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Civil Society and the Legitimacy of the WTO Dispute Settlement System

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CIVIL SOCIETY AND THE LEGITIMACY OF THE WTO DISPUTE SETTLEMENT SYSTEM

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INTRODUCTION

The legitimacy of a rule or an institution is important because it may encourage voluntary compliance with the rule or the institution's decisions, while the lack of legitimacy may be used as an excuse for noncompliance.[1] Legitimacy is especially critical within the context of international law, as the international community lacks effective enforcement tools.[2] This Article focuses on the legitimacy of the World Trade Organization's ("WTO") dispute settlement system.[3] As the coverage of the WTO Agreement[4] expands and its enforcement intensifies, its impact on the lives of citizens becomes more extensive and profound. The dispute settlement system has been criticized for enforcing the WTO Agreement without due regard to the nontrade interests and values of civil society.[5] Given that citizens have become important stakeholders in international trade disputes, critics demand that the dispute settlement system reflect the concerns of not only States and businesses, but also civil society.

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1. MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 212–16 (Ephraim Fischoff et al. trans., 1978).

2. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 27–40 (1990).

3. The WTO was established in 1995 as a result of the Uruguay Round, the last round of trade negotiations under the General Agreement on Tariffs and Trade. WORLD TRADE ORG., THE WORLD TRADE ORGANIZATION IN BRIEF 3 (2007), http://www.wto.org/english/res_e/doload_e/inbr_e.pdf. The WTO has 153 member nations, and this accounts for approximately 97% of world trade. *Id.* at 7. The WTO's dispute settlement system, the WTO's procedure for resolving trade quarrels, is instrumental in enforcing WTO rules and "ensuring that trade flows smoothly." *Id.* at 5. Nearly 400 disputes have been brought before the dispute settlement system, and almost 300 rulings (including panel and Appellate Body reports and arbitration awards) have been issued. WTO Dispute Settlement: Basic Facts and Figures, http://www.worldtradelaw.net/dsc/database/basicfigures.asp. (last visited Nov. 18, 2008).

4. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 [hereinafter WTO Agreement]. The WTO Agreement includes the Marrakesh Agreement and the other agreements in its annexes.

5. *See infra* note 80 and accompanying text.

There are many existing proposals on how to legitimize the dispute settlement system in civil society. Some proposals introduce innovative concepts such as "constitutionalism,"[6] "democracy,"[7] and "governance,"[8] while others focus on specific revisions to the dispute settlement system, such as the acceptance of unsolicited amicus curiae briefs and the incorporation of nontrade values.[9] Despite the divergence of views, most of the proposals maintain that the dispute settlement system should directly reflect the diverse interests and values of citizens so as to be perceived legitimate by civil society.

While the primary question scholars have asked is *how* this can be accomplished, in the author's view, there are more fundamental questions to be addressed. In the first place, why does the dispute settlement system, an intergovernmental trade tribunal, need to respond to civil society's demand for legitimacy? Does enhanced legitimacy as perceived by civil society also improve the overall legitimacy of the system? Furthermore, even if such legitimacy needs to be taken into account, is the dispute settlement system suitable for and capable of directly representing and coordinating the various concerns of civil society?

Responding to these questions, this Article is organized as follows: Part I analyzes several key sources of legitimacy in the dispute settlement system and demonstrates that there is a conflicting relationship

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6. *See, e.g.*, DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM (2005); CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006); THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES (Gráinne de Búrca & Joanne Scott eds., 2001).

7. *See, e.g.*, Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001); Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329 (2000); Americo Beviglia Zampetti, *Democratic Legitimacy in the World Trade Organization: The Justice Dimension*, 37 J. WORLD TRADE 105 (2003). Without defining the terms, this Article discusses the substance of constitutionalism and democracy to the extent that these concepts are relevant. It should be noted that these terms have been developed in the domestic sphere and that there is always a risk of incorporating such terms into the international sphere. J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 270 (1999).

8. *See, e.g.*, TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION (2004); Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004).

9. *See, e.g.*, Steve Charnovitz, *Participation of Nongovernmental Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998) [hereinafter Esty, *Non-Governmental Organizations*].

among the various sources of legitimacy. Part II examines civil society's demand for legitimacy and discusses various proposals that seek to set forth how this demand can be fulfilled in the dispute settlement system. While recognizing the growing significance of civil society in the context of international trade, this section criticizes these proposals and shows how they might impair the overall legitimacy of the system. Part III discusses alternative ways of legitimizing the dispute settlement system as perceived by civil society. Underscoring that the dispute settlement system is merely part of the plural international and domestic legal orders, this section argues that the interests and values of civil society should be considered and reflected in different domains, both WTO and non-WTO, and at international, regional, national, and local levels.

I. SOURCES OF LEGITIMACY IN THE DISPUTE SETTLEMENT SYSTEM

In defining legitimacy, it is helpful to distinguish between two different types of legitimacy—objective and subjective.[10] Objective legitimacy follows from the actual properties of a rule or institution.[11] For example, an international treaty is objectively legitimate when its text clearly articulates what the contracting States have agreed to. Likewise, an international institution is objectively legitimate when its structure effectively helps to achieve its goals. Subjective legitimacy arises from the perceptions of a rule or institution by those affected by the rule or institution.[12] In particular, the perceptions by States, expressed by their consent (or the lack thereof) to a rule or institution, determine the subjective legitimacy of the rule or institution.[13] Although objective and subjective legitimacy spring from different sources, these two types of legitimacy may affect one another. For example, if a rule or institution is ineffective, a State may refuse to consent to the rule or institution.

What confers legitimacy, either in an objective or subjective sense, varies across areas of international law and over the course of time.[14] State

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10. *See* Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOR. AFF. 385, 424–25 (2003).

11. See FRANCK, *supra* note 2, at 24 (discussing legitimacy as a property of an institution's rules or rulemaking process that pulls actors towards compliance).

12. See FRANCK, *supra* note 2, at 25 (noting that an actor's perception of a rule's or institution's legitimacy will dictate the extent to which the actor complies).

13. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 558–59 (1993).

14. For example, scientific expertise is an essential source of legitimacy in making and enforcing regulations on whaling. David Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 159–63 (1995). However, the legitimacy argument once demanded the *universal participation* of the interested States

consent is a primary, though implicit, source of legitimacy in international law. Under the principle of *pacta sunt servanda*, when States consent to an international rule, they accept its legitimacy and agree to comply with it.[15] As state consent was traditionally viewed as the exclusive source of legitimacy in international law, legitimacy was not explicitly discussed as distinct from state consent until recently.[16] Despite the continuing importance of state consent, there is a growing belief in the international community that state consent is insufficient to persuade States of the legitimacy of an international rule or institution.[17] There are several explanations for this new trend.[18]

First, the structure of international law is changing to include not only the law of coexistence, but also the law of cooperation.[19] Consequently, an international law rule or institution must address new situations in a manner that differs from the texts of the treaties and agreements to which States have consented. Something in addition to state consent is necessary to legitimize the subsequent evolution of an international law rule or

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in the Antarctic Treaty System. Richard Falk, *The Antarctic Treaty System: Are There Viable Alternatives?*, *in* THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS 399, 412 (Arnfinn Jorgensen-Dahl & Willy Ostreng eds., 1991). In the context of the European community, one scholar has suggested that in the process of European integration, the sources of legitimacy have been expanded to include not only a democratic foundation, but also a "broad, empirically determined societal acceptance." J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2468–74 (1991) [hereinafter Weiler, *Transformation*].

15. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (defining *pacta sunt servanda* as the principle that binds parties to an agreement and ensures performance of its terms in good faith). *See also* Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 604 (1999) (discussing consent).

16. *See* Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 412–13 (2006) (discussing state consent as a measure of legitimacy and referring to this standard as the "International Legal Pedigree View" of legitimacy); *id.* at 417–18 (noting characteristics of legitimacy that must be assessed independent of democratic state consent). *See also* IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL 5–7 (2007) (stating that consent does not fully explain state behavior).

17. *See, e.g.*, Bodansky, *supra* note 15, at 606–11, 623–24; Joshua Meltzer, *State Sovereignty and Legitimacy of the WTO*, 9336 U. PA. J. INT'L ECON. L. 693, 693–94 (2005); Weiler, *Transformation*, *supra* note 14, at 2468–69.

18. Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 912–15 (2004) (arguing that the development of international law as governance blurs the distinction between national and international law and consequently leads to the issue of democratic legitimacy).

19. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 60–71 (1964).

institution. Second, the coverage of international law has expanded to include nonstate actors. A State may be prevented from complying with an international law rule if its people do not consider the rule legitimate.[20] Thus, legitimacy needs to be ensured from the perspective of nonstate actors within the State.[21] Finally, international tribunals have begun to play a more important role in interpreting international law rules, a role that in the past was fulfilled by States alone.[22] These tribunals may be remote from the control of state consent, and this raises concerns about the legitimacy of their interpretations as well as the tribunals themselves.

Having recognized the significance of legitimacy in international law, it remains to be examined what, in addition to state consent, confers legitimacy to international law. The composition of additional sources of legitimacy and the significance of each may even vary within a single institution.[23] The following subsections examine major sources of objective and subjective legitimacy in the dispute settlement system.[24] The chief purpose of this Section is not to create an exhaustive list of legiti-

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20. Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collective Project*, 1 GLOBAL GOVERNANCE 119, 142 (1995).

21. Bodansky, *supra* note 15, at 610–11.

22. Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 372, 385 (1991).

23. Such variety exists within the WTO as well. In trade liberalization negotiations, the involvement of every Member State is strongly preferred in order to ensure the legitimacy of the negotiations. For example, developing countries are encouraged to participate in the current services negotiations through the submission of *any* kind of liberalization requests and offers. Special Session of the Council for Trade in Services, *Guidelines and Procedures for the Negotiations on Trade in Services*, ¶¶ 1–2, S/L/93 (Mar. 29, 2001). What matters here is not the substance of liberalization commitments, but rather the fact that all the members are *involved* in the liberalization process. *Id.* On the other hand, in the Trade Policy Review Mechanism ("TPRM"), the completeness and accuracy of information is more critical than the attendance and remarks of every member at TPRM meetings. Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153, 158–63 (2007). The most remarkable example of such variety can be illustrated by the difference between the decision-making procedure in the negotiations and that in the dispute settlement system. The former adopts the consensus approach, whereas the latter adopts the negative consensus approach, and not without reason. *See* WORLD TRADE ORG., UNDERSTANDING THE WTO 57, 101 (2007), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf [hereinafter UNDERSTANDING THE WTO].

24. Bodansky, *supra* note 15, at 601–02.

macy sources,[25] but rather to reveal the relative value of each.[26] This analysis will show that the overall legitimacy of the dispute settlement system is achieved through a delicate balance among its various legitimacy sources.

A. Objective Legitimacy

There are four indispensable factors that confer objective legitimacy to the dispute settlement system: independence, transparency, authority, and effectiveness.[27] Regarding the first,[28] impartial rulings made by independent tribunal members help ensure that no political or special interest groups prejudice rulings in favor of one party. Transparency, also an essential source of objective legitimacy in the dispute settlement system, fosters its impartiality by enabling the public to monitor the adjudication of disputes.[29] The third source is the authority of the system.[30] Unless

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25. Scholars have attempted to draw a list of legitimacy sources in and outside the context of the WTO. *See, e.g.*, Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1515–22 (2006) [hereinafter Esty, *Good Governance*]; Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 298–337 (1997); Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, *in* THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE 35, 41–68 (J.H.H. Weiler ed., 2000); Kumm, *supra* note 18, at 917–27.

26. A factor that enhances objective legitimacy could undermine subjective legitimacy and vice versa. Moreover, the sources of legitimacy of the dispute settlement system do not necessarily ensure the legitimacy of other branches of the WTO, or the WTO as a whole. BROUDE, *supra* note 8, at 57–73; Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 50–56 (2005) [hereinafter Pauwelyn, *Transformation*]. *But see* Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 458–65 (1996).

27. These sources of objective legitimacy are merely illustrative. There can be other sources of objective legitimacy in the dispute settlement system, although this Article does not discuss them.

28. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 276–84 (2003). *But see* Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 29–54 (2005) (statistically analyzing the practices of international tribunals, including the WTO, and rejecting the correlation between the independence and the effectiveness of the tribunals).

29. Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT'L STUD. Q. 109, 109–11 (1998); Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221, 248 (2003).

30. Bodansky, *supra* note 15, at 605–06 (discussing authority in terms of legality and legitimacy). In this Article, "authority" signifies the legal validity of the jurisdictional basis and findings of the panels and the Appellate Body.

panel and Appellate Body reports are based on a valid jurisdictional basis and legally sound findings, the reports will lack the power to induce the responding party to comply. Finally, the dispute settlement system cannot be objectively legitimate unless it is effective in achieving its institutional goals, the most primary of which is the resolution of disputes.[31]

These sources of objective legitimacy may conflict with one another, and each source contributes to the overall legitimacy of the system to a different degree. Placing greater emphasis on one legitimacy source could conflict with another source and thus lower the overall legitimacy of the system. Thus, we need to be aware of the different importance of each source when we emphasize or de-emphasize one source over others. A fine balance among these sources of legitimacy bestows overall objective legitimacy to the dispute settlement system.

This can be illustrated by the relationship between independence and transparency. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") sets forth detailed provisions regarding the independence of the tribunals' composition and deliberations.[32] The DSU thereby ensures that the proceedings of the dispute settlement system are free from any undue influence of interested parties[33] or WTO political divisions, such as the Dispute Settlement Body ("DSB").[34] However, the dispute settlement system has often been criti-

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31. Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 277–78 (2008) (discussing deliberation as a means to achieve legitimacy). There is an interdependent relationship between the *effectiveness* of a rule or institution and the legitimacy of a rule or institution. While the effective resolution of disputes is a fundamental source of legitimacy in the dispute settlement system, the legitimacy of the system helps ensure effective dispute resolution. Caron, *supra* note 13, at 558–61 ("[P]erceptions of illegitimacy may work against the effectiveness of the Security Council.").

32. Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 8.2, 8.9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. *See also* WTO Dispute Settlement, *Working Procedures for Appellate Review*, art. 6.2, WT/AB/WP/5 (Jan. 4, 2005).

33. There is an exception wherein the parties are allowed to oppose the composition of panelists proposed by the WTO Secretariat if they have "compelling reasons" to do so. DSU, *supra* note 32, art. 8.6. In this manner, the parties can exert some influence over the selection of panelists. This frequently invoked exception is justified in order to make the selection legitimate from the perspective of the parties.

34. The DSB, comprised of all WTO member governments, is authorized to decide to establish a panel and adopt a panel report. DSU, *supra* note 32, art. 6.1 (regarding the establishment of panels); *id.* art. 16 (regarding the adoption of reports). Under the negative consensus approach, such decisions are made automatically and the authority of the DSB is nominal. *See* UNDERSTANDING THE WTO, *supra* note 23, at 56. The influence of member governments would grow if their authority was made effective. Special Session

cized for its serious lack of transparency. The DSU states that the deliberations of the tribunals shall be kept confidential[35] and that unless a party to a dispute decides to disclose its submissions to the public, written submissions to the tribunals shall remain confidential.[36] While critics have suggested that the legitimacy of the dispute settlement system should be improved by enhancing its transparency,[37] this suggestion overlooks how transparency and independence may conflict with each other.

In some cases, the system's transparency may enhance its independence. For example, the publication of party submissions may prevent the tribunals from considering exogenous factors, such as political factors, that are not included in the submissions. Nevertheless, the transparency of the dispute settlement system may clash with its independence.[38] For example, transparency might open the way for various actors to influence dispute settlement proceedings.[39] Public attendance and media coverage of tribunal meetings might sway panelists and Appellate Body members in favor of one of the parties and could thereby impair their independence. In addition, the requirement to publicize all party submissions might encourage the disputing parties to settle a dispute outside the dispute settlement system. Thus, there is a conflicting relationship between the transparency and independence of the dispute settlement system, and these two sources must be balanced to achieve greater objective legitimacy.

A similar relationship exists between the system's authority and effectiveness. The jurisdictional basis of a panel to adjudicate disputes is es-

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of the Dispute Settlement Body, *Revised Textual Proposal by Chile and the United States: Flexibility and Member Control*, TN/DS/W/89 (May 31, 2007) (proposing the so-called "partial adoption" procedure).

35. DSU, *supra* note 32, arts. 14, 17.10.

36. *Id.* art. 18.2.

37. *See, e.g.*, Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 365–68 (2006) [hereinafter Charnovitz, *Nongovernmental Organizations*]; Esty, *Good Governance*, *supra* note 25, at 1544–47.

38. The position of the DSU is that the independence of the dispute settlement system should be prioritized over the transparency of the system. DSU, *supra* note 32, arts. 8.2, 14, 17 (Article 8.2 explicitly calls for the selection of independent panel members, while Articles 14 and 17 require the confidentiality of both the panel and the Appellate Body proceedings, thereby subverting transparency.). The dispute settlement system is relatively open, at least for members, in that a member can easily intervene in dispute settlement proceedings either as a co-complaining party or as a third party. Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, 5 J. INT'L ECON. L. 287, 300–03 (2002) (pointing out the liberal approach of WTO panels in permitting intervention by nonparty WTO members).

39. Trachtman & Moremen, *supra* note 29, at 228.

tablished at a DSB meeting upon a request filed by the complaining party and the scope of the panel's jurisdiction is limited to the specific facts and WTO provisions explicitly mentioned in the request.[40] On the one hand, this restraint on the panel's authority may be justified because it enables the panel and the parties to focus on specifically defined issues, and to develop and refine factual and legal arguments. On the other hand, limited jurisdiction may prevent the panel from considering changes in circumstances subsequent to a panel request,[41] or the broader context of a dispute.[42] As a result, a panel may fail to provide an *effective* solution to the overall dispute between the parties. In practice, when defining its jurisdictional scope, a panel must attain a balance between the need to restrain its authority and the need to resolve a dispute effectively.

B. Subjective Legitimacy

Subjective legitimacy arises from the views of stakeholders in trade disputes.[43] Most importantly, it refers to legitimacy as perceived by governments, particularly those of disputing parties.[44] The WTO Agreement expressly provides for the rights and obligations of governments, and it is the governments of the disputing parties that owe obligations resulting from the settlement of disputes.[45] Thus, a government may refuse to comply with a dispute settlement decision if it considers the decision or the dispute settlement system itself to be illegitimate.[46]

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40. DSU, *supra* note 32, arts. 6–7.

41. According to the Appellate Body, factual developments subsequent to the panel establishment can fall within the panel's jurisdiction provided the developments did not change the essence of the original measure identified in the panel request. Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶¶ 135–44, WT/DS207/AB/R (Sept. 23, 2002). *See also* Panel Report, *India—Measure Affecting the Automotive Sector*, ¶¶ 7.23–.37, 8.14–.30, WT/DS146/R, WT/DS175/R (Dec 21, 2001).

42. In a recent WTO dispute, the Appellate Body refused to adjudicate non-WTO issues even though the issues before the Appellate Body were only a part of the broader dispute between the parties. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 78, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter *Mexico—Soft Drinks*].

43. As actors in the WTO's dispute settlement system, the views of the stakeholders will determine the degree of legitimacy conferred on the institution. *See* HURD, *supra* note 16, at 7 (discussing the subjective facet of legitimacy, generally, as "an actor's normative belief that a rule or institution ought to be obeyed").

44. *See id.* (examining how an actor's "perception" of an institution and its rules will affect behavior).

45. *See, e.g.*, DSU, *supra* note 32, arts. 3.2, 19.1.

46. DSU, supra note 32, art. 19.1. *But cf.* Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 HARV. NEGOT. L. REV. 331, 352

The subjective legitimacy of the system also depends upon the perceptions of businesses.[47] Although they do not have immediate legal obligations under the dispute settlement system, businesses are deeply affected by the economic effects of trade disputes. However, unlike the subjective legitimacy on the part of governments, legitimacy as perceived by businesses is not directly reflected in the structure of the dispute settlement system. For example, businesses are not allowed to bring a case directly to the dispute settlement system.[48] If they wish to file a complaint against a WTO member, they need to persuade their government to do so.[49] In addition, businesses cannot attend panel and Appellate Body meetings, even if their vital interests are involved in a dispute.[50] While the intergovernmental nature of the WTO may explain the exclusion of businesses from dispute settlement proceedings,[51] it may appear to businesses that the statist approach deprives them of the right to advance their economic interests directly before the WTO.[52] Nevertheless, busi-

(2004) (analyzing the DSU's inability to enforce its decisions by means other than "allowing the complaining party to erect retaliatory trade barriers against the offending party until the offending party complies with the ruling").

47. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 877–86 (1995) (arguing that in an "Efficient Market Model" of international trade dispute resolution, "governments and businesses that favor free trade may circumvent domestic protectionist groups and increase the world's wealth" through international trade laws and tribunals). *See also* Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶¶ 7.71–.94, WT/DS152/R (Dec. 22, 1999) (stating that the objects and purposes of Article 23 of the DSU are "the creation of market conditions conducive to individual economic activity in national and global markets and . . . the provision of a secure and predictable multilateral trading system").

48. GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 15 (2003).

49. *See id.* at 31–50 (describing the "public-private collaboration" that allows the interests of private firms a point of entry into the DSB).

50. DSU, *supra* note 32, app. 3 ("The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.").

51. In international investment arbitrations, private businesses can directly sue the government of a host country in accordance with the rules of international law. *See, e.g.*, Wong-Mog Choi, *The Present and Future of the Investor-State Dispute Settlement Paradigm*, 10 J. INT'L ECON. L. 725, 735–36 (2007) (discussing the advantages of international investment arbitration). While direct standing is beneficial to investing businesses, arbitrators and their decisions are occasionally criticized for disregarding the legitimate public policy concerns of the host country. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1521–23, 1584–88 (2005).

52. Shell, *supra* note 47, at 902–03. *But see* Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 25 U. PA. J. INT'L

nesses often have a close connection with their government, which enables them to exert influence over trade policy.[53] In fact, governments participating in dispute settlement proceedings often act as faithful agents of businesses, and a government's decision to file a complaint with the dispute settlement system is often a response to the demands of businesses.[54] Thus, the lack of legitimacy as perceived by businesses is supplemented by their partnership with governments in the domestic sphere.[55]

While in some cases subjective legitimacy is derived from objective legitimacy, in others, these two types of legitimacy may be incompatible. This relationship may be illustrated by the former decision-making procedures in the General Agreement on Tariffs and Trade ("GATT"), the consensus approach.[56] Under the consensus approach, a panel could not be established and a panel report could not be adopted unless all the contracting parties to the GATT reached a consensus to that effect.[57]

This approach had both positive and negative effects on the overall legitimacy of the GATT dispute settlement system. On the one hand, the consensus approach weakened the dispute settlement system's indepen-

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ECON. L. 669, 699 (2004) [hereinafter Nichols, *Standing*] (presenting a skeptical view on the direct standing of nongovernmental actors).

53. Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 441–51 (1998) (describing the significant roles played by private companies behind the film dispute between Japan and the United States). *See also* William H. Barringer & James P. Durling, *Out of Focus: The Use of Section 301 to Address Anticompetitive Practices in Foreign Markets*, 1 UCLA J. INT'L L. & FOREIGN AFF. 98 (1996). Of course, there are also cases where a government refused a request by businesses to bring a case to the dispute settlement system in the light of public policy considerations. *See* Petros C. Mavroidis et. al., *Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?*, 32 J. WORLD TRADE 147, 151 (1998).

54. One of the typical examples is *Japan—Measures Affecting Consumer Photographic Film and Paper*, a WTO dispute between Japan and the United States, which was triggered by the struggle between the private film companies Fuji and Kodak. Barringer & Durling, *supra* note 53.

55. *See generally* SHAFFER, *supra* note 48 (evaluating how private companies collaborate with governmental authorities in the domestic sphere to challenge foreign trade barriers before the WTO).

56. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194. [hereinafter GATT Agreement]. The GATT is the predecessor to the WTO and is now incorporated in the WTO Agreement as the GATT 1994. WTO Agreement, *supra* note 4, art. 2(4). The decision-making procedures in the GATT, including those in the dispute settlement system, have adopted the consensus approach. ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 165, 231–33 (1993).

57. *Id.* at 231–33.

dence and effectiveness, sources of objective legitimacy. It gave *de facto* veto power to every contracting party, and this occasionally interrupted the flow of the dispute settlement proceedings.[58] On the other hand, the government parties perceived the dispute settlement system's proceedings and decisions to be legitimate because the unanimous consent of contracting parties was required.[59] At the time the GATT was adopted, it was not backed by strong political support.[60] Thus, although the consensus approach interfered with the GATT's objective legitimacy, this approach was favored because it increased the GATT's legitimacy as perceived by the governments of the contracting parties.[61]

However, as trade relations expanded and trade disputes increased, the contracting parties gradually became frustrated by the ineffectiveness of the GATT dispute settlement system, which eventually led the United States to pursue unilateralism.[62] The U.S. response persuaded the contracting parties to tackle the system's inefficiency. Consequently, the Uruguay Round adopted the negative consensus approach, which allows for the automatic establishment of a panel and the automatic adoption of a panel report.[63]

While the negative consensus approach improved the effectiveness of the dispute settlement system by giving it *de facto* compulsory jurisdic-

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58. For example, in the GATT disputes between the United States and the European Community in the 1980s, the adoption of panel reports was either blocked or significantly delayed by the refusal of one or some of the contracting parties. *Id.* at 145–64.

59. *But see* Robert Howse, *The Legitimacy of the World Trade Organization*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355, 359–63 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (pointing out that the legitimating value of state consent is "inherently limited or insufficient").

60. After World War II, there was a major need for international economic institutions, and although the GATT was originally intended to serve as a multilateral treaty, and not an organization, the GATT began to apply provisionally in the deadlock of the negotiation of the International Trade Organization. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 35–41 (1989).

61. HUDEC, *supra* note 56, at 8.

62. Robert E. Hudec, *Thinking About the New Section 301: Beyond Good and Evil*, *in* AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 113, 125–36 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

63. Under the negative consensus approach, the DSB establishes a panel and adopts a panel report automatically unless it decides otherwise by consensus. HUDEC, *supra* note 56, at 237 (stating that "the only plausible explanation" for the inclusion of the negative consensus approach is the U.S. unilateral legal policy). *See also* Pauwelyn, *Transformation*, *supra* note 26, at 29–32 ("[S]urrender of the veto occurred through [an] . . . incremental process, closing off a major exit route, while injecting new levels of voice" in the political decision-making process.).

tion,[64] it also reduced governments' control over proceedings, thereby threatening to impair the subjective legitimacy of the system. Thus, complementary measures were introduced to compensate for the diminished role of state consent. For example, in order to enhance the overall legitimacy of the system, the Uruguay Round adopted improvements such as the creation of the Appellate Body, the unification of dispute settlement procedures, and the clarification of the standard of review.[65] In short, the former decision-making procedure in the GATT demonstrates how the structure of the dispute settlement system strikes a balance between objective and subjective legitimacy.

II. LEGITIMACY AS PERCEIVED BY CIVIL SOCIETY

A. Background and Criticism

Recently, the dispute settlement system has been criticized for disregarding the nontrade interests and values of citizens, such as the environment, human rights, and health.[66] This criticism adds a new dimension to establishing the overall legitimacy of the system.[67] In the past, citizens were relatively indifferent to international trade rules because these rules tended to be very technical and appeared to have no visible impact on them.[68] Accordingly, the GATT dispute settlement system was created without considering civil society's concerns.[69] Citizens attributed little significance to the system, which seemed most relevant for governments and large businesses. However, the situation is now chang-

64. Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law?: Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25, 33–35 (1998).

65. ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 177–98 (1997).

66. *See, e.g.*, Howse, *supra* note 25, at 62–68; Robert Howse & Elisabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the* Canada-EC Asbestos Dispute, *in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283, 300–06 (Gráinne de Búrca & Joanne Scott eds., 2001) (pointing out that the Appellate Body did consider nontrade values in interpreting Article III of GATT 1994); Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 6, 709–18 (1996) [hereinafter Nichols, *Values*].

67. Howse, *supra* note 25, at 36–42 (arguing that tribunals must address nontrade values fairly and sensitively because dispute settlement outcomes must now have "social legitimacy" in addition to "formal legitimacy").

68. John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511, 557–58 (2000).

69. Shoaib A. Ghias, *International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body*, 24 BERKLEY J. INT'L L. 534, 546–47 (2006).

ing.[70] Civil society is becoming increasingly conscious of and concerned about international trade rules and dispute settlements.

One of the major reasons for this change is the development of international trade rules. Since the GATT, the WTO rules have expanded substantially and now cover every aspect of the trade in goods, services, intellectual property rights, and investments.[71] The WTO Agreement may even occasionally have a detrimental affect on nontrade-related domestic regulation, such as the regulation of food safety and environmental protection.[72] Moreover, improved enforcement through the WTO's dispute settlement system reinforces the impact of the WTO Agreement's expansive rules.[73]

Concurrent with the development of international trade rules, the flow of international trade and investments has been increasing at an unprecedented rate,[74] thereby furthering not only economic, but also social and cultural globalization. As a result, even citizens who were unconcerned with trade rules have been forced to face the challenges of globalization. Recognizing that they are critical stakeholders in international trade disputes, citizens are demanding a say in the dispute settlement system, which they have criticized as statist and trade-biased.[75]

In part, the position of citizens in international trade disputes is similar to that of businesses, as citizens' interests and values are also not directly

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70. Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 269–72 (2001) (arguing that the club arrangements of trade politics—under which small numbers of rich-country trade ministers controlled the agenda and made deals—are being undercut by their success).

71. WTO Agreement, *supra* note 4.

72. Nichols, *Values*, *supra* note 66, at 672–90 (pointing out that societal values, such as the environment, labor, and cultural identity, may conflict with the precepts of free trade).

73. *See, e.g.*, William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17 (2005) (discussing the success of the dispute settlement system).

74. For example, the global inflow of foreign direct investment in 2006 was $1306 billion, compared to $202 billion in 1990. U.N. CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT 2007: TRANSNATIONAL CORPORATIONS, EXTRACTIVE INDUSTRIES AND DEVELOPMENT at 9, U.N. Sales No. E.07.II.D.9 (2007).

75. Steve Charnovitz, *Opening the WTO to Nongovernmental Interests*, 24 FORDHAM INT'L L.J. 173, 197–212 (2000). *See also* Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL. 753, 789–90 (stating that the dispute settlement system should protect individual rights and that it should be open to nonstate actors). There is also a controversy over the participation of civil society in rulemaking procedures. *See, e.g.*, Charnovitz, *Nongovernmental Organizations*, *supra* note 37, at 366–68.

represented. However, unlike businesses, citizens are unorganized and tend to lack close connections with their governments, making it difficult for them to influence their policies.[76] Moreover, foreign policy, an area known for its high politics, is normally subject to only limited democratic control,[77] which has been further eroded as the forces of globalization shift decision-making fora from the domestic to the international sphere.[78] What supplements the lack of legitimacy as perceived by businesses (i.e., close connections with governments) is insufficiently available to citizens. The lack of subjective legitimacy on the part of citizens is exacerbated by the absence or weakness of domestic channels, which would allow them to better realize their preferences.[79]

Therefore, critics argue that the dispute settlement system should directly consider and reflect the diverse concerns of civil society without relying on the intermediation of national governments.[80] They have offered several specific ways in which this can be achieved. First, critics have suggested opening panel and Appellate Body meetings to the public.[81] Second, some have proposed the acceptance and consideration of unsolicited amicus curiae briefs submitted by the public.[82] Finally, oth-

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76. *See* Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 489–91 (2001) (noting that as the integration of international institutions intensifies, national democracies tend to be more constrained).

77. The treaty-making power of the executive is normally subject to parliamentary consent alone. LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 49–68 (1990). *See also* Karl Kaiser, *Transnational Relations as a Threat to the Democratic Process*, *in* TRANSNATIONAL RELATIONS AND WORLD POLITICS 356, 357 (Robert O. Keohane & Joseph S. Nye, Jr. eds., 1972).

78. JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 8–10 (2006) (discussing the exogenous and endogenous forces of globalization); Robert A. Dahl, *Can International Organizations be Democratic? A Skeptic's View*, *in* DEMOCRACY'S EDGE 19, 34 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) (pointing out that the costs of democracy should be taken into account when constructing international organizations). *See also* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995).

79. *See* Eric Stein, *supra* note 76, at 489–91.

80. In a similar vein, some argue that international institutions should be accountable to civil society. *See, e.g.*, Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121, 1135–38 (2003) (discussing the accountability of the U.N. Security Council). *See also* Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006) (examining to whom international institutions should be accountable).

81. *See, e.g.*, J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 AM. REV. INT'L ARB. 177, 191 (2002).

82. *See, e.g.*, Charnovitz, *supra* note 9, at 348–57; Esty, *Non-Governmental Organizations*, *supra* note 9, 125–26.

ers have maintained that trade tribunals should reflect nontrade concerns in their interpretations of international trade rules.[83]

Given the growing impact of trade rules and trade disputes on civil society, the interests and values of citizens cannot be neglected in the settlement of international trade disputes. Unless citizens perceive the dispute settlement system and its rulings as legitimate, governments of responding parties will meet strong resistance from their citizens when implementing the dispute settlement rulings and may fail to internalize these rulings into their domestic legal orders. Nevertheless, the critics' proposals may disturb the balance among sources of legitimacy.

B. Effects of the Critics' Proposals on Legitimacy

1. Open Panel and Appellate Body Meetings

Critics assert that opening panel and Appellate Body meetings to the public will enhance the transparency of the dispute settlement system and thereby improve its legitimacy as perceived by civil society.[84] However, this proposal may also have harmful effects on the system's overall legitimacy. For example, the presence of citizens at meetings could prevent governments of the disputing parties from reaching an effective solution to the dispute.[85] Open meetings could also impair the independence of panel and Appellate Body reviews[86] and interfere with governments' control over proceedings. Special precautions would need to be taken in order to avoid such results. A few recent cases illustrate the type of precautions that may be used. In *US—Continued Suspension* and *Canada —Continued Suspension,* the disputing parties agreed to open the panel

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83. *See, e.g.*, Howse, *supra* note 25, at 62–68; Howse & Tuerk, *supra* note 66, 300–06 (pointing out that the Appellate Body did consider nontrade values in interpreting Article III of GATT 1994); Nichols, *Values*, *supra* note 66, at 709–18. There is also a proposal to take legislative measures, instead of adjudicative measures, in order to incorporate the nontrade concerns of citizens into the WTO. Guzman, *supra* note 8, at 309–28.

84. Dispute Settlement Body Special Session, *Further Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Relating to the Transparency—Revised Legal Drafting*, ¶¶ 1–2, WTO Doc. TN/DS/W/86 (Apr. 21, 2006).

85. Article 3.7 of the DSU provides that a solution mutually acceptable to the parties is clearly preferred. DSU, *supra* note 32, art. 3.7. In practice, the parties to a dispute occasionally continue talks in order to reach an amicable solution to the dispute even after a panel review has begun. *E.g.*, Panel Report, *Japan—Import Quotas on Dried Laver and Seasoned Laver*, ¶¶ 14–17, WT/DS323/R (Feb. 1, 2006) (noting that the parties reached a mutually agreed solution after establishment of the panel).

86. As discussed above, the DSU prioritizes independence over the transparency of the system. *See supra* note 38 and accompanying text.

meetings to the public.[87] Citizens observed the meetings through closed-circuit television broadcasts, but they were not allowed to sit in the meeting rooms.[88] This method was subsequently adopted in other meetings because of its practical value in furthering transparency without impairing the independence of the proceedings.[89]

2. The Acceptance and Consideration of Amicus Curiae Briefs

Another proposal offers that unsolicited amicus curiae briefs should be accepted and considered in order to facilitate citizens' participation in the dispute settlement system. This proposal, though, may impair rather than improve legitimacy as perceived by civil society. First, amicus curiae briefs may not be sufficiently representative of civil society as a whole.[90] Only a handful of citizens have the resources or expertise to submit them, and there is no assurance that these citizens represent the collective views of civil society.[91]

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87. Communication from the Chairman of the Panels, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, *Canada—Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS320/8, WT/DS321/8 (Aug. 2, 2005). In these cases, the Appellate Body's oral hearing was also opened to the public. WTO Trade Topics Section: Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/public_hearing_july08_e.htm (last visited Nov. 10, 2008).

88. *E.g.*, Press Release, World Trade Org., WTO Meeting on "Zeroing" Dispute Opened to the Public (Oct. 10, 2008). Among the citizens that came to these meetings were journalists, nongovernmental organization representatives, and scholars. WTO 2005 News Items, *Dispute Settlement—WTO Opens Panel Proceeding to Public for the First Time*, Sept. 12, 2005, http://www.wto.org/english/news_e/news05_e/openpanel_12sep_e.htm.

89. After *US—Continued Suspension* and *Canada—Continued Suspension*, for cases in which panel meetings were opened to the public at the request of the parties, see Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 1.9, WT/DS350/R (Oct. 1, 2008); Panel Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Article 21.5 of the DSB by the United States*, ¶ 1.11, WT/DS27/RW/USA (May 19, 2008); WORLD TRADE ORGANIZATION, *WTO: 2008 News Items—WTO Meeting on "Zeroing" Dispute Opened to the Public*, Oct. 10, 2008, http://www.wto.org/english/news_e/news08_e/dispu322_10oct08_e.htm (a decision for the dispute *United States—Measures Relating to Zeroing and Sunset Reviews* has yet to be published); WORLD TRADE ORGANIZATION, *WTO: 2008 News Items—WTO Hearings on Apple Dispute Opened to the Public*, Aug. 11, 2008 (a decision for the dispute *Australia—Measures Affecting the Importation of Apples from New Zealand* has yet to be published).

90. Yuka Fukunaga, *Participation of Private Parties in the WTO Dispute Settlement Processes: Treatment of Unsolicited Amicus Curiae Submissions*, 4 SOOCHOW L.J. 99, 122–24 (2007) [hereinafter Fukunaga, *Participation*].

91. Although it is uncertain whether the proposed criteria can successfully sort out the eligible amici curiae, some criteria are proposed to assess if amici curiae are suitably representative. *See, e.g.*, Hervé Ascensio, *L'Amicus curiae devant les juridic-*

In addition, it would be difficult for panelists and Appellate Body members to reconcile conflicting interests and values in amicus curiae briefs.[92] Critics seem to assume that these briefs would enable all trade stakeholders to engage in a deliberative dialogue and to reach a rational and persuasive outcome for the entire society.[93] However, such a deliberative dialogue can only succeed in a polity in which citizens share a common identity and common interests.[94] At this point, the most common form of polity is the nation-state.[95] A polity that transcends national boundaries has not emerged and is not likely to do so in the near future.[96]

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tions-internationales [Amicus Curiae Before International Courts], 105 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.I.D.P.] 897, 911–21 (2001) (Fr.); Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 BROOK. J. INT'L L. 139, 178–206 (2005); Gabrielle Marceau & Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs Before WTO Adjudicating Bodies*, 4 J. INT'L ECON. L. 155, 179–81 (2001).

92. Fukunaga, *Participation*, *supra* note 90, at 125–28.

93. Esty, *Good Governance*, *supra* note 25, at 1520–21 ("In the international policy arena, a transparent decision-making process that provides opportunities for debate and political dialogue, with participation by those representing a broad range of views, is a key to legitimacy, substituting for the missing democratic legitimacy and accountability that elections provide."); Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94, 114–16 (2002) ("[P]roviding participatory opportunities for NGOs is not simply a matter of addressing the problem of agency costs of representative democracy—it is also a question of seizing on the potential for deliberative democracy at the transnational level.") (emphasis removed). For a discussion of deliberative democracy in general, see, for example, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 107–09, 118 (William Rehg trans., 1996).

94. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6–7 (1991); Will Kymlicka & Christine Straehle, *Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature*, 7 EUR. J. PHIL. 65, 68–72, 82–83 (1999). Anderson describes this type of polity as follows:

> [The nation] is an imagined political community and imagined as both inherently limited and sovereign. . . . [I]t is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions, not so much to kill, as willingly to die for such limited imaginings.

ANDERSON, *supra*, at 6–7.

95. ANTHONY D. SMITH, NATIONAL IDENTITY 8–18 (1991) (discussing the elements of national identity).

96. *See, e.g.*, *id.* at 175 ("[T]he chances of transcending the nation and superseding nationalism are at present slim. . . . A growing cosmopolitanism does not in itself entail the decline of nationalism."); Bodansky, *supra* note 15, at 615–17 ("[A] demos—a shared sense of community . . . is absent at the global level."). *See also* Weiler, *supra* note 14, at 2466–74 (stating that even in the European Union, a collective polity has not emerged). It

A deliberative dialogue might therefore be regarded as the unilateral imposition of a foreign value by foreign citizens.[97] Given these circumstances, even if panels and the Appellate Body make rulings with full awareness of all the interests and values represented by amicus curiae briefs, the citizens adversely affected by the rulings may only consider their concerns to have been illegitimately discounted in favor of others.

Second, the acceptance and consideration of amicus curiae briefs may also harm the dispute settlement system's legitimacy as perceived by governments. Trade disputes often involve a direct conflict of economic interests between disputing parties, and arguments of amicus curiae briefs tend to favor the interests of one party to the detriment of the other.[98] Moreover, even if the arguments in a brief are consistent with those that a government would like to make in a given case, the government may consider them to have adverse implications for future cases. In fact, many developing countries, whose interests are more likely to clash with those of amici curiae, are opposed to the acceptance and consideration of unsolicited briefs.[99]

Finally, instituting the proposal in question may also damage the objective legitimacy of the dispute settlement system. Consideration of amicus curiae briefs would allow a few select interest groups to influence dispute settlement proceedings considerably and may call into question the independence of the system. A small number of protectionist interest groups often exert disproportionate pressure to restrict trade despite the benefits of free trade for the rest of the world.[100] In addition to protec-

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is also suggestive that while international law recognizes the value of democracy, it generally does so at the national, not international, level. James Crawford, *Democracy and International Law*, 64 BRIT. Y. B. INT'L L. 113, 123–30 (1993).

97. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 222–29 (1944).

98. Thus far, most amicus curiae briefs have supported the position of the responding party. Fukunaga, *Participation*, *supra* note 90, at 120.

99. *See, e.g.*, Dispute Settlement Body Special Session, *Dispute Settlement Understanding Proposals: Legal Text*, at 1, WTO Doc. TN/DS/W/47 (Feb. 11, 2003); WTO Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 October 2002*, at 7–27, WT/DSB/M/134 (Jan. 29, 2003); Dispute Settlement Body Special Session, *Text for the African Group Proposals on Dispute Settlement Understanding Negotiations*, at 3, WTO Doc. TN/DS/W/42 (Jan. 24, 2003); Dispute Settlement Body Special Session—*Negotiations on the Dispute Settlement Understanding*, at 3–4, WTO Doc. TN/DS/W/18 (Oct. 7, 2002); WTO Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 6 November 1998*, WT/DSB/M/50 (Dec. 14, 1998).

100. McGinnis & Movsesian, *supra* note 68, at 515–16 ("[O]wners and workers in . . . industries [that suffer because of free trade] will agitate for protectionist measures that restrict imports. Such protectionist interest groups command disproportionate leverage in

tionist groups, an empirical study shows that major businesses have been active in submitting unsolicited amicus curiae briefs to the panels and Appellate Body.[101] One of the challenges for the multilateral trading system has been to insulate trade policy from such protectionist pressure,[102] and the acceptance and consideration of amicus curiae briefs may conflict with this objective.

Additionally, it is unclear if the panels and the Appellate Body even have the legal authority to accept and consider amicus curiae briefs. Although the Appellate Body has asserted its authority to do so, the text of the DSU neither confirms nor denies this right.[103]

3. The Interpretative Approach to Reflect Nontrade Values

Reflecting nontrade values in the interpretation of the WTO Agreement has long been the subject of scholarly debate.[104] This issue arises in two different situations, when a nontrade value is embodied in non-WTO international law rules, and when it is not. While in the former case the issue concerns how these non-WTO rules relate to the rules of the WTO Agreement, in the latter it is whether panels and the Appellate Body are justified in reflecting the non-law, nontrade value in their interpretations of the WTO Agreement. Critics claim that in both situations the interpretative approach incorporating nontrade values would reduce the trade bias of the dispute settlement system and improve legitimacy as perceived by civil society.[105] However, if taken too far, this approach could

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domestic politics, and their lobbies are often able to secure import restrictions, even though the overall citizenry suffers.").

101. Fukunaga, *Participation*, *supra* note 90, at 120.

102. Robert Hudec, *"Circumventing" Democracy: The Political Morality of Trade Negotiations*, 25 N.Y.U. J. INT'L L. & POL. 311, 312–17 (1993) (pointing out that direct democratic participation led to the adoption of the notorious Smoot-Hawley Act).

103. *See, e.g.*, Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶¶ 39–42, WT/DS138/AB/R (May 10, 2000); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 101–10, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US—Shrimp*]; Brigitte Stern, *L'Intervention des tiers dans le contentieux de l'OMC* [Third-Party Intervention in WTO Disputes], 107 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.I.D.P.] 257, 289–93 (2003) (Fr.) (criticizing the interpretations of the Appellate Body). In practice, the Appellate Body has not taken into account amicus curiae briefs unless the briefs were attached to the parties' submissions. *United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 75–77, WT/DS58/AB/RW (Oct. 22, 2001).

104. *See supra* note 80 and accompanying text.

105. Howse, *supra* note 25, at 62.

have harmful consequences on the balance of legitimacy. The following discussion considers each situation separately.

(a) Nontrade Values Embodied in Rules of International Law

The interpretive approach incorporating nontrade international law rules may be helpful in resolving trade disputes if the non-WTO rule does not conflict with the WTO Agreement. For example, the WTO Agreement may explicitly or implicitly[106] recognize the relevance of a non-WTO international law rule. In this case, the WTO members have agreed that the panels and Appellate Body are required to rely on the non-WTO rule in resolving the trade dispute. If the WTO Agreement does not implicitly or explicitly recognize the non-WTO rule, the interpretive approach may still be helpful in resolving trade disputes. Even if its relevance is not recognized in the text of the WTO Agreement, the nontrade rule may help clarify the meaning of the rules of the WTO Agreement. For example, in *US—Shrimp*, to clarify the meaning of Article XX of the GATT, the Appellate Body cited non-WTO international law, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the doctrine of *abus de droit*.[107]

Referencing non-WTO rules may also generally improve the subjective and objective legitimacy of the dispute settlement system. The interests of civil society are more likely to be embodied in non-WTO rules, for example, international human rights law,[108] and governments expect the panels and the Appellate Body to reflect other international agreements in adjudicating disputes.[109] In addition, recognizing non-WTO rules may strengthen the objective legitimacy of the system. Article 31(c) of the

106. Article 3.2 of the DSU implicitly recognizes the rules of interpretations codified in Articles 31 and 32 of the Vienna Convention. *See, e.g.*, Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 10–12, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996); Appellate Body Report, *United States—Standards for Reformulating and Conventional Gasoline*, at 15–16, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US—Gasoline*]. The Agreement on Trade-Related Aspects of Intellectual Property Rights explicitly incorporates the provisions of international legal instruments concerning the protection of intellectual property rights. *See, e.g.*, Panel Report, *Canada—Patent Protection of Pharmaceutical Products*, ¶¶ 7.13–.15, WT/DS114/R (Mar. 17, 2000).

107. *US—Shrimp*, *supra* note 103, ¶¶ 129–34, 158.

108. *E.g.*, David Kinley, *Human Rights Fundamentalisms*, 29 SYDNEY L. REV. 545, 571–72 (2007) (stating that international organizations, such as the WTO, the World Bank, and the IMF, do not sufficiently address human rights concerns).

109. *E.g.*, Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 8.162, WT/DS308/R (Oct. 7, 2005) (asserting compliance with an international agreement as Mexico's defense to a U.S. claim in the DSB).

Vienna Convention on the Law on Treaties ("Vienna Convention") provides that "any relevant rules of international law applicable in the relations between the parties"[110] shall be taken into account in interpreting international law rules.[111] Similarly, the Appellate Body has stated that the WTO Agreement "is not to be read in clinical isolation from public international law."[112] In fact, the panels and Appellate Body have been referencing non-WTO international law rules in interpreting the WTO Agreement when members have accepted these rules.[113]

Nonetheless, when there is a conflict between non-WTO international law rules and the WTO Agreement, the application[114] of the former may

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110. It is unclear whether the term "parties" refers to the parties to a dispute or to the parties to the treaty being interpreted. In the case of the latter, a non-WTO international law rule cannot be taken into account under this provision unless the rule under consideration is applicable to all WTO members. One panel took this approach. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.65–.71, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) ("[T]he rules of international law applicable in the relations between 'the parties' are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force."). On the other hand, the Appellate Body might have a slightly broader view as long as environmental issues are concerned. *US—Shrimp*, *supra* note 103, ¶¶ 130–31 (referring to several international legal instruments on environmental issues in the light of "the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement"). *See also* U.N. Int'l Law Comm'n [ILC], *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para. 472, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC, *Fragmentation*] (*finalized by* Martti Koskenniemi). While the report states that "it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been 'implicitly' accepted or at least tolerated by" all the parties to the treaty being interpreted, it proposes "permit[ting] reference to another treaty provided that *the parties in dispute* are also parties to that other treaty . . . ." *Id.*

111. The second sentence of Article 3.2 of the DSU provides that the WTO Agreement shall be clarified "in accordance with customary rules of interpretation of public international law." DSU, *supra* note 32, art. 3.2. The Appellate Body repeatedly found that such customary rules are codified in the Vienna Convention, in particular Articles 31 and 32. *See supra* note 123.

112. *US—Gasoline*, *supra* note 106.

113. For more detail, see JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 273 (2003). *See also* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 336–39, 362–64 (1999) (arguing that as far as environmental issues are concerned, the WTO Agreement can be interpreted harmoniously with environmental rules).

114. In this Article, "reference" to a non-WTO rule means that the non-WTO rule is consulted in the course of applying the WTO rules. On the other hand, "application" of a

undermine the dispute settlement system's overall legitimacy.[115] Conflicts may arise in several different situations.[116] For example, a direct conflict may occur when a non-WTO rule requires the adoption of a specific measure that constitutes a violation of the WTO Agreement,[117] or when a violation of the WTO Agreement is justifiable under a non-WTO rule. There may also be subtler conflicts between the WTO Agreement and nontrade rules. For example, a matter deliberately left open in the WTO Agreement may be articulated in non-WTO rules.[118] When there is a conflict between the international non-WTO rules and the WTO Agreement, may the tribunals apply the former to modify or supersede the latter? If so, will this enrich the dispute settlement system's legitimacy? In the author's view, both questions must be answered in the negative.

Regarding the first, the panels and the Appellate Body lack the legal authority to apply non-WTO international law rules when they conflict with the WTO Agreement. Although the DSU does not prohibit the ap-

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non-WTO rule means that the non-WTO rule is directly relied upon in the absence of relevant WTO rules. Although the distinction between the two is a matter of degree, reliance on a non-WTO rule that is in conflict with the WTO rules is plainly not a "reference," but rather an "application." PAUWELYN , *supra* note 113, at 273–74.

115. *See* Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 347–50 (2002).

116. For analysis on the notion of conflict, see PAUWELYN, *supra* note 113, at 161–200 ("*Essentially, two norms are . . . in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other*."); Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 425–27 (1953) ("A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.").

117. *See, e.g.*, World Trade Organization, Comm. on Trade and Environment, *Subparagraph 31(i) of the Doha Declaration*, TN/TE/W/20 (Feb. 10, 2003); World Trade Organization, Comm. on Trade and Environment, *Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda*, ¶ 31(i), TN/TE/W/1 (Mar. 21, 2002).

118. Conflicts of laws are not new phenomena in international law, which lacks centralized lawmaking authorities. Recently, however, there has been an increasing likelihood of conflicts among international law rules partly due to the functionalist approach to international law. *See, e.g.*, Douglas M. Johnston, *Functionalism in the Theory of International Law*, 26 CAN. Y.B. INT'L L. 3, 29–59 (1988). Under this approach, international law is functionally differentiated into several subareas such as trade, environment, and human rights. *Id.* In these subareas, international law rules have been developed rather autonomously through specialized institutions and tribunals. *Id.* As a result, international law has become more fragmented, and conflicts among the rules are more likely to arise. *Id.*

plication of such rules,[119] certain provisions of the DSU, such as Articles 7 and 11, suggest that the panels and Appellate Body should only apply the rules of the WTO Agreement.[120] Moreover, if the application of non-WTO rules results in the modification of the WTO Agreement, this violates Article 3(2) of the DSU, which stipulates that the dispute settlement system shall not "add to or diminish the rights and obligations" under the WTO Agreement.[121] In addition, nothing in the Vienna Convention justifies the panels and the Appellate Body modifying the WTO Agreement by applying conflicting non-WTO international law rules.[122]

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119. A non-WTO rule can be *applied* to fill the absence of the WTO rules when the absence is not deliberate, and therefore, there is no conflict between the non-WTO rule and the WTO rules. *See* PAUWELYN, *supra* note 113, at 213–15; David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 298, 398–99 (1998); Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT'L & COMP. L.Q. 647, 653 (1998).

120. DSU, *supra* note 32, arts. 7, 11; Yūji Iwasawa, *WTO hō to hi WTO hō no kōsaku* [*The Interaction Between WTO Law and Non-WTO Law*], 1254 JURISUTO 20, 21–22 (2003); Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties*, 35 J. WORLD TRADE 1081, 1102–05, 1116 (2001); Trachtman, *supra* note 113, at 342–43.

121. DSU, *supra* note 32, art. 3.2.

122. ILC, *Fragmentation*, *supra* note 110, at 248–56 (admitting that the Vienna Convention fails to provide complete rules to resolve conflicts among international law rules). *See also* Martti Koskenniemi, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, Keynote Speech at Harvard University (Mar. 5, 2005). For criticism of the ILC report, see Benedetto Conforti, *Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"* 111 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1 (2007). In this regard, at least one scholar suggests that, on the contrary, Articles 30(4)(A), 41, and 58 of the Vienna Convention require panels and the Appellate Body to acknowledge that two or more WTO members may modify or suspend the WTO rules as between the members by adopting environmental or human rights rules. PAUWELYN, *supra* note 113, at 315–24.

However, this suggestion is not convincing for the following reasons. First, the WTO rules, such as Articles XX and XXIV of the GATT and the last sentence of Article 3.2 of the DSU, appear to contract out of the conflict of laws rules of the Vienna Convention. GATT Agreement, *supra* note 56, arts. XX(d), XXIV(12); DSU, *supra* note 32, art. 3.2. Moreover, it is questionable that the Vienna Convention, which was drafted decades ago, provides a suitable solution to the current fragmentation of international law. Second, assuming that the Vienna Convention is applied in this context, Articles 41 and 58 of the Vienna Convention merely allow "the parties to a multilateral treaty" to modify or suspend the treaty under certain conditions, but neither authorize nor oblige a treaty body to modify or suspend the treaty, or to acknowledge the modification or the suspension among parties. Vienna Convention, *supra* note 15, arts. 41, 58. Therefore, while Articles 41 and 58 might allow two or more WTO members to conclude an agreement to modify or suspend the WTO Agreement as between themselves, these provisions do not justify panels or the Appellate Body acknowledging and validating such modifications or suspensions of the WTO Agreement. *See id.* Third, the modification or the suspension of the

Thus, the DSU requires that the panels and the Appellate Body resolve disputes by exclusively applying the provisions of the WTO Agreement, even if these rules conflict with non-WTO rules.[123]

Even if the panels and the Appellate Body had the legal authority under the DSU to apply conflicting non-WTO rules, which they arguably do not, both substantive and institutional issues remain concerning how to address conflicts among international law rules. The substantive concern is whether it is necessary to resolve conflicts between the WTO Agreement and non-WTO international law rules. Conflicts among international law rules, often referred to as fragmentation, are a natural consequence of how international law is developed. Specialized rules and institutions have been created to respond to diverse needs and concerns

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WTO Agreement is unlikely to meet the conditions set forth in Articles 41 and 58 of the Vienna Convention, which establish that the modification or the suspension shall not affect the right of other parties to the treaty and shall not contradict the object and purpose of the treaty. *See, e.g.*, Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 7.50, WT/DS27/R/USA (May 22, 1997) (observing that, per the DSU, parties need not have a "legal interest" to request a Panel, rather it is only necessary for the complaint to assert a potential "infringement" on the complaining party's rights under the WTO Agreement by an ancillary agreement among other members). *See also, e.g.*, Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 136, WT/DS27/AB/R (Sept. 9, 1997) (reinforcing the aforementioned view of the Panel and noting specifically the justification for the U.S. claim against the E.C. banana regime).

It should be recalled that the WTO Agreement reflects the balance of rights and obligations of WTO members and that one of the primary goals of the dispute settlement system is to preserve this balance. DSU, *supra* note 32, art. 3.2. The modification or the suspension of the WTO rules between some members would inevitably distort the balance in the WTO Agreement and, consequently, affect the rights and obligations of other WTO members. Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations*, 9 J. INT'L ECON. L. 383, 389–95 (2006) [hereinafter Fukunaga, *Compliance*].

123. One concern might be that the rulings of panels and the Appellate Body may be incompatible with non-WTO rules or the rulings of other non-WTO tribunals. Thus, it is suggested that panels and the Appellate Body should pronounce a *non liquet* and refrain from making rulings when they face unresolvable conflicts of international law rules. PAUWELYN, *supra* note 113, at 419–22. Nothing in the DSU, though, authorizes them to abstain from exercising the established jurisdiction. *Mexico—Soft Drinks*, *supra* note 42, ¶ 49. On the contrary, the abstention of jurisdiction would diminish the right of members under the DSU to bring disputes to the dispute settlement system. *Id.* ¶ 49 (A panel has no discretion "to decline to exercise its jurisdiction even in a case that is properly before it."). The situation here is different from the one justifying the principle of judicial economy in *Mexico—Soft Drinks* because the exercise of jurisdiction is not considered necessary to resolve a dispute.

across different areas of law.[124] When efforts are made to maximize rationality, understandably, they result in conflicting rules.[125] Resolving conflicts would negate such efforts. Conflicts cannot be resolved without developing a hegemonic hierarchy of different rationalities, which is incompatible with the relativity of most international law rules.[126]

There is also a fundamental institutional issue involved, that is, the capacity and eligibility of panels and the Appellate Body to apply conflicting non-WTO international law rules. First, panelists and Appellate Body members may lack expertise in such rules. The application of conflicting non-WTO rules raises the issue of power allocation within the WTO. Political bodies composed of WTO member governments, not the dispute settlement system, are better suited to make decisions regarding the coordination of conflicts among WTO and non-WTO rules.[127] Otherwise, the power to make policy decisions which is reserved to governments would be eroded, and the legitimacy of the dispute settlement system as perceived by governments could be undermined.

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124. Conforti, *supra* note 122, at 18; Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 859 (2004).

125. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1006–07, 1017 (Michelle Everson trans., 2004).

126. Koskenniemi, *supra* note 122, at 12. Although resolving conflicts among different international law rules may be problematic, the interaction between specialized institutions enriches the activities of these institutions. Fischer-Lescano & Teubner, *supra* note 125, at 1017–45. However, such interaction should not lead to the assimilation of specialized institutions. In the context of the WTO, the integrity and security of the trading system should not be lost for the sake of the unity of international law. *See generally* NIKLAS LUHMANN, SOCIAL SYSTEMS (John Jr. Bednarz & Dirk Baecker trans., 1995). Moreover, even if panels and the Appellate Body resolve conflicts between the WTO Agreement and non-WTO international law rules, they do not necessarily resolve the fragmentation of international law in general. An international law rule may have different meanings depending on the context, and the application of an international law rule by a trade tribunal may have only limited relevance in nontrade tribunals. *See* Prosecutor v. Delalic, Case No. IT–96–21–A, Judgment, ¶¶ 21–24 (Feb. 20, 2001) ("Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion."). Some suggest that the International Court of Justice should coordinate the conflicting rules of international law. *See, e.g.*, Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848, 862 (1995) (proposing that an international tribunal with a narrow mandate should refer cases to the International Court of Justice upon encountering a difficult question related to public international law). However, this proposal is unlikely to be realized. *See, e.g.*, Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 128–29 (1998).

127. Guzman, *supra* note 8, at 307.

Second, the application of conflicting non-WTO international law rules may disrupt the balance between effectiveness and subjective legitimacy on the part of governments.[128] Using both trade and non-WTO rules to resolve disputes enables panels to consider all legal aspects of a dispute and resolve it effectively, which is the primary objective of the dispute settlement system. Dispute resolution through such a comprehensive review prevents a losing party from seeking additional recourse in a tribunal outside the WTO dispute settlement system.[129] However, the increased effectiveness of the dispute settlement system reduces governments' control over disputes, and therefore undermines their perceptions of the system's legitimacy. In this regard, it is noteworthy that other international agreements often have individual compliance systems with different degrees of effectiveness. For example, while the WTO created the dispute settlement system specifically to enforce compliance with the WTO Agreement,[130] international environmental and human rights agreements prefer a different approach to compliance. These agreements use a managerial approach that encourages and facilitates, rather than enforces, compliance with their rules.[131] When governments agree to sign an environmental or human rights treaty, they expect that compliance with the agreement will be secured by relatively "soft" secondary

128. As discussed earlier, the negative consensus approach and other Uruguay Round improvements changed the balance of the dispute settlement system's sources of legitimacy. *See supra* note 63 and accompanying text.

129. Assuming that panels and the Appellate Body apply only the WTO rules, *res judicata* does not apply to other tribunals applying non-WTO rules to the same dispute. Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (May 19, 2003) (examining the complaining party's claims, despite the party's preceding recourse to another tribunal, and reaching a different conclusion). However, if the panels and the Appellate Body applied both the WTO rules and non-WTO rules to a certain dispute between parties, the res judicata effects of their findings might prevent other tribunals from adjudicating the same dispute between the same parties in accordance with the same non-WTO rules. *See, e.g.*, YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 245–47 (2003); Yuka Fukunaga, *Trade Remedies in East Asian Regional Trade Agreements*, *in* THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES 287, 304–07 (Mitsuo Matsushita, Dukgeun Ahn & Tain-Jy Chen eds., 2006); Vaughan Lowe, *Overlapping Jurisdictions in International Tribunals*, 20 AUSTL. Y.B. INT'L L. 191 (1999).

130. Fukunaga, *Participation*, *supra* note 90, at 384–85.

131. Fukunaga, *Compliance*, *supra* note 122, at 383, 385–88. *See also* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995). "Enforcement" of non-WTO rules not only means the imposition of obligations or the finding of violations under these rules, but also includes the exercise of the rights under the rules. *See, e.g.*, DSU, *supra* note 32, arts. 1–3, 6.

rules such as advising and monitoring.[132] Similarly, governments decide whether they will enter into an agreement based in part on the relative hardness or softness of its approach to compliance.[133] If the dispute settlement system applies its enforcement power to nontrade rules, governments may view this action as illegitimate, as they did not anticipate the stronger enforcement of these rules. Although referencing and applying non-WTO rules can have positive effects on civil society's perceptions of the dispute settlement system's legitimacy, adopting such an approach is likely to impair the overall legitimacy of the system if the panels and the Appellate Body apply non-WTO rules that conflict with the WTO Agreement.[134]

(b) Nontrade Values not Embodied in the Rules of International Law

Some argue that nontrade values not embodied in rules of international law should be reflected in the trade tribunals' interpretations of the WTO Agreement.[135] It is clear that the interpretation of the WTO Agreement

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132. Dinah Shelton, *Commentary and Conclusions*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 451 (Dinah Shelton ed., 2000); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 421 (1983) ("There is now a trend towards the replacement of the monolithically conceived normativity of the past by graduated normativity.").

133. Kal Raustiala, *Forms and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 583–85, 608–09 (2005) (focusing on domestic politics and institutions, and analyzing why the review structure in trade agreements is strong whereas the review structure in environmental agreements is weak). *But see* George W. Downs, David M. Rocke & Peter N. Barsoon, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 384–97 (1996) (arguing that deeper cooperation requires stronger enforcement).

134. An exception to the above analysis may exist when preemptory rules of international law are involved. When a non-WTO rule has acquired preemptory status in international law, the panels and the Appellate Body may be required to modify the WTO rules by applying the preemptory rule. Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000), http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html. However, a question remains as to whether the panels and the Appellate Body are able and eligible to decide whether a certain rule has preemptory status. *See* Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 801–07 (1999) (arguing that the International Court of Justice's role is to recognize the existence of preemptory rules, which are to be respected in every area of international law).

135. The international legal status of nontrade values often becomes an issue in international trade disputes. *See, e.g.*, Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 123–25, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶¶ 7.86–.89,

should reflect the object and purpose of the WTO, which includes addressing not only trade interests, but also nontrade interests and values such as the preservation of the environment.[136] However, the integration of non-law, nontrade values into the dispute settlement system's decisions could have detrimental effects on the system's legitimacy if the panels and the Appellate Body go beyond what is provided in the WTO Agreement. First, such integration could create an imbalance among the different sources of subjective legitimacy. Governments, businesses, and citizens each perceive the dispute settlement system's legitimacy differently and only share values to a limited extent.[137] The sections of the

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WT/DS291/R, WT/DS292/R, WT/DS293/R (Sep. 29, 2006). *See also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Prot. of Human Rights, *Economic, Social and Cultural Rights: Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization*, ¶¶ 46–49, U.N. Doc. E/CN.4/Sub.2/2004/17 (June 9, 2004) (*prepared by* Robert Howse) (suggesting how the right to development could affect the interpretation of the WTO Agreement); Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT'L L. 323, 330–38 (2002) (pointing out the ambiguity of the precautionary principle in international law as well as in WTO law and jurisprudence); Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9, 11 (2007) ("What laws mean and the objectives they may appear to have depend on the judgment of the law-applier."); Andrew T.F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT'L ECON. L. 81, 106–09 (2006) (arguing that ideational factors shape the character of the WTO trade regime); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 261 (2004) (The Appellate Body uses an "interpretative method that is inherently elastic."). A number of authors believe that

> international law is moving towards its 'constitutionalization'—by which term these observers denote a development turning the traditional, 'horizontal,' minimalist international law governing more or less exclusively relations among sovereign states in strictly bilateral ways, into something more 'vertical,' as it were—more densely institutionalized, more mature, community-oriented, value-laden, peremptory and hierarchical, according to some even quasi-federalist.

Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845, 845 (2004).

136. For example, the preamble to the Marrakesh Agreement states that the parties to the WTO Agreement recognize the importance of "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." WTO Agreement, *supra* note 4, pmbl.

137. For example, the attempt to incorporate labor issues into the WTO has met with strong opposition from developing countries. *See, e.g.*, Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 210–13 (2007); Jose M. Salazar-Xirinachs, *The*

international community that are adversely affected by, or that disagree with, the protection of a particular non-law, nontrade value would perceive the trade tribunal's decision as illegitimate. Concerning the system's objective legitimacy, it is quite questionable whether the panels and the Appellate Body have the ability to identify and prioritize the shared values of the international community.[138] As a result, if the tribunals attempted to do so and assessed nontrade values not provided in the WTO Agreement, their reasoning could lose persuasiveness and authority.

IV. ALTERNATIVES TO THE CRITICS' PROPOSALS

The dispute settlement system is not the only forum that can reflect civil society's interests and values vis-à-vis trade.[139] In other fora, different balances of legitimacy sources are struck, and the perceptions of civil society may be given higher importance. The dispute settlement system's weak subjective legitimacy on the part of civil society can, and should, be supplemented in other venues—including the nonjudicial organs of the WTO, other international institutions, as well as regional, national, and local bodies.[140]

Trade-Labor Nexus: Developing Countries' Perspectives, 3 J. INT'L ECON. L. 377, 380–84 (2000).

138. Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CALIF. L. REV. 885, 889–98 (2003); Nichols, *Values*, *supra* note 66, at 694–96.

139. The author has described the concept of dispute settlement *processes* as being distinct from the dispute settlement *system*. Under this terminology, the dispute settlement system embodies a set of structures and procedures that are provided in the DSU and institutionalized within the WTO, whereas the dispute settlement processes adopt a more comprehensive view, covering both domestic and international processes to settle trade disputes. Fukunaga, *Participation*, *supra* note 90, at 105–06. *See also* Yuka Fukunaga, Global Economic Institutions and the Autonomy of the Development Policy: A Pluralist Approach (Dec. 14, 2007) (unpublished conference paper, on file with the Brooklyn Journal of International Law). *See also* Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1105, 1112–17 (2005); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 977–78 (2004); Benedict Kingsbury, Editorial Comment, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT'L L. 713, 723 (1998); Koskenniemi, *supra* note 122; Krisch, *supra* note 80, at 263–74; Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

140. *See* Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 306–07, 337–48 (2006) (noting that optimal dispute settlement requires multilevel procedures, including those at domestic and international levels). *See also* Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 265–69 (2006) (discussing the new functions of localities in the global legal order).

The legitimacy of the dispute settlement system should be augmented either less directly or from outside the system. First, panels and the Appellate Body should endeavor to *accommodate* the diversity of citizens' nontrade interests and values, instead of attempting to *consider and reflect* these interests directly within the dispute settlement system.[141] This accommodation does *not* imply that the panels and the Appellate Body should refrain from making any violation findings or recommendations in complete deference to the policies of WTO members. Instead, it implies that the panels and the Appellate Body should choose an appropriate standard of review depending on the nature of the disputes, in order not to interfere with the autonomous preferences of citizens, businesses, and member governments.[142] In particular, they should apply a more deferential standard of review in adjudicating disputes involving nontrade policies, namely, environmental, human rights, and health policies, which are deliberatively left to the discretion of WTO members.[143] In addition, the procedures that ensure the implementation of DSB recommendations leave room for the responding party to defend the critical interests and values of its constituents despite its obligation to comply with the recommendations.[144]

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141. Sabino Cassese, *The Globalization of Law*, 37 N.Y.U. J. INT'L L. & POL. 973, 987–89 (2005) ("The emerging legal order appears as a binary order, in which differences coexist with a set of common principles. . . ."). *See also* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 265–71 (2000) (stating that international institutions should respect the self-determination of citizens).

142. *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 42–46, 68–70 (2003) ("[Subsidiarity] purports to affirm a universal common good while still requiring ample room for pluralism in the concrete determination and application of that good.").

143. MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 28–33 (2003) ("[T]he standards of review subtly balance the delicate conflict over legal and political authority between panels and national authorities in trade and trade-related matters governed by the WTO agreements."); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194, 205–06, 211–13 (1996) ("The standard-of-review question" implicates an "allocation of power between national governments and international institutions on matters of vital concern to many governments, as well as the domestic constituencies of some of those governments."); David Winickoff et. al., *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 YALE J. INT'L L. 81, 106–11 (2005). Further study, though, is necessary to reveal how the standards of review should be chosen and applied in order to balance the need to enhance compliance with the WTO Agreement and the need to accommodate the diverse interests and values of civil society.

144. S*ee* Fukunaga, *Compliance*, *supra* note 122, at 399–426 (providing a detailed analysis on mechanisms that ensure the implementation of DSB recommendations). Dispute settlement rulings do not have direct applicability in the domestic legal orders of

Second, citizens should build a domestic partnership with their governments and thereby influence trade policy.[145] For example, governments can be encouraged to hold public hearings[146] or to take nontrade concerns into account[147] when crafting dispute settlement strategies.[148] Conflicts of interests and values among citizens can be better coordinated within the domestic sphere. And the full representation of citizens' concerns in the domestic sphere would render redundant their direct reflection in the dispute settlement system.[149]

Finally, interaction between the WTO's nonjudicial organs[150] and other international institutions can address the dispute settlement system's lack of legitimacy as perceived by civil society. While the interaction of the dispute settlement system with other international institutions may raise questions of independency,[151] the WTO's nonjudicial organs are

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major WTO members, and in this sense, members retain discretion regarding whether and how to internalize the rulings. *See, e.g.*, Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1215–16 (2005); Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83, 102–10 (1998); Krisch, *supra* note 80, at 259–60, 267–69; Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT'L L. 655 (1999).

145. *See* Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 235–36 (2006) (asserting that one fundamental difference between the international community and national communities is that in national communities "the foremost source of governmental legitimacy" is "the people"). *See also* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 792 (2003); Nichols, *Standing*, *supra* note 52, at 686.

146. *See, e.g.*, Trade Act of 1974, 19 U.S.C.A. § 2414(b)(1)(A) (West 2008) (The United States Trade Representative "shall provide an opportunity . . . for the presentation of views by interested persons, including a public hearing if requested by any interested person" before taking any action under Section 301.).

147. *See, e.g.*, Council Regulation (EC) No. 3286/94 of 22 Dec. 1994, art. 8.1, 1994 O.J. (L 349) 71 (The European Commission may take action under the Trade Barriers Regulation only if it is "in the interest of the Community.").

148. Peter M. Gerhart, *The Two Constitutional Visions of the World Trade Organization*, 24 U. PA. J. INT'L ECON. L. 1, 61–70 (2003) ("[T]he WTO regime provides . . . a set of procedural protections [in the domestic sphere] for foreigners when a state takes action that affects their interests.").

149. John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 217–18 (2000) ("Civil society's 'second bite at the apple' raises profoundly troubling questions of democratic theory that its advocates have almost entirely elided.").

150. The nonjudicial organs of the WTO include the political organs, such as the Ministerial Conference, the General Council, and other councils and committees, including the Trade Negotiations Committee and its subsidiary bodies, as well as the WTO Secretariat. *See* BROUDE, *supra* note 8, at 23–24.

151. *See supra* Part I.A. This does not deny the value of the interaction between the dispute settlement system and other international institutions. In fact, panels occasionally

not as constrained in this respect and may actively cooperate with other international bodies.[152] For example, the interaction between the WTO's negotiating bodies and international human rights institutions would allow the former to draft WTO rules that are more consistent with human rights standards.

CONCLUSION

Today, a number of international institutions with narrow mandates are inextricably intertwined with domestic legal orders. It is under these circumstances that citizens raise criticisms against the legitimacy of the dispute settlement system and demand that it reflect their interests and values. This Article has argued that fulfilling this demand may be problematic, as the perceptions of civil society are merely one of several sources of the dispute settlement system's legitimacy. There are necessary tradeoffs between sources of legitimacy, and these tradeoffs should be carefully considered if the overall legitimacy of the system is not to be compromised.

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obtain information from other international institutions, and this is expected to add authority to their rulings. *See, e.g.*, Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, ¶¶ 2.16–.18, 7.234, WT/DS290/R (Mar. 15, 2005) (requesting the International Bureau of the World Intellectual Property Organization to provide any factual information relevant to the interpretation of certain provisions of the Paris Convention for the Protection of Industrial Property); Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶¶ 1.8, 7.138–.154, WT/DS302/R (Nov. 26, 2004) (requesting the International Monetary Fund to provide certain information pursuant to the agreement between it and the WTO).

152. ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 24–28, 99–103, 137–41 (2007). The author does not exclude the possibility of interaction between the nonjudicial organs of the WTO and civil society. While the participation of citizens in the formal political processes of the WTO could be harmful to the legitimacy of the WTO, cooperation with civil society in informal settings might contribute to enhancing its legitimacy. In fact, the General Council has adopted guidelines for the participation of nongovernmental organizations in the WTO processes. World Trade Organization General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WT/L/162 (July 23, 1996).