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The World Trade Constitution

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COMMENTARY

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Conventional wisdom holds that the World Trade Organization (WTO) necessarily poses a threat to sovereignty and representative government within its member nations. Professors McGinnis and Movsesian refute this view. They argue that the WTO can be understood as a constitutive structure that, by reducing the power of protectionist interest groups, can simultaneously promote international trade and domestic democracy. Indeed, in promoting both free trade and accountable government, the WTO reflects many of the insights that inform our own Madisonian Constitution. Professors McGinnis and Movsesian reject recent proposals to grant the WTO regulatory authority, endorsing instead the WTO's limited adjudicative power as the better means to resolve the difficult problem of covert protectionism. They develop a series of procedure-oriented tests that would permit WTO tribunals to invalidate covert protectionism without supplanting national judgments on labor, environmental, health, and safety policies. Finally, they demonstrate that the WTO's emerging approach to the problem of covert protectionism largely comports with the democracy-reinforcing jurisprudence they recommend, and they offer some suggestions for reforms that would help prevent the organization from going astray in the future.

INTRODUCTION

Free trade policies, and the institutions that implement them, are at a turning point. Once the concern of a handful of scholars and policymakers, trade institutions now draw mass public protests, such as the ones that took place last fall in Seattle at a meeting of the World Trade Organization (WTO). While the Seattle protesters had diverse aims and sometimes radical political philosophies, most voiced a complaint that one also hears from more mainstream critics: the WTO in its current form poses a serious threat to sovereignty and representative democracy within its member nations.[1] In a blinkered pursuit of

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[1] *See Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 375 (Sean D. Murphy ed., 2000) (describing the various protests in Seattle); Mark L. Movsesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons From the History*

free trade, an unaccountable WTO will block important programs that popularly elected national governments have adopted to promote the public welfare.[2] Opponents voice particular concern about labor, environmental, health, and safety regulations.[3] By invalidating these sorts of measures, opponents contend, the WTO not only will interfere with members' ability to govern themselves as they think best, but will also place people around the world at serious risk.[4]

Quite apart from the critics, some WTO members have made statements that hint at a potentially substantial expansion of the organization's authority.[5] At present, the WTO lacks authority to formulate international regulations. It merely polices members' laws to ensure that these laws do not discriminate against foreign trade in violation of treaty obligations.[6] In Seattle, however, the United States and some European countries suggested that the WTO should begin to develop international labor and environmental standards.[7] While these members disclaimed any immediate intention of penalizing coun-

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of Supreme Court Review, 20 MICH. J. INT'L L. 775, 779 & n.19, 793–94 (1999) (discussing these critiques).

[2] *See, e.g., Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Fin.*, 103d Cong. 240 (1994) (statement of Ralph Nader) (suggesting that the world trading system after the Uruguay Round would "undermine citizen control and chill the ability of domestic democratic bodies to make decisions on a vast array of domestic policies from food safety to communications and foreign investment policies"); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L.J. 631, 634–43 (1994) (arguing that trade agreements have "significant implications for domestic policy-making" but are "neither developed nor implemented in accordance with . . . core democratic principles"); Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699, 728–42 (1994) (asserting that the failure of international trade agreements to allow for democratic participation slows the spread of democracy and hinders the functioning of democratic governments); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1944–46 (1997) (reviewing THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)) (describing a "new sense of vulnerability throughout the [United States]").

[3] Trimble, *supra* note 2, at 1945; Guy de Jonquières, *Temperatures Likely to Rise: 'Green and Blue' Issues Generate Divisive Arguments Both Inside and Outside the WTO*, FIN. TIMES, Nov. 29, 1999, at 4.

[4] *See* Michael H. Shuman, *GATTzilla v. Communities*, 27 CORNELL INT'L L.J. 527, 528 (1994); *see also* de Jonquières, *supra* note 3 ("Opponents blame free trade for causing or contributing to problems ranging from global warming, destruction of rain forests and harming endangered species, to exploitative child labour and human rights abuse.").

[5] *See infra* pp. 551–52.

[6] *See, e.g.*, Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 FOOD & DRUG L.J. 81, 82 (2000) (noting that the WTO allows nations to set food standards so long as these standards do not discriminate against foreign goods); Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 277–78 (2000) (noting that the WTO permits nations to set their own environmental standards, but requires that they do so in a nondiscriminatory manner).

[7] Evelyn Iritani, *WTO: What's at Issue*, L.A. TIMES, Dec. 1, 1999, at A18.

tries that did not meet these standards, President Clinton indicated that sanctions might be a long-term goal.[8]

We offer here a blueprint for the proper structure of the WTO. We refute arguments that the WTO threatens members' sovereignty, and we reject recent attempts to expand the organization's authority. In our view, the WTO will present a danger to democracy within member states only if attempts to grant it regulatory authority are successful. If its powers remain properly limited, the WTO will promote the power of national democratic majorities by constraining the influence of protectionist interest groups.[9] Indeed, by facilitating jurisdictional competition, the WTO, in conjunction with open capital markets, can help reduce the power of interest groups generally. In this way, the WTO can make national governments more responsive to their constituents' priorities, tastes, and development goals.

In promoting both free trade and accountable democratic government, the WTO reflects many of the principles that inform federalism — the keystone of our own Constitution. One effect of our original federal structure was to prevent discrimination against interstate trade and thus restrain protectionist interest groups.[10] This free trade regime, in conjunction with an open national capital market, also restrained special interests more broadly, making it more difficult for them to exact resources from state governments.[11] In this way, federalism reinforced the power of majorities within states while promoting a continental economy.[12] Our domestic trade constitution thus achieved the goals James Madison set out for constitutionalism in general: "[t]o secure the public good and private rights against the danger of . . . faction, and at the same time preserve the spirit and the form of popular government . . . ."[13]

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[8] *See* Michael Paulson, *Clinton Says He Will Support Trade Sanctions for Worker Abuse*, SEATTLE POST-INTELLIGENCER, Dec. 1, 1999, 1999 WL 6607255.

[9] Interest groups are groups of individuals, corporations, or other organizations that can acquire resources for themselves at the expense of the public through their substantial influence over the political process. Protectionist interest groups are the subset of interest groups that acquire such resources by securing tariffs or other laws that impede competition from foreign products. *See infra* pp. 523–25 (discussing protectionist groups). Our definition of interest groups does not include those groups, like environmental organizations, that do not seek resources for themselves through the political process, but instead seek to change government policy by persuading the public that their distinctive values should guide society. For discussion of this point, see below at pp. 529–30.

[10] *Cf.* Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1322–24 (1995) (describing how the Constitution established a free trade regime among the states).

[11] *See* Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 8 (1995) (discussing the manner in which federalism constrained governing coalitions in the states).

[12] For an elaboration of this point, see below at pp. 526–27.

[13] THE FEDERALIST NO. 10, at 48 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961).

The WTO can accomplish similar goals of Madisonian constitutionalism on a global scale.[14] Because of the declining costs of information and transportation, trade among nations offers unparalleled opportunities for economic growth.[15] Nonetheless, given the structure of contemporary democratic governments, protectionist interest groups within a country can often use the political process to pursue policies that profit members of the group at the expense of the nation as a whole.[16] If carefully circumscribed, the WTO can protect opportunities for private exchange while also strengthening democratic governance.[17] Conversely, if the WTO is empowered to engage in substantive regulation, it will give leverage to interest groups — this time on a global scale — and thus restrict growth and undermine democratic sovereignty.

Our argument proceeds as follows. Free trade and democratic government face a common obstacle — the influence of concentrated interest groups. Because free trade creates wealth for each nation, one would expect national majorities to favor free trade policies over policies that benefit special interests at the majority's expense. Some industries within a nation, however, suffer because of free trade, and owners and workers in those industries will agitate for protectionist measures that restrict imports. Such protectionist interest groups command disproportionate leverage in domestic politics, and their lobbies are often able to secure import restrictions, even though the overall citizenry suffers.[18]

The WTO and the trade agreements it administers act to restrain protectionist interest groups, thereby promoting both free trade and democracy.[19] Since 1947, the General Agreement on Tariffs and Trade (GATT) has served as a framework for several global negotiating "rounds" in which signatories have agreed to substantial reciprocal tariff reductions.[20] The regime of reciprocal tariff reductions has cre-

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[14] For a discussion of what Madisonian constitutionalism means in this context, see below at pp. 526–27.

[15] *See* Louis De Alessi, *Form, Substance, and Welfare Comparisons in the Analysis of Institutions*, 146 J. INSTITUTIONAL & THEORETICAL ECON. 5, 14 (1990) (observing that mutually profitable exchanges become more available as information and transportation costs fall).

[16] *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 77–79 (1982) (describing the decline of growth-inducing governmental policies in stable democracies such as Great Britain due to the increasing power of interest groups).

[17] *See infra* section II.D, pp. 544–49.

[18] *See infra* pp. 523–25.

[19] For the WTO Agreement and its attendant instruments, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

[20] GATT appears as an annex to the WTO Agreement. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization

ated incentives for exporters, who benefit from lower foreign tariffs, to lobby their governments for free trade policies.[21] This mobilization of exporter interest groups serves to counteract the efforts of protectionist groups.[22]

GATT thus represents a familiar constitutional strategy for reducing agency costs. In such a strategy, a majority commits to political institutions that make it more difficult for the majority's agents in the legislative or executive branches to reward powerful interest groups with policies that benefit the groups at the expense of society as a whole.[23] One measure of GATT's success in this regard is the decline in average world tariffs from approximately 40% when the agreement was adopted in 1947 to less than 5% at the beginning of the last decade.[24]

Reduced tariffs force protectionist interest groups to seek other import barriers. One typical approach is to lobby for measures that protect domestic industry covertly — measures that are ostensibly designed to serve labor, environmental, health, or safety goals, but that are really intended to impede competition from abroad.[25] Covert protectionism presents a difficult dilemma: while interest groups should not be permitted to impose costs on citizens by erecting protectionist barriers in the guise of legitimate legislation, bona fide labor, environmental, health, and safety regulations might be necessary to protect against dangers that the market cannot address on its own. The WTO has begun to address this dilemma through its new adjudicative dis-

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[hereinafter WTO Agreement], Annex 1A, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994]. For a discussion on negotiating rounds, see below at pp. 544–45.

21 *See infra* pp. 545–46.

22 *See infra* p. 546.

23 *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 245 (1986) (discussing constitutional mechanisms as a response to the high agency costs that citizens face in monitoring legislators). We address strategies for reducing agency costs in both the domestic and world trade constitutions. *See infra* p. 542.

24 Michael J. Trebilcock, *On the Virtues of Dreaming Big but Thinking Small: Comments on the World Trading System After the Uruguay Round*, 8 B.U. INT'L L.J. 291, 292 (1990).

25 *See* DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 45 (1994) (noting that there is a "danger that environmental regulatory processes will be 'captured' by protectionist interests, who will use environmental standards as a guise for erecting barriers to imports"); *see also* Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131, 2164–65 (1995) (discussing ways in which countries "may abuse environmental trade measures for protectionist reasons"); Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 3–4 (1999) (discussing the distinction between legitimate regulatory measures and those that are designed to serve protectionist objectives).

pute settlement system,[26] one of the organization's most important and controversial features.

We demonstrate how the WTO's approach to the problem of covert protectionism — what we call the "antidiscrimination model" — can reinforce democracy while advancing free trade. We endorse the WTO's employment of an adjudicative system with limited authority to resolve claims concerning discriminatory trade measures.[27] This system has been questioned recently by politicians and academics who would prefer that the WTO adopt what we call the "regulatory model," which would authorize the formulation of global labor, environmental, health, and safety standards.[28]

Advocates have advanced various arguments in favor of the regulatory model. Some commentators believe the model would democratize the WTO by allowing it to balance environmental, labor, health, and safety values against free trade.[29] Others argue that international rulemaking is necessary to prevent "races to the bottom" in which countries adopt suboptimal regulatory standards in order to attract and retain business in the global economy.[30] Finally, some argue that global regulatory standards could help minimize covert protectionism by preventing nations from establishing rules solely through their own parochial processes.[31] These arguments have given rise to various

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[26] *See infra* pp. 531–32.

[27] *See infra* pp. 566–69.

[28] *See infra* section III.B, pp. 552–66 (discussing some of the dangers of the regulatory model).

[29] *See* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 911–13 (1995) (discussing a "Trade Stakeholders Model" in which nongovernmental organizations would help develop and enforce a "limited set of globally defined, international trade-related labor, environmental, safety, and consumer norms"); *cf.* Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L.J. 607, 608, 614–22 (1994) (arguing that GATT's flawed approach to environmental issues suggests the need for a new forum). For further discussion of these arguments, see below at pp. 534, 550–51.

[30] In the international context, a "race to the bottom" is a continuing reduction in regulatory standards accelerated by international competition. *See, e.g.*, Frederick M. Abbott, *International Trade and Social Welfare: The New Agenda*, 17 COMP. LAB. L.J. 338, 368 (1996) (noting race-to-the-bottom pressures that exist in developing countries); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1558–59 (1999) (discussing the need for international environmental governance structures to prevent races to the bottom); *cf.* Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 168 (1999) (describing the lower levels of consumer protection that can result from lowered regulatory standards); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1213–19 (1992) (discussing races to the bottom in the context of domestic environmental regulation). Politicians have made similar points. *See* John F. Kerry, *Trade and the Environment: Charting a New Course*, 27 CORNELL INT'L L.J. 447, 452 (1994). For further discussion, see below at pp. 551–52.

[31] *See* Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 723 (1992); *see also infra* note 227 (noting such arguments).

proposals, such as the United States's position at the Seattle conference that the WTO should become involved in setting global labor and environmental standards.[32]

Unlike the antidiscrimination model, the regulatory model would transform the WTO to the detriment of democratic sovereignty. By encouraging uniform rules that ignore the differing views and development levels of member states, centralized regulatory authority would impede, rather than facilitate, the exercise of representative government.[33] Moreover, far from preventing races to the bottom, a regulatory function within the WTO would lead to less efficient regulation because interest groups would capture the organization and skew regulation in their favor.[34] Indeed, because the WTO is even more remote from popular control than national regulatory agencies, interest groups would enjoy even more disproportionate leverage than they do in the domestic context.[35] Ironically, those politicians and commentators who believe that the way to reform the WTO is to give it a greater role in formulating labor, environmental, health, and safety standards would create the very sort of unaccountable, antidemocratic organization that they oppose.

After defending the WTO's antidiscrimination model, we develop a jurisprudence that would allow the organization to invalidate covert protectionism without supplanting national judgments about labor, environmental, health, and safety policies. We endorse a variety of procedure-oriented tests that would screen for discrimination and, in the process, reinforce domestic democracy.[36] For instance, a requirement that domestic measures be transparent would limit interest groups' ability to lobby for opaque legislation that confuses the electorate.[37] A requirement that regulations affecting imports be consistent with those affecting like domestic products would encourage domestic industries to resist protectionist legislation because the burdens imposed upon foreign producers might come back to haunt them.[38] Thus, by making legislation more accessible and by mobilizing forces to counteract protectionist interest groups, the tests we advocate would

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[32] Guy de Jonquières & Mark Suzman, *Clinton Tries to Soothe Fears over Labour Rights*, FIN. TIMES, Dec. 2, 1999, at 1. President Clinton startled delegates at the Seattle conference by expressing his support for a set of core labor and environmental standards that the WTO would eventually enforce through trade sanctions. *Id.*

[33] *See infra* section III.B.1, pp. 552–55.

[34] *See infra* section III.B.2, pp. 556–58.

[35] *See infra* pp. 557–58.

[36] *See infra* pp. 573–80.

[37] *See infra* pp. 574–75.

[38] *See infra* pp. 575–76. We also endorse a requirement that regulations be based on some modicum of objective evidence. *See infra* pp. 577–79.

actually enhance the democratic accountability of national governments.

Having described our proposed jurisprudence, we compare it to the WTO's emerging approach to the problem of covert protectionism. The WTO has been moving toward a Madisonian jurisprudence in certain key respects. Recent agreements, like those on Sanitary and Phytosanitary Measures (the SPS Agreement)[39] and on Technical Barriers to Trade (the TBT Agreement),[40] expressly provide for procedure-oriented tests, wisely cabining the authority of WTO tribunals to devise their own approaches.[41] Moreover, the WTO has interpreted GATT to apply democracy-reinforcing tests to ferret out disguised discrimination.[42] At the same time, the WTO has generally avoided making intrusive judgments about the substance of members' labor, environmental, health, and safety goals.[43]

The WTO has departed from a Madisonian approach, however, by suggesting that members have a duty to negotiate with affected countries before adopting environmental measures that restrict trade.[44] This position threatens to involve the WTO in the kind of substantive standard-setting it should avoid if it is to promote free trade while reinforcing democratic governance. Judging whether members have fulfilled their duty to negotiate over environmental regulations would require the WTO to evaluate the wisdom of various proposals, thus inexorably involving the WTO in the formulation of domestic policy.

The WTO's adoption of a least restrictive means test also raises some concern.[45] Under this test, members must employ regulations that affect trade in the "least restrictive" manner. While the organization has been relatively deferential in applying it, the least restrictive means test could ultimately inject the WTO into national debates on alternative approaches to important problems. Indeed, dicta in a recent ruling suggest the potential for such a result.[46] This development would be unfortunate: the WTO must not allow the least restrictive means test to become an excuse for second-guessing the substance of national regulatory policy.

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39 Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 27 (1994), http://www.wto.org/english/docs_e/legal_e/15-sps.pdf [hereinafter SPS Agreement].

40 Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 27 (1994), http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf [hereinafter TBT Agreement].

41 For a discussion of these agreements, see below at pp. 596–98.

42 *See infra* pp. 590–92.

43 *See infra* pp. 594, 599–600, 601–02.

44 *See infra* pp. 593–94.

45 For a discussion of the least restrictive means test, see below at pp. 589–90, 594–96, 598–99.

46 *See infra* pp. 594–95.

The emerging duty to negotiate and the potential intrusiveness of the least restrictive means test underscore the enduring threats to a Madisonian world trade regime. Even if properly circumscribed by optimal rules, institutions may not in the long term exercise the self-restraint necessary to advance the goals of both democratic governance and free trade. Bureaucratic agencies, and even courts, have a tendency to overstep their proper bounds. We therefore close by offering some thoughts on additional mechanisms that can prevent the WTO's adjudicative system from going astray.

By clarifying its democratic potential, we hope to blunt pressures for an imprudent expansion of the WTO's jurisdiction. The WTO's agenda includes both complex and novel issues. The key to their successful resolution lies in confining the organization's structure and jurisprudence to the important task at hand — keeping the avenues of trade open by restraining the protectionist groups that obstruct both economic growth and democracy.

Part I shows how protectionist interest groups pose common problems for free trade and domestic democracy. Part II describes the basic mechanisms that the WTO employs to blunt the influence of interest groups. By way of example, it explores the ways in which American political institutions — what we call the "domestic trade constitution" — work to reduce those problems. Part II also begins to address concerns that the WTO will compromise sovereignty and representative government.

Part III considers in depth an essential component of the world trade constitution — its mechanism for policing covert protectionism. We defend the WTO's adoption of the antidiscrimination model as the best way to address the problem in the context of the world trading system. In doing so, we reject the regulatory model, demonstrating that granting the WTO the power to establish global rules on labor, the environment, health, and safety would detract from sovereignty and lead to inefficient regulation. We further show why such a power would not even be the optimal way to solve "spillover" problems — externalities caused by activities in one country that have adverse effects in another.

Part IV describes a jurisprudence of procedure-oriented tests that the WTO should use to root out covert protectionism. It also shows why members should not have general authority to regulate on behalf of the public welfare outside their jurisdictions. Finally, Part V evaluates the WTO's emerging approach to the problem of covert protectionism and assesses the consistency of that approach with our proposed jurisprudence. Part V also offers some suggestions for reforms that will allow the WTO better to fulfill its potential for advancing free trade and reinforcing domestic democracy.

I. FREE TRADE, DEMOCRACY, AND THEIR COMMON DISCONTENTS

A. Free Trade and Protectionist Interest Groups

Free trade creates wealth among nations. This proposition has been well established since at least the beginning of the nineteenth century, when David Ricardo first articulated the theory of comparative advantage.[47] According to that theory — perhaps the most widely accepted in contemporary economics — nations should specialize in the goods and services they can produce most efficiently.[48] By producing those goods and services and trading for others, nations optimally deploy the various factors of production available to them.[49] Trade also facilitates growth by permitting the introduction of new goods, which themselves encourage innovation and increase productivity. Experience as well as theory demonstrate the power of comparative advantage: the increase in international trade has been a key factor in stimulating robust world economic growth since World War II.[50]

A recent study confirms that the benefits of trade are not limited to the developed world.[51] While living standards in developing countries generally lag behind those of the developed world, some developing countries are catching up — namely, those that are open to trade. Indeed, the more open developing countries are to trade, the faster their standards of living converge with those of the developed world. For

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[47] *See* DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 91–93 (1996) (discussing the contributions of Ricardo and his contemporaries to the theory of comparative advantage).

[48] Nations need only have a comparative advantage for specialization to confer benefits. Thus, even if a nation is the best in the world at producing all goods and services, it still could profit by specializing in those that it produces most efficiently by the greatest degree. *See* EDWIN MANSFIELD, ECONOMICS 357–58 (7th ed. 1992) (providing examples to differentiate comparative advantage from absolute advantage).

[49] *See generally* PETER H. LINDERT, INTERNATIONAL ECONOMICS 15–39 (9th ed. 1991) (explaining Ricardo's original theory of comparative advantage and its subsequent modification using increasing marginal costs and the Heckscher-Ohlin model to predict trade patterns based on specialization).

[50] *See* JAGDISH BHAGWATI, PROTECTIONISM 5–9 (1988) (arguing that much global prosperity is attributable to decreases in trade restrictions occasioned by GATT); ANNE O. KRUEGER, PERSPECTIVES ON TRADE AND DEVELOPMENT 206–12 (1990) (using Turkey as an example to demonstrate how world trade has created economic growth).

[51] L. Alan Winters, *Trade and Poverty: Is There a Connection?*, *in* SPECIAL STUDIES 5: TRADE, INCOME DISPARITY AND POVERTY 43, 43 (World Trade Org. ed., 1999), http://www.wto.org/english/news_e/presoo_e/pov3_e.pdf; *see also* David Dollar & Aart Kraay, Growth *Is* Good for the Poor (Mar. 2000) (unpublished manuscript), http://www.worldbank.org/research/growth/pdfiles/growthgoodforpoor.pdf (citing a World Bank study that, using data from 80 countries over four decades, confirms that openness to trade boosts economic growth and that the incomes of the poor rise proportionately with overall growth).

instance, thirty years ago, South Korea was as poor as Ghana. Today, in large part because of trade liberalization, South Korea is as wealthy as Portugal, with a per capita gross domestic product (GDP) exceeding $12,000.[52] Countries as diverse as Nicaragua, Poland, and New Zealand have also benefited enormously from trade liberalization.[53]

It is true that free trade does not make everyone within a nation better off, at least in the short term. Free trade displaces workers and owners in industries where the comparative advantage lies abroad, because it becomes cheaper for the nation to import the goods than to produce them domestically.[54] Workers often cannot change industries easily because they have nontransferable skills. Owners' capital, moreover, may not be mobile because the owners have invested it in industry-specific assets. As a result, workers and owners in industries that lack a comparative advantage stand to lose a significant portion of their income.[55]

In the long run, free trade may make many of these workers and owners better off, as open borders create higher-paying jobs and higher returns to capital.[56] But the workers and owners may discount

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[52] Dollar & Kraay, *supra* note 51; *see also* Press Release, World Trade Org., Free Trade Helps Reduce Poverty, Says New WTO Secretariat Study (June 13, 2000), http://www.wto.org/english/news_e/presoo_e/pr181_e.htm (highlighting the improving condition of South Korea).

[53] In 1990, Nicaragua's average level of nominal protection in the form of tariffs was 43.2%; it fell to 6.8% by January 1, 1999. The 1999 temporary import tariff ranged between 20% and 5%, down from 30% and 5% in June of 1997. By 1999, this tariff had been abolished for 83.8% of tariff headings. In the 1990s, Nicaragua passed a prohibition of nontariff restrictions on foreign trade, abolished production and export subsidies and taxes, abolished price controls (except for fuel and medicine), and enacted a copyright law and other intellectual property rights. A 1999 report by the WTO credits such reforms — many undertaken in fulfillment of obligations under GATT and the new WTO — with the resumption of economic growth and the decline of unemployment in the country. The report forecasts 6% real GDP growth for Nicaragua in 1999, despite the hurdles associated with the nation's extreme poverty. Press Release, World Trade Org., Nicaragua: October 1999 (Oct. 18, 1999), http://www.wto.org/english/tratop_e/tpr_e/tp118_e.htm.

The Polish economy has also improved dramatically as it has opened to the world. Growth rates since the early 1990s have raised real GDP to one quarter above pretransition levels. Since 1995, growth has averaged around 5% per year. Press Release, World Trade Org., Poland: June 2000 (June 26, 2000), http://www.wto.org/english/tratop_e/tpr_e/tp136_e.htm.

A 1996 WTO Secretariat report on New Zealand showed that "[t]rade liberalization and structural reforms have helped to reduce unemployment from 11 per cent in the mid-1980s to 6 per cent in 1996, to cut inflation in the last 10 years from 15 per cent to around 2 per cent and to achieve average, annual economic growth rates of 4 per cent since 1993." Press Release, World Trade Org., New Zealand: October 1996 (Oct. 15, 1996), http://www.wto.org/english/tratop_e/tpr_e/tp43_e.htm.

[54] *See* LINDERT, *supra* note 49, at 69–73 (explaining that the Heckscher-Ohlin model predicts that a nation, in the short run, will be divided into groups of winners and losers from free trade).

[55] *See id.* at 70–71 (explaining that in the short run, production factors may be immobile, causing losses in industries without a comparative advantage).

[56] *See* Robert W. McGee, *An Economic Analysis of Protectionism in the United States with Implications for International Trade in Europe*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 550 (1993) (arguing that in the long run "[p]rotectionism raises prices, entrenches inefficiency, and de-

these hopeful prospects. A well-known feature of human psychology called the "matching principle" suggests that people have difficulty calculating the current value of future benefits.[57] As a result, many people refuse to forgo a current benefit for future gain, even when the latter will be greater on a discounted basis. Thus, workers who fear the adverse effects of free trade may give scant consideration to the possibility of better jobs in the future, and owners scant consideration to the chance that they will increase their profits in another business.

As a result of real monetary losses and the patterns of human psychology, then, workers and owners in industries adversely affected by free trade will try to persuade the government to erect protectionist barriers.[58] The realities of interest group politics suggest that they will enjoy significant success.[59] As concentrated groups, workers and owners can obtain substantial benefits from government action.[60] Consequently, these groups have strong incentives to provide campaign contributions and electoral support in return for protectionist policies.

In contrast, groups that benefit from free trade, such as consumers, are diffuse, and their gains, though large in the aggregate, tend to be

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stroys more jobs than it saves"); *see also* LINDERT, *supra* note 49, at 72–73 (explaining that in the long run, factors are mobile and move to sectors with a comparative advantage).

[57] For a description of the matching principle, see ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS 76–80 (1988). This psychological phenomenon should be distinguished from risk aversion. Most individuals are risk averse, which means that they prefer the certainty of a single outcome to the uncertainty of a range of outcomes, even if the expected value of the average of the range is as high as the single outcome. Thus, workers may well prefer a job in hand even to the strong possibility of better jobs in the offing. Risk aversion is a matter of preference, whereas the matching principle is a flaw in calculation. Public policymakers should accept risk aversion as a preference, but should be encouraged to devise mechanisms to correct systematic calculation errors that lead to wealth reductions.

[58] *See* DENNIS C. MUELLER, PUBLIC CHOICE II 238–42 (1989) (using the Stigler-Petzman theory to predict that "industries with concentrated market structures and geographically concentrated production patterns [will] be more successful at gaining protection[]" from trade than will consumers at lowering barriers to trade); *see also* ROBERT Z. LAWRENCE & ROBERT E. LITAN, SAVING FREE TRADE: A PRAGMATIC APPROACH 23–24 (1986) (arguing that in times of economic distress, interest groups pressure the legislature to pass protectionist measures).

[59] Interest groups participate in and influence the political process in a variety of ways. First, they are able to monitor what transpires in the political process; for example, what legislation is considered and how it affects their interests. *See, e.g.*, Michael A. Andrews, *Tax Simplification*, 47 SMU L. REV. 37, 42 (1993). Second, because of their greater resources, interest groups are able to conduct coordinated and coherent campaigns in the media to publicize their position. *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 623 (1982) (noting studies showing that "massive spending and sophisticated media campaigns by special interest groups have swamped referenda that were initially favored by a majority of voters"). Finally, interest groups may exercise great leverage over legislators through campaign contributions or independent political expenditures. *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826–28 (1985).

[60] *See* OLSON, *supra* note 16, at 34.

small on an individual basis.[61] These groups have comparatively few incentives to contribute time and money to lobby *for* free trade policies. Moreover, they face high agency costs in monitoring legislators to determine whether their representatives are yielding to interest groups at the expense of society as a whole.[62] For these reasons, citizens may choose to remain "rationally ignorant" of almost all trade policy issues.[63]

So far, this account is the relatively familiar story of interest group politics.[64] But protectionist groups enjoy an additional advantage: they can exploit nationalist sentiments. These sentiments, which are often deeply rooted in a country's tradition and culture, can have a positive impact on politics by encouraging the production of public goods. For example, they facilitate the common defense and aid in rallying opposition to totalitarian oppression, as in Eastern Europe at the end of the Cold War.[65] Unfortunately, these sentiments can also

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[61] *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 145 (1965) (detailing the difficulties that diffuse groups face in organizing).

[62] *See* A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 447–48 (1999); *see also* Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1178–79 (1998) (discussing how collective action problems pose difficulties for citizens' monitoring of legislative conduct).

[63] Rational ignorance describes the systematic tendency of citizens to pay little attention to political information. The phenomenon occurs because acquiring information about politics is both costly and unproductive. It is costly because, to acquire such information, individuals must invest time that they could be using in other more lucrative or pleasurable enterprises. It is unproductive because, although the principal instrumental use of such information is to guide voting, the vote of any one individual is unlikely to influence the outcome of an election. *See* Movsesian, *supra* note 62, at 1179. For further discussion of the roots of rational ignorance and its pervasive effects on informational inputs in a democracy, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 123–26 (1996). For a discussion of the expressive value of voting, see below at note 396.

[64] Of course, not all interest groups favor higher tariffs. Domestic businesses, for example, want inexpensive factors of production, whether imported or not. But the strength of special interests that favor low tariffs is not likely to be equal to that of protectionist interests. First, an inexpensive foreign input is generally not as crucial to the profits of a business as an inexpensive imported end product is dangerous to a domestic industry. Hence, protectionist interests have more at stake and therefore will spend more on lobbying. Moreover, unions are structured such that the political lobbying of workers is wholly protectionist, even if workers in particular industries would benefit from cheap inputs. *See* Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 GEO. L.J. 39, 83 & n.174 (1992) (explaining the "tendency of labor unions to back international protectionist schemes"). Finally, many products are sold to individual consumers, not to businesses, and therefore generate no concentrated, countervailing interests in favor of lowering tariffs.

[65] *See* Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1085 & n.15 (1996) (noting scholarship on nationalism); *see also* WILLIAM PFAFF, THE WRATH OF NATIONS 30 (1993) (discussing nationalism's role in the resistance to fascism and communism). In fact, many authors argue that nationalism has natural roots in our evolutionary heritage. For a discussion of the biological roots of ethnic solidarity and xenophobia, see generally PIERRE L. VAN DER BERGHE, THE ETHNIC PHENOMENON (1981).

provide cover for a variety of protectionist measures, like "Buy American" and domestic-content laws, that are designed to benefit interest groups at the expense of the public.[66]

The trade restrictions secured by protectionist interest groups are particularly deleterious to social welfare. It is well established in economic theory that the most effective way to increase the income of disadvantaged groups is through direct transfer payments. For instance, direct transfer payments are preferable to rent control as a method of improving housing for the poor because direct transfers lack the substantial deadweight loss that accompanies rent control.[67] Instead, it is better to provide the poor with housing vouchers.[68] Similarly, with the wealth generated by free trade, society can provide transfers to people with less income, including those for whom trade provides no advantage or even a net disadvantage.[69] For example, instead of pressuring the Japanese automobile industry to adopt voluntary export restraints in the 1980s, the United States could have paid cash compensation to American autoworkers. This strategy would have cost far less than the $3 billion that American consumers ultimately spent in higher car prices.[70]

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[66] For a survey of state "Buy American" legislation, see James D. Southwick, *Binding the States: A Survey of State Law Conformance with the Standards of the GATT Procurement Code*, 13 U. PA. J. INT'L BUS. L. 57, 73–76 (1992). Such legislation has generated substantial litigation. *See, e.g.*, Bethlehem Steel Corp. v. Bd. of Comm'rs of Dep't of Water and Power, 80 Cal. Rptr. 800 (Ct. App. 1969) (considering the constitutionality of California's Buy American Act).

The capacity of nationalist sentiments to serve protectionist interests also can be gauged by comparing antitrust law to antidumping law. Both antitrust and antidumping law fall under the rubric of competition law. But antitrust law, which applies equally to domestic and foreign companies under the jurisdiction of the United States, is designed to promote consumer welfare. In contrast, antidumping law, which applies only to foreign companies, protects domestic competitors at the expense of consumers. *See* Wesley A. Cann, Jr., *Internationalizing Our Views Toward Recoupment and Market Power: Attacking the Antidumping/Antitrust Dichotomy Through WTO-Consistent Global Welfare Theory*, 17 U. PA. J. INT'L ECON. L. 69, 106–10, 118–28 (1996) (explaining that antitrust laws and antidumping laws have entirely different objectives).

[67] *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 652 n.155 (1998) (defining a deadweight loss as occurring "whenever the costs of an individual's self-interested act exceed the individual's benefits from the act").

[68] *See* Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 900–13 (1990) (discussing the economic advantages and limitations of direct subsidies in place of public housing); *see also* R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019, 1048–49 (1992). In the rent control context, "deadweight loss" occurs when owners' direct costs exceed renters' direct benefits, which is invariably the case. *See* Radford, *supra*, at 1049.

[69] *See* Winters, *supra* note 51, at 43 (arguing that nations should seek to alleviate the hardships caused by trade rather than abandon all attempts at reform). Moreover, recent studies suggest that trade provides as many benefits for the poor as it does for those who are better off. *See* Dollar & Kraay, *supra* note 51.

[70] Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 212 (2000).

B. Democracy and Protectionist Interest Groups

In addition to interfering with international trade, protectionist groups pose serious obstacles for democracy at home.[71] Democracy, of course, is a much disputed concept.[72] We adopt the understanding of the classical liberal tradition, which favors democracy because it provides the best mechanism for diffusing governmental power throughout society.[73] A central concern of this tradition is to prevent special interests, whether they take the old forms of oligarchs and aristocrats or the new form of concentrated pressure groups, from turning government to their private advantage.[74]

Under this conception of democracy, institutional structures may be crucial to reinforcing the power of the diffuse citizenry and to restraining special interests. Our own Madisonian Constitution, very much a part of this liberal tradition, includes many institutional mechanisms to restrain the undue influence of what *The Federalist* called factions — groups united by common aims "adverse . . . to the permanent and aggregate interests of the community."[75] For instance,

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[71] In noting these obstacles, we do not mean to imply that interest groups have no value in the political process. They help measure the intensity of preferences. They may also bring to the public attention useful policy information. *See* Dwight R. Lee, *In Defense of Excessive Government*, 65 S. ECON. J. 674, 680–84, 688–90 (1999) (noting that interest groups have incentives to produce information relevant to the political process that individuals often lack). Nevertheless, interest groups also cause welfare losses through rent-seeking. The effects of protectionist interest groups in this regard are particularly unfortunate because they reduce the economic benefits of free trade.

As we demonstrate, the WTO's response to the welfare losses that protectionist groups impose is to mobilize countervailing groups rather than to dissolve protectionist interest groups. *See infra* pp. 545–46. Thus, protectionist groups will continue to act in the body politic, disseminating information and registering preferences. The costs they impose, however, will be reduced.

[72] *See* DAVID HELD, MODELS OF DEMOCRACY 2 (2d ed. 1996) ("The history of the idea of democracy is complex and is marked by conflicting conceptions.").

[73] The classical liberal tradition sees democracy as a structure conducive to the pursuit of individual goals. *Id.* at 40–43. Under Professor Held's typology, the classical liberal tradition is labeled "protective democracy." *Id.* at 75. For a recent gloss on this idea, see MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS (2000), showing that democracy, unlike autocracy, leads to a society governed by an "encompassing interest." *Id.* at 14–17.

[74] *See* HELD, *supra* note 72, at 89–94 (discussing concerns about factions in classical liberal or "protective" democracy). For a recent discussion of the reasons why a political system dominated by special interests is morally as well as economically undesirable, see John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999), arguing that political structures dominated by special interests create a "world of suspicion and division as citizens are pitted directly against one another." *Id.* at 445.

[75] THE FEDERALIST NO. 10, *supra* note 13, at 46. Madison focused on "majority" factions — groups that would unite around a common interest to suppress minority rights, particularly property rights. *Id.* at 46–52. In the modern era, however, partly due to the same decline in the cost of information and transportation that has made trade more profitable, interest groups have become even more effective than majorities in gaining resources from the state. *See* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1337 (1994).

the large Republic described in *The Federalist No. 10* decreased the power of local factions by pitting them against one another in a more extended polity.[76] Other mechanisms, such as bicameralism and the separation of powers, frustrated special interests by imposing stronger barriers to rent-seeking legislation than would simple majoritarian structures.[77]

Madison provided international trade as an example of the sort of issue that would incite the formation of factions, and protectionist interest groups are, in fact, a particular bane of democracy.[78] Unlike other factions, protectionist groups lack effective natural enemies in the form of countervailing interest groups.[79] Consumers cannot easily counteract protectionist groups, and foreign producers, the interest group that would naturally benefit most from reduced domestic barriers, are not represented in the polity. Without such counterbalancing, protectionist groups often achieve results that most citizens would not support.[80]

When protectionist groups *do* face strong countervailing interests, democratic processes can yield policies more favorable to free trade. This phenomenon is illustrated by so-called "drawback" rules in United States tariff law. Despite the advantages of free trade, the United States generally imposes import duties on foreign products. The law relaxes tariffs, however, when a foreign good is incorporated into a product that is subsequently exported from the United States.

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[76] THE FEDERALIST NO. 10, *supra* note 13, at 48–51.

[77] *See* McGinnis & Rappaport, *supra* note 74, at 387–89 (describing the manner in which bicameralism and the separation of powers constrain special interests).

[78] THE FEDERALIST NO. 10, *supra* note 13, at 48 ("Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufacturers? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good."). Another way to understand the depth of the problem is to analogize it to the lightly populated "pocket boroughs" (also known as "beggarly boroughs") that certain British families and other groups, like universities, controlled until the electoral reforms of the nineteenth century. Because of the pocket boroughs, these families and groups had a built-in advantage over the average subject in constructing legislative majorities. Protectionist groups enjoy similar legislative advantages in achieving their aims. For a discussion of beggarly boroughs, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 170 (1998).

[79] For discussion of the few forces opposing protectionist groups, see above at note 64. The theory of the large republic is that each faction should be counterbalanced by an opposing faction. FEDERALIST NO. 10, *supra* note 13, at 46–52.

[80] The American historical experience supports this view. Before the Reciprocal Trade Agreements Act of 1934, which mobilized exporters to favor low domestic tariffs through the prospect of lower foreign tariffs in return, Congress passed the infamous Smoot-Hawley Tariff Act. *See* Douglas A. Irwin & Randall S. Kroszner, *Interests, Institutions, and Ideology in Securing Policy Change: The Republican Conversion to Trade Liberalization After Smoot-Hawley*, 42 J.L. & ECON. 643, 644–45 (1999) (discussing the manner in which the Reciprocal Trade Agreements Act of 1934 encouraged export interests and thereby convinced Republicans to support free trade).

In these circumstances, drawback rules permit recovery of 99% of the duty.[81]

To be sure, workers and owners in the domestic industry injured by the foreign good still lose money and presumably would want to retain a tariff rate sufficient to block the imports. They are countered, however, by another interest group — the export industry — that benefits from less expensive foreign imports that provide cheaper inputs for their production. Thus, when concentrated groups appear on opposite sides of a debate over tariffs, the legislative process can result in a freer trade policy.

The fact that protectionist groups frustrate democracy as well as free trade casts doubt on the conventional wisdom that international trade regimes like the WTO pose a threat to representative government in member states.[82] Once one understands the problem of interest groups, the threat seems greatly exaggerated. An international body that acts to restrain protectionist groups can both promote free trade and help domestic majorities to achieve their goals.[83]

The WTO's potential to improve domestic democracy also belies another frequent criticism, namely that the organization inevitably will encroach on members' sovereignty. Although some scholars have questioned sovereignty's usefulness as an ordering principle in today's "new medieval" world,[84] the concept remains powerful, and for good reason: at its core, sovereignty denotes the idea that a community should be free to constitute itself as a political entity and make its own

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[81] CUSTOMS LAW & ADMINISTRATION § 17.1, at 15–16 (Lawrence J. Bogard ed., 3d ed. 1998); *see also* Nicholas & Co. v. United States, 7 Ct. Cust. 97, 110 (1916), *aff'd*, 249 U.S. 34 (1919) (defining drawback as the "repayment of moneys previously paid by the exporters upon goods previously imported"). Customs regulations define a drawback as "the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation." 19 C.F.R. § 191.2(i) (1999).

[82] *See* Movsesian, *supra* note 1, at 779 & n.19, 793–94 (describing arguments that the WTO poses a threat to sovereignty and representative democracy). For further discussion of these arguments, see below at pp. 533–34.

[83] Moreover, democratic WTO members agree to participate in the WTO by democratic means. Thus, accession to the WTO, like other elements of constitutionalism, can be reconciled with democracy by understanding accession as a strategy, designed to reduce agency costs, by which majorities reduce the leverage of interest groups in the political process. For further discussion, see below at p. 542.

[84] The "New Medievalism" refers to:

> [A]n approach to international relations that asserts "a secular reincarnation of the system of overlapping or segmented authority that characterized" pre-Reformation Europe. As the world has become increasingly integrated, it is argued, authority patterns have dispersed into a variety of overlapping layers, much like the overlapping medieval authorities of emperor, pope, prince, and feudal lord.

Developments in the Law—The Law of Cyberspace, 112 HARV. L. REV. 1680, 1688–89 (1999) (footnotes omitted).

laws.[85] Sovereignty is important intrinsically, but also instrumentally. As we discuss below, regulations are likely to be more efficient when they derive from national, as opposed to international, institutions.[86] National institutions, which are more familiar and accountable to the average citizen, are more likely to reflect the tastes, traditions, and economic realities of the people whom the regulations most affect.[87]

In recent times, democracy has come to be seen as an important element of legitimate sovereignty.[88] Increasingly, international law views governments as legitimate only to the extent that they can make some plausible claim to popular support.[89] An international trade regime focused on restraining the influence of protectionist interest groups can therefore actually reinforce, rather than weaken, an important element of sovereignty.[90] Of course, an international trade regime with a roving jurisdiction to impose its judgments on the substance of regulatory policy could make encroachments on sovereignty more likely.[91] We must not lose sight, however, of the WTO's democracy-reinforcing potential.

It is important to note that our analysis concerns only groups whose opposition to free trade is based on narrow economic interest.[92] Value-driven groups, like environmentalists, also may lobby for policies that adversely affect trading opportunities. The jurisprudence we recommend for the WTO is designed to raise hurdles only for protectionists, not for groups that attempt to persuade their governments to regulate their territories on the basis of values — whether those values reflect the importance of the environment, human health, or something

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[85] JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 2 (1998) ("Sovereignty denotes independence. A sovereign state is one that acknowledges no superior power over its own government — or, as the Declaration of Independence put it, with proper piety, no superior 'among the powers of the Earth.'" (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776))).

[86] *See infra* section III.B, pp. 552–56.

[87] *Cf.* John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 160 (1997) (explaining that most sovereignty objections derive from the belief that, "as a matter of good government policy," power should remain at the national rather than international level).

[88] Historically, sovereignty has been defined in terms of the ability of a nation's leaders formally to enact their own laws and foreign policy — sometimes called Westphalian sovereignty — as well as the ability to act independently in a de facto and a de jure sense. For a discussion of the different strands of sovereignty, see STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 10–25 (1999).

[89] *See* Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) (arguing that democracy is on its "way to becoming a global entitlement").

[90] The WTO does so without weakening other strands of Westphalian sovereignty. WTO members remain free as a matter of domestic law to accept or reject the decisions of the WTO. *See infra* p. 532. Moreover, even if an international trade regime does erode de facto economic independence, such erosion would likely occur anyway, in light of the decreased costs of transportation and information.

[91] *See infra* pp. 552–53.

[92] For a discussion of the nature of such groups, see above at p. 523.

else.[93] Indeed, one of the virtues of the model we support is that it will help to distinguish between protectionist pressures and the influence of groups pursuing policies that redound to the good of their fellow citizens in general.[94]

II. THE WORLD TRADE CONSTITUTION

A. The WTO and Its Critics — A Brief Introduction

In succeeding sections, we describe in detail how the WTO's structure and jurisprudence can help reinforce democracy and promote economic growth within its member nations.[95] We begin by introducing the WTO and discussing some of its critics' main objections.

The Final Act of the Uruguay Round of trade negotiations established the WTO in 1994.[96] The organization has 138 member states[97] and a variety of responsibilities.[98] The most important of these responsibilities is supervising the operation of several multilateral trade agreements. These agreements include the General Agreement on Tariffs and Trade (GATT) — an agreement that dates from 1947[99] — as well as two others that we discuss below, the Agreement on Sanitary and Phytosanitary Measures[100] and the Agreement on Technical

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[93] For example, an optimal international trade regime would limit tariffs by mobilizing exporter interest groups to counterbalance protectionist interest groups. For discussion, see below at section II.D, pp. 544–48.

[94] *See supra* note 9 (defining interest groups).

[95] *See infra* sections II.D.2, pp. 546–48, IV.A, pp. 573–83, V.A–B, pp. 590–602.

[96] Final Act, *supra* note 19. Although the Final Act was signed in April 1994, the WTO did not actually come into existence until the following year. David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 1, 7 (1995).

[97] For a list of the WTO's membership, see World Trade Org., The Organization: Members and Observers, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Sept. 8, 2000).

[98] A major responsibility relates to dispute settlement, a matter we discuss below. *See infra* pp. 531–32. The WTO's other responsibilities include providing a forum for multilateral trade negotiations, administering a monitoring device called the Trade Policy Review Mechanism, and cooperating with other international economic organizations. *See* WTO Agreement, *supra* note 20, art. III; *see also* RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW § 4(c), at 16, § 6, at 48–49 (1998).

[99] GATT has a complicated history. Adopted provisionally in 1947, GATT developed "by default" into an informal institution that "coordinat[ed] national policies on international trade." JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 295 (3d ed. 1995). The Uruguay Round appended GATT as an annex to the new WTO Charter. *See* GATT 1994, *supra* note 20. As a result, WTO members are automatically bound to GATT. *See* Movsesian, *supra* note 1, at 783 n.49. When we refer to "GATT" as an institution, we are referring to the informal institution that developed before the establishment of the WTO.

[100] SPS Agreement, *supra* note 39. For more on this agreement, see below at section V.B, pp. 596–602.

Barriers to Trade.[101] These agreements are designed, broadly speaking, to prevent discrimination against foreign products.[102] Other WTO agreements address intellectual property rights,[103] government procurement,[104] and trade in services.[105]

The WTO's most significant function is settling members' disputes under these agreements. Disputes are bound to arise because protectionist groups inevitably seek discriminatory legislation.[106] Before the inauguration of the WTO, the parties to GATT settled disputes informally, influenced heavily by the relative power of the countries involved.[107] Now, however, disputes are resolved in the more formal adjudicative process established by the new Dispute Settlement Understanding (DSU), an annex to the WTO charter.[108] Under the DSU, a panel of experts hears arguments when a WTO member claims that another member has enacted a measure violating a WTO agreement. The panel issues a report of its findings; if the panel believes that a member has violated an agreement, it usually recommends that the member "withdraw[] the offending measure."[109]

Parties can appeal a panel ruling to a seven-member Standing Appellate Body within the WTO.[110] Members of the Appellate Body, who are appointed by the WTO, serve four-year terms; each person may be reappointed once.[111] Appellate Body members must be unaffiliated with any government and "broadly representative" of the makeup of the WTO.[112]

A final report, either of a panel (if unappealed) or of the Appellate Body, binds the parties according to a "reverse consensus" rule: the re-

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[101] TBT Agreement, *supra* note 40. For more on this agreement, see below at section V.B, pp. 596–602.

[102] *See infra* pp. 596–98.

[103] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994).

[104] Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4(b), LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31 (1994), http://www.wto.org/english/docs_e/legal_e/gpr-94.pdf.

[105] General Agreement on Trade in Services, Apr. 15, 1994, WTO Agreement, Annex 1B, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vols. 28–30, 33 I.L.M. 1168 (1994).

[106] *See supra* p. 523.

[107] *See* Movsesian, *supra* note 1, at 777 & n.9.

[108] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU].

[109] JACKSON, DAVEY & SYKES, *supra* note 99, at 343.

[110] DSU, *supra* note 108, art. 16, § 4, art. 17, § 1. Three members serve on any one appeal, which is limited to questions of law and "legal interpretations" developed in panel reports. *Id.* art. 17, §§ 1, 6.

[111] *Id.* art. 17, § 2.

[112] *Id.* § 3.

port binds the parties unless a consensus develops *against* the report among the membership of the WTO.[113] On the assumption that a winning party will be unwilling to join any consensus against a ruling in its favor, the reverse consensus requirement assures the automatic adoption of final reports.

As a matter of domestic law, WTO rulings lack direct effect: members so far have rejected the notion that they must change their laws to comply with adverse rulings.[114] As a result, WTO rulings do not bind domestic courts in the way that United States Supreme Court rulings bind state courts in the American system. Domestic courts can continue to apply domestic law, regardless of what the WTO holds with respect to its legality.[115] If a member does not comply with a final report by changing its law, however, it must consult with the injured party and attempt to reach agreement on appropriate compensation.[116] If the parties cannot agree on compensation, the injured party may retaliate by suspending its own trade obligations to the offending party.[117]

In addition to its adjudicative function, the WTO also plays a very limited policymaking role.[118] The highest decisionmaking body in the

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[113] *Id.* art. 16, § 4, art. 17, § 14. "Consensus" is achieved if no member formally objects to the decision being taken. *Id.* art. 2, § 4 n.1.

[114] *See* Movsesian, *supra* note 1, at 787–88 & n.89. The United States's implementing legislation, for example, denies effect to WTO rulings that are inconsistent with United States law. 19 U.S.C. § 3512(a)(1) (1994). Whether members have an international legal obligation to change their laws in response to adverse WTO rulings is a controversial question. *Compare* John H. Jackson, *The WTO Dispute Settlement Understanding — Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 61, 63–64 (1997) (suggesting that WTO rulings are binding instruments inasmuch as any international law can be binding), *with* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416–17 (1996) (arguing that compliance with WTO rulings is entirely voluntary, though there are incentives for member states to comply).

[115] Movsesian, *supra* note 1, at 788–89, 815.

[116] DSU, *supra* note 108, art. 22, § 2.

[117] *Id.*

[118] *See* Jackson, *supra* note 87, at 173 (noting that "the decision-making procedures of the WTO have been significantly circumscribed by negotiated treaty text"). For an argument that the WTO's decisionmaking apparatus amounts to a "legislative assembly," see Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 692 (1996). That view, however, is exaggerated. The WTO lacks general governmental power: its authority is limited to facilitating the operation of trade agreements. *See* Movsesian, *supra* note 1, at 815–16; *cf.* Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 599 (1996) ("The WTO . . . lacks significant strength in legislative . . . functions."); Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 35 (1999) (suggesting that the WTO lacks legislative authority). Moreover, there are significant procedural limitations that cabin the organization's discretion. *See* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 850 (1995) (arguing that the WTO's "'legislative' mechanisms . . . are extremely cumbersome").

A number of commentators wish to expand the WTO to give it more of a regulatory role. We discuss their arguments extensively and reject them. *See infra* pp. 550–62.

WTO is the Ministerial Conference, composed of representatives from all WTO members.[119] The Ministerial Conference meets relatively infrequently, however, and the day-to-day work of the organization is carried out by the General Council, also composed of representatives of all WTO members.[120] A number of subsidiary councils and committees assist the General Council, including a Committee on Trade and Development and a Committee on Trade and Environment.[121]

When possible, the WTO decides policy by consensus.[122] When consensus is not possible, "ordinary" matters are decided by vote, with each WTO member having one vote.[123] Supermajority requirements and other procedural rules, however, help constrain the WTO's decisionmaking authority on important matters. For example, only the Ministerial Conference and the General Council have the authority to adopt binding interpretations of multilateral agreements.[124] Any interpretation must receive an affirmative vote of three-fourths of the entire membership of the WTO — a formidable hurdle.[125] Similarly, only the Ministerial Conference can adopt amendments to multilateral agreements, usually by a two-thirds vote.[126] Certain amendments require unanimous approval.[127]

The WTO has drawn substantial criticism from commentators who view it as a threat to democratic sovereignty and representative government.[128] Critics deplore the fact that the WTO, a remote institution with few ties to the populations of its member states, has the authority to displace the decisions of nationally elected legislatures.[129]

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119 BHALA & KENNEDY, *supra* note 98, § 4(d)(1), at 16–17; *see also* WTO Agreement, *supra* note 20, art. IV(1).

120 The Ministerial Conference must "meet at least once every two years." WTO Agreement, *supra* note 20, art. IV(1). There have been only three meetings since the founding of the organization in 1995. *See* World Trade Org., Ministerial Conferences on the WTO Website, *at* http://www.wto.org/english/thewto_e/minist_e/minist_e.htm (last visited Nov. 1, 2000) (listing three meetings). On the General Council, see WTO Agreement, *supra* note 20, art. IV(2). *See also* BHALA & KENNEDY, *supra* note 98, § 4(d)(2), at 17–18.

121 BHALA & KENNEDY, *supra* note 98, § 4(d)(2)(A), at 18, § 4(d)(2)(B), at 18–19; *see also* World Trade Org., The Organization: The Organization Chart, *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm (last visited Nov. 1, 2000).

122 *See* WTO Agreement, *supra* note 20, art. IX(1); *see also* BHALA & KENNEDY, *supra* note 98, § 4(f), at 21 & n.48.

123 JACKSON, DAVEY & SYKES, *supra* note 99, at 312.

124 BHALA & KENNEDY, *supra* note 98, § 4(f)(1), at 21–22.

125 JACKSON, DAVEY & SYKES, *supra* note 99, at 312; Jackson, *supra* note 87, at 174.

126 JACKSON, DAVEY & SYKES, *supra* note 99, at 312.

127 *Id.* at 312–13.

128 *See, e.g.*, Jackson, *supra* note 87 (discussing the role that sovereignty arguments played in debates on United States ratification of the WTO agreements).

129 *See* Sara Dillon, Fuji-Kodak, *the WTO, and the Death of Domestic Political Constituencies*, 8 MINN. J. GLOBAL TRADE 197, 201, 204–07 (1999); *see also* Jeffrey Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 236–37 (1998) (describing democratic critiques of international trade regimes); Bello, *supra*

As Phillip Trimble put it in an early essay, "the question comes down to who will be primarily in charge of trade policy — elected officials . . . who are responsive to the constituencies of their districts . . . or . . . international judges."[130]

Critics also decry what they perceive as a pro-trade bias on the part of the WTO.[131] By virtue of their training and office, critics assert, the trade bureaucrats who serve on WTO tribunals have little understanding of, or interest in, the nontrade values that inform much domestic legislation.[132] As a result, the bureaucrats tend to discount labor, environmental, health, or safety justifications that support measures restricting trade.[133] This pro-trade bias slights the deeply held convictions of national populations and may expose them to serious risks.[134] The DSU's provision for automatic adoption of WTO rulings only heightens critics' concerns.[135]

Critics also complain about the lack of transparency in WTO proceedings.[136] The deliberations of panels and the Appellate Body are confidential.[137] Members of the public cannot attend hearings or re-

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note 114, at 416 (describing nationalist arguments that the WTO threatens United States sovereignty).

130 Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016, 1029 (1985) (reviewing JOHN H. JACKSON, JEAN-VICTOR LOUIS & MITSUO MATSUSHITA, IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES (1984)).

131 *See* Dillon, *supra* note 129, at 208–09; Goldman, *supra* note 2, at 645.

132 *See* Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 352–54 (1998); *see also* Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 334 (1996) (summarizing criticisms of the WTO by environmental, labor, development, consumer, public interest, and farm groups).

133 *See* Dillon, *supra* note 129, at 208–15; Trimble, *supra* note 130, at 1028–29.

134 *See* Shuman, *supra* note 4, at 528.

135 *See, e.g.*, John A. Ragosta, *Unmasking the WTO — Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 LAW & POL'Y INT'L BUS. 739, 740–41, 743–46 (2000) (expressing concern over the lack of democratic and procedural safeguards in the WTO dispute resolution process); Lori Wallach, *Transparency in WTO Dispute Resolution*, 31 LAW & POL'Y INT'L BUS. 773, 774 (2000) (same); *cf.* Robert Howse, *Managing the Interface between International Trade Law and the Regulatory State: What Lessons Should (and Should Not) Be Drawn from the Jurisprudence of the United States Dormant Commerce Clause*, *in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 139, 144 (Thomas Cottier & Petros C. Mavroidis eds., 2000) (noting that there exists "no higher level of democratic community that is able to intervene to reinstate . . . regulatory choices" after an adverse WTO ruling).

136 *See, e.g.*, Ragosta, *supra* note 135, at 749–54 (arguing that the WTO's lack of transparency casts doubt on its legitimacy as a "court"); Wallach, *supra* note 135, at 777 (arguing that increased procedural safeguards are needed to reduce the arbitrariness of the WTO's dispute resolution system).

137 DSU, *supra* note 108, art. 14, § 1 (panels); *id.* art. 17, § 10 (Appellate Body); *see also id.* app. 3, §§ 2–3 (panels).

ceive transcripts.[138] Parties may disclose their own submissions to the public, but must treat the submissions of opposing parties as confidential;[139] although parties must supply nonconfidential summaries of their positions upon request, parties often do not meet this requirement in a timely manner.[140] The opinions of individual panelists and Appellate Body members remain anonymous.[141]

Furthermore, although WTO rules seek to ensure the neutrality of panelists and members of the Appellate Body, compliance is largely voluntary.[142] Panelists and Appellate Body members must avoid "direct or indirect conflicts of interest," and must disclose information to the WTO that "is likely to affect, or give rise to justifiable doubts as to [their] independence or impartiality."[143] But this information is not disclosed publicly. The rules provide vaguely for recusal or removal in case of "material violations,"[144] but provide no clear procedures. Critics have cited cases to show that the WTO does not take this requirement seriously. For example, some commentators point to the appointment in 1996 of Arthur Dunkel, the former head of GATT, to a WTO panel considering a European Union challenge to the Helms-Burton Act.[145] At the time, Public Citizen's Lori Wallach writes, Dunkel was chairing an "International Chamber of Commerce policy group that had launched a campaign against the U.S. Helms-Burton Act, arguing that it violated WTO rules."[146] In another dispute before a WTO panel, a member of the Appellate Body apparently served as a legal adviser to one of the parties, providing tips on litigation strategy in the case.[147] The member may well have intended to recuse himself later, but advising a litigant in a case that is likely to come before one's court is hardly "the behavior that one would expect of an objective judge."[148]

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138 Terence P. Stewart & Amy Ann Karpel, *Review of the Dispute Settlement Understanding: Operation of Panels*, 31 LAW & POL'Y INT'L BUS. 593, 604–08 (2000) (describing the secrecy of WTO panel proceedings).

139 DSU, *supra* note 108, art. 18, § 2.

140 Stewart & Karpel, *supra* note 138, at 607.

141 DSU, *supra* note 108, art. 14, § 3 (panels); *id.* art. 17, § 11 (Appellate Body).

142 *See* WORLD TRADE ORG., RULES OF CONDUCT FOR THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, WT/DSB/RC/1 (Dec. 11, 1996), http://www.wto.org/ddf/ep/A5/A5267e.wpf [hereinafter RULES OF CONDUCT]; *see also* Ragosta, *supra* note 135, at 760 (noting that the WTO rules of conduct rely on "self-disclosure requirements"). For example, ex parte contacts are forbidden. DSU, *supra* note 108, art. 18, § 1.

143 RULES OF CONDUCT, *supra* note 142, art. II, § 1, art. III, § 1.

144 *Id.* art. VIII.

145 The Helms-Burton Act is the colloquial reference to the Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996).

146 Wallach, *supra* note 135, at 774.

147 Ragosta, *supra* note 135, at 761 (citing "several reliable sources").

148 *Id.* at 761 n.89.

In answer to the WTO's critics, we argue that under the proper theoretical and institutional framework, the organization can actually reinforce democracy in member states. To the contention that the WTO displaces national legislators, we respond that the WTO embodies a strategy of reducing agency costs familiar to democratic theorists.[149] In response to the objection that the WTO is biased in favor of trade and thus undercuts national legislation based on other values, we develop a jurisprudence in which WTO panels and the Appellate Body would be constrained from substituting their substantive judgments for those of national sovereigns.[150] Finally, to address concerns about transparency and conflicts of interest, we argue that the WTO should model itself upon domestic institutions like the judiciary that enforce provisions reducing agency costs, but that place a much greater emphasis on transparency and conflict of interest rules.[151] Implementing our suggestions would require some reforms that we discuss below.

B. The Domestic Trade Constitution

The principal task of trade institutions like the WTO should be to restrain protectionist interest groups and thereby promote both free trade and representative democracy. Our own political structure furnishes an instructive example of how institutions can simultaneously promote free trade and democratic governance. The original Constitution established mechanisms that restrict protectionist interest groups, and subsequent generations have developed further structural limitations. These constraints have made representative democracy more reflective of majority will, improved regulatory efficiency, and promoted economic growth through trade.[152]

Protectionist groups have the potential to cause problems at both levels of our federal system. At the state level, such groups might try to block the entry of competing products from sister states. At the federal level, protectionist groups might lobby the government to block imports from foreign countries. We survey the structures that our constitutional system employs to prevent either scenario from occurring.

The Framers fully understood the dangers that interstate trade disputes pose for national union.[153] In the period between the end of the Revolutionary War and the adoption of the Constitution, the Framers

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149 *See infra* pp. 542–44.

150 *See infra* pp. 572–83.

151 *See infra* pp. 602–03.

152 For a brief description of Madison's constitutional objectives, see above at pp. 514, 526–27.

153 *See* THE FEDERALIST NO. 42, at 235 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) ("The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience.").

feared that many of the former colonies were engaged in protectionist tactics severe enough to threaten both the health of the economy and the stability of the United States.[154] Indeed, Hamilton argued in *The Federalist* that separate commercial policies, with their attendant "distinctions, preferences, and exclusions," could lead to outright war among the states.[155]

To prevent economic losses and forestall political dissolution, the Constitution created a free trade regime among the states. For instance, Article IV requires the states to give citizens of other states all the privileges and immunities they give their own citizens, facilitating the operation of businesses by out-of-state residents.[156] Article I grants Congress the power to regulate interstate commerce on the premise that it use this power to keep open the avenues of commerce among the states.[157] Finally, the Supreme Court's elaborate Commerce

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[154] *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1114 (1986). Some scholars have argued that although the Framers claimed to fear protectionist state legislation, there is actually little evidence that state protectionism was a serious problem during the period governed by the Articles of Confederation. *See* Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 HARV. J.L. & PUB. POL'Y 119, 121–22 (1982).

[155] THE FEDERALIST NO. 7, at 30–34 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961); *see also* THE FEDERALIST NO. 22, at 112–13 (Alexander Hamilton) (Clinton Rossiter ed., Mentor 1999) (1961) (arguing that "the interfering and unneighborly regulations" of some states threatened to become "serious sources of animosity and discord"); *cf.* THE FEDERALIST NO. 42, *supra* note 153, at 235–37 (drawing on comparisons with other nations to demonstrate the need for a central authority regulating commerce). It might be possible to read into Hamilton's words an endorsement of uniform regulations generally, on the theory that uniformity is conducive to business. But this is not the only possible Federalist vision of state regulation. *See infra* note 159 (discussing the place of state regulations in Chief Justice Marshall's construction of the Commerce Clause).

[156] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). For evidence that the Privileges and Immunities Clause provides a comprehensive antiprotectionist principle, see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–48 (1982). *But see* Regan, *supra* note 154, at 1204 (suggesting that the Privileges and Immunities Clause only prohibits protectionism caused by a regulation applying to out-of-state residents doing business in the state). This constitutional clause has a rough equivalent in the requirement of national treatment for imports under article III of GATT. *See infra* p. 547.

[157] U.S. CONST. art. I, § 8, cl. 3; *see* THE FEDERALIST NO. 22, *supra* note 155, at 112 (observing that "federal superintendence" over commerce is necessary to prevent "interfering and unneighborly regulations"). The premise that Congress should use its authority to keep open the avenues of commerce among the states is nowhere explicit in the Constitution, but it is implied textually and is consistent with what we know of the Framers' beliefs about free markets. *See* Nelson Lund, Comment, *The Uniformity Clause*, 51 U. CHI. L. REV. 1193, 1212 (1984) (arguing that various limitations on Congress's power under the Commerce Clause "are designed to prevent factions from causing a specific substantive evil: regional favoritism that reduces unrestrained economic competition"). Such restrictions on Congress include the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ."), and the prohibition on requiring vessels to pay charges for travelling to another state, *id.* ("[N]or shall Vessels bound to, or from, one State, be obliged to enter,

Clause jurisprudence, established early on, expressly prevents states from discriminating against out-of-state products or services.[158]

The free trade regime established by the Constitution reduces the influence of protectionist groups within member states, thus promoting both economic growth and accountable government. The creation of an open national market encourages jurisdictional competition among the states for businesses and capital, thereby improving the quality of regulation in all states.[159] Finally, by reserving the power to enact bona fide public welfare legislation to the states rather than to the national government, the original Constitution encouraged legislation adapted to local tastes and conditions.[160]

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clear, or pay Duties in another."). *See also infra* note 163 (discussing the Export Clause as a provision preventing factions from interfering with the free market in foreign commerce).

[158] For a discussion of the dormant commerce clause and its history, see Regan, *supra* note 154; *see also* Chen & Gifford, *supra* note 10, at 1324 (observing that the essential function of the dormant commerce clause is to guarantee a free trade zone among the states); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 17 (1987) (suggesting that the dormant commerce clause created a "charter of free trade").

[159] The canonical exposition of the economic advantages of regulatory competition can be found in Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). A good summary of the optimal conditions for this competition appears in Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1228 (1997). "Decentralized governments will be most efficient for those activities and regulations that can be efficiently provided to small populations and that have no significant positive or negative spillovers onto nonresidents." *Id.* Some have criticized regulatory competition for precipitating races to the bottom in which necessary health, safety, environmental, and labor regulations are abandoned in order to attract firms and capital. We address this critique extensively below at pp. 558–59. For modern economic views on the relationship between free trade and jurisdictional competition, see below at pp. 559–61.

The Framers' views on the efficiency of regulatory competition were not as clearly developed as those of modern economic theory. But in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Chief Justice John Marshall interpreted the Constitution in a manner broadly conforming to the ideal economic division of power between the center and localities. He suggested that the federal government might exercise exclusive power over regulations that relate to commerce among the states, but that states retain authority over regulations meant to protect health and safety. Chief Justice Marshall stated that states have power over an "immense mass of legislation . . . all [of] which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass." *Id.* at 203.

[160] *See* Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POL'Y REV. & YALE J. ON REG. (Symposium Issue) 149, 154 (1996) ("The essential insight of classic economic arguments for state variation . . . is that communities are different, and these differences are essential and reasonably impervious to efforts at homogenization.").

The New Deal, however, weakened regulatory competition in the United States. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 505 (1987) (suggesting that in the New Deal, the United States abandoned reliance on regulation at the local level and relied on administrative agencies and the President for regulation at a national level). Despite this shift, prohibitions on protectionism have survived.

The Constitution also attempts to restrain the influence of interest groups on foreign commerce.[161] National representatives are more likely to rise above parochial interests than local representatives, who may seek to protect particular local industries. As a consequence, the Constitution gives Congress, rather than the states, the authority to regulate foreign trade.[162]

Nevertheless, members of Congress are themselves susceptible to interest group pressures against trade. Particular industries that lose from trade may be concentrated in their districts.[163] Because important legislative work is done in small committees, even a few relatively influential members can frustrate free trade legislation.[164] In contrast,

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161 We do not suggest that the Framers were single-mindedly committed to the idea of free trade. Rather, competing strands in eighteenth-century political economy — both the nascent free trade theories of Adam Smith and older mercantilist ideas — influenced them. *Compare* Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 574 (1994) (noting that "[b]y the 1790s, mercantilism had been replaced with Smith's faith in growth and progress"), *and* Brian F. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 330 (2000) (arguing that the Framers "did not seek to orient the specific commercial policies of successive American governments toward either protectionism or mercantilism"), *with* Regan, *supra* note 154, at 1124 (arguing that the Framers "envisaged a mercantilist foreign trade policy for the United States as a whole").

162 U.S. CONST. art. I, § 8, cl. 3. The Framers' experience under the Articles of Confederation gave them cause to worry about inconsistent state regulation of foreign commerce. *See* THE FEDERALIST NO. 22, *supra* note 155, at 111–13. Thus, the states are forbidden from levying tariffs and duties. U.S. CONST. art. I, § 10, cl. 2 ("No State shall . . . lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . .").

163 MUELLER, *supra* note 58, at 242 (citing three studies showing that congressmen are influenced to vote for protectionist measures by campaign contributions from interest groups, especially contributions from industries important to the locales they represent); *see also* Barry R. Weingast, Kenneth A. Shepsle & Christopher Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642, 650–51 (1981) (concluding that the geographic structure of congressional representation leads to parochial, inefficient policies). The Framers of the Constitution themselves addressed this danger by prohibiting Congress from laying any taxes or duties on articles exported from any state. U.S. CONST. art. I, § 9, cl. 5. They included this clause in the Constitution in large part to prevent parochial interests in the North from raising revenues by taxing Southern exports. *See* Claire R. Kelly & Daniela Amzel, *Does the Commerce Clause Eclipse the Export Clause?: Making Sense of* United States v. United States Shoe Corp., 84 MINN. L. REV. 129, 145 n.79 (1999) (discussing the background of the Export Clause at the Constitutional Convention). The clause probably applied to exports rather than imports because mercantilist theories of trade, popular in the late eighteenth century, stressed the importance of exports alone as essential to economic well-being. *See* IRWIN, *supra* note 47, at 38–44.

164 A variety of procedural devices increase the influence of special interests over trade legislation. First, the committee system affords special interests greater power because the legislators most focused on particular interests are disproportionately represented on the committees responsible for legislation affecting these interests. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 42 (1991) ("[The] committee structure can exacerbate interest group influence."); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 55–56 (1988). Second, the filibuster rule in the Senate allows forty-one senators to delay legislation indefinitely. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 185, 210 (1997). Thus, protectionist interests may succeed in blocking legislation even while enjoying less than a legislative

the President has a national constituency not tied to particular localities and their interest groups.[165] Moreover, his electoral fortunes are more closely tied to national economic growth — one of the most important consequences of free trade.[166] The President, therefore, is more likely than Congress to favor reductions in tariffs and the elimination of other trade barriers.[167]

Accordingly, various mechanisms have evolved to give the President a leading role in setting trade policy. For instance, for most of the past twenty-five years, Congress has granted the President so-called "fast-track" authority.[168] Fast-track allows the President to submit legislation implementing a trade agreement to Congress under procedures that prohibit amendment, limit debate, and require automatic discharge from committee.[169] These procedures deprive protectionist groups of parliamentary devices that enable them to obtain concessions and thus make it more difficult for such groups to unravel free trade agreements.[170]

Congress has also granted the President substantial discretionary authority to raise tariffs when import surges threaten to decimate

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majority. Because a state's representation in the Senate is not proportionate to its population, this legislative minority may in turn represent an even smaller proportion of the population at large. *See* Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 26–27 (1997) (showing that the Senate is very unrepresentative of the national population).

165 Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 98–99 (1995) (suggesting that the President can more easily surmount the interests of parochial groups because of his national base).

166 *See* Ray C. Fair, *Econometrics and Presidential Elections*, 10 J. ECON. PERSP. 89, 89–90 & n.3 (1996) (concluding from a study of all American elections since 1916 that the growth of per capita output in the year preceding the election was the most important factor in determining whether the party of the incumbent President retained the presidency).

167 *See* Irwin & Kroszner, *supra* note 80, at 648.

168 *E.g.*, 19 U.S.C. §§ 2112, 2191, 2902 (1994). These grants have expired by their terms, and President Clinton no longer has fast-track authority. *See* David A. Gantz, *Failed Efforts to Initiate the "Millennium Round" in Seattle: Lessons for Future Global Trade Negotiations*, 17 ARIZ. J. INT'L & COMP. L. 349, 358 n.40 (2000) (noting that "[t]he Clinton Administration and the Congress have been unable since 1994 to agree on legislation that would provide the president with 'fast-track' negotiating authority to conclude trade agreements").

169 Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 696 (1996) (discussing the manner in which fast-track authority eliminates procedural mechanisms that can delay trade agreements).

170 *See* Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 148 (1992) (discussing how fast-track prevents ad hoc amendments to negotiated trade agreements); *cf.* Kenneth Shepsle & Barry Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149, 166–67 (1994) (discussing the benefits of access to legislative mechanisms, including the ability to make durable deals regarding legislation, and thereby implying that the loss of access to those mechanisms can reduce redistributive and parochial legislation).

American industries.[171] Because of his institutional inclination to favor free trade, the President can be expected to deploy this authority prudently to relieve dangerous domestic protectionist pressures.[172] The President also has the authority to retaliate against the unfair trade practices of other nations.[173] Once again, this authority can be seen as a strategic safety valve for the President to use when the trade practices of foreign nations threaten the popularity of free trade in the United States.

Thus, over time the United States has developed a practical trade constitution that departs from the ordinary legislative process in order to promote prosperity and reflect the majority will. The Constitution first granted authority over both interstate and foreign commerce to the federal government rather than to the states. Mechanisms then developed within the federal government that delegated responsibility for foreign trade to the President, the actor with the greatest institutional inclination to favor free trade.

Some commentators have criticized these mechanisms as undemocratic.[174] These critics concede that members of Congress are tied more closely than the President to local industries, but view such accessibility as reinforcing, rather than undermining, representative democracy. Critics emphasize that members of Congress can provide essential democratic "inputs" for national policy precisely because they are more accountable than the President to local constituents.[175] Similarly, state governments are often in the best position to decide trade-related issues, such as licensing and government procurement questions, that affect their citizens.[176] Giving the President increased power thus undermines the legitimacy of American measures on international trade.

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[171] *See, e.g.*, 19 U.S.C. §§ 1337, 2251–2254 (1994 & Supp. II 1996) (providing the President with the authority, in coordination with the United States International Trade Commission, to take all appropriate action to combat illegitimate import competition).

[172] *Cf.* Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 282 (1991) (arguing that the purpose of safeguard authority is to permit officials to "escape" from tariff concessions when the "political gains to officials in the importing country 'outweigh' the costs to the officials in the exporting country").

[173] 19 U.S.C. § 2411 (1994). This authority is not GATT-based, but rather a unilateral measure used as retaliation against unfair trade practices that may not be covered by GATT. *See* Determination Under Section 301 of the Trade Act of 1974: Memorandum for the United States Trade Representative, 45 Fed. Reg. 51,173 (July 31, 1980).

[174] *See* Atik, *supra* note 129, at 236–38; Goldman, *supra* note 2, at 633, 654–58; Housman, *supra* note 2, at 730–41.

[175] *See* Housman, *supra* note 2, at 730–31; *see also* Dillon, *supra* note 129, at 201, 204–06 (discussing how the WTO interferes with "democratic 'inputs'" for national legislation).

[176] *See* Housman, *supra* note 2, at 741 (describing the NAFTA-prompted federal rule that "removed from the states the traditional police power of using licensing requirements to ensure the health and safety of citizens").

Despite such criticism, the institutional constraints on national and state legislatures that we have described can be reconciled with democratic principles by understanding these limitations as majoritarian strategies to reduce agency costs — strategies in which a majority binds itself to institutions that increase its effective future representation in the political process.[177] Such strategies make it difficult for politicians to pursue policies that favor concentrated groups at the majority's expense.[178] By cabining the power of protectionist groups, our domestic trade constitution reduces the agency costs that impede the majority from monitoring its legislators on trade issues.[179] It is hardly undemocratic for the majority to create institutions that will muffle the predictably powerful cries of special interests.

C. *The Analogy to Federalism*

Strategies to reduce agency costs can also explain the participation of member nations in the WTO. The WTO reduces agency costs, thereby preventing protectionist groups from gaining benefits at the expense of national majorities.[180] Like the domestic institutions discussed above, the WTO can be reconciled with democratic theory:[181] in voting to join the organization, national majorities commit to an institution that can increase their political effectiveness.[182]

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[177] *Cf.* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 795–96 (1992) (noting that precommitment theory can reconcile judicial review with majoritarianism).

[178] *See* Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 126–28 (1993) (discussing the manner in which precommitments can reduce agency costs).

[179] *Cf.* Macey, *supra* note 23, at 242–50 (arguing that one purpose of the Constitution is to restrain interest groups by reducing agency costs).

[180] *Cf.* Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 67 (2000) (arguing that the WTO, like United States constitutional mechanisms, helps shift "the political consensus toward results that tend to benefit consumers").

[181] Indeed, WTO rulings may pose less of a countermajoritarian difficulty than the constitutional rulings of domestic courts because they are binding only as a matter of international law. WTO rulings are not backed by force, and thus member nations can ultimately disregard them. *See* Movsesian, *supra* note 1, at 815–16. Nevertheless, because of nations' interests in abiding by international rules to which they have agreed, WTO rulings do have some constraining effect. *See id.* at 817–18. For a discussion of nondemocratic members of the WTO, see below at section IV.C, pp. 588–89.

[182] Given the strength of protectionism, one may wonder how an international trade regime is ever effectuated over the objections of special interests. But this is a question for all constitutional structures that restrain interest groups. In general, the logic of interest group analysis suggests that such structures arise when events increase the power of the diffuse majority, creating a window of opportunity for the majority to work its will. For instance, a crisis may force the citizenry to pay more attention, both reducing rational ignorance and the inertia that frequently blocks consideration of innovative solutions. As Machiavelli understood, even beneficial innovations face political obstacles because they have "as enemies all the people who were doing well under the old order, and only halfhearted defenders in those who hope to profit from the new." NICCOLO MACHIA-

Of course, the analogy to domestic constitutionalism is not exact.[183] The differences between the domestic and international contexts, however, decrease the risk that the WTO will develop into a centralized regulatory body that supplants national sovereignty. For example, in the domestic context, the concept of citizenship creates stronger moral claims to equality of treatment and opportunity.[184] The need to address such claims can require the creation of national bodies with broad regulatory authority. Because claims of citizenship do not arise in the WTO context, however, there is less need for a regulatory superstructure.[185] As we explain below, such a structure would threaten the sovereignty of member states and be subject to capture by interest groups.[186]

In addition, nationalist sentiments may serve as a more enduring check on the consolidation of power in the WTO than state attachments did in the context of the United States government. As we discuss below, international consolidation of regulatory power would benefit interest groups.[187] Interest groups tend to erode constitutive structures that constrain their rent-seeking[188] and often seek consolidation of power in centralized structures that they can dominate.[189] Na-

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VELLI, THE PRINCE 17 (Robert M. Adams ed. & trans., Norton 1992) (1513). For the Framers, threats to the prosperity and stability of the fledgling republic engendered such a crisis. *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 371 (1995) (suggesting that people at the time perceived a crisis). At least at the outset of GATT, the Cold War threat may have offered geopolitical imperatives for structures that would facilitate Western prosperity. *See* Paul B. Stephan, *The New International Law — Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1571 (1999).

183 For a discussion of international federalism, see John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 913–18 (1996).

184 *Cf.* Alvin K. Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE L. & POL'Y REV. & YALE J. ON REG. (Symposium Issue) 177, 182 (1996) (noting that concerns about egalitarianism may be stronger in the domestic context than in the international context, "[g]iven a deeper sense of shared values among citizens of the same country").

185 Moreover, WTO opinions do not bind national courts in the way that Supreme Court opinions bind state courts in the American system. *See supra* p. 532.

186 *See infra* section III.B.2, pp. 556–58.

187 *See id.*

188 This notion follows from the basic premises of public choice theory. Interest groups seek rents. If they can gain higher rents through constitutional change, they will seek constitutional change. *See* Boudreaux & Pritchard, *supra* note 178, at 113–15 (discussing the reasons why interest groups seek constitutional change). For instance, studies of amendments subsequent to the Bill of Rights suggest that interest groups played a key role in their enactment. *See, e.g.*, Gary M. Anderson & Robert D. Tollison, *Political Influence and the Ratification of the Income Tax Amendment*, 13 INT'L. REV. L. & ECON. 259 (1993) (discussing interest group influence in the passage of the Sixteenth Amendment).

189 *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 204–12 (1997) (arguing that interest groups sought passage of the Seventeenth Amendment to weaken federalism and to make rent-seeking easier); *see also* Barry Friedman, *Valuing Federalism*, 82 MINN.

tionalism, however, gives citizens reasons of the heart to resist the transfer of power to international bodies. In the past, to be sure, state loyalties served a similar function in the domestic context.[190] But those loyalties have largely dissipated;[191] it is inconceivable today that someone would say, as did Robert E. Lee, that he owed a greater allegiance to his state than to his country.[192] The continuing strength of national attachments, by contrast, will help members to resist potential encroachments by the WTO.[193]

D. The Basic Rules of the WTO in Constitutional Perspective

1. The Core of the WTO System: Reciprocal Tariff Reductions as a Restraint on Interest Groups. — The core feature of the WTO system has been periodic reductions in world tariffs. Even before the inauguration of the WTO, GATT members met roughly every decade in negotiating rounds that reduced tariffs on goods on a reciprocal basis.[194] These rounds reduced world tariffs dramatically. The ratio of the value of duties collected to the value of imports fell from about 37% before the adoption of GATT to less than 5% in the early 1990s.[195] The Uruguay Round, which established the WTO, continued the pattern of reciprocal tariff reductions and expanded the scope of the system by adopting new agreements on services,

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L. REV. 317, 373–75 (1997) (discussing interest group politics favoring "federalization"). The claim that these interest groups will be progressively successful over time at attacking a constitution that constrains them follows directly from the insight that stable societies gradually generate more and more interest groups by virtue of their very stability. *See* OLSON, *supra* note 16, at 41.

190 James Madison himself understood that individuals' attachments to states were essential to protecting the autonomy of states and preventing consolidation. *See* THE FEDERALIST NO. 46, at 262 (James Madison) (Clinton Rossiter ed., Mentor 1999) (1961) (stating that the ability of a state or federal government to expand "at the expense of the other" will "depend on the sentiments and sanction of their common constituents"). For a discussion of the implications of this insight for modern federalism, see Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 44–47, in which Young observes that attachments to states presuppose state governments that have considerable power relevant to people's daily lives, a power that has been eroded.

191 *See* Maurice J. Holland, *Prospects for Federalism*, 6 HARV. J.L. & PUB. POL'Y 31, 37 (1982) ("The strong sense of cultural identity with one's state characteristic of nineteenth century Americans is moribund, a permanent victim of social mobility and the pervasive influence of the national media, among other factors.").

192 ALAN T. NOLAN, LEE CONSIDERED 38–39 (1991).

193 On the comparative strength of state and national attachments, see Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. & YALE J. ON REG. (Symposium Issue) 187, 218 (1996), which notes that "the nation has replaced the states as the locus of attachment and loyalty." For further discussion of nationalism, see above at pp. 524–25.

194 *See* JACKSON, DAVEY & SYKES, *supra* note 99, at 314.

195 Trebilcock, *supra* note 24, at 292.

intellectual property, health and safety measures, and product standards.[196]

The engine of the WTO regime is reciprocity. Reciprocal tariff reductions create pressure for free trade in each country. Producers that enjoy a comparative advantage gain new markets when foreign countries reduce tariffs. This prospect creates incentives for such producers to lobby for lower tariffs in their own countries: because of the reciprocity requirement, only reduced domestic tariffs for foreign goods can secure reduced foreign tariffs for exports. Thus, the WTO system mobilizes the interest groups that stand to win — workers and owners in industries that will prosper because of free trade — to counterbalance the interest groups that stand to lose.[197]

The expansion of the Uruguay Round to include trade in services provides a dramatic example of the way in which reciprocity mobilizes interest groups to push for free trade.[198] Industries in developed countries that stood to gain from the export of services and the protection of intellectual property pressed their governments to agree to reduce tariffs on textiles and agricultural products. They did so because developing countries demanded such reductions in exchange for lowering their own tariffs on services and for providing greater protections for intellectual property rights.[199] The reciprocity regime thus created

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[196] John H. Jackson & Alan O. Sykes, *Introduction and Overview*, *in* IMPLEMENTING THE URUGUAY ROUND 1, 4 (John H. Jackson & Alan O. Sykes eds., 1997); *see also* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 141–47 (2d ed. 1999) (discussing the Uruguay Round agreements on health and safety measures).

[197] Irwin and Kroszner argue that such a dynamic was present in the United States after passage of the Reciprocal Trade Agreements Act (RTAA) of 1934, ch. 474, 48 Stat. 943 (codified as amended at 19 U.S.C. §§ 1351–1354 (1994)). The RTAA, the prototype for much subsequent American trade legislation, authorized the President to conclude international agreements "for the reciprocal reduction of tariffs" and, in connection with those agreements, to "proclaim" new tariff levels. JACKSON, DAVEY & SYKES, *supra* note 99, at 139 (internal quotation marks omitted). As Irwin and Kroszner explain:

> The RTAA explicitly linked foreign tariff reductions that were beneficial to exporters to lower tariff protection for import-competing producers. By directly tying lower foreign tariffs to lower domestic tariffs, the RTAA may have fostered the development of exporters as an organized group opposing high tariffs and supporting international trade agreements.

Irwin & Kroszner, *supra* note 80, at 649.

[198] *See* Jeffrey L. Dunoff, *Understanding Asia's Economic and Environmental Crisis*, 37 COLUM. J. TRANSNAT'L L. 265, 277 (1998) (reviewing ASIAN DRAGONS & GREEN TRADE: ENVIRONMENTAL ECONOMICS AND LAW (Simon S.C. Tay & Daniel C. Esty eds., 1996)) (discussing the Uruguay Round's "grand bargain," in which developing countries made "concessions in services and intellectual property" in return for "concessions in market access and textiles").

[199] *See* JACKSON, DAVEY & SYKES, *supra* note 99, at 1124; *The Final Act of the Uruguay Round: A Summary*, GATT FOCUS (GATT Secretariat, Geneva, Switz.), Dec. 1993, at 5, 11–12 [hereinafter *Final Act Summary*], *reprinted in* Jackson & Sykes, *supra* note 196, at 8, 16 ("Provisions to facilitate the increased participation of developing countries in world services trade envisage negotiated commitments on . . . the liberalization of market access in sectors . . . of export interest.").

momentum for an enormous and beneficial enlargement of world trade.[200]

Reducing the influence of protectionist groups by committing to a reciprocity regime reinforces domestic democracy at the same time that it promotes free trade.[201] Without the pressure of a reciprocity regime, protectionist groups would have more leverage over trade policy than consumers, even though consumers are far more numerous.[202] Protectionist groups would have a greater ability to distort the political process to achieve a result — higher tariffs — that the majority of voters likely would not favor. The reciprocity regime thus reinforces the voice of citizens in democratic deliberations.

2. The Basic Democracy-Reinforcing Rules of the WTO. — Tariff reductions cannot by themselves ensure a free trade regime. Protectionist groups can frustrate the effect of tariff reductions by persuading national governments to impose nontariff barriers.[203] Even if a member complies with GATT-mandated tariff reductions on a given product, for example, the member could offset the effect of these reductions by imposing quotas on the number of imports allowed into the country. Therefore, just as the United States Supreme Court has developed a doctrine to prevent state nontariff discrimination against out-of-state imports, the WTO has established a series of rules that prevent mem-

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200 *See supra* note 53.

201 We recognize that not all members of the WTO are democratic. Nevertheless, membership in the WTO may have beneficial political effects on these countries as well. *See infra* section IV.C, pp. 588–89.

202 For an explanation, see above at pp. 523–25.

203 While we focus in this Article on attempts to erect import barriers, other anti-trade strategies can also benefit interest groups at the expense of the public. For example, failing domestic industries might pressure governments to grant subsidies to enable them to compete with imports. In addition, exporter groups might lobby for subsidies that make it easier for their products to compete abroad. By diverting the country's resources from more productive activities, such subsidies would interfere with comparative advantage and work to the detriment of citizens as a whole. *See* JACKSON, DAVEY & SYKES, *supra* note 99, at 758.

Just as it limits the ability of domestic interest groups to erect import barriers, the WTO also works to reduce the possibility of trade-distorting subsidies. *Cf.* Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 258 (1989) (noting how nations might "establish international constraints" in order to "escape pressures to grant subsidies that reduce domestic economic welfare"). The Agreement on Subsidies and Countervailing Measures (SCM Agreement), adopted at the Uruguay Round, prohibits members from granting certain kinds of subsidies, including those that are contingent on export performance ("prohibited" subsidies) and those that nullify or impair benefits accruing to other members under GATT ("actionable" subsidies). Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 27 (1994), http://www.wto.org/english/docs_e/legal_e/24-scm.pdf; *see also Final Act Summary*, *supra* note 199, *reprinted in* JACKSON, DAVEY & SYKES, *supra* note 99, at 770, 770–71.

bers from adopting measures that negate the value of GATT tariff reductions.[204]

Many of these rules concentrate on the most obvious evasive tactics. For example, article XI of GATT proscribes quantitative restrictions on imports.[205] Article III prohibits members from imposing special internal taxes on imports — sales taxes, for example — that exceed taxes on "like domestic products."[206] Because members might impose discriminatory internal regulations on imports, article III also requires members to accord imports "treatment no less favorable than that accorded like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, . . . purchase, transportation, distribution or use."[207]

These rules reinforce democracy by making trade restrictions more obvious to average citizens.[208] Transparency is crucial to restraining interest groups in a modern democracy. We speak above of the tendency of politicians to attempt to satisfy cohesive interest groups at the expense of the diffuse public.[209] Political success, however, depends not only on satisfying members of a politician's coalition, but also on disarming the potential opposition.[210] One important way of doing this is to raise the information costs of potential opposition by disguising the mechanisms of the legislation, hiding its effects, or even obscuring its importance or existence.[211] If two proposals accomplish the same goal, but one can be defeated only if its opponents are willing to

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[204] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI(1), 61 Stat. A-3, A-32 to -33, 55 U.N.T.S. 187, 224–25 [hereinafter GATT 1947]; JACKSON, DAVEY & SYKES, *supra* note 99, at 294 (observing that GATT includes "some . . . general protective clauses which would prevent evasion of the tariff commitments").

[205] Subject to limited exceptions, GATT article XI provides that "[n]o prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained" on imports from other GATT members. GATT 1947, *supra* note 204, art. XI(1).

[206] *Id.* art. III(2).

[207] *Id.* art. III(4).

[208] For a more complete discussion of how transparency reinforces democracy, see below at pp. 573–75.

[209] See *supra* pp. 523–24.

[210] *See* Phillip Nelson, *Political Information*, 19 J.L. & ECON. 315, 323 (1976) (suggesting that rent-seekers who lack a political majority need to take their gain "in a form where the issue can be easily obscured"); *see also* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1374–75 (1993) (arguing that "[u]nfunded mandates . . . present legislators with the political temptation to levy hidden municipal taxes" because constituents do not appreciate the link between their municipal tax bills in a later period and their legislators' adoption of unfunded mandates in an earlier period).

[211] *See, e.g.*, John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 LA. L. REV. 1507, 1530–31 (1994) (observing this phenomenon in the context of the collateral attack bar in employment discrimination and suggesting that information costs are a general issue in the public choice analysis of legislation).

expend significant resources on voter education, one would expect the latter proposal to be the chosen vehicle of interest groups.[212] Therefore, structures that block nontransparent legislative forms — that is, structures that reduce information costs to the citizenry — reinforce democratic governance.

A notable feature of GATT rules is that they effectively require increased transparency in the trade-related legislation of member states. As trade barriers go, tariffs are relatively transparent: they are visible to consumers, who would like to pay less for imported products.[213] The effects of quotas and discriminatory laws, by contrast, are less apparent to consumers.[214] Thus, by "channel[ing] all 'border protection' against imports into" tariffs, GATT requires nations to use precisely those methods that are most likely to arouse consumers to resist the machinations of protectionist interest groups.[215]

Other features of GATT also aid transparency. For instance, one rationale for article I's most favored nation (MFN) principle is that "[f]rom the domestic-political viewpoint, the MFN commitment makes for more straightforward and transparent policies."[216] As we explain at greater length below, provisions of other WTO agreements that seek to prevent discrimination against foreign products also impose transparency requirements and otherwise weaken the power of interest groups.[217]

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[212] *See id.*

[213] Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT'L L.J. 421, 426–27 (1998) ("Unlike import quotas and other non-tariff barriers to trade, tariffs are 'transparent,' that is, the level of protection they afford can be readily and accurately determined.").

[214] *See, e.g.*, JACKSON, DAVEY & SYKES, *supra* note 99, at 17 ("[I]t is sometimes argued that quotas tend to conceal from the public the degree of protection being afforded domestic producers — the price effect of tariffs is more obvious."). As Professor Hansen explains:

> A five percent tariff on shoes transparently reveals the level of protection that is afforded to domestic shoe producers. In contrast, it is virtually impossible to assess the level of protection that is likely to result from a quota prohibiting imports of more than 10,000 pairs of shoes. The level of protection will depend on the number of shoes that would be imported in the absence of the quota, which would vary from year to year.

Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017, 1059 (1999).

[215] JACKSON, DAVEY & SYKES, *supra* note 99, at 290.

[216] *MFN Commitment — Basis of the Trading System*, GATT FOCUS (GATT Secretariat, Geneva, Switz.), Sept.–Oct. 1984, at 3, 3. For a discussion of other GATT provisions that promote transparency, see below at pp. 573–75.

[217] *See infra* p. 597 (discussing the SPS and TBT Agreements).

III. THE EMERGING ANTIDISCRIMINATION AND REGULATORY MODELS OF THE WTO

A. An Introduction to the Problem

The WTO's success in lowering tariffs and prohibiting open discrimination against imports creates pressure for concentrated interests to adopt a more subtle strategy. Because protectionist groups cannot successfully lobby their governments for measures that overtly discriminate against imports, they are likely to make even greater efforts to lobby for substitute measures that covertly accomplish the same end.[218] For example, because protecting the environment, health, and safety is a public good that governments traditionally provide, measures ostensibly aimed at these objectives furnish a particularly useful disguise for the imposition of burdens on competing imports.[219]

For example, consider the effect of the Uruguay Round's reductions in tariffs on agricultural products.[220] The United States has a comparative advantage over Europe with respect to most such products.[221] As a result, the tariff reductions have increased competitive pressures on European farmers. Because they cannot lobby their governments for legislation that overtly discriminates against American products, the farmers have incentives to find substitute measures that will hinder the competition. One possible strategy would be to restrict the sale of American products on "safety" grounds.[222] European farmers might seize on the fact that American agricultural methods differ from European methods in some regard and claim that the difference creates risks for human health. The United States and Europe have recently argued over such issues.[223]

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218 For a general discussion of the manner in which concentrated interest groups will attempt to substitute one kind of rent-seeking for another kind that is blocked by the political system, see McGinnis & Rappaport, *supra* note 74, at 428–29.

219 Some environmentalists themselves have recognized this possibility. *See* ESTY, *supra* note 25, at 45 ("Thus, there is a danger that environmental regulatory processes will be 'captured' by protectionist interests, who will use environmental standards as a guise for erecting barriers to imports."); *see also* Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn From the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 11, 112 (1999) (arguing that environment-based trade sanctions can be "abuse[d]" for protectionist ends).

220 *See* Kennedy, *supra* note 213, at 463–67 (noting that the Uruguay Round reduced agricultural tariffs).

221 *See id.* at 466.

222 *See* Marsha A. Echols, *Food Safety Regulation in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525, 540 (1998) (noting the possibility of "protectionism in the guise of a food safety measure").

223 *See* WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998), http://www.wto.org/english/

In light of the Uruguay Round's expansion of the world trading system and its large-scale reductions in global tariffs, one can expect the problem of covert protectionism to be increasingly important for the WTO.[224] Unfortunately, covert protectionism raises issues of political economy that are far more complex than those raised by the reduction of tariffs and the elimination of overtly protectionist measures. Although trade discrimination is socially undesirable, government regulation is desirable when necessary to protect against dangers that the market cannot address on its own. For instance, genuine environmental, health, and safety regulations can increase the well-being of a nation's citizens and go to the heart of a government's sovereign duties to its people.[225]

The possibility of covert protectionism thus necessarily forces the WTO to address environmental, health, and safety issues.[226] The organization has done so by developing rules to distinguish between those environmental, health, and safety regulations that are genuine and those that are merely disguised attempts to discriminate against foreign competition. Indeed, making such distinctions has been a focus of the WTO's dispute settlement system. But the WTO's approach — we call it the antidiscrimination model — is both controversial and unsettled.

First, given that the WTO addresses environmental, health, and safety regulations in any event, some commentators have suggested that the organization should be more involved in setting global regulatory standards.[227] Indeed, some believe that trade law is already

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tratop_e/dispu_e/hormab.pdf [hereinafter *Hormones*] (invalidating European regulations restricting meat products derived from cattle treated with particular growth hormones).

[224] Hans van Houtte, *Health and Safety Regulations in International Trade*, *in* LEGAL ISSUES OF INTERNATIONAL TRADE 128, 129 (Peter Sarcevic & Hans van Houtte eds., 1990).

[225] *Cf.* Paul Martin, *Sovereignty and Food Safety in a NAFTA Context*, 24 CAN.-U.S. L.J. 369, 369 (1998) (noting that WTO agreements "were carefully drafted to respect the sovereign right and responsibility of governments to make regulatory decisions that ensure the safety of the food supply of their citizens").

[226] *See* Howse, *supra* note 135, at 139 (asserting that WTO panels can no longer "avoid making complex trade offs between free trade and other public values"). As we demonstrate in Part V, GATT and the SPS and TBT Agreements all require the WTO to distinguish between genuine regulation and disguised discrimination in the context of environmental, health, and safety measures. *See infra* pp. 589–602. WTO instruments, however, do not generally require the organization to address labor regulations, *see* Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT'L L. 11, 12 (1998), and the WTO has therefore not had occasion to resolve disputes about disguised discrimination in that context. *See* Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 136 (1999) [hereinafter Howse, *Workers' Rights*]. GATT does allow members to restrict importation of the products of prison labor. GATT 1947, *supra* note 204, art. XX(e); *see* Howse, *Workers' Rights*, *supra*, at 135.

[227] *See* Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 382 (1994) (suggesting that international standards can be a useful strategy to avoid protectionism); *see also* Schoenbaum, *supra* note 31, at 703, 723 (suggesting that international standards are needed for the sake of both free trade and environmental protection in light of different

moving beyond the elimination of protectionism and is now designed to eliminate "regulatory differences of all sorts that inhibit trade."[228] Under this more encompassing approach, the WTO could formulate more rational and uniform standards than individual nations could, thus promoting compliance by both firms and governments. Finally, the organization could inject labor, environmental, health, and safety values into regulatory calculations to prevent trade from trumping all other concerns.[229]

Other commentators and politicians advance even broader arguments for adding a regulatory component to the WTO. Most importantly, they suggest that allowing individual nations to set different standards will lead to races to the bottom in which nations will weaken necessary health, labor, environmental, and safety standards in a competitive effort to attract business investment.[230] The United States's negotiating position in Seattle, for example, called for the WTO to become involved in setting international labor and environmental standards.[231] Although President Clinton disclaimed any notion that the WTO would automatically apply labor standards to its members, he did recommend that, in the long run, nations that did not meet the standards should be subject to trade sanctions through the

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and potentially discriminatory standards across nations); Mark J. Spaulding, *Transparency of Environmental Regulation and Public Participation in the Resolution of International Environmental Disputes*, 35 SANTA CLARA L. REV. 1127, 1142 (1995) (endorsing the view that international environmental standards can prevent disguised discrimination). The European Commission partially reflects this model. The Commission, an organ of the European Union (EU), sets many health and safety standards that apply to all EU members. *See* Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 491–92 (1995). For example, the Commission, not its member states, issued the EU's controversial ban on hormone-treated beef. *See infra* pp. 599–600.

228 Friedman, *supra* note 189, at 376. For a discussion of how uniform regulations set by central authorities can reduce firms' costs, see Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225, 252–53 (1997). *Cf.* David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, *in* 1 FAIR TRADE AND HARMONIZATION 41, 62 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (discussing the economies-of-scale argument for regulatory harmonization).

229 *See* Dunoff, *supra* note 29, at 623 (arguing for incorporation of environmental values); Daniel C. Esty & Damien Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 329–31, 336 (1997) (suggesting that the European Community's more centralized approach to environmental regulation should serve as a model for the WTO); Andrew L. Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 774 (1998) ("Given this need for global regulation, if we wish to have a just, open, and peaceful international order, global regulatory regimes adapted from domestic democratic systems must be implemented.").

230 For a discussion of this argument, see below at section III.B.3, pp. 558–61.

231 De Jonquières & Suzman, *supra* note 32.

WTO process.[232] Many understood the President's remarks to reflect the agenda of key interest groups, like labor unions, that are the mainstays of his political party.[233]

Given the ensuing opposition of many delegates at the Seattle conference, a full-fledged health, safety, labor, and environmental regulatory program seems unlikely to emerge within the WTO anytime soon.[234] Nevertheless, in light of its academic and political support, the regulatory model will likely compete with the antidiscrimination model in shaping the WTO of the future.

In this section, we therefore evaluate both the regulatory and antidiscrimination models in terms of our Madisonian theory of the international trade regime. We reject the regulatory model, arguing that a regulatory function within the WTO would lead to both reduced public welfare and greater leverage for concentrated interest groups. In contrast, as long as it is properly cabined, the antidiscrimination model can fulfill the WTO's potential for reducing the power of interest groups, thus simultaneously creating wealth and reinforcing domestic democracy.[235]

B. The Dangers of the Regulatory Model

1. One Size Does Not Fit All. — Uniform health, labor, safety, and environmental regulations are unlikely to be appropriate for all members of the world trading community, as members of the WTO vary

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[232] *See* Telephone Interview with Michael Paulson of the Seattle Post-Intelligencer from San Francisco, California, 35 WEEKLY COMP. PRES. DOC. 2485, 2486 (Nov. 30, 1999) (remarks of President Clinton).

[233] *See, e.g.*, Editorial, *Clumsy Clinton*, CHI. SUN-TIMES, Dec. 5, 1999, at 33A (arguing that President Clinton was motivated in his stance at the trade talks by the need to placate interest groups); *see also* Susan Milligan, *Clinton Speaks of His Coming Commuter Marriage*, BOSTON GLOBE, Dec. 9, 1999, at A54 (reporting President Clinton's denial of this criticism).

[234] *See* Guy de Jonquières & Frances Williams, *A Goal Beyond Reach*, FIN. TIMES, Dec. 6, 1999, at 18 (describing the turmoil at the WTO convention in Seattle and the resulting lack of support for reform).

[235] Before proceeding, it is useful to dispose briefly of one other possible approach to the problem of covert protectionism. One might argue that the WTO should not concern itself with covert protectionism at all. This approach would have the benefit of affording nations substantial autonomy on important issues of labor, health, safety, and the environment. Nevertheless, such a hands-off regime would also permit many protectionist measures to stand unchallenged. The magnitude of the defect would depend on how many covertly protectionist measures nations are likely to enact.

It is tempting to think that because such legislation would impose costs on citizens, nations would not adopt a significant amount of covertly protectionist legislation. As we have seen, however, concentrated interest groups can have substantial leverage in the political process. *See supra* pp. 523–25. Therefore, one cannot expect countries to forgo disguised protectionist measures, regardless of the fact that such regulations reduce citizens' wealth. Overtly protectionist measures also reduce citizens' wealth, but this fact does not stop nations from adopting them. Just as a world organization helps to prevent nations from enacting overtly discriminatory legislation, such an organization helps to prevent nations from adopting covertly protectionist legislation as well.

widely in their levels of development.[236] As a result, they will rationally choose different regulatory standards.[237] It is wrong to assume, for example, that Indian and American regulations on water purity should necessarily be the same. Indians may not be able to afford American water safety standards, just as they unfortunately cannot afford many other goods that Americans can.[238] Forcing underdeveloped countries to achieve the standards of the industrialized world would only provoke resentment toward the free trade regime and undermine domestic sovereignty.[239]

It may be argued that a central regulatory body could impose diverse standards appropriate to different nations of the world. But in reality, as we discuss below, interest groups are likely to undercut this possibility by pushing for regulations that are inappropriate for developing nations.[240] Moreover, good environmental, labor, health, and safety regulations in one nation are not generally contingent on good regulations in other countries.[241] Therefore, nations themselves are

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236 It is not incongruous to favor uniform standards to facilitate free trade while permitting diverse standards for environmental, labor, health, and safety standards. As we discuss above, free trade benefits all countries. *See supra* pp. 521–22. In contrast, as we show in this section, appropriate regulatory standards vary depending on the income levels and preferences of particular citizens. Freer trade is rooted in universally applicable economic truths; appropriate regulations, in contrast, require particularized information that is best gathered locally.

237 *See* Jagdish Bhagwati, *Free Trade and the Environment*, *in* WRITINGS ON INTERNATIONAL ECONOMICS 476, 481 (V.N. Balasubramanyam ed., 1997); *see also* HAKAN NORDSTRÖM & SCOTT VAUGHAN, SPECIAL STUDIES 4: TRADE AND ENVIRONMENT 3, 44 (1999), http://www.wto.org/english/tratop_e/envir_e/environment.pdf [hereinafter TRADE AND ENVIRONMENT]; Bhala, *supra* note 226, at 33–35.

238 *Cf.* C. Ford Runge, *Trade Protectionism and Environmental Regulations: The New Nontariff Barriers*, 11 NW. J. INT'L L. & BUS. 47, 52 (1990) ("In low-income developing countries, while the share of national resources devoted to food and agriculture remains large . . . , environmental quality and occupational health risks are widely perceived as concerns of the rich. Even if these risks are acknowledged, the income levels of most developing countries do not permit a structure of environmental regulation comparable to that in the [developed world].").

239 *See* Brown, *supra* note 227, at 376–77, 382 (arguing that developing countries perceive the imposition of global environmental standards as a threat to their sovereignty). The EU has drawn criticism for interfering with the sovereignty of its member states, *see, e.g.*, Robert Graham, *French Split Reopens on Sovereignty*, FIN. TIMES, Nov 25, 1998, LEXIS, News Library, FINTIME File, even though it can derive support from historical traditions of European consolidation stretching back to the Roman Empire and Charlemagne, and even though the European Commission is itself accountable in some measure to a European Parliament elected directly by the people. *See* Koen Lenaerts, *Federalism: Essential Concepts in Evolution — The Case of the European Union*, 21 FORDHAM INT'L L.J. 746, 767 (1998) (noting that the European Parliament can force the European Commission to resign). Lacking these historical advantages, an international regulatory regime would stir even fiercer resentment.

240 *See infra* p. 557.

241 Proponents of the race-to-the-bottom theory suggest that appropriate regulatory standards in one country are contingent on appropriate standards in another. We address this argument below at section III.B.3, pp. 558–61.

better suited than the WTO to choose regulations that reflect their peoples' tastes and levels of development.[242]

Imposing the developed world's regulatory standards on developing countries could also restrict the latter's growth and thus be counterproductive for raising standards.[243] Growth makes developing nations richer, allowing them to raise their standards to those of the developed world.[244] Growth also allows governments to raise more revenues to pay for public goods, such as cleaning up the environment.[245] Such improvement is more than just a theoretical possibility — the so-called Kuznets curve, which predicts the relationship between per capita income and environmental degradation, indicates that development ultimately improves the environment, even if it initially degrades it.[246] This prediction has been empirically verified for a number of pollutants, though not all of them.[247]

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[242] In contrast, we have argued that lower tariffs in one nation are politically contingent on lower tariffs in other nations. For discussion, see above at pp. 545–46. This relationship provides a reason for establishing a trade regime at the international level.

[243] *See* Runge, *supra* note 238, at 52–56 (noting that "environmental arbitrage" allows developing countries with lower environmental standards to attract industries from the developed world).

[244] *See* Patrick Low, *Trade and the Environment: What Worries the Developing Countries?*, 23 ENVTL. L. 705, 706 (1993) (noting that "the demand for improved environmental quality tends to rise with income"); *see also* Dan Ben-David, *Trade, Growth, and Disparity Among Nations*, *in* SPECIAL STUDIES 5: TRADE, INCOME DISPARITY AND POVERTY, *supra* note 51, at 11, 37–39, http://www.wto.org/english/news_e/presoo_e/pov2_e.pdf (suggesting that trade leads to upward income convergence among nations).

[245] Bhagwati, *supra* note 237, at 478; TRADE AND ENVIRONMENT, *supra* note 237, at 4.

[246] *See* Steve Charnovitz, *World Trade and the Environment: A Review of the New WTO Report*, 12 GEO. INT'L ENVTL. L. REV. 523, 533–34 (2000) (describing the Kuznets curve in the environmental context).

[247] *See* M.A. Cole, A.J. Rayner & J.M. Bates, *The Environmental Kuznets Curve: An Empirical Analysis*, 2 ENVTL. & DEV. ECON. 401, 411 (1997) ("Results suggest that meaningful [environmental Kuznets curves] exist only for local air pollutants, whilst indicators with a more global, or indirect, environmental impact either increase monotonically with income or else have high turning points with large standard errors."); Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 Q.J. ECON. 353, 370 (1995) (finding that sufficiently high levels of growth improve air and water quality); Ramón López, *The Environment as a Factor of Production: The Effects of Economic Growth and Trade Liberalization*, 27 J. ENVTL. ECON. & MGMT. 163, 182–83 (1994) (arguing that, given certain assumptions, growth improves environmental quality in the short and long run); Kenneth E. McConnell, *Income and the Demand for Environmental Quality*, 2 ENVTL. & DEV. ECON. 383, 385–86 (1997) (noting that empirical evidence suggests the existence of environmental Kuznets curves); Seth Norton, *Property Rights, the Environment, and Economic Well-Being*, *in* WHO OWNS THE ENVIRONMENT? 37, 50–51 (Peter J. Hill & Roger E. Meiners eds., 1998) (arguing that property rights and growth should be seen as favorable for environmental protection in certain contexts); Thomas M. Selden & Daqing Song, *Environmental Quality and Development: Is There a Kuznets Curve for Air Pollution Emissions?*, 27 J. ENVTL. ECON. & MGMT. 147, 161 (1994) (finding "substantial support" for a Kuznets-like relationship between GDP and air pollutants).

Some commentators have suggested that when the pollutants are easy to externalize, like carbon dioxide emissions, studies show "no tendency [on the part of these pollutants] to decrease with higher per capita income." SIGRID STAGL, DELINKING ECONOMIC GROWTH FROM ENVIRONMENTAL DEGRADATION? A LITERATURE SURVEY ON THE ENVIRONMENTAL KUZNETS

Of course, as a WTO report on the environment itself suggests, improvement in the environment does not happen automatically, but rather through government action.[248] Growth through trade, however, facilitates government action to protect the environment. Communities tend to become more environmentally conscious as they become wealthier;[249] thus, wealthier nations with democratic governments are better able to force firms to clean up the environment.[250] Moreover, as we discuss below, the WTO can help make environmental regulation more probable by rendering the domestic legislative process more transparent. This greater transparency will help a more environmentally conscious citizenry work its democratic will by enacting and enforcing environmental laws. Thus, the WTO, in the long run, is likely to help secure the connection between growth and environmental protection through the channel of democracy.[251]

CURVE HYPOTHESIS 14 (Research Focus: Growth and Employment in Europe: Sustainability and Competitiveness, Working Paper No. 6, 1999). The problem of externalities in the pollutants, as Stagl recognizes, may require international cooperation. We suggest below that international cooperation is inhibited because countries of widely varying development value the environment radically differently. *See infra* p. 562. Growth is likely to facilitate a convergence of values. Thus, for pollutants like carbon dioxide emissions, free trade should eventually help to turn the Kuznets curve positive, but it will take relatively longer.

248 TRADE AND ENVIRONMENT, *supra* note 237, at 52.

249 Marian Radetzki, *Economic Growth and Environment*, *in* INTERNATIONAL TRADE AND THE ENVIRONMENT 121, 129–34 (World Bank Discussion Papers No. 159, Patrick Low ed., 1992) (suggesting that increases in economic growth lead to a more environmentally conscious society because wealthy countries can afford to pay for environmental costs, and wealth increases the likelihood of pro-environment technological advances); *see also* PETER HUBER, HARD GREEN: SAVING THE ENVIRONMENT FROM THE ENVIRONMENTALISTS: A CONSERVATIVE MANIFESTO 151 (1999) (discussing the manner in which wealth makes people want to enjoy the environment more). Huber also observes that development shrinks the "footprint" of man on the planet, because new technology allows for more efficient growth of food and extraction of energy. *See id.* at 148–53. Thus, the United States has been reforesting the land for much of this century. *See id.* at 101.

250 *Cf.* TRADE AND ENVIRONMENT, *supra* note 237, at 40 (discussing the ability of wealthy, well-educated communities to exert pressure on polluters). By increasing wealth, trade should prompt governments to improve labor as well as environmental standards. Industrial history provides an excellent example of the effects of increases in wealth on working conditions. "As the peoples in the West and North grew richer, they could 'afford' more concern with the most appalling examples of labor standards abuses in the global marketplace." Henry H. Drummonds, *Transnational Small and Emerging Business in a World of Nikes and Microsofts*, 4 J. SMALL & EMERGING BUS. L. 249, 283 (2000). That is, regulations to improve labor conditions are a kind of "normal good," in that as income and wealth increase, demand rises as well. *Id.*

251 Some — including the President of the United States — have argued that the WTO should set environmental and labor standards for the same reasons it currently sets certain minimum intellectual property standards in connection with the Agreement on Trade-Related Aspects of Intellectual Property Rights. *See* President's News Conference, 35 WEEKLY COMP. PRES. DOC. 2537, 2543 (Dec. 8, 1999). Economically, however, there is a much stronger case for uniform intellectual property standards than for uniform environmental and labor standards. First, weak intellectual property standards discourage trade in goods because counterfeit goods decrease the demand for real ones. Keith E. Maskus, Regulatory Standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection, and Core Labor Standards (Jan. 2000) (unpublished working paper of the Inst. for Internat'l Econ.), http://207.238.152.36/catalog/WP/

2. The Likelihood of Interest Group Capture. — Placing a regulatory function within the WTO would also give more leverage to concentrated interest groups, undermining the organization's goal of counterbalancing protectionist groups. Such a function would require substantial policymaking discretion because choices would have to be made among competing regulatory programs. The structure best suited to the undertaking would likely resemble a commission or administrative agency.[252] In short, the task of formulating coercive global regulations would require a more powerful and intrusive governance structure than the task of merely removing discriminatory barriers to voluntary transactions among people of different nations.

A commission or agency charged with international regulation would be particularly prone to capture by protectionist interest groups.[253] Consider the case in which the WTO attempts to formulate an international environmental standard. In order to impose costs on competitors in the developing world, industries and workers in the developed world would naturally be inclined to lobby for regulations that impose higher environmental standards than developing nations would rationally choose.[254]

It is true that exporter interest groups in developing nations will have incentives to lobby for lower standards.[255] But exporter interest

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2000/00-1.htm. Second, weak standards encourage free riding on the creations of others and therefore lead to less worldwide innovation. *Id.*

We recognize that these arguments for international intellectual property standards may not be strong enough to overcome the presumption in favor of setting regulations at the national level rather than in distant international fora. Although WTO structures supporting trade liberalization help all countries economically and reinforce democracy, it is not clear that the same can be said for intellectual property standards. Countries that produce little intellectual property may be harmed by such standards and may rationally choose to do without them. Thus, the decision whether to include intellectual property standards in the WTO regime may present a difficult tradeoff between economic benefits and democratic sovereignty. The sovereignty and economic arguments, however, both militate against setting environmental and labor standards within the WTO. Thus, the inclusion of intellectual property standards within the WTO system does not provide a persuasive analogy for including other standards.

252 The literature on the rise of the American administrative state demonstrates the superior ability of administrative over judicial institutions in making policy. *See, e.g.*, BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION 28 (1980) (discussing possible limitations of the judicial process as a regulatory device).

253 *See* Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 958 (1996) (acknowledging that as "power seeps upwards [to international organizations], so does the attention of interest groups").

254 *Cf.* Raj Bhala, *MRS. WATU and International Trade Sanctions*, 33 INT'L LAW. 1, 21 (1999) (discussing developing countries' fears that "the United States will drive up their production costs by imposing its environmental regulations extraterritorially").

255 In contrast, exporters located in the developed world have little concern with the environmental regulations affecting production in the developing world. It might be thought that some multinational companies would have concerns with standards in the developing world because the companies might decide to move some operations there. But these multinational companies have many options regarding where to locate their business operations, and a particular environmental

groups in one nation or set of nations cannot be relied upon to counterbalance protectionist groups in another nation or set of nations. For instance, the exporter groups of Bangladesh lack the wealth and sophistication of competing industries in the United States and thus will exert much less influence on any structure within the WTO devoted to international regulatory standards. Moreover, poorer nations like Bangladesh often lack the resources and quality of representation necessary to reflect adequately the wishes of their constituents at international fora.[256]

Even apart from the danger that protectionist groups will infiltrate a centralized commission to lobby for policies with protectionist effects, concentrated interest groups in general will be able to exercise substantial influence to bring about policies that serve their interests, rather than the public interest.[257] For instance, existing industries around the world may prefer standards that make it harder for fledgling competitors with new technology to succeed. Even in the domestic context, agencies captured by interest groups often generate regulations that are neither efficient nor the product of real democratic consensus.[258]

Moreover, in at least three respects, an international regulatory commission is more likely than a domestic agency to issue inefficient regulations that lack a popular consensus. First, an international regulatory commission would be more susceptible to capture by interest groups than domestic institutions.[259] Even in the domestic context,

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standard's adverse effect in one area of the world is unlikely to impel a company to oppose high standards in another area of the world. Moreover, unions are likely to favor higher standards even if such standards are not in the interests of their respective employers. *See* Wonnell, *supra* note 64, at 83 (explaining the protectionist stance of the union movement). Thus, one cannot expect a very substantial interest group lobby outside of the developing world for the less stringent standards that developing countries favor.

256 Indeed, some developing nations lack the resources even to send delegates to these fora and thus have resorted to using nongovernmental organizations (NGOs) to represent their interests. *See, e.g.*, Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. (forthcoming Winter 2001) (manuscript at 99–100, on file with the Harvard Law School Library) (recounting how Sierra Leone attempted to give its seat at the WTO's Committee on Trade and Environment to the Foundation for International Environmental Law and Development in return for reports on what transpired). The problem is that the NGOs are likely to be dominated by Westerners and thus are unlikely to reflect the interests of developing nations. We discuss NGOs more generally below at pp. 569–72.

257 *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 38 (1998) (arguing that because citizens are often uninformed about regulatory decisionmaking, interest groups are well positioned to seek rents from administrative agencies).

258 *See* Michael A. Fitts, *Retaining the Rule of Law in a* Chevron *World*, 66 CHI.-KENT L. REV. 355, 358 (1990) (offering the "standard" critique that New Deal federal agencies have become subject to interest group capture).

259 These interest groups would include not only the kind of concentrated interest groups we described earlier, *see supra* p. 523, but also international technocratic elites. *See* ANNE-MARIE

citizens often remain rationally ignorant about regulatory developments.[260] Information about agency action is difficult to obtain, and citizens have other projects to pursue.[261] Average citizens would find the workings of an international body even more remote and opaque and would have even fewer opportunities for oversight.[262] As a result, interest groups would have a greater ability to skew regulations in their favor.

Second, more is at stake in formulating harmonized rules for the entire world than for a single nation. If an interest group succeeds in obtaining a regulation that disadvantages competitors, it can gain monopoly profits on a global scale.[263] Thus, the resources that an interest group would be willing to invest to capture an international regulatory body would be higher than in the domestic context.

Third, domestic agencies face at least some competitive pressure from other jurisdictions. For instance, if a domestic agency bans a useful technology at the behest of interest groups, capital may move elsewhere.[264] A WTO regulatory commission, by contrast, would face much less discipline because its regulations would extend to almost all relevant jurisdictions.[265]

3. Beneficial Jurisdictional Competition Rather Than Races to the Bottom. — Ironically, the most pervasive argument for international regulatory standards attacks decentralization head on and argues that centralized regulatory authority is necessary to prevent "races to the bottom" that endanger labor conditions, health, safety, and the environment.[266] Races to the bottom, the argument goes, are the result of

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SLAUGHTER, AGENCIES ON THE LOOSE? HOLDING GOVERNMENT NETWORKS ACCOUNTABLE 10 (Harvard L. Sch. Pub. L. & Legal Theory Working Paper Series, Working Paper No. 006, 1999), http://papers.ssrn.com/paper.taf?abstract_id=209319.

260 Croley, *supra* note 257, at 37 (discussing citizens' lack of incentives to seek information about regulatory developments).

261 For further discussion of the roots of rational ignorance, see above at note 63.

262 *See* Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 699–702 (1996–1997) (explaining that citizens face higher costs monitoring international rules than domestic rules).

263 *Cf.* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1337–38 (1994) (noting that rent-seeking is more intense at the federal than the state level because there are more rents to be had).

264 For more discussion of regulatory competition, see below at pp. 559–61.

265 Given the greater risks of regulatory capture in the international context, it is not inconsistent to favor centralized regulatory authority in the United States and to oppose its international extension.

266 *See, e.g.*, Abbott, *supra* note 30, at 368; Esty, *supra* note 30, at 1573 (arguing for global regulation to prevent a race to the bottom with regard to environmental standards). Politicians have made similar points. Kerry, *supra* note 30, at 452 (outlining the risk of an international "race to the social bottom").

jurisdictional competition.[267] Nations competing for business investment seek to attract firms by enacting suboptimal regulations that allow the firms to decrease production costs. The "winners" are those jurisdictions with the least stringent standards — developing countries at first, but over time some developed countries as well.[268] To avoid this undesirable result, the argument continues, nations must cede regulatory authority to international institutions that would be better able to protect workers, health, safety, and the environment.[269]

The race-to-the-bottom argument has both empirical and theoretical flaws. First, its empirical premise — that one nation's regulatory regime has the capacity to undermine those of other nations — is open to serious question. There is not much evidence, for example, that polluting industries have been migrating from developed to developing countries to take advantage of lax environmental standards.[270] The cost of pollution control is relatively low in developed countries — "no more than 1 per cent of production costs for the average industry" — and besides, because most polluting firms are capital intensive, they tend to cluster in developed countries where capital is readily available.[271] Similarly, there is little empirical support for a link between increased world trade and a decline in labor conditions.[272] One study has concluded that labor conditions in developing countries do not have much of an effect on labor markets in the developed world.[273]

Second, the theoretical premise of the argument — that centralized regulatory authority will achieve a more efficient regulatory regime than separate jurisdictions subject to international competition — is also seriously flawed. As we have seen, centralized government struc-

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[267] *See, e.g.*, Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 275 (1997) (sketching the basic race-to-the-bottom argument); Esty, *supra* note 30, at 1560 (same); Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 95–98 (1999) (describing the race-to-the-bottom argument in the context of labor conditions).

[268] *See* Bhala, *supra* note 226, at 17–20 (discussing the argument that labor conditions in developing countries will have adverse effects on the labor market in the United States).

[269] *See* Jagdish Bhagwati, *The Demands to Reduce Domestic Diversity Among Trading Nations*, *in* 1 FAIR TRADE AND HARMONIZATION, *supra* note 228, at 9, 32–34 (outlining how the race-to-the-bottom argument leads to calls for international harmonization of regulatory standards).

[270] TRADE AND ENVIRONMENT, *supra* note 237, at 4–5; *see also* Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 298 (1997) (noting that "cost differences in environmental standards play little part in companies' location decisions").

[271] TRADE AND ENVIRONMENT, *supra* note 237, at 4.

[272] *See* C. O'Neal Taylor, *Linkage and Rule-Making: Observations on Trade and Investment, and Trade and Labor*, 19 U. PA. J. INT'L ECON. L. 639, 657–58 (1998). *But see* Van Wezel Stone, *supra* note 267, at 98 (discussing "considerable data" that "firms tend to move production to the countries that offer lower labor costs, as well as lower levels of unionization").

[273] Christopher L. Erickson & Daniel J.B. Mitchell, *The American Experience with Labor Standards and Trade Agreements*, 3 J. SMALL & EMERGING BUS. L. 41, 44–45, 85 (1999).

tures can be easily captured by concentrated groups and thus can produce results that reflect more the strength of particular private interests than the public interest.[274] In contrast, recent economic models confirm that when there are no substantial spillover effects (for instance, in the case of environmental regulation, when jurisdictions do not pollute beyond their bounds), jurisdictional competition is likely to prove conducive to appropriate levels of regulation.[275] This is the case even when nations are competing with one another to attract businesses. The essence of the argument is that such competition allows the cost of regulations to be directly reflected in lost wages.[276] The connection between regulation and wages creates a dynamic in which the movement of capital leads to the optimal level of regulation for each individual jurisdiction: capital flows across borders to equalize the marginal cost and marginal benefit of an additional unit of regulation.[277] In less technical terms, employees value public goods such as a clean environment and will accept lower wages in jurisdictions that provide them.[278] The WTO reinforces this structure by making regulations more transparent, thus making it easier for citizens to evaluate the costs and benefits of regulation in the democratic process and to come to the appropriate tradeoff.[279]

Some critics of jurisdictional competition argue that jurisdictions' decisions to impose excessive taxes on capital will distort this effect by

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274 For discussion, see above at section III.B.2, pp. 556–58.

275 For an excellent discussion of these models, see Revesz, *supra* note 30. Although Revesz examines the interstate case, his arguments apply to the international context as well because they do not depend on the mobility of individuals between jurisdictions; they depend only on the mobility of capital. *Id.* at 1234 n.76 (observing that the "Article proceeds on the assumption that individuals are immobile"); *see also* TRADE AND ENVIRONMENT, *supra* note 237, at 41–44; Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE J. ON REG. 23, 25 (1996) (arguing that environmental regulatory authority should be allocated to areas affected by pollution rather than to areas that can harmonize standards).

276 For a full discussion of this argument, see Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333 (1988). Oates and Schwab assume that individuals cannot move among jurisdictions. *Id.* at 337.

277 Revesz, *supra* note 30, at 1240.

278 Even if races to the bottom posed real problems, international institutions might not be the best way to address them. First, because of the public choice problems we have noted, an international institution may well be captured by interest groups and thus choose an inadequate standard. Second, the institutions needed to offset races to the bottom would infringe more upon sovereignty and governmental accountability in the international context than they would in a domestic federal system. *Cf.* Klevorick, *supra* note 184, at 178 (arguing that there is greater need to correct races to the bottom in a federal system because members of different regulatory jurisdictions share citizenship and identity).

279 For more on transparency, see above at pp. 534–35, 547–48, and below at pp. 573–75, 597.

skewing the costs of regulation.[280] But even if taxes are suboptimal, it does not follow that centralized regulation — with its interest group driven imperfections — is better than imperfect jurisdictional competition.[281] It seems odd to argue that we should do away with competitive restraints on government regulation on the grounds that governments may act suboptimally in assessing taxes. In any event, open global capital markets are creating economic conditions that are conducive to regulatory competition by making it harder for countries to impose distortionary taxes on capital.[282] Thus, even if it were true that distortionary taxes provide an argument against regulatory competition, the argument is becoming increasingly less relevant.

One other argument for centralized regulation is that globally uniform standards will reduce the compliance costs of businesses.[283] Although uniformity does have its advantages, its benefits are given due consideration under a system of jurisdictional competition. All else being equal, a nation's adoption of widely used standards will make it attractive to firms.[284] But all else is typically not equal, and in jurisdictional competition, uniformity is just one advantage to be traded off against others in reaching a result that is efficient, given the preferences and resources of a nation's citizens. In our view, this approach is the only way that uniformity can be properly valued in a system of diverse, democratic nations.

4. Spillovers Do Not Call for Regulation by the WTO. — For all the above reasons, jurisdictional competition is likely on balance to improve regulation; nations should not cede regulatory authority to an international body on a race-to-the-bottom rationale. There is one

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280 A leading critic of jurisdictional competition argues that taxes on capital are too inefficient to lead to optimal regulation. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 635 (1996). Professor Esty has been criticized for ignoring the problem of political externalities that international environmental regulation itself would create. *See* Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 871 (1999).

281 *See* Revesz, *supra* note 30, at 1242.

282 For a discussion of the power of global markets to discipline governments' fiscal and monetary policies, see STEVEN SOLOMON, THE CONFIDENCE GAME 39 (1995). Moreover, the latest review of the effect of globalization on taxation suggests that taxes on capital are falling dramatically because of the ease with which capital can exit a jurisdiction. *See* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1577 (2000). Thus, the mobility of capital in open global markets strongly reinforces the benefits of jurisdictional competition within the WTO system.

283 These arguments are perhaps as venerable as THE FEDERALIST NO. 22, *supra* note 155, which speaks of the inconveniences stemming from "conflicts of State regulations." *Id.* at 113. Such arguments have been renewed in the modern era. *See supra* note 155.

284 For instance, the American states often adopt uniform proposals when it is efficient to do so. *See* Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 950 (1995) (arguing that the National Conference of Commissioners on Uniform State Laws proposals are enacted into law when they are efficient).

situation, however, in which jurisdictional competition may not generally yield optimal results. If pollution from industry in nation *A* spills over into nation *B*, nation *A* is unlikely to take into account the costs of the pollution in nation *B* when setting its environmental regulations because pollution in nation *B* does not harm the citizens of nation *A*. Such "spillovers" constitute a classic commons problem:[285] because each country does not pay the full cost of its pollution, each country lacks the appropriate incentives to reduce pollution to a point that reflects its real costs and benefits.[286] One does not need to believe in the potential for races to the bottom to see spillovers as a potentially important problem.[287]

Nevertheless, lodging regulatory authority in the WTO — even authority limited to spillovers — is not the proper mechanism to address this difficulty. International commons problems typically do not admit of easy solutions. As discussed above, citizens in different countries, with widely varying incomes and preferences, may place widely different values on environmental goods.[288] A cooperative solution will therefore be difficult to obtain: when benefits vary widely — that is, when they are "heterogeneous" in economists' terms — it is hard to reach agreement on the collective action necessary to solve a commons problem.[289]

Lack of common understanding may also impede agreement. For instance, environmental organizations and the media have sensitized Americans to environmental problems. It is not at all clear that citizens in less developed countries, with fewer such organizations and lower levels of media penetration, are as aware of these problems. When problems are not well understood and well defined by all the actors, it is harder to trigger the collective action necessary to solve them.[290]

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285 *See* BARRY C. FIELD & NANCY D. OLEWILER, ENVIRONMENTAL ECONOMICS 64–81 (1995) (explaining the international tragedy of the commons in pollution).

286 Chang, *supra* note 25, at 2146 (describing spillovers as an instance of a commons problem).

287 Indeed, the "federalist matching principle" itself suggests that we should consider giving regulatory authority to an entity large enough to encompass the areas affected by the common pollution. *See* Butler & Macey, *supra* note 275, at 25.

288 *See, e.g.*, Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039, 2097 (1993) ("[A]s a practical matter many developing countries would not agree, at least in the short to medium term, to adopt the same environmental standards as the OECD nations. Nor would the latter agree to lower their existing standards.").

289 GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 22–23 (1989). For a discussion of the implication of this problem for the Global Warming Treaty, see JOSEPH R. BIAL & GARY D. LIBECAP, GLOBAL WARMING TREATY NEGOTIATION AND COMPLIANCE: IMPLICATIONS FOR COLLECTIVE ACTION 6–14 (Int'l Centre for Econ. Research, Working Paper No. 9/99, 1999).

290 BIAL & LIBECAP, *supra* note 289, at 6–14; *cf.* Inman & Rubinfeld, *supra* note 159, at 1222–25 (explaining why governments may find it difficult to reach agreements on commons problems).

Monitoring compliance may also pose difficulties. Nations will be unlikely to enter into an agreement to solve a commons problem unless some mechanism exists for policing compliance by other parties.[291] Such mechanisms would likely raise concerns about sovereignty that could jeopardize the agreement. Finally, given the disparity of benefits we mentioned above, some countries will have incentives to hold out for unrelated "side payments" to induce them to join the agreement.[292] At the very least, strategic demands for side payments would make negotiations divisive, and agreement hard to obtain.[293]

For all these reasons, disputes about international spillover effects are likely to be exceedingly contentious and protracted.[294] Even for experts, their resolution would be a daunting task. Of course, the trade bureaucrats who work at the WTO are not experts in environmental matters; there is little reason to think they would have the capacity to make sensitive judgments about them.[295] Placing the resolution of spillover disputes in the WTO would only create tensions and distract the organization from the more limited functions it can perform.[296]

Moreover, the WTO would face a crisis of legitimacy if it were to resolve difficult spillover problems on an ongoing basis. As we see

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291 BIAL & LIBECAP, *supra* note 289, at 8–9.

292 For instance, developing nations may require the United States to offer cash payments in return for an agreement on global warming.

293 *See* Inman & Rubinfeld, *supra* note 159, at 1224 (noting that strategic considerations make it difficult to agree on how to share the costs of agreement). Bial and Libecap note the problems posed by holdouts and the need to use side payments to rope such nations into an agreement. BIAL & LIBECAP, *supra* note 289, at 10–11.

294 The intractability of these issues is demonstrated by the failure of the WTO's Committee on Trade and Environment, which has not achieved any concrete results despite years of meetings and discussions. *See* Shaffer, *supra* note 256 (manuscript at 52–55).

295 *See* Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709, 714 (1998) (arguing that the WTO "lacks the capacity to make decisions on environmental issues and other non-trade subjects when dealing with problems that require expertise"); *see also supra* p. 534 (discussing an alleged pro-trade bias on the part of WTO bureaucrats). Esty does think that, in the absence of a global environmental organization, the WTO must "by default" play a role in environmental regulation. Esty, *supra*, at 714.

One might argue that the WTO should make up for its lack of skill by expanding its staff to include environmental experts who could advise panels on how best to address spillover questions. Of course, this is just another way of saying that the WTO should add the resolution of environmental spillovers to its docket, a contention we reject for the reasons discussed in the text.

296 One might argue that international trade and the global environment are inextricably linked, and that by refusing to decide environmental questions the WTO necessarily tilts the scales against environmental concerns. *Cf.* Sara Dillon, *Trade and the Environment: A Challenge to the GATT/WTO Principle of "Ever-Freer Trade"*, 11 ST. JOHN'S J. LEGAL COMMENT. 351, 381–82 (1996) (arguing that GATT panels' failure to consider the complexity of trade's effects on the environment and other nontrade concerns results in a bias in favor of free trade). But this argument proves too much. International trade affects a multitude of nontrade issues, including public health and national security. If nations began to grant the WTO authority to resolve disputes on matters "linked" to world trade, they would sign away vast areas of governmental authority.

from the United States Supreme Court's role under the dormant commerce clause, an institution can accomplish the modest task of policing trade discrimination without itself having been popularly selected.[297] In contrast, a structure providing substantial regulatory discretion on issues like the environment will require continuing inputs from the political processes of member states.[298]

The experience of the European Union (EU) confirms this dynamic. As the EU has undertaken increasingly greater regulatory responsibilities on behalf of its member states, administrative action through Brussels has become more important, providing a new locus for the influence of interest groups.[299] As the bureaucracy has grown, so too have complaints about the EU's "democratic deficit."[300] Accordingly, the EU faces an intractable dilemma. It can wield largely unaccountable power from Brussels or make the elected European Parliament more politically active. The former option is antidemocratic. The latter has the disadvantage of displacing the authority of the democratic processes of individual nations, which are more responsive to the preferences and traditions of their respective polities.

If the WTO were to assume a regulatory function, its legitimacy problem would be far more acute. Quite simply, there is no global demos.[301] It is thus difficult to imagine global structures akin to the European Parliament that could ensure representation of the diverse citizenry subject to the WTO's decisions.[302]

Our objection to regulatory standards within the WTO does not imply a general opposition to multilateral approaches to spillovers. When possible (that is, when the spillovers are not global in scope), nations would be better advised to reach agreement on international standards through regional rather than global fora. Because the citi-

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297 For discussion of the dormant commerce clause, see above at pp. 536–38. For a discussion of how trade discrimination can be policed in the WTO without substantially intruding on the substantive decisionmaking of member states, see below at section III.C, pp. 566–72.

298 *See* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 599 (1999) (suggesting that the issue of legitimacy would arise if environmental regulation were transferred from the national to the international plane).

299 *See* Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 COLUM. J. EUR. L. 499, 520 (1998) (finding that centralization of decisionmaking in social and economic areas has led interest groups to seek influence at the European Commission instead of with their respective domestic governments).

300 Bodansky, *supra* note 298, at 597 (noting the crisis of legitimacy in the European Union and analogizing it to emerging and potential crises of confidence for international regulatory governance); *see* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2472 (1991) (describing the democratic deficit as an impediment to the consolidation of the European Union).

301 Bodansky, *supra* note 298, at 600.

302 Some argue that providing more representation to NGOs may help cure a democratic deficit in the WTO. We believe, however, that more power for NGOs would only exacerbate the problem by giving undue leverage to special interests, for reasons we discuss below at pp. 571–72.

zens of nations in a particular region are more likely to have similar preferences, resources, political values, and economic systems, it may be easier for them to reach effective and enforceable regional agreements.[303] After nations have already formed such smaller compacts, it may be easier for them to move to a global agreement.[304]

Moreover, a global agreement that arises from such incremental steps is more likely to contain efficient regulations, precisely because the agreement emerged from a decentralized process subject to jurisdictional competition.[305] The different regional regimes can be comparatively assessed for efficiency before a global regime is constructed. Such a process sustains jurisdictions as laboratories for experimentation in the process of achieving a final resolution.[306]

Nations can address substantial spillovers that are already global in scope through separate multilateral agreements,[307] as they have already done in pacts like the Montreal Protocol on Ozone.[308] The discrete nature of these pacts and their institutional separation from the WTO will help prevent them from becoming easy vehicles for protectionism.[309] Of course, some might argue that using the already existing WTO would minimize the transaction costs associated with negotiating discrete agreements. In light of the other substantial impediments to global multilateralism on spillovers, however, transaction costs are not likely to be determinative factors in the conclusion of such agreements.[310]

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303 *See* Frederick M. Abbott, *Regional Integration and the Environment: The Evolution of Legal Regimes*, 68 CHI.-KENT L. REV. 173, 179 (1992) (suggesting that states with "common interests" are "more likely to achieve an integrated environmental regime than will the global universe of states"); Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT'L L. 231, 232 (1997) (suggesting that the EU has an advantage over multilateral organizations like the WTO in harmonizing policy because of the relatively similar economic systems of the EU's members).

304 *See* Abbott, *supra* note 303, at 201 (suggesting that "regional arrangements may establish effective models for global solutions to environmental problems"). Professor Abbott, however, also favors trade-related environmental measures within the GATT. *Id.*

305 For discussion of the reasons jurisdictional competition is conducive to efficient regulations, see above at pp. 559–61.

306 For a discussion of this view of federalism, see Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 777 (1995).

307 *Cf.* Stewart, *supra* note 288, at 2061 (suggesting that environmental "harmonization should focus on the most significant externalities").

308 Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3 (1987), *amended and adjusted*, 30 I.L.M. 537 (1990).

309 Thus, the argument that the WTO would be an appropriate forum for resolving spillovers because of its ability to enforce such agreements through authorizing trade sanctions is seriously flawed. The protectionist pressures we discuss above at pp. 556–58 would undermine the neutrality of these sanctions.

310 Indeed, in part because people in different nations are more likely to agree that specific pollutants are a problem than to submit to general environmental regulation, "transboundary pollu-

Thus, the regulatory model should be rejected. A regulatory commission within the WTO would increase, rather than reduce, the leverage of special interest groups and would detract from, rather than reinforce, democracy.[311] Indeed, just as the WTO's trade regime replicates the positive features of American federalism, a trade institution that moves toward a regulatory model risks incorporating the least desirable elements of centralized government.[312] Ironically, those who argue that the WTO should have regulatory authority would create the very sort of unaccountable institution, beholden to special interests, that they vigorously oppose.

C. The Virtues of the Antidiscrimination Model

Having explained the defects of the regulatory model, we can now appreciate the merits of the antidiscrimination model that the WTO has chosen to address national regulations that potentially interfere with free trade. As we have shown, the WTO has established an adjudicative system, complete with panels and appellate review, to resolve disputes among member states, including disputes about covert protectionism.[313] Under this system, the WTO does not enact labor, environmental, health, or safety regulations for its members. Rather, it reviews members' laws to determine whether they constitute instances of covert protectionism that violate WTO rules. Unlike the regulatory model, the antidiscrimination model has the potential to reinforce domestic democracy and to help generate sound regulatory regimes.

First, under the antidiscrimination mechanism, nations retain responsibility for promulgating their own labor, environmental, health, and safety regulations. Although interest groups may capture domestic

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tion is more likely to be addressed through bilateral and multilateral agreements designed to address specific transboundary pollution problems than through global or regional regimes of [general] liability or regulation." Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 985 (1997).

311 The influence of interest groups also poses problems for the antidiscrimination model we discuss in the next section. Because the jurisdiction of a regulatory commission is more open-ended, however, interest groups are a more serious problem in that context. For further discussion, see above at pp. 557–58.

312 In particular, the New Deal's success in undermining American federalism should serve as a warning regarding the fragility of the WTO. Just as the New Deal weakened regulatory competition among the states by providing the national government with expanded regulatory authority, *see* Sunstein, *supra* note 160, at 504–05 (suggesting that in the New Deal, the United States abandoned localism and competition among the states), an international commission would weaken regulatory competition among nation states. After the New Deal, interest groups gained a more substantial capacity to influence the regulatory agenda because federal agencies afforded them one-stop shopping and removed much of the restraint of jurisdictional competition. Similarly, an international commission would give interest groups greater capacity to press for global standards that favor them at the expense of the public welfare.

313 *See supra* pp. 531–32.

institutions,[314] these fora are both more familiar and more accountable than international bodies.[315] As a result, the regulations they adopt are less likely to abrade local nerves and generate animosity toward the free trade regime than global standards formulated by an international body. In addition, as we have shown, allowing nations to adapt their own standards to local tastes and levels of development encourages economic growth and jurisdictional competition that will ultimately lead to better regulatory measures.[316]

Second, the antidiscrimination model is less susceptible to capture by interest groups, including protectionist interest groups, than an international regulatory model would be. An antidiscrimination model does not require an administrative agency or commission to formulate regulations. It requires only a tribunal to determine the validity of members' regulations under a series of substantially determinate rules set forth in WTO instruments.[317] These rules limit the tribunal's discretion and make interest group lobbying less effective.

To be sure, no set of rules can remove all discretion from a tribunal.[318] Nevertheless, interest groups do not enjoy the same advantages in reshaping legal rules to their benefit when they petition a tribunal that they do in more open-ended commission processes resembling those of a legislature or administrative agency. The marginal effectiveness of additional expenditures on lobbying is lower at a tribunal than at a policymaking commission, because a tribunal operates under more constraints on its decisionmaking process and more barriers to interest group influence.[319]

The principal means of influencing a tribunal is a legal brief. Beyond a certain point, spending more resources on a brief provides little, if any, return. At some point, more money cannot make a brief

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314 *See supra* pp. 526–27.

315 *See* Stephan, *supra* note 262, at 699.

316 For these arguments, see above at pp. 559–60.

317 For a detailed discussion of such rules, see below at section IV.A, pp. 573–83.

318 *See, e.g.*, Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 963 (1995); Robert P. George, *One Hundred Years of Legal Philosophy*, 74 NOTRE DAME L. REV. 1533, 1546–47 (1999).

319 While the DSU provides for essentially automatic adoption and enforcement of final rulings, *see supra* pp. 531–32, one can conceive of less formal versions of a tribunal. Indeed, before adoption of the DSU, rulings of GATT dispute settlement panels did not have automatic effect. Rulings took effect only when the entire voting GATT membership approved of them; if they wished, losing parties could block adoption of adverse panel reports. *See* Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 396–97 (1996).

The DSU's move to "automaticity" has occasioned great controversy. *See* Movsesian, *supra* note 1, at 791–95 & n.108. For our purposes, however, the most important distinction is not between more and less formal tribunals, but between a tribunal that reviews national laws and a centralized bureaucracy with the power to establish global regulatory standards.

more persuasive.[320] In contrast, a commission's more open-ended decisionmaking process permits almost limitless avenues for interest group influence. Contributions can become larger, and political pressure can be brought to bear on both commissioners and those who appoint them.[321] In such a system, promises and threats grow more effective in direct proportion to the power of the interest group making them.[322] Moreover, because political inputs are necessary to ensure the legitimacy of policymaking bodies, a commission's personnel cannot be insulated as effectively from political pressure as the members of a tribunal.[323]

In addition to blunting interest group pressure, the WTO's new adjudicative structure may have positive effects on members' compliance with international trade obligations.[324] The consent of a losing party is no longer required for adoption of a WTO ruling, as it was under the old regime. Rather, a ruling takes effect automatically in the absence of a unanimous contrary vote by the entire WTO membership; stalling is no longer an option.[325] Appellate review further promotes the regular application of determinate rules, which will in turn encourage members to live up to their trade obligations.[326]

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320 *Cf.* Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219, 226–27 (1997) (showing that a litigant faces diminishing marginal returns from additional expenditures on lawyers).

321 *See id.* at 228.

322 Professor Merrill observes that the more an interest group spends, "the greater the expected value of the legislative output." *Id.*

323 Therefore, scholars are wrong to suggest that the same arguments that support international trade institutions also require international institutions that would set environmental standards. For an example of such scholarship, see Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1318 (1997), asserting that "[t]he same kinds of imperfections which suggest the need for legally protecting free trade . . . also tend to support efforts to harmonize or coordinate environmental regulations." Rules prohibiting protectionism can be laid down largely in advance and can then be implemented by a tribunal. In contrast, determining the content of environmental rules requires an institution with substantial policymaking power. Once it acquires such power, a policymaking institution requires continual political input to remain accountable and legitimate. This political input will in turn, however, exacerbate the undue influence of interest groups. Thus, the case for international trade institutions is stronger than that for international environmental institutions: basic juridical institutions can promote trade, but setting international environmental standards requires policymaking institutions. For further discussion of the need for political accountability to protect the legitimacy of policymaking bodies, see above at pp. 563–64.

324 *See* Movsesian, *supra* note 1, at 792. The WTO's potential to promote compliance has been the subject of heated debate. *See id.* at 791–95. For a more complete description of the WTO's adjudicative system, see above at pp. 531–32.

325 Of course, a unanimous contrary vote is extremely unlikely, given that the winning party would have to disavow its own victory in order for opposition to be unanimous. *See supra* pp. 531–32.

326 *See* Movsesian, *supra* note 1, at 791–92.

Of course, members may choose to keep their laws, whatever the WTO decides, and accept retaliation from their trading partners.[327] Indeed, one would expect members to resist compliance with adverse rulings when the stakes are sufficiently high.[328] The existence of this "escape hatch," however, constitutes an advantage of the WTO system. A more coercive system would create greater friction with national governments and might instigate a backlash against the trade regime. In addition, the ability of members to retain their regulations despite adverse rulings serves as a useful check against overreaching by the WTO.

We also recognize that some have objected to the WTO's adjudicative system because of its "democratic deficit."[329] Critics decry the fact that the WTO has authority to invalidate laws enacted by national legislatures which, unlike WTO panelists, remain accountable to the citizens who elect them.[330] One cannot, however, assess whether a system reinforces democracy as a whole by simply summing up the democracy quotient of each of its constituent parts. The United States constitutional system has rights, and procedures for enforcing those rights, that are insulated from majority will. Yet, as John Hart Ely has argued, such nonmajoritarian institutions ensure that American democracy flourishes.[331]

Critics also suggest that to remedy this "democratic deficit," the WTO should allow nongovernmental organizations (NGOs) to participate in both policymaking and the dispute settlement process.[332] With regard to policymaking, critics argue that the organization should allow NGOs to attend meetings of the General Council and working committees; some even argue that the WTO should allow NGOs to sit

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[327] *See supra* p. 532.

[328] Movsesian, *supra* note 1, at 817.

[329] Esty, *supra* note 295, at 715 (quoting Naomi Roht-Arriaza, *The Committee on the Regions and the Role of Regional Governments in the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 413, 420 (1997)) (internal quotation marks omitted); *see* Atik, *supra* note 129, at 230, 236–39; Dillon, *supra* note 129, at 248.

[330] *See* Housman, *supra* note 2, at 730–31.

[331] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980) (arguing that the United States Supreme Court is capable of democracy-reinforcing judicial review).

[332] Esty, *supra* note 295, at 715, 727–28 (quoting Roht-Arriaza, *supra* note 329, at 420) (internal quotation marks omitted); *see also* Charnovitz, *supra* note 132, at 331 ("Nongovernmental organizations . . . should be given opportunities to participate in the work of the World Trade Organization . . . ."); Ragosta, *supra* note 135, at 751–52; Shell, *supra* note 29, at 907–25; G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 376 (1996) [hereinafter Shell, *Trade Stakeholders Model*]; Mark Edward Foster, Note, *Trade and Environment: Making Room for Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393, 435–37 (1998).

in on multilateral trade negotiations.[333] With regard to dispute settlement, they argue that the WTO should allow NGOs to file amicus briefs as a matter of right, rather than at the discretion of a panel, as is now the case.[334] Some would go even further, arguing that NGOs should have "standing to initiate . . . proceedings as complaining parties."[335]

Critics believe that greater NGO participation would enhance the legitimacy of the WTO by airing the views of people around the world who care deeply about trade-related issues.[336] Among these people are environmentalists, consumer and human rights advocates, and members of labor unions.[337] For a variety of reasons, critics claim, governments often fail to present these views to the WTO.[338] NGOs can correct that error by ensuring that the organization hears from groups that reflect the "richness and diversity of civil society."[339]

Moreover, critics argue, NGO participation would foster trust in the WTO because NGOs would educate their members about the organization.[340] Environmentalists, for example, are more likely to rely on NGOs to explain the impact of WTO policies and rulings than on government agencies or the WTO itself.[341] Therefore, by excluding NGOs, the WTO risks losing the public support that it desperately needs to carry out its mission.[342]

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333 *See* Charnovitz, *supra* note 132, at 340–48; Esty, *supra* note 295, at 727–29; *see also* Kevin C. Kennedy, *The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 375, 423–25 (1998) (discussing arguments regarding NGO participation). The WTO already allows NGOs to attend plenary sessions of ministerial meetings. Over 800 NGOs attended the Seattle ministerial conference. *See* Stewart & Karpel, *supra* note 138, at 627. Still, WTO guidelines do not allow NGOs "to be directly involved in the work of the WTO or its meetings." WORLD TRADE ORG., WTO GUIDELINES FOR ARRANGEMENTS ON RELATIONS WITH NON-GOVERNMENTAL ORGANIZATIONS, WT/L/162 (July 18, 1996), http://www.wto.org/english/forums_e/ngo_e/guide_e.htm.

334 *See* Ragosta, *supra* note 135, at 754–56. For more on the WTO's treatment of amicus briefs, see Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT'L L. 113, 123 (1999); Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, the Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 334–35 (2000); and Stewart & Karpel, *supra* note 138, at 625–27.

335 Kennedy, *supra* note 333, at 424; *see* Shell, *supra* note 29, at 838.

336 *See* Esty, *supra* note 295, at 716–19; *see also* Shell, *Trade Stakeholders Model*, *supra* note 332, at 370, 377–78; *cf.* Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. Q. 45, 46 (1995) ("Bringing NGOs more deeply into the fold of international institutions . . . could enhance the legitimacy of those institutions . . . .").

337 *See* Shell, *supra* note 29, at 838; Shell, *Trade Stakeholders Model*, *supra* note 332, at 376.

338 *See* Esty, *supra* note 295, at 718–19; *see also* Charnovitz, *supra* note 132, at 352–54; Shell, *Trade Stakeholders Model*, *supra* note 332, at 381.

339 Esty, *supra* note 295, at 718.

340 *See* Charnovitz, *supra* note 132, at 351; Esty, *supra* note 295, at 717.

341 Esty, *supra* note 295, at 717; *cf.* Wallach, *supra* note 135, at 776 (describing the Clinton Administration's positive "spin" on a WTO ruling that many environmentalists found objectionable).

342 Charnovitz, *supra* note 132, at 331, 351.

Finally, critics believe that NGOs can help mitigate a pro-trade bias that characterizes WTO decisionmaking.[343] By describing the impact of trade on the environment, for example, NGOs can supply panelists with a necessary context for their rulings.[344] NGOs can accomplish this task more effectively than can government agencies, critics claim, because of NGOs' often superior expertise and their freedom from bureaucratic constraints.[345]

We do not agree that the WTO should allow NGOs a direct role in the dispute settlement process. Such a role would give NGOs — groups that are sometimes unaccountable even to their own memberships — too great a measure of influence.[346] Moreover, conferring standing on NGOs would inevitably aggrandize the WTO's bureaucracy, which would acquire power to designate which of the many NGOs with an interest in a dispute could appear.[347] We are also skeptical of claims that NGOs should be able to file amicus briefs as a matter of right.[348] Even in the United States Supreme Court, organizations that do not have the permission of the parties need leave of the Court to file amicus briefs.[349] Furthermore, in the international context, there is a risk that amicus briefs will overshadow the submissions of developing countries, a problem that generally does not exist in the domestic context.[350]

Similarly, permitting NGOs a role in policymaking would allow interest groups, including protectionist groups, to distort the world trade regime and exacerbate the power and access differentials between the developed and developing worlds.[351] In short, providing NGOs with special access would undermine the key benefits of a properly con-

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[343] *See id.* at 354–55 (arguing that NGOs should have the right to make presentations to panels because of the WTO's lack of attention to environmental issues).

[344] *See id.* at 355; *see also* Dillon, *supra* note 129, at 208 (arguing that the present dispute settlement system "suppresses significant contextual issues surrounding the particular dispute").

[345] *See* Esty, *supra* note 295, at 721–22.

[346] *See* Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 870 (1996). On NGOs' lack of accountability to their memberships, see Spiro, *supra* note 253, at 963.

[347] For example, "hundreds, if not thousands," of international and national NGOs "deal with environmental issues." Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 319 (1996). As Nichols points out, however, WTO panels "cannot possibly hear from thousands of groups." *Id.* Someone — presumably someone in the WTO — will need to decide which of these groups may appear in a dispute involving an environmental question. The process of choosing among them "will involve normative and evaluative decisions that will be, at best, judgmental and, at worst, arbitrary." *Id.*

[348] Currently, NGOs may submit amicus briefs to WTO panels at the panels' discretion. *See supra* p. 570.

[349] SUP. CT. R. 37.3(b).

[350] *Cf.* Ragosta, *supra* note 135, at 756 & n.69 (discussing developing countries' concerns about this risk).

[351] We discuss these power imbalances above at pp. 556–57.

structed international trade regime — mechanisms that reduce the power of interest groups in order to permit trade and democracy to flourish.

IV. A JURISPRUDENCE OF COVERT PROTECTIONISM

Having demonstrated the advantages of the antidiscrimination model, we now develop a jurisprudence that would allow the WTO to distinguish between labor, environmental, health, and safety measures that are genuine and those that are merely disguised attempts at import discrimination. In our view, the WTO generally should employ a series of procedure-oriented tests that screen for covert protectionism. These tests would reveal whether an ostensibly neutral measure was actually designed to place burdens on imports and would do so without supplanting national judgments on labor, health, safety, and the environment. In addition, the tests would improve domestic democracy by limiting the power of interest groups to advance protectionist measures that detract from the general welfare.[352]

Although, as we shall see, the WTO has incorporated many of the factors we recommend, no one has yet offered a theory justifying those factors or discouraging the WTO from adopting others. Without a comprehensive theory, it will be easy for the WTO to go astray in the future, particularly given the pressure to adopt the regulatory model.

Before describing our theory, however, we need to define generally the subset of labor, environmental, health, and safety regulations that constitute covert protectionism. In our view, a measure qualifies as covert protectionism if it has two characteristics. First, the measure must be one that would not have been enacted but for the benefits it gives domestic industries by restraining imports.[353] Second, the measure must lack a public interest foundation.[354]

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[352] As we discuss below at pp. 574–75, by increasing the transparency of nations' regulations, our jurisprudence will have the useful by-product of restraining interest groups more generally.

[353] For example, assume that European farmers, and only European farmers, employ an agricultural method that the European Commission believes to endanger human health. Assume further that the European Commission is incorrect; that is, that the method poses no risks to human health. A European regulation banning the sale of crops grown with the method might not be wise, but it would not constitute covert protectionism. As the regulation would affect only European farmers, one could hardly see it as directed at foreign competition.

[354] Assume another set of facts; namely, that American farmers, and only American farmers, employ an agricultural method that the European Commission believes to be dangerous. Assume that the Commission is correct; that is, that the method does pose risks to human health. We would not want the WTO to invalidate a European ban on the sale of crops grown with this method, even if the Commission would not have banned their sale if European farmers also employed the method in question. Generally, the WTO should not invalidate good regulations simply because they have bad motivations. That approach would invalidate useful legislation — a social cost in itself — and also undermine support for free trade by targeting protections desired by a nation's citizens.

This second criterion may be subsumed as a practical matter by the first. We shall see that governments often rely on "public interest" justifications to support measures that burden imports.[355] When those justifications are false, they raise an inference that the government's real motive was to benefit domestic industry.[356] If a government bans the sale of foreign agricultural products on the ground that they are dangerous, for example, and the products are in fact safe, the ban might suggest that the government was really trying to protect domestic farmers. However one employs the public interest requirement — either as an independent criterion or as an indication of protectionist motive — the WTO should avoid invalidating measures that serve some bona fide public welfare function.

A. Rules for Identifying Covert Protectionism

Having defined the kind of regulations that the WTO should prohibit, we now describe the tests that will best enable the organization to identify those regulations in a manner that reinforces rather than detracts from democratic accountability. To begin, the WTO should require that labor, environmental, health, and safety regulations affecting international trade be transparent and performance-oriented. The transparency principle requires that domestic regulations provide fair notice to affected firms. In other words, a government should offer affected firms an opportunity to comment on regulations before they take effect. In addition, a government should publicize the terms of regulations in some accessible manner after they take effect.[357] Performance orientation requires that labor, environmental, health, or safety standards be expressed in terms of the objectives the standards seek to accomplish rather than the production processes that the regulated industries must employ.[358]

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355 *See* Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, *in* 2 FAIR TRADE AND HARMONIZATION 95, 136 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (noting that "this sort of disguise is frequently practiced by national governments on behalf of domestic industries").

356 *See* Sykes, *supra* note 25, at 17.

357 *See* Catherine Curtiss & Kathryn Cameron Atkinson, *United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 117–18 (1995) ("Transparency means that measures affecting trade must be known to those affected, through notice and publication of standards and procedures."); Spaulding, *supra* note 227, at 1136–37 (defining transparency and "citizen rights-to-know" similarly). Other commentators define transparency more broadly to include the requirement that regulations affecting foreign products be consistent in their objectives with regulations that affect comparable domestic products. *See* Jonathan T. Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN.-U.S. L.J. 39, 49 (1994). We use the more limited definition here and address the requirement of consistency separately. *See infra* pp. 575–76.

358 *Cf.* Patti Goldman, *The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulation*, 7 J. ENVTL. L. & LITIG. 11, 13–14 (1992) (noting the decision of a GATT dispute resolution panel that the U.S. Marine Mammal Protection Act violated GATT because it was

The requirements of transparency and performance orientation reduce the potential for covert protectionism by increasing the likelihood that national regulations will affect domestic and foreign producers equally, helping to ensure that both kinds of producers face similar regulatory costs.[359] Foreign firms may have greater difficulty complying with generally applicable regulations simply because the firms are less familiar with the ways of domestic bureaucracy. Transparency levels the playing field by ensuring that regulations are publicized and the steps for compliance are clear.[360] Similarly, because production processes often differ from country to country, regulations framed in terms of processes could easily discriminate against foreign producers. Performance standards avoid this problem by focusing on a product's use, which is likely to be the same at home and abroad.[361]

The transparency and performance-orientation requirements also reduce the likelihood of interest group capture of the legislative process, thus facilitating representative democracy while advancing free trade. Opaque legislation helps interest groups by raising the price that the public must pay to understand the legislation's terms.[362] By requiring clarity and accessibility, the transparency requirement would impede this interest group strategy.[363] Moreover, by giving importer

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not based on product characteristics, but instead focused on the process by which the product was harvested).

359 *See* Robert L. McGeorge, *The Pollution Haven Problem in International Law: Can the International Community Harmonize Liberal Trade, Environmental and Economic Development Policies?*, 12 WIS. INT'L L.J. 277, 341 (1994) ("If domestic and foreign producers of a particular product would incur similar costs in producing goods satisfying the higher internal standards, the higher standards would not adversely affect the competitive relationship between domestic and foreign producers."). Of course, regulations rarely impose perfectly equal effects on regulated companies. For instance, if, as is likely, foreign companies have lower sales volumes within a given country than do that country's own domestic companies, the domestic companies may gain advantages in the market through their greater economies of scale in complying with regulations. *See* Richard B. Stewart, *International Trade and Environment: Lessons from the Federal Experience*, 49 WASH. & LEE L. REV. 1329, 1334 (1992). Nevertheless, a substantially equal incidence of regulation on domestic industry gives one comfort that the regulation does not amount to covert protectionism. If domestic industry pays costs as well, it gives foreign producers some virtual representation in the domestic political processes that lead to the regulation and provides some assurance that the regulation is not discriminatory.

360 *See* Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 WIS. INT'L L.J. 246, 296–97 (1996) (understanding the transparency requirement as a means of preventing discrimination against foreign products).

361 *See* Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 316–19 (1994). Another advantage of performance standards is that they encourage innovation by promoting industrial techniques that improve performance. *See* Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 573 (1979).

362 *See supra* pp. 547–48.

363 *Cf.* Bello, *supra* note 114, at 418 (explaining that some interest groups oppose the WTO because the regime makes it harder for interest groups to hide the inefficiencies of their favored regulations); Hansen, *supra* note 214, at 1063 (observing that "[i]n the case of environmental trade

groups notice and allowing them to comment on regulations, the transparency requirement would give virtual representation to diffuse groups, such as consumers, who would benefit from low cost imports but might otherwise not be well represented in the regulatory process. The performance-orientation requirement would do likewise by ensuring that legislation is structured in terms of goals rather than processes: the public generally understands substantive goals more readily than administrative processes.[364]

In addition, the transparency and performance-orientation requirements would not intrude on the substance of national decisions about labor, the environment, health, or public safety because a nation can make a regulation more transparent and performance-oriented without changing its essential content.[365] Indeed, by promoting firms' compliance, the transparency requirement could actually serve to advance a regulation's objectives.

The transparency and performance-orientation requirements, however, would not be sufficient to prevent all instances of covert protectionism. In some circumstances, only foreign firms make a given product. Thus, the weight of a regulation directed at that product, even a transparent regulation expressed in terms of performance standards, would fall only on foreign firms. As we have seen, this inequality of incidence offers the opportunity for disguised protectionism.

In these circumstances, the WTO should apply a consistency requirement, examining whether the regulation is consistent with regulations affecting comparable domestic products.[366] For example, if a country bans the sale of certain food imports on the ground that they pose a risk of cancer, the WTO should examine whether the country also bans the sale of domestic food products that present similar risks. If a country fails to apply neutral principles to similarly situated do-

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measures, a measure that fails to reveal the specific level of environmental protection sought is far more susceptible to political capture than a rule that transparently reveals the importing state's specific environmental objective").

364 *Cf.* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 30–31 (1992) (discussing agencies' incentives to increase regulatory complexity and thus become less susceptible to public monitoring and control).

365 *Cf.* Alan O. Sykes, *Externalities in Open Economy Antitrust and Their Implications for International Competition Policy*, 23 HARV. J.L. & PUB. POL'Y 89, 95–96 (1999) (noting that substantive differences are "permitted under an agreement that merely requires non-discrimination, transparency, and due process").

366 *See* Warren H. Maruyama, *A New Pillar of the WTO: Sound Science*, 32 INT'L LAW. 651, 670–71 (1998) (discussing the consistency requirement under article 5.5 of the SPS Agreement); Vern R. Walker, *Keeping the WTO from Becoming the "World Trans-science Organization": Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 CORNELL INT'L L.J. 251, 269–70 (1998) (same); Michele D. Carter, Note, *Selling Science Under the SPS Agreement: Accommodating Consumer Preference in the Growth Hormones Controversy*, 6 MINN. J. GLOBAL TRADE 625, 647–48 (1997) (same).

mestic products, the omission should raise an inference that the country is engaging in covert protectionism.[367]

Like the transparency and performance-orientation requirements, a consistency requirement would reduce the power of protectionist interest groups. If regulations affecting foreign producers must comport with regulations affecting similarly situated domestic producers, those domestic producers gain an interest in preventing unduly burdensome regulations on the foreign producers.[368] The consistency requirement would thus help reduce the ability of concentrated groups to secure regulations for themselves at the expense of the public interest.

Of course, to assess the consistency of regulations, the WTO would need to identify the public policies that the regulations serve.[369] As a result, the consistency requirement would intrude somewhat more on the policymaking role of nation states than would the transparency and performance-orientation requirements. Nevertheless, the WTO would not need to assess the wisdom of public policy justifications. It would take the public policy values as a given and decide whether regulations on similar subjects consistently reflect those values. Moreover, if the WTO did invalidate a regulation for inconsistency, the nation could revise the regulation as long as it did so under a more neutral and principled regulatory framework.

A jurisprudence composed of these three requirements — transparency, performance orientation, and consistency — should eliminate most instances of covert protectionism. Nonetheless, other potentially troubling scenarios remain. Suppose that only American farmers use a given method in cultivating an agricultural product, and the European Commission believes that the method introduces contaminants that render the product harmful to human health. On this basis, the Commission restricts the sale of all batches produced using the method

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367 *See* Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1422–25 (1994) (describing instances of "spurious product" distinctions as indicative of protectionism, even when regulations are facially neutral).

368 The United States Supreme Court has relied on a similar insight in dormant commerce clause cases. In that context, the Court often asks whether legislation burdens "in-state economic interests . . . to a similar extent as out-of-state economic interests; where such parity exists, the Court will be less likely to find impermissibly protectionist legislation." Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1620 n.67 (1999). In these circumstances, the Court believes that in-state groups have an incentive to lobby against abusive legislation. *See* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 1004–05 (1998); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981) ("The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse.").

369 *Cf.* Maruyama, *supra* note 366, at 671 (describing how the Appellate Body of the WTO relied on an assessment of the European Community's motives for banning beef containing growth hormones in order to decide whether the ban was a case of regulatory protectionism).

in question. The restriction is transparent, performance-oriented, and consistent with other European health regulations. Finally, suppose that the Commission is wrong; that is, that the method in question does not render the product dangerous for human consumption.

This scenario presents the WTO with a difficult dilemma. On the one hand, the fact that the product is not actually harmful may suggest that the restriction is a disguised attempt to protect European producers. On the other hand, evaluating the public interest bona fides of labor, environmental, health, and safety regulations would create significant friction with members' sovereign decisions on national welfare and would require the WTO to make substantive decisions for which it is not well suited.[370]

A procedure-oriented approach would help solve this dilemma. The WTO could require members to support their contentions that products cause harm to the environment or public health with some modicum of objective evidence.[371] For example, the organization could require that members justify trade restrictive measures with scientific studies.[372] The requirement should not be too stringent, however. For instance, members would not necessarily need to conduct their own studies; they could rely on those carried out by other members or by international bodies. Moreover, members would retain a great deal of discretion in determining how best to respond to scientific evidence regarding a particular trade restrictive measure. Studies on the safety of a given product may support a variety of reasonable policy judgments, some more cautious than others.[373] In any event, the point would not be to second-guess members' policy judgments.[374] The WTO would simply confirm that members had some objective basis for their restrictions on imports. The organization would thus verify that proffered public interest justifications were not merely disguises for discrimination.

An objective evidence requirement, like the other procedure-oriented tests we have discussed, would weaken the power of protectionist interest groups, thereby reinforcing domestic democracy. First,

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370 For discussion of the reasons why the WTO should refrain from making substantive regulatory decisions, see above at section III.B., pp. 552–66.

371 *Cf.* ESTY, *supra* note 25, at 117–21, 235 (arguing for a "legitimacy" test that turns on the scientific basis for environmental measures).

372 *See* Sykes, *supra* note 25, at 17 (discussing the "sham principle" and scientific evidence); *see also* Kennedy, *supra* note 213, at 456 (discussing the "scientific evidence" requirement under the SPS Agreement); Maruyama, *supra* note 366, at 663 (same).

373 Scientific opinion may be divided, for example. Even when there is a clear majority opinion among experts on a product's safety, the presence of dissenting views may justify the position that prudence nevertheless requires restrictions on sale. For discussion of these matters see, for example, Kennedy, *supra* note 213, at 456; and Walker, *supra* note 366, at 262–63.

374 *See* Howse, *supra* note 135, at 156.

it would create incentives for nations to bring experts into their regulatory processes, thus offering some objective barrier to interest group pressures.[375] Second, by requiring that members illuminate the factual bases for their regulations, an objective evidence requirement would make it more difficult for interest groups to mislead the general public.[376]

Once a nation provides reasonable support for its regulation, the WTO should not engage in a further, searching inquiry into the bona fides of the nation's public interest justifications. One way of explaining our choice of this deferential standard is in terms of what are called "type I" and "type II" errors. A type I error is a false positive,[377] which occurs when a nation enacts a regulation that does not constitute covert protectionism, but the WTO nonetheless invalidates the measure. A type II error is a false negative,[378] in this context an improper acquiescence in covert protectionism. Increasing the standard of review would decrease type II errors but would increase type I errors because the WTO would invalidate rules even with substantial evidentiary support. The question whether to raise the standard of review beyond a deferential one is as follows: does the more searching inquiry reduce the costs of the sum of type I and type II errors after subtracting for any increased administrative costs? This calculation in turn depends on the frequency of type I and type II errors generated by a deferential standard and the relative costs of each kind of error.

First, if we are right that the previous three tests — transparency, performance orientation, and consistency — will succeed in ferreting out most covert protectionism, type II errors should be relatively rare, thus decreasing the marginal benefits of such an inquiry. Second, the costs of a type I error will be quite high because, as a result of the error, the WTO would wrongly impugn a nation's regulatory deci-

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375 *Cf.* Whitney Debevoise, *Access to Documents and Panel and Appellate Body Sessions: Practice and Suggestions for Greater Transparency*, 32 INT'L LAW. 817, 824 (1998) (arguing, in the context of dispute settlement proceedings, that the use of "expert review groups" could counter interest groups' submission of "misleading or . . . false information").

376 The "hard look" doctrine, which "require[s] that agencies offer detailed explanations for their actions," serves a similar purpose in American administrative law. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 491 (1997). By forcing agencies to publicize the reasons for their decisions, the doctrine helps limit the power of interest groups to capture agency processes and subvert them to their own ends. *Id.*; *see* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 933 (1990); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61–63 (1985).

377 *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1504 (1999) (defining a Type I error).

378 *See id.* (defining a Type II error).

sion.[379] Administrative costs would also rise because the parties and the tribunal would have to expend more effort and hire more experts to sift carefully through conflicting evidence. This requirement would be particularly problematic for developing nations that lack the resources for this kind of inquiry. Thus, given this framework of analysis, deference should go to the nation's own assessment of the risks. As in administrative law generally, the actual language the tribunal uses ("modicum of evidence," "reasonable support," etc.) is less important than the spirit of deference in which it conducts the inquiry.[380]

For similar reasons, we believe that a "least restrictive means test" might also be useful — but only if deployed with substantial deference to members' regulatory choices.[381] A least restrictive means test would allow the WTO to inquire whether there were other measures that could have achieved the same policy goals but interfered with imports to a lesser degree.[382] If there were such alternatives, the WTO might conclude that the member had chosen the more trade-restrictive option because it benefited domestic producers.

For instance, consider this hypothetical. A member state requires the manufacturers of a somewhat risky product to post a bond covering the costs of injury and refuses to allow importers to post the bond in lieu of manufacturers. This restriction might well pass the four tests we have established[383] and yet still be protectionist if manufacturers from the developing world were unable to obtain bonds because of their inefficient financial markets. A least restrictive means test would condemn the regulation because the member state could accomplish its objective — maintaining a fund for those injured — by imposing liability on importers.

A least restrictive means requirement has some appeal. In many cases, the fact that a nation had chosen a regulation that unnecessarily restricted trade would suggest a protectionist purpose. Moreover, a

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[379] *Cf.* Howse, *supra* note 135, at 156 (arguing that trade tribunals should not second-guess the judgments of nations in the context of SPS measures).

[380] *Cf.* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 291 (2000) (noting that courts show deference to an agency's own interpretation of its regulations, despite varying formulations of the standard of review).

[381] *See* Kennedy, *supra* note 213, at 459 (discussing the "'least trade restrictive' principle" under GATT); Sykes, *supra* note 25, at 21–22 (discussing the least restrictive means requirement); *cf.* Schoenbaum, *supra* note 270, at 276–77 (arguing against the least restrictive means test in the context of GATT article XX(b)).

[382] Kennedy, *supra* note 213, at 458–59; *see* Maury D. Shenk, *WTO Dispute Settlement Body — Article XX Environmental Exceptions to GATT — National Treatment — Consistency with GATT of U.S. Rules Regarding Imports of Reformulated Gasoline*, 90 AM. J. INT'L L. 669, 672–74 (1996).

[383] The regulation in this example is transparent and focuses on the performance of the product. The regulation could also satisfy the consistency requirement if it were consistent with regulations that the nation applied to similar domestic risky products. It could satisfy the objective evidence requirement if the product were indeed risky.

least restrictive means requirement would entail only a limited examination of national programs. The WTO would not assess the value of the public policy at issue and, assuming the nation had taken the least trade-restrictive course, would permit the nation to pursue its desired objectives.[384] A least restrictive means requirement would thus create less friction than a straightforward cost-benefit analysis involving a direct evaluation of national goals.[385]

Nonetheless, a least restrictive means requirement could still be deployed in a manner that would provide too much discretion to the WTO.[386] While not as intrusive as a cost-benefit analysis, an evaluation of legislative alternatives — even "reasonably available" legislative alternatives — could involve sensitive judgments on the substance of national regulatory agendas. Over time, a test that required the WTO to assess the merits of competing regulatory proposals could encourage the development of a jurisprudence of "preferred" solutions to labor, environmental, health, and safety issues. As we have shown, this is just the sort of jurisprudence the organization should avoid.[387] Thus, in employing the least restrictive means test, the WTO should defer to the regulatory objectives of member states. It should determine that a less restrictive regulation is reasonably available only if the regulation achieves essentially the same objective as the trade restrictive regulation while using essentially the same amount of resources and not distorting any other objective.

The procedure-oriented jurisprudence we develop here would allow the WTO to invalidate covertly protectionist measures without supplanting the substance of national regulatory policies. It could also help shape emerging doctrine in other areas of WTO law. For example, one perplexing question involves the standard of review that a panel should apply to the factual determinations of national authori-

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384 "A . . . 'least trade-restrictive' test could work as an efficiency precept, forcing attention to the means chosen to pursue environmental goals, without threatening the goals chosen." ESTY, *supra* note 25, at 48 n.15; *see also* Sykes, *supra* note 25, at 22 (noting that the least restrictive means principle allows governments to pursue their own chosen objectives).

385 *See* David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, 1997 U. CHI. LEGAL F. 331, 345 & n.42 (distinguishing between cost-benefit analysis and the least trade restrictive requirement). For a proposal for a modified cost-benefit analysis with regard to environmental measures, see ESTY, *supra* note 25, at 127–30.

386 *See* Howse, *supra* note 135, at 140 (noting that "[a] legal economist can always imagine a hypothetical welfare-maximizing regulatory instrument that achieves a public purpose without resort to trade restrictions").

387 Moreover, in some cases, the objectives of a least restrictive means requirement will be met by the consistency requirement we discuss earlier. If a regulation burdens imports more than is necessary to respond to some risk, the regulation will likely be inconsistent with regulations that address similar risks created by domestic products.

ties.[388] The DSU provides that a panel should make "an objective assessment of the facts of [a] case,"[389] but it does not elaborate further, and disputes have already arisen about the precise degree of deference that a panel should give to the findings of national agencies.[390] The Appellate Body has so far failed to offer definitive guidance on the question.[391]

A procedure-oriented jurisprudence could be quite valuable in this context. Rather than engage in a de novo review, a panel could inquire whether a national agency had employed transparent procedures and considered all the evidence presented to it;[392] the panel could also apply a deferential "objective evidence" test of the sort we have discussed. The panel could thus assess the record in a case without disparaging the factfinding ability (or veracity) of national authorities. While its full development must await another occasion, such a procedure-oriented approach to standard-of-review questions holds much promise.

It is as important to understand what kinds of regulations our tests would leave standing as to understand what kinds they would invalidate. Our tests would permit nations to make their own trade-offs between labor, environmental, health, and safety goals on the one hand, and economic growth on the other, so long as the nations do not discriminate against imports. They would permit nations to accept scientific judgments that other nations might reasonably believe are wrong or ill-considered. In short, the tests would preserve space for autonomous democratic decisionmaking while insulating such decisionmaking from the distortions of protectionist interest groups.

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388 *See generally* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996). Another sort of standard-of-review question relates to the deference a panel should give to the *legal* determinations of national bodies; for example, determinations that a measure comports with WTO rules. *See* Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1237 (1998). There seems to be little justification for deference to national legal determinations, since that would inevitably lead to conflicting and self-serving interpretations that would undermine the integrity of the WTO's dispute settlement system. *See id.*

389 DSU, *supra* note 108, art. 11.

390 *See* Lichtenbaum, *supra* note 388, at 1237–42; Craig Thorn & Marinn Carlson, *The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade*, 31 LAW & POL'Y INT'L BUS. 841, 846–47 (2000).

391 Lichtenbaum, *supra* note 388, at 1243–44. One Appellate Body decision that attempts to provide some guidance is *Hormones*, *supra* note 223. In that case, the Appellate Body noted that an "objective assessment of the facts," *id.* ¶ 117 (quoting DSU, *supra* note 108, art. 11) (internal quotation marks omitted), means neither de novo review nor "total deference," *id.* ¶ 117 (internal quotation marks omitted), and added that a panel could not deliberately disregard, refuse to consider, wilfully distort, or misrepresent the evidence put before it, *id.* ¶ 133. We discuss other aspects of the *Hormones* dispute below at pp. 599–600.

392 *Cf. Hormones*, *supra* note 223, ¶ 133 (describing a similar test to determine whether a panel has made an objective assessment of the facts of a case).

Moreover, our tests would permit other measures that allow citizens to express their concerns about nontrade values. For example, a member could require that imports bear marks of origin — familiar declarations that goods are products of a foreign country.[393] Similarly, a member should be able to establish nondiscriminatory labeling requirements that provide consumers with information about the characteristics and environmental impact of products.[394] Finally, a member could grant a subsidy directly to domestic producers, so long as it was not targeted in a way that would impair benefits that other countries legitimately expect from tariff concessions.[395]

These sorts of measures would not raise as starkly the dangers of interest group capture that we have identified. For example, while origin marking and other labeling requirements might result in decreased market share for imports, they would do so only because they help consumers exercise choice.[396] If informed consumers *prefer* to

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[393] *See* GATT 1947, *supra* note 204, art. IX. A member could not discriminate among countries in doing so, of course, and would also need to ensure that marking requirements do not "materially reduc[e]" the value of the foreign products. *Id.* art. IX(4). For discussions of some of the issues raised by origin-marking requirements, see BHALA & KENNEDY, *supra* note 98, § 3-1(a), at 267–69; and JACKSON, DAVEY & SYKES, *supra* note 99, at 535–37.

[394] Labeling requirements would be subject to the provisions of two agreements we discuss at length below, the TBT and SPS Agreements. The TBT Agreement provides that labeling requirements must afford nondiscriminatory treatment to the products of other countries and must not be "more trade-restrictive than necessary to fulfil a legitimate objective," including the "protection of human health or safety, animal or plant life or health, or the environment." TBT Agreement, *supra* note 40, arts. 2.1–.2; *see also id.* Annex 1(1) (defining "technical regulation" to include labeling requirements). We have expressed concerns about too intrusive an application of the least restrictive means requirement. *See supra* pp. 579–80. The SPS Agreement, which applies to certain kinds of health and safety measures, requires nondiscriminatory treatment and that measures be based on appropriate scientific evidence. SPS Agreement, *supra* note 39, arts. 2.2–.3, 5.1; *see also id.* Annex A(1) (defining SPS measures to include labeling requirements). For a discussion of labeling under these various provisions, see Schoenbaum, *supra* note 270, at 294–95; *see also* Kennedy, *supra* note 6, at 101–02.

[395] *See* BHALA & KENNEDY, *supra* note 98, § 1-4(e)(2), at 103; Robert E. Hudec, *A WTO Perspective on Private Anti-Competitive Behavior in World Markets*, 34 NEW ENG. L. REV. 79, 90 & n.16 (1999); Sykes, *supra* note 25, at 15. In some circumstances, subsidies may justify the imposition of countervailing duties by other countries. *See id.* at 15.

[396] *See* Schoenbaum, *supra* note 270, at 295. Some have argued that labeling would be ineffective because of collective action problems. For example, even if an individual consumer would like to pay more for a domestic product, his one purchase will have negligible impact unless other consumers make the same choice. Because he cannot be sure what other consumers will do, he may rationally decide to purchase the lower-priced import. *See* Howse, *Workers' Rights*, *supra* note 226, at 160–61 (discussing labeling in the context of labor rights); *see also* Chang, *supra* note 25, at 2176–77 (discussing labeling in the context of environmental protection).

The decision to buy a domestic product rather than a lower-priced import, however, is in most cases a low-cost one. It appears that low-cost decisions pose less of a collective action problem than higher-cost decisions in which there is more at stake. *See* John H. Aldrich, *Rational Choice and Turnout*, 37 AM. J. POL. SCI. 246, 261 (1993) (observing that rational choice theory is not suited to low-cost/low-benefit decisions). Indeed, the well-known paradox of voting suggests that individuals may be willing to engage in low-cost acts to express themselves. *See* Dwight R.

spend more money to "buy local," our model would not obstruct them; our model seeks to prevent interest groups from imposing costs on consumers by disguising protectionist legislation as legitimate regulation. Similarly, although subsidies to domestic producers might serve protectionist ends, they at least would have the advantage of being more transparent than the subterfuges we address here. It is more difficult for interest groups to hide direct transfers of cash than to mask the protectionist goals of ostensibly neutral legislation.[397]

Accordingly, the jurisprudence we recommend would be advantageous for people both as consumers and as citizens. It would help ensure the availability of inexpensive products and would reduce the power of concentrated groups to pursue their narrow, self-interested agendas.

B. National Regulations and Extrajurisdictionality

Another important issue for the WTO is the nature of permissible public interest justifications for regulations that adversely affect international trade. Our view is that nations must have authority to enact regulations based on a broad variety of justifications, of which environmental protection, labor, public health, and safety are only examples. The only restriction we would impose is that, with a few important exceptions, public interest justifications must relate directly to the welfare of the regulating nation itself and not the welfare of other nations.

For example, assume a case involving two WTO members. The first, presumably a developing country, exempts textile factories from workplace safety regulations. The second, presumably a developed country, has stringent workplace safety rules that do apply to textile factories. After a campaign by labor and human rights advocates, the second country enacts a measure banning the importation of textiles from the first country; it argues that the ban is necessary to protect the safety of textile workers in the first country. In our view, this ban should not be permissible. Although WTO members should have the

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Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 192 (1988). For the paradox of voting for the rational choice model, see MUELLER, *supra* note 58, at 349–50, which explains that although individual votes have a negligible chance of affecting the outcome, millions of people nevertheless vote. Thus, if consumers really have any substantial interest in expressing themselves through their informed choice of products, it is not at all clear that collective action problems would frustrate them. A failure to respond to labeling may simply demonstrate that consumers are less offended by imports than environmental or other groups would like them to be.

397 *See* Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 494 (2000) (explaining that a "subsidy makes explicit the actual cost of protection and thus facilitates a conscious decision about whether the protection brings sufficient benefits to warrant the costs and the redistributional consequences, whereas a total exclusion of competition places a hidden cost on consumers in the form of higher prices").

authority to take steps to protect their own citizens, they should not have the authority to ban imports to protect citizens in the country of export.

Both the breadth of permissible justifications and the jurisdictional limit follow from our concern with promoting trade while reinforcing democratic government. For reasons we have discussed, domestic authorities can better determine the appropriate subject matter of regulation than can international bodies.[398] Domestic authorities are more familiar with national tastes and traditions and, at least in democratic polities, more accountable to citizens than international bureaucracies.[399] Moreover, as we have seen, allowing national authorities discretion to shape regulatory policies will promote jurisdictional competition that will ultimately improve the quality of regulations around the globe.[400]

Nevertheless, for some of the same reasons, nations should not generally be permitted to regulate on behalf of the welfare of people, or to protect the environment, in places outside their jurisdictions. Domestic authorities are not well positioned to assess the traditions and needs of foreign citizens, nor are they easily accountable for the effects of their decisions in foreign territory.[401] Moreover, permitting a nation to regulate to protect health, safety, workers, or the environment in another jurisdiction would empower rather than restrain interest groups. As we have seen, nations that are at different levels of development

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398 *See supra* section III.B.1–2, pp. 552–58. The advantages of allowing domestic institutions to regulate domestic conduct often appear in connection with conflicts-of-laws issues. *See, e.g.*, GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 337 (3d ed. 1996) (discussing conflicts of laws in the context of forum non conveniens doctrine).

399 *See* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 315 (1982) (noting the "principle of territorial sovereignty," which allows one "to identify the governmental unit that is accountable to its fellows for conduct carried on within its borders"); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2240 (1999) ("As a matter of accountability, when the government imposes rules of conduct on individuals, those rules ought to be made by members of the legislature who directly represent the people."). We discuss the international trade regime and nondemocratic forms of government below at pp. 588–89.

400 *See supra* section III B.3, pp. 558–61.

401 According to one commentator:

> [T]he legitimacy of applying a state's laws to conduct that occurs in another state's territory depends on whether such laws "would prevent [that] State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State."

Developments in the Law—The Law of Cyberspace, 112 HARV. L. REV. 1574, 1687 (1999) (quoting *New York v. United States*, 505 U.S. 144, 177 (1992)); *see also* M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1129 (1999) (noting that the concern for arbitrary actions by outsiders "renders the idea of sovereignty a necessary legal concept in international law").

will choose different levels of health, safety, labor, and environmental protection.[402] As a result of these and other differences, some countries will be able to produce certain goods more efficiently than others. Free trade allows all countries to take advantage of these differences by importing goods from those countries that can produce them most efficiently.[403]

Workers and owners in high-cost industries, however, would like nothing better than to change the conditions that make foreign production more efficient.[404] Extrajurisdictional justifications would allow these groups to mask protectionist measures as legislation directed at the welfare of foreign citizens. To be sure, some people are motivated by genuine desires to better the lot of people around the world. But altruism typically operates at shorter distances.[405] We have reason to suspect that citizens are more likely to protect their own interests than those of foreigners, and that regulation that focuses only on the condition of foreigners is particularly likely to constitute covert protectionism.[406]

Finally, permitting extrajurisdictional justifications would put the WTO in an inescapable bind. If the WTO were to permit all such justifications, the international trade regime would unravel because nothing would prevent interest groups from substituting "foreign welfare" regulations for tariffs and overtly discriminatory legislation. If the WTO were to attempt to choose among such justifications, it would have to make sensitive judgments about the value of a justification compared to its effect on free trade. Those substantive judgments are precisely the kind that conflict with a democracy-reinforcing jurisprudence.[407]

Some scholars argue nonetheless that nations should be able to legislate when citizens' "existence values" are injured by actions that take place in other countries.[408] Existence values are the preferences people

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402 *See supra* pp. 552–53.

403 *See supra* pp. 521–22 (discussing the theory of comparative advantage).

404 For a discussion of the reasons why interest groups may achieve their goals, see above at pp. 523–25.

405 *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1510 (1987) (book review) (suggesting that the spirit of human benevolence operates more surely at shorter distances).

406 Developing countries frequently raise this objection to linking trade and labor standards. *See* Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, *in* 2 FAIR TRADE AND HARMONIZATION, *supra* note 355, at 177, 182.

407 *See* Howse, *supra* note 135, at 156 (arguing that international trade tribunals, which are "not directly accountable to the democratic community in question," should not "second-guess[] the justification[s] for regulatory outcomes").

408 Chang, *supra* note 25, at 2166–70. For a comprehensive, recently published survey of the problems of existence values, see generally Donald Boudreaux, Roger E. Meiners & Todd J. Zywicki, *Talk is Cheap: The Existence Value Fallacy*, 29 ENVTL. L. 765 (1999), which details the diffi-

have for situations that do not immediately affect them.[409] For example, environmentalists in one country may derive a psychological benefit from the knowledge that tropical forests exist in other countries, or union activists from the knowledge that other countries protect labor rights.[410] If other countries deplete the forests to produce timber or fail to protect workers in a given industry, these people suffer psychological injuries — even when the end products themselves are safe.[411] Because these injuries occur at home, existence values do not qualify as extrajurisdictional justifications. A nation that acts to protect existence values acts to protect the welfare of its own citizens, not those of other countries. Indeed, one might view existence values as spillover effects of a particularly elusive type.[412]

In this context, existence values raise much the same concerns as extrajurisdictional justifications. Indeed, as a practical matter, there may be little difference between the two: a nation could recharacterize any extrajurisdictional justification as a domestic existence value simply by arguing that a foreign practice offends its citizens. Even assuming that one could maintain a meaningful distinction, claims of injured existence values should raise a great deal of suspicion in the international context. People tend to care much more about their own situations than others'. The danger that existence values are merely serving as a disguise for something less admirable — protectionism — is strong.

Prohibiting nations from restraining imports when conduct in other countries injures existence values at home has analogs in domestic legal traditions. In nuisance law, for example, one generally cannot sue a neighbor for a practice one deems offensive unless the practice causes tangible harm.[413] To permit psychological nuisance suits would invite blackmail by allowing individuals to discover sensitivities and trade their right not to have them offended for cash. To be sure, nuisance law does take account of psychological harm in some circum-

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culty of measuring existence values and argues that their recognition in public policy leads to serious wealth losses.

409 Chang, *supra* note 25, at 2166–67.

410 *Id.*

411 Regulations based on production processes raise other difficulties as well. Because production processes often differ from country to country, regulations framed in terms of processes can easily discriminate against foreign producers. We discuss these matters above at p. 574.

412 For a discussion of spillovers, see above at section III.B.4, pp. 561–66.

413 *See* W. PAGE KEETON, DAN B. DOBBES, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 88, at 627–28 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. Nuisance law allows persons to recover for interference with the use and enjoyment of their land, but only when the interference is substantial and unreasonable. *Id.* at 626. Acts that cause the plaintiff "mental annoyance" generally do not qualify as substantial and unreasonable interference unless they "result[] in a depreciation in the market or rental value of the land." *Id.* at 627.

stances. A plaintiff can bring a nuisance action for "personal discomfort" when "normal persons . . . in the particular locality" would find a practice seriously offensive or intolerable.[414] But a "community standards" test breaks down in the international context, at least when it comes to issues like the environment and labor. As we have seen, countries have sharply divergent views on these subjects.[415]

Of course, international "community standards" do exist with regard to some subjects. Nations increasingly recognize some human rights issues, including slavery, genocide, and war crimes, to be of "universal concern."[416] Extrajurisdictional justifications that relate to these sorts of issues would not raise the problems addressed here. By definition, a trade ban that attacks a universally condemned practice would not risk slighting the traditions or values of other nations. Moreover, just as in domestic nuisance law, the existence of recognized standards would provide a helpful check on the abuses of psychological injury claims. Finally, while protectionist groups might use even these justifications as a pretense for self-interested legislation, the consequences would not be dire. Even if a trade ban did serve a parochial interest in these circumstances, it would simultaneously advance values on which the community of nations has agreed.

With an exception for globally recognized standards, then, we would not allow nations to base trade restrictions on extrajurisdictional justifications. Of course, refusing generally to recognize extrajurisdictional justifications does not mean that the impulse behind such measures is illegitimate. Nations would retain substantial authority to take action to express the values of their citizens. For example, nations can require domestic corporations to comply with national health, safety, labor, and environmental regulations even when the companies operate in foreign countries.[417] Moreover, citizens in any nation can organize private boycotts of foreign products made using methods that conflict with the citizens' values.[418] Neither of these ap-

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[414] RESTATEMENT (SECOND) OF TORTS § 821F cmt. D (1979); *see also* PROSSER AND KEETON, *supra* note 413, § 88, at 627–28 (discussing the "normal persons" standard).

[415] On the absence of an international consensus on environmental issues, see Winfried Lang, *Is the Protection of the Environment a Challenge to the International Trading System?*, 7 GEO. INT'L ENVTL. L. REV. 463, 473–75 (1995); and Foster, *supra* note 332, at 407–10. On the absence of a true consensus on labor issues, despite a recent International Labour Organisation (ILO) declaration on "fundamental" labor rights, see Van Wezel Stone, *supra* note 267, at 107–08; and Erickson & Mitchell, *supra* note 273, at 48–49.

[416] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986).

[417] Bhagwati, *supra* note 237, at 482; *see also* Schoenbaum, *supra* note 270, at 279–80.

[418] Jagdish Bhagwati, *Trade and the Environment: The False Conflict?*, *in* TRADE AND THE ENVIRONMENT 159, 173 (Durwood Zaelke, Paul Orbuch & Robert F. Housman eds., 1993). Collective action problems should not render boycotts ineffective. *See supra* note 396 (suggesting that individuals will engage in low-cost behavior despite collective action problems).

proaches would seriously frustrate the democracy and growth-enhancing elements of the global trade regime.

C. The WTO and Nondemocratic Nations

We recognize that respecting the choices that each nation makes within its jurisdiction would have the greatest moral force in a world in which all governments were democratic. Of course, this world does not yet exist. A growing number of countries are democratic, however — certainly a majority of those nations currently participating in the WTO. Even with respect to nations that are not presently democratic, rules designed to advance an international trade regime can be justified in terms of democratic values because in the long run trade tends to help democratize nations.[419] The requirement of transparency, for instance, makes regulations more visible to the public, thus facilitating norms of greater government openness.[420] Moreover, authoritarian regimes — communist China, for example — often depend on support from interest groups like the military-industrial complex.[421] Structures that limit the benefits these interest groups receive from protectionism may thus help weaken authoritarian regimes.[422]

More generally, trade creates prosperity, and in the modern world democracy and prosperity are highly correlated.[423] This correlation may reflect an important political truth: as citizens become richer, they increasingly demand more democracy and civil rights to protect their wealth from the arbitrary actions of government.[424] Moreover, once a nation has become democratic, economic growth clearly plays an im-

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419 *See* Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 170–71 (2000).

420 *See* Spaulding, *supra* note 227, at 1136–37.

421 *Cf.* Steven N.S. Cheung, *Privatization vs. Special Interests: The Experience of China's Economic Reforms*, *in* ECONOMIC REFORM IN CHINA: PROBLEMS AND PROSPECTS 21, 30 (James A. Dorn & Wang Xi eds., 1990) (discussing the manner in which interest groups with vested government privileges impede reform).

422 *See* Chen, *supra* note 419, at 170.

423 *See* Robert J. Barro, *Determinants of Democracy*, 107 J. POL. ECON. S158, S158–60, S163, S182 (1999) (using regression analysis to demonstrate that prosperity is correlated with democracy); *see also* TRADE AND ENVIRONMENT, *supra* note 237, at 52 (noting that "democracy tends to be a positive function of income"); John F. Helliwell, *Empirical Links Between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225, 233–35 (1994) (suggesting that increases in wealth strengthen democracy). We must be careful not to make more of this correlation than the evidence warrants. Some scholars, in fact, have suggested that dictatorships tend to become democracies because of events unrelated to economic development. *See* Adam Przeworski, Michael Alvarez, José Antonio Cheibub & Fernando Limongi, *What Makes Democracies Endure?*, *in* CONSOLIDATING THE THIRD WAVE DEMOCRACIES: THEMES AND PERSPECTIVES 295, 296 (Larry Diamond, Mark F. Plattner, Yun-han Chu & Hung-mao Tien eds., 1997). But to our knowledge, there is no empirical evidence that economic growth retards the long-run development of democracy.

424 For an elaboration of the historical basis of this view, see generally John O. McGinnis, *A New Agenda for International Human Rights: Economic Freedom*, 48 CATH. U. L. REV. 1029 (1999).

portant role in sustaining that form of government.[425] As a result, applying the rules of the international trade regime to nondemocratic and democratic nations alike is consistent with the long-term goal of promoting democratic sovereignty as well as economic growth.[426]

V. THE WTO'S EARLY RECORD

This Part assesses the WTO's record in addressing covert protectionism in the context of environmental, health, and safety regulations.[427] We discuss three of the more important WTO instruments: GATT, the SPS Agreement, and the TBT Agreement. Each of these agreements establishes a framework for the WTO to use in deciding whether particular environmental, health, and safety measures constitute covert protectionism. Although the law is still at an early stage of development — the WTO has decided only a handful of cases under GATT and the SPS Agreement, and none at all under the TBT Agreement — enough material exists to identify an emerging approach.

The WTO's approach largely comports with the democracy-reinforcing jurisprudence we recommend. In attempting to uncover protectionist motives for regulation, the WTO has relied on the procedure-oriented factors we describe in Part IV: transparency, the use of performance rather than process standards, and consistency with other environmental, health, and safety measures.[428] In addition, the WTO has employed a deferential version of the objective-evidence requirement.[429] Finally, the WTO has avoided making judgments about members' environmental, health, or safety goals and has taken a dim view of members' attempts to block imports in order to advance the environment, health, or safety of other members.[430]

The WTO may be departing from the Madisonian model, however, by endorsing a least restrictive means requirement that does not give sufficient deference to the policies of member states.[431] As already noted, a failure to defer to a country's choice of policies, including its

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[425] *See* Przeworski, Alvarez, Cheibub & Limongi, *supra* note 423, at 296–97.

[426] Free trade may also help democracy indirectly by helping to create the conditions for peace, which in turn facilitates prosperity. *See* McGee, *supra* note 56, at 551 ("Countries that trade with each other are less likely to go to war than are countries that erect trade barriers to prevent foreign goods from crossing their borders.").

[427] As we have discussed, the WTO's current agenda does not generally include labor issues. *See supra* note 226.

[428] *See supra* pp. 573–76.

[429] *See infra* p. 601.

[430] *See supra* pp. 584–87.

[431] *See supra* pp. 579–80. The SPS and TBT Agreements expressly endorse this requirement, and the WTO has applied it under the more general language of GATT as well. *See infra* pp. 594–95, 598–99.

allocation of resources, may undermine a democracy-reinforcing jurisprudence by involving the WTO in assessing the wisdom of national regulations.[432] In addition, the WTO has suggested that members may be obligated to negotiate with affected countries and seek mutually acceptable solutions before adopting environmental measures that restrict trade. A duty to negotiate would involve the WTO in just the sort of substantive standard-setting it should avoid. Judging whether members have fulfilled their duty in this regard would require active review of national environmental programs and could entangle the WTO in the formation of domestic policy. Furthermore, a duty to negotiate would create incentives for stalling and holding out that would ultimately undermine both global trade and environmental protection.

A. GATT

GATT generally prohibits member countries from banning imports[433] and in addition requires that members accord imports treatment "no less favourable" than like domestic products once the imports clear customs.[434] GATT's general exceptions clause, article XX, tempers these restraints, however.[435] For example, article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health."[436] Article XX(g) provides a similar exception for measures "relating to the conservation of exhaustible natural resources."[437] Both of these exceptions are subject to an overarching requirement set forth in the introductory clause of article XX, known as the "chapeau":[438] measures excused under subparagraphs (b) and (g) may not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[439]

The WTO has construed these articles in ways that generally comport with our Madisonian model. For example, the *Shrimp-Turtles* case involved a set of American statutes and regulations, known col-

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[432] *See supra* pp. 579–80.

[433] GATT 1947, *supra* note 204, art. XI.

[434] *Id.* art. III(4).

[435] *Id.* art. XX. Other exceptions relate to measures necessary to protect public morals (art. XX(a)), measures necessary to secure compliance with regulations that are not themselves inconsistent with GATT (art. XX(d)), and measures relating to the products of prison labor (art. XX(e)). *Id.* Article XXI provides exceptions necessary for the protection of members' essential security interests. *Id.* art. XXI.

[436] *Id.* art. XX(b).

[437] *Id.* art. XX(g).

[438] On the use of the term "chapeau" to refer to the "preambulatory conditions" of article XX, see Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, 32 INT'L LAW. 619, 637 (1998).

[439] GATT 1947, *supra* note 204, art. XX.

lectively as "section 609," that banned the importation of shrimp from countries that did not protect sea turtles from incidental capture during shrimp harvesting.[440] The ban allowed importation of shrimp only from "certified" countries — countries that could demonstrate both that they had adopted turtle-protective programs similar to those of the United States and that their shrimp fishermen captured sea turtles at a rate comparable to or less than that of the United States.[441]

The Appellate Body held that section 609 fell within article XX(g)'s exception for conservation measures.[442] It took pains to note that the species of sea turtles at issue are all found in United States waters and that there was a "sufficient" jurisdictional "nexus" to support the American regulation.[443] The Appellate Body's focus may have been a reaction to an earlier GATT panel decision, the *Tuna-Dolphin* case, which had invalidated a similar American ban on tuna imports because it attempted to regulate tuna with no connection to United States waters.[444] While the Appellate Body in *Shrimp-Turtles* expressly declined to say whether article XX(g) contemplates a juris-

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[440] WTO Appellate Body Report on United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, ¶¶ 3, 111 n.76 (Oct. 12, 1998), http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf [hereinafter *Shrimp-Turtles*].

[441] *Id.* ¶ 4. Certification was also possible for "countries with a fishing environment which [did] not pose a threat of the incidental taking of sea turtles in the course of shrimp harvesting." *Id.* ¶ 3.

[442] *Id.* ¶¶ 125–145.

[443] *Id.* ¶ 133. The United States did not claim that all populations of these species traversed United States waters. *Id.* Conceivably, section 609 affected some sea turtles that never entered United States jurisdiction. *Id.* One should not view *Shrimp-Turtles* as an endorsement of extrajurisdictional justifications, however. The Appellate Body noted that none of the parties claimed exclusive ownership of the sea turtles. *Id.* Thus, the Appellate Body implied that regulations are not extrajurisdictional when the complaining party has no ownership of the regulated resources and when the regulating party has some connection to them, however remote.

[444] GATT Dispute Panel Report on United States — Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna-Dolphin I*]. *Tuna-Dolphin I* concerned the U.S. Marine Mammal Protection Act (MMPA) of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1361–1421h (1994 & Supp. IV 1998)), an environmental measure that attempted to limit the incidental taking of dolphins by tuna fisherman in the Pacific Ocean. *Tuna-Dolphin I*, *supra*, at 191. This act required American tuna fishermen to use specified techniques to reduce the incidental taking of dolphins and banned the import of tuna from countries that failed to protect dolphins in a "comparable" manner. *Id.* In order to gain access to the United States market, an exporting country had to demonstrate that its tuna fleet took dolphins at an average rate "not in excess of 1.25 times the average incidental taking rate of United States vessels . . . during the same period." *Id.*

In response to a complaint by Mexico, a GATT panel ruled that the MMPA constituted an import ban in violation of article XI. *Id.* at 205. The panel rejected the United States's argument that the MMPA fell within article XX(b)'s exception for measures "necessary to protect . . . animal . . . life or health." *Id.* at 197–200 (quoting GATT 1947, *supra* note 204, art. XX(b)) (internal quotation marks omitted). The panel held that the exception did not apply to measures like the MMPA that purported to protect animals outside the jurisdiction of the enacting state. *Id.* at 198–200. The panel decision was never adopted by the GATT membership. JACKSON, DAVEY & SYKES, *supra* note 99, at 584.

dictional limit, its opinion does reflect an uneasiness with extrajurisdictional justifications.[445]

The Appellate Body concluded, however, that section 609 failed to satisfy the requirements of article XX's chapeau.[446] In practice, it explained, section 609 required that other countries adopt regulatory programs that were "not merely *comparable*, but rather *essentially the same*, as that applied to the United States shrimp trawl vessels."[447] This "single, rigid, and unbending" policy, one that took no account of different conditions in other countries or alternative measures available to protect sea turtles, was both arbitrary and unjustifiable.[448] In the Appellate Body's view, section 609 seemed to be concerned not so much with protecting sea turtles, but with requiring other countries to adopt the United States's favored method of protecting sea turtles. The case thus reflects a preference for performance rather than process standards.[449]

Shrimp-Turtles also recognizes a strong version of the transparency requirement. The Appellate Body criticized the United States's procedures for certifying countries that would be exempt from section 609.[450] United States officials made certification decisions on an ex parte basis, and countries applying for certification lacked formal opportunities to present their cases or to respond to arguments against them.[451] The American officials did not provide reasoned explanations for their decisions and did not allow appeals.[452] The absence of "transparent, predictable certification" procedures, the Appellate Body

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445 A second GATT panel decision involving the MMPA indicated that extrajurisdictional measures could fall within the scope of article XX(g). *See* GATT Dispute Panel Report on United States — Restrictions on the Imports of Tuna, DS29/R, ¶¶ 5.14–.15 (May 20, 1994), 1994 WL 907620. This second panel report also was never adopted, and the Appellate Body in *Shrimp-Turtles* did not refer to it. For a general discussion of the Appellate Body's decision, see Jennifer Warnken, Note, *The Shrimp-Sea Turtle Case Before the World Trade Organization*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 27.

446 *Shrimp-Turtles*, *supra* note 440, ¶¶ 184, 186.

447 *Id.* ¶ 163.

448 *Id.* ¶ 177. "[D]iscrimination results," the Appellate Body held, "not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries." *Id.* ¶ 165.

449 The first *Tuna-Dolphin* case also sheds light on this issue. In that case, the United States argued that its ban on Mexican tuna was permissible under article III as a neutral product regulation. *Tuna-Dolphin I*, *supra* note 444, at 161–62, 165–68. The panel disagreed, noting that "[r]egulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product." *Id.* at 195. *Tuna-Dolphin I* thus stands for the proposition that members cannot disguise process regulations as neutral product standards. For more on the panel's ruling, see above at note 444.

450 *Shrimp-Turtles*, *supra* note 440, ¶¶ 178–183.

451 *Id.* ¶ 180.

452 *Id.*

held, amounted to arbitrary discrimination for purposes of the chapeau.[453]

Shrimp-Turtles departs from a Madisonian jurisprudence, however, in suggesting that members may be obligated to negotiate with other countries before adopting environmental measures that restrict trade. While the Appellate Body did not expressly announce a duty to negotiate, it gave great weight to the United States's failure to engage "in serious, across-the-board negotiations" with other countries before imposing its import ban.[454] Although protecting migratory animals such as sea turtles requires "concerted and cooperative efforts on the part of . . . many countries,"[455] it pointed out that the United States had not "even seriously attempted" to conclude a comprehensive international agreement on the subject.[456]

The Appellate Body's call for "serious, across-the-board negotiations" suggests that it is interested in something more than mere formalities.[457] A duty to negotiate, however, would constitute a significant departure from the antidiscrimination model. First, the Appellate Body could assure itself that members had negotiated "seriously" only by evaluating the substance of proposals that members had made and rejected in the course of their consultations. Otherwise, nations could fulfill the duty to negotiate by offering proposals that no other nation would accept. As a result, the duty would require the Appellate Body to make sensitive judgments about the desirability of various regulatory options and thereby inexorably move it toward shaping international standards.

Moreover, a duty to negotiate would encourage strategic delays. In *Shrimp-Turtles*, for example, nonconservationist countries might delay consultations — while continuing to deplete the sea turtle population — until the United States offered side payments or agreed to impose comparatively lax regulations. In addition, the widely differing values

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453 *Id.* ¶¶ 180–181; *see also id.* ¶ 184. The Appellate Body recommended that the WTO ask the United States to bring section 609 into conformity with the requirements of GATT. *Id.* ¶ 188.

454 *Id.* ¶ 166.

455 *Id.* ¶ 168.

456 *Id.* ¶ 167. The Appellate Body noted that, in section 609 itself, Congress had "expressly recognized the importance of securing international agreements for the protection and conservation of" sea turtles. *Id.* Moreover, the United States had concluded a regional agreement with five Latin American countries, demonstrating that "consensual and multilateral procedures [were] available and feasible" to preserve sea turtles. *Id.* ¶¶ 169–170.

457 *Id.* ¶ 166. If the Appellate Body's reference to the failure to negotiate is not a separate basis for the holding, but simply an observation in an opinion that rests on the lack of transparency and performance-oriented standards, it is less troubling. One indication that these remarks have enduring significance, however, is *Tuna-Dolphin I*, in which a GATT panel similarly held that United States regulations were defective because of a failure to negotiate with other countries about international standards. *Tuna-Dolphin I*, *supra* note 444, at 199–200. For a more comprehensive discussion of *Tuna-Dolphin I*, see above at notes 444, 449.

that countries place on environmental goods, and the differential access that they have to information, would complicate the search for consensus on any common policy, leading to frustration and dissension among WTO members.[458]

Accordingly, we believe that the duty to negotiate strand of *Shrimp-Turtles* is not in accord with a democracy-reinforcing jurisprudence. It gives excessive power to centralized agencies and prevents a nation's citizens from protecting against adverse effects in their own environment.

As another example, the recently decided *Asbestos* case contributes to a democracy-reinforcing jurisprudence by demonstrating the WTO's reluctance to second-guess members' health and safety goals, provided there is some objective evidence to support them.[459] In *Asbestos*, a panel upheld a French ban on the importation of asbestos from Canada.[460] Although the ban treated imports less favorably than like domestic products — French asbestos substitutes — it fell within article XX(b)'s exception for measures "necessary to protect human . . . life or health."[461] The panel believed that the submissions of the parties and the comments of experts the panel had consulted contained "sufficient scientific evidence" to support France's claim that asbestos posed risks to human health.[462] The panel rejected Canada's argument that controlled use of asbestos under international safety standards could reduce the risks to acceptable levels.[463] International standards would not achieve the level of protection France had chosen, and France had the right to choose the level of protection it saw fit.[464]

Asbestos also comports with our proposed jurisprudence by applying a relatively deferential version of the least restrictive means requirement — though it also contains dicta at odds with our position.

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458 *See supra* p. 562.

459 WTO Dispute Settlement Panel Report on European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (Sept. 18, 2000), http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm [hereinafter *Asbestos*]. We also discuss the objective evidence requirement in connection with WTO rulings under the SPS Agreement. *See infra* pp. 599–600, 601–02.

460 *Asbestos*, *supra* note 459, ¶ 9.1.

461 GATT 1947, *supra* note 204, art. XX(b). For the panel's reasoning on the discrimination point, see *Asbestos*, *supra* note 459, ¶¶ 8.101–.158. For the panel's reasoning on article XX(b), see *id.* ¶¶ 8.160–.223. In light of Canada's failure to argue that France treated Canadian asbestos less favorably than asbestos from other countries, the panel concluded that the ban did not violate article XX's chapeau. *Id.* ¶¶ 8.227–.229, 8.237, 8.240.

462 *Asbestos*, *supra* note 459, ¶¶ 8.182–.195. The panel stressed that it did "not intend to set itself up as an arbiter of the opinions expressed by the scientific community," *id.* ¶ 8.181, and that it was consulting experts only to help it "understand and evaluate the evidence submitted and the arguments advanced by the parties," *id.* ¶ 8.182. The panel had appointed the experts "in consultation with the parties." *Id.* ¶ 8.182 n.129.

463 *Id.* ¶¶ 8.204–.217.

464 *Id.* ¶ 8.210; *see also id.* ¶¶ 8.171, 8.179.

Although GATT does not expressly contain such a requirement, a number of reports, both before and after the Uruguay Round, have interpreted article XX to provide one.[465] In *Asbestos*, the panel stated that France's ban could be considered "necessary" only if there were no reasonably available alternative, less inconsistent with GATT, that would allow France to achieve its public health goals.[466] In assessing whether there was a reasonably available alternative, one would need to consider the economic and administrative realities that France faced and the resources that France could dedicate to the problem.[467] As a developed country, France could be expected "to deploy administrative resources proportionate to its public health objectives and to be prepared to incur the necessary expenditure."[468]

Despite this language, however, the *Asbestos* panel's *application* of the least restrictive means requirement was relatively respectful of national regulatory choices. The panel rejected Canada's argument that controlled use of asbestos would provide a reasonable alternative to France's ban.[469] Given France's unreviewable decision to set a very high level of protection, the panel explained, controlled use was not an option.[470] The panel thus took France's public health goals as a given and did not substitute its own safety analysis.[471] Moreover, its ruling suggests that the WTO will not use the least restrictive means requirement as an engine for regulatory uniformity. By recognizing that a country's resources play a role in its choice of options, *Asbestos* suggests there will be flexibility for developing countries that cannot afford the regulatory programs of the developed world.[472]

Still, the least restrictive means requirement has the potential to entangle the WTO in national regulatory choices. Deciding whether alternatives were "reasonably available" could entail sensitive judgments about national environmental and safety policies — particularly if fu-

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[465] *Id.* ¶¶ 8.198–.199 & n.158. The panel cited two pre-Uruguay Round panel rulings, *see* GATT Dispute Panel Report on Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991); GATT Dispute Panel Report on United States — Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990), and one post-Uruguay Round panel ruling, *see* WTO Dispute Settlement Panel Report on United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/R (Jan. 29, 1996), http://www.wto.org/english/tratop_e/dispu_e/gasoline.wp5.

[466] *See Asbestos*, *supra* note 459, ¶ 8.207.

[467] *Id.*

[468] *Id.*

[469] *Id.* ¶¶ 8.204–.217.

[470] *Id.* ¶ 8.210.

[471] The panel repeatedly characterized its role as deciding how a "decision-maker responsible for developing public health measures" might reasonably act, given French safety objectives. *Id.* ¶ 8.217; *see also id.* ¶¶ 8.202, 8.209, 8.211, 8.214.

[472] *See id.* ¶ 8.207. For a discussion of how a least restrictive means requirement might lead to a jurisprudence of "preferred" regulatory options, see above at pp. 579–80. For a discussion of the benefits of regulatory competition among jurisdictions, see above at section III.B.3, pp. 558–61.

ture panels take seriously *Asbestos*'s suggestion that developed countries should spend significant resources to avoid trade restrictions. Under that approach, panelists would have the latitude to substitute their own views on the trade-offs of regulatory approaches for the determinations of national authorities. To avoid this problem, members must make sure that the WTO applies the least restrictive means requirement with substantial deference to national regulatory agendas.

B. The SPS and TBT Agreements

The SPS and TBT Agreements reflect our model's concern with transparency, performance orientation, and consistency, as well as its deference to national health and safety goals. The SPS Agreement addresses a category of health and safety regulations known as "sanitary and phytosanitary measures" — measures that members adopt to protect the life or health of humans, animals, or plants within their territories from risks posed by pests, diseases, food additives, or contaminants.[473] The TBT Agreement, in turn, relates primarily to other "[t]echnical regulation[s]" that mandate "product characteristics" and "related processes and production methods."[474]

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473 SPS Agreement, *supra* note 39, Annex A(1). Article 1.1 of the SPS Agreement provides that "[t]his Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade." *Id.* art. 1.1. An annex to the SPS Agreement defines SPS measures as those applied:

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Id. Annex A(1). The annex gives several examples of SPS measures, such as testing and inspection procedures, quarantine treatments, and packaging and labeling requirements. *Id.* To the extent that the SPS Agreement applies, it preempts the more general requirements of article XX(b) of GATT. Article 2.4 of the SPS Agreement specifically provides that measures in compliance with the agreement shall be presumed to comply with article XX(b) of GATT as well. *Id.* art. 2.4; *see also* Hudec, *supra* note 438, at 644 (noting the "usual understanding" in trade law "that the more specific agreement . . . prevails over the more general").

474 TBT Agreement, *supra* note 40, Annex 1(1). The Agreement also relates to "[s]tandard[s]," defined as documents providing "guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory." *Id.* Annex 1(2).

The TBT Agreement does not apply to SPS measures, which fall within the scope of the SPS Agreement. *Id.* art. 1.5. Whether the TBT Agreement preempts the more general GATT provisions is not entirely clear. One would expect the TBT Agreement, as the more specific of the two, to preempt GATT when it applies. Hudec, *supra* note 438, at 644. Yet one panel chose to decide a case under GATT rather than the TBT Agreement even though the parties had argued the case under both. *See id.* Another panel, however, recently suggested that when both the TBT Agree-

Like GATT, the SPS and TBT Agreements contemplate an overarching nondiscrimination principle.[475] The agreements improve on GATT, however, in that they more clearly direct WTO tribunals to apply procedure-oriented tests to root out covert discrimination. The agreements also expressly endorse a least restrictive means requirement, but do not make clear the degree of deference that the WTO should afford members' regulatory objectives.

Both agreements endorse transparency. The SPS and TBT Agreements require members to publish measures "promptly" and in a manner accessible to interested members.[476] Members must generally allow producers in affected countries time "to adapt their products and methods of production" to the new requirements.[477]

In addition, both the SPS and TBT Agreements are performance- rather than process-oriented. For example, the TBT Agreement provides that "[w]herever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics."[478] The SPS Agreement is slightly less explicit, but its requirement that regulations be evaluated in terms of risks and levels of protection[479] strongly suggests that products can be regulated only on the basis of their effects, not the processes by which they are made.[480] The SPS Agreement also specifically requires that WTO tribunals consider the consistency between regulatory standards that apply to foreign products and those that apply to domestic products.[481] Finally, the SPS Agreement re-

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ment and GATT apply to a technical regulation, the TBT Agreement governs because of its greater detail and specificity. *See Asbestos*, *supra* note 459, ¶¶ 8.16–.17.

475 *See* SPS Agreement, *supra* note 39, art. 2.3; TBT Agreement, *supra* note 40, art. 2.1. For instance, members must ensure that their SPS measures do not "arbitrarily or unjustifiably discriminate" against other members and must not apply SPS measures "in a manner which would constitute a disguised restriction on international trade." SPS Agreement, *supra* note 39, art. 2.3.

476 SPS Agreement, *supra* note 39, Annex B(1); *see* TBT Agreement, *supra* note 40, arts. 2.11, 2.12, 5.6, 10.1.

477 SPS Agreement, *supra* note 39, Annex B(2); *see* TBT Agreement, *supra* note 40, arts. 2.11, 2.12, 5.6, 10.1. In addition, in response to "reasonable questions," members must provide documents regarding proposed or adopted SPS measures and any applicable risk assessment procedures. SPS Agreement, *supra* note 39, Annex B(3). In some circumstances, members must grant other countries an opportunity to comment on proposed SPS measures and must take those comments "into account." *Id.* Annex B(5).

478 TBT Agreement, *supra* note 40, art. 2.8.

479 For discussion of this requirement, see below at pp. 599–600.

480 *See* SPS Agreement, *supra* note 39, arts. 4–5.

481 *Id.* art. 5.5 ("[E]ach member shall avoid arbitrary or unjustifiable distinctions in the levels [of protection it considers] to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.").

The WTO's Committee on Sanitary and Phytosanitary Measures recently adopted a set of nonbinding guidelines to help members implement article 5.5. COMM. ON SANITARY AND PHYTOSANITARY MEASURES, WORLD TRADE ORG., GUIDELINES TO FURTHER THE PRACTICAL IMPLEMENTATION OF ARTICLE 5.5, G/SPS/15 (July 18, 2000), http://www.wto.org/ddf/ep/E2/

quires that countries offer objective evidence to support their regulatory standards. Under the Agreement, members must base their SPS measures on "sufficient scientific evidence,"[482] including "appropriate" assessments of the risks to human, animal, or plant life or health.[483]

The SPS and TBT Agreements also expressly endorse a least restrictive means requirement.[484] Under article 5.6 of the SPS Agreement, members must ensure that SPS measures "are not more trade-restrictive than required to achieve their appropriate level of [SPS] protection, taking into account technical and economic feasibility."[485] Similarly, the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create."[486] The Appellate Body has not yet definitively interpreted these requirements. As discussed above, unless WTO tribunals apply these re-

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E2955e.doc. These guidelines advance several of the principles we advocate. For example, in order to improve transparency, the guidelines provide that a member "should indicate the level of protection which it considers to be appropriate . . . in a sufficiently clear manner so as to permit examination of the extent to which" an SPS measure achieves that level. *Id.* § A.1. Similarly, the guidelines provide that a member should "establish clear . . . communication and information flows within and between the authorities . . . responsible for the selection and implementation of [SPS measures]." *Id.* § B.1. The guidelines note that a member "may consider seeking expert advice on the selection and implementation of [SPS measures]," *id.* § B.7, and make clear that, while a member "may find it helpful to examine measures applied by other Members facing similar risks and situations," it need not harmonize its regulations with those of other countries, *id.* § B.6.

[482] SPS Agreement, *supra* note 39, art. 2.2 ("Members shall ensure that any [SPS] measure is . . . based on scientific principles and is not maintained without sufficient scientific evidence . . . .").

[483] *Id.* art. 5.1; *see also id.* Annex A(4) (defining risk assessment). In assessing these risks, members must take into account several factors, including available scientific evidence, relevant ecological and environmental conditions, and "the relative cost-effectiveness of alternative approaches to limiting [the] risks." *Id.* arts. 5.2–.3.

[484] Although GATT does not contain an explicit least restrictive means test, panels have interpreted the broad language of article XX to provide one. *See supra* p. 595.

[485] SPS Agreement, *supra* note 39, art. 5.6. "[A] measure is not more trade-restrictive than required" for these purposes "unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of [SPS] protection and is significantly less restrictive to trade." *Id.* art. 5.6 n.3. The Appellate Body discussed article 5.6 in its *Salmon* ruling. WTO Appellate Body Report on Australia — Measures Affecting Importation of Salmon, WT/DS18/AB/R, ¶¶ 1–2 (Oct. 20, 1998), http://www.wto.org/english/tratop_e/dispu_e/ds18abr.doc [hereinafter *Salmon*]. The panel below had ruled that the import ban at issue in that case was "more trade restrictive than required" to achieve Australia's appropriate level of protection, and therefore that Australia had acted inconsistently with article 5.6. *Id.* ¶ 179 (quoting SPS Agreement, *supra* note 39, art. 5.6) (internal quotation marks omitted). The Appellate Body in *Salmon* emphasized once again the right of members to set their own levels of protection, declaring that article 5.6 required "an examination of whether possible alternative SPS measures meet the appropriate level of protection *as determined by the Member concerned.*" *Id.* ¶ 204. Because of factual deficiencies in the record, however, the Appellate Body could not ascertain whether measures other than the ban would have achieved the level of protection Australia established. The Appellate Body ultimately reversed the panel's ruling on other grounds. *Id.* ¶ 213; *see* Kennedy, *supra* note 6, at 97–98.

[486] TBT Agreement, *supra* note 40, art. 2.2.

quirements with appropriate deference to the policy choices of member states, the requirements could become a vehicle for centralized determinations about the wisdom of particular regulations and thus prove inconsistent with our Madisonian model.[487]

Two recent Appellate Body reports elaborate on the provisions of the SPS Agreement, demonstrating that the WTO does have the capacity for fashioning a Madisonian jurisprudence.[488] The first is the noted *Hormones* report, adopted in 1998.[489] The *Hormones* case addressed a European ban on the sale of meat from cattle that had been treated with certain growth hormones.[490] An international body of experts had approved the use of the hormones in question, but the European Community (EC) asserted that they were carcinogenic.[491] While the ban applied both to European and imported beef, European producers had long been forbidden to administer growth hormones; therefore, the ban fell disproportionately on producers in countries like the United States and Canada that permit the practice.[492]

In a sweeping report, the Appellate Body concluded that the ban was inconsistent with the EC's obligations under the SPS Agreement.[493] The Appellate Body affirmed the EC's right to disregard international norms and adopt measures affording a higher standard of protection.[494] The EC, however, needed to base its safety measures on objectively valid risk assessments;[495] in this case, the Appellate Body found that the EC had offered no risk assessment that reasonably supported the ban on hormone-treated meat.[496] While the EC had produced general studies on the carcinogenic potential of hormones, those studies did not specifically address the administration of hormones to cattle for growth promotion purposes.[497] On that question, all of the submitted studies concluded that hormones were "safe" if administered in accordance with good veterinary practice.[498]

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487 *See supra* pp. 579–80.

488 The WTO has yet to decide any cases under the TBT Agreement.

489 *Hormones*, *supra* note 223. For further discussion of the *Hormones* case, see generally Dale E. McNiel, *The First Case Under the WTO's Sanitary and Phytosanitary Agreement: The European Union's Hormone Ban*, 39 VA. J. INT'L L. 89 (1998); and Walker, *supra* note 366.

490 *Hormones*, *supra* note 223, ¶¶ 2–5.

491 *See* McNiel, *supra* note 489, at 102, 107–08, 117; Walker, *supra* note 366, at 254.

492 *Hormones*, *supra* note 223, ¶ 244.

493 *See id.* ¶¶ 253–255.

494 *Id.* ¶ 172.

495 *See id.* ¶¶ 176–177. The Appellate Body explained that a "risk assessment must sufficiently warrant — that is to say, reasonably support — the SPS measure at stake." *Id.* ¶ 193.

496 *Id.* ¶ 208.

497 *Id.* ¶¶ 199–200. For an interesting criticism of the Appellate Body on this issue, see Walker, *supra* note 366, at 299–300.

498 *Hormones*, *supra* note 223, ¶¶ 197–198, 206–207. One scientist had expressed a contrary opinion, but again, this finding did not stem from a specific analysis of the risks from hormones administered to cattle. *Id.* ¶ 198 (discussing the opinion of Dr. Lucier). Although the Appellate

The Appellate Body also discussed the SPS Agreement's consistency requirement. It determined that the EC had drawn an unjustifiable distinction between the levels of protection it imposed with respect to hormones and the levels of protection it imposed with respect to certain other feed additives.[499] In light of a legislative history reflecting legitimate and particularly intense concerns about drug-free meat, however, the Appellate Body declined to conclude that this inconsistency amounted to "discrimination or a disguised restriction on international trade."[500]

The Appellate Body again considered risk assessment and consistency in the *Salmon* case, which addressed an Australian measure banning the importation of certain uncooked salmon from Canada.[501] As in *Hormones*, the Appellate Body held that the ban was not based on a valid risk assessment.[502] The government report supporting the Australian ban had evaluated the probability of some adverse effects, but contained only "general and vague statements of mere possibility" with respect to others.[503] Moreover, the report failed to evaluate the relative effectiveness of alternative SPS measures in reducing the risk of those adverse effects.[504]

The Appellate Body also held that the ban violated the consistency requirement.[505] In the Appellate Body's view, Australia had drawn arbitrary and unjustifiable distinctions between standards addressing comparable situations. Australia had applied less restrictive measures

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Body left open the possibility that the ban might be valid if erected to screen hormones rendered harmful by improper administration, the EC submitted no studies at all on the effects of abusive veterinary practice. *See id.* ¶¶ 207–208.

499 *Id.* ¶¶ 226–235. The feed additives in question were carbadox and olaquindox, which are administered to piglets. *Id.* ¶ 226. The EC had also established differing levels of protection for other hormones, but the Appellate Body believed that these distinctions were explicable. *Id.* ¶¶ 218–225.

500 *Id.* ¶¶ 218–225.

501 *Salmon*, *supra* note 485, ¶¶ 1–2.

502 *Id.* ¶ 136.

503 *Id.* ¶¶ 127–129 (quoting WTO Panel Report on Australia — Measures Affecting Importation of Salmon, WT/DS18/R, ¶ 8.83 (June 12, 1998), http://www.wto.org/english/tratop_e/dispu_e/18roo.pdf) (internal quotation marks omitted). The Appellate Body explained that while the likelihood of adverse effects might be expressed in qualitative terms, *id.* ¶ 124, more than "general and vague statements of mere possibility" were required, *id.* ¶ 129.

504 The government report identified the alternative measures available, *id.* ¶ 132 n.84, but failed to evaluate them sufficiently, *id.* ¶¶ 133–134.

It is important to note that the Appellate Body was not suggesting a least restrictive means requirement here. Australia's failure fully to evaluate different options merely indicated that it had not conducted a proper risk assessment to support its ban. The Appellate Body did consider the SPS Agreement's least restrictive means requirement in another section of its ruling, but was unable to reach a conclusion because of insufficient factual findings by the panel. *See id.* ¶¶ 179–213, 241–242; *see also supra* note 485 (discussing the *Salmon* case's treatment of the least restrictive means requirement).

505 *Salmon*, *supra* note 485, ¶¶ 140–141, 178, 240.

to herring, for example, even though herring posed potentially greater risks than salmon.[506] The Appellate Body found that, under the circumstances, Australia's failure to treat comparable products consistently suggested disguised restriction on international trade.[507]

We believe that these decisions are broadly consistent with a democracy-reinforcing jurisprudence. By relying on procedure-oriented factors to root out covert protectionism, the *Hormones* and *Salmon* rulings comport with our recommended approach.[508] By requiring consistency between regulations that affect imports and those that affect comparable domestic products, the decisions limit the power of domestic interest groups to harm the broader citizenry through rent-seeking regulations.

Moreover, the rulings reflect our recommended deference to the substance of domestic judgments about public health and safety.[509] Although the Appellate Body faulted the EC and Australia for failing to base their regulations on appropriate risk assessments, it did not presume to make independent judgments about the necessity for protective measures.[510] It was not that national authorities had wrongly assessed the risks, but rather that they had failed to make genuine attempts to support their regulations with objective evidence.[511] The Appellate Body's insistence in the *Hormones* case that members have a right to depart from international standards in determining their levels of sanitary protection also confirms the regulatory autonomy of member states.[512] Thus, these aspects of WTO jurisprudence allow citizens

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506 *Id.* ¶¶ 154–158.

507 *See id.* ¶¶ 159–177. The Appellate Body believed that several aspects of the Australian regulation, "considered *cumulatively*, [led] to the conclusion that the distinctions in the levels of protection imposed by Australia result[ed] in a disguised restriction on international trade." *Id.* ¶ 177; *see id.* ¶¶ 237–240.

508 *See supra* section IV.A pp. 573–83.

509 *See supra* pp. 579–80.

510 In *Hormones*, indeed, the Appellate Body noted that scientific evidence may lead to a wide range of scientific conclusions and consequent policies. *See Hormones*, *supra* note 223, ¶ 194; *see also id.* ¶ 124 (noting that the SPS Agreement provisions "explicitly recognize the right of Members to establish their own appropriate level of sanitary protection."). Interestingly, the EC argued in *Hormones* that its ban was justified under the "'precautionary principle,' which counsels governmental authorities to err on the side of protection in formulating public policy in contexts characterized by conditions of scientific uncertainty." David A. Wirth, *International Decisions*, 92 AM. J. INT'L L. 755, 758–59 (1998). The Appellate Body noted that the SPS Agreement reflects the principle's concern with caution in the face of irreversible risks to human health, but nevertheless ruled that the precautionary principle did not override the agreement's basic risk assessment requirements. *Hormones*, *supra* note 223, ¶¶ 120–125.

511 The Appellate Body made clear in the *Hormones* case that it is not necessary that a member carry out its own risk assessment, and that a member could rely on assessments carried out by other members or international organizations. *Hormones*, *supra* note 223, ¶ 190.

512 *Id.* ¶ 172. Although the European ban in the *Hormones* case was inconsistent with the determination of an international body of experts that had approved the use of the hormones in question, in the view of the Appellate Body that inconsistency in itself did not preclude the EC from

to choose the level of protection that suits their preferences and traditions, and to confront any threat that can be established with some scientific validity.

C. *Recommendations for Reform*

We close this Part with some brief recommendations. Our goals are to curb the aggrandizing tendencies we have observed in the WTO's jurisprudence — such as the duty to negotiate and the potentially intrusive least restrictive means requirement — and, in addition, to reduce opportunities for special interest machinations. We submit two types of proposals: structural changes in the dispute resolution process and substantive changes in the agreements that this process enforces.

First, the Dispute Settlement Understanding's provisions regarding the tenure of Appellate Body members should be reformed. We do not object to relatively short terms for Appellate Body members.[513] Long terms, let alone life tenure, would encourage judicial activism as members gained experience and prestige and came to think of themselves as something more than humble arbiters of legal disputes.[514] The current provision for reappointment, however, is troubling. It creates incentives for members of the Appellate Body to take excessively broad views of their authority and generally aggrandize the role of the WTO; presumably the WTO, the reappointing authority, would look favorably upon such readings. Thus, the reappointment provision gives structural encouragement to doctrines, like the duty to negotiate, that we have found inconsistent with a democracy-reinforcing jurisprudence.[515] We would therefore eliminate the possibility of reappointment.

Second, the WTO must more effectively police conflicts of interest on panels and in the Appellate Body. Tribunals can restrain special interests only if their members are not beholden to those interests. Thus, strong conflict of interest rules are essential to a democracy-reinforcing jurisprudence. Unfortunately, critics of the WTO have shown that panelists and Appellate Body members have not always met such standards, in large part because the WTO rules are vague and depend entirely on self-policing.[516]

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choosing a more cautious approach. *Id.*; *see also* Walker, *supra* note 366, at 268, 271 ("Selecting the appropriate level of protection is an act of sovereignty . . . .").

513 The current term is four years. DSU, *supra* note 108, art. 17, § 2.

514 For a discussion of this problem in the context of Supreme Court Justices, see John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 542–44 (1999).

515 For discussion of the duty to negotiate, see above at pp. 593–94.

516 For criticism of conflict of interest problems in the WTO, see above at p. 535.

A template for more effective conflict of interest rules can be found in the United States, where tribunals also play an important role in a democracy-reinforcing jurisprudence. In the United States, federal judges are required to fill out financial disclosure forms, which are now publicized on the Internet.[517] A statute clearly establishes specific circumstances in which judges may not sit due to conflicts of interest.[518] These standards are not completely self-policing; an appellate court reviews a federal trial judge's refusal to disqualify himself under an abuse of discretion standard.[519] Although conflict of interest requirements need not be as rigorous as the American rules, some combination of mandatory public disclosure and independent policing would go a long way toward making the WTO's adjudicative structure a more legitimate component of a democracy-reinforcing system.

Third, the WTO should adopt procedures that ensure greater transparency in dispute settlement. While a process that began as an aspect of diplomacy understandably exhibits lingering remnants of the secrecy inherent in diplomatic proceedings, the WTO dispute resolution process has become increasingly adjudicative and rule-oriented.[520] With this change should come the attributes of transparency associated with proper adjudication, such as the public dissemination of all documents essential to the proceedings and public admission to the proceedings themselves. Of course, any matters relating to national security may still need to be closely held. Moreover, we must be sensitive to the concerns of nations that are not quite as ebullient as the United States in their regard for "[s]unlight" as "the best of disinfectants."[521] But if the decisions of the WTO adjudicative system are to enjoy public confidence, the process must be as transparent to the public as possible.

Finally, WTO members should amend GATT to more expressly adopt a jurisprudence centered around the procedure-oriented tests we have identified. As we have noted, the SPS and TBT Agreements already embrace some of these tests explicitly.[522] GATT should follow their example for two reasons: First, although recent WTO rulings in-

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[517] *See* Richard Carelli, *Judges' Financial Reports Hit Web*, ASSOCIATED PRESS, June 22, 2000, 2000 WL 23358974.

[518] 28 U.S.C. § 455 (1994); *see also* 28 U.S.C. § 144 (1994) (requiring a judge, upon "a timely and sufficient affidavit" from a litigant, "to proceed no further" if he "has a personal bias or prejudice" against the litigant or "in favor of any adverse party").

[519] *See, e.g.*, United States v. Mizell, 88 F.3d 288, 299 (1996).

[520] *See* Ragosta, *supra* note 135, at 750 (discussing the transformation of GATT from a diplomatic arrangement to more of a judicial dispute settlement system).

[521] The origins of the phrase are found in LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (1933).

[522] *See supra* pp. 597–98. We believe that these agreements could be improved by making clear the degree of deference with which the objective evidence and least restrictive means tests should be employed.

corporate some elements of a democracy-reinforcing jurisprudence, the organization has not clearly embraced them all. Writing these elements into GATT would help to entrench them against the vagaries of future decisions. Second, as GATT becomes more like a code than a general statement of principles, it will become more difficult for panels and the Appellate Body to justify adverse innovations that aggrandize the WTO's power at the expense of the appropriate regulatory agencies of member states.[523]

CONCLUSION

Free trade and democracy both promote human happiness. Unfortunately, critics often view international structures that facilitate free trade as incompatible with democratic government. This bit of conventional wisdom is false. International free trade and domestic democracy share a common enemy — protectionist interest groups. Therefore, constitutive structures that restrain such groups can simultaneously reinforce both trade and democracy. This is as true of the emerging world trade constitution as it is of our venerable domestic trade constitution.

Indeed, the task facing the world trade constitution resembles that facing all constitutions: to encourage the production of public goods — in this case, free trade and improved democracy — while resisting the attempts of politicians, bureaucrats, and interest groups to hijack government for their own purposes. This struggle will be constant, because there is a sad dilemma at the heart of all constitutions: the more wealth a regime creates, the greater the incentives for interest groups to distort the system to their advantage.[524] The United States government, for example, has become more centralized, and its structural limitations on special interest legislation less effective, in part because of interest group pressures.[525]

The WTO may yet avoid this fate. With neither an elected legislature nor an executive to enforce its judgments, the WTO currently lacks some of the structures that interest groups have traditionally turned to their advantage. Moreover, nationalism, even more than state pride within the American system, may serve as an effective check against overreaching by the organization in the future. Still, given the interest group pressures that the WTO has already begun to face, it is not too early for policymakers and academics to persuade the

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[523] Recall that in *Shrimp-Turtles*, the Appellate Body seized on the vague nondiscrimination principle of article XX's chapeau to imply the troubling duty to negotiate. *See supra* pp. 592, 593–54. We would recommend that this holding be expressly disavowed.

[524] *See* John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 208 (1997) (discussing this dilemma).

[525] *See id.* at 204–08.

public that the WTO's limitations make possible its substantial contributions. The organization must remain focused on its important, and importantly circumscribed, role: restraining interest groups in the service of a simultaneously more prosperous and more democratic world.