TRIANGULATING THE WORLD TRADE ORGANIZATION

*By Steve Charnovitz**

One of the biggest challenges facing the World Trade Organization is to determine its own mission.[1] The failure to launch new trade talks at the WTO's Ministerial Conference at Seattle in late 1999 was due, in large part, to disagreements between members about what "new" issues should be placed on the negotiating agenda.[2] These problems continued to stymie the WTO in the run-up to the Doha ministerial meeting in 2001.

Everyone agrees that the WTO ought to address proper issues, yet opinions diverge over what those issues are. For example, in April 2001, WTO Director-General Mike Moore declared that governments "urgently need to broaden the agenda beyond the mandated negotiations" listed in the WTO Agreements. Nevertheless, he warned that while the "agenda has to be broad enough to have something in it for everyone," it "must exclude issues that are inappropriate or where compromise is impossible."[3] Yet Moore did not explain how to tell whether an issue is inappropriate. A few weeks later, the governments in the Group of Fifteen (now consisting of seventeen countries that cooperate on economic development policy) issued a summit communiqué stating that "non-trade issues such as labour standards and environmental conditionalities should not be included in the WTO agenda."[4] This exclusion of labor and environment is specific, but the communiqué did not explain why those issues are "non-trade." In early 2001, Moore's three predecessors circulated a public statement declaring that "[t]he WTO cannot be used as a Christmas tree on which to hang any and every good cause that might be secured by exercising trade power."[5] Yet these statesmen did not reveal how to ascertain the good causes that ought to be secured by trade power.

Civil society organizations have actively participated in the debate about the policy boundaries of the WTO. For instance, in March 2001, a worldwide coalition of nongovernmental organizations (NGOs), organized by the Third World Network, circulated an open letter opposing the introduction of new issues into the WTO, particularly investment, competition policy (i.e., antitrust), and government procurement. According to the coalition, "These

* Wilmer, Cutler & Pickering, Washington, D.C. The author wishes to thank Jeffrey Dunoff, Florentino Feliciano, Heinz Hauser, Robert Hudec, and J. David Richardson for their helpful comments.

[1] By "WTO," I mean the international organization composed of governmental parties. I do not use WTO to refer to the secretariat alone. For the WTO treaty and its annexes, Apr. 15, 1994, see WTO, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999), or the WTO Web site, <http://www.wto.org>.

[2] The "Members" of the WTO are governments or separate customs territories exercising full autonomy in matters provided for in the WTO Agreement and the annexed Multilateral Trade Agreements. Marrakesh Agreement Establishing the World Trade Organization, Art. XII:1 [hereinafter WTO Agreement]. In an effort to demystify the WTO, I will avoid using the term "Member" and refer instead to WTO governments or member governments.

[3] Mike Moore, The WTO: Challenges Ahead, Address Before the German Council on Foreign Relations (Apr. 23, 2001), *at* <http://www.wto.org/english/news_e/news_e.htm>. The main mandated negotiations are services and agriculture.

[4] XI Summit of the Heads of State and Government of the Group of Fifteen, Joint Communiqué, Jakarta, para. 17 (May 30–31, 2001), *at* <http://www.dfa-deplu.go.id>.

[5] Joint Statement on the Multilateral Trading System (Feb. 1, 2001), *at* <http://www.wto.org/english/news_e/news_e.htm>. The authors were directors-general of the General Agreement on Tariffs and Trade (GATT) or the WTO: Arthur Dunkel, Peter D. Sutherland, and Renato Ruggiero. The statement concludes with an endorsement of a "broad trade negotiation within the WTO." On the relationship of the GATT to the WTO, see *infra* note 19.

issues, if located in the WTO, would lead to disastrous consequences socially, environmentally, economically and for human rights, for people worldwide."[6]

The vigorous debate about the WTO's purview demonstrates the vitality of the organization. Governments and private actors are not clamoring to broaden the charter of most other international institutions. The WTO has become a magnet for expansionist ideas because it is perceived as powerful and effective.[7]

The purpose of this article is to present an analytic method for considering proposals to expand the scope of the WTO. My approach will be to organize the contending ideas about the rationale for the WTO and to show how varying assumptions can lead to different conclusions on the proper content of international trade law. As illustrated above, proponents of any particular mission of the WTO base their advocacy on an implicit assumption about its purpose. Yet often these assumptions remain unstated. I want to unpeel the outer layers of the WTO to examine its institutional core. This article seeks to advance the debate by comparing these different assumptions and in so doing takes note of some of the key literature about trade linkage. I will also build on that literature by presenting a new framework.

What does it mean for a new issue to be incorporated into the WTO? It means that governments would amend the WTO Agreements to include new obligations as part of the overall single undertaking. Such governmental obligations could then be covered by the WTO dispute settlement system and would be enforced in the same way as other WTO rules. Adding an issue to the WTO does not necessarily make it a "condition" for international trade. WTO rules are disciplines on government policies, not positive requirements for economic actors that wish to engage in voluntary, cross-border commerce.

Of course, the WTO treaty system could be amended to prohibit a particular kind of trade. For example, WTO rules could require governments to prohibit trade in goods made with forced labor.[8] The most analogous provision in the WTO is the one in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that requires governments to establish a process enabling the holder of an intellectual property right to ask customs authorities to detain counterfeit trademark or "pirated" copyright goods.[9] Furthermore, TRIPS commits governments to cooperate with a view to "eliminating" international trade in goods infringing intellectual property rights.[10] The success of adding intellectual property rights during the Uruguay Round (1986–1994) has led many analysts to view TRIPS as a template for incorporating other issues loosely linked to trade into the WTO.[11]

This article proceeds in three parts. Part I shows why the purpose of the WTO is not self-evident and how a framework can be useful for improving the debate about the organization's mission. Part II presents a three-category framework reflecting the different ambits in which the WTO operates: the relationship between states, the relationship between the state and individuals, and the relationship between intergovernmental organizations. These

[6] Joint NGO Statement, NGOs Urge Governments to Call off "New Round" Proposal (Mar. 19, 2001), *at* <http://www.twnside.org/sg/title/joint3.htm>.

[7] Sylvia Ostry, *The WTO and International Governance*, *in* THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND 285, 290, 293 (Klaus Günter Deutsch & Bernhard Speyer eds., 2001) (stating that the WTO has become a magnet for policy overload).

[8] GATT Art. XX(e) allows governments to ban the importation of goods made with prison labor. But it does not require them to do so. Moreover, its applicability to forced labor remains uncertain. In 1999 the (U.S.) Business Roundtable suggested that the WTO clarify this ambiguity by affirming that governments may ban products made using forced labor. BUSINESS ROUNDTABLE, PREPARING FOR NEW WTO TRADE NEGOTIATIONS TO BOOST THE ECONOMY (1999), *at* <http://www.brtable.org/document.cfm/321>.

[9] Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 51 [hereinafter TRIPS]. In addition, TRIPS directs governments to forbid the re-exportation of goods with counterfeit trademarks other than in exceptional circumstances. *Id.*, Art. 59.

[10] *Id.*, Art. 69.

[11] *See, e.g.*, C. O'Neal Taylor, *Linkage and Rule-Making: Observations on Trade and Investment, and Trade and Labor*, 19 U. PA. J. INT'L ECON. L. 639, 690, 695 (1998) (discussing TRIPS as a model for a "Trade-Related Labor Rights Agreement" in the WTO).

three categories encompass eight distinct frames for conceptualizing the WTO's role. Part III summarizes the analysis and explains how the frames can help triangulate the WTO within international law. This article, however, should not be taken as an instruction manual for deciding whether a new issue fits the WTO. Two readers using the methods suggested here could reach different conclusions about the same issue. My goal is more modest—to improve the quality of advocacy and analysis about the future mission of the WTO.

I. THE NEED FOR AN ANALYTICAL FRAMEWORK

If the benefits member governments derive from the WTO were obvious, then determining its appropriate mission would be relatively easy. Part I contends that they are not so obvious, and that this ambiguity makes it hard for governments to agree on the right mission.[12] To sharpen the debate, I introduce the idea of "frames" that explain the WTO's purpose. By first calling attention to previous efforts to propose criteria for adding new issues to the WTO, I intend to show why the clarification of purpose is essential. The last section in part I briefly takes note of three frames that pervade discourse on trade policy but are not included in part II because they fail to fit the WTO.

The debate about the proper mission of the WTO is political and prescriptive. Thus, it is not primarily a legal debate about clarifying the WTO's existing mandate. For example, the argument against adding fundamental workers' rights to the WTO is not that such an action would be *ultra vires*. No one has asserted that the parties to the WTO Agreement lack the authority to amend the treaty to add workers' rights. Rather, the usual argument is that this issue does not fit the WTO or would be counterproductive to its purpose.

Besides workers' rights, numerous candidate issues might be incorporated into the treaty as WTO obligations. They include investment, competition, environment, alleviation of poverty, harmful tax practices, corruption, and labor mobility. Other issues are pointed to as matters that should be exempt from WTO obligations. For example, WTO rules could specifically permit measures to preserve local culture, enhance food security, combat cigarette smoking, or fight terrorism.[13]

Deciding on the proper mission for the WTO and other agencies must be a continuing exercise. Even forty years ago, Georg Schwarzenberger foresaw that "the need for international collaboration in matters as diverse as economic, financial, social, cultural and educational relations is likely to call for an expansion in existing international institutions and the creation of new agencies."[14] Today, in the face of rapidly evolving globalization, the call to expand existing institutions and create new ones has become more salient.

This expectation of change in the allocation of competence is precisely why we need a better understanding of the purpose of an international organization and its institutional history. As regards the trading system, analysts may need to consider not just the WTO as a seven-year-old treaty-based organization, but also the multilateral and bilateral trade agreements that preceded it and the customary practice they exemplify.[15] Trade agreements and negotiations have often been linked to goals beyond trade.[16]

[12] INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, WHAT'S IT ALL FOR? SETTING CLEAR GOALS FOR THE WORLD TRADE ORGANIZATION (WTO) (2001), *at* <http://www.iisd.org> ("Part of the problem is that there is no clear statement of the WTO mission, making it nearly impossible for the WTO to respond to its critics.").

[13] Mary E. Footer & Christoph Beat Graber, *Trade Liberalization and Cultural Policy*, 3 J. INT'L. ECON. L. 115 (2000); Georgia McCullough Mayman, *The Iran and Libya Sanctions Act of 1996: Enforceable Response to Terrorism or Violation of International Law?* 19 WHITTIER L. REV. 137 (1997); Mark Ritchie & Kristin Dawkins, *WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food*, 9 MINN. J. GLOBAL TRADE 9, 28–30 (2000); Gordon Fairclough, *Should Trade Have No-Smoking Section?* WALL ST. J., July 23, 2001, at A1.

[14] GEORG SCHWARZENBERGER, THE FRONTIERS OF INTERNATIONAL LAW 306 (1962).

[15] *See* Philip M. Nichols, *Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 461 (1998).

[16] *See, e.g.*, Oscar Schachter, *Enforcement of International Judicial and Arbitral Decisions*, 54 AJIL 1, 7 (1960) (noting that the United Kingdom linked a trade negotiation with the Soviet Union to execution of an arbitral award).

In his contribution to this symposium, David Leebron distinguishes two types of linkage claim—normative and strategic.[17] In a normative claim, the contention is that trade and the other issue are governed by the same norm, or that one of the issues has consequences for the other. In a strategic claim, a party asserts that it will not accept resolution of one issue unless another issue is also resolved.

Strategic linkage became the leitmotif of the Uruguay Round trade negotiations, particularly with regard to the inclusion of TRIPS.[18] Negotiators sought a "package deal" of interlocked commitments rather than a collection of stand-alone agreements.[19] The idea of strategic linkage continues to inspire the WTO leadership. For example, Director-General Moore recently urged governments to "broaden the negotiating agenda" because that "creates political trade-offs." In particular, he preached that "[t]here is a much greater chance of reducing agricultural support in Europe and Japan if other countries are willing to make concessions in areas where Europe and Japan have demands, such as competition, investment, and anti-dumping."[20]

My article is about normative linkage, not strategic linkage. I am looking for a normative justification of why a candidate WTO issue, such as human rights or the environment, should be included in or excluded from future WTO law.[21] Thus, I will not examine power-oriented claims that this or that issue needs to be added to the WTO because a particular government demands it. In not covering strategic linkage, however, I am unavoidably omitting consideration of theories that would be useful for predicting the actual mission of the WTO five or ten years hence.

An examination of normative linkage requires clarification of the WTO's norms. What does the WTO aim at accomplishing? What is its quiddity?

Let us begin with the WTO treaty language. Article II of the WTO Agreement is captioned "Scope of the WTO." It states that "[t]he WTO shall provide the *common institutional framework* for the conduct of trade relations among its Members in matters related to the agreements."[22] Article III is captioned "Functions of the WTO." It states that "[t]he WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements . . . [and] may also provide a forum for further negotiations among its Members concerning their multilateral trade relations."[23] The WTO preamble can also be examined. It states that the parties were desirous of "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations." It further notes that the parties were determined "to

Recently, Antonio Perez suggested a WTO agreement on recognition and enforcement of arbitral judgments. Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44, 50 (2001).

[17] David W. Leebron, *Linkages*, 96 AJIL 5 (2002).

[18] Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 454 (1996–97) (noting how the Uruguay Round linked issues concerning different subject matter and made progress on one conditional on progress on the others). Recently, Kenneth Abbott has critiqued the "obsessive quid pro quo thinking" that dominates the WTO. Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT'L ECON. L. 275, 293 (2001). Abbott points out that even when new international rules can produce mutual benefits, some governments refuse to discuss them without market access trade-offs.

[19] The package included the creation of "GATT 1994," which was the existing GATT (1947) given a new name. Creating the new GATT allowed the United States and other countries to announce that they were going to withdraw from the existing GATT. This closed the door for developing countries to stay in the old GATT system, rather than join the new WTO with its broader set of obligations.

[20] Mike Moore, The WTO and the Arab World: Preparations for Doha, Address to UNCTAD High-Level Meeting for Arab Countries (June 20, 2001), *at* <http://www.wto.org/english/news_e/news_e.htm>.

[21] *See* José E. Alvarez, *How Not To Link: Institutional Conundrums of an Expanded Trade Regime*, 7 WID. L. SYMP. J. 1, 12 (2001) (discussing the types of justification for linking trade and human rights).

[22] WTO Agreement, Art. II:1 (emphasis added).

[23] *Id.*, Art. III:2.

preserve the basic principles and to further the objectives underlying this multilateral trading system."[24]

Unfortunately, textual analysis does not take us far. A key term is "trade relations," yet the WTO Agreement does not define those relations. The preamble notes the goal of "mutually advantageous arrangements" but does not specify the unit of analysis. Does every treaty clause have to be mutually advantageous? Should every constituent agreement (e.g., TRIPS) be so? Or the WTO system as a whole? The preamble indicates that the WTO has "basic principles," but there is no agreed list of such principles.[25]

As noted above, Article II of the WTO Agreement (captioned "Scope of the WTO") says that the WTO provides a "common institutional framework." The organizational boxes of this framework are specified, but the overall scope is not. Decisions of WTO panels may be helpful yet can also be misleading. For example, in 2001 the compliance panel in the *Shrimp/Turtle* dispute declared that "we must keep in mind that sustainable development is one of the objectives of the WTO Agreement."[26] If this statement is right, it would have far-reaching implications regarding the obligations that might be added to the WTO to promote sustainability.

My article seeks to clarify the WTO framework by probing several frames that fit WTO law and practice. No single frame perfectly captures the ethos of the WTO. Yet an examination of multiple frames can yield insight into the normative basis for the trading system and explain why governments joined the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT). Once we have a frame that explicates the current content of the WTO, that frame can be used to assess whether a particular candidate issue should be added to the organization's mission.

Such an exercise is about coherence, not consent. Coherence means whether the new issue can be assimilated so as to further the WTO's purpose. Each frame leads to an "if, then" conclusion: if the WTO is really about achieving *x*, then adding issue *a* makes sense but not issue *b*. I do not focus on whether governments will consent to add a new issue to the WTO's domain. Any revision of the WTO, minor or major, requires the agreement of all member governments.

This qualifying and disqualifying of issues is intended to follow from an analysis of the WTO's purpose. A frame that fails to match the current trading system would be an unreliable instrument for ascertaining the suitability of new issues. Thus, my inductive approach emphasizes the continuity of the WTO rather than the correctness of its current content. This approach reflects the conservative orientation of the ongoing intergovernmental debate about the WTO's proper mission. Policymakers evaluate candidate issues as to whether they are sufficiently "WTO-like."

Previous Framework Builders

My framework builds on studies by several authors who have postulated criteria for adding issues to the WTO. Many of these criteria are useful. Yet working through this body of literature, I was struck by the absence of a shared understanding of the WTO's purpose. My article seeks to strengthen the analytical spine of scholarship so that the function of the world trading system can be adequately defined.

[24] *Id.*, pmbl.

[25] Meinhard Hilf, *Power, Rules and Principles—Which Orientation for WTO/GATT Law?* 4 J. INT'L ECON. L. 111, 112–13 (2001). This meticulous study seeks to identify these principles from the WTO text and case law, and from public international law and the principles common to the internal legal regimes of member governments.

[26] United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WTO Doc. WT/DS58/RW, para. 5.54 (June 15, 2001). The role of the compliance panel is to see whether the defending government has complied with the recommendations of the WTO Dispute Settlement Body. To this author's surprise, Malaysia did not appeal this point.

In 1996 Philip Nichols wrote an article arguing that curbing transnational bribery should become a WTO goal.[27] In it, he proposed a set of four criteria for testing new issues.[28] First, the prospective issue must fall within the legal jurisdiction of the WTO. Second, the issue must substantially affect trade. Third, the WTO must be able to enforce any requirement that it makes of member governments with respect to the issue. Fourth, the issue must require international coordination and, if so, the WTO must offer the optimal coordination. To illustrate the selectivity of his criteria, Nichols devised a clever hypothetical on whether the WTO should mandate a "lightning code" for customhouses. The lightning code met the first criterion but failed the other three.[29] Nichols then applied his criteria to show that the issue of transnational bribery would fit the WTO.

In 1998 Cherie O'Neal Taylor proposed a framework with three preconditions for the promulgation of new rules by the WTO.[30] First, there must be a consensus in the international community on the core principles to be vindicated or the rights to be protected. Second, the new rule must relate to and facilitate trade. Third, the rule must require international cooperation, and the WTO should be the best available institution for effecting it.

In 1999 Martin Khor called for a "framework" and "clear criteria" to assess proposed new issues for the WTO.[31] Khor recognized that a requirement of trade relatedness is not enough because "almost any issue is related in some way with trade."[32] Instead, Khor suggested that the key criterion ought to be "whether the entry of a particular issue would add advantage and benefit to the Members of WTO (especially the majority, i.e. the developing countries, and to the majority of people in these countries) and to the WTO system, with the ultimate goal of equitable and sustainable development."[33]

In a forthcoming article, Brian Hindley considers potential criteria for adding issues to the WTO Agreements.[34] Hindley explains that such criteria are unnecessary in voluntary negotiations but would be useful for the WTO, which was negotiated under unilateral trade threats from the U.S. government. The criterion Hindley endorses would require an agreement on any new issue to lead to an increase in world economic welfare.[35] Hindley rejects what he calls the "bureaucratic neatness" argument—viz., that the myriad topics of bilateral trade agreements should be unified into the WTO. In his view, bureaucratic tidiness may shift too much power to bureaucrats.

The topic of trade linkages was examined in 1997 at a conference sponsored by the American Society of International Law's interest group on international economic law.[36] In reviewing those conference papers and earlier literature, Jeffrey Dunoff concluded that there may be "no simple principle or parsimonious model that can neatly tie together the disparate threads running through the various linkage issues."[37] Instead, Dunoff counseled international trade scholars to "identify the strengths and weaknesses of the various models avail-

[27] Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711, 714 (1996).

[28] *Id.* at 714, 722–40.

[29] *Id.* at 740–47. Nichols says that the first criterion is met because customhouses relate to trade.

[30] Taylor, *supra* note 11, at 669–72, 693–96.

[31] Martin Khor, *A Comment on Attempted Linkages Between Trade and Non-Trade Issues in the WTO*, *in* THE NEXT TRADE NEGOTIATING ROUND: EXAMINING THE AGENDA FOR SEATTLE 53 (Jagdish Bhagwati ed., 1999).

[32] *Id.* at 61.

[33] *Id.*

[34] Brian Hindley, *What Subjects Are Suitable for WTO Agreement?* *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 157 (Daniel L. M. Kennedy & James D. Southwick eds., forthcoming 2002).

[35] Calculating effect on world economic welfare is not a straightforward exercise. Hindley gives the pros and cons of counting the effect of a government's policy on *its own* residents.

[36] *See* Symposium, *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. 201 (1998).

[37] Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA J. INT'L ECON. L. 347, 386 (1998); *accord* Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 772 (1999) (suggesting that it is too simplistic to expect just one theory to explain the existence of any given regime).

able, and pull from each of these models insights that can help illuminate the difficult challenges posed by the linkage issues."[38] My own analysis below confirms Dunoff's conclusion that the linkage debate cannot be settled by one single principle.

Faulty Frames

Before moving to the framework in part II, I briefly note three frames that I considered but discarded. They are (a) Efficiency, (b) Best Practices, and (c) GATT Enhancement.

Efficiency is often specified as a central theme of the trading system. Economic efficiency exists when resources are allocated so that no activity can be increased without having to cut back on some other activity. Efficiency can be achieved through a perfectly functioning market, but in the presence of market failures, gaining efficiency may require government intervention.

In many ways, the WTO pushes economies toward greater efficiency. Reducing tariffs and opening markets can do so. In addition, assuming that governments will protect domestic industries, WTO rules tilt policies toward more efficient import protection.[39] For example, the GATT prohibits quantitative restrictions in some circumstances, and the Agreement on Agriculture requires quotas to be converted into tariffs and scheduled for reduction.[40]

Nevertheless, for two reasons the WTO falls short of matching an Efficiency frame. First, WTO rules permit rampant inefficiency via trade policy, for example, by allowing governments to retain protectionism through tariffs and antidumping duties, and through textile/apparel quotas until 2005.[41] The WTO also permits discrimination through preferential trading arrangements.[42] The second problem is that the WTO does not induce governments to correct market failures that involve commerce.[43] For example, the WTO lacks rules on trade in contaminated food and endangered species.

A Best Practices frame views the WTO as a handbook of practices for governments to follow in their own interest. The unifying principle is that markets should be open and contestable. Conditioning liberalization on reciprocal action by other governments is unjustified strategic linkage. As Alan Greenspan has explained: "In almost every credible scenario, if one lowers [trade] barriers and the other does not, the country that lowered barriers unilaterally would still be better off having done so."[44] The WTO Secretariat also proselytizes this view. In a recent report, it stated that "it is important to bear in mind that participants in negotiations do not only benefit from their partner countries' liberalization. They also, if not primarily, gain from opening their own markets."[45]

WTO Agreements promote best practices to open markets. For example, the original GATT directed governments to publish trade regulations so that traders could become acquainted with them, and this transparency principle was strengthened into a notification

[38] Dunoff, *supra* note 37, at 386.

[39] FRIEDER ROESSLER, *The Constitutional Function of the Multilateral Trade Order, in* THE LEGAL STRUCTURE, FUNCTIONS & LIMITS OF THE WORLD TRADE ORDER 109 (2000); Alan O. Sykes, *"Efficient Protection" Through WTO Rulemaking, in* EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 114 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian, & Americo Beviglia Zampetti eds., 2001).

[40] GATT Art. XI; Agreement on Agriculture, Art. 4.2.

[41] GATT Art. II; Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [hereinafter Antidumping Agreement]; Agreement on Textiles and Clothing.

[42] Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

[43] Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AJIL 478, 489 (2000) ("The WTO is not designed to help governments act more effectively to address a shared regulatory problem.").

[44] *International Trade and the American Economy: Hearing Before the Senate Comm. on Finance*, 107th Cong. 4 (2001) (statement of Alan Greenspan, chairman, Federal Reserve System), *at* <http://www.federalreserve.gov/boarddocs/testimony/2001>.

[45] WTO, MARKET ACCESS: UNFINISHED BUSINESS 5 (Special Studies No. 6, 2001), *at* <http://www.wto.org/english/res_e/res_e.htm>.

and consultation procedure in several WTO Agreements.[46] The Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) call on governments to use international standards unless they would be inappropriate.[47]

Even though this frame fits the WTO in many ways, it misconnects in others. Above all, the WTO is more than a bible of best practices. It is a code of legal obligations. This law is enforced by a vigorous dispute settlement system, which shows that something more complex is going on than membership in a self-improvement association. Why governments need to require themselves to perform what is in their own interest is the puzzle of the trading system. Part II attempts to systematize the search for a solution to that puzzle.

A GATT Enhancement frame posits that the WTO should continue building on the GATT just as the Uruguay Round did. Most of the WTO Agreements represent attempts to strengthen GATT rules to respond to recurrent trade problems, as is evidenced by the six understandings and two WTO Agreements whose titles specifically reference the GATT.[48] Furthermore, some of the agreements that might appear to be new topics (e.g., Trade-Related Investment Measures) consist of little more than emendations of various GATT rules.[49] Seven years after the GATT was transformed into the WTO, the atavistic pull of the earlier system still remains strong.

This mimetic frame achieves some congruence with current WTO law but has two large flaws. The obvious one is its failure to take account of TRIPS, which is not just an incremental improvement to the GATT.[50] The second flaw is less apparent, yet equally fatal. A close look at GATT 1947 and decisions approved by GATT bodies shows earlier attention to some of the so-called new issues facing the trading system today.

The experience under the GATT is more variegated than is commonly realized. For example, the GATT states that there are important interrelationships between trade and financial assistance for development, and calls for close and continuing collaboration with international lending agencies.[51] The GATT also calls for collaboration to expand trade through "international harmonization and adjustment of national policies and regulations."[52] In 1960 the GATT Contracting Parties set up a committee to study the problem of market disruption and authorized it "to call on experts, both governmental and non-governmental, and to seek the co-operation of the International Labour Office."[53] Relatedly, the secretariats of the GATT and the International Labour Organization (ILO) were tasked to prepare a joint study of economic, social, and commercial factors pertaining to market disruption.[54] In 1967 a group of GATT parties signed the Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement, which committed those parties to contribute specified levels of food aid to developing countries.[55] In the Tokyo

[46] GATT Art. X; *see, e.g.*, Agreement on Technical Barriers to Trade, Art. 2.9 [hereinafter TBT]; Agreement on Trade-Related Investment Measures, Art. 6 [hereinafter TRIMS]; Agreement on Safeguards, Art. 12.3.

[47] TBT Art. 2.4; Agreement on the Application of Sanitary and Phytosanitary Measures, Art. 3 [hereinafter SPS].

[48] The WTO Agreements include understandings on GATT Articles II:1(b), XVII, XXIV, and XXVIII, and on the balance-of-payments and waiver provisions of the GATT. The WTO treaty also contains agreements on the implementation of GATT Articles VI and VII.

[49] *See, e.g.*, TRIMS Annex.

[50] The GATT did not contain a single requirement for the protection of intellectual property in domestic law. TRIPS contains 73 articles with dozens of requirements.

[51] GATT Art. XXXVI:6.

[52] *Id.*, Art. XXXVIII:2(e).

[53] Avoidance of Market Disruption, GATT B.I.S.D. (9th Supp.) at 26 (1961).

[54] Avoidance of Market Disruption, Annex, Programme of Study of Underlying Economic, Social and Commercial Factors, *id.* at 105. The joint study was not completed. Reportedly, the ILO lost interest in the project when it became apparent that GATT counterparts were seeking to use the study to help justify the Short Term Arrangement Regarding International Trade in Cotton Textiles.

[55] Memorandum of Agreement on Basic Elements for the Negotiation of a World Grains Arrangement, Art. 2, §V, *id.* (15th Supp.) at 18 (1968).

Round Agreements of 1979, several governments agreed to the plurilateral International Dairy Arrangement, which, among several provisions, called on the parties to cooperate with the United Nations Food and Agriculture Organization (FAO) so as to foster recognition of the value of dairy products in improving nutritional levels and to make dairy products more available in developing countries.[56] These GATT provisions and episodes could all justify analogous initiatives in the WTO.

II. A FRAMEWORK FOR THE WTO

Part II presents eight frames for thinking about the proper content of the WTO. These frames are placed in one of the three categories mentioned above: State-to-State Relations, Domestic Politics, and International Organization. All three categories are needed to appreciate the teleology of the WTO.[57] The section on each frame will end with a brief discussion of implications for the WTO's future role.

State-to-State Relations

The first category includes four frames that address the horizontal relationships between states, or more precisely, governmental members of the WTO: (1) Cooperative Openness, (2) Harmonization, (3) Fairness, and (4) Risk Reduction. This category responds to the dialectic in which governments compete against each other, yet also cooperate to gain some control over the nature of the competition.[58]

1. Cooperative Openness. In the faulty frame of Best Practices, open markets are seen as rational for a national economy regardless of whether other nations have them. By contrast, the Cooperative Openness frame starts from a different premise. Whether the maintenance of an open market is a rational policy is said to depend on whether other nations have open markets.[59] When adhering to this view, governments contend that fruitful liberalization needs to be reciprocal.[60]

The challenge of setting trade policy is often analogized to the game of Prisoners' Dilemma.[61] Since no state wants to act alone in giving up trade restrictions, the solution is for states to

[56] International Dairy Arrangement, Art. V:1(a), *id.* (26th Supp.) at 91 (1980).

[57] *See* DAVID A. LAKE, POWER, PROTECTION, AND FREE TRADE 228 (1988) ("The task still before us is to integrate domestic and international, statist and society-centered explanations."). In his contribution to this symposium, Joel Trachtman conducts a multilevel analysis looking at (1) the horizontal allocation of authority among states, (2) the vertical allocation of authority between states and international institutions, and (3) the allocation of authority among international organizations. Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . . ,"* 96 AJIL 77 (2002). He says that the same analytical techniques (i.e., property rights theory, the theory of the firm, and regulatory competition theory) are applicable to all three levels.

[58] *See* Ignaz Seidl-Hohenveldern, *Failure of Controls in the Sixth International Tin Agreement, in* 1 TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS: ESSAYS IN HONOUR OF HENRY G. SCHERMERS 255 (Niels Blokker & Sam Muller eds., 1994) (noting that international organizations are established to give states control over each other's activities).

[59] Kyle Bagwell & Robert W. Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues*, J. ECON. PERSPECTIVES, Summer 2001, at 69, 72, 77–78 (contending that when a government raises its trade barriers, part of the cost of that protective policy can be shifted to foreign exporters, and hypothesizing that this shift will occur unless governments can be induced to guarantee market access through reciprocal negotiations).

[60] *See* Office of the U.S. Trade Representative, Identification of Trade Expansion Priorities Pursuant to Executive Order 13116: Apr. 30, 2001, 66 Fed. Reg. 23,064, 23,066 (2001) (stating that "[t]he message we are sending to other countries is that the United States is willing to negotiate. We are willing to open if they open."); *see also* Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 25–27 (1986) (discussing reciprocity in international trade negotiations).

[61] Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501, 503–07, 522 (1985); Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 620 (2000). In the Prisoners' Dilemma model, if each of the prisoners refuses to admit their joint crime, they will both be sentenced for a lesser offense; but because each prisoner fears the other will snitch on him and get released, they both admit the crime and get punished, although not as severely as would one who refuses to cooperate while the other talks. WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992). This story gets confusing when retold in the context of governmental cooperation because the good outcome for the prisoners is a bad outcome for society.

sign a contract to abandon them jointly. Unlike the prisoners who cannot communicate with each other, governments can set up institutions to work out the details of cooperation and watch for defection. The GATT evolved into such an institution.

This frame fits the WTO well. As noted above, the preamble to the WTO Agreement memorializes the desire of the governments for "reciprocal and mutually advantageous arrangements" on the reduction of tariffs and other trade barriers. The GATT states the importance of conducting tariff negotiations on a "reciprocal and mutually advantageous basis."[62] The General Agreement on Trade in Services (GATS) says that "successive rounds of negotiations" shall take place "with a view to promoting the interests of all participants on a mutually advantageous basis."[63] The WTO dispute settlement system provides a forum for a complaint that another party is not living up to its side of the bargain.[64] By establishing a commitment to negotiate and the machinery to enforce the results, the WTO facilitates the removal of barriers to the free movement of goods and services. Because the WTO has no code on fair treatment to nonmember countries, those countries have an incentive to join.[65]

Nevertheless, not all WTO rules promote openness. Indeed, some agreements authorize developing countries to withhold market access commitments.[66] Yet no WTO rule forbids openness.

What does the Cooperative Openness frame imply about new issues? As one example, it could justify new WTO action to facilitate the free movement of workers. At present, the GATS contains very limited provisions on labor mobility.[67] Recently, a high-level panel appointed by the UN Secretary-General recommended that the WTO seek some measure of international agreement on the movement of natural persons for short-term employment in foreign countries.[68]

2. Harmonization. Governments routinely compete by using domestic policy to promote their homeland industries. Sometimes governments do so by raising standards too high (i.e., overregulation), and sometimes by lowering standards too much (i.e., underregulation). Recognizing the seduction of suboptimal standards, governments may seek greater policy convergence. In the Harmonization frame, governments use the WTO to help them set appropriate standards.[69]

The WTO contains several disciplines against overregulation. For example, the SPS Agreement requires domestic health measures to be "based on scientific principles" and "not main-

[62] GATT Art. XXVIII *bis*:1. But Art. XXXVI:8 states that developed countries do not expect reciprocity from developing countries.

[63] General Agreement on Trade in Services, Art. XIX:1 [hereinafter GATS].

[64] Florentino P. Feliciano & Peter L. H. Van den Bossche, *The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice*, 75 PHILIPPINE L.J. 1 (2000).

[65] *See, e.g.*, GATS Art. XXVII (regarding denial of benefits).

[66] *See, e.g.*, Agreement on Agriculture, Art. 15.2 (applying to least-developed countries).

[67] The GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement provides for negotiations, but states that the GATS shall not apply to measures affecting natural persons seeking access to the employment market. GATS Article V *bis* states that a labor market integration agreement is not prohibited, provided that it exempts citizens of parties to the Agreement from requirements concerning residency and work permits. The GATS Understanding on Commitments in Financial Services states in paragraph 9(a) that member governments shall permit temporary entry of management and specialist personnel of a financial service supplier that has a commercial presence in that country. A recent study terms these provisions "remarkable for their weakness," and notes that for many countries a multilateral commitment with regard to the inward movement of labor, even on a temporary basis, is considered "out-of-bounds." Pierre Sauvé & Arvind Subramanian, *Dark Clouds over Geneva? The Troubled Prospects of the Multilateral Trading System*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 39, at 16, 27.

[68] Letter Dated 25 June 2001 from the Secretary-General to the President of the General Assembly [transmitting report of the High-Level Panel on Financing for Development (Zedillo Panel)], UN Doc. A/55/1000, at 42 (2001), *at* <http://www.un.org/reports/financing/full_report.pdf>.

[69] *See* David W. Leebron, *Lying down with Procrustes: An Analysis of Harmonization Claims*, *in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 41, 41–66 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (defining harmonization and discussing its justifications).

tained without sufficient scientific evidence."[70] SPS also contains some modest "harmonization" requirements.[71] The GATS combats domestic standards that are unnecessarily restrictive. It states that licensing and qualification requirements shall be based on "objective and transparent criteria" and not be "more burdensome than necessary to ensure the quality of the service."[72] In addition, the GATS requires that governments accord recognition to suppliers of services in a nondiscriminatory way, and notes that this can be achieved through "harmonization" of licensing and certification.[73] Under a few WTO Agreements, governments commit themselves to notifying other governments of new regulatory actions, responding to inquiries, and considering comments.[74]

The problem of underregulation is sometimes called the "race to the bottom."[75] In its hypothetical worst form, each government competes by lowering its social or environmental regulation until it falls to a zero standard. No one contends that rock bottom has been reached, but many analysts fear that the race-toward-the-bottom dynamic suppresses regulation below the point where it should otherwise be set. Governments worried about this dynamic might cooperate to harmonize their regulations. Such cooperation is mutually reinforcing.

The idea that underregulation in one country will make it harder for another country to effectuate proper regulation goes back to the beginning of the twentieth century. In establishing the ILO in 1919, the parties to the Treaty of Versailles declared that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."[76] To remove that obstacle, governments agreed to initiate a process to harmonize labor standards.

None of the WTO rules addresses race to the bottom. TRIPS may appear to do so, but it was not a response to that issue.[77] The lack of intellectual property protection in developing countries does not impede the maintenance of such laws in industrial countries. Thus, advocates who use race to the bottom to justify incorporating new issues into the WTO do so without a precedent from prior trade negotiations.

Although the WTO does not deal with race to the bottom, it does address the broader problem of underregulation and the need for positive economic integration. The best example is TRIPS, under which governments agreed to set minimum standards for the protection of intellectual property owned by foreign nationals. The GATS also contains some provisions to strengthen domestic regulation. For example, that Agreement requires governments to ensure that when a monopoly supplier competes outside the scope of its monopoly, it "does not abuse its monopoly position" in a manner inconsistent with the government's commitments.[78]

[70] SPS Art. 2.2. There is an exception under Article 5.7 when relevant scientific evidence is insufficient. The SPS disciplines apply only to measures that directly or indirectly affect international trade. *Id.*, Art. 1.1.

[71] *See id.*, Art. 3.

[72] GATS Art. VI:4, VI:5 (applying in sectors where commitments are undertaken).

[73] *Id.*, Art. VII:1, VII:3.

[74] *See* SPS Annex B; TBT Art. 2.9; Agreement on Import Licensing Procedures, Art. 1.4.

[75] *See* Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, 77 INT'L AFF. 15, 21–22 (2001) (explaining that the race to the bottom has theoretical validity, but that evidence showing that it occurs is lacking).

[76] Treaty of Versailles, June 28, 1919, pt. XIII headnote, 225 Consol. TS 188.

[77] *See* Inge Govaere & Paul Demaret, *The TRIPS Agreement: A Response to Global Regulatory Competition or an Exercise in Global Regulatory Coercion? in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 364, 366 (Daniel C. Esty & Damien Geradin eds., 2001) (stating that there was no race to the bottom prior to the conclusion of the TRIPS Agreement).

[78] GATS Art. VIII:2 (applying in sectors where commitments are undertaken). Competition policy was also addressed in the GATS negotiations on basic telecommunications services. Some governments adopted the "Reference Paper" principles, which call for the prevention of anticompetitive practices. Reference Paper, para. 1, 36 ILM 354, 367 (1997); Marco C. E. J. Bronckers, *The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law? in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 391 (Marco Bronckers & Reinhard Quick eds., 2000).

The GATS also deals with professional qualifications: it requires governments to adopt adequate procedures to verify the competence of foreign professionals offering services.[79]

By setting minimum standards and giving governments a forum for lodging complaints about each other's practices, the WTO performs a function that no government can do alone. Governments join the WTO to be eligible to initiate dispute settlement and participate in the formulation of WTO rules.

In line with the Harmonization frame, the WTO could be expanded to consider other problems of overregulation or underregulation. Competition policy is the most obvious example.[80] Although the current attention largely concerns governments that lack adequate competition laws, the General Electric/Honeywell affair has cast new light on the potential problem of overregulation. In that episode, competition authorities of the European Union prohibited the merger of two large U.S. corporations even though it had been approved by the U.S. government.[81] Both decisions may have correctly reflected the competition law being applied. But no international review is now available when the burden of one government's antitrust decision falls mainly on another country.

Before I conclude this frame, let me note that harmonization is sometimes a response to vicious competition between states, yet not all competition is vicious. The public can benefit from competition between government jurisdictions.[82] The conditions under which regulatory competition should be preferred to regulatory harmonization is a topic that has generated thoughtful scholarship.[83] The task of relating this body of literature to the WTO lies ahead. Ideally, perhaps, WTO rules would promote *virtuous* competition between governments regarding regulatory policy.[84]

3. Fairness. The Fairness frame is concerned with the equity of trade and trade relations between countries. Governments join the WTO to increase their chances of being treated fairly by other governments. The Marrakesh Declaration, signed by governments at the conclusion of the Uruguay Round, notes the widespread desire for a "fairer and more open multilateral trading system."[85] The Agreement on Agriculture states the objective of a "fair and market-oriented agricultural trading system."[86]

[79] GATS Art. VI:6 (applying in sectors where commitments are undertaken).

[80] Eleanor M. Fox, *Antitrust Law on a Global Scale: Races Up, Down, and Sideways, in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION, *supra* note 77, at 348; Friedl Weiss, *From World Trade Law to World Competition Law,* 23 FORDHAM INT'L L.J. 250 (2000). For a skeptical view, see DIANE P. WOOD, INTERNATIONAL STANDARDS FOR COMPETITION LAW: AN IDEA WHOSE TIME HAS NOT COME (PSIO Occasional Paper, June 1996). In April 2001, Canada and Costa Rica signed a free trade agreement that contains a chapter on competition policy that was undoubtedly formulated as a model for future, broader negotiations. Free Trade Agreement, Apr. 23, 2001, Can.–Costa Rica, ch. XI, *at* <http://www.dfait-maeci.gc.ca>.

[81] *EU Fears It Can't Compete with U.S. Merger,* WASH. TIMES, June 16, 2001, at A1; George Melloan, *GE-Honeywell Exposes Flaws in Antitrust Policy,* WALL ST. J., June 26, 2001, at A23.

[82] *See, e.g.,* Richard L. Revesz, *Federalism and Regulation: Some Generalizations, in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION, *supra* note 77, at 3; David Vogel, *Environmental Regulation and Economic Integration,* 3 J. INT'L ECON. L. 265 (2000); *see also* William A. Niskanen, *Building on the WTO's Success,* 19 CATO J. 459, 460 (2000) (arguing that allowing the WTO to reduce rule-setting competition between governments would be too high a price to pay for having the WTO spur increased competition between private firms).

[83] *See* Daniel C. Esty & Damien Geradin, *Regulatory Co-Opetition,* 3 J. INT'L ECON. L. 235 (2000); Phedon Nicolaides, *Competition Among Rules,* WORLD COMPETITION, Dec. 1992, at113; Joel P. Trachtman, *Regulatory Competition and Regulatory Jurisdiction,* 3 J. INT'L ECON. L. 331 (2000).

[84] *See* Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime,* 96 AJIL 94 (2002) (suggesting that trade rules should facilitate democratic experimentalism at the domestic level).

[85] Marrakesh Declaration, Apr. 15, 1994, para. 2, *in* LEGAL TEXTS, *supra* note 1, at iii, iv. In a resource booklet prepared for the Fourth Ministerial Conference, the WTO Secretariat stated that "[m]any WTO rules are specifically designed to ensure that fair trade conditions prevail between trading partners." THE WTO . . . WHY IT MATTERS: A GUIDE FOR OFFICIALS, LEGISLATORS, CIVIL SOCIETY AND ALL THOSE INTERESTED IN INTERNATIONAL TRADE AND GLOBAL GOVERNANCE 7 (2001).

[86] Agreement on Agriculture, Art. 20(c).

The quest for fairness and a level playing field is a perennial theme in trade policy. Even U.S. President George W. Bush, a self-proclaimed free trader, has adopted the fair trade mantra. In March 2001, he warned: "If our trading partners trade unfairly, they'll hear from us."[87]

The Fairness frame can explain many features of the WTO. Besides the most-favored-nation principle, the WTO has three types of fairness rules: fairness of the imported product, fairness of the governmental intervention by the trading partner, and fairness in the trade relationship between industrial and developing countries. These rules consist of both substantive and procedural elements.

For imported products, some key provisions concern antidumping duties against low pricing and countervailing measures against government subsidies. The GATT states that dumping "is to be condemned if it causes or threatens material injury," and the WTO treaty establishes elaborate machinery for national investigations of dumping and the utilization of remedies.[88] Governments are not required to levy antidumping duties, but the WTO Secretariat has helpfully prepared a model antidumping law for governments that lack such laws.[89] The Agreement on Subsidies and Countervailing Measures (SCM) actually *requires* governments to investigate an allegation of a subsidized import when a domestic actor lodges a petition.[90] Governments retain autonomy, however, in deciding whether to levy a countervailing measure.[91]

The WTO is also concerned about the fairness of government programs and regulation. For example, the SCM Agreement prohibits subsidies contingent upon export performance and domestic subsidies that cause "adverse effects" in foreign countries.[92] The Agreement on Import Licensing Procedures states that such procedures shall be "neutral in application and administered in a fair and equitable manner."[93]

A third type of fairness involves the distribution of gains from trade. Several WTO Agreements provide for "special and differential" treatment to developing countries.[94] The GATT recognizes the "needs of less-developed countries for a more flexible use of tariff protection to assist their economic development."[95] GATT secondary law allows governments to apply tariff discrimination in favor of particular developing countries.[96] Fairness is also sought by means of the prohibition in the Safeguards Agreement of voluntary export restraints and similar measures on the import side.[97] Such coercive measures had proliferated in the 1980s on the pretense of being voluntary.

A few WTO provisions pursue fairness by calling for assistance to developing countries. For example, the TRIPS Agreement directs industrial countries to provide incentives to enter-

[87] George W. Bush, Remarks at Western Michigan University in Kalamazoo, Michigan, 37 WKLY. COMP. PRES. DOC. 524, 528 (Apr. 2, 2001), *at* 2001 WL 14297354.

[88] GATT Art. VI:1; Antidumping Agreement.

[89] Asif H. Qureshi, *Drafting Anti-Dumping Legislation—Issues and Tips*, J. WORLD TRADE, Dec. 2000, at 19, 23; *see also* Daniel Pruzin, *India Expands Antidumping Policy in 2000; Ranks Second in Trade Practice Complaints*, DAILY REP. FOR EXECUTIVES (BNA), Apr. 16, 2001, at A–8 (noting that India's recourse to antidumping relief has grown enormously since the advent of the WTO).

[90] Agreement on Subsidies and Countervailing Measures, Art. 11.1 [hereinafter SCM].

[91] *Id.*, Art. 19.2.

[92] SCM Arts. 3.1(a), 5.

[93] Agreement on Import Licensing Procedures, Art. 1.3.

[94] *See, e.g.*, Agreement on Agriculture, Art. 15; SCM Art. 27.2(a). As many analysts have noted, this encouragement of protectionism in developing countries provides an illusory benefit to those countries. Jagdish Bhagwati & Arvind Panagariya, *The Truth About Protectionism*, FIN. TIMES (London), Mar. 30, 2001, at 21.

[95] GATT Art. XXVIII *bis*:3(b).

[96] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause"), GATT B.I.S.D. (26th Supp.) at 203 (1980); *see* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 40, 58, 426 (1995) (pointing to this GATT practice for achieving distributive justice and remedying the fairness deficit).

[97] Agreement on Safeguards, Art. 11.1(b).

prises in their territories for the purpose of promoting and encouraging technology transfer to least-developed countries.[98] The Agriculture Agreement does not require food aid but declares that when donor governments give food aid, they shall do so in accordance with FAO principles and on terms no less concessional than provided for in the Food Aid Convention of 1986.[99] The GATS Annex on Telecommunications calls on governments to make information technology available to developing countries.[100]

One reason why the WTO has attracted so many developing countries as members is that they gain rights to invoke dispute settlement. A developing or small industrial country with a complaint knows that a WTO tribunal is more likely to give it sympathetic consideration than a powerful country that is treating it unfairly.

Although the Fairness frame fits the WTO well, not every trade rule is fair. Some analysts have criticized the lopsided accession procedures under which WTO member governments can force applicant governments to sign away membership rights temporarily as a condition for joining.[101] The United States did that to China.[102]

Looking through the Fairness frame, one can visualize many pro-fairness actions that the WTO could undertake. To make the system more equitable for developing countries, the most important action would be to give them maximum opportunities to export.[103] Such a policy is encompassed by the WTO's current mission but is as controversial as any "new" WTO issue.

Another extensively discussed fairness issue is workers' rights. The capacity of horrendous working conditions to render trade unfair was acknowledged by the parties to the Covenant of the League of Nations in stating that the members of the League "will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and *in all countries to which their commercial and industrial relations extend.*"[104] The 1948 Charter of the International Trade Organization (ITO) included an article on fair labor standards, which stated: "The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade . . . ."[105] Whether the addition to the WTO Agreements of a provision on workers' rights would enhance fairness or erode it depends upon what that provision would require. Yet it can hardly be doubted that the labor issue fits the trade Fairness frame.

[98] TRIPS Art. 66.2.

[99] Agreement on Agriculture, Art. 10.4; *see also* Food Aid Convention, Mar. 13, 1986, Art. IV, 1429 UNTS 71. In addition, a WTO Decision attached to the Final Act of the Uruguay Round commits governments to initiate negotiations in the "appropriate forum" to establish a level of food aid commitments sufficient to meet the needs of developing countries as they implement the Agreement on Agriculture. Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, para. 3(i), *in* WTO, THE LEGAL TEXTS, *supra* note 1, at 392; Melaku Geboye Desta, *Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach,* 35 J. WORLD TRADE 449, 456–57 (2001) (noting that the appropriate forum is limited to donor nations).

[100] GATS Annex on Telecommunications, para. 6(b). This is to be done in cooperation with relevant international organizations and where practicable.

[101] Accession is provided for in Article XII of the WTO Agreement, but no rules prescribe what current members can demand of the applicant. For a critical discussion of demanding WTO-plus commitments, see Roman Grynberg & Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System,* J. WORLD TRADE, Dec. 2000, at 159, 172–73; *see also* Group of 77 South Summit, Havana Programme of Action, §V, decision 1 (Apr. 2000), *at*<http://www.g77.org/summit> (stating that developing countries seeking accession to the WTO should not be given terms that exceed or are unrelated to the commitments of developing countries that are already members of the WTO).

[102] Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga,* 15 AM. U. INT'L L. REV. 1469, 1513–15 (2000).

[103] Isabella D. Bunn, *The Right to Development: Implications for International Economic Law,* 15 AM. U. INT'L L. REV. 1425, 1462–66 (2000); Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates,* 19 U. PA. J. INT'L ECON. L. 391, 429–31 (1998).

[104] LEAGUE OF NATIONS COVENANT Art. 23(a) (emphasis added).

[105] Havana Charter for an International Trade Organization, Art. 7, *reprinted in* RAJ BHALA, INTERNATIONAL TRADE LAW HANDBOOK 83 (2d ed. 2001) [hereinafter ITO Charter]. The Charter did not enter into force.

4. Risk Reduction. Private economic actors often want to engage in transborder transactions but have to contend with risk from governmental interference. In the Risk Reduction frame, private actors seek rules that prevent governments from taking arbitrary and unpredictable actions. In response, governments contract with each other to establish rules for the benefit of private economic actors.

The establishment of such intergovernmental contracts is the basis for the international economic order, which enables governments to cooperate so as to permit "some minimum degree of predictability."[106] These mutual obligations of governments create value for producers, importers, and exporters. Heinz Hauser articulated this theory cogently in 1988. He emphasized that properly enforced international rules "reduce the risk of government interventions into private transactions" and in so doing, "perform a function which is analogous to domestic constitutional law."[107] In Hauser's view, "[T]he ultimate test of international trade law is to be seen in the extent to which international commitments make government behaviour more stable and easier to predict, both for private investors and for other governments."[108]

Several analysts perceive the WTO's relationship to economic actors as a key (or the key) function. In Richard Shell's "Efficient Market model," WTO rules are "a means for globally oriented business interests and their government allies to overcome domestic resistance to free trade, reduce the legal transaction costs that states impose on the movement of goods and services across national borders, and thereby enhance consumer welfare for citizens of all nations."[109] Ernst-Ulrich Petersmann postulates that the WTO performs "constitutional functions" that further the "protection of freedom, nondiscrimination, and rule of law for domestic citizens across frontiers."[110] Kal Raustiala suggests that the WTO looks after foreign stakeholders that are not represented in the domestic political process.[111] As Fiona McGillivray succinctly argues, "The WTO is not about global governance, it's about the right to trade . . . ."[112]

The Risk Reduction frame fits the WTO nicely. Most of the WTO Agreements impose transparency requirements on national governments, and some give private actors a right to comment.[113] The GATS requires that governmental measures be "administered in a reasonable, objective and impartial manner."[114] The Agreement on Rules of Origin notes that "clear and predictable rules of origin and their application facilitate the flow of international trade."[115] The Understanding on Rules and Procedures Governing the Settlement of Disputes describes its rules as "a central element in providing security and predictability to the

[106] Jan Tumlir, *Need for an Open Multilateral Trading System,* 6 WORLD ECON. 393, 402 (1983); *see also* Jan Tumlir, *GATT Rules and Community Law—A Comparison of Economic and Legal Functions, in* THE EUROPEAN COMMUNITY AND GATT 1, 6, 20–21 (Meinhard Hilf, Francis G. Jacobs, & Ernst-Ulrich Petersmann eds., 1986).

[107] Heinz Hauser, *Foreign Trade Policy and the Function of Rules for Trade Policy Making, in* FOREIGN TRADE IN THE PRESENT AND A NEW INTERNATIONAL ECONOMIC ORDER 18, 28 (Detlev Chr. Dicke & Ernst-Ulrich Petersmann eds., 1988).

[108] *Id.* at 29.

[109] G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization,* 44 DUKE L.J. 829, 877–78 (1995) (internal citation omitted). Shell criticizes this model on normative grounds.

[110] Ernst-Ulrich Petersmann, *Prevention and Settlement of International Trade Disputes Between the European Union and the United States,* 8 TUL. J. INT'L & COMP. L. 233, 243 (2000); *see* David M. Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate,* 41 VA. J. INT'L L. 279, 329 (2001) (stating that the WTO offers fairness to foreign producers facing discrimination).

[111] Kal Raustiala, *Sovereignty and Multilateralism,* 1 CHI. J. INT'L L. 401, 414 (2000).

[112] FIONA MCGILLIVRAY, DEMOCRATIZING THE WORLD TRADE ORGANIZATION 2 (Hoover Institution Essays in Public Policy, No. 105, 2000).

[113] For example, the TBT Agreement requires central government standardizing bodies to allow a period of at least sixty days for the submission of comments by an interested party. TBT Art. 4.1 & Annex 3, Code of Good Practice for the Preparation, Adoption and Application of Standards, para. L.

[114] GATS Art. VI:1 (applying in sectors where commitments are undertaken).

[115] Agreement on Rules of Origin, pmbl.

multilateral trading system."[116] Director-General Moore has opined that "[i]f the WTO did not exist, people would be crying out for a forum where governments could negotiate rules, ratified by national parliaments, that promote freer trade and provide a transparent and predictable framework for business."[117] The WTO Web site explains that while the WTO Agreements were negotiated and signed by governments, "their purpose is to help producers of goods and services, exporters, and importers conduct their business."[118] According to the Office of the U.S. Trade Representative, "The WTO dispute settlement process provides certainty for American businesses and workers that *their* disputes will be heard by a panel of impartial experts . . . ."[119]

The role of the WTO in reducing risk to economic actors was a central theme in the decision of the *Section 301* dispute panel.[120] This case involved a complaint about section 301 of the U.S. Trade Act of 1974, in which the panel found no WTO violation. In reaching this conclusion, the panel enounced that an object and purpose of the WTO was "the creation of market conditions conducive to individual economic activity in national and global markets and to the provision of a secure and predictable multilateral trading system."[121]

Undertaking new WTO obligations to limit government-induced risk to private actors would be consistent with the Risk Reduction frame. For example, the WTO could seek an agreement to govern investment. European Commissioner for Trade Pascal Lamy contends that some basic WTO rules on investment, "by increasing the predictability for potential investors, [would] lead to more investment with all the benefits it can bring."[122] Investment, however, is a multifaceted issue. The concerns of economic actors about risk from governmental interference are matched by concerns of social actors about risk from investor activities. If the WTO decides to write rules on investment, it may prove politically difficult to focus only on the rights of investors, while giving no attention to their social responsibilities.

Domestic Politics

The second category, Domestic Politics, comprises two frames that address the vertical relationship between a national government and the public: (5) Self-Restraint, and (6) Coalition Building. Unlike frames 1–3, which explain the WTO as the interaction of unitary, rational states, the Domestic Politics frames look inside the state to the interface between the WTO and domestic decision making. These frames are predicated on the view, articulated well by Martin Wolf, that "[t]he principal purpose of international economic institutions is to reconcile the politics of nation states with their international interests and obligations."[123]

5. Self-Restraint. Protectionist trade policy arises when pressure groups acting in their own interest exert disproportionate political influence by capturing the support of legislators and administrators.[124] In the Self-Restraint frame, governments construct and join the trading

[116] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Art. 3.2.

[117] Mike Moore, The Backlash Against Globalization? Address to Liberal International (Oct. 26, 2000), *at*<http://www.wto.org/english/news_e/news_e.htm>.

[118] The WTO in Brief, *at*<http://www.wto.org>.

[119] U.S. Trade Representative, America and the World Trade Organization (1999) (emphasis added), *at*<http://www.ustr.gov/html/wto_usa.html>.

[120] United States—Sections 301–310 of the Trade Act of 1974, WTO Doc. WT/DS152/R (Dec. 22, 1999). The law at issue is 19 U.S.C. §2411 (Supp. II 1996).

[121] United States—Sections 301–310 of the Trade Act of 1974, *supra* note 120, para. 7.71.

[122] Pascal Lamy, The WTO New Round: Perspectives for Hamburg and Europe, Address to Handelskammer Hamburg (Sept. 3, 2001), *at*<http://europa.eu.int/comm/trade>.

[123] Martin Wolf, *If You Go Down to the Woods Today*, FIN. TIMES, July 26, 1994, at 15. *Compare* Heinz Hauser, *Domestic Policy Foundation and Domestic Policy Function of International Trade Rules*, AUSSENWIRTSCHAFT, Sept. 1986, at 171, 172 ("International trade rules need a domestic policy foundation.").

[124] VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY 377–79 (Ann S. Schwier trans., 1971) (1906); E. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF 287 (Archon Books 1963) (1935); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, bk. IV, ch. II, at 300–01 (Kathryn Sutherland ed., Oxford World's Classics, 1998) (1776).

system to prevent themselves from giving in to self-defeating trade policies. The main problem being solved by the WTO is not the stability of trade relations between states; it is the stability of trade policy within the state.[125] Enlightened government leaders commit national policy to global rules to strengthen their ability to say no to special interests at home.

An intellectual history of this frame has yet to be written, but some important strands can be noted. In 1954 Wilhelm Röpke explained the dual nature of state sovereignty as involving "not only unimpeachable rights of one government vis-à-vis others but also [such rights] vis-à-vis its own nationals."[126] Röpke focused on the latter relationship—particularly the dangers of "collectivist economic control"—and proposed abolishing or diminishing internal sovereignty. He also warned that shifting the "seat" of sovereignty to a higher political unit could worsen the abuses.[127] In 1962 James M. Buchanan and Gordon Tullock pointed out the need for "constitutional changes" to reduce the excessive costs that discriminatory legislation imposes on all groups over time.[128] In the early 1980s, Jan Tumlir characterized the GATT as serving a constitutional function to overcome legal inadequacies at the national level.[129] Following Tumlir's death sixteen years ago, two of his colleagues, Frieder Roessler and Petersmann, continued to enlarge on this thesis. In 1986 Roessler explained how international law helps states "correct constitutional deficiencies."[130] In his view, "[G]overnments collude with one another and with international organizations to overcome domestic political forces through international commitments."[131] In 1992 Petersmann wrote that GATT negotiations "can assist liberal-minded governments in cooperating as a sort of cartel against protectionist domestic interest groups."[132] Other analysts have characterized the GATT in the same way. For example, in 1985 C. Michael Aho and Jonathan Aronson stated that one of the GATT's "key functions" was "to protect governments against themselves by providing help to policy-makers in withstanding pressures from special interests."[133]

Today, governmental Self-Restraint has garnered wide acceptance as the raison d'être of the WTO. Indeed, on its Web site, the WTO contends that "[g]overnments need to be armed against pressure from narrow interest groups, and the WTO system can help."[134] One restraining instrument used by the WTO is the "binding," an agreement by governments not to undo negotiated liberalization.[135] The WTO dispute resolution system fits this frame well by enabling politicians to give the public a cogent reason for why the government should comply with WTO rules.

[125] ROESSLER, *supra* note 39, at 109 (pointing out that the "essential function of the multilateral trade order is to resolve conflicts of interest within, not between, nations").

[126] Wilhelm Röpke, *Economic Order and International Law*, 86 RECUEIL DES COURS 203, 250 (1954 II).

[127] *Id.*

[128] JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 291 (Ann Arbor Paperback 1965) (1962). This recommendation was made in a discussion of the domestic politics of tax legislation.

[129] *See* ROBERT E. HUDEC, *The Role of Judicial Review in Preserving Liberal Foreign Trade Policies*, *in* ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW 133, 133–39 (1999) (discussing Tumlir).

[130] Frieder Roessler, *The Constitutional Function of International Economic Law*, AUSSENWIRTSCHAFT, Sept. 1986, at 467, 474.

[131] *Id.* Roessler opines that many years are likely to pass before such phenomena "are fully incorporated into the analyses and concepts of economists, lawyers and political scientists."

[132] Ernst-Ulrich Petersmann, *National Constitutions, Foreign Trade Policy and European Community Law*, 3 EUR. J. INT'L L. 1, 31 (1992).

[133] C. MICHAEL AHO & JONATHAN DAVID ARONSON, TRADE TALKS. AMERICA BETTER LISTEN! 149 (1985); *see also* STEPHANIE ANN LENWAY, THE POLITICS OF U.S. INTERNATIONAL TRADE: PROTECTION, EXPANSION AND ESCAPE 54 (1985) (noting that trade regime rules constrain the influence of domestic pressure groups).

[134] Ten Benefits of the WTO Trading System, No. 9, "The system shields governments from narrow interests," *at*<http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm> (visited Mar. 22, 2001). The Web site also says that "governments use the WTO as a welcome external constraint on their policies." *Id.*, No. 10.

[135] *See* GATT Art. XXVIII *bis*: 2(a); Agreement on Agriculture, Art. 4.1; Agreement on Textiles and Clothing, Art. 7.1(a).

Nevertheless, the Self-Restraint frame is an enigma. If politicians and bureaucrats derive benefits from gratifying special interest groups, why should these officials bind themselves not to gratify those groups? Three explanations are offered. First, the public in every country demands that its own government tie its hands to refrain from using protectionist instruments.[136] Second, always-enlightened officials really want to pursue trade liberalization but need a tenable public explanation for turning down pleas for protection. Third, politicians who successfully liberalize trade want to prevent their successors from backsliding, so they use a trade agreement to lock in reforms.[137] The third explanation seems the most persuasive.

If the WTO's purpose is to assist governments in overcoming rent-seeking interests at home, then other policies involving benefits to vested interests from governmental regulation might be candidates for WTO oversight. One example would be the allocation of portions of the electromagnetic spectrum. At present, the only relevant WTO discipline is contained in the Reference Paper for basic telecommunications, which commits participating governments to allocating electromagnetic frequency bands "in an objective, timely, transparent and non-discriminatory manner."[138] Another example would be the allocation of airport landing rights.

Before relying on this frame, one should consider whether it is too antidemocratic.[139] The idea of justifying a trade treaty as a way to restrict the policy options available to democratic governments is questionable in this era of public concern about the legitimacy of international organizations. Thus, the WTO Web site may be unwisely promoting the organization for "arming" governments against domestic interests.

6. Coalition Building. In contrast to the Self-Restraint frame, in which the WTO serves to incapacitate politicians or administrators, the Coalition Building frame centers on the way that national political leaders use the GATT/WTO to garner domestic support for trade agreements.[140] Because a trade agreement generates both winners and losers, governments want to assure that enough winners emerge so that a majority coalition can be mobilized to obtain any needed legislative clearance and support from voters.[141] The Coalition Building frame will be a mix of normative and strategic linkage, depending on the political debate within each country.

[136] In a recent commentary, John O. McGinnis and Mark L. Movsesian posit: "The principal task of trade institutions like the WTO should be to restrain protectionist interest groups and thereby promote both free trade and representative democracy." John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 536 (2000). The authors do not explain why such groups would allow themselves to be restrained other than to say that the "majority commits to political institutions that make it more difficult for the majority's agents in the legislative or executive branches to reward powerful interest groups." *Id.* at 516.

[137] Brink Lindsey, *Free Trade from the Bottom Up*, 19 CATO J. 359, 363 (2000).

[138] Reference Paper, *supra* note 78, para. 6.

[139] It is the nature of treaties, and indeed all higher law, for the people of the present to bind the people of the future. The people of the future may consider that antidemocratic. Nevertheless, most democracies have constitutions that can be changed only by supermajority approval. One can argue that the typical domestic deliberation that polities have used to join the WTO does not achieve the extraordinary level of democratic consent needed to justify an act calculated to tie the hands of politicians in the future. *See* Robert Howse & Kalypso Nicolaïdis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far*, *in* EFFICIENCY, EQUITY, AND LEGITIMACY, *supra* note 39, at 227, 237. Perhaps the best defense of the democratic character of trade negotiations came in an article by Robert Hudec in 1993. ROBERT E. HUDEC, *"Circumventing Democracy": The Political Morality of Trade Negotiations*, *in* ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW, *supra* note 129, at 215. Hudec says that a trade negotiation provides a setting that legitimizes participation by affected interests. *Id.* at 219–20.

[140] *See* Hauser, *supra* note 107, at 34 ("Gaining domestic political support from important export industries is the main driving force for governments to seek international trade agreements"); *International Trade in Services*, Comment by Brian Hindley, *in* THE EMERGING SERVICE ECONOMY 35, 36 (Orio Giarini ed., 1987) ("To change the protective structure, therefore, it is necessary to change the factors that support the underlying political equilibrium."). *Compare* Charles E. Martin, *The International Regulation of Tariffs*, 28 ASIL PROC. 44, 61 (1934) (stating that the greatest hope in reasonable international regulation lies in the acceptance that the exporter and allied interests are entitled to a legitimate place in an integrated and balanced national economy, and that both municipal and international regulation must be shaped with their interests in mind).

[141] Alan Sykes discusses a similar idea from a less idealistic public choice perspective. Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 24–25 (1999) (suggesting that trade agreements help export interests, which then reward political officials).

Participation in the WTO helps governments to build and maintain a domestic coalition in favor of a liberal trade policy.[142] At every stage in the life cycle of a trade round, governmental officials seek political support from the domestic economic actors that expect to gain from income growth or other regulatory changes.[143] Even in the absence of ongoing negotiations, governments maintain a dialogue with social and economic actors about the importance of the trading system. Setting the terms of reference for a new round has become a difficult exercise, as governments shape the agenda to accord with the volition of key domestic interest groups (including protectionists).

The Coalition Building frame explains the attainment of some of the new Uruguay Round agreements. For example, in the United States, the prospect of a multilateral agreement on services elicited support from large U.S. corporations, which helped to overcome the opposition of import-protected textile and apparel interests. Coalitions of such corporations lobbied for the comprehensive General Agreement on Trade in Services. A similar process resulted in the SPS Agreement, which was championed by U.S. agricultural exporters. The WTO Committee on Trade and Environment also confirms this frame. The committee was established to assuage both environmental groups worried about WTO oversight and exporters worried about environmental regulation.[144]

Nothing in the WTO contradicts this frame, but one provision may impede the efficacy of coalition building. That is the WTO's decision rule, which provides for agreement by consensus.[145] Although the consensus rule can inhibit workability in all of the frames, it is particularly troublesome here because this frame assumes success in starting, concluding, and implementing successive rounds of trade negotiations.

The Coalition Building frame presupposes openness to new issues and the pursuit of large package deals. Any topic conducive to building a domestic majority may fit in.[146] Summing up the fifty-year experience of the trading system, Fred Bergsten concludes that a key lesson is "[b]ig is beautiful."[147]

The way this frame was presented, governmental officials did the driving, but the leadership could also be assumed by economic and social actors.[148] Mobilizing against protection and for liberalization began to increase in the 1980s.[149] The initiative for the TRIPS Agreement came from business groups in the United States and Europe who won over govern-

[142] JAGDISH BHAGWATI, PROTECTIONISM 41 (1988) (contending that GATT provides the mechanism and momentum that the ideology and the interests favoring freer trade need in order to influence policy).

[143] This idea goes back long before there was a WTO. In 1933 James Shotwell proposed to Cordell Hull that new trade agreements condition lower tariffs on achieving basic labor standards. Shotwell viewed it as a "Trojan horse to get inside the protectionist walls." JAMES T. SHOTWELL, THE AUTOBIOGRAPHY OF JAMES T. SHOTWELL 308 (1961). In 1945 the economist Allan Fisher proposed a "nutritional approach" to trade agreements so that "people who had become enthusiastic about nutrition would thereby be impelled to take a more lively interest in the trade obstructions which hitherto have often barred their access to good and sufficient food." He further hypothesized that a prudent statement would insist upon combining the moderation of trade restrictions with "something else." ALLAN G. B. FISHER, ECONOMIC PROGRESS AND SOCIAL SECURITY 270 (1945).

[144] *See* Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 19, 22, 83 (2001).

[145] WTO Agreement, Art. IX:1. The WTO does have standby majority and supermajority decision rules in the event that a consensus cannot be reached, but these rules remain largely untested. Debra P. Steger, *The World Trade Organization: A New Constitution for the Trading System*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, *supra* note 78, at 135, 149–52.

[146] Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 133, 143 (Anne O. Krueger ed., 1998) ("Obtaining and maintaining a free trade majority is easier when countries have the largest possible pool from which to make trade-offs . . .").

[147] C. Fred Bergsten, *Fifty Years of Trade Policy: The Policy Lessons*, 24 WORLD ECON. 1, 4 (2001).

[148] *See* Hauser, *supra* note 107, at 32 (suggesting that the GATT is best seen and used as a partner for domestic free trade coalitions).

[149] I. M. DESTLER & JOHN S. ODELL, ANTI-PROTECTION: CHANGING FORCES IN UNITED STATES TRADE POLITICS (Institute for International Economics, 1987).

ment support.[150] Of course, not all private activity will favor greater economic integration. In recent years, transnational activism has tended to oppose globalization.[151] In his 1964 study of international negotiations, Fred Iklé saw no evidence that such antiliberalization was organizing around the GATT.[152] Those days are gone.

International Organization

The third category, International Organization, sits on another level. Rather than explain why governments create or join an international organization, it seeks to show why a given international organization should be allocated a particular competence. The previous six frames looked at interactions between states and inside states. The last two frames, (7) Trade Functionalism, and (8) Comparative Institutionalism, look at international organizations created by states. The frames examine the scope and operations of these agencies, and their horizontal relationships. The embedded assumption in this category is that international organizations can and should be analyzed separately from states.[153]

7. Trade Functionalism. In the Trade Functionalism frame, the mission of the WTO is self-evident. It's about trade.[154] As former Director-General Renato Ruggiero explained, "This organization [the WTO] cannot be allowed to gradually drift away from its trade vocation. It would serve neither the WTO nor any other cause if it were to pretend it could offer solutions to every nontrade issue."[155]

The idea of setting up a functional international organization for trade goes back to the early twentieth century. In 1915 the political scientist A. A. Tenney suggested that a "world consular service" and a "world-chamber of commerce" be provided for in the postwar peace treaty.[156] In 1916 then U.S. Congressman Cordell Hull proposed the establishment of a permanent international trade congress after the war. In Hull's plan, the function of this congress would be to consider trade practices and policies that lead to commercial controversies and "to formulate agreements with respect thereto, designed to eliminate and avoid the injurious results and dangerous possibilities of economic warfare, and to promote fair and friendly trade relations among all the nations of the world."[157] In 1919 Huston Thompson, a U.S. governmental official, suggested that the creation of an international trade tribunal be incorporated into the Treaty of Versailles.[158] Twenty years later, Thompson gave a talk at the American Society of International Law in which he elaborated on his ideas for a tribunal that would review international complaints about quotas, price fixing, and theft of trademarks.[159]

[150] Susan K. Sell, *Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights, in* PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 169 (A. Claire Cutler, Virginia Haufler, & Tony Porter eds., 1999).

[151] EDWARD M. GRAHAM, FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES (2000).

[152] FRED CHARLES IKLÉ, HOW NATIONS NEGOTIATE 132 (1964).

[153] *See* Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations,* 53 INT'L ORG. 699, 705–09 (1999) (calling international organizations independent actors with their own agendas); Tarullo, *supra* note 43, at 486 (noting that the characteristics of international organizations shape governance arrangements located within them).

[154] One prominent economist disagrees. Gerald Karl Helleiner asks how the WTO can be a trade organization when it "doesn't seriously concern itself with trends and fluctuations in its members' terms of trade." He suggests that the WTO should be called the "World Market Harmonization Organization." Gerald Karl Helleiner, Markets, Politics and Globalization: Can the Global Economy Be Civilized?, 10th Raúl Prebisch Lecture (Dec. 11, 2000), *at* <http://www.unctad.org>.

[155] Renato Ruggiero, *Reflections from Seattle, in* THE WTO AFTER SEATTLE at xiii, xv (Jeffrey J. Schott ed., 2000).

[156] A. A. Tenney, *Theories of Social Organization and the Problem of International Peace,* 30 POL. SCI. Q. 1, 12 (1915).

[157] 1 CORDELL HULL, THE MEMOIRS OF CORDELL HULL 82 (1948).

[158] Huston Thompson, *An International Trade Tribunal,* 34 ASIL PROC. 1, 3–4 (1940). The proposed focus of this tribunal was largely private anticompetitive activity.

[159] *Id.* at 7–9.

The core idea of functionalism is that international governance should be organized according to "tasks" and "functional lines."[160] By the early twentieth century, the functionalist approach was being advocated for both international law and international administration.[161] A leading proponent of functionalist treaty making was Manley O. Hudson who, in 1925, urged that the League of Nations be used "to further legislation with respect to specific problems" and to "develop a functional law of nations to meet the demands which the dwindling of the world has created."[162] A leading proponent of functionalist administration, Sir James A. Salter, explained in 1921 that "the vital principle of international administration" was the "direct contact" and "continuous co-operation" between "specialists" from different governments.[163] According to Salter, the "international machine was not an external organization based on delegated authority; it was the national organizations linked together for international work and themselves forming the instrument of that work."[164] Salter's vision of the international machine proved enduring for international agencies of the twentieth century, including the GATT/WTO.

While the functional approach tells us how governments should cooperate, it gives no discrete, cohesive answer as to the breadth of the cooperation. How does one discern the difference between Ruggiero's "trade vocation" and potential "nontrade" issues? Tenney's "world consular service" may approximate the "trade facilitation" function in vogue in the WTO today.[165] Thompson's recognition of the need for an international agreement on unfair trade practices prefigured the current debate about competition policy. Policy analysts anticipating the creation of the United Nations showed awareness of the challenges of defining institutional scope. For instance, J. B. Condliffe and A. Stevenson wrote in 1944: "It is probably wise to start by creating technical institutions for specific functions; but unless those institutions are governed by common aims their usefulness will be limited and they may even work at cross purposes."[166]

In 1948 the governments establishing the International Trade Organization thought that its charter needed not only the GATT rules, but also chapters on employment and economic activity, economic development and reconstruction, restrictive business practices, and intergovernmental commodity agreements.[167] Yet very little of those four chapters can be found in the WTO Agreements. Some analysts draw the lesson that the ITO's proposed mandate was too broad for those times. But such a lesson is too simplistic.[168]

[160] DAVID MITRANY, THE PROGRESS OF INTERNATIONAL GOVERNMENT 128 (1933); *see* W. Friedmann, *Limits of Functionalism in International Organisation*, 1956 Y.B. WORLD AFF. 256; *see also* Michael P. Ryan, W. Christopher Lenhardt, & Katsuya Tamai, *International Governmental Organization Knowledge Management for Multilateral Trade Lawmaking*, 15 AM. U. INT'L L. REV. 1347, 1349–55 (2000) (discussing functionalism).

[161] *See* David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275, 344–45 (1996) (discussing the writings of Pierre Kazansky and Pasquale Fiore).

[162] Manley O. Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL L.Q. 419, 446–47 (1925).

[163] J. A. SALTER, ALLIED SHIPPING CONTROL: AN EXPERIMENT IN INTERNATIONAL ADMINISTRATION 253–54 (1921).

[164] *Id.* at 252.

[165] *See* Council for Trade in Goods, Chairman's Progress Report (2000) on Trade Facilitation, WTO Doc. G/L/425 (Dec. 5, 2000).

[166] J. B. CONDLIFFE & A. STEVENSON, THE COMMON INTEREST IN INTERNATIONAL ECONOMIC ORGANISATION 126 (1944).

[167] ITO Charter, *supra* note 105, chs. II, III (esp. Arts. 10–12), V, VI; *see* W. L. Clayton, *Foreword* to CLAIR WILCOX, A CHARTER FOR WORLD TRADE at vii, vii (1949) (stating that the Havana conference that drafted the ITO Charter covered a wider range of problems than had ever been tackled by any economic conference in the history of international affairs); William Diebold, *Reflections on the International Trade Organization*, 14 N. ILL. U. L. REV. 335, 336–37 (1994) (discussing the mind-set of the drafters that led to the broad Charter).

[168] The ITO did not go into force because, for many reasons, the U.S. Congress did not act to approve it and because the other signatories did not have the confidence to go forward without the United States. STEVE DRYDEN, TRADE WARRIORS: USTR AND THE AMERICAN CRUSADE FOR FREE TRADE 24–31 (1995); THOMAS W. ZEILER, FREE TRADE, FREE WORLD: THE ADVENT OF GATT 147–64 (1999). In 1955 governments agreed to institutionalize the GATT into the "Organization for Trade Cooperation," but the U.S. Congress again refused to approve the measure. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 337–38 (1970). This

The proper meaning of trade functionalism today is engaging scholars from different fields. Using an economics approach, Jagdish Bhagwati contends that the purpose of the GATT and the WTO should be to secure mutual gains from trade. Thus, he asserts that issues with nonmutual objectives should not be added to the WTO.[169] WTO linkage to nontrade issues "undermines both the freeing of trade and the advancing of our social agendas" because one instrument (i.e., WTO rules) cannot be used to achieve two targets, the economic and the social.[170] As Bhagwati recognizes, his approach counsels against adding not only environmental or labor rules to the WTO, but also intellectual property (IP) rules. He argues that "the principle of mutual gain simply does not obtain in any significant degree for intellectual property protection," and that TRIPS therefore "turned the WTO into a royalty-collection agency: its trade sanctions were to be put at the disposal of the IP-producing countries."[171]

Other analysts have sought to define a political economy approach to shaping function. For example, Pierre Jacquet, Jean Pisani-Ferry, and Dominique Strauss-Kahn assert that institutional specialization is essential because the international system lacks a government or parliament.[172] They argue that only by giving organizations a focused mandate can one hold them accountable and assess their performance. The authors contemplate having separate international institutions for each function, such as trade, finance, development, and nuclear safety.

Another approach to defining function may be found in the doctrine of organizational specialty within international jurisprudence. In 1922 the Permanent Court of International Justice (PCIJ) gave an advisory opinion holding that the ILO lacked competence under the Treaty of Versailles to draft conventions promoting improvements in agricultural processes to achieve higher production.[173] Nevertheless, the PCIJ explained that the ILO need not be excluded from dealing with a matter merely because it may involve consideration of the methods of production.[174] In *Jurisdiction of the European Commission of the Danube*, an advisory opinion of 1927, the PCIJ held that the commission did enjoy the questioned jurisdiction and noted that as "an international institution with a special purpose," the European commission "only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it."[175] In its advisory opinion for the World Health Organization (WHO) on the use by a state of nuclear weapons, the International Court of Justice (ICJ) found that the WHO lacked competence to inquire into the legality of the use of nuclear weapons.[176] The Court explained that international organi-

proposed organization did *not* replicate the broad scope of the ITO. Thus, it is far from clear that an ITO with a narrower mandate would have won approval from the U.S. Congress in 1948 or 1949.

[169] Bhagwati, *supra* note 75, at 26–27. Bhagwati points out that even pure trade liberalization might not lead to mutual gain, but he suggests that the solution for that is short-term financial assistance to the losing countries.

[170] Jagdish Bhagwati, *On Thinking Clearly About the Linkage Between Trade and the Environment*, 5 ENV'T & DEV. ECON. 485, 494 (2000).

[171] Bhagwati, *supra* note 75, at 26. According to one close observer of GATT, the "main reason that the WTO mandate was expanded to include the protection of intellectual property" was "to gain access" to the WTO's "effective enforcement mechanism" in which, "if all else fails, lie multilaterally approved trade sanctions." Richard Blackhurst, *The Capacity of the WTO to Fulfill Its Mandate*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION, *supra* note 146, at 31, 47.

[172] PIERRE JACQUET, JEAN PISANI-FERRY, & DOMINIQUE STRAUSS-KAHN, TRADE RULES AND GLOBAL GOVERNANCE: A LONG TERM AGENDA (Centre d'Etudes Prospectives et d'Informations Internationales, Working Paper No. 2000–22, 2000).

[173] Advisory Opinion No. 3, 1925 PCIJ (ser. B) No. 3, at 53–59.

[174] *Id.* at 59.

[175] Jurisdiction of the European Commission of the Danube, 1927 PCIJ (ser. B) No. 14, at 64, 69. The questioned jurisdiction was over the maritime sector from Galatz to Braila.

[176] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ REP. 66, para. 26 (July 8).

zations, unlike states, do not possess a general competence but, rather, are governed by the "principle of speciality"; the Court did not define this principle other than to say that international organizations "are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[177] Whether this body of case law points to a general principle of specialty, or whether each decision should be understood only in relation to the treaty being interpreted, is unclear.

The governments in the WTO would seem to be competent to determine its mandate. The UN Charter gives the United Nations the role of initiating negotiations for the creation of "any new specialized agencies" required to accomplish international economic and social cooperation.[178] Yet there is no prohibition on action by governments to set up an unspecialized agency (whatever that might mean). Since the WTO Agreement contains a broad power of amendment, any tribunal would be hard put to characterize an expansion of the WTO's mission as *ultra vires*.[179] Moreover, such a review is almost inconceivable.

Although functionalism and specialization are often pointed to as a normative principle for determining what the WTO should cover, these concepts are difficult to put into operation. Once it is recognized that the WTO goes well beyond trade policy because it contains disciplines on subsidies, domestic regulations, and intellectual property rights for foreigners, analysts will find it difficult to draw a clear line between those disciplines and other efforts to achieve open and nondistortive trade relations.[180] Attempts to draw a coherent limitation—such as the economic approaches noted above[181]—may lead to politically unacceptable results, such as removing TRIPS from the WTO Agreements or setting up a plethora of new international organizations.

8. Comparative Institutionalism. Rather than determining the proper mission of an intergovernmental organization (IGO) from its constitution or activities, the Comparative Institutionalism frame suggests that the mission be determined from the external institutional map. The participants in the authoritative decision making for each issue will look at the advantages and disadvantages of siting it in a particular IGO, as compared to the alternative policy space. The cartography of this frame is challenging because every IGO has individual features and organizations continuously evolve.

Determining the best IGO for a particular problem involves a menu of decisions: If a new issue is being considered for the WTO, will the WTO take it over from another IGO? If no other organization has competence for the issue, is attention by the WTO an interim strategy for stimulating the creation of a new IGO? If another IGO does have such competence, does the WTO intend to compete with it? Or is the WTO's role complementary to that of the other IGO? Should assignment to the WTO be subject to specified deference to another

[177] *Id.* at 78, para. 25.

[178] UN CHARTER Art. 59. In 1946 the United Nations initiated the negotiations leading to the ITO Charter.

[179] "One might say that, in theory, there are no formal limits to matters on which the WTO can make rules by consensus." Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489 (2001); *see* WTO Agreement Art. X (Amendments). The same broad amendment power existed in GATT. DAM, *supra* note 168, at 384 (noting that the GATT had been amended in the past and could be amended again to expand the range of GATT's interest to cover investment); *see also* Ebere Osieke, *The Legal Validity of Ultra Vires Decisions of International Organizations*, 77 AJIL 239, 249 (1983) (noting the difficulty of considering a decision of the members of an international organization as *ultra vires*).

[180] Parliamentary Group of the Party of European Socialists, A New Direction in World Trade: Towards a WTO Round for Development, Democracy and Sustainability (Apr. 2001), *at* <http://www.europarl.eu.int/pes> (stating that some critics argue that nontrade issues should be totally divorced from the WTO, but so long as we want internationally agreed rules on nontariff barriers to trade, this clear separation is impossible); *see also* Agreement on Agriculture, Art. 20(c) (providing for new negotiations to begin in 1999, and stating that they should take into account "non-trade" concerns, identified in the preamble as including food security and environmental protection).

[181] *See* text at notes 169–72 *supra*.

IGO? Or should the issue be assigned to the other IGO subject to specified deference to the WTO? These questions will be discussed briefly below.

Although the WTO has not absorbed any authority from another IGO, it is noteworthy that the drafters of the ITO Charter of 1948 assumed that the trade organization might want to do that. Article 87 of the Charter provided that if another IGO wished to be incorporated into the ITO or to transfer its functions to that organization, the conference of ITO governments could approve the action.[182] Today, the WTO seems unlikely to seek to swallow other organizations.

By contrast, having the WTO take up a new issue may be an interim step toward convincing governments to set up a separate IGO. For example, the WTO Working Group on the Interaction between Trade and Competition Policy could eventually lead to a new intergovernmental entity rather than to an accretion of WTO competence. Similarly, the WTO Committee on Trade and Environment is highlighting the weakness of ecological governance and increasing the calls for a global environmental organization. In that regard, one should recall that the ITO Charter contained a provision stating that in the event of complaints about restrictive business practices in services, the ITO would transfer the matter to the appropriate IGO; but if no such organization existed, the ITO could make a recommendation for international agreement on remedying the situation.[183]

The WTO is not actively competing with other multilateral agencies and appears to be acting cooperatively in the fields where its mandate overlaps with that of other agencies—for example, intellectual property. In transplanting TRIPS to the trading system, governments manifested their lack of confidence in the World Intellectual Property Organization (WIPO) and its treaty system.[184] The experience with TRIPS led Frederick Abbott to put forward the concept of "distributed governance," in which responsibility is distributed to the IGO "best adapted to the particular subject matter or goal-attainment."[185] According to Abbott, the WTO moves slowly and does not handle incremental rule changes well.[186] Thus, he says that the WIPO, not the WTO, should develop responses to current intellectual property challenges, like electronic commerce. But he claims that the WTO, not the WIPO, should supervise compliance with basic rules on intellectual property.

Another example of positive interaction is the relationship between the WTO and the Codex Alimentarius Commission, which has responsibility for drafting food safety standards. Because the SPS Agreement directs member governments to use codex standards unless specified conditions are met,[187] governments and stakeholders are now paying a lot more attention to the codex than a decade ago. (Of course, the heightened concern about unsafe food is also a contributing factor.) The food safety technocrats attending the commission's meetings know that in the absence of a codex standard for a particular substance, a trade dispute involving food safety may occur in the WTO. Thus, the commission has a new incentive to speed up its own work.

The intermeshing responsibilities of IGOs may stimulate more competition between regimes. As John Jackson observed many years ago, such competition can have a "salutary effect."[188] Competition between IGOs could also play out counterproductively.

[182] ITO Charter, *supra* note 105, Art. 87.3.

[183] *Id.*, Art. 53.3.

[184] Marco C. E. J. Bronckers, *More Power to the WTO?* 4 J. INT'L ECON. L. 41, 45 (2001); Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 NW. J. INT'L L. & BUS. 1014, 1053–54 (1996–97).

[185] Frederick M. Abbott, *Distributed Governance at the WTO-WIPO: An Evolving Model for Open-Architecture Integrated Governance*, 3 J. INT'L ECON. L. 63, 65 (2000).

[186] *Id.* at 69–70.

[187] SPS Art. 3.1.

[188] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 771 (1969).

The WTO, like the GATT before it, accords some deference to other institutions. Under the GATT, the Contracting Parties are to accept a determination by the International Monetary Fund (IMF) as to whether a government's action in exchange matters accords with the IMF Articles of Agreement or with a special agreement between that government and the GATT.[189] In the SCM Agreement, an export credit practice is precluded from being found to be an export subsidy if it accords with the existing undertaking on official export credits or a "successor undertaking" adopted by the original members of the earlier undertaking.[190] The referenced undertaking is the Arrangement on Guidelines for Officially Supported Export Credits, concluded by the Organisation for Economic Co-operation and Development (OECD) in 1978 and revised most recently in 1998.[191] In 2001 a WTO panel confirmed a dynamic interpretation of the phrase "successor undertaking."[192] Thus, the WTO defers to a group of OECD countries to prescribe standards for export credit practices.

Another way of allocating responsibility is for other IGOs to defer to the WTO. For example, under the Convention on the Law of the Sea, the International Seabed Authority's production policy is to be based on the subsidy principles of the GATT and its codes *and any successor or superseding agreements.*[193] This provision gives the WTO a continuing legislative role in relation to the seabed authority.

Several scholars are using the comparative institutional approach, such as Joel Trachtman, Daniel Esty, and Daniel Tarullo. For several years, Trachtman has called attention to the need for "comparative institutional analysis" at the international level.[194] Bringing together several strands of economics and international relations scholarship, Trachtman has presented a framework for ascertaining when coverage of certain issues should be raised from national autonomy to an international economic organization.[195] Although he has focused mainly on this vertical (state-IGO) dimension, Trachtman has taken note of the tension between an IGO's wish for a monopoly over its function and citizens' desire for competition between IGOs.[196]

In his studies of global governance, Esty explains the benefits of competition between agencies at different levels of government for achieving optimal environmental policy.[197] He has expanded this point beyond environmental concerns with a broader contention that faulty decisions at one level of government can be counterbalanced by parallel decision processes at other levels of government.[198] In a joint article, he and Damien Geradin put forward a "regulatory co-opetition" model to emphasize the need for both cooperation and

[189] GATT Art. XV:2.

[190] SCM Agreement Art. 3.1 & Annex I, item (k).

[191] OECD, Arrangement on Guidelines for Officially Supported Export Credits (1998), *at*<http://www.oecd.org/ech/act/xcred/arrngmnt.htm>.

[192] In the Canada-Brazil *Aircraft* dispute, the defendant government Brazil urged the panel to interpret this provision as referring only to the OECD arrangement in effect when the WTO went into force in 1995. Brazil argued that it was inappropriate to give a handful of countries carte blanche to amend the scope of this safe haven. Brazil—Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU, WTO Doc. WT/DS46/RW/2, para. 5.68 (July 26, 2001). Brazil was not in the handful of original members of the arrangement in 1978, as it was limited to OECD members. The panel admitted that item (k) was "unusual," but held that it refers to the most recent successor undertaking. *Id.*, paras. 5.81, 5.87. The panel also suggested that if the original member industrial countries "were to abuse their power to modify the scope of the safe haven, the recourse of other Members would be to renegotiate" item (k). *Id.*, para. 5.89 & n.86. Of course, renegotiation may be hollow recourse in an organization that acts by consensus.

[193] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Aug. 17, 1994, GA Res. 48/263, Annex, §6, para. 1(b), *reprinted in* 33 ILM 1309, 1324 (1994).

[194] *See, e.g.*, Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis,* 17 NW. J. INT'L L. & BUS. 470 (1996–97).

[195] *Id.* at 503.

[196] *Id.* at 512 (citing the work of Bruno Frey and Beat Gygi), 519.

[197] Daniel C. Esty, *Toward Optimal Environmental Governance,* 74 N.Y.U. L. REV. 1495, 1557–61 (1999).

[198] Daniel C. Esty, *We the People: Civil Society and the World Trade Organization, in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, *supra* note 78, at 87, 97.

competition between governments, within governments, and between governmental and nongovernmental actors.[199] They do not specifically apply this model to the relationship of one international organization to another, but it seems applicable to cooperation and competition between IGOs.

Tarullo has pointed out the need for "careful institutional analysis" in an article on the possible addition of competition policy to the WTO's domain.[200] Noting that the institutional context of an issue can produce positive and negative externalities for other institutional arrangements, Tarullo concludes that the addition of competition policy would strain cooperative relations between competition authorities at the national level.[201] Because of this and other problems, he favors seeking a more robust arrangement in the OECD and only a small expansion of the WTO's role.[202] My point is not necessarily to endorse Tarullo's conclusions but, rather, to call attention to his analytical method.

Sometimes the WTO cannot be directly compared to an alternative IGO because there is none. In that situation, resort to the WTO should be compared to the option of leaving needed government cooperation to bilateral agreements or informal arrangements. Because its rules are backed by a strong enforcement system, the WTO should be careful about articulating new disciplines on topics lacking an international organization that might serve as a check against WTO overreaching.[203] For example, no institution champions the property rights that indigenous peoples ought perhaps to have over traditional knowledge. Thus, the TRIPS Agreement can be overpowering. Another example is trade in services. Pressing for greater market openness in developing countries may have deleterious effects in the absence of an effective regulatory structure (e.g., financial services).

Good comparative analysis examines the way that organizations respond to change. Peter and Ernst Haas contrast "learning" and "adaptive" IGOs regarding their ability to address an interconnected problem.[204] The learning IGO reexamines cause-and-effect relationships and constantly gathers information from the relevant technical and scientific communities and advocacy groups. The adaptive IGO fails to recognize significant links, to change operating procedures, or to search for new ideas. Furthermore, learning IGOs redefine their missions in light of new interdependencies, while the merely adaptive IGOs will introduce only slight modifications into their routine.[205]

If the WTO does not operate as a learning IGO, then that would militate against assigning it new, complex tasks. Writing in 1970, Kenneth Dam compared the OECD with the GATT and pointed out that in "sharp contrast" to the GATT, the OECD "emphasizes the necessity of approaching economic problems from all relevant perspectives simultaneously."[206] The WTO commenced operations with the same insularity as the GATT. Over the past few years, however, the WTO has begun to recognize significant links beyond commercial considerations. This recognition has emerged most obviously in the controversy over TRIPS and pub-

[199] Esty & Geradin, *supra* note 83, at 248–55.

[200] Tarullo, *supra* note 43, at 504. Tarullo explains that institutional analysis can show how trade rules will create problems for regulatory systems and where complementary or alternative arrangements may be indicated. *Id.*

[201] *Id.* at 492–93. Tarullo says that if a WTO competition code provides for dispute settlement, then competition authorities from different countries will inevitably be pulled into litigation.

[202] See *id.* at 501–04 for details of Tarullo's argument.

[203] Daniel K. Tarullo, *The Relationship of WTO Obligations to Other International Arrangements*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW, *supra* note 78, at 155, 172 (suggesting that the reconciliation of trade and nontrade norms will work best in the WTO when relevant international arrangements are themselves robust); *see* Ernst-Ulrich Petersmann, *Human Rights and International Economic Law in the 21st Century: The Need to Clarify Their Interrelationships*, 4 J. INT'L ECON. L. 3, 12 (2001) (discussing checks and balances in political philosophy).

[204] Peter M. Haas & Ernst B. Haas, *Learning to Learn: Some Thoughts on Improving International Governance of the Global Problematique*, *in* ISSUES IN GLOBAL GOVERNANCE: PAPERS WRITTEN FOR THE COMMISSION ON GLOBAL GOVERNANCE 295, 300–06 (1995).

[205] *Id.* at 314.

[206] DAM, *supra* note 168, at 387–88.

lic health.[207] Governments are learning that TRIPS might prevent poor countries from getting access to drugs to treat AIDS and other diseases, or might be misperceived as doing so. The TRIPS Agreement calls for cooperation with the WIPO,[208] but does not mention other relevant entities such as the WHO and the Secretariat of the Convention on Biological Diversity. Of course, the WTO has general authority to cooperate with other IGOs.[209] Yet so far these efforts have been inadequate.[210]

What would it take to transform the WTO into a learning organization? Pierre Sauvé and Americo Beviglia Zampetti have criticized the WTO for being too segmented in design and operation.[211] To improve it, they advocate "[g]reater horizontality and seamlessness in rule-design" with more "cross-fertilization between policy domains."[212] For example, they see no reason for separate rules on goods and services. Another idea for reform comes from Marco Bronckers, who notes that "there is nothing in the WTO that limits it to considering 'trade-related' issues only."[213] But if the WTO is to adopt agreements on issues like the environment, health, and labor, Bronckers says, then it must develop solid working relationships with the appropriate specialized agencies.[214] Bronckers further suggests that the WTO cease being "owned" by national trade ministries. Instead, each WTO Agreement should be administered at the WTO by delegates from the appropriate national governmental agencies.[215]

These proposals could help transform the WTO into a learning IGO, but there is an important prior question: do the member governments want a WTO that can redefine its mission in light of new interdependencies? Many governments probably do not. It would create tension between increased legitimacy through greater effectiveness, and decreased legitimacy as a result of deviating from the original mandate.

III. CONCLUSION

The success of the WTO sparks proposals to broaden its agenda.[216] Recognizing the danger of institutional overload, analysts are looking for a way to screen out inappropriate topics. Ideally, every candidate issue should be subject to the same screening process.

This article suggests the method of legal triangulation, in which one examines the position of the WTO in relation to interstate diplomacy, domestic politics, and the plane of inter-

[207] *Access to Medicines Could Become Doha's (Only?) Success Story*, BRIDGES, June 2001, at 1, *at* <http://www.ictsd.org>.

[208] TRIPS Art. 68.

[209] WTO Agreement Art. V:1 (stating that the WTO General Council shall make appropriate arrangements for effective cooperation with other IGOs that have responsibilities related to those of the WTO), Art. III:5 (stating that the WTO shall cooperate as appropriate with the IMF and the World Bank); WTO Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy-making, para. 5, *in* THE LEGAL TEXTS, *supra* note 1, at 386 ("The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies."); GATS Art. XXVI (Relationship with Other International Organizations). Oddly, the WTO Agreement makes no mention of improving cooperation with the UN Conference on Trade and Development, an organization referenced indirectly in GATT Article XXXVIII:2(b).

[210] For example, the WTO Council for TRIPS has refused to grant even observer status to the Secretariat of the Convention on Biological Diversity. This step is reportedly opposed by the United States, which is not a party to that Convention.

[211] Pierre Sauvé & Americo Beviglia Zampetti, *Subsidiarity Perspectives on the New Trade Agenda*, 3 J. INT'L ECON. L. 83, 104 (2000).

[212] *Id.* at 104, 105.

[213] Bronckers, *supra* note 184, at 53.

[214] *Id.* at 49. *Compare* Konrad von Moltke, Trade and . . .: The Agenda of Trade Linkages 25 (Sept. 2001) (unpublished manuscript, on file with author) ("Most 'trade and' issues will ultimately require a determination concerning the most appropriate relationship between the trade regime and other international regimes.").

[215] Bronckers, *supra* note 184, at 54–55.

[216] The same phenomenon occurred in the pre-WTO era under the GATT. *See* JACKSON, *supra* note 188, at 471 (noting how the cognizance of the GATT was expanded beyond the articles of the General Agreement); Frieder Roessler, *The Competence of GATT*, J. WORLD TRADE L., No. 3, 1987, at 73, 82 (noting that the GATT Contracting Parties had used their deliberative powers to discuss a range of subject matter far wider than that covered in the General Agreement).

national organizations. Only by looking at each can one begin to model the operation and influence of the WTO. Clarifying the mission of the WTO is a complex exercise because the WTO comprehends a mélange of purposes.

Greater systematization should be brought to the study of the WTO. This article presents eight frames (or perhaps theories) for conceptualizing the proper mission of the WTO. The first four fall under the rubric of State-to-State Relations and are (1) Cooperative Openness, (2) Harmonization, (3) Fairness, and (4) Risk Reduction. The category of Domestic Politics comprises the next two frames, (5) Self-Restraint, and (6) Coalition Building. The third category, International Organization, includes the last two frames, (7) Trade Functionalism, and (8) Comparative Institutionalism. These eight frames play a dual role in this article. First, they help to define the WTO's mission; and second, they serve to test a prospective new WTO issue to see how well it fits the current multilateral trading system. If a new issue can be justified by frames in all three categories, then that issue would have a solid basis for inclusion under the umbrella of the WTO.