subject to the provisions of Article III.

217. *Id.* art. 20(b).

218. *Id.* art. 20(g).

219. Citing several prior GATT cases for support, the panel reasoned that the exception for "internal regulations" was designed to allow states to tax, regulate, or ban imported products that were similarly taxed, regulated, or banned for sale in the domestic market to assure that like products were treated alike. 1991 Report, *supra* note 208, ¶ 5.15, reprinted in 30 I.L.M. at 1618.

stitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.”²²⁰ The U.S. interpretation of the GATT’s environmental exemptions threatened to establish a system under which “each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”²²¹ Given the priority of sovereignty within the GATT scheme, such a rule would upset the GATT’s delicate balance between preserving states’ powers over their own affairs and the surrender of that power in carefully delineated areas of trade. The panel suggested that global conservation and environmental problems would be better addressed through multilateral negotiations among the contracting parties, who might decide to amend or supplement the GATT or, better yet, develop an independent multilateral framework for environmental issues.

Outraged conservation and environmental interest groups strongly objected to the first Tuna/Dolphin decision,²²² and as a result of a settlement between the United States and Mexico,²²³ the decision was never presented to the GATT Council.²²⁴ The European Union and the Netherlands, however, instituted a separate complaint on the same issue and pressed for another decision on the scope of article 20.²²⁵ The second panel reached the same

220. *Id.* ¶¶ 5.27, 5.32, reprinted in 30 I.L.M. at 1620–21.

221. *Id.* ¶ 5.32, reprinted in 30 I.L.M. at 1621.

222. See, e.g., Jessica Mathews, *Dolphins, Tuna and Free Trade; “No Country Can Protect Its Own Smidgen of Air or Ocean,”* WASH. POST, Oct. 18, 1991, at A21 (arguing that the reasoning of the GATT Panel would invalidate U.S. laws protecting endangered species).

223. 1994 Report, *supra* note 208, ¶ 2.4, reprinted in 30 I.L.M. at 846 (describing a June 1992 agreement between the United States, Mexico, and a number of other Central and South American countries to reduce dolphin mortality in the eastern tropical Pacific area).

224. Hurlock, *supra* note 211, at 2131 n.179 (discussing how the Mexican government agreed not to present the Tuna/Dolphin panel decision to the GATT Council as part of its overall push to improve relations with the United States).

225. The EU-Netherlands complaint sought to assess the legality of the MMPA’s provisions for an “intermediary nation embargo” against an intermediary nation that fails to certify and prove that it does not buy tuna from a nation covered by a primary embargo imposed under the MMPA. 1994 Report, *supra* note 208, ¶¶ 2.12, 3.3–5, reprinted in 33 I.L.M. at 849, 851. The legal issues raised in the EU case regarding the consistency of the MMPA with the GATT, however, were identical to those in the Mexican case.

result as the first panel, but for slightly different reasons²²⁶ that demonstrate a regime-oriented sensitivity to the global politics of environmental protection. In contrast with the first panel, the second panel implied that a GATT signatory might, in an appropriate case, justify cross-border environmental regulations based on the GATT exemption for the "conservation of exhaustible natural resources"²²⁷ or the protection of "animal . . . life."²²⁸ As to both exemptions, the panel observed that the GATT itself does not limit the power to regulate based on the location of resources²²⁹ or living things.²³⁰ Nor could an "absolute" rule prohibiting such regulation be deduced from prior GATT cases, other GATT provisions, or general international law.²³¹

Nevertheless, the second panel still held that the MMPA was invalid under the GATT. The panel reasoned that the MMPA was not primarily aimed at or strictly necessary for protecting dolphins. Rather, the MMPA import quotas sought "to force other countries to change their policies . . . within their own jurisdiction,"²³² and it was these policy changes, not the import quota, that would have an "effect on the conservation [or protection of the life or health] of dolphins."²³³ The panel felt that this indirect method of conservation was overbroad because it "prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country's tuna harvesting practices and policies were not comparable to those of the United States."²³⁴ Such a system of environmental regulation, were it to be adopted by many nations, would seriously impair "the basic objectives of the General Agreement."²³⁵

226. See Timothy Noah & Bob Davis, *Tuna Boycott Is Ruled Illegal by GATT Panel*, WALL ST. J., May 23, 1994, at A2.

227. GATT CHARTER art. 20(g); 1994 Report, *supra* note 208, ¶ 5.12, reprinted in 33 I.L.M. at 890; Frances Williams, *Boycott Ruling Irks U.S.*, FIN. TIMES, May 27, 1994, at 7.

228. GATT CHARTER art. 20(b); 1994 Report, *supra* note 208, ¶ 5.29, reprinted in 33 I.L.M. at 895.

229. 1994 Report, *supra* note 208, ¶ 5.15, reprinted in 33 I.L.M. at 891.

230. *Id.* ¶ 5.31, reprinted in 33 I.L.M. at 895-96.

231. *Id.* ¶¶ 5.16-17, 5.32, reprinted in 33 I.L.M. at 891-92, 896.

232. *Id.* ¶¶ 5.24, 5.37, reprinted in 33 I.L.M. at 894, 897.

233. *Id.*

234. *Id.*

235. *Id.* ¶¶ 5.26, 5.38, reprinted in 33 I.L.M. at 894, 896.

This crucial revision to the reasoning of the first panel's decision is itself a classic example of regime-oriented interpretation. The uproar over the first panel's decision created considerable pressure within the United States to revise the GATT to include explicit environmental exemptions that would prove very difficult for the rest of the world to accept. Moreover, the second panel's decision was issued just as the new WTO agreement was being considered by the U.S. Congress and environmental lobbyists were using the first panel's decision in advertisements to generate opposition to the WTO proposal.²³⁶ The second panel's shift to a narrower ground of decision that held out a theoretical possibility of cross-border environmental regulation, even as it struck down the embargo provisions of the MMPA, served to enhance overall regime stability by asking for less political commitment from its regime members as the price of regime membership.

2. *The Efficient Market Model: Enhancing Welfare by Reducing Legal Barriers to Trade*

a. *Description of the model.* Both realism and regime theory reflect international law's traditional preoccupation with states as the unit of action and analysis in international relations.²³⁷ To explain the next model of trade legalism, the Efficient Market Model, I will introduce both a new explanation for state behavior and a new conception regarding the function of international law. This model borrows from the foreign relations theory of "liberalism" under which the state is conceived of as the agent for particular domestic constituencies' interests, not as a self-motivated actor seeking power or political stability.²³⁸ A corollary to this reduction in the status of the state as the main, autonomous unit in international society is a shift in the focus of international law. Under the liberal view, the proper purpose of international law is to enhance the welfare of individual citizens or

236. Indeed, the second panel made reference to the pending proposal for the WTO. *Id.* ¶ 5.43, reprinted in 33 I.L.M. at 898-99.

237. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 331 (defining treaties with reference to states); Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 14 (1988) ("The subjects of international law are states . . .").

238. Reif, *supra* note 29, at 738 (stating that under liberal international relations theory, state preferences are constituted by their "particular domestic sociolegal structures" and states in international society "represent parts of their constitutive society").

groups, not the welfare, power, or stability of governments as political entities.²³⁹

The Efficient Market Model views trade legalism as a means for globally oriented business interests and their government allies²⁴⁰ to overcome domestic resistance to free trade, reduce the legal transaction costs that states impose on the movement of goods and services across national borders, and thereby enhance consumer welfare for citizens of all nations. The model relies heavily on a normative commitment to economic free trade theory and the doctrine of comparative advantage as descriptions of how trade creates wealth for both individual citizens and groups. Recall that the doctrine of comparative advantage holds that states are better off, individually as well as collectively, if they produce only what they are comparatively efficient at producing and import the rest of what they need. Thus, under neoclassical free trade doctrine, the reduction of barriers to imports enhances welfare at the national as well as the international level.²⁴¹

The road to reduced trade barriers, however, is blocked by well-organized domestic interest groups securing "special interest" laws that are wealth-enhancing to them but costly to the population as a whole.²⁴² Producers that are "losers" in the global econ-

239. This view has most recently been put forward by international legal scholars favoring the foreign relations theory of "liberalism," but it harkens back at least to Immanuel Kant. Allott, *supra* note 237, at 26 (proposing a manifesto for "the new international law" that would, among other things, "acknowledge the peoples of the world as the true subjects of international law"); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 54 (1992) ("Liberal theory commits itself . . . to normative individualism, to the premise that the primary normative unit is the individual, not the state."). It is no coincidence that Kant himself proposed that an "International Court of Trade" be among the international legal institutions necessarily implied by his theory. *Id.* at 99-100.

240. Abbott, *The Trading Nation's Dilemma*, *supra* note 21, at 520. Abbott writes that "responsible public official[s]" may work to implement free trade policies over the objections of the political forces for protection in the pursuit of long-term political interests. He also notes that although appointed officials are responsive to the goals of their elected superiors, they are less influenced by political pressure than their elected counterparts and more likely to hold in view the national interest and welfare of consumers; additionally, among elected officials, the President is more likely to be sympathetic to liberal trade policy than a congressman because he faces a broader political constituency. *Id.* at 516-18.

241. Tumlin, *supra* note 32, at 406 ("[T]he legally flimsy international [free trade] rules represent a truer expression of the national interest of all the countries concerned than the mass of national [economic] legislation . . .").

242. Wolfgang Michalski, *Costs and Benefits of Protection*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT, *supra* note 152, at 25, 25 ("Protectionist measures yield few

omy mobilize labor and other affected constituencies to lobby for laws to protect them from foreign competition.²⁴³ Such trade barriers include both restrictions on imports and domestic legal rules that operate in a biased fashion against foreign traders.²⁴⁴ In economic terms, these groups obtain "rents"²⁴⁵ from the majority of

benefits and impose substantial costs, chiefly on the protecting country but also on its trading partners."); see also Edward J. Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285, 290-91 (1987) (citing example of special interest groups blocking the opening of U.S. markets for exports from developing countries). Both regime theory and economic free trade theory recognize the importance of public choice theory and its relationship to law. Regime theory is preoccupied with cooperative behavior by states in international settings, however, and is agnostic regarding the priorities that states bring to the international bargaining table. See *supra* notes 148-49 and accompanying text. Economic free trade theory, by contrast, is normatively opposed to protectionism and other domestic forces that seek restrictions on free trade. See James Bovard, *The Morality of Protectionism*, 25 N.Y.U. J. INT'L L. & POL. 235, 248 (1993) (arguing that protectionism is "oppressive"). For a general review of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

243. See Robert E. Baldwin, *Trade Policies in Developed Countries*, in *INTERNATIONAL TRADE: SURVEYS OF THEORY AND POLICY* 183, 184-94 (Ronald W. Jones ed., 1986); Cohen, *supra* note 124, at 264-65; J.J. Pincus, *Pressure Groups and the Pattern of Tariffs*, 83 J. POL. ECON. 757 (1975); Rowley & Tollison, *supra* note 152, at 151-52 (explaining protectionism as a result of (1) political activity by uncompensated "losers" from free trade; (2) a lack of awareness by free trade "winners;" (3) the differential representation resulting from a geographical concentration of those who will benefit from protectionism; (4) the perverse effects of logrolling in voting legislatures; and (5) the short-term benefit to governments from tariff revenues).

244. RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* xi, 3 (1985) (arguing that the "independent judges" in international commercial arbitration forums are able to supplant "the State monopoly of lawmaking and the confiscation of justice by the State" by developing "in appropriate cases, a *jus gentium* and *lex mercatoria* of a new type, free of the contingencies and prejudices which dominate the [legal] scene in the various States"). David emphasizes that businesses seek arbitral alternatives to domestic courts both to improve the efficiency of the administration of justice, *id.* at 10-13, and to seek "another justice" compatible with the needs of international trade, *id.* at 13-18 ("Businessmen may endeavour to develop, through the device of arbitration, a commercial law of their own (*droit corporatif*), different in some measure from the legal rules emanating from State organs, which the courts apply[, and t]he craving for such a new international law cannot be denied."). See Thomas E. Carbonneau, *National Law and Judicialization of Arbitration: Manifest Destiny, Manifest Disregard, or Manifest Error*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?* 115, 116-17 (Richard B. Lillich & Charles N. Brower eds., 1993) [hereinafter *INTERNATIONAL ARBITRATION*] (discussing how domestic "legal processes [that] are too rigid to adapt and to undergo reform" fuel the demand for international commercial arbitration services); see also DAVID, *supra*, at 350-51 ("When parties request that arbitrators adjudicate their dispute in accordance with international law or with the general principles of law, their intention is to escape from the national systems of law.").

245. Rowley & Tollison, *supra* note 152, at 143-45 (discussing concept of economic

the population. The general population acquiesces in paying these rents because the costs are "hidden and diffuse"²⁴⁶ in the economy as a whole. Elected officials, meanwhile, "concern themselves far more with the impact of trade policy on producer interests than on consumer interests" because producer interests tend to mobilize for elections.²⁴⁷ The Efficient Market Model sees trade legalism as a way to overcome such political failures so as to improve general welfare.²⁴⁸

Richard Cooper has noted that domestic trade policy has two "tracks" on which it is conducted: a "high" political track requiring considerable attention by political officials and subject to political accountability, and a "low" track of rule-oriented dispute adjudication in which individual cases are determined by domestic tribunals under technical criteria established by law and administrative regulation.²⁴⁹ Protectionist forces have been adept at moving their domestic agenda from the "high" track of visible political debate to the "low" track of technical regulation and adjudication. In such "low" track proceedings as domestic anti-dumping and countervailing duty cases, protectionists are able through "misdirection and

"artificial rents" produced when government intervention introduces "man-made scarcity" by government decree in response to public pressure for protection from market competition).

246. Heinz Hauser, *Domestic Policy Foundation and Domestic Policy Function of International Trade Rules*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT, *supra* note 152, at 9, 12-13.

247. Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 275 (1991). Of course, producers of intermediate goods are themselves consumers of foreign component parts for their final products. Governments may well attend to the needs of consumers that are, in effect, value-added resellers.

248. When legal barriers restrict imports, domestic producers enjoy artificially protected markets. This means they can raise prices, forcing consumers to transfer their wealth to the protected industry. *See* Michalski, *supra* note 242, at 29-30. Further, with the higher prices imposed, the country will invest more resources than it should in producing the protected item and delay shifting those resources to other, more advantageous products. *Id.* at 32-34. Moreover, according to free trade advocates, protection does not really save jobs, as protectionists often assert in political forums. *See, e.g.,* Lang & Hines, *supra* note 152, at 13. Rather, it simply favors one group of protected workers at the expense of others who would be able to work in more productive industries if trade distortions were removed. Free trade advocates believe the dwindling demand for unskilled workers in developed countries is more a function of technological innovations such as robots and computers than of competition from cheap labor abroad. *Workers of the World, Compete*, ECONOMIST, Apr. 2, 1994, at 70 ("Many economists prefer to blame the dwindling demand for unskilled workers on the technological revolution of the past decade.").

249. Richard N. Cooper, *Trade Policy Is Foreign Policy*, 9 FOREIGN POL'Y 18, 18 (1972-1973).

obfuscation" to secure protectionist rulings "without being called to task" by those who are disadvantaged by their actions.²⁵⁰ The Efficient Market Model of international trade dispute resolution takes Cooper's insight one step further by conceptualizing the international trade adjudicatory system as a "low" technical/legal track that operates at the international level to serve as a check on both the "high" and the "low" track domestic trade systems of individual states.²⁵¹

Although a normative belief in the welfare consequences of free trade grounds the Efficient Market Model, international trade adjudication systems gain legitimacy from domestic legislatures' approval of these systems. The most obvious reason for such approval is that global economic interests have become powerful lobbying forces at the domestic level.²⁵² The emerging profile of the world economy strongly supports this claim. For example, the volume of "international production," i.e., the production of goods within a country under the global strategy of a foreign-owned and foreign-directed multinational enterprise, now exceeds the total volume of international trade.²⁵³ Thus, intrafirm transfers account

250. J.M. Finger et al., *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452, 454 (1982); see also Burley & Mattli, *supra* note 21, at 44 ("Law . . . is widely perceived by political decision makers as 'mostly technical,' and thus lawyers are given a more or less free hand The result is that important political outcomes are debated and decided in the language and logic of law." (citing Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 3 (1981))).

251. The use of supranational institutions and mechanisms through which the public officials charged with managing foreign affairs may make decisions without resorting to domestic legislatures is a relatively common phenomenon. Note, *Discretion and Legitimacy in International Regulation*, 107 HARV. L. REV. 1099, 1099 (1994) (noting use of amendment procedures for treaties, "nonunanimity" voting provisions in international agreements, and the delegation of discretion to foreign policy officials).

252. The U.S. example illustrates how foreign firms have rapidly gained influence in domestic political markets in recent years. Bruce Kogut and Michelle Gittelman have pointed out that "[l]ess than 6 per cent of [U.S.] industrial output was from foreign-owned companies at the start of the 1980s. The percentage is now close to 20 per cent." BRUCE KOGUT & MICHELLE GITTELMAN, *THE LARGEST FOREIGN MULTINATIONALS IN THE UNITED STATES AND THEIR CONTRIBUTION TO THE AMERICAN ECONOMY* 1 (1994). As of 1994, 105 of the largest foreign multinational corporations operating in the United States could be added to the Fortune 500 industrial rankings based solely on the sales of their U.S.-based operations. *Id.* at 1-2. Moreover, "foreign firms hired 12 per cent of the manufacturing workforce in 1991, and paid them 14 per cent of total compensation." *Id.* at 8-9. As the welfare of executives and workers becomes increasingly intertwined with the success or failure of foreign enterprises that must engage in international trade to survive, governments are likely to become more inclined to resist protectionist impulses.

253. Strange, *The Name of the Game*, *supra* note 30, at 242 (noting that the

for as much as half of some countries' total imports.²⁵⁴ The legal burdens of moving intrafirm goods across borders act "as an additional tax on internal transfers; and the less they exist, the better."²⁵⁵ Multinational business firms have thus found it in their interests to become powerful players in domestic trade politics.²⁵⁶

Within the developing world, multinational firms "have begun to resemble states,"²⁵⁷ rivaling nations in power and influence and able to "keep 'sovereignty at bay'" because of their sheer economic size, which sometimes exceeds that of the states where they do business.²⁵⁸ In industrialized states, the power of multinationals is less relative to the total number of rival interest groups, but global firms provide significant resources toward winning legislative

mid-1980s were a "milestone" because the volume of international production exceeded the volume of international trade for the first time in history); *A Disquieting New Agenda for Trade*, *ECONOMIST*, July 16, 1994, at 56 (citing U.N. statistics showing that in 1991 firms' sales of goods through foreign affiliates exceeded value of their trade in goods and services). Multinational firms based in the United States lead the world in direct investments overseas, and their stakes are rising. Fred R. Bleakley, *Foreign Investment by Multinationals Rebounds, Benefiting China, U.N. Says*, *WALL ST. J.*, Aug. 31, 1994, at A2 (reporting that multinationals worldwide invested some \$195 billion in foreign affiliates and other companies in 1993, \$50 billion of which was invested by U.S.-based multinational firms in other companies outside the United States).

254. WINHAM, *supra* note 185, at 53-54 n.63 (citing a 1977 study finding that over 48% of the value of total U.S. imports originated with exporters who were related by ownership to the importing firms); Winfried Ruigrok, *Paradigm Crisis in International Trade Theory*, 25 *J. WORLD TRADE*, Feb. 1991, at 77, 77 (noting that only 25% of world trade is truly "free" and governed by GATT rules, and that the balance is intracompany trade (25%), bilateral trade governed by preferential agreements (25%), and barter trade (25%)); Strange, *Protectionism*, *supra* note 30, at 253. Many multinational firms ultimately locate major production facilities in the markets where final sales will take place to reduce the costs associated with exporting. For example, in the United States, the Japanese car manufacturer Honda intends by the year 2000 to produce in the United States over 75% of the Hondas sold in the United States. *The No. 1 Carmaker: The U.S.?*, *PHILA. INQUIRER*, Aug. 16, 1994, at C1.

255. WINHAM, *supra* note 185, at 54.

256. Ronald Facchinetti, *Global Lobbying in the New Europe*, *CORP. BOARD*, Jan. 1995, at 19 (examining the techniques used by multinational firms lobbying European Union institutions and comparing these techniques with those used when these firms lobby the U.S. Congress); Bruce Stokes, *The American Marketplace Has Gone Global*, 26 *NAT'L J.* 1426, 1430 (1994) (describing membership of multinational firms in the Emergency Committee for American Trade, a powerful lobby group in the United States, and discussing how trade lobbying has become a "profit center" for Washington law firms in recent years); *Globe-Totting*, *ECONOMIST*, Sept. 3, 1994, at 62 (reporting on U.N. Conference on Trade and Development study that places the number of multinationals in operation in 1992 at 37,000, controlling more than 200,000 affiliates and employing some 73 million people).

257. Strange, *The Name of the Game*, *supra* note 30, at 242.

258. IGNAZ SEIDL-HOHENVELDERN, *INTERNATIONAL ECONOMIC LAW* 14 (1989).

fight for both free trade agreements²⁵⁹ and friendly, supranational legal rules governing business conduct.²⁶⁰

In addition, the global financial market now dominates most local markets, including those of many large players like the United States.²⁶¹ Global investment funds therefore go where they can find the highest returns, not to where they produce the best effects for a given economy.²⁶² States' control over their own capital markets, including their own currencies, is slipping.²⁶³ Finally, a growing number of industries are what Jagdish Bhagwati has called "footloose," i.e., "shiftable" from one country to another based on small changes in efficiency that can result from regulatory moves.²⁶⁴ This gives corporations increasing leverage to block inefficient laws altogether or, alternatively, to help create supranational legal tribunals that can temper or annul the application of these laws.

Free trade interests help their cause by using effective legislative "packaging" for free trade agreements. Dispute resolution systems such as the WTO are voted on as part of trade treaties that

259. See David S. Broder & Michael Weisskopf, *Business Prospered in Democratic-led 103rd Congress*, WASH. POST, Sept. 25, 1994, at A1 ("Business mobilized tremendous forces to secure . . . congressional support [for the NAFTA]. The NAFTA issue united the lobbying power of U.S. corporations and the Mexican government, which paid U.S. lobbyists and public relations experts \$25 million to sell the pact here.").

260. Cf. W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 127-34 (1992) (discussing passage of international arbitration laws in Belgium and Switzerland that drop the requirement of confirmation of arbitral awards in a local court so as to entice global businesses to use their jurisdictions to arbitrate claims). See generally David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423 (1991) (discussing potential lowest-common-denominator effect of market pressures on jurisdictions between which there is relatively free mobility of capital and describing EC efforts to harmonize corporate law to prevent such a "race to the bottom").

261. Strange, *The Name of the Game*, *supra* note 30, at 246 ("Local financial markets are now ancillary to the global one, not the other way around.").

262. Kenichi Ohmae, *New World Order: The Rise and Fall of the Region-State*, WALL ST. J., Aug. 16, 1994, at A12 ("[In a global economy, b]oth capital and corporate presence flow to those areas where global economic logic is—and can be seen to be—consistently and reliably at work.").

263. Peter Gumbel & Bob Davis, *G-7 Countries Show Limits of Their Power*, WALL ST. J., July 11, 1994, at A6 (discussing inability of United States and other industrialized nations to control fall of U.S. dollar on world markets).

264. Bhagwati, *supra* note 137, at 229 (noting that different environmental or safety standards among countries can lead to complaints by producers that competitors are deriving "their lethal competitive edge because of some 'unfair' [regulatory] advantage that they 'should not' have").

are loaded with free trade benefits and side payments that appeal to a broad group of constituencies.²⁶⁵ These benefits include not only increased trade but also solutions to politically troubling domestic issues that gain the approval of groups that might not otherwise have a stake in the trade debate.²⁶⁶ Moreover, trade coalitions spend enormous resources on behalf of trade initiatives that include international adjudicatory dispute resolution systems.²⁶⁷ In the United States, "fast track" voting rules often apply to trade treaties, and these rules forbid amendments or separate votes on particular provisions.²⁶⁸ Thus, potentially controversial dispute resolution systems obtain approval as part of the overall package of attractive treaty terms. The fast-track procedure makes it much

265. H. Richard Friman, *Side-Payments Versus Security Cards: Domestic Bargaining Tactics in International Economic Negotiations*, 47 INT'L ORG. 387, 390-91 (1993) (discussing how policymakers use side payments to domestic constituencies as a tactic to gain domestic support for international economic agreements); Kevin Merida & Tom Kenworthy, *For Some in House, Last-Minute Deal-Making Leaves Bitter Taste*, WASH. POST, Nov. 18, 1993, at A11 (describing "deals President Clinton cut" assuring special treatment for sugar, citrus, vegetable, beef, peanuts, appliances, and other products to secure lawmakers' votes for the NAFTA). In the battle to pass the WTO, U.S. protectionists succeeded in strengthening their rights under domestic anti-dumping laws in spite of U.S. agreement to weaken these laws. Robert Keatley, *Congress Inserts Rules in GATT Treaty That Make It Harder to Trade Globally*, WALL ST. J., Aug. 19, 1994, at A6; Peter Passell, *An End Run on GATT*, N.Y. TIMES, Aug. 6, 1994, at 33 ("Industries including steel, autos, and semiconductors have become expert at using the law against dumping, or importing goods below what is considered fair value, and they view the enabling legislation for GATT as an opportunity to increase their leverage.").

266. See Friman, *supra* note 265, at 391-95 (discussing use of issue redefinition as a tactic to gain domestic political support for international trade agreements). To secure passage of the NAFTA, treaty proponents in the United States emphasized that the NAFTA would solve the problem of illegal immigration from Mexico in addition to creating domestic jobs and better new markets for U.S. products. Gary C. Hufbauer & Jeffrey J. Schott, *Options for a Hemispheric Trade Order*, 22 U. MIAMI INTER-AM. L. REV. 261, 282-83 (1991) (discussing full range of interests brought to the NAFTA by Mexico, Canada, and the United States, including U.S. concerns about illegal immigrants from Mexico).

267. For example, backed by globally minded businesses, the Mexican government spent more money lobbying to secure passage of the NAFTA than has any other foreign principal, public or private, in the history of the United States. James Gerstenzang, *Mexico's NAFTA Lobbying Called a Record*, L.A. TIMES, May 28, 1993, at D3; see Broder & Weisskopf, *supra* note 259, at A1.

268. The "fast track" voting procedure requires a single vote up or down on the entire trade deal, thus foreclosing the possibility of amendments that might separate the substantive provisions from the dispute resolution system. See, e.g., Alan F. Homer & Judith H. Bello, *U.S. Trade and Policy Series No. 20: The Fast Track Debate: A Prescription for Pragmatism*, 26 INT'L L. 183 (1992) (describing fast-track procedures).

more likely that the voting coalition needed for passage will hold together.

In summary, the Efficient Market Model of international trade dispute resolution views international trade laws and tribunals as devices by which governments and businesses that favor free trade may circumvent domestic protectionist groups and increase the world's wealth.²⁶⁹ The mechanisms used to accomplish these goals are efficiency-enhancing international legal rules capable of trumping municipal laws and international trade tribunals that can supplant meddlesome domestic courts and agencies. Ultimately, Efficient Market Model advocates envision internationally developed free trade norms becoming the "rule of law" for individual states by giving these norms direct legal effect in domestic courts and by making the awards of international tribunals convertible into domestic court judgments with only minimal substantive scrutiny.²⁷⁰ In contrast with the Regime Management Model, which restricts standing to assert claims to states, the Efficient Market Model gives business parties standing to directly assert pro-trade norms before both international and domestic tribunals, thus enabling them to gain legal leverage over their own and other governments' economic policy choices.²⁷¹

269. Hauser, *supra* note 246, at 16 (stating that international trade agreements function as constitutions imposing frameworks of constraints on discretionary economic policy that "restrict national governments in the choice of protectionist instruments"); Frieder Roessler, *Discussion to Session IV: Competition and Trade Policies. The Constitutional Function of International Economic Law*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT, *supra* note 152, at 303, 307-08 (stating that institutions such as the GATT help offset the political "bias" caused by the fact that domestic producers are "better organized than consumers").

270. See Ernst-Ulrich Petersmann, *Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS, *supra* note 31, at 33, 70-71.

271. See Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the US Tariff Act of 1930*, J. WORLD TRADE, June 1990, at 5 (arguing for direct participation by commercial parties in GATT proceedings); Hilf, *supra* note 31, at 321-22; Roessler, *supra* note 269, at 305-12; Tycho H.E. Stahl, *Liberalizing International Trade in Services: The Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, 439-40 (1994) (arguing that treaties governing trade in services should include private rights of action on behalf of business parties so that such parties can bypass the need "to lobby their national governments to champion an issue before foreign governments" and supplement "the limited resources of a relatively small number of government officials [who] serve as advocates in . . . trade disputes").

TABLE 3
Efficient Market Model

	Types of Parties with Standing	Theories Underlying Model	Purpose of Dispute Resolution System	Source of Law for Enforcement Purposes
Efficient Market Model	States and Commercial Entities	Foreign Relations Liberalism and Free Trade Theory	Reduce Legal Transaction Costs and Fully Integrate Global Market	Inter-national and Municipal
Regime Management Model	States	Realism and Regime Theory	Balance States' Interests in Free Trade and Autonomy	Inter-national

b. The model in action. A number of international commercial dispute resolution systems and institutions, all of which seek to reduce the legal transaction costs imposed on global businesses by nation-states, provide illustrations of the Efficient Market Model. These agreements include the North American Free Trade Agreement (NAFTA),²⁷² international commercial arbitration treaties such as the New York Convention on the Recognition of Foreign Arbitral Awards (the "New York Convention"),²⁷³ and the World Bank's International Center for Settlement of Investment Disputes (ICSID).²⁷⁴

272. North American Free Trade Agreement, Dec. 8-17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 and 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The NAFTA was supplemented by "side agreements" on environmental and labor issues. North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (1993); North American Agreement on Labor Cooperation, Sept. 8-14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (1993).

273. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

274. Convention on the Settlement of Investment Disputes Between States and Na-

Unlike Regime Management Model systems like the ICAO, which emphasize state monopoly on power, use institutions such as the International Court of Justice, and rely exclusively on international law norms, Efficient Market Model systems operate to limit the power of states to regulate transnational commerce. They do so by granting commercial parties direct access to tribunals along with states and by empowering tribunals to issue judgments with binding effect within the domestic legal systems of nation-states.

The NAFTA, which came into effect on January 1, 1994, contains dispute resolution provisions to serve both states and private parties.²⁷⁵ The dispute resolution provision that most clearly reflects the Efficient Market Model is NAFTA article 19. This article creates a binding, supranational arbitration scheme accessible directly by private business parties²⁷⁶ through which businesses may overturn final anti-dumping and countervailing duty decisions of domestic trade regulators.²⁷⁷ These arbitration panels, which are directed by the treaty to apply the domestic law of the state that issued the anti-dumping or countervailing duty decision,²⁷⁸ provide the last word on such allegedly unfair trade claims.²⁷⁹

tionals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

275. See David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 431 (1993); Andrew K. Rose, Note, *Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution*, 15 MICH. J. INT'L L. 255, 260-83 (1993) (providing a detailed comparison of the NAFTA and the Canada-U.S. Free Trade Agreement dispute resolution systems).

276. Both private parties and states have access to this process. NAFTA, *supra* note 272, art. 1904(5), 32 I.L.M. at 683. Consistent with the thesis advanced in this Article regarding the importance of business interests in the development of the WTO system, there is evidence that exporters were behind the creation of the NAFTA article 19 system and its predecessor in the Canada-U.S. Free Trade Agreement. See GILBERT R. WINHAM, *TRADING WITH CANADA* 18-19 (1988) (discussing role of business interests in developing the chapter 19 binational arbitration process for anti-dumping and countervailing duty cases in the Canada-U.S. agreement).

277. The NAFTA offers parties who wish to appeal anti-dumping and countervailing duty decisions issued by national regulatory authorities a choice of appellate procedures. Aggrieved parties may either use the regular domestic system of judicial review of the country that issued the decision or request that a binational NAFTA arbitration panel hear their appeal. NAFTA, *supra* note 272, art. 1904, 32 I.L.M. at 683-84.

278. If the parties elect to use an article 19 panel, the panel will apply the substantive national law and standard of judicial review of the importing state that has issued the contested ruling. *Id.* art. 1904(2), 32 I.L.M. at 683. Article 19 panels consist of five arbitrators, a majority of whom must be lawyers. *Id.* Annex 1901.2(2), 32 I.L.M. at 687.

279. The NAFTA provides that panel decisions may be appealed by states, *id.* art. 1904(13), 32 I.L.M. at 683, to three-member "Extraordinary Review Committees," *id.*

The New York Convention has provided businesses with a widely used system²⁸⁰ through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes,²⁸¹ subject only to minimal standards of domestic judicial review for basic fairness²⁸² and consistency with national public policy.²⁸³ The international commercial arbitration system has become increasingly free of state regulation as courts have narrowed the New York Convention's "public policy" exception to include only those awards that violate deeply held, fundamental fairness standards²⁸⁴ and as states, eager to gain business as arbitration forums, have revised their domestic arbitration laws and lifted various legal restrictions on proceedings taking place within their borders.²⁸⁵ The jurisdictional

Annex 1904.13(1), 32 I.L.M. at 688, which may reverse a panel decision only if an arbitrator is guilty of "gross misconduct, bias, or serious conflict of interest," if the panel "seriously departed from a fundamental rule of procedure," or if the panel "manifestly exceeded its powers," and only if such wrongful conduct "materially affected the panel's decision and threatens the integrity of the binational review process," *id.* art. 1904(13), 32 I.L.M. at 683. Conceptually, it is important to note that article 19 panels are international dispute resolution tribunals that not only are accessible directly by private parties but also have the final word on domestic questions of law without even cursory, domestic court review. Huntington, *supra* note 275, at 431 ("[Article 19 procedure] is quite unusual in the world of international trade treaties."). In this sense, these tribunals closely track the Efficient Market Model.

280. REISMAN, *supra* note 260, at 108-09 (stating that the New York Convention "is the most comprehensive and, until now, successful effort" to channel international arbitral processes and rules through national judicial systems). A number of worldwide commercial arbitration forums such as the International Chamber of Commerce in Paris, the London Court of Arbitration, the Stockholm Chamber of Commerce, and the American Arbitration Association in New York offer arbitration services to commercial and state parties under the umbrella of this convention. *Id.* at 107 ("The great bulk of international commercial arbitration, thousands of cases each year, is conducted under the auspices of a number of private international organizations.").

281. The New York Convention establishes that the domestic courts of all signatory countries will enforce arbitration agreements in international and maritime contracts. The prerequisites for such enforcement are minimal. The agreement to arbitrate must be in writing and must be capable of withstanding an attack that it is "null and void, inoperative or incapable of being performed." New York Convention, *supra* note 273, art. 2(1), (3), 21 U.S.T. at 2519, 330 U.N.T.S. at 38, 40.

282. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 296-311 (1981) (discussing grounds for challenging arbitral award based on basic notions of "due process").

283. *Id.* at 359-68.

284. *Id.* at 366 ("[T]he courts have refused enforcement [on the basis of the public policy exception] in very exceptional cases only [and have] generally given a narrow interpretation and application to the Convention's public policy provisions.").

285. REISMAN, *supra* note 260, at 127-31 (discussing how Belgium and Switzerland

sweep of international commercial arbitration, meanwhile, has expanded rapidly in recent years. For example, the U.S. Supreme Court has ruled that international arbitration panels operating without the constraint of substantive judicial review have the power to decide cases under both antitrust and securities laws of the United States.²⁸⁶ Such jurisdiction effectively "privatizes" these public regulatory schemes by taking them out of the hands of domestic judges and placing them in the hands of ad hoc international adjudicators.²⁸⁷

Perhaps most interestingly, the ICSID arbitration system permits private parties to sue states using an international arbitral procedure that is wholly self-regulatory, featuring its own internal appeals process.²⁸⁸ Once the ICSID arbitration scheme has run its course, states agree to enforcement of awards against them in their own domestic courts without even the minimal "public policy" review permitted under the New York Convention.²⁸⁹ In essence, ICSID permits private business creditors to obtain virtually automatic collection of awards against state debtors using debtor

have recently passed international arbitration laws that bar post-award review by courts unless one of the parties is a citizen in order "to attract a quantity of arbitral business that would otherwise not have selected their venue").

286. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40 (1985) (holding that federal antitrust claims are arbitrable by international arbitrators); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513, 519-20 (1974) (holding that claims under the 1934 Securities Exchange Act are arbitrable by international arbitrators); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 458-60 (1993).

287. See Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION* 19 (Thomas E. Carbonneau ed., 1990); Thomas E. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L L. 265, 282-83 (1986); Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1663 (1991).

288. Albert Jan van den Berg, *Annulment of Awards in International Arbitration*, in *INTERNATIONAL ARBITRATION*, *supra* note 244, at 133, 134 n.2 ("[ICSID provides for] a self-sufficient system of truly international arbitration . . .").

289. John T. Schmidt, *Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*, 17 HARV. INT'L L.J. 90, 104-05 (1976). The ICSID treaty requires contracting states to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State" without regard to "public policy" notions. ICSID Convention, *supra* note 274, art. 54(1), 17 U.S.T. at 1291, 575 U.N.T.S. at 194. This undertaking renders an award that may be binding as a matter of international law binding under the defendant's own domestic legal system subject only to the doctrine of sovereign immunity. *Id.* art. 55, 17 U.S.T. at 1292, 575 U.N.T.S. at 194; Schmidt, *supra*, at 105.

nations' own courts—the strongest extant example of an Efficient Market Model scheme.

c. *The Efficient Market Model and trade jurisprudence.* The Efficient Market Model not only provides a useful perspective on the purposes, dynamics, and structures of international trade adjudication systems, but also illuminates a jurisprudential theme that appears in trade cases. In contrast with regime-oriented interpretation, which emphasizes the contractual nature of trade treaties and the need for "regime maintenance," trade-oriented interpretation sees adjudication as a utilitarian instrument for helping the world trading community to attain its goal of "an open world trading system free of government restrictions."²⁹⁰

Adjudicators motivated by the normative values embodied in the Efficient Market Model can accomplish this goal by interpreting the qualifying language, exceptions, and limiting conditions in trade treaties narrowly and, when possible, by ignoring or finessing these barriers to free trade altogether. Such adjudicators can be expected to seek bright-line rules that further the "long-term legal objective of protecting . . . the national as well as individual self-interest in liberal trade and in 'rule-oriented' decision-making processes."²⁹¹

A prominent example of trade-oriented jurisprudence in the GATT is the *DISC* case, a decision that invalidated a U.S. scheme to promote exports by giving special tax breaks to U.S. corporations qualified as "domestic international sales corporations" (DISCs).²⁹² As the plaintiff, the European Community argued that the tax deferral benefits offered to DISC corporations were export subsidies that violated article 26(4) of the GATT.²⁹³ The United States countered that its DISC program was not a "subsi-

290. WINHAM, *supra* note 185, at 404.

291. Petersmann, *supra* note 81, at 324.

292. GATT BISD, 23d Supp. 98, 113 (1977). Among other things, 95% of DISC receipts had to result from export sales. *Id.*

293. Article 16(4) prohibits governments from granting subsidies on the export of industrial products:

[C]ontracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market.

Art. 16, 4 GATT BISD 27 (1969).

dy," but was rather a way of creating a "tax haven" for U.S. exporters similar to the havens used by companies in Europe, where exporters often incorporated "shell" subsidiaries in a low- or no-tax jurisdiction through which to channel export sales and save taxes.²⁹⁴

Essentially, the United States made a regime-oriented, relational contract argument that past "GATT practice" supported its narrow interpretation of the word "subsidy" in article 26(4).²⁹⁵ Furthermore, the United States asserted that even if the DISC program was a subsidy, the European Community had failed to carry its burden of proving the required element of article 26(4) that the DISC program directly caused exported U.S. goods to be sold for prices below those at which the same goods were sold domestically.²⁹⁶ Finally, passing both the subsidy and pricing issues, the United States claimed that the EC could not show that it had suffered "nullification or impairment" of treaty benefits as a result of the DISC program.

The GATT panel, which included economists from the London School of Economics and Italy's University of Turin,²⁹⁷ held that the DISC law violated the GATT. The panel's reasoning clearly reveals its Efficient Market Model assumptions regarding the purposes of GATT adjudication in the world economy. The panel first dismissed the relational contract argument that many nations had historically used their tax systems to encourage exports, holding that "one distortion could [not] be justified by the existence of another one."²⁹⁸ Instead, the panel "started by examining the effects of the DISC legislation in economic terms."²⁹⁹ Viewed economically, the panel found that the tax program "conferred a tax benefit . . . related to exports . . . [, which] would result in more resources being attracted to export activities than would have occurred in the absence of such benefits

294. Robert E. Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. REV. 1443, 1447-48 (1988).

295. John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 766 (1978).

296. Hudec, *supra* note 294, at 1451.

297. GATT BISD, 23d Supp. 98 (1977). The other three members of the five-person panel were a counselor from Sri Lanka's GATT mission in Geneva, the director of trade policy for the Department of Trade and Industry in Wellington, New Zealand, and a counselor from Sweden's delegation to the European Community. *Id.*

298. *Id.* at 114.

299. *Id.* at 112.

for exports."³⁰⁰ It therefore held that the tax program was a "subsidy."³⁰¹

Having found a subsidy to exist, the panel went on to determine if the plaintiff had shown the requisite "bi-level pricing" required by article 26(4). Although the EC had made no showing whatever on this required element, the panel reasoned that "from an economic point of view," an export subsidy could be *presumed* to either lower prices, increase sales, or increase profits per unit, and "it was to be expected that all of these effects would occur."³⁰² Thus, a "concentration of the subsidy benefits on prices could lead to substantial reductions in prices . . . in export markets . . . [that did not need] to be accompanied by similar reductions in domestic markets."³⁰³ This presumption was based entirely on economic speculation, but it permitted the panel to rule that the DISC program caused bi-level pricing in violation of article 26(4).

Finally, as to the requirement of "nullification and impairment," the panel relied on a prior GATT case to hold that once a plaintiff proves a GATT violation, this proof constitutes a *prima facie* showing of nullification of benefits,³⁰⁴ subject to rebuttal by the defendant.³⁰⁵ Since the panel had already assumed that such a violation occurred, it concluded that "there was a *prima facie* case of nullification or impairment of benefits which other contracting parties were entitled to expect under the General Agreement."³⁰⁶ In effect, the panel built its findings of liability and impairment on a double presumption regarding the existence of bi-level pricing and the probability of harm flowing from such pricing. Both presumptions rested on neoclassical economic theory.

The *DISC* decision caused significant controversy. Among other things, it was criticized as being poorly drafted, and the United States effectively delayed its adoption by the GATT Council for over a decade.³⁰⁷ In the light of the Efficient Market

300. *Id.*

301. *Id.* This sweeping conclusion potentially labeled as a GATT-proscribed "subsidy" any tax policy that benefited exports.

302. *Id.* at 113.

303. *Id.*

304. *Id.* at 114.

305. Jackson, *supra* note 295, at 771.

306. GATT BISD, 23d Supp. at 114.

307. HUDEC, *supra* note 56, at 95; Jackson, *supra* note 295, at 764. The United States ultimately amended its tax laws in response to the *DISC* decision to protect the integrity

Model, however, the *DISC* case can be seen as an example of economic theory forming the foundation for mandatory legal presumptions.³⁰⁸

Another example of Efficient Market Model trade jurisprudence is the line of cases in the European Court of Justice (ECJ) in which the court held that individuals, not just Member states, have standing to assert European Community trade norms within their domestic legal systems.³⁰⁹ The 1963 decision of the ECJ in *Van Gend & Loos*³¹⁰ exemplifies this jurisprudential thread in European law. The case involved a challenge by a private Dutch importer against the Dutch government's attempt to impose customs duties on specified imports. The importer sued in a Dutch court, alleging that the duties violated European Community law.³¹¹ Article 177 of the Treaty of Rome, on which the ECJ based its jurisdiction, authorizes the ECJ to issue "preliminary

of the GATT dispute resolution process, HUDEC, *supra* note 56, at 94, but the U.S. amendments "made no significant change in the underlying export subsidy," *id.* at 95.

308. Radical free trade advocates seek to transform economic free trade theory into a system of rights and law. See PETERSMANN, *supra* note 19, at 463 (arguing that "[t]he constitutional lawyer should recognize freedom of [international] trade as a basic individual right and should not misunderstand it as a mere 'economic theory'"). A striking example of an international trade adjudicator confusing economics and law can be found in one of the decisions issued by a dispute resolution panel under the U.S.-Canada Free Trade Agreement, the precursor to the NAFTA. See *Fresh, Chilled or Frozen Pork from Canada*, No. USA 89-1904-11, 12 I.T.R.D. (BNA) 2119 (Binational Panel 1990); Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269, 302-34 (1991). The *Pork* case involved an allegation by the National Pork Producers of the United States that Canadian pork processors were receiving countervailable subsidies from the Canadian government, allowing the Canadians to sell pork in the United States at artificially low prices. In a series of decisions and remands, members of the U.S. International Trade Commission (ITC) leveled charges that the panel had reached a "counter-intuitive, counterfactual, and illogical" conclusion in overturning the ITC's ruling. One of the panelists was a Canadian professor of economics, John Whalley. In a written panel opinion, Whalley called for the ITC to adopt reasoning in accord with the "mainstream economics profession" as insurance against reversal by panels in the future. *Pork*, 12 I.T.R.D. at 2133; Lowenfeld, *supra*, at 316. It is difficult to imagine a more pointed example of trade-oriented decisionmaking than an economist who is sitting as a judge on an international trade arbitration panel calling on domestic legal authorities in an "administered protection" system to substitute economic theory for domestic legal standards.

309. *Burley & Mattli*, *supra* note 21, at 42 (describing ECJ cases that gave individuals standing to sue in domestic courts using European Community norms).

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

311. *Id.* at 4-5.

rulings" on any question involving the interpretation of community law arising in the national courts.³¹²

Although article 177 was included "[a]lmost as an after-thought"³¹³ and was originally intended "simply to ensure uniform interpretation of Community law throughout the Member States,"³¹⁴ the ECJ seized on article 177 to rule that the Dutch plaintiff had the right to assert the priority of European Community law in his own country's courts:

[T]he Community constitutes a new legal order . . . for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.³¹⁵

Cases such as *Van Gend & Loos* harken to a period in the history of the EU when it was primarily an Efficient Market Model legal system concerned with removing inefficient barriers to trade. Within the total context of European integration, this legal system has become much more, as will be discussed later.³¹⁶

III. LEGALIST MODELS AND THE WORLD TRADE ORGANIZATION

This Part investigates three important questions regarding the WTO's international trade dispute resolution system. First, what legalist vision best accounts for the structure of the WTO's legal

312. Burley & Mattli, *supra* note 21, at 58.

313. *Id.*

314. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2420 (1991).

315. *Van Gend & Loos*, 1963 E.C.R. at 12. The ECJ has subsequently held that individuals may rely directly on EC law to sue other individuals. *See, e.g.*, Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, 1976 E.C.R. 455 (holding that article 119 of the Treaty of Rome, which requires equal pay for equal work, had direct effect within member states and could be relied on by a private individual in a suit against another private individual).

316. *See infra* notes 385-93 and accompanying text.

system? Second, what sort of WTO dispute resolution system reforms are various proponents of legalism likely to advance as global economic integration proceeds? Finally, what kind of justice should we expect from the new international trade legalism?

A. *Global Business Interests and the Structure of the WTO Legal System*

As argued in Part II, the development of the WTO's binding dispute resolution structure cannot be readily reconciled with the international relations theory of realism.³¹⁷ States in a realist world marked by interstate anarchy would not find sufficient common ground or trust to create the WTO's binding dispute resolution mechanism, particularly when one considers that the WTO system is coupled with a system of trade sanctions for securing compliance with adjudicatory awards. Leaving realism to one side, therefore, let us see how the legalist models presented in Part II help explain certain general aspects of the WTO's legal system.

Both the Regime Management Model and the Efficient Market Model support the WTO's use of a binding dispute resolution process. Under the Regime Management Model, a binding international law enforcement mechanism based in international law will discourage defections from the trade treaty "bargain" and help solve the prisoner's dilemma among trading states. Such a system provides more dependable enforcement, adds pressure towards compliance, reduces transaction costs, and inspires more confidence that trade rules will apply equally to all states than does a nonbinding, power-based bargaining process.

At a time when there is no global superpower or other central enforcement mechanism committing nations to comply with negotiated trade norms, state leaders motivated by a Regime Management Model understanding of trade governance might well negotiate a binding dispute resolution system such as the one adopted by the WTO. For example, although the United States is still a dominant trading nation, it is no longer the hegemon it was and must therefore meet on roughly equal terms in the trade arena with the European Union, Japan, and the emerging trading blocs of Asia and South America.³¹⁸ In such a world, the United

317. See *supra* notes 129-33 and accompanying text.

318. Kuttner, *supra* note 144, at 52 ("[T]he relative shrinkage of the United States

States benefits from having access to a binding dispute resolution system because the threat of binding adjudication forces other nations to live up to their trade promise of more open markets. The cost of this access, however, is that the United States itself must live up to its obligations. Compliance with trade norms will sometimes involve a loss of domestic control over economic and social priorities.³¹⁹ Under the Regime Management Model, consent to binding trade adjudication is part of the price of participation for all states seeking to participate fully in the world market.

The Efficient Market Model also supports the WTO's adoption of binding dispute resolution, but for quite different reasons. Under this model, global business interests and their government allies seeking to establish an efficient global market would like to discard burdensome domestic legal regulations and procedures that interfere with free and open trade. Binding international dispute resolution systems and transnational legal rules help to circumvent these barriers to efficient trading. A treaty system like the WTO is, under this view, a step in the direction of a truly global system of international commercial dispute resolution through which businesses may gain independence from state regulation.

Unlike the Regime Management Model, which points to a relative decline in U.S. power as the trigger that has caused states to turn toward binding dispute resolution, the Efficient Market Model suggests that state leaders the world over—including in the United States—are losing control over economic matters to global market forces.³²⁰ As the structure of the world economy undermines state control over domestic economic events, state leaders seeking to reap the rewards of expanding trade must accommodate the needs of global traders through acquiescence in binding dispute systems in which the needs of private commercial parties can be addressed.³²¹

economy makes such a role [as a hegemon] unsustainable. The issue is how best to adjust to the new realities.”).

319. Katz, *supra* note 28, at A10 (arguing that Congress should approve the WTO because “[i]f we expect other countries to observe international trading rules, we must also be prepared to observe the rules we helped to write” and noting that “[t]he WTO ensures that member countries agree to the obligations of all of the agreements, not just those they like”).

320. See Ohmae, *supra* note 262, at A12 (“Economic borders have meaning, if at all, not as the dividing lines between civilizations or nation-states, but as the contours of information flow. Where information reaches, demand grows; where demand grows, the global economy has a local home.”); *supra* notes 244–55 and accompanying text.

321. This phenomenon appears to be most apparent at present in regional trade re-

Both the Regime Management and the Efficient Market models also support the use of a self-contained appeals procedure such as the WTO Appellate Body to assure that the rules developed within the WTO dispute resolution system by various panels are consistently applied by judges who have the greatest experience in the political and legal operation of the WTO. The appeals process gives the WTO system as a whole protection against the rulings of idiosyncratic "rogue panels" that might, depending on the global trade model motivating the system, injure the regime³²² or announce economically inefficient interpretations of trade rules. The exact role the Appellate Body will play in the WTO remains to be seen. Suffice it to say at this point that potential judges for this court may bring with them normative beliefs that incline them toward either of the models discussed above and still be wholeheartedly legalist in orientation.

Given that both models theoretically support the development of a binding process and appellate review in WTO dispute resolution, which of the two models provides the best description of the specific adjudication structures adopted by WTO? The answer is clear: the Regime Management Model.

First, the WTO dispute resolution system recognizes states as the only parties with standing to bring or defend a claim. This limitation is strongly consistent with the Regime Management Model's image of trade agreements as "contracts among sovereign states." Second, the WTO system is binding for WTO members under international law only, thus giving states somewhat more flexibility at the compliance stage of adjudication than would a system that made judgments binding under the municipal law of the disputing parties.³²³ Third, the WTO rules specifically instruct trade adjudicators to apply the "customary rules of interpretation of public in-

gimes such as the NAFTA and the EU. The governance structures of both the NAFTA and the EU demonstrate that within these regional trade spheres states must yield large areas of legal control to supranational tribunals and rules to accommodate the needs of transnational business. Systems such as the New York Convention and the ICSID demonstrate that these same economic forces are at work to achieve a similar result at the global level.

322. For example, with respect to the Regime Management Model, the Appellate Body will provide an opportunity to reexamine cases in light of any extraordinary political responses that a given panel decision might spark. The Tuna/Dolphin cases discussed in Part II reveal the value to a trade regime of having such a "second look" built into the structure of a binding system. See *supra* notes 208-36 and accompanying text.

323. See *supra* notes 170-73 and accompanying text.

ternational law"³²⁴ in their decisions—a source of law that strongly reflects relational contract norms in a “contract among sovereign states” at the international level.³²⁵

There is one significant aspect of the new WTO system that the Regime Management Model does not adequately explain, however: the unanimity voting requirement to overturn a panel or Appellate Body ruling. The Regime Management Model is concerned with regime stability and maintenance as well as with rule enforcement. A binding dispute resolution process serves these interests only if such a process does not pose the constant threat of destabilizing the regime. The WTO structure raises just such a specter because it leaves literally no exit for states seeking relief from decisions through some sort of politically accountable system of checks and balances. Every WTO country except the winner of a case could vote to overrule a decision, and the new WTO system would still provide no relief from a manifestly unacceptable rule. In such a case, the political stresses on the regime would be enormous.

Such a peculiar voting scheme does not square well with the Regime Management Model's normative concern for political play in the joints of the dispute resolution system. States could have adopted a voting rule similar to that of the International Civil Aviation Organization, under which the immediate parties to a dispute would be disqualified from voting.³²⁶ Such a rule, coupled with a requirement of a two-thirds or even three-fourths majority to overturn a decision, would have achieved binding decisions in all but the most politically charged cases and would have been more consistent with Regime Management Model values.

To fully understand the “consensus to overrule” voting scheme, therefore, one must go beyond the Regime Management Model and reexamine the negotiating history of the WTO legal system in the light of the Efficient Market Model. As recounted in

324. Understanding, *supra* note 7, art. 3(2), reprinted in 33 I.L.M. at 115.

325. Chayes & Chayes, *supra* note 167, at 175 n.2 (stating that treaty law, based on 19th-century models, “adopts, implicitly or explicitly, a contractual model of bilateral relationships”). U.S. Trade Rep. Michael Kantor was quite clear about his own “contractual” understanding of the WTO in testimony before Congress prior to the approval of the Uruguay Round: “This is a contract organization. . . . No one wants this contract organization to become more than it is.” *Gatt Hearings*, *supra* note 28, (testimony of U.S. Trade Rep. Michael Kantor).

326. See *supra* notes 175–84 and accompanying text.

Part I, globally oriented business interests demanded that an effective means be found to open foreign markets. When the GATT dispute resolution system proved a clumsy and unreliable tool for this purpose, pro-trade businesses prodded their governments to use unilateral threats and sanctions under such schemes as section 301. The use of these unilateral mechanisms, in turn, set in motion a complex political response.

The business community as a whole was disturbed by the prospect of worldwide resort to selective, arbitrary sanctions under provisions like section 301. Trade sanctions not only injure selected business communities in both the sanctioned and sanctioning states,³²⁷ but also pose the risk that the targeted state will respond with reciprocal sanctions designed to cause maximum injury to the domestic economy and political credibility of the state that started the "trade war." Commercial interests and their government allies therefore sought a more effective, centralized, multilateral legal system to enforce trade rules. As these discussions evolved, it became clear that to be effective, the dispute resolution mechanism would need to be virtually automatic, with little room for the political maneuvering that caused dissatisfaction with the GATT system.

The economic pressures that led governments to seek reforms of the GATT dispute resolution process thus pushed states further than they might otherwise have wished to go and led them to adopt a strictly binding system with a "consensus to overrule" voting requirement. This ultrabinding system does more than provide incremental change from the realist GATT system of the past. Rather, it is a substantial step toward the long-run goals of an Efficient Market Model system.

327. This point was recently brought home vividly in the United States when President Clinton was forced to back down on a threat to impose trade sanctions on China for failure to make progress on human rights policy. Robert S. Greenberger & Michael K. Frisby, *Clinton's Renewal of Trade Status for China Followed Cabinet Debates, Congress's Sea Change*, WALL ST. J., May 31, 1994, at A18. Hundreds of thousands of American jobs and billions of dollars in contracts were at risk if the United States had withdrawn "most favored nation" status from China as Clinton had said he would do. *Id.* at A18 (reporting that congressional attitudes about imposing trade sanctions on China changed because "lawmakers stared into the abyss and feared that a rupture of trade with China could mean big job losses in their districts"); Louis Uchitelle, *Back to Business on China Trade*, N.Y. TIMES, May 27, 1994, at D1 (detailing efforts of multinationals such as Boeing and AT&T to reverse Clinton's threat to link human rights with trade).

The Efficient Market Model also helps us understand why the government officials negotiating this agreement might embrace such a delegation of sovereignty to the WTO court. The model suggests that WTO defendants frequently prefer to *lose* cases. If, as the Efficient Market Model assumes, governments are allied with globally oriented business interests, favor free trade results, and regret defending protectionist laws and practices, then a formally binding adjudication system with no exit makes sense. Unlike the old GATT system with its veto powers and political flexibility, the new WTO system can deflect the blame for causing free trade's inevitable dislocations within domestic economies and provide political officials with "cover" against domestic criticism.³²⁸ Government officials will still hear cries of protest from domestic parties that oppose an Appellate Body ruling, but these officials can credibly answer domestic critics by saying, "The WTO has ruled. To resist now will threaten our overall economic well-being because we need a strong WTO to open other markets to *our* products." They will face no further obligation to seek diplomatic reversal of the ruling because such steps would be legally futile under the rules.

While the Efficient Market Model suggests that globally oriented businesses would have ideally preferred a system in which they themselves could enforce trade rules against both foreign and domestic governments, the adoption of the "consensus to overrule" voting scheme for the WTO advances the goal of a world "free for trade" in a number of ways. Under the new WTO system, in contrast with the old GATT system, defendants will face enormous pressure to comply with the wishes of the WTO because the credibility of the WTO as a legal institution will hinge on defendants' cooperation.³²⁹ The former GATT system, which permitted losing

328. PETERSMANN, *supra* note 19, at xxvii-xxviii (noting that "governments often gladly accept GATT dispute settlement reports" that require them to introduce trade measures "which they were previously prevented from using by domestic political pressures from powerful protectionist groups"); Abbott, *The Trading Nation's Dilemma*, *supra* note 21, at 520-25 (emphasizing that international trade rules help "responsible public official[s] . . . divert some of the political responsibility for a negative vote [on protection] to the rules themselves, casting them as a superior external force that takes the matter out of the officials' hands"); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the "Domestic Policy Functions" of International Trade Rules*, in PROTECTIONISM AND STRUCTURAL ADJUSTMENT, *supra* note 152, at 243, 258-60 ("GATT rules . . . assist governments and public officials . . . in resisting protectionist pressures and implementing economically efficient trade policies . . .").

329. ORAN YOUNG, INTERNATIONAL COOPERATION 73-74 (1989) (arguing that defi-

defendants to veto decisions that they found unacceptable, was not at such risk when states chose to resist dispute resolution results.

In addition, the new WTO system will make the imposition of costly trade sanctions on recalcitrant defendants virtually automatic. This power will add new "bite" to the dispute resolution process and push parties to comply with trade rulings. As states bargain toward solutions for their trade differences within the WTO legal structure, these new pressures toward compliance will give export interests and multinationals seeking to bring down trade barriers enhanced negotiating leverage.³³⁰

B. *Looking Toward the Future of the WTO: Reform Proposals*

A major question facing the new WTO system is whether it will satisfy the needs of the global business community that helped bring it into being or whether this community will eventually seek further reforms. There are reasons to suspect that business interests will soon be forced to apply further pressure for reform.

First, although the WTO system is stronger than the old GATT process at the Council confirmation and sanctioning stages, states are still likely to bring fewer cases than exporters and multinational firms would like to see brought. Associational concerns among states about preserving good diplomatic relations on a variety of non-trade matters may cause them to forbear suing certain violators, thus frustrating private interests that are suffering losses from the existence of a trade barrier. Indeed, the WTO's "consensus to overrule" voting scheme may make states somewhat more reluctant than before to initiate proceedings because the consequences of engaging the dispute resolution system will be much more significant. Moreover, free rider problems are likely to plague enforcement, because all states will enjoy the benefits of litigation that eliminates trade barriers while the diplomatic costs

ance of an important treaty regime risks precipitating a chain reaction leading to a more general collapse of the cooperative structure).

330. Businesses will still, as before, be able to petition states to bring cases complaining of trade barriers and thus push for binding WTO decisions that they favor. *See supra* notes 67-68 and accompanying text. In this regard, it has been suggested that multinational firms may use their power over smaller developing states as leverage to employ a "rent a government" litigation strategy within the WTO. *See Nader, supra* note 4, at A12 (arguing that under the new WTO rules "multinationals . . . will have strong motivation to see that such challenges [to anti-business laws] are made" by using a "rent a government" litigation strategy).

of bringing any specific WTO complaint will fall on only a few states.³³¹ Some evidence for a possible enforcement gap is supplied by the experience of the Regime Management Model ICAO dispute resolution system, which has adjudicated only a handful of cases since 1947.³³²

Second, even among cases that are brought, states will likely settle more cases short of a definitive declaration of rights than businesses would prefer. Once again, associational concerns will cause states to seek compromises on a case-by-case basis, while global business interests might prefer to see the WTO make a binding declaration that an entire class of trade rules or practices violates WTO trade norms.³³³

If these assumptions are correct and states prove to be unfaithful agents for global business interests, these interests will eventually press for further reforms. Consistent with the Efficient Market Model, business interests will demand that the WTO permit participation in its adjudication system by commercial parties directly affected by disputes. This could occur in a number of ways. First, business parties may obtain the right to appear as "friends of the court" before the Appellate Body in cases in which they have a substantial underlying stake.³³⁴ Participation of this sort already occurs informally through communication between counsel representing corporate interests, state representatives, and dispute resolution panelists.³³⁵ Second, commercial parties may

331. Frey & Buhofer, *supra* note 160, at 171 (arguing that such free rider problems can cause free trade regimes to erode, bringing on inevitable "protectionist cycles.")

332. Detlev Vagts & Charles Kent, *Book Review*, 83 AM. J. INT'L L. 435, 436 (1989) (reviewing DEMPSEY, *supra* note 175) (noting that only three disputes were submitted to the ICAO Council for formal judicial resolution over a period of 40 years); see *supra* note 180 and accompanying text; cf. DEMPSEY, *supra* note 175, at 300-02 (arguing that the "political" nature of the ICAO Council and the "cost of lengthy adjudication proceedings" make it unattractive for states to adjudicate cases).

333. Abbott, *The Uruguay Round and Dispute Resolution*, *supra* note 21, at 123 (contending that rule-based GATT decisions produce and refine fixed reference points, "making private ordering more effective and less costly . . . [whereas] compromise settlements . . . produce no new reference points and muddy the existing ones").

334. See M.C.E.J. BRONCKERS, *SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS* 240 (1985) (advocating private-party access for preliminary, nonbinding interpretations of the GATT).

335. See Transcript of Discussion Following Presentation by Kenneth W. Abbott, *supra* note 73, at 161 (remarks of Professor Lowenfeld) (noting that "there usually is some kind of a private dispute behind these [GATT] cases" and that panelists on a GATT case he was hearing had received a telegram while they were deliberating indicating that the private parties had settled).

gain access to WTO-sponsored mediation or conciliation processes operating parallel to the state-controlled adjudication track. Again, there is precedent for such activities from the GATT experience.³³⁶ Third, business parties may seek standing as full participants with the power to bring claims under GATT rules.³³⁷ Finally and most radically, private interests may persuade WTO states to permit certain world trade rules to be directly enforced as rules of law in domestic courts.³³⁸ This could happen either by making certain international trade norms the rule of law in a defendant's domestic courts³³⁹ or by making particular judgments of the Appellate Body specifically enforceable by private parties in a defendant's judicial system. Such systems of direct enforcement now exist by treaty in a number of commercial areas.³⁴⁰

Advocates for a Regime Management Model may meet these suggestions with their own proposals to permit the WTO to participate in and ultimately bring cases that, for one reason or another, states are reluctant to file.³⁴¹ This development could be seen as a natural extension of the already extensive participation of the Secretariat in advising and drafting opinions for dispute resolution panels. Moreover, because the WTO can be characterized as an agent of the states that make up the WTO, such a reform might be presented as less threatening to states than opening the WTO legal system to direct participation by private parties.³⁴² Howev-

336. *Id.* at 162-63 (remarks of Professor Patterson) (discussing how European and Japanese copper smelters, who were the private interests behind a GATT case between Europe and Japan, participated in a GATT-sponsored mediation of the dispute together with representatives of the two governments involved).

337. Brand, *supra* note 271, at 12-21. Curiously, John H. Jackson, whom I would characterize as a Regime Management Model scholar, *see supra* note 162 and accompanying text, is also on record as favoring private-party participation in GATT proceedings. *See* JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* 207-09 (1984). This surprising position perhaps reflects Jackson's high degree of confidence in the ultimate power of states to control the GATT machinery.

338. *See* PETERSMANN, *supra* note 19, at 421-27.

339. *See* Roessler, *supra* note 269, at 311. *See generally* Note, *supra* note 173, at 1287 (arguing that "judges should be as willing to apply internationally created law as they are domestic law").

340. *See supra* notes 272-89 and accompanying text.

341. *See, e.g.,* Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 *BROOK. J. INT'L L.* 31, 75-78 (1992).

342. Indeed, within the European Union the Commission has the power to bring an enforcement action before the European Court of Justice against a member state that has failed to fulfill an obligation under the Treaty of Rome. *GEORGE A. BERMAN ET AL.,*

er, such a reform would break the monopoly of states on the WTO dispute resolution system and would therefore advance the Efficient Market Model as well as the Regime Management Model. In addition, in some cases the WTO might be even less inclined than private parties to settle cases short of a definitive ruling, a factor that would serve both global traders' collective interests and the goals of the Efficient Market Model.³⁴³

There is of course no way to predict the actual future direction of WTO reform. The normative models presented in Part II, however, help anticipate the structural changes that different groups may propose. It also seems likely that, over time, at least some of these proposals will find acceptance as participants seek to address the system's shortcomings.

C. *International Relations Theory and WTO Jurisprudence*

The third subject area that the analysis in Part II illuminates is the type of jurisprudence one can expect from the WTO dispute resolution system. Part II demonstrated that models of trade legalism derived from international relations theory have surprising relevance to this inquiry. The vague provisions of the WTO trade agreements leave enormous room for interpretation of such terms as "equitable share of the market," "like products," and "subsidy." Moreover, the customary theories of interpretation governing international treaties, while regime-oriented, are indeterminate at best. Without an objective, strictly neutral method of interpreting international trade texts,³⁴⁴ WTO adjudicators will enjoy a significant zone of interpretive discretion within which to legitimately implement their preferred model of legalism.

Although the Regime Management and Efficient Market models do not exhaust the possible theories of trade adjudication rea-

CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 292 (1993).

343. Private parties with concrete economic stakes in a trade dispute might be amenable to a settlement if their economic losses were compensated with side payments. The WTO would not have concrete economic stakes in disputes and would therefore be more likely to litigate cases solely to establish a precedent.

344. Many legal scholars believe that an "objective" rule of law is impossible even within a single society because of the long-run indeterminacy of language and social practices. See Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 251 (1993) ("A striking feature of much postmodern legal thought, particularly its post-structuralist variant, is its flat rejection of the possibility of the Rule of Law."). These difficulties are exacerbated in the international setting, where there is no agreement on a common language.

soning, they are useful guides to some important classes of cases.³⁴⁵ States and other parties concerned with the crucial task of nominating potential judges to the WTO Appellate Body would therefore do well to consider whether candidates for this new court have strong inclinations toward either of these normative frameworks.

Overall, there is reason to believe that Appellate Body decisions will tend to drift toward reliance on economic free trade theory and the doctrine of comparative advantage to ground their legal analysis. Adjudicators sympathetic to the Efficient Market Model will of course advocate the use of economic theory as a jurisprudential device. Indeed, Efficient Market Model advocate Ernst-Ulrich Petersmann, the former head of GATT's Office of Legal Affairs and Secretary to the Uruguay Round Negotiating Group on Dispute Resolution,³⁴⁶ has advocated that the legal regime for international trade style itself on the famous *Lochner* period of U.S. legal history, when laissez-faire "freedom of contract" was viewed as a constitutional norm superior to all federal and state law in the United States.³⁴⁷ Even regime-oriented adju-

345. As demonstrated in Section II(B), *supra* notes 185-236, 290-316 and accompanying text, particular adjudicators held beliefs about the GATT dispute resolution system that corresponded with the political and economic assumptions underlying both the Regime Management and Efficient Market models.

346. See *supra* note 82 and accompanying text.

347. Petersmann advocates that the world's constitutional democracies add a "freedom to trade" to their list of constitutionally protected individual rights as a way of defeating protectionism. See PETERSMANN, *supra* note 19, at 311-13. Petersmann's proposal would require judges to overturn protectionist legislation at the request of commercial plaintiffs. In U.S. legal history, "[s]cholars generally consider the *Lochner* era to be the high water mark" for judicially imposed, libertarian notions of "freedom of contract" under the U.S. Constitution. Shell, *supra* note 286, at 447-62. During the late 19th and early 20th centuries, both state courts and ultimately the U.S. Supreme Court actively overturned legislation limiting employment relations and other commercial arrangements on the grounds that such laws interfered with freedom of contract, an "essential component of individual liberty protected by the Fifth and Fourteenth Amendments" of the U.S. Constitution. *Id.* at 447; see *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court's "freedom of contract" decisions became increasingly unpopular as they collided with pressing social needs that accompanied the Great Depression in the 1930s and the New Deal legislation that President Roosevelt proposed to bring the United States out of this domestic economic crisis. When "Roosevelt threatened to 'pack' the [Supreme] Court if it did not alter its [economic] substantive due process views," the Court reversed course and overruled the *Lochner* line of cases. Shell, *supra* note 286, at 450 n.89; see *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); see also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 808 n.1 (1988) (stating that *West Coast Hotel* "finally overruled" *Lochner*) (Rehnquist, C.J., dissenting).

dicators will likely view the doctrines of comparative advantage and free trade as a "basic policy" of world trade agreements³⁴⁸ and will seek to implement these doctrines as long as concerns for state autonomy are satisfied.

It therefore seems likely that when domestic political realities make it difficult or impossible for the leading states in the world trade system to take the risk of championing a particular free trade reform, the WTO Appellate Body may step into the role of an advocate for the free trade agenda. At the extreme, as in the *DISC* case, adjudicators may turn to economic theory to create evidentiary presumptions that favor free trade, use economic assumptions about likely market behavior, and impose obligations on states to adopt "least trade restrictive" means to accomplish non-trade policy goals, thereby invalidating socially useful laws that pose a threat to trade.³⁴⁹

If Appellate Body adjudicators assume this role armed with economic free trade logic as a jurisprudential guide, Petersmann's *Lochner* scenario may not be so farfetched. The United States and other nations would then face governance by a group of unelected, multinational judges striking down domestic laws on the basis of economic theory. Petersmann's *Lochner* suggestion serves at the very least to emphasize the direction in which WTO jurisprudence is set to move without substantial diversification of the parties with standing to participate in the WTO system and of the norms on which the WTO legal system will draw for decisions.

348. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1231 (1992).

349. For example, in the old GATT system a doctrine evolved that the exceptions to free trade responsibilities in article 20 were to be interpreted "narrowly" so as to preserve free trade values to the greatest extent possible. See *Canada—Import Restrictions on Ice Cream and Yoghurt*, Panel Report adopted Dec. 5, 1989, GATT BISD, 36th Supp. 68, 84-85 (1990). GATT panels also held that a member state "is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions." *United States—Section 337 of the Tariff Act of 1930*, Panel Report adopted Nov. 7, 1989, GATT BISD, 36th Supp. 345, 393 (1990).

IV. TOWARD A TRADE STAKEHOLDERS MODEL: CIVIC REPUBLICANISM AND THE WORLD TRADE GOVERNANCE SYSTEM

The advent of the World Trade Organization dispute resolution system marks a sea change in trade governance from realism to legalism. However, the analyses presented in Parts II and III demonstrate that the models of legalism currently dominating the intellectual landscape suffer from being exceedingly narrow in scope. Both the Regime Management Model and, to an even greater extent, the Efficient Market Model rely heavily on normative commitments to economic theory as a foundation for legal interpretation. The two dominant models also seek, in different ways, to limit participation in trade dispute resolution so that their respective legalist visions can be implemented without having to take account of potentially controversial social and environmental issues inevitably surrounding trade.

The closed character of the two dominant models of trade legalism poses problems for the WTO of long-range stability, distributive fairness, and procedural justice. First, a trade governance system concerned substantially, if not primarily, with the value of maximizing economic wealth underemphasizes explosive wealth distribution issues that can lead to domestic or even regional political instability. Research has shown that people care passionately about *relative*, not just absolute, gains.³⁵⁰ Any governance structure for global trade that focuses too narrowly on maximizing wealth without taking into account distributional consequences is likely to encounter strong, perhaps even violent, resistance from the losers in the distributional tug-of-war.³⁵¹ With improvements in mass communications, problems of social comparisons among citizens both within and across societies will become an increasingly contentious

350. DEAN G. PRUITT & JEFFREY Z. RUBIN, *SOCIAL CONFLICT* 15–16, 19–20 (1986) (discussing how invidious social comparisons between groups can be the source of social conflict and even “political violence” when “people whose outcomes are better than our own seem similar to us in basic merit . . . or when people whose outcomes are equal to our own appear to have lower merit than we do”).

351. The eruption of civil strife in the poor, rural state of Chiapas, in Mexico, in reaction to the NAFTA may be an example of such a phenomenon. *The Other Mexico*, N.Y. TIMES, Jan. 4, 1994, at A14.

issue in trade policy in the years ahead. Such domestic instability can threaten the viability of the WTO.

Second, a global trade jurisprudence developed under limited standing rules raises issues of procedural justice. Both the Regime Management Model and, to a somewhat lesser extent, the Efficient Market Model exclude from participation in WTO dispute resolution processes many parties affected by trade, potentially alienating them from trade adjudication outcomes and silencing them insofar as they might contribute to wiser, more contextual decision-making.³⁵²

The Regime Management Model limits standing in trade disputes to states, leaving a host of interests clamoring for "places at the table" in international public policy debates. These interests include private commercial parties,³⁵³ indigent citizens in developing countries with weak governments,³⁵⁴ environmentalists,³⁵⁵ la-

352. See Lawrence Susskind & Connie Ozawa, *Negotiating More Effective International Environmental Agreements*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 142, 158-59 (Andrew Hurrell & Benedict Kingsbury eds., 1992) (noting that a lack of democratic process in rule formation at the global level may harm support for compliance at the domestic level).

353. See *supra* notes 252-64 and accompanying text.

354. See Riding, *supra* note 3, at 48 (noting that some development experts believe many African and Caribbean nations that are the "poorest of the poor" may suffer as a result of the Uruguay Round agreements because of increases in the price of cereals on world markets); see also SEIDL-HOHENVELDERN, *supra* note 258, at 3-9 (commenting that Third World states' demand for a "New International Economic Order" is not given proper priority, despite their majority position in world trade organizations, due to the greater economic power of industrialized market economy countries); Roshani M. Gunewardene, *GATT and the Developing World: Is a New Principle of Trade Liberalization Needed?*, 15 MD. J. INT'L L. & TRADE 45, 68 (1991) (contending that the GATT is a "pawn in the hands of developed countries"); Sean Flynn, *Sutherland Speaks of a Defining Moment in World History of Trade*, IRISH TIMES, Dec. 16, 1993, at 12, available in LEXIS, World Library, Itimes File (reporting on the Coalition for Development Action's statement issued in Geneva that opposed the Uruguay Round because "the world's poorest people would lose through higher food prices, less support for breadline farmers, and higher costs for seeds and medicines"); Lawrence Ingrassia, *Developing Nations Feel Shortchanged by GATT*, WALL ST. J., Dec. 15, 1993, at A6 (arguing that developing countries got "crumbs" from new GATT deal).

355. See Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407 (1992) (describing the growing conflicts between free trade and environmental protection interests and proposing a framework for the limited use of trade barriers to protect global environmental resources); Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185 (1994) (describing increased use of unilateral trade measures to promote environmental protection and proposing a multilateral approach under the auspices of the GATT to the pursuit of environmental goals).

bor interests,³⁵⁶ and consumer groups.³⁵⁷ Such groups are relegated to the domestic political arena, where governments can exercise substantial agenda control. The Efficient Market Model advocates that private commercial parties share access with states to trade dispute resolution machinery. But one of the notable characteristics of this model is that only members of the "global business civilization" gain the privilege of litigating trade cases. The Efficient Market Model thus assures that there is discussion at the global level of the needs of the business community and the economic burdens of domestic legal regulation, but noncommercial interests such as the poor, environmentalists, consumers, and labor are shut out except insofar as the laws of comparative advantage promise to "lift all boats" on a rising tide of global economic growth.³⁵⁸

The exclusion of so many interests with a stake in international trade policy from the WTO process by which disputes are resolved and treaties interpreted points up the need for new thinking about how trade and non-trade values are to be integrated at the global dispute resolution and policy formation level. One possible solution might be to abolish the WTO as a centralized trade forum and transfer its responsibilities to some other global institution, such as the United Nations, with a mandate to handle trade disputes within representative forums that address social and environmental issues. Another answer might involve the creation of separate but coequal dispute resolution and governance mechanisms for trade, social, and environmental issues.³⁵⁹ Conflicts among these various global institutions would then be placed on the agenda of some sort of "megacourt" or governing council.

356. See RICHARD J. BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* 289-309 (1994); Richard J. Barnet & John Cavanagh, *Just Undo It: Nike's Exploited Workers*, N.Y. TIMES, Feb. 13, 1994, at C11 (calling for new global rules "grounded in international trade agreements" to protect workers' health and safety).

357. Robert E. Hudec, "Circumventing" *Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311, 321-22 (1993) (noting that ways need to be found to include environmental and consumer groups in trade negotiations).

358. Bhagwati, *supra* note 137, at 233.

359. Daniel C. Esty has suggested that the Bretton Woods international economic institutions be augmented with a "Global Environmental Organization" to promote "optimal national environmental policies." Daniel C. Esty, *The Case for a Global Environmental Organization*, in *MANAGING THE WORLD ECONOMY*, *supra* note 10, at 287.

My own preference for a new model of global trade governance is to use the existing structure of the WTO as a base on which to build a new, more inclusive institution. This preference is essentially driven by pragmatic concerns. The Uruguay Round took nearly a decade to negotiate and has achieved domestic political approval at significant political cost. My sense is that the complex web of global and domestic institutions that need to be engaged for social progress to occur will be better able to focus on social and environmental concerns using a trade baseline than any other single perspective. By leveraging off the widely shared consensus that some sort of economic development through trade is a social "good," those seeking progress on social and environmental values may seek incremental changes within the WTO structure to broaden the base of participation and enrich the set of free trade and political norms now in ascendance. To help conceptualize such a reform program, I offer what I call the "Trade Stakeholders Model" for global trade governance through the WTO as an alternative to the approaches discussed in Part II.³⁶⁰

The Trade Stakeholders Model emphasizes direct participation in trade disputes not only by states and businesses, but also by groups that are broadly representative of diverse citizen interests.³⁶¹ It also eschews reliance on any ideology such as free

360. The concept of "stakeholders" has a broad literature in the field of corporate governance and business ethics. See, e.g., R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* (1984); Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 *ACAD. MGMT. REV.* 65, 68 (1995) (describing stakeholder theory as holding "that all persons or groups with legitimate interests participating in an enterprise do so to obtain benefits and that there is no prima facie priority of one set of interests and benefits over another"); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 *GEO. WASH. L. REV.* 14 (1992). Like the use of the term in this Article, these theories advocate participation by and consideration of an array of social and community interests in decisions that have traditionally been dominated by narrowly conceived economic considerations.

361. Of course, the mere participation of NGOs in trade decisionmaking does not guarantee legitimacy, because NGOs may have agendas unrelated to the public interest or be co-opted by governments. See David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. L. REV.* 407, 494 (1994); see also FELICE MORGENSTERN, *LEGAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS* 87-89 (1986) (noting that non-governmental organizations do not always truly represent the constituencies that they purport to represent). But NGO participation is at least an improvement from Regime Management and Efficient Market systems that systematically exclude non-trade interests from entering into the trade dialogue.

trade theory to define an objective "good" for global society. Rather, the priorities for global society are open-ended and subject to deliberation by those whose lives will be affected by economic decisions.

The WTO Charter itself contains the germ of this model in its preamble, which states that the purpose of the agreement is to enhance trade and consumption while "raising standards of living, ensuring full employment and . . . allowing for the optimal use of the world's resources in accordance with the objective of sustainable development"³⁶² Reference to distributive concepts such as "full employment" and "standards of living" and the environmentally sensitive idea of "sustainable development" indicate a concern for issues that go beyond the notion of maximizing material wealth through trade.

A. Description of the Model: Liberalism with Civic Republican Values

Like the Efficient Market Model, the Trade Stakeholders Model traces its theoretical roots to the international relations theory of "liberalism."³⁶³ Under both models, international political arrangements are ultimately aimed at improving the welfare of individuals, not states as political entities, and individuals are therefore proper subjects of international law and institutions. Unlike the Efficient Market Model, however, the Trade Stakeholders Model seeks broad participation in trade dispute resolution for all parties with a stake in trade policy, not just commercial parties.

In addition, the Trade Stakeholders Model seeks broad participation as an end in itself, not as a means to another goal, such as economic efficiency for global markets. The Trade Stakeholders Model thus views trade dispute resolution as part of a wide-ranging deliberative process by which an emerging global social system can set its priorities.

In recent years, a number of international law scholars working primarily in the areas of human rights and the environment have begun to elaborate a "liberal" view of international relations under which citizen-sponsored, nongovernmental organizations

362. Final Act, *supra* note 1, preamble, reprinted in 33 I.L.M. at 1144.

363. See *supra* notes 238-39 and accompanying text.

(NGO) would assume enhanced roles in the development of international law and the resolution of global conflicts.³⁶⁴ Scrapping the idea that states are the exclusive subjects of international law,³⁶⁵ these reformers seek mechanisms under which NGOs and individuals may assert international environmental and human rights standards against states in domestic³⁶⁶ as well as international³⁶⁷ legal systems.

364. See, e.g., LAWRENCE E. SUSSKIND, *ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS* 43-61 (1994) (advocating greater cooperation between governments and NGOs in the formulation and execution of international environmental policy); Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519, 548-65 (1991) (describing extensive scope of participation by NGOs in human rights and labor regimes and arguing that NGOs "should be empowered to bring complaints against states failing to live up to their obligations"); Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377, 380 (1989) (discussing how experts working through international and nongovernmental organizations were able to alter the balance of power within individual governments, thereby setting in motion a process of convergence toward compliance with an environmental regime's norms); Peter M. Haas et al., *The Effectiveness of International Environmental Institutions*, in INSTITUTIONS FOR THE EARTH 24 (Peter M. Haas et al. eds., 1993) (noting that international institutions like NGOs do not "supersede" states but rather "create networks over, around, and within states that generate the means and the incentives for effective cooperation among those states"); Philippe J. Sands, *The Environment, Community, and International Law*, 30 HARV. INT'L L.J. 393, 396-401, 412-17 (1989); Paul C. Szasz, *International Norm-Making*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 41, 51 (Edith B. Weiss ed., 1992) (describing role of NGOs in environmental policymaking); David A. Wirth, *Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues*, 100 YALE L.J. 2645, 2655-57 (1991) (same); Tim Carrington, *In the Third World, Self-Help Groups Pop Up to Fill Gaps Left by Governments*, WALL ST. J., July 11, 1994, at A8 (detailing role of NGOs in developing countries).

365. Haas et al., *supra* note 364, at 3 (summarizing the "profound skepticism regarding the ability of the nation-state system to solve" environmental problems).

366. See Gregory W. MacKenzie, Note, *ICSID Arbitration as a Strategy for Levelling the Playing Field Between International Non-Governmental Organizations and Host States*, 19 SYRACUSE J. INT'L L. & COM. 197 (1993). MacKenzie argues for a system that would permit NGOs to bring international arbitral complaints against host states to facilitate food distribution. These judgments would, as under the ICSID system, be fully binding under domestic law. Domestic regulatory bodies already enforce some international standards, including environmental ones. See also David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 401 (1992) (describing implementation of an air pollution treaty by the EPA under pre-existing statutory authority under the Clean Air Act); Note, *supra* note 251, at 1103-04 (describing several methods by which Congress would assign responsibility for implementation of international obligations to administrative agencies and arguing that such assignment would substantially increase compliance with international law).

367. See Sands, *supra* note 364, at 394 ("NGOs should be granted standing to enforce these [environmental] rights in the international arena by negotiating with states and appearing before international institutions and tribunals.").

The Trade Stakeholders Model for WTO dispute resolution builds on the work of these scholars. It would operate within the context of world trade governance by requiring the WTO to open its dispute resolution system to all groups with a stake in the outcomes of trade decisions.³⁶⁸ In theory the model would also favor enforcing a limited set of globally defined, international trade-related labor, environmental, safety, and consumer norms within domestic, not just international, legal systems. While this legal program potentially has a broad sweep, it is important to emphasize that the type of social and environmental norms the Trade Stakeholders Model is concerned with is limited to those with a strong nexus to the activities of international trade, not to any and all economic activity. The social and environmental mandate of the WTO under the model would therefore have built-in limits that would leave much to domestic political processes or regulation by other international bodies.

One approach to understanding the Trade Stakeholders Model is U.S. legal scholarship advocating a "civic republican" approach to constitutional democracy.³⁶⁹ As summarized by Mark Seidenfeld,³⁷⁰ civic republicanism sees democratic ideals as best fulfilled in a system in which "government decisions are a product of deliberation that respects and reflects the values of all members of society."³⁷¹ Under this theory, "government's primary responsibility is to enable the citizenry to deliberate about altering preferences and to reach consensus on the common good."³⁷² An important condition making this deliberative process possible is "open access to the policymaking process" for interest groups that "consolidate

368. The United States has advocated steps that are consistent with the Trade Stakeholders Model value of openness and participation in WTO dispute resolution processes. The Statement of Administrative Action that accompanied the Uruguay Round implementing bill provided that the United States would press the WTO to open all important meetings within the WTO, including those of the Appellate Body, to the public and "permit 'interested parties' to submit amicus briefs to dispute settlement panels and the appellate body." *After Free Trade Euphoria, Now Comes the Hard Part, Special Report: Outlook 1995 International Trade*, 12 Int'l Trade Rep. (BNA) No. 3, at 129, 130 (Jan. 20, 1995) [hereinafter *After Free Trade Euphoria*].

369. See Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

370. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992).

371. *Id.* at 1514; see also Sunstein, *supra* note 33, at 45-48 (describing Madisonian Federalists' conception of a "deliberative democracy").

372. Seidenfeld, *supra* note 370, at 1514.

people with common private interests and backgrounds.”³⁷³ One of the crucial means through which domestic interest groups gain access to the policymaking apparatus is standing to litigate claims before both administrative tribunals and courts.³⁷⁴

The civic republicanism analogy is not perfect as applied to the WTO. Civic republicanism is a theory for implementing the ideals of constitutional democracy at the domestic level, and the WTO is presently an international institution made up of both democratic and nondemocratic states. Nevertheless, the ideals of constitutional democracy are certainly relevant to the normative aspirations of an organization like the WTO. Moreover, at present all of the most important states in the global trading system, such as the United States, EU member states, Canada, and Japan, are democracies. The WTO therefore serves as a kind of international regulatory agency for the formulation and adjustment of trade policy among large democratic states and regions.³⁷⁵ The question under the Trade Stakeholders Model is whether this institution can be encouraged to open its processes to nongovernmental actors so as to make more legitimate decisions regarding trade issues.

The WTO brings out the same tensions discussed in the civic republicanism literature between the traditional “representative” model of governance,³⁷⁶ which in the WTO context relies on states to represent collective interests of their citizens, and the civic republican “participatory” model, which seeks to expand deliberative processes to a broad array of parties and interest groups so that “all interests potentially affected by [an action will have] . . . meaningful opportunities to engage in discussion about the action.”³⁷⁷ At the very least, the civic republican analogy offers a conceptual framework within which to begin theorizing about an alternative model for global trade governance that embraces values such as participation, deliberation, and context-based

373. *Id.* at 1530.

374. Sunstein, *supra* note 33, at 74–75 (discussing need for broad rules of standing for public interest groups in administrative and judicial decisionmaking).

375. Many of the most important WTO members are also members of the Organization for Economic Cooperation and Development (OECD), membership in which is limited to democracies. See Ronald Rogowski, *Trade and the Variety of Democratic Institutions*, 41 INT’L ORG. 203, 212–13 (1987).

376. Seidenfeld, *supra* note 370, at 1531.

377. *Id.* at 1530.

decisionmaking—values that are largely absent in the Regime Management and Efficient Market models.

In summary, the Trade Stakeholders Model, like the Efficient Market Model, seeks to break the monopoly of states on international dispute resolution machinery and to extend the power to enforce international legal norms beyond states to individuals. As a corollary to this emphasis on the individual as the proper subject of international law, the Trade Stakeholders Model also envisions direct applicability of some international legal standards in domestic courts as well as in international tribunals.

Unlike the Efficient Market Model, however, the Trade Stakeholders Model would open the courthouse door to a broad array of trade stakeholders, not just commercial interests. In addition, the Trade Stakeholders Model differs from both the Efficient Market Model and the Regime Management Model in embracing a vision of civic republican “participatory legalism” to rival the narrowly conceived “economic legalism” of the two now-dominant models in the trade arena.³⁷⁸

Table 4 summarizes the attributes of the Trade Stakeholders Model in comparison with the Regime Management and Efficient Market models.

378. John Barton and Barry Carter have written a particularly strong, visionary statement of support for an international legal regime that would reflect the core Trade Stakeholders Model values of broad participation, liberal focus on individual rights, and enforcement of international legal norms in domestic courts. See John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535 (1993).

TABLE 4
Trade Stakeholders Model

	Types of Parties with Standing	Theories Underlying Model	Purpose of Dispute Resolution System	Source of Law for Enforcement Purposes
Trade Stakeholders Model	States and All Trade Stakeholders	Foreign Relations Liberalism and Civic Republican Theory	Maximize Participation and Consensus Among All Groups Affected by Trade	Inter-national and Municipal
Efficient Market Model	States and Commercial Entities	Foreign Relations Liberalism and Free Trade Theory	Reduce Legal Transaction Costs and Fully Integrate Global Market	Inter-national and Municipal
Regime Management Model	States	Realism and Regime Theory	Balance States' Interests in Free Trade and Autonomy	Inter-national

B. *The Model in Action*

Several existing international institutions exhibit traits consistent with a Trade Stakeholders Model.³⁷⁹ The International Labor Organization (ILO) allows workers' and employers' organizations to participate with their governments as formal members of

379. In addition to the examples given in the text, many of the established international adjudication tribunals, such as the International Court of Justice, have established procedures under which NGOs may participate in cases as *amici curiae*. See Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 611-12 (1994).

national delegations. The ILO gives these substate groups "access to a number of mechanisms to adjudicate nonobservance of binding standards established under ILO auspices."³⁸⁰ David Wirth has noted that these procedures, while far from being universally effective, "have been highly successful in encouraging ILO member states' adherence to binding treaty obligations like those in World Bank loan agreements."³⁸¹

Within the field of environmental protection, Philippe Sands has pointed out that the 1974 Nordic Convention³⁸² "grants individuals, groups, and non-governmental organizations access to a legal system under international law . . . treat[ing] such persons as members of a community [by giving] expression to their concerns, interests, and rights."³⁸³ The Nordic Convention provides that any person who is or may be affected by "environmentally harmful activities" may challenge that activity before an appropriate court or agency and seek compensation.³⁸⁴

The most comprehensive example of a Trade Stakeholders Model legal system is that of the European Union.³⁸⁵ The EU has transformed itself from a simple trade alliance exhibiting many Efficient Market Model characteristics into a socially responsive confederation of fifteen states³⁸⁶ that permits individuals as well

380. Wirth, *supra* note 364, at 2664; see PIERRE PESCATORE, *THE LAW OF INTEGRATION* 6 (Christopher Dwyer trans., 1974) (discussing the ILO as precedent for the ideas of "representativity" that underlie the European Union); NICHOLAS VALTICOS, *INTERNATIONAL LABOUR LAW* 239-55 (1979) (describing the "[g]eneral [s]upervisory [m]achinery of the ILO"); Ernest A. Landy, *The Implementation Procedures of the International Labor Organization*, 20 SANTA CLARA L. REV. 633, 640, 648-59 (1980) (discussing methods by which the ILO hears and acts on complaints).

381. Wirth, *supra* note 364, at 2664.

382. Nordic Convention on the Protection of the Environment, Feb. 19, 1974, 1092 U.N.T.S. 279, (entered into force Oct. 5, 1976) [hereinafter Nordic Convention].

383. Sands, *supra* note 364, at 414.

384. Nordic Convention, *supra* note 382, art. 3, 1092 U.N.T.S. at 296.

385. The European Union began when France, Germany, Italy, and the Benelux countries signed the Treaty of Paris in 1951, establishing the European Coal and Steel Community. Weiler, *supra* note 314, at 2405. The European Economic Community became the "European Community" in 1987 with the signing of the Single European Act and finally became the European Union in 1993 after the signing of the Treaty on Union at Maastricht. See *Europe After Maastricht: Not the Union They Meant*, ECONOMIST, Nov. 6, 1993, at 56 (noting that the name of the European Community changed to the "European Union" on November 1, 1993).

386. *Norwegians Vote Against Joining European Union*, WALL ST. J., Nov. 29, 1994, at A19 (noting that Sweden, Finland, and Austria have recently voted to join the EU while Norway voted to reject membership). These 15 states contain a population of over 350 million people and form the largest trading bloc in the world. Weiler, *supra* note 314, at

as states to assert a wide array of transnational standards in legal disputes at both the regional and the domestic level.

The EU's political institutions include the European Commission,³⁸⁷ the Council of Ministers,³⁸⁸ and the European Parliament.³⁸⁹ At the hub of this complex political arrangement is the EU's judicial arm, the European Court of Justice (ECJ), which has jurisdiction to hear claims brought by states, the Commission, and, most importantly for present purposes, individuals.³⁹⁰ As a result of a line of ECJ interpretations of the EU's basic treaties, beginning with the *Van Gend & Loos* decision discussed above in Part II,³⁹¹ private parties within the EU have the right to assert in their own domestic courts transnational legal norms developed by the various branches of the EU. Scholars have recently summarized the rights of individuals to assert EU norms as follows:

Until 1963 the enforcement of the Rome treaty, like that of any other international treaty, depended entirely on action by the national legislatures of the member states of the community. By 1965, a citizen of a community country could ask a national court to invalidate any provision of domestic law found to conflict with certain directly applicable provisions of the treaty. By 1975, a citizen of an EC country could seek the invalidation of a national law found to conflict with self-executing provisions of community secondary legislation, the "directives" to national governments passed by the EC Council of Ministers. And by 1990, community citizens could ask their national courts to interpret national legis-

2405.

387. The Commission is the EU's executive branch and has responsibility for implementing EU laws and policies. It consists of over 12,000 employees, headed by 17 commissioners appointed for four-year terms by the joint action of the member states. JACKSON, *WORLD TRADING*, *supra* note 35, at 80.

388. The Council of Ministers is the most important of two "legislative" arms of the EU and consists of one representative from each member state. Typically, the Commission proposes legislation in the form of regulations or directives, and the Council of Ministers must approve these proposals, most often by a weighted majority vote. *Id.*

389. The European Parliament consists of 567 representatives elected directly by the voters of member states. *Id.*; see Craig R. Whitney, *European Parliament Backs 4 New Members*, N.Y. TIMES, May 5, 1994, at A14 (noting that European Parliament would increase from 518 to 567 members after new elections in June 1994 and that Germany would have the largest bloc, increasing its representation to account for German unification). Under current practice, the Parliament is able to amend and in some cases reject legislation approved by the Commission and the Council. JACKSON, *WORLD TRADING*, *supra* note 35, at 79-81.

390. Burley & Mattli, *supra* note 21, at 42.

391. See *supra* notes 310-16 and accompanying text.

lation consistently with community legislation in the face of undue delay in passing directives on the part of national legislatures.³⁹²

Crucially, for purposes of the Trade Stakeholders Model, the rights enforceable under European law have expanded along with the list of parties able to assert them. EU regulations now cover labor standards, environmental concerns, human rights, and other social issues, in addition to economic rights for businesses.³⁹³ What began as an Efficient Market Model system, therefore, has evolved into a prime example of transnational participatory legalism in action.

C. *The Trade Stakeholders Model and Trade Jurisprudence*

Because the world trade governance system historically has been dominated by narrowly conceived regime and free trade models, there are no good examples from GATT trade adjudication of decisions that reflect Trade Stakeholders Model values. A number of ECJ cases may serve as models for a Trade Stakeholders Model jurisprudence, however.

Using what has come to be called "teleological jurisprudence,"³⁹⁴ the ECJ has played a central role in transforming the

392. Burley & Mattli, *supra* note 21, at 42. Citizens of European Union member states enjoy the protection of EU law in two distinct ways. First, certain EU laws are directly applicable to member states without any legislative action by the state. BERMAN ET AL., *supra* note 342, at 180-82. Second, and more importantly for purposes of the argument in the text, the ECJ has held that both regulations and directives of the EU may have "direct effect" within the legal systems of member states such that individuals can assert EU law as a source of rights in their own domestic courts against their own governments and, in some instances, in disputes with other private parties. *Id.* at 180-92.

393. This trend culminated in the Protocol on Social Policy attached to the Treaty on European Union negotiated at Maastricht, Netherlands, in December 1991 and signed by 11 of the 12 member states. Treaty on European Union and Final Act, Feb. 7, 1992, reprinted in 31 I.L.M. 247, 357-58; John T. Addison & W. Stanley Siebert, *Recent Developments in Social Policy in the New European Union*, 48 INDUS. & LAB. REL. REV. 5, 5-6 (1994).

394. Teleological jurisprudence was recently described by a former ECJ judge as using "concepts such as the customs union, equality of treatment and non-discrimination, freedom of movement, mutual assistance and solidarity" with a view to accomplishing "economic interpenetration and finally economic and legal unity as the supreme objective." PESCATORE, *supra* note 380, at 88. Teleological jurisprudence has played a major role in the development of European human rights law under the ECJ. J.H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Community*, 61 WASH. L. REV. 1103, 1108 (1986).

European Union's legal system into one that is responsive to social as well as economic concerns. Perhaps most dramatically, the ECJ has become a champion for a transnational system of human rights in Europe.³⁹⁵ Although the basic treaties of the European Union contain no specific provisions for the protection of human rights, the ECJ has found that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice"³⁹⁶ and has gone on to recognize that individuals have protected rights, *inter alia*, to property, to practice a trade or profession, to privacy, to freedom from discrimination based on sex, to practice their religion, and to engage in trade union activity.³⁹⁷

Apart from its jurisprudence of fundamental rights, the ECJ has also been an energetic interpreter of European Union directives and other legislative actions protecting individual stakeholder interests in the economic arena.³⁹⁸ For example, the ECJ recently decided a case, *Webb v. EMO Air Cargo (UK), Ltd.*,³⁹⁹ involving a woman who had been dismissed by her English employer because, being pregnant, she could not fully perform her duties. The plaintiff, Webb, was hired specifically to replace another woman who was taking maternity leave, but she was hired for an indefinite period, not just as a temporary worker who would depart when the original employee returned. Two weeks after starting work, the plaintiff discovered that she, too, was pregnant and would therefore be absent on maternity leave during a portion of the original employee's leave. She was then terminated.

In response to Webb's suit, the English Employment Appeal Tribunal and Court of Appeal upheld the dismissal because, under English antidiscrimination law, the employer would and could have

395. The protection of human rights in Europe is not limited to the ECJ; there is also a detailed human rights convention and the European Court on Human Rights. Manfred A. Dauses, *The Protection of Fundamental Rights in the Community Legal Order*, 10 EUR. L. REV. 398, 400 (1985).

396. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1134.

397. 1 A.G. TOOTH, *THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW* 286-87 (1990).

398. See, e.g., Addison & Siebert, *supra* note 400, at 8-13 (summarizing the scope of European Union labor market regulation).

399. 2 CEC (CCH) 393 (E.C.J. July 14, 1994) (declaring that European Union legal norms granted rights to women employees to forbid a British air cargo company from dismissing a pregnant clerk); *Labor Letter*, WALL ST. J., July 19, 1994, at A1 (reporting on *Webb* case).

fired a man similarly disabled from performing his duties under these circumstances.⁴⁰⁰ The ECJ overruled the English courts. It held that the EU directive underlying the English law does not permit courts to equate pregnancy with an illness or other pathological disability.⁴⁰¹ Moreover, the woman in question was hired for an indefinite period, not as a temporary replacement, and thus was entitled to the full protections of the law regardless of the short-term expectations of her employer. Termination by reason of her pregnancy was therefore barred.⁴⁰²

Decisions such as *Webb* depend on underlying social legislation that is not currently a part of the WTO treaty structure. However, the EU started life as the European Steel and Coal Community, an organization with a narrow, economic focus. The foundation for the ECJ's current progressive jurisprudence as illustrated in *Webb* lies in the overall Trade Stakeholders Model approach to interpretation and standing that over time has come to characterize the EU legal system. The WTO is capable of similar evolution as global economic integration proceeds.

Within the specific context of the WTO, Philip Nichols has recently argued that the WTO Appellate Body should interpret the WTO's basic treaties in a way that would permit non-trade values to trump free trade norms in certain cases.⁴⁰³ His interpretive rule would allow laws to survive WTO scrutiny when they are enacted "for the purpose of reflecting an underlying [non-trade] societal value" rather than for the purpose of frustrating trade and when "the impediment to trade [is] incidental."⁴⁰⁴ Nichols's proposal is broadly reflective of Trade Stakeholder Model values and would, in effect, protect trade stakeholders' voices at the domestic level by assuring that their efforts to assert legitimate, nonprotectionist interests would be respected by the WTO.

While it is perhaps risky to put too much weight on a comparison between a regional legal system among European democracies and the WTO, there is at least significant potential as the WTO matures for the WTO Appellate Body to assume a role si-

400. *Webb*, 2 CEC (CCH) at 401-02.

401. *Id.* at 403.

402. *Id.* at 403-04.

403. Philip M. Nichols, *Trade Without Values* 5 (forthcoming 90 NW. U. L. REV. (1995)).

404. *Id.*

milar to that of the ECJ. Both courts are strategically located at the legal epicenter of their respective governance systems. As scholars have noted, the ECJ has periodically stepped in to render legal rulings advancing the cause of economic and social integration when EU countries have been "unwilling to stick to their treaty obligations" and "policymaking leadership [has been needed] to prevent the rapid erosion of the community."⁴⁰⁵ The Appellate Body, like the ECJ, is positioned to be the "keeper of the norms" in the WTO's turbulent political environment and may therefore eventually be in a position to advance a Trade Stakeholders Model vision of trade governance. Such a development would hold considerably more promise than Petersmann's vision of the latter-day *Lochner* era assuming as is now the case for the ECJ, that the range of parties able to have their voices heard would extend beyond those of the "global business civilization" and the range of norms embraced by the WTO would be broader than the simple models of neoclassical economics.

D. *The Need for Direct Political Participation in the WTO*

The comparison of the EU and WTO legal systems demonstrates how far the WTO must travel to arrive at a Trade Stakeholders Model adjudication scheme. The comparison also reveals that ultimately, individuals and NGOs will need to become more deeply involved in the legislative process by which the world trade community creates rules and standards—not just the adjudicative process by which these rules are applied. The EU example underscores the importance of political institutions such as the European Commission and the European Parliament in the process of developing socially responsive rules to govern economic and trade obligations. The legislative system under which the WTO now operates is a relatively primitive, "one state, one vote" regime that sharply limits the opportunities for international political dialogue between states and individuals directly affected by trade policy decisions. If the WTO legal system is to escape the twin problems of overreliance on states to represent public interests and overcommitment to economic theory as the foundation for a jurisprudence of world trade, it must evolve new political mechanisms that will permit broader participation for those affected by trade decisions.

405. Burley & Mattli, *supra* note 21, at 46.

The civic republican theory that grounds the Trade Stakeholders Model of dispute resolution also emphasizes open, explicit legislative and regulatory bargaining as processes for resolving conflicts of interest between actors with a stake in political outcomes. A broader set of political processes within the WTO would permit more policy flexibility than the current WTO adjudication system and would encourage a set of checks and balances to emerge among the legislative, judicial, and regulatory arms of a trade system. Regulatory rulemaking systems that bring together not only states, but also private commercial parties, as well as social and environmental interest groups, might also result in the drafting of more precise rules that all parties would be willing to implement without resort to adjudication.⁴⁰⁶

Interestingly, a start has been made toward injecting stakeholder values into WTO policymaking by a group of policy innovators operating under the umbrella of a group called "The Policy Dialogue on Trade and Environment."⁴⁰⁷ The purpose of the group is to provide WTO policymakers on the WTO's new Committee on Trade and the Environment⁴⁰⁸ with "a continuing forum for discussion of major issues before the Committee and for generating consensus . . . on solutions that preserve the potential gains of a liberalized trading system while at the same time promoting the goal of sustainable development."⁴⁰⁹

The Policy Dialogue group, sponsored by several U.S. foundations and facilitated by members of the U.S.-based Consensus

406. See Note, *supra* note 251, at 1109–11. An analogy can be drawn between the proposal in the text and domestic "regulatory negotiation" rulemaking and litigation processes in U.S. administrative law. See, e.g., Philip J. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 57–60 (1986) (summarizing the regulatory negotiation process).

407. See Abram Chayes & Lawrence Susskind, *The Policy Dialogue on Trade and Environment: Report on First Meeting at Talloires, France, Sept. 29–30, 1994* (1994) (unpublished manuscript, on file with author).

408. When trade ministers met in Marrakesh in April 1994 to ratify the Uruguay Round agreements, they agreed to establish a special committee within the WTO to address environmental issues. *After Free Trade Euphoria*, *supra* note 368, at 131. The committee met informally on several occasions in 1994 and had its first official meeting on February 16, 1995. *U.S. Delegate Tells WTO Panel to Limit Environmental Policy-Making Role*, DAILY REP. EXEC., Feb. 17, 1995, available in LEXIS, News Library, Nwltex File.

409. Consensus Building Institute, Inc., *The Policy Dialogue on Trade and Environment*, Proposal Narrative 4–5 (1994) (unpublished manuscript, on file with author); Letter from Lawrence E. Susskind to G. Richard Shell (Dec. 20, 1994) (on file with author).

Building Institute, convenes on an informal basis WTO officials, national ambassadors to the WTO, representatives of environmental NGOs, members of the business community, and academic experts to "shadow" the operation of the WTO Committee on Trade and the Environment. The group schedules its meetings to precede formal sessions of the WTO committee and addresses the same items that are scheduled for discussion by the committee. The ambassador who serves as the chair of the WTO committee, WTO officials with committee responsibilities, and other government representatives serving as committee members attend both the Policy Dialogue sessions and the committee meetings that follow, assuring that the non-state members of the Policy Dialogue group have an opportunity for meaningful input even though they are barred from attending the formal committee meetings. The committee itself is not a rulemaking body, but it is empowered to set the agenda for WTO discussion in the environmental area. The Policy Dialogue group therefore serves as a nascent example of a WTO Trade Stakeholders Model deliberative forum in which all trade stakeholders have a "place at the table" when rules are formulated.

It is beyond the scope of this Article to suggest the specific forms that Trade Stakeholder Model political institutions within the WTO could or should take. It is clear, however, that stakeholders in trade decisions deserve to have and will continue to demand a direct voice in the way the WTO makes trade policy. The need for international trade institutions to acquire democratic legitimacy represents a major challenge and opportunity for legal and political science scholarship in the next decade. Although states will continue to play a central role in trade governance, states cannot retain their monopoly on dispute resolution and governing institutions and still adequately address the needs of an integrated and economically interdependent world.⁴¹⁰ Additionally, while the EU is itself far from perfect, the EU's structure and experience should be a prominent part of discussions regarding the evolution of the WTO. Finally, the experiences of countries such

410. See Steve Charnovitz, *The World Trade Organization and Social Issues*, 28 J. WORLD TRADE, Oct. 1994, at 17, 33 (arguing that "[s]ince trade is important to linking the world together, it seems appropriate for the WTO to undertake formal co-ordination with other international institutions and to establish serious work groups on the environment, labour standards, culture, community or any other issue with systemic implications"); Sands, *supra* note 364, at 396-401.

as the United States in developing broadly inclusive processes for regulatory rulemaking along the lines advocated by civic republican scholars deserve close scrutiny as points of departure for the types of interest-based bargaining and rulemaking that should attend the drafting of global trade rules. In this way, such rules will do justice not only to commercial interests and states worried about preserving their sovereignty, but also to social, consumer, environmental, and labor interests that have a stake in trade policy.

CONCLUSION

This Article has analyzed the new World Trade Organization dispute resolution system. This system dramatically alters the existing GATT scheme for resolving trade disputes by making adjudicatory decisions automatically binding among WTO member states in nearly every case, by creating a permanent trade appeals court, the WTO Appellate Body, to hear appeals from dispute resolution panel decisions, and by making it much easier for states to retaliate when defendant states fail to comply with dispute resolution rulings.

The Article has attempted to probe these developments through constructing and analyzing three theories of trade legalism. These models can be used not only to understand the history and structure of many existing international trade dispute resolution systems, but also to study certain jurisprudential techniques and choices made by trade adjudicators in actual cases.

Applying the models to the new WTO system, the Article concludes that the Regime Management Model—with its emphases on state standing, international law as a source of binding norms, and the mixed motives brought by states to trade systems—best explains the existing design of the WTO. However, the Article has argued that both the unwieldy consensus voting rule for overturning WTO dispute resolution decisionmaking and the political dynamics that led to the adoption of the WTO innovations demonstrate the importance of the Efficient Market Model.

My study of international relations theory as a key to the jurisprudence of international trade reveals that free trade theory and the doctrine of comparative advantage are likely to loom large in the future development of the WTO system. In the absence of meaningful political institutions to complement the powerful new adjudicatory system of the WTO, therefore, the new mechanism

may easily evolve into a forum that lacks democratic legitimacy and, ultimately, effectiveness.

Pointing to this and other normative weaknesses shared by both the Regime Management and the Efficient Market models, I have proposed a new model for trade governance called the Trade Stakeholders Model. This model would grant broad participatory rights to diverse constituencies affected by trade policy similar to the rights accorded individuals within the European Union and by the European Court of Justice. The Trade Stakeholders Model points not only to broader rules of judicial standing but also to the need to develop distinctive and innovative political mechanisms such as the Policy Dialogue on Trade and Environment to complement the WTO's adjudication procedures.

The debate in which this Article participates is an old one. At issue is the primacy of the nation-state as the autonomous unit of political organization in what is sometimes a dangerous world. I agree with those who see the nation-state as an increasingly ineffective agent for both the domestic and the global interests that must be brought together if economic development and prosperity are to translate into something we can collectively recognize as a "quality of life." World trade is not monopolized or even substantially controlled by political forces. Yet, as we have seen in the WTO legal system, states still seek whenever possible to monopolize the means by which disputes over economic growth and allocation are resolved.

This is not a situation that private interests having direct and sustained stakes in global trade—multinational businesses, exporters, factor importers, financial institutions, and others—will long endure. The choice will ultimately be between an Efficient Market Model system in which states interact only with private commercial interests in solving the problems of global economic integration and a system such as the Trade Stakeholders Model in which a broader array of social interests will have a voice in trade decisionmaking. My belief is that participation and the opportunity to engage in deliberation are themselves part of what it means for life to have "quality." It follows that representatives for all parties affected by trade policies should be present when important trade questions are considered. This dynamic is already playing itself out in regional trading systems such as the EU and the NAFTA, and the same voices will ultimately demand to be heard at the global level.

Global economic integration appears to generate a need for dispute resolution and governance systems. Moreover, these systems have a tendency over time to gain a kind of technical autonomy, operating more or less independently of the governments that established them. The Regime Management, Efficient Market, and Trade Stakeholders models help us to see beneath the surface of many seemingly diverse systems and identify the common threads that bind these systems into meaningful patterns. In the end, however, these models are but abstractions pointing to an even more fundamental dynamic in the world economy—the competition between national politics on the one hand and global economic forces on the other for the hearts and minds of individual citizens the world over. Ultimately, trade policy must come to reflect the trade-offs that citizens make among their needs as members of national communities and as consumers, workers, and investors participating in the emerging global business civilization. The way people strike the balance among their potentially conflicting needs, along with the success of international institutions in transforming the potential for conflict in the trade area into opportunities for social advancement and development, will shape the history of much of the next century.