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Two Snowflakes are Alike: Assumptions Made in the Debate Over Standing Before World Trade Organization Dispute Settlement Boards

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Abstract

This Essay identifies five assumptions that have worked their way into the debate on standing before the dispute settlement panels of the World Trade Organization (“WTO”). The dispute settlement process is one of the most visible — and most scrutinized — activities of the WTO. Moreover, the dispute settlement process constitutes an integral part of the international trade regime. The five assumptions discussed in this Essay are assumptions; they have neither been proven nor disproven by either side of the debate. This Essay does not empirically treat any of these assumptions, other than to demonstrate that they are assumptions. Rather, this Essay discusses the degradation to the debate over standing that could be caused by acceptance of these assumptions, and sets out ground rules for avoiding these harms. A real understanding of the WTO, and real progress in improving the international trade regime, will only be achieved through meticulous study that avoids easy assumptions.

TWO SNOWFLAKES ARE ALIKE: ASSUMPTIONS MADE IN THE DEBATE OVER STANDING BEFORE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT BOARDS

Philip M. Nichols*

No two snowflakes are alike. This enduring “fact” has become a cornerstone of Western culture—it finds expression in prose, in poetry,¹ in exposition,² and even in legal scholarship.³

The assumption that no two snowflakes are alike, however, in not just an assumption, it is an *erroneous* assumption. At least two like snowflakes have been found in nature,⁴ and in controlled conditions physicists can produce myriad identical snowflakes.⁵ Two snowflakes are alike.

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1. See, e.g., Ted Kooser, *First Snow*, in *NEW AND SELECTED POEMS* (1980) (“This is the night / when one of us gets to say, as if it were news / that no two snowflakes are ever alike . . .”); Maxine Kumin, *Shelling Jacobs Cattle Beans*, in *SELECTED POEMS 1960-1990*, at 227, 227 (“Each its own example; / a rare bird’s egg / cranberry- or blood-flecked / as cool in the hand / as a beach stone / no two exactly alike / yet as close as snowflakes.”); Betsy Scholl, *The World Snow Posits*, in *THE RED LINE* 69, 69 (1992) (“I’d been listening to your voice on the phone / suggesting that if no two are alike, / then difference is what we all share, . . .”).

2. See, e.g., Gregory Rabassa, *No Two Snowflakes are Alike: Translation as Metaphor*, in *THE CRAFT OF TRANSLATION* 1 (John Biguenet & Rainer Schulte eds., 1989); Don J. DeBenedictis, *An Experiment in Reform; Like Snowflakes, No Two Plans for Reducing Civil Delays Are Alike*, ABA J., Aug. 1992, at 16; Brian K. Schimoller, *Power Plants Go Modular*, *POWER ENGINEERING*, Jan. 1998, at 14, 14 (comparing power plants to snowflakes because no two are alike).

3. See, e.g., John D. Leshy, *Special Water Districts—The Historical Background*, in *SPECIAL WATER DISTRICTS: CHALLENGE FOR THE FUTURE* 11, 23 (James N. Corbridge, Jr. ed., 1983) (suggesting that special water districts resemble snowflakes because no two are alike); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1776 (1990) (“Complexity is not the same as chaos. No two snowflakes are alike, but when it is snowing, it is cold outside.”); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 221 (“Keepers, like monitoring organizations generally, are akin to snowflakes—no two are alike.”).

4. Arthur Fisher, *Pinhead Science; Scanning Transmission Electron Microscope Use in Data Storage*, *POPULAR SCI.*, Apr. 1989, at 17 (describing discovery by Nancy Knight, a meteorologist at the National Center for Atmospheric Research, of two snowflakes that were alike); Alfie Kohn, *Folk Wisdom is All Wet*, *SAN FRANCISCO CHRON.*, Mar. 15, 1992, at 11/Z1 (describing discovery by Nancy Knight and debunking other popular myths).

5. See *SFU Physicist Debunks Myth: Two Snowflakes Can Look Alike*, at <http://>

The cultural repetition of an erroneous assumption about snowflakes probably does not cause a great deal of harm. References to snowflakes are usually meant as metaphor rather than as a statement of fact. The concept of uniqueness is more important than the scientific accuracy of the metaphor that transmits it. The fact that two snowflakes are alike, for example, does not detract from the individuality or specialness of each person, nor does it mean that uniqueness does not exist in the world.

Assumptions in scholarly debate, on the other hand, can be deleterious. This Essay identifies five assumptions that have worked their way into the debate on standing before the dispute settlement panels of the World Trade Organization.⁶ The dispute settlement process is one of the most visible—and most scrutinized—activities of the World Trade Organization. Moreover, the dispute settlement process constitutes an integral part of the international trade regime.

The five assumptions discussed in this Essay are assumptions; they have neither been proven nor disproven by either side of the debate. This Essay does not empirically treat any of these assumptions, other than to demonstrate that they are assumptions. Rather, this Essay discusses the degradation to the debate over standing that could be caused by acceptance of these assumptions, and sets out ground rules for avoiding these harms. A real understanding of the World Trade Organization, and real progress in improving the international trade regime, will only be achieved through meticulous study that avoids easy assumptions.

I. DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION

The purpose of the World Trade Organization is to facilitate international trade.⁷ In order to do so, it imposes limits on

www.sfu.ca/~science/media/snowflakes.html ("If two snowflakes are grown under identical conditions, they will appear almost identical.") (quoting John Bechhoefer, physicist at Simon Fraser University).

6. Marrakesh Agreement Establishing the World Trade Organization, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 I.L.M. 1144 (1994) [hereinafter *WTO Agreement*].

7. The World Trade Organization's organic documents, of course, state this goal somewhat less starkly. See *WTO Agreement* pmbl. (stating a goal of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods

its members: tariffs and other trade barriers are minimized and, aside from a set of specified exceptions, members' laws and bureaucratic procedures must not discriminate against goods or services from other members.⁸ These limits are imposed in the first few paragraphs of the three trade agreements annexed to the Organization's charter;⁹ the remainders of the three agreements deal with the intricacies of imposing those simple requirements.¹⁰

What sets the World Trade Organization apart from most international organizations is its enforcement process.¹¹ The World Trade Organization does not enforce its own rules and guidelines. Instead, members enforce the rules by bringing complaints when a benefit that should accrue to them under

and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment").

8. See JOHN JACKSON, *THE WORLD TRADING SYSTEM* 115-19 (1989) (describing the process of tariff reduction). Prior to the creation of the World Trade Organization, tariff reduction pursuant to the General Agreement was very successful. See Claus-Dieter Ehlermann, *The International Dimensions of Competition Policy*, 17 *FORDHAM INT'L L.J.* 833, 840 (1994) (stating that trade negotiations had "reduced tariffs to overall levels at which they no longer create a serious obstacle to trade"). The World Trade Organization has not yet undertaken a multilateral round of negotiations to further reduce tariffs or other trade barriers.

9. See *Multilateral Agreements on Trade in Goods*, Apr. 15, 1994, WTO Agreement, Annex 1A, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 28, 33 *I.L.M.* 1154 (1994); *General Agreement on Trade in Services*, Apr. 15, 1994, WTO Agreement, Annex 1B, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 1, 33 *I.L.M.* 1168 (1994); *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, WTO Agreement, Annex 1C, *LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND* vol. 31, 33 *I.L.M.* 1197 (1994).

10. In describing the General Agreement on Tariffs and Trade, which preceded the trade agreements of the World Trade Organization and which essentially became the World Trade Organization's agreement on trade in goods, Peter Ehrenhaft notes that "[i]ts simple theses of unconditional, multilateral 'most-favored-nation' and 'national' treatment for all imported merchandise consume but a page of the General Agreement's voluminous text. The balance is a crust of barnacles, weighing it down with provisos and exclusions." Peter D. Ehrenhaft, Book Review, 84 *AM. J. INT'L L.* 334, 335 (1990); see also Catherine Curtiss & Kathryn C. Atkinson, *United States-Latin American Trade Laws*, 21 *N.C.J. INT'L L. & COM. REG.* 111, 127-28 (1995) (noting that the Multilateral Agreements in Trade in Goods includes the General Agreement).

11. See Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 *BERK. J. INT'L L.* 171, 171 (1998) ("The central pillar of the WTO multilateral trading system and its 'most individual contribution' is the dispute settlement mechanism"); Michael D. Pendleton, *A New Human Right—The Right to Globalization*, 22 *FORDHAM INT'L L.J.* 2052, 2083 (1999) (stating that the former Director-General of the World Trade Organization described the dispute settlement process as the Organization's "most individual contribution to the stability of the global economy").

one of the trade agreements is "nullified or impaired" by the actions of another member.¹² Disputing parties must consult with one another; if consultations do not yield a satisfactory result, a panel is formed to hear the complaint and recommend a course of action for the parties and for the World Trade Organization. The hearing is quasi-judicial in nature¹³ and is closed to nonparticipants.¹⁴ The conclusions and recommendation of a panel may be appealed to an appellate board before they are adopted by the World Trade Organization.¹⁵ The panel or appellate body recommendations are straightforward. If a panel finds that a member is acting inconsistently with an agreement, the panel is to recommend that the complained of member "bring the measure back into conformity" with that agreement.¹⁶

If a member fails to comply with a recommendation to behave within the bounds of the rules set out by the World Trade Organization, then the real teeth of the World Trade Organization are exposed. If a member continues to nullify and impair a benefit that should accrue to the complaining party, then the World Trade Organization may authorize the complaining party to suspend concessions or other benefits that are given to the violating member by the complaining party under the trade

12. See JACKSON, *supra* note 8, at 94 ("The key to invoking the GATT dispute-settlement mechanism is almost always 'nullification or impairment,' an unfortunately ambiguous term.").

13. John Rogosta takes issue with the common characterization of the dispute settlement process as quasi-judicial; he states the term quasi-judicial has as much meaning as the term quasi-pregnant. John A. Rogosta, *Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 L. & POL'Y INT'L BUS. 739, 747 (2000).

14. See Kenneth W. Abbot, *"Economic" Issues and Political Participation: The Evolving Boundaries of International Federalism*, 18 CARDOZA L. REV. 971, 1005 (1996) (stating that the World Trade Organization is among the most conservative international organizations with respect to private participation).

15. See Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L.J. 73, 75-78 (1999) (describing the dispute settlement process); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996) (describing the dispute settlement process).

16. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, art. 19, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) [hereinafter Understanding]. The panel also may "suggest ways in which the [complained of member] could implement the recommendations." *Id.*; see William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427, 470 (1995) (discussing process of recommendation to bring measures into conformity).

agreements.¹⁷ Suspension of benefits is compensatory rather than punitive; it is limited in amount to the amount of the nullification and impairment.¹⁸

II. THE DEBATE OVER STANDING

As could be expected, the creation within an international organization of a quasi-judicial process has engendered a great deal of scrutiny and a number of debates among legal scholars.¹⁹ One particularly vigorous debate concerns the issue of standing before dispute settlement panels, which currently extends only to member polities of the World Trade Organization.²⁰ Some scholars advocate expanding standing so that it includes private, nongovernmental parties; a common version of this suggestion is

17. Understanding art. 22(1). The complaining member is *authorized* to retaliate; it is not *required* to retaliate nor may the World Trade Organization itself take action against the offending member. See Thomas A. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT'L L. 349, 360 (1995) (noting that the World Trade Organization "presently lacks executive authority to bring action on its own initiative against Member Nations").

18. Understanding art. 22(4). Andreas Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 487 (1994) ("Punishment for unlawful conduct is not contemplated or permitted."). The World Trade Organization has so far authorized suspension of benefits five times. See Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 335 (2000) (reporting five authorizations and noting that that number surpasses in five years the number of times that countermeasures were authorized in the 47 years of the General Agreement).

19. See Ragosta, *supra* note 13, at 739 (stating that the dispute settlement process is "lionized by government officials, academics, and practitioners as the single most important development in the post-World War II trading regime").

20. See Eyal Benvenita, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 210-11 (1999) (noting the importance of the debate); Ronald A. Brand, *Semantic Distinctions in an Age of Legal Convergence*, 17 U. PA. J. INT'L ECON. L. 3, 6 n.12 (1996) (discussing the debate); Chi Carmody, *Of Substantial Interest: Third Parties Under GATT*, 18 MICH. J. INT'L L. 615, 617 n.10 (1997) (discussing the debate); Mark Edward Foster, *Making Room for Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393, 435 (1998) (focussing on the debate); Kevin C. Kennedy, *The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes*, 22 WM. & MARY ENV'T L. & POL'Y REV. 375, 422 & n.255 (1998) (noting the debate); Julie Mertus, *Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, 32 N.Y.U. J. INT'L L. & POL'Y 537 (2000) (entering the debate); Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 INDIANA J. GLOBAL STUD. 579, 627 & n.281 (1999) (noting the debate); Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 847 & n.342 (1997) (discussing the debate).

to extend standing only to nongovernment interest groups.²¹ A number of bases are suggested for such expansion. Some suggest that a paradigmatic shift in the theoretical understanding of international institutions mandates expansion of standing,²² others argue that pragmatic concerns dictate expansion of standing,²³ and others state that expansion would simply make de jure what is already de facto.²⁴ Other scholars oppose expansion of standing, on the same grounds.²⁵

Jeffrey Dunoff has aptly summarized the substantive arguments of this debate.²⁶ Those arguments are interesting—indeed, perhaps too interesting. Scholars have gone so far down the road with the substantive arguments that they have stopped scrutinizing the starting point of the case for expansion of standing. That case rests on several assumptions. Unless those assumptions are revealed as assumptions, unless they are scrutinized and hopefully put to empirical test, then the debate

21. See G. Richard Shell, *The Trade Stakeholder Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359 (1996).

22. See G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 911 (1995) (discarding the realist theory of international law and applying a stakeholder model to the World Trade Organization).

23. See Sung-Jun Cho, *GATT Non-Violative Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 348 (1998) (suggesting that access by private parties to the dispute settlement process will provide better information to the panel more efficiently); Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 129 (1998) (offering a number of pragmatic reasons for extending standing to interest groups); Michael Laidhold, *Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations a Voice in the WTO?*, 12 TRANSNAT'L LAW. 427, 431 (1999) (arguing that granting standing to private parties would preclude capture of the World Trade Organization by interest groups).

24. See Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1998) (arguing that standing exists). One of the more interesting arguments offered on these grounds is not that private parties already have standing but instead that the dispute settlement process is already understood to be the "world trade court" and therefore should behave like a court in extending standing to all interested parties. Ragosta, *supra* note 13, at 747-48.

25. See Meinhard Hilf, *The Role of National Courts in International Trade Relations*, 18 MICH. J. INT'L L. 321, 354 (arguing that private access to the World Trade Organization is not the status quo and that allowing participation "would require reforming the entire WTO system"); Kennedy, *supra* note 20, at 424-25 (opposing expansion of standing on pragmatic grounds); Philip M. Nichols, *Extension of Standing in the World Trade Organization to Nongovernmental Parties*, 17 U. PA. J. INT'L & ECON. L. 295 (cautioning against expanding standing on pragmatic and theoretical grounds).

26. Dunoff, *supra* note 24.

degenerates into a situation in which advocates of each side simply hurl their assumptions at each other rather than building on one another's scholarship and developing an empirically accurate understanding of the international trade regime.²⁷ This is unfortunate because the World Trade Organization does have a significant influence on global well being, the dispute settlement process is an integral component of the World Trade Organization,²⁸ and legal scholarship is important to both.²⁹

III. ASSUMPTIONS THAT HAVE ENTERED THE DEBATE OVER EXPANSION OF STANDING

Five assumptions entered this debate from the very begin-

27. The "is too, is not, is too, is not" nature of the debate over expansion of standing is exacerbated by the unclear line in legal writing between advocacy and scholarship. Unlike other scholarly disciplines, legal scholars in countries that use the adversarial system have been trained to advocate a position as vigorously as possible and let a neutral party evaluate the truth and merit of their arguments. Some critics have expressed concern that this tendency diminishes the value of some legal scholarship. See R.L. Bard, *Advocacy Masquerading as Scholarship: Or Why Legal Scholars Cannot Be Trusted*, 55 BROOK L. REV. 853, 855 (1989) (describing and criticizing advocacy scholarship); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (discussing advocacy scholarship). Edward Rubin, in contrast, argues that legal scholarship should have a prescriptive component. See Edward L. Rubin, *Law and the Methodology of Law*, WISC. L. REV. 521, 522 (1997) (stating that legal scholarship "frames recommendations, or prescriptions, to legal decisionmakers").

28. See Pendleton, *supra* note 11, at 2083 ("Without enforcement, the rules-based system would be worthless. The WTO's procedure underscores the rules of law, and makes the trading system more secure.") (quoting Renato Ruggiero, then Director-General of the World Trade Organization).

29. See Jeffrey L. Dunoff, "Trade And": *Recent Developments in Trade Policy and Scholarship—and Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 759 (1997). Indeed, the very creation of the World Trade Organization resulted from legal scholarship. At the outset of the Uruguay Round of negotiations, which eventually lead to the creation of the World Trade Organization, participants contemplated only the improvement of the existing trade regime. Britain's Royal Institute of International Affairs commissioned Professor John Jackson to evaluate the international trade regime. Jackson reported that only the creation of an international organization could bring coherency to the regime. Although Jackson himself discussed an international organization only as an "improbable" hypothetical useful for demonstrating existing problems, the European Union embraced his idea and formally proposed the creation of an international organization. Eventually, the European Union's proposal prevailed. See Gardner Patterson & Eliza Patterson, *The Road from GATT to MTO*, 3 MINN. J. GLOBAL TRADE 35, 41-42 (1994); see also JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* 91-103 (1990) (proposing and describing a hypothetical international organization). John Jackson also describes the formation of a real international organization as "improbable" and suggesting that his hypothetical "might further stimulate thought about some of the difficult institutional problems of the GATT system." *Id.* at 93.

ning, and the debate seems to have rushed past any recognition that these assumptions *are* assumptions. Just as the notion that no two snowflakes are alike took on the appearance of fact, so too have these assumptions. Unlike, however, the assumption regarding snowflakes, the assumptions regarding the World Trade Organization could work to the detriment of global well being.

Two of the five assumptions possibly distort the debate; clarification of the debate thus requires discussing these assumptions first. The first of these assumptions is that the same arguments apply to participation in the rulemaking process and in the dispute settlement process. This assumption is made both explicitly and implicitly in broad arguments that encompass private participation in all activities of the World Trade Organization.³⁰ This assumption is dubious on its face.³¹ Indeed, the fact that persons intimately familiar with the U.S. system can make this argument is somewhat incredible.³² One would hardly give credence, for instance, to an assumption that a detailed discussion of standing before a U.S. court involves the same issues as a discussion of participation in the deliberations of the U.S. Congress or the rulemaking of an administrative agency.³³

If this assumption is false, its continued promulgation damages the discussion in at least three ways. First, it moves the discussion in a counterproductive direction. Rather than becoming more refined, the discussion of the World Trade Organization becomes coarser and less focused.³⁴ Second, insight is lost; an observation that may apply only to one of the World Trade Organization's activities may be overlooked in the broader

30. See Eric L. Richards & Martin A. McCrory, *The Sea Turtle Dispute: Implications for Sovereignty, The Environment, and International Trade Law*, 71 U. COLO. L. REV. 295, 334 (2000) (discussing participation in all activities without distinguishing among them).

31. See Esty, *supra* note 23, at 144 (noting the importance of distinguishing among the various activities of the World Trade Organization, which include legislation, adjudication, and trade negotiation).

32. In the United States, the legislatures and the judiciaries have very different functions. In some countries, however, the roles of the legislatures and the judiciaries blend together.

33. See generally William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

34. See John H. Jackson, *Foreword*, 30 L. & POL'Y INT'L BUS. 189, 189-90 (1999) (emphasizing the opportunity and need for detailed scrutiny of the World Trade Organization).

view.³⁵ Third, if the assumption is false, mistakes probably will be made. An observation that is true of one World Trade Organization activity could easily be untrue of others. Again using the United States as an example, prescriptions for improving democratic representation in the legislature would most likely prove deleterious for the court system.³⁶

The assumption that processes within the World Trade Organization are similar for purposes of standing could be correct. Nonetheless, there are reasons not to accept the assumption without some form of empirical proof. Moreover, if the assumption is wrong its acceptance as a fact could seriously degrade the debate over standing before dispute settlement panels. A ground rule of the debate, therefore, should be that advocates of either side must either ground their arguments only in the dispute process or must empirically demonstrate that the processes within the World Trade Organization are similar enough to allow broader arguments.

The second assumption is similar to the first. Rather than suggesting that all processes within the World Trade Organization are the same, however, this assumption holds that all international organizations are the same. This assumption does not appear in explicit form; rather, it appears in the use of analogy. Interest group participation works in other international organizations, therefore it will work in the World Trade Organization.³⁷ Like the assumption that all activities within the World Trade Organization are the same, this assumption is dubious on its face.³⁸ There are myriad forms of international organiza-

35. Illustratively, perceptive studies of the World Trade Organization tend to focus on one process within the Organization—often the dispute settlement process. See, e.g., Andrew W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. L. 277 (1998).

36. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 750 (1995) (explaining the position that "judicial review of legislative outcomes is inherently and irreconcilably undemocratic"); John Ferejohn, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 572 (1992) ("[C]ourts are inherently undemocratic and perhaps even antidemocratic institutions.").

37. See Steve Charnovitz, *Participation of Nongovernment Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 332, 334-35 (1996); Esty, *supra* note 23, at 128.

38. Indeed, it is interesting that many of the advocates who make this implicit assumption begin their arguments with a discussion of the uniqueness and importance of the World Trade Organization's disputes settlement process.

tions, with myriad purposes.³⁹ The International Labor Organization, for example, includes labor unions among its voting members.⁴⁰ The International Telecommunications Satellite Organization ("INTELSAT") includes quasi-private corporations.⁴¹ Moreover, as it becomes easier for people to create relationships without regard for distance or political boundaries,⁴² the concept of international,⁴³ and even transnational,⁴⁴ becomes blurred. The International Chamber of Commerce, for example, does not include governments among its membership,⁴⁵ yet it creates rules that are incorporated into the laws of most of the major trading countries.⁴⁶

If the assumption that international organizations are similar with respect to standing before dispute resolution bodies is false, similar degradations of the discussion could occur. Rather than moving the discussion toward more refined scrutiny of the World Trade Organization, the assumption leads to a coarser, more general type of analysis. The international trade regime can be analyzed through analogy rather than on its own terms. The assumption also risks stymieing innovation by making what other international organizations have done the path of least re-

39. International organizations can no longer be categorized simply as intergovernmental or other. Paul Taylor's useful taxonomy, for example, first divides international organizations into three groups based on how that organization fits into theories of international relations; each of the three categories is then divided into a number of categories that also reflect different means of creating relationships. Taylor's scheme envisions a spectrum of organization types rather than a few simple boxes. See Paul Taylor, *A Conceptual Typology of International Organization*, in *FRAMEWORKS FOR INTERNATIONAL CO-OPERATION* 12, 12-17 (A.J.R. Groom & Paul Taylor eds., 1990).

40. See International Labour Organization, *Structure of the ILO*, available at <http://www.ilo.org/public/english/depts/fact.htm> (describing the "tripartite structure" of the International Labour Organization in which governments, workers, and employers are members).

41. See INTELSAT, *INTELSAT—Connecting With Customers to Bring Their Worlds Together*, available at <http://www.intelsat.int/about/profile.htm> (describing INTELSAT as "an international commercial cooperative").

42. See Jessica Matthews, *Power Shift*, *FOREIGN AFF.*, Jan.-Feb. 1997, at 50 (noting that relationships are now created with little regard for political boundaries).

43. Which generally means between political nations.

44. Which generally means between geographic units.

45. See International Chamber of Commerce, *ICC Membership* at http://www.iccwbo.org/home/menu_membership.asp (stating that membership is open to businesses, professional associations, employer federations, law firms and consultancies, chambers of commerce, and individuals involved in international business).

46. See Boris Kozolchyk, *The Immunization of Fraudulently Procured Letters of Credit Acceptances*, 58 *BROOK. L. REV.* 369, 381 n.32 (1992) (discussing general acceptance of the Chamber's rules on international collection).

sistance for those who offer prescriptions for the World Trade Organization.⁴⁷

The assumption that the World Trade Organization is similar enough to other international organizations to allow for meaningful comparison with respect to the extension of standing may or may not be valid. If, however, the assumption is false, then its assimilation into the debate could degrade the discussion of standing. A ground rule for advocates of either position, therefore, should be that discussions of standing in other international organizations will not be offered as proof of the viability or unworkability of extension of standing in the World Trade Organization unless that advocate offers rigorous evidence of the comparability of the international organizations in question.

The third and most pernicious assumption that permeates the debate on standing is that participation by interest groups in the World Trade Organization will enhance the legitimacy of the World Trade Organization among the world's populace.⁴⁸ This assumption is forcefully stated, often in very elegant terms. Dan Esty, for example, argues that interest groups "offer the promise of serving as 'connective tissue' that will help to bridge the gap between the WTO decision-makers and the distant constituents which they are meant to serve, thereby ensuring that the WTO's actions are perceived as responsive and fair,"⁴⁹ evoking images of the law and legal institutions as living things.⁵⁰

47. See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 900 (1992) (noting that methodological commitment tends to bind scholars and blind them to alternatives).

48. See Daniel C. Esty, *Linkage and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709, 711 (1998); Reich, *supra* note 20, at 848; Richards & McCrory, *supra* note 30, at 334; Andrea K. Schnieder, *Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 627 (1998); see also Bruce A. Silverglade, *The Impact of International Trade Agreements on U.S. Food Safety and Labeling Standards*, 53 FOOD & DRUG L.J. 537, 541 (1998) (arguing that the exclusion of interest groups from standing before dispute settlement panels "offend[s] American notions of due process and reinforce the impression that the WTO dispute resolution process inevitably will erode the rights of consumers to high levels of health and safety protection"). This assumption has also worked its way into student notes. See, e.g., Suzanne Pyatt, Note, *The WTO Sea Turtle Case*, 26 ECOLOGY L.Q. 815, 816 (1999); Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2278 (1997).

49. Esty, *supra* note 23, at 125-26.

50. Cf. *Oppenheim v. Kridel*, 140 N.E. 227, 230 (N.Y. 1923) ("The common law is . . . a living organism which grows and moves in response to the larger and fuller development of the nation."); Adama Dieng, *Roles of Judges and Defending the Rule of Law*, 21

The seeming logic of this assumption—participation in the process through a representative organization will make people feel better about the World Trade Organization—makes it easy to accept it as truth. It is not, however, a proven fact; it is an assumption and it may or may not be true. Indeed, there are reasons to question the validity of this assumption. Interest groups are notoriously undemocratic,⁵¹ they represent small segments of society, and to the extent that they exist outside of the west, they are often disconnected from the people they are intended to serve.⁵²

If this assumption is false, its acceptance as true potentially degrades the debate in two ways. First, if the assumption is false, then the solution that many have posed to the very serious problem of creating popular legitimacy for the World Trade Organization will fail.⁵³ Second, to the extent that the assumption leads to a simple answer, scholars will not have an expended effort to look for other avenues through which to legitimize the World Trade Organization.

The assumption that extending standing to private parties will lead to acceptance and legitimization of the World Trade Organization appears straightforward, but no proof has been offered that the assumption is valid. Indeed, there are reasons to question the validity of this assumption, and if it is erroneous, its use could degrade the debate. A ground rule for discussions of standing, therefore, should be that connections should not be

FORDHAM INT'L L.J. 550, 552 (1997) ("[T]he rule of law should have the dynamism of life itself, and it should adapt itself to the constant process of transformation which characterizes all living organisms.").

51. See Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZA L. REV. 957 (1996).

52. See David M. Abramson, *A Critical Look at NGOs and Civil Society as Means to an End in Uzbekistan*, 58 HUMAN ORG. 240, 240-50 (1999) (stating that nongovernmental organizations in developing countries simply create a new group of elite and that interest groups are in general distant from society); Laura MacDonald, *A Mixed Blessing: The NGO Boom in Latin America*, NACLA REPORT ON THE AMERICAS, Mar.-Apr. 1995, at 30, 30-35 (reporting that international nongovernmental organizations are paternalistic and interventionist and impose policies with little consultation with the affected community); R.L. Stirrat & Heiko Henkel, *The Development Gift: The Problem of Reciprocity in the NGO World*, 554 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 66-78 (1997) (discussing the asymmetrical relationships between southern and northern interest groups and noting a loss of identity among southern nongovernmental organizations).

53. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 707-09 (1996) (discussing the need of the World Trade Organization to be perceived as legitimate).

drawn between interest group standing and legitimization in the absence of empirical proof.

The fourth assumption is related to the third; that interest groups are alike. This assumption is not stated directly but instead is found in the arguments of those who advocate interest group participation. While these advocates speak of interest groups in general, the authorities that they use refer mostly to environmental groups, with a smattering of labor and human rights groups. Dan Esty provides an illustration. He makes the general statement that "[h]istorically NGOs have contributed to the efficacy and legitimacy of international organizations in a range of ways which should be instructive for the international trading system."⁵⁴ The authorities he uses to support his statement, however, each discuss environmental interest groups.⁵⁵

This assumption degrades the debate in two ways. First, it places primacy on the intersection between environmental and trade issues. There is no gainsaying the potential importance of environmental issues; if there is a serious argument, for example, that the erosion of the ozone layer could fundamentally alter life on Earth, then that is an issue that *must* receive attention. Environmental concern, however, is only one of the myriad issues connected to trade and thus within the potential ambit of the World Trade Organization's dispute settlement process.⁵⁶ To alter the structure of the World Trade Organization out of concern for the single issue of environmental concerns would be extraordinary, to do so if the assumed similarity between environmental and other interest groups was wrong would be even more so.

Second, the assumption could be false. Indeed, there are reasons to question the validity of this assumption. Environmental interest groups are different from many types of interest groups. Arguably, environmental interest groups *do* represent

54. See Esty, *supra* note 23, at 128. This observation, of course, is not meant to impugn Esty's well-deserved status as a prominent trade scholar, it is merely an observation on the state of the debate.

55. *Id.*

56. See Nichols, *supra* note 53, at 668-90 (describing the tensions and intersections between trade and other societal values, including ecology, labor, and cultural identity and noting that many more exist); see also 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, *passim* (1996) (discussing the breadth of the World Trade Organization's authority to deal with societal issues).

the best interests of the majority and thus act as a counterweight to the more concentrated interests of those who would exploit the global commons.⁵⁷ The vast majority of interest groups, on the other hand, represent the collective interests of a narrower band of people.⁵⁸ It is fine to make arguments based on the history of environmental and human rights groups, but it must be acknowledged that those groups will constitute a fraction of the interest groups that ask for standing before dispute settlement panels.⁵⁹

Environmental groups may or may not be analogous to other interest groups with respect to arguments concerning standing before dispute panels. Neither side has offered a credible argument or empirical evidence. A ground rule for the debate over standing, therefore, should be that advocates must acknowledge when their arguments are based on the behavior or history of one type of interest group, and must either acknowledge the limits of that basis or must explain why their discussion can be generalized.

The final assumption is final indeed. Some scholars assume that the debate is over, that it has been mooted by events. This

57. In this way, environmental interest groups may avoid the problem posed by public choice theory, in that they do not represent a small group of people who work together because they have a narrow interest. Thus when environmental groups capture an agency, it is not necessarily to the detriment of others. This can hardly be said of other interest groups. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 41-47 (1982) (describing the inefficiency, misallocation of resources, and slow economic growth that occur when interest groups are allowed extensive participation in governance).

58. See Lillian R. Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1273 (1994) (noting that interest groups allow for collective action by small groups, and also that interest group participation causes "destructive fractionalism").

59. It should also be acknowledged that the relationship between environmental and other groups is particularly prone to disagreement. Riley Dunlap and Kent Van Liere describe what they call the "New Environmental Paradigm"—a world view that encompasses nature-oriented values and rejects anthropocentrism. Riley Dunlap & Kent Van Liere, *The "New Environmental Paradigm"*, J. ENVTL. EDUC., Summer, 1978, at 10, 10. This world view is now held by a majority of people, but is most deeply held by environmentalists. *Id.* at 13. Those who possess this worldview see and experience the world differently than those who do not, and it is very difficult for one side to explain its position to the other side or for one side to understand the other side's position. See Thomas Dietz et al., *Definitions of Conflict and the Legitimation of Resources: The Case of Environmental Risk*, 4 SOC. FORUM 47 (1989); Paul C. Stern et al., *Support for Environmental Protection: The Role of Moral Norms*, 8 POPULATION & ENV'T 204, 205 (1986). Again, this suggests caution when evaluating the assumption that environmental groups are analogous to other interest groups.

assumption holds that interest groups already participate in the World Trade Organization's activities, including dispute settlement, and thus as Jeffrey Dunoff articulately suggests, the debate over whether standing should be given to private actors is "misguided."⁶⁰

The participation of nongovernmental groups in the activities of the World Trade Organization is beyond peradventure. Nonetheless, the assumption that private entities have de facto standing to appear before dispute settlement panels is questionable and, if false, is harmful. The facts underlying this assumption do not necessarily support it. One line of reasoning suggests that the fact that some governments have used outside counsel to represent them before dispute panels means that the process is now open to private parties.⁶¹ A lawyer, however, is an agent and does not represent him or herself.⁶² The fact that a lawyer may appear before a dispute panel to represent a country does not mean that that lawyer could appear before a panel to represent him or herself. The second line of reasoning is that disputes such as the Kodak-Fuji dispute are actually disputes between private parties, and that dispute panels thus are open to private litigants.⁶³ Kodak and Fuji were quite active in the dispute; they were active, however, only at the behest of the member nations that actually stood before the dispute settlement panels.⁶⁴ The fact that private companies used the mechanisms within their countries⁶⁵ to get their countries to use the dispute

60. Dunoff, *supra* note 24, at 433.

61. See Ted Sano, *Historical Consequences of the Trade Relationship Between Japan and the United States*, 16 ARIZ. J. INT'L & COMP. L. 29, 34 (1999) (noting that the use of private lawyers raises the question of participation). A student note nicely outlines the arguments on both sides of the debate over the use of private lawyers representing members and representing private interests. Jessica C. Pearlman, Note, *Participation by Private Counsel in World Trade Organization Dispute Settlement Proceedings*, 30 L. & POL'Y IN INT'L BUS. 399, 405-14 (1999).

62. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Appellate Body Report, WT/DS27/AB/R (Sept. 9, 1997) (finding nothing in the trade agreements, the Understanding "of the Working Procedures, nor in customary international law or the prevailing practice in international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings"); *Indonesia—Certain Measures Affecting the Automobile Industry*, WTO Panel Report, WT/DS54/R (July 2, 1998) (same).

63. Dunoff, *supra* note 24, at 434.

64. Sano, *supra* note 61, at 34-35.

65. In the United States, for example, section 301 of the trade laws allows private parties to request the United States Trade Representative to press a claim before the

settlement system of the World Trade Organization does not necessarily mean that private parties effectively have standing before those tribunals.

If this assumption is wrong, it degrades the discussion by terminating it. Scholars are handed an ipso facto solution rather than given room to explore possibilities. If this assumption becomes assimilated into the debate, scholars could move away from the "solved" issue of standing and work on other issues.

It is not at all clear, however, that the assumption that parties have standing in reality is valid. It is certainly not clear that the debate should be terminated. A ground rule for the debate, therefore, might be that descriptions of private party access to the dispute settlement process not be framed in terminal language, so that resolution of the issue may be left open.

CONCLUSION

The debate over standing before the disputes settlement panels of the World Trade Organization is an important debate, but it is also a debate that is rife with assumptions. Individually, each of these assumptions potentially harm the international trading regime, and scholars should be careful either to avoid or to carefully explain each of them. The existence of assumptions in such a critical debate also highlights the need for an empirical examination of this issue.

In the aggregate, these assumptions also represent an abdication to the World Trade Organization. The assumption underlying all of these assumptions, indeed underlying the entire debate, is that the World Trade Organization is where the conflicts between trade and other societal issues must be resolved. Given the nature of the World Trade Organization and the experiences of other trading bodies, this is a revolutionary assumption. The World Trade Organization is a small, very specialized body with limited resources and deep, but narrow, expertise. To borrow from Peter Eigen, the Chair of Transparency International, during a discussion of the creation of ethical standards by large corporations, "Do we really want these guys to resolve so-

World Trade Organization. See Frank J. Schweitzer, *Flash of the Titans: A Picture of Section 301 in the Dispute Between Kodak and Fuji and a View Toward Dismantling Anticompetitive Practices in the Japanese Distribution System*, 11 AM U. J. INT'L L. & POL'Y 847, 847-46 (1996) (describing the use of section 301).

cial issues?"⁶⁶ It is quite possible that no matter how many interest groups appear before the World Trade Organization, no matter how much information is provided to them, no matter how many of the above described assumptions actually are true, that the trade experts at the World Trade Organization will choose trade-related values above other types of societal values.⁶⁷

Rather than simply accepting the World Trade Organization as the final arbiter of societal conflict, scholars should ask odd questions and explore unusual possibilities. Should decisions of the World Trade Organization be appealable to a body that balances all societal interests? Should the teeth of the World Trade Organization be pulled, or should bodies that promote other interests be given teeth? Does the World Trade Organization represent an unworkable throwback to a time when nations were the most important actors in international relations, or is it unworkably ahead of its time in representing trends toward economic and social integration? These and more questions, rather than reliance on unproven assumptions, will move forward the understanding and development of the World Trade Organization.

66. Comments of Peter Eigen, Wharton Impact Conference on the Law and Ethics in Emerging Economies, March, 1997, Philadelphia, Pennsylvania.

67. Thus, the author of this Essay has suggested elsewhere that persons from outside the trade regime should be placed on dispute settlement panels. Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 328 (1996).