

2001

The International Recognition of Judgments: The Debate between Private and Public Law Solutions

Antonio F. Perez

Recommended Citation

Antonio F. Perez, *The International Recognition of Judgments: The Debate between Private and Public Law Solutions*, 19 BERKELEY J. INT'L LAW. 44 (2001).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol19/iss1/2>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The International Recognition of Judgments: The Debate Between Private and Public Law Solutions

by
Antonio F. Perez*

INTRODUCTION AND SUMMARY OF ARGUMENT

The recognition and enforcement of judgments rendered by the courts of other sovereigns is a central tool of trade integration. Traders seek the security provided by the enforcement of legal rights and the provision of an adequate remedy. Accordingly, without secure means by which that remedy may be given effect, exporters may undervalue the gains from trade. Consequently, they may fail to take advantage of trading opportunities that would otherwise be socially beneficial, taking into account both the gains for individual traders and the benefits that would flow to third parties. At the same time, the inability of importers to vindicate their legal rights through the effective enforcement of judgments would also distort incentives for trade, leading exporters not to appreciate fully the costs of their activities and encouraging them to exploit trading opportunities that would be better left unrealized. Self-help mechanisms may contribute to resolving some of these problems,¹ but it is a basic proposition that some level of public intervention is necessary to facilitate socially optimal trade, although one can argue about what precise remedial rules achieve socially preferred results.²

Domestic legal systems address the problem of achieving socially optimal contracting through a variety of means. Public law, such as environmental pro-

* Associate Professor of Law, Columbus School of Law, The Catholic University of America. J.D. Columbia, 1985, A.B. Harvard, 1982. A portion of this article was presented in the Trilateral Meeting of the Canadian, U.S. and Japanese Societies of International Law, at Ottawa on October 26, 2000. I thank the participants of that meeting for their comments and criticisms. Remaining errors and misjudgments are mine, of course. I thank the Columbus School of Law for its generous support in the preparation of this paper. I also wish to thank Maura Jeffords, J.D. Class of 2001 of the Columbus School of Law, for her assistance with this paper.

1. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (analyzing the conditions under which dispute resolution operates without judicial enforcement); Shuba Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 *YALE L.J.* 61, 95 (1987) (describing nonperformance in some contractual modifications as a kind of self-help specific performance).

2. Compare Lon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, pt. 1, 46 *YALE L.J.* 52 (1936) (advocating the reliance principle, rather than expectancy, as a plausible option in many cases), with Alan Schwartz, *The Case for Specific Performance*, 89 *YALE L.J.* 257 (1979).

tection statutes and labor law, does the main work of addressing the negative externality problem, although law and economic scholars argue that judge-made law has already done much of this work in common law systems³ and public choice theorists argue that interest-group rent-seeking behavior in public law-making actually distorts socially optimal common law rules.⁴ Yet, publicly created remedial systems affecting private incentives for contracting do address the cost of unrealized contracting opportunities against welfare losses flowing from the negative externalities of contracting, albeit imperfectly. In robust democracies, such as the United States, the political process ultimately addresses these issues either through tacit acquiescence in common-law rules or through legislative or executive intervention, including both statutes creating new private rights to judicial remedies⁵ and statutes affording the government the right directly to seek relief on behalf of public interests.⁶ Some argue, moreover, that “the political system manages to overcome the inherent advantages of special interests”⁷ through “mass politics” in so-called “republican moments”⁸ during which legislative outcomes avoid special interest capture. What label one attaches to such outcomes – ranging from social welfare maximization⁹; a discursively justified¹⁰ (or morally discovered¹¹) conception of the common good; or, less pre-

3. See generally RICHARD POSNER, *THE ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

4. For the seminal expositions of this position, see JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) [hereinafter OLSON, *COLLECTIVE ACTION*]. See generally DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (critiquing so-called public choice theory).

5. See, e.g., 15 U.S.C. § 15d, which creates a private right of action and aggregate damages for a private person injured by violation of U.S. competition laws. Roughly stated, the private right of action here forces private monopolists to internalize the cost to society of pricing goods at values above the marginal cost of production. See generally HERBERT HOVENKAMP, *ANTITRUST LAW* (2d ed. 1999) [hereinafter Hovenkamp, *ANTITRUST LAW*]. Another useful example is the judicially recognized private right of action for fraud in the issuance of and transfer of stocks that is calculated to deter such fraud, in large part because of the positive externalities that flow from maintaining the integrity of capital markets. See generally 15 U.S.C.A. § 780; compare *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (holding that excluded securities dealer was entitled to limited exemption from application of antitrust laws due to securities law policy of authorizing self-regulation of securities markets).

6. The Department of Justice has exclusive criminal jurisdiction under federal antitrust law, but has concurrent jurisdiction with the Federal Trade Commission to seek civil remedies. State attorneys general have authority to vindicate interests of consumers residing within their state by Sherman Act suits seeking damages or equitable relief. See 15 U.S.C. § 15 (1998).

7. Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992); reprinted in *THE FOUNDATIONS OF ENVIRONMENTAL LAW* 236 (Richard L. Revesz ed., 1997).

8. *Id.* at 238-39.

9. See BUCHANAN & TULLOCK, *supra* note 4.

10. See, e.g., JURGEN HABERMAS, *FACTS AND NORMS* (1996) (elaborating his conception of “discursive justification” through ideal speech situations); Joshua Cohen, *The Economic Basis of Deliberative Democracy*, SOC. PHIL. & POLICY 25, 33 (emphasizing that choices must be made in “a deliberative way,” and not “simply conform to the preferences, convictions, and ideals of citizens”) (emphasis omitted).

11. See, e.g., JACQUES MARITAIN, *MAN AND THE STATE* (1951) (locating a conception of the common good through natural law reasoning).

cisely but more intuitively, the judgment of the “People”¹² – may depend on one’s overall political and legal theory. It is enough to say that such decisions by a self-governing community are practically and normatively legitimate,¹³ notwithstanding the public choice critique, even if particular applications of some judicially or legislatively made rules reflect interest group rent-seeking rather than satisfy some criterion of legitimacy.

At the international level, things are not quite so simple. With the emergence of a global trading system, the international judgments recognition process masks profound value conflicts. This is so because of the wide divergence in national values on issues ranging from the propriety of the exercise of jurisdiction by national courts; the fairness of varying procedures or remedies, such as the jury system or punitive damages; to even the location of the boundary between trade and non-trade concerns, such as the boundary between human rights and comparative advantage in labor costs. To the extent that domestic political judgments about tradeoffs between competing values are embedded in judicial judgments, political tensions are bound to emerge as these domestic judgments seek recognition and enforcement in other states. International tensions rise if foreign judgments are not recognized and domestic tensions rise if they are recognized in defiance of national values. Ultimately, such conflicts

12. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (employing republican theory to account for constitutional amendment in the U.S. outside the formal procedures prescribed in Article V of the U.S. Constitution reflecting the deepest convictions of the American people acting collectively on the basis, at least in part, of their ideals). Ackerman’s conception of constitutional politics bears some resemblance to the ideal theory advanced by John Rawls, under which principles of justice governing the basic structure of a society can be discovered on the basis of rational choices by individuals under conditions of moderate uncertainty as to their individual interests, the so-called “veil of ignorance.” See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

13. Staking out a rough position on how to use the concept of “legitimacy” would seem to be necessary for developing the argument of this paper. Focusing on the descriptive component of legitimacy, it would seem useful to draw on Max Weber’s rational-legal conception of legitimacy in this context, for rules on recognition and enforcement of judgments must be based on rule-like commands even if the specific deviations from rules of recognition and enforcement at the municipal level may reflect “traditionally” or “charismatically” grounded practices, such as marriage or gambling laws. See generally, MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 152, 324-86 (Talcott Parsons ed., 1947) (defining “legitimacy” in terms of actual compliance and describing as ideal types the forms of “legitimate” authority – charismatic, traditional, and rational/legal – as resting on different forms of belief that are offered as justifications for compliance with the commands of an authority). A useful frame of reference for discussing normative legitimacy is contained in John Rawls’ most recent work, which deals with the question of bridging belief systems that are fundamentally incompatible if applied thoroughly yet may share sufficient common attributes to form the basis for cooperation in limited spheres of interaction. See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* (1999) [hereinafter RAWLS, *THE LAW OF PEOPLES*] (outlining a conception of political discussion in democratic societies intended to accommodate the participation and membership in the same political society of groups holding inconsistent “comprehensive views,” that is, views of the good, including for example those grounded in religious conceptions). It is important that Rawls seems to suggest that a range of modes of justification – from Habermas’ conception of discursive justification to Maritain’s neo-Thomist view of the common good – can form the basis for normative justification at the level of the state. See *id.* at 142 nn. 28-29. Further, Rawls’ recognition that even Islam is amenable to participation in public discourse with other comprehensive conceptions suggests that his basic methodology can be extended to global political ordering. See *id.* at 151 n. 46. This is so even if Rawls himself thinks that his arguments are limited to a particular kind of community not yet found universally. For a related critique of Rawls’ international political philosophy, see FERNANDO R. TESON, *A PHILOSOPHY OF INTERNATIONAL LAW* 105-26 (1998).

must be resolved through particular institutions or a mix of institutions – taking into account that both wholly private, market-based approaches and wholly public, political approaches will have costs. In short, international recognition of judgments is an issue ripe for comparative institutional analysis.¹⁴

Institutional Alternatives

This article explores institutional alternatives for balancing the competing trade and non-trade concerns at the national and global levels in relation to the recognition and enforcement of judgments. It argues against a private international law convention of the kind that is currently being negotiated at the Hague Conference on Private International Law, and against quasi-constitutional and constitutional solutions, such as those employed by the European Union and the United States. Rather, the article argues that managing the tensions between trade and non-trade values and between state autonomy and globally established standards can best be achieved through a supplementary agreement in the World Trade Organization (WTO).

With comparative institutional analysis must come recognition that the question of whether to achieve efficiency or distributive justice hinges on defining the distribution of political voice and power. This requires one to consider the underlying view of the types of political actors meriting representation in the political community within a state. Likewise, a theory of international political process is necessary in order to define the balance between state autonomy to define those tradeoffs and the cosmopolitan or global perspective in assessing the tradeoffs between efficiency and distributive justice. One might draw on the intuitions of Hedley Bull, who thought that one can understand international politics in terms of competing frames of reference. At one end of the spectrum there is international anarchy, in which the only meaningful unit of social solidarity is the state. At the other end is cosmopolitan international society, in which states do not play meaningful roles. Finally, in an intermediate position is international society, in which the society of states plays a useful role in the mediation of international conflict.¹⁵ In short, one can classify the costs of various institutional alternatives in terms of whether effects on efficiency and distributive justice are determined from the standpoint of individuals forming communities within states, the states within the community of states, or individuals forming communities across states, perhaps even conceived as communities formed within a hypothesized world state (the so-called *civitas maxima*).¹⁶

14. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) [hereinafter KOMESAR, *IMPERFECT ALTERNATIVES*] (analyzing the advantages and disadvantages of political, market and adjudicative processes as decision-making alternatives).

15. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977) [hereinafter BULL, *THE ANARCHICAL SOCIETY*].

16. See generally NICHOLAS G. ONUF, *THE REPUBLICAN LEGACY IN INTERNATIONALIST THOUGHT* (1998) (esp. ch. III); Nicholas Greenwood Onuf, *Civitas Maxima: Wolff, Vattel and the Fate of Republicanism*, 88 *AM. J. INT'L L.* 280 (1994) (attempting to recover the forgotten civic republican foundations of international law's formative period).

At one extreme is the traditional approach of an agreement between states, which appears to ignore interests in global efficiency and distributive justice. At the initiative of the U.S. Government,¹⁷ and largely because of concerns that the U.S. suffers a trade disadvantage relative to the European Community, such an agreement is now the subject of negotiation in a series of Hague Conventions on Private International Law (the Hague Conference).¹⁸ The Hague Conference approach is designed, through the adoption of technical standards bridging the differences between national legal systems, to facilitate transnational litigation.¹⁹ Its technical approach is reflected in the composition of the negotiating groups, which consist primarily of professional experts, and in the important role of the Hague Conference secretariat in performing its mandarin drafting functions.²⁰ However, like other "private" legislatures in the domestic law-making and standard-setting process,²¹ international law-making through relatively nontransparent organizations that have little opportunity for broad public participation and produce statutes for domestic implementation generate outcomes producing either too much or too little controlling law.²² They might produce too much by enabling the private interests that are disproportionately represented in the private law-making process to achieve gains at the expense of the public interest.²³ They might produce too little by yielding rules that are so

17. See Peter Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998) [hereinafter Pfund, *Project of the Hague Conference*] (special adviser to US Delegation reporting on status of the U.S. initiative). The precise U.S. negotiating position draws largely on the work of Arther T. von Mehren, a noted U.S. and international expert on private international law. See Arther T. von Mehren, *A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994) (proposing the mixed convention approach). For views of other national representatives and interested parties, see Maryellen Fullerton, *Enforcing Judgments Abroad: The Global Challenge*, 24 BROOK. J. INT'L L. 1 (1998) (summarizing symposium contributions); Peter North, *The Draft UK/US Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219 (1979) (noting collapse of earlier U.S.-U.K. effort to negotiate a bilateral treaty).

18. Preliminary Draft Convention on Jurisdiction and the Effects of Judgments in Civil and Commercial Matters, adopted provisionally by the Special Commission of the Hague Conference, Oct. 30, 1999, at <http://www.hcch.net/e/conventions/draft36e.html> [hereinafter Preliminary Draft].

19. See, e.g., Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter the Hague Service Convention]; and Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter the Hague Evidence Convention].

20. See Pfund, *Project of the Hague Conference*, *supra* note 17.

21. See Alan Schwartz & Robert Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

22. See generally Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law* 39 VA. J. INT'L L. 742 (1999) [hereinafter Stephan, *Futility*] (extending the model of private legislatures to international lawmaking and examining a few illustrative cases); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996); REGULATORY COOPERATION AND COMPETITION: THE SEARCH FOR VIRTUE (University of Virginia Legal Studies Working Paper Series, No. 99-12, 1999) (concluding with the bleak assessment that the "largely unchecked power of the legal profession to construct these rules makes it more difficult for the political process to correct poor choices of rules . . .").

23. See Stephan, *Futility*, *supra* note 22, at 763-68 (discussing pro-defendant liability rules relating to international shipping emerging from the Hague process and distinguishing it from the results of the more pro-plaintiff Hamburg process); Malcolm Whincop, *The Recognition Scene:*

vague and confer so much discretion to implementing agencies or judiciaries that they either (1) replicate the status quo or (2) allow rent-seeking interest groups yet another opportunity to achieve disproportionate gains by influencing the exercise of discretion in the national implementation of the agreed upon international rules.²⁴ International private legislatures such as the Hague Conference thus raise serious legitimacy questions both at the international and domestic levels.

At the other extreme is the constitutional model of recognition and enforcement of judgments. One example of this constitutional model is that required of American courts by the Full Faith and Credit Clause of the U.S. Constitution.²⁵ The constitutional approach supposes the existence of a single political community for purposes of recognition and enforcement of foreign judgments. It therefore suppresses the differences among the political sub-communities that are embedded in the policies upon which those judgments are based. The constitutional character of this approach is exemplified in the current tendency toward deeper integration in the European Union and its apparent accompaniment by an effort to reformulate rules concerning recognition and enforcement of judgments as internal E.U. rules. New authority concerning judicial matters E.U. member states have extended to the E.U. under the recent Amsterdam amendments to the Treaty of Maastricht has made this possible.²⁶ The original EC treaty approach exemplified in the Brussels Convention,²⁷ and extended to the European Free Trade Association countries through the Lugano Convention²⁸ (together known as the Brussels/Lugano regime), is in the process of mutating into an E.U. rule commanding E.U. member states to implement the Brussels/Lugano rules as part of their national laws.²⁹ Because the regulation will be binding on E.U. member states and enforceable through the European Court of Justice, it will operate in

Game Theoretic Issues in the Recognition of Foreign Judgments 23 MEL. U. L. REV. 416, 436 (1999) [hereinafter Whincop, *The Recognition Scene*] ("recognition conventions may extend the scope and coverage of political deals cut in domestic legislatures").

24. See Stephan, *Futility*, *supra* note 22, at 772-80 (discussing the vagueness and ambiguities of the UN Commission on International Trade Law's (UNCITRAL) Convention on the International Sale of Goods (CISG)); Whincop, *The Recognition Scene*, *supra* note 23, at 435-36 (drawing on Stephan's work, suggesting the Hague Conference negotiations may produce too much discretion: "given the [group] dynamics of expert bodies, they are likely to adopt provisions that repose discretion in decision-makers, such as judges, rather than specify outcomes that flow from described circumstances (that is, standards are preferred to rules)") (citing Schwartz & Scott, *The Political Economy of Private Legislatures*, *supra* note 21). *But see* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998) (defending these rules as laying the groundwork for supranational interpretation based on norms emerging from the global commercial community).

25. U.S. CONST. art. IV, § 2.

26. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Amsterdam Treaty].

27. Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter the Brussels Convention]. For the consolidated, current text of the convention, see 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413.

28. Convention on Jurisdiction and Enforcement of Judgments in Civil Commercial Matters, Sept. 16, 1988, 1988 O.J. (L319) 9, *reprinted in* 28 I.L.M. 620 [hereinafter the Lugano Convention].

29. See Council Draft Regulation 5733/00 EC of 8 February 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

much the same way as the Full Faith and Credit Clause of the U.S. Constitution, under which the U.S. Supreme Court compels states to recognize and enforce each other's judgments.³⁰ For a similar effect on the global level, a treaty would need to be self-executing, enabling all interested individuals to invoke treaty rights to protect their substantive interests in the recognition and enforcement of foreign judgments. Even if such an intrusive instrument were negotiable in a single treaty, the necessary agreement on substantive policies and the tradeoffs among them would require a single, global political process capable of representing all individual and community interests.

This article proposes the following intermediate approach: a new multilateral agreement on recognition and enforcement of judgments as part of the World Trade Organization (WTO). The WTO is well suited to do the work of mediating between state-centric and cosmopolitan perspectives in addressing the problem of recognition and enforcement of foreign judgments. This is largely because the remedial regime of the WTO serves the purpose of mediating between the state-centric, private law conception reflected in the Hague Conference and the constitutional, public law conception suggested by the Full Faith and Credit Clause of the U.S. Constitution, which subordinates state interests in diversity to the homogenizing tendencies of a free trade policy. While WTO dispute resolution normally results in calls upon states to conform their conduct to the WTO's trade rules, these rulings have resulted in bargaining processes over remedies that very often take the form of substitutional relief such as compensatory tariff increases. The tension between a constitutional law approach and a private law or bargain conception of the WTO legal order parallels the contrast between public law's preference for compliance and private commercial law's preference for substitutional remedies.³¹ Perhaps, as Kenneth Abbott states in reference to the GATT, the WTO's predecessor, "the role of international institutions of justice is to apply community policy, not merely to resolve private conflicts."³² Yet, their role also may well be to moderate the formation of community policy in response to political lessons learned from the resolution of private conflicts.

The Argument for the WTO

There seems to be no doubt that the recognition and enforcement of judgments is an international trade issue, even though "[a]s yet, there has not been an international focus on whether absence of private law upgrades may in some

30. On the other hand, unlike the Full Faith and Credit Clause of the U.S. Constitution, which has ordinarily been interpreted not to have a public policy exception to take account of important policy differences between political communities, the Brussels/Lugano regime does contain a public policy exception to take account of those national differences (*see infra* note 97). Whether any regulation ultimately issued by the EC would follow the Brussels/Lugano model or the U.S. Full Faith and Credit Clause remains to be seen.

31. See Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 *YALE J. INT'L L.* 301, 307-24 (1998) [hereinafter Perez, *WTO and U.N. Law*].

32. Kenneth Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 *BROOK J. INT'L L.* 31, 32 (1992).

cases be close to a non-tariff barrier to cross-border trade otherwise authorized under new trade agreements.”³³ The attention the Hague Conference has recently given the subject makes this clear.³⁴ Negotiating a set of rules on the criteria for recognition and enforcement of foreign judgments would, therefore, seem to be within the competence of the WTO.

Placing the responsibility for this issue with the WTO would take advantage of the binding character of WTO commitments and their enforceability through the WTO Dispute Settlement Body (DSB). The WTO remedial system permits not only claims based on violations of a WTO rule yielding a prima facie showing of nullification or impairment of negotiated trade benefits but also so-called “non-violation” claims of nullification or impairment of benefits through measures not in themselves violative of WTO rules.³⁵ Even if rules of judgment recognition and enforcement were not made a part of the WTO law through negotiation of a new agreement governing recognition and enforcement of foreign judgments, it might still be possible to argue that discrimination against foreign judgments “resulting in nullification or impairment of market access rights” would give rise to a right to a WTO remedy. This would be contingent on trade benefits being negotiated in the next WTO negotiating round on the premise of nondiscriminatory recognition and enforcement of judgments protecting these trade opportunities.³⁶

Placing the responsibility for this issue with the WTO could also take advantage of the administrative machinery of the WTO’s Trade Policy Review Mechanism (TPRM) to monitor compliance with any agreed upon WTO rules,³⁷ providing a record of whether states have complied with their obligation not to discriminate against foreign judgments. Such a record could facilitate dispute resolution.

33. Hal Burman & Don Wallace, Jr., *Private International Law : PIL Unification and International Economics: Crossroads in 2000?*, 29 INT’L LAW NEWS 17, 18 (Section of International Law and Practice, ABA, Winter 2000) [hereinafter Burman & Wallace, *Crossroads*].

34. See generally Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 592 (Bhandari and Sykes eds., 1999) [hereinafter Brand, *Judgments as a Trade Issue*].

35. See generally JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 348-49 (1995) (distinguishing prima facie cases from non-violation, nullification or impairment cases and citing examples).

36. See Burman & Wallace, *Crossroads*, *supra* note 33, at 18 (focussing on the possibility that violation of a UNCITRAL Convention on banking related issues would operate as an “impairment or nullification” of trade benefits and on the possibility of including a Multilateral Agreement on Investment in the WTO).

37. See Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1154 [hereinafter TPRM]. See generally Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT’L L. 477 (1994); Miquel Montana i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT’L L. 103, 128-41 (1993); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT’L LAW. 389, 396-406 (1995) (discussing move from power-oriented to rules-oriented approach in international trade).

Finally, a WTO-based approach could serve as a platform for a more transparent, politically-accountable and rational evolution of the law's accommodation of trade and non-trade concerns at cross-issue negotiations conducted at the global level. Meanwhile, it could preserve states' autonomy by acknowledging national discretion to refuse to enforce foreign judgments on public policy grounds, albeit at the price of WTO/DSB-authorized remedial countermeasures. This approach would be consistent with the practice of the many states that refuse to comply with WTO/DSB decisions finding certain practices illegal under GATT, because compliance with these decisions would violate the interests of core domestic constituencies.³⁸ Indeed, this approach would also preserve the option of defending national values through noncompliance, albeit at the price of a loss of trade concessions.³⁹ The discipline of paying a price for deviating from welfare enhancing trade rules would compel national political processes to address the value they attach to public policies compelling them to deviate from trade law, yielding either relaxation of the local public policy or renewed political effort at the WTO level for re-negotiation of global rules to accommodate the local policy. In any event, taking into account the global diversity of trade and related non-trade interests,⁴⁰ as well as the need for domestic political discretion to manage domestic political support for continuing trade integration,⁴¹ a WTO-based approach to the recognition and enforcement of judgments would achieve the greatest level of trade benefits at the least political cost.

38. The E.U.'s noncompliance with the WTO beef hormones decision seems to be a textbook example of a case where the domestic political cost of compliance, as perceived by the E.U., would exceed any possible retaliatory suspension of concessions the U.S. could impose. See *Merry-Go-Round*, THE ECONOMIST, May 13, 2000, at 75 ("despite its professed enthusiasm for free trade, the E.U. has shown little enthusiasm for obeying WTO rulings. Europeans stonewalled not just over bananas, but also over rulings on hormone-treated beef.").

39. See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416-17 (1996) (arguing "WTO rules are simply not "binding" in the traditional sense," for "a government could renege on its negotiated commitment not to exceed a specified tariff on an item, provided it restored the overall balance of GATT concessions through compensatory reductions in tariffs on other items. That is, a government could change its mind about and raise a particular tariff, provided it offset such 'nullification and impairment' of the delicate GATT balance through compensatory tariff reductions."). But see John H. Jackson, *The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 61 (1997) (taking a contrary view about the "binding" quality of GATT obligations). For a critique of these views and argument for an intermediate position in the special case of the GATT national security exception, see generally Perez, *WTO and U.N. Law*, supra note 31.

40. See Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 J. INT'L ECON. L. 49, 49-50 (1999) ("harmonization is inferior to a legal system that tolerates regulatory differences subject to legal constraints," which Sykes calls "policed decentralization").

41. See Alan O. Sykes, *Regulatory Protectionism and International Trade Law*, 66 U. CHI. L. REV. 1 (1999) [hereinafter Sykes, *Regulatory Protection*] (arguing that politically sophisticated trade agreements preserve national discretion to invoke regulatory measures that can serve non-protectionist policies even if those exceptions yield some protectionism and generally avoid supranational balancing of protectionist and non-protectionist effects as a test for legality).

An Argument to the WTO

More important, a WTO approach would strengthen the WTO itself, ultimately broadening participation in the WTO and thus increasing the legitimacy of its work. At one point, the GATT legal community approximated the Hague Conference in that it lacked binding force unless states enacted its rules. This was largely because the GATT's legal status as an international organization, and in turn the status of its dispute resolution system, was unclear from the very beginning.⁴² This private law approach focussed on technical expertise and depoliticized policy-making, but permitted disproportionate influence by business interests.⁴³ A public law model, by contrast, expressly politicizes lawmaking and thereby includes a broader range of interests and examines a broader range of policy options through political debate. The public law model thereby opens the door to political participation in the law-creating forum rather than merely at the municipal level, as is the case in the Hague context. An important effect of integrating judgments into the WTO, therefore, could be to persuade those who hold non-trade values⁴⁴ and who see the WTO as an enemy to their agendas that non-trade interests can be vindicated through political action at the WTO.

By including the recognition of foreign judgments in the WTO trade regime, state practices deviating from global standards will increasingly come under scrutiny, which will generate information about their nature and purpose that will enlighten both domestic and international debate. Indeed, one of the arguments for addressing the question of judgments explicitly as a trade problem in the WTO context is that the WTO is developing into a vehicle for measuring compliance with trade obligations.⁴⁵ Members of the WTO are now required to allow the Trade Policy Review Body (WTO/TPRB) to review their "trade poli-

42. For contrasting views, compare JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997) [hereinafter JACKSON, *THE WORLD TRADING SYSTEM*] (describing the anomalous legal status of the GATT as its "flawed constitutional beginnings" but describing the GATT process during this period favorably), with David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 671, 714 (1995) ("An imaginary trade constitution, liberal trade ideas, national and international political judgments, a decentralized regime of bargained reciprocity: Jackson presents all these as facts rather than commitments.").

43. See LORI WALLACH AND MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION?: CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY* (1999) (Public Citizen's critique of the WTO's record during its first five years as eroding safety, labor and environmental laws and transferring power from domestic citizens' groups to private groups operating behind closed doors); *Lori's War: Interview with Lori Wallach*, FOREIGN POLICY, Spring 2000, 118 (explaining political strategy of Public Citizen and defending its conduct leading up to the Seattle Ministerial).

44. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 660 (1996) (arguing that, "as currently envisioned, [the WTO] fails to take into account the fundamental nature of societal values, and creates little or no space in which such laws can exist. This intemperance may diminish the already fragile support for the international trade regime, which in turn may hinder the ability of member countries to support the World Trade Organization."); Philip 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) (critiquing international trade law scholarship as focussing excessively on regime theory and institutional economics, rather than historical and sociological institutionalism, and thereby forgoing analysis of the impediments to effective trade law linkages to nontraditional trade law issues, such as business ethics or human rights).

45. See *supra* note 37.

cies and practices.”⁴⁶ Although the WTO/TPRB’s purpose is “to contribute to improved adherence by all Members to rules, disciplines and commitments” under the WTO, it is “not, however, intended to serve as the basis for enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members.”⁴⁷ Nonetheless, claims of discriminatory treatment could be presented on the basis of objective evidence and measured against objective criteria employed by the WTO/TPRB. Even before a case could emerge before the DSB, one might expect that asymmetrical recognition and enforcement would emerge as an issue and that the data measuring such compliance would begin to be developed in a way that might prove useful later at the DSB. This is particularly the case as national governments and domestic and international interest groups begin to see a practical purpose for the collection of such data.

Perhaps, just as foreign judgments vindicating trade-related claims would be domestically-enforceable because of globally protected trade, thus strengthening individual rights to free trade,⁴⁸ judgments vindicating non-free trade interests harmed by trade could also be domestically-enforceable because of the rights enshrined in global trade law.⁴⁹ In avoiding private parties’ direct access to the WTO dispute resolution procedures and continuing to rely on domestic adjudicatory authorities, however, this approach would avoid constitutionalizing tendencies.⁵⁰ It would also avoid the correlative legitimacy concerns of individual standing in WTO adjudication⁵¹ that could arise at this preliminary stage in the development of a global society.⁵² Nonetheless, enabling individuals and groups to vindicate non-trade interests through judicial action enabled by the

46. TPRM, *supra* note 37, at para. C.

47. *Id.* at para. A.

48. See Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 3, 38-44 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (arguing for judicial review of individual free trade claims as a check on mercantilist behavior by states).

49. See Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Non-government Parties*, 17 U. PA. INT’L ECON. L. 295, 300-03 (1996).

50. Cf. Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287-90 (1997) (focussing on direct links, including standing for private persons in supranational adjudicatory bodies, with sub-national entities).

51. See 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, 449 (1999) (arguing that recent examples of NGOs and others to submit views to the DSB regarding ongoing proceedings are insufficient and that more structural change is necessary, such as WTO/DSB appellate review of private party suits by private attorneys general seeking WTO enforcement in national courts); Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT’L ECON. L. 587 (1998) (analyzing generally the question of individual involvement in trade treaties).

52. See Philip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1951 (1997) (reviewing Thomas Franck’s FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995), and calling into question the existence of a global community from which authoritative domestic law could directly flow without an intervening domestic political process); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 209-10 (1993) (calling into question canons of legislative construction favoring deference to international law in an era of increasing international lawmaking without the pedigree of domestic legitimacy).

WTO could have significant implications for the evolution of transnational civil society;⁵³ voice, of course, diminishes the tendency for disloyalty and exit.⁵⁴ Reducing the costs of the WTO for non-trade values could thus spawn a virtuous cycle of better political management of the tradeoffs between trade expansion and its negative effects on non-trade interests, such as labor and the environment.⁵⁵ Of course, there is a danger that the entry into an organization of those fundamentally opposed to its purposes could in the end destroy the organization or at least transform it into a creature that none of its creators would be able to recognize.⁵⁶ Yet evolution of the WTO's mandate to take account of the externalities of trade liberalization does not seem to be inconsistent with its basic mandate.

In sum, giving individual litigants affected by the negative externalities of trade a vested interest in trade rules at the WTO would hasten the erosion of the private law approach and instill a public law conception of international trade. A WTO agreement on recognition and enforcement of foreign judgments would also facilitate an increasingly broader and deeper global consensus on the tradeoffs between welfare maximization and distributive justice. WTO decision-making might better articulate and help implement a conception of the good global society.⁵⁷ Under this approach one avoids the extreme positions of, on

53. See *Conclusions and Implications*, Part IV, *infra* text and accompanying notes. In the important short term, moreover, inclusion of a judgments proposal in the agenda for the next negotiating round may well be necessary to secure continued support in the U.S. for continued institutionalization of world trade and, perhaps, even continued U.S. acquiescence in China's membership in the WTO, as the danger of low-cost PRC exports free from effective externalization of the costs of negligence in production looms on the American horizon.

54. See Eyal Benveniste, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 1681 (1999) (extending Albert Hirshman's insights in *EXIT, VOICE AND LOYALTY* (1970) to participation of under-represented groups at international organizations through global public interest organizations); but see Peter Spiro, *The New Global Potentates: Nongovernmental Organizations and the 'Unregulated' Marketplace*, 18 CARDOZO L. REV. 957 (1996) [hereinafter Spiro, *New Global Potentates*] (offering a more critical view of global public interest organizations as potentially unaccountable and antidemocratic).

55. Cf. Oona A. Hathaway, *Positive Feedback: The Impact of Trade Liberalization on Industry Demands for Protection*, 52 INT'L ORG. 575 (noting that interest group attitudes toward trade liberalization may be dynamic, such that progressive enmeshment in free trade tends to reduce the political support for protectionism as the groups that would suffer costs from increased free trade slowly change their practices so that further liberalization becomes less costly). Hathaway's insight about the effect of trade liberalization on protectionist groups arguably would work in the other direction as well, for increased participation of formerly protectionist groups in the WTO would tend to broaden the perspective of WTO policy-making.

56. Something like this might have happened to the International Convention for the Regulation of Whaling, which started out as a fisheries management regime but was transformed into an animal rights organization as the balance of power among the membership moved from states having an economic interest in the continuation of whaling to states lacking such an economic interest but philosophically committed to whale preservation. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 130 (1995); see also Antonio F. Perez, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L.J. 463, 476-77 (1996) [hereinafter Perez, *Who Killed Sovereignty?*] (reviewing *THE NEW SOVEREIGNTY* and critiquing its failure to take account of such fundamental value conflicts).

57. For more about the good society concept, see Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355 (2000) (distinguishing between a "civil" society, a "good" society and a "prescriptive" state; such that the civil society is grounded on

the one hand, radical state or private sector autonomy when private international law ignores community needs and, on the other, the eradication of state sovereignty or private sector autonomy when international organs impose public international law from above. Indeed, the ambiguous legal environment would reflect the ambiguous sources of value in the modern international legal system, sources that now require multiple modes of representation. These sources range from participation in policy-making of the society of states,⁵⁸ the society of peoples,⁵⁹ and the other forms of community that are emerging in global politics through non-territorially-based communities,⁶⁰ founded on criteria as diverse as membership in economic organizations, classes or businesses, religious faiths,⁶¹ or perhaps even in internet chat-rooms.⁶² Accordingly, increased legitimacy would flow both from a quasi-utilitarian standpoint, because WTO decisions would more likely then reflect the greatest good for the greatest number, and a quasi-republican standpoint, because WTO decision-making would also more likely represent the conclusions of reasoned debate at the global level.⁶³

A Road Map

Part I of this Article provides context by analyzing the history of municipal approaches to the problem of recognition and enforcement of foreign country judgments and contrasting the constitutional and quasi-constitutional approaches – of the U.S. with respect to state court judgments and the E.U with respect to member state judgments – with the traditional private international law approach

human autonomy, a good society relies primarily on informal means of social control to establish a balance of autonomy and duty forming the good character of its members, and a prescriptive state ordains and enforces the public spiritedness of its citizens). Etzioni's conception of a good society is the one most consistent with the vision of the international society of states and the emerging civil society of peoples articulated in this essay.

58. See BULL, *THE ANARCHICAL SOCIETY*, *supra* note 15.

59. See RAWLS, *THE LAW OF PEOPLES*, *supra* note 13.

60. See GIDON GOTTLIEB, *NATION AGAINST STATE: A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY* 7-47 (1993) (arguing that sovereignty can be fractioned, thus making possible multiple, overlapping sovereignties rather than the internal sovereignty of a single nation-state).

61. See COMMISSION ON GLOBAL GOVERNANCE, *OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE* (1995) [hereinafter COMMISSION, *OUR GLOBAL NEIGHBORHOOD*] (report of privately organized group of former world leaders describing the diffusion of sovereignty and the increasing role of transnational groups in global governance).

62. See FRANCES CAIRNCROSS, *THE DEATH OF DISTANCE: HOW THE COMMUNICATIONS REVOLUTION WILL CHANGE OUR LIVES* 257-79 (1997) (arguing that the telecommunications revolution is enabling the emergence of politics and governance outside of normal modes dominated by nation-states).

63. These arguments make no effort to prioritize between utilitarian or republican conceptions of the relationship between trade and other values, such as environmental or labor, affected by trade. *But see* MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (1988) (arguing that environmental values are misconceived as welfare maximization problems requiring governmental intervention to correct for market failure, and that they are rather "moral, aesthetic, cultural, and political" problems that must be "addressed in those terms"). Consistent with Rawls' view that public discourse should be conducted in terms that accommodate reasonable comprehensive views, including utilitarianism and republicanism, this paper assumes that comparative institutional analysis of the recognition and enforcement of judgments must invoke both utilitarian and republican arguments.

of courts in the U.S. with respect to foreign country judgments. It shows why the asymmetries in U.S. and E.U. policy, coupled with changing patterns of world trade, have focussed attention on recognition and enforcement of judgments as a trade issue. It then develops the argument that recognition and enforcement of judgments is now a global trade issue meriting attention in light of the potential inconsistency of current rules and practices with accepted principles of free and fair trade. Finally, it notes the increasing significance of civil litigation in areas related to trade that may need to be addressed in a full-blown trade approach to the problem of non-recognition and enforcement of judgments. Part II describes and evaluates efforts to address this trade issue through a multilateral treaty negotiated at the Hague Conference on Private International Law. It argues that a multilateral treaty is too inflexible to negotiate tradeoffs between trade and non-trade values and that it is unlikely to provide the basis for revisiting those tradeoffs, which in turn precludes legal adaptation to reflect the evolving views of relevant domestic and international constituencies. Part III considers whether a WTO regime is a suitable alternative for addressing the shortcomings of constitutional and private international law approaches. It considers the relative advantages and disadvantages of these institutional strategies in the resolution of the problem of the trade-related dimensions of recognition and enforcement of judgments. Finally, Part IV appends some final speculations concerning the implications of pursuing a WTO solution for emerging transnational civil society and governance.

I.

INTERNATIONAL PRIVATE LAW SOLUTIONS

The essential problem, from a U.S. perspective, is a perceived asymmetry in the relative recognition⁶⁴ and enforcement⁶⁵ of foreign judgments between the U.S. and the rest of the world, in particular major U.S. trading partners who are members of the European Union. The claim is that U.S. courts are generally receptive to enforcing foreign judgments, while foreign courts are inclined either not to enforce U.S. judgments or to otherwise discriminate against U.S. citizens by exercising exorbitant jurisdiction over them. The reasons for this phenomenon, if true,⁶⁶ are varied, but they flow in large part from unique features of U.S.

64. Recognition refers to the effect given by a domestic court to a foreign country judgment when the domestic court relies on the foreign ruling to bar litigation of a particular claim or issue on the ground that it has previously been litigated abroad. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 93-98, ch. 5, topic 2 Introductory note (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 481 cmts. a & b (1987). See generally GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 936 (3d ed. 1996) [hereinafter BORN, INTERNATIONAL CIVIL LITIGATION].

65. Enforcement refers to the effect given by a domestic court to a foreign country judgment when the domestic court relies on the foreign ruling to order compliance with the foreign award, typically a money judgment. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §§ 99-102, ch. 5, topic 3 Introductory note (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 481 cmts. a & b (1987). See generally BORN, INTERNATIONAL CIVIL LITIGATION, *supra* note 64.

66. But it is important to recognize that at present no statistical evidence exists to verify whether such a discrepancy truly exists in practice. See, e.g., Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 115-16 (1998) [hereinafter Juenger, *A Hague Judg-*

constitutional law of jurisdiction and from the unique characteristics of the U.S. remedial system for tort liability. The effects of resistance to the U.S. legal system are exacerbated in Europe by the consolidation of the European Community, and now the European Union, into an international actor. Together with changing patterns of world trade, which now confront U.S. consumers with even more extreme discrepancies between U.S. legal culture and that of major East Asian U.S. importers, the trade effects may well be substantial for the U.S. Finally, these practices and effects, if not technically inconsistent with international trade law principles, conflict with the fundamental policies of the trade law regime and thus warrant a global solution. At the same time, any attempt to develop a solution will run headlong into the increased use of civil law judgments to vindicate international human rights and environmental norms, sometimes in conflict with trade-related interests.

A. Sources of Asymmetry in U.S. Treatment of Foreign Judgments

The common understanding is that U.S. practice in the recognition and enforcement of foreign judgments is rooted in the seminal U.S. Supreme Court decision *Hilton v. Guyot*.⁶⁷ The Court, noting that in France a U.S. judgment would be reviewed again on the merits, refused to give effect to a French judgment against a citizen of the United States. Justice Gray for the majority observed:

The reasonable, if not necessary, conclusion appears to us to be that judgments rendered in France or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim. In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.⁶⁸

The practical effect of the reciprocity requirement was, however, to create something of a Catch-22: if both the judgment rendering state (F1) and the judgment enforcing state (F2) adopted the reciprocity requirement, as Justice Gray supposed was a common practice among states,⁶⁹ then F1 would not give automatic

ments Convention?) (“[T]he concededly anecdotal evidence I have been able to collect by reading foreign cases and literature suggests that European courts rarely render judgments against American citizens or enterprises that have no ‘minimum contacts’ with the foreign forum.”); Russell J. Weintraub, *How Substantial is our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT’L L. 167, 170-71 [hereinafter Weintraub, *How Substantial is our Need*] (noting absence of empirical evidence substantiating claim that U.S. judgments are not recognized and enforced abroad and offering personal estimate that, although this may have been a problem in the past, it is no longer a significant problem for “judgments obtained by U.S. lawyers who follow proper procedures”).

67. 159 U.S. 113 (1895).

68. *Id.* at 227-28.

69. Justice Gray noted:

effect to the judgments of F2, and F2 as a consequence would not give automatic effect to judgments of F1.

A game-theoretic treatment of the problem explains why neither the U.S. nor other states would have moved to enforcement of each other's judgments except on condition of reciprocity. One might argue that the situation took the form of the problem of the Prisoners' Dilemma.⁷⁰ In this classic of game theory, two criminals by cooperating and not informing on each other avoid extended sentences. However, each could suffer the so-called sucker's payoff of an extremely long sentence by not cooperating with the police while the other confessed. Meanwhile, the confessing player would receive an intermediate sentence that avoided the sucker's payoff but also forbore the opportunity to obtain the shortest possible sentence. Accordingly, it would be rational for each player to choose avoiding the sucker's payoff by confessing, because neither player would be assured of the other's cooperation. Making ordinary assumptions about risk aversion, the expected utility of non-cooperation would exceed the expected utility of cooperation, including the sucker's payoff.

The situation might not be so grim, for it has also been described as a so-called Stag Hunt, in which the incentives for defection are somewhat less than those under the expected utilities described in the Prisoners' Dilemma.⁷¹ The Stag Hunt supposes that the sucker's payoff of catching only the rabbit rather than the cooperative payoff of capturing the stag renders the cost of non-reciprocal cooperation less onerous than that in the Prisoners' Dilemma. If this is so, one expects greater willingness to risk cooperation, and thereby suffer the sucker's payoff, in a Stag Hunt scenario than one would expect in a situation typified by Prisoners' Dilemma payoffs. Non-cooperation may nonetheless be a common strategy under Stag Hunt payoffs, since a modest payoff for individual action will always exceed the sucker's payoff, even if the Stag Hunt problem's payoffs are thought to generate only defensive incentives for defection.⁷²

In France and in a few smaller States . . . the merits of the controversy are reviewed, as of course, allowing the foreign judgment, at the most, no more effect than of being prima facie evidence of the justice of the claim. In the great majority of the countries on the continent of Europe . . . and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

Id. at 227.

70. See DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* 33 (1994); AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS AND EVERYDAY LIFE* 11-14, 89-115 (1991).

71. See Brand, *Judgments as a Trade Law Issue*, *supra* note 34, at 622-23 n.120 (discussing a Stag Hunt model of reciprocal enforcement of foreign country judgments).

72. *Id.* at 622-26. See Kenneth Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 *CORNELL INT'L L.J.* 1, 4-8 (1993) (distinguishing between "offensive" and "defensive" incentives for defection); see also Whincop, *The Recognition Scene*, *supra* note 23, at 420 (distinguishing between games with payoffs giving rise to true cooperation problems, such as the Prisoners' Dilemma, and games giving rise to mere coordination problems, in which both players are better off employing a cooperative strategy but that strategy is not self-selecting).

Under either scenario, however, the logic of non-cooperation holds only under limited conditions, principally non-iteration and finite time horizons.⁷³ This is so because in an iterated or repeated game cooperation is possible through strategic signaling.⁷⁴ This signaling of future cooperation can induce cooperative commitments so long as players play under an indefinite time horizon, because it is only when the game has a fixed endpoint that one is able to calculate a series of moves resulting in a significant sucker's payoff at the end of the game. Because Axelrod showed that tit-for-tat could lead to cooperation even under Prisoners' Dilemma payoffs, tit-for-tat would *a fortiori* lead to cooperation under the more favorable Stag Hunt payoffs that some argue characterize the recognition and enforcement of judgments problem.

Thus, the reciprocity criterion stated in *Hilton v. Guyot* would seem reasonably calculated to employ a tit-for-tat strategy.⁷⁵ In other words, the U.S. courts would offer to reward cooperation and punish non-cooperation by the courts of other states. Moreover, shortly after *Hilton*, U.S. courts seemed to have already taken the first step of offering cooperation in a tit-for-tat strategy by relaxing the reciprocity requirement under exceptions stated in *Hilton* itself.⁷⁶ Such an approach would have signaled a willingness to cooperate, for it would have created uncertainty about the existence of the reciprocity requirement. This uncertainty could have induced foreign courts to find that U.S. courts would recognize and enforce foreign awards, but for the applicability of narrow exceptions. It is possible such a strategy, if maintained, would have resulted in the widespread recognition and enforcement of U.S. judgments in Europe and elsewhere. It is argued that the failure of U.S. courts to sustain a requirement of reciprocity over time is evidence that the problem was never really significant.⁷⁷ However, whether continued judicial insistence on reciprocity would have induced foreign states to recognize and enforce U.S. judgments or whether the failure to conform to a policy of reciprocity evidenced the absence of incentives for strategic behavior is more likely a moot question because intervening developments in U.S. law frustrated any chance to achieve those results.

73. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

74. See *id.* at 27-54 (discussing the superiority of tit-for-tat strategies).

75. See Whincop, *The Recognition Scene*, *supra* note 23, at 424 ("The early law on recognition in the United States imposed a reciprocity requirement. Although the formal reason for this was described as 'comity', it is easier to understand as a punishment for defecting states.") (footnotes omitted).

76. One court in an early case treated the reciprocity requirement as dictum, since the Supreme Court might have denied enforcement on the ground that the F1 judgment was procured through fraud. See *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381 (Ct. App. 1926).

77. Analyzing early U.S. law for evidence of strategic behavior, Whincop reads the rapid departure from reciprocity as a general condition for enforcement in the U.S., as well as the U.K.'s consistent rejection of reciprocity, as evidence that the problem may never have been perceived as a Prisoner's Dilemma. See Whincop, *The Recognition Scene*, *supra* note 23, at 424. On the other hand, Whincop rejects the vested rights theory explanation for automatic enforcement of foreign judgments and the absence of a condition of reciprocity and thus acknowledges that the "process of judgment recognition provides the opportunity to choose not to recognise judgments thought to represent uncooperative behaviour." *Id.* at 424.

Rather, U.S. courts moved away from the reciprocity regime for unrelated reasons. In *Erie Railroad v. Tompkins*,⁷⁸ the Supreme Court abolished the general federal common law upon which *Hilton v. Guyot* was founded. Lower federal courts came to assume that the question of recognition and enforcement of foreign judgments was a question of state common law in the absence of controlling federal or state statutes.⁷⁹ Indeed, one reading of *Johnston v. Compagnie Generale Transatlantique*⁸⁰ is that a state interested in inducing foreigners to invest capital within its boundaries, by expressing a more favorable attitude than the federal government toward recognition of foreign money judgments, was prepared to place its own interests ahead of those of the nation as a whole.⁸¹ In time, in light of criticism of the reciprocity requirement⁸² and the absence of a reciprocity requirement in the Uniform Foreign Money Judgments Act (UFMJA),⁸³ the pattern of decisions applying state law was thought, with some exceptions, to dispense with the reciprocity requirement.⁸⁴ The absence of reciprocity as a general criterion thus opened the door to widespread recognition of foreign country judgments in the U.S., but without the ambiguous threat of non-recognition when foreign courts do not give reciprocal treatment to judgments rendered by U.S. courts. This arguably evidenced a competitive race-to-the-bottom among U.S. states in their relations with foreign judicial systems.⁸⁵

78. 304 U.S. 64 (1938). The continuing role of special federal common law relating to foreign relations or international law in the recognition and enforcement of foreign judgments in U.S. courts remains undetermined, although some courts have suggested in dictum that these considerations cannot be ignored. See, e.g., *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885 (N.D. Tex. 1980); see generally BORN, *INTERNATIONAL CIVIL LITIGATION*, *supra* note 64, at 961 (citing relevant authority).

79. *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161 (E.D. Pa. 1970).

80. 242 N.Y. 381 (Ct. App. 1926) (pre-*Erie* New York state court case misreading the *Hilton v. Guyot* holding on this point as dictum and relying instead on the independent exception for fraud as a ground for nonenforcement).

81. See generally OLSON, *COLLECTIVE ACTION*, *supra* note 4. Olson's central argument is that one who cannot be excluded from a benefit does not have an incentive to contribute to its provision. Thus, a state's constitutional authority to exercise jurisdiction over foreign persons and render judgments against them to be enforced in-state or under the Full Faith and Credit Clause in a sister state undercuts the formation of a common front among U.S. states in recognizing and enforcing foreign judgments on the basis of reciprocity toward judgments rendered in any of the U.S. states.

82. See, e.g., J. BEALE, *CONFLICT OF LAWS 1385-1890* (1935) (views of chief reporter of FIRST RESTATEMENT OF CONFLICTS OF LAWS); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 790-93 (1950) (views of chief reporter of subsequent RESTATEMENT (SECOND) OF CONFLICT OF LAWS).

83. While the UFMJA did not contemplate a reciprocity requirement, some states' implementing legislation did contain provisions relating to reciprocity, either mandating reciprocity or treating it as a discretionary ground for denial of recognition. See, e.g., GA. CODE ANN. §9-12-114(10)(1082) (2000) (reciprocity is a mandatory condition for recognition); TEX. CIV. PRAC. & REM. CODE ANN. §36.005(b)(7) (1986) (lack of reciprocity is discretionary basis for non-recognition).

84. See BORN, *INTERNATIONAL CIVIL LITIGATION*, *supra* note 64, at 952-55 (detailing state and federal practice).

85. Cf. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437 (1992) (advancing a more limited prediction of merely marginally inefficient competition); but see Ralph K. Winter, Jr., *State Law, Shareholder Protection and the Theory of the Firm*, 6 J. LEGAL STUD. 251, 254-62 (1977) (advancing a race-to-the-top argument that state competition in producing corporate law was efficient). In

A second important development was the transformation of the U.S. legal system spawned by the revolution of U.S. jurisdictional law governing the reach of state courts into multi-state and multi-national transactions, which consequently increased the impact of the U.S. damages system. In part because of the growth of interstate commerce and the increased mobility of persons in the United States, the U.S. Supreme Court refocused the constitutional law of state court jurisdiction on the sufficiency of the defendant's contacts with the forum rather than on the Court's capacity to exercise power over that person.⁸⁶ This dramatically expanded the breadth of federal court jurisdiction in multi-state and international cases. The reasonable foreseeability of the effects of the foreign defendant's foreign conduct on the forum would ordinarily be sufficient to exercise jurisdiction, even if the Supreme Court opined that mere foreseeability would be insufficient to establish the reasonableness of the exercise of jurisdiction.⁸⁷ The expansiveness of U.S. jurisdictional law is thought to enable U.S. courts to exercise jurisdiction exorbitantly.⁸⁸ The impact of this perceived aggressive exercise of jurisdiction by state courts is magnified, moreover, by the extraordinary damages that U.S. courts are prepared to authorize, and U.S. juries are inclined to award, in products liability cases. The combination of these factors may so deeply ingrain European suspicions about the U.S. legal system that any attempt to provide an explanation of the limits the U.S. Due Process Clause imposes on U.S. state courts, particularly in international cases,⁸⁹ may well be met with disbelief. Those in other countries not conversant with the tension between the broadest possible readings of judicial statements and the more

the foreign commerce context, balkanization of state policy is described in Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999); *but see* Crosby v. National Foreign Trade Council, 120 S.Ct. 2288 (2000) (holding that federal Burma sanctions legislation preempted state sanctions, largely because of the Executive Branch's capacity to speak for the U.S. in the negotiation of multilateral sanctions). Crosby thus evidences Supreme Court deference to a congressional judgment that uncoordinated state sanctions might yield a sanctions race-to-the-bottom.

86. Compare *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (focussing on "minimum contacts"), with *Pennoyer v. Neff*, 95 U.S. 714 (1877) (grounding jurisdiction on the court's physical power over the defendant). However, in upholding tag service of a defendant present in California, the Supreme Court has suggested that power over the defendant through the defendant's presence in the forum is still a sufficient basis for jurisdiction, irrespective of the reasonableness of the exercise of jurisdiction under minimum contacts analysis. See *Burnham v. Superior*, 495 U.S. 604 (1990) (Scalia, J., plurality opinion).

87. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (holding mere foreseeability insufficient for purpose of finding personal jurisdiction over regional automobile distributor under the Due Process Clause).

88. See generally Ronald Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 660 (1999) [hereinafter Brand, *Due Process*] (attempting to dispel these notions through an exhaustive and convincing attempt to read U.S. due process jurisprudence narrowly).

89. It is argued, for example, that a European court would have asserted jurisdiction in the *Asahi* case, while the Supreme Court held that California could not under the Due Process Clause assert jurisdiction in a dispute between two foreign parties on an indemnification claim even though the tortious harm occurred in California. See Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 401 (1995).

nanced and restrained reality of common-law adjudication may particularly disbelieve.⁹⁰

In sum, the supervening legal developments undermined the effectiveness of a tit-for-tat strategy in securing the enforcement of U.S. judgments abroad. The U.S. system for determining whether jurisdiction is proper became grounded on constitutional concerns that are simply incomprehensible to most countries that do not constitutionalize this question, and this new constitutional analysis enabled the dramatic expansion of U.S. jurisdiction over foreign defendants.⁹¹ At the same time, *Erie* suggested that states have authority to determine the conditions for recognition of foreign judgments in the U.S., which in turn disabled the U.S. as a whole from compensating with tit-for-tat responses for increased foreign non-recognition of U.S. judgments. Moving the carrots and sticks of recognition and enforcement policy from the federal government to the states may have disrupted the evolution of the tit-for-tat strategy initiated by the Supreme Court in *Hilton v. Guyot* as a rational response to a national problem of non-recognition and enforcement.

B. Sources of Asymmetry in E.U. Treatment of Foreign Judgments

In contrast, the courts of the E.U. countries have lacked an incentive, as well as the power arguably, to open their doors to the recognition and enforcement of U.S. judgments. They may lack the power to exercise the kind of discretion that common-law courts can exercise in implementing a tit-for-tat regime leading to mutual recognition, because the civil law tradition does not, in theory at least, empower courts to make the policy judgments that seem embedded in a tit-for-tat approach.⁹² The courts of E.U. countries have lacked an interest in doing so because they have in effect been able to “free ride” on U.S. courts that grant recognition and enforcement of most E.U. judgments without the requirement of reciprocity. Finally, the constitutional evolution of the E.U. made cooperation with the U.S. even more difficult.

One might argue that, even if most U.S. jurisdictions had imposed a reciprocity requirement, it would not have been in the interest of most E.U. countries to respond to the U.S. reciprocity criterion by beginning to enforce U.S. judgments until recently. This is because U.S. firms traditionally had relatively more capital invested in Europe than European firms had invested in the U.S. The same could be said about a number of emerging capital-exporting countries around the world. Under these conditions, judgments against U.S. firms in Eu-

90. Brand, *Due Process*, *supra* note 88, at 687 (“To a lawyer from a civil law system, accustomed to the relative structure of code-type lists of jurisdictional rules, and reasoning from general principles often more certain than the concept of due process, [a] trip through U.S. case law must seem rather confusing.”).

91. See Friedrich K. Juenger, *Constitutionalizing German Jurisdictional Law*, 44 AM. J. COMP. L. 521 (1996) (casting doubt on correctness of *Pennoyer v. Neff* approach of constitutionalizing jurisdiction).

92. See JACKSON AND TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 663-66 (1999) (drawing on work of civilian scholarship to explain the resistance to “lawmaking” of courts in the civil law tradition).

rope were more likely to be immediately enforceable in Europe against the European assets of U.S. firms than U.S. judgments in the U.S. against foreign assets in the U.S. This relative asymmetry exposed U.S. firms to greater risk of judicial enforcement in European countries than European firms faced in the U.S. Thus, E.U. courts seeking to vindicate their nationals' interests had less incentive than U.S. courts seeking to vindicate the interests of U.S. nationals to cooperate in creating a non-negotiated regime for mutual recognition and enforcement of each other's judgments.⁹³

Changing capital flows would in theory change these incentives, however. Admittedly, at first a state in the E.U. with few local assets in the territory of foreign creditors will have little incentive to deter such creditor states, such as the U.S., from adopting laws preferring local creditors.⁹⁴ However, the costs of non-cooperation for the E.U. would increase as U.S. creditors become better able to enforce their E.U. judgments against E.U. nationals operating in the U.S. against E.U. property located in the U.S. Thus, over time, as E.U. investments in the U.S. increased, the interests of E.U. courts in protecting their own nationals should have encouraged them to show greater receptivity toward recognition and enforcement of U.S. judgments.

Yet, even if the diminution of asymmetric investment stimulates a mutual recognition regime, this factor is clearly outweighed by the influence of the emergence of the European Economic Community in driving E.U. countries toward non-recognition of U.S. judgments. In contrast to the U.S. regime toward foreign judgments, the countries of the European Community negotiated an internal regime via a multilateral convention that discriminates against the recognition and enforcement of non-EC judgments. The so-called Brussels Convention was then extended to the countries of the European Free Trade Area (EFTA), many of which have since entered the E.U., through the so-called Lugano Convention. Taken together, the Brussels-Lugano Convention system comprised a unified law for the recognition and enforcement of EC/EFTA judgments.

More important, the E.U. has now taken steps to implement the Brussels Convention as a matter of E.U. law by issuing a draft regulation that will ultimately compel E.U. member states to implement the rules of the Brussels Convention as part of their national laws.⁹⁵ This will make compliance with the substance of the Brussels rules a right of individuals in the E.U., which may be enforced by the European Court of Justice (ECJ). The binding quality of ECJ decisions now effectively guarantees the E.U. common market and thereby pro-

93. Lucian Arye Bebchuk and Andrew Guzman have made a similar argument in the related context of assessing whether asymmetry of investment would prevent the evolution of national bankruptcy laws toward a globally welfare-enhancing universalist approach, rather than a territorialist approach under which states effectively prefer local creditors. See Bebchuk and Guzman, *An Economic Analysis of Transnational Bankruptcies*, 42 J.L. & ECON. 775, 805-07 (1999).

94. See *id.*

95. See *supra* note 29. As a matter of E.U. law, this approach appears to be legally sustainable. See Brand, *supra* note 34, at 617-18 (noting the acknowledgment in 1994 by the European Court of Justice of the relationship between trade law and judgments recognition and enforcement).

notes the continuing process of political integration. In sum, it might be assumed that the Brussels Convention rules will have effects similar to those of the Full Faith and Credit Clause of the U.S. Constitution in furthering economic and political integration and in further reducing the competitive opportunities of persons outside the E.U. Certainly the workings of the Brussels-Lugano system further the aims of European economic integration, although the retention of a public policy exception in the E.U. regime⁹⁶ seems to tolerate greater diversity than does the Full Faith and Credit Clause of the U.S. Constitution.⁹⁷

C. Recognition and Enforcement of Judgments As a Trade Issue

The Brussels system, unlike the Full Faith and Credit Clause, explicitly discriminates against judgments rendered by foreign states. It does so by making some bases for non-recognition or non-enforcement of a foreign judgment inapplicable with respect to judgments rendered against a non-domiciliary of a Brussels-Lugano country.⁹⁸ If then, for example, a French court renders an award against a U.S. person not domiciled in an EC or EFTA country based on a jurisdictional ground that would deny the enforcement if rendered against a domiciliary of an EC or EFTA country, the judgment would, nonetheless, be enforceable against the U.S. citizen's assets anywhere in the EC or EFTA. The practical implications of this discrimination are clear with respect to the comparative risks faced by the U.S. person and an EC or EFTA person doing business in France. The U.S. person suffers greater legal risk of enforcement of any claims that might arise from the transaction. To the extent that the U.S. person and EC/EFTA person are competing for trade opportunities in France, the U.S. person will be at a relative disadvantage.

It is not clear, however, that this practice amounts to a violation of GATT's rules. As an E.U. scholar has argued, such measures may not conflict with GATT's nondiscrimination obligations because they are framed in terms of domicile rather than nationality.⁹⁹ Nonetheless, the preceding hypothetical crystallizes the undeniable effect of the increased legal risk, amounting to an unlevel playing field, for U.S. persons doing business with domiciliaries of E.U. and EFTA countries. Moreover, the effect of the Brussels rules may be to operate as a disguised discrimination against non-E.U. nations, which might well be actionable under the WTO.

96. See Brussels Convention, *supra* note 27, art. 27(1).

97. In the language of dissenting Justice White in *Fauntleroy v. Lum*, the majority's rejection of a public policy exception to the Full Faith and Credit Clause "so enlarges that clause as to cause it to obliterate all state lines." *Fauntleroy v. Lum*, 210 U.S. 230, 239 (1908) (White J., dissenting).

98. See the Brussels Convention, *supra* note 27, art. 4; Lugano Convention, *supra* note 28, art. 4.

99. See Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities*, 82 MICH. L. REV. 1195, 1211 (1984) (criticizing this discrimination); but see MATTHIAS REIMANN, *CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE* 71 (1995) [hereinafter REIMANN, *A GUIDE THROUGH THE JUNGLE*] (arguing that, because the discrimination is based expressly on domicile rather than nationality, it is not a violation of either the most favored nation or national treatment principles of the GATT).

The E.U. is now seeking to incorporate the Brussels/Lugano system into the body of E.U. law.¹⁰⁰ For this reason, recent scholarship has encouraged U.S. policymakers to renew efforts to achieve a treaty-based solution that strives for maximum enforcement of U.S. judgments abroad through the negotiation of a multilateral convention at the Hague Conference on Private International Law.¹⁰¹ Moreover, as argued below, the jurisprudence of the WTO supports treating recognition and enforcement of judgments as a trade solution. Finally, while there appears to be no empirical confirmation of asymmetric recognition and enforcement of U.S. judgments in the E.U., and legal scholars appear to be divided,¹⁰² there seems to be considerable interest and support in the U.S. practitioner community. Yet, U.S. trial lawyers appear more concerned about the risk that U.S. judgments will not be enforced in countries that are emerging as importers into the U.S., principally the countries of East Asia where large volumes of consumer products are produced and later brought to the U.S.¹⁰³ The products liability concerns are potentially staggering. This is because the U.S. Supreme Court gave U.S. practitioners further concern about the scope of the problem by suggesting in the *Asahi* case that foreign manufacturers could avoid personal jurisdiction in U.S. courts by keeping their operations out of the U.S. and importing through essentially judgment proof intermediaries.¹⁰⁴

In sum, the appearance of asymmetry, combined with the perception of an emerging liability issue derived from changing global trade flows, has generated pressure in the U.S. for a global approach to recognition and enforcement of judgments as a trade problem and stimulated an effort to seek a solution at the Hague Conference on Private International Law. At the same time, trade-related interests face the challenge of an increasing public perception of the external costs of trade and attempts to vindicate those interests through litigation.

D. *Human Rights and Environmental Interests in Judgments*

The very expansiveness that drives U.S. jurisdictional and liability law with respect to trade-related interests has increased opportunities to use the federal courts to vindicate non-trade related interests. For example, American lawyers have recently utilized the Alien Tort Claims Act (the Act)¹⁰⁵ to challenge the labor practices of U.S. oil firms operating in Nigeria.¹⁰⁶ The Act has in the past been interpreted to permit suit by foreign plaintiffs against foreign defend-

100. See *supra* note 29.

101. See Brand, *Judgments as a Trade Issue*, *supra* note 34.

102. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 94 n.28 (1999). For additional discussion of the empirical question of asymmetric enforcement, see authorities cited in *supra* note 66.

103. See Matthew Vita, *Senate Approves Normalized Trade With China*, WASH. POST, Sept. 20, 2000, at A01.

104. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987).

105. 28 U.S.C. § 1350 (2000).

106. See *Go Global, Sue Local*, THE ECONOMIST, Aug. 14, 1999, at 54.

ants.¹⁰⁷ Buttressed by the Supreme Court's possible reaffirmation of transient or so-called "tag" jurisdiction,¹⁰⁸ the Act may well allow the U.S. human rights community to vindicate the rights of foreign persons through generous U.S. judgments. As U.S. case law makes clear, the punitive damages of U.S. remedies for common-law torts may well be available for analogous "torts" cognizable under the Act in violation of international law.¹⁰⁹ Similarly, emerging environmental law norms may well generate similar tort-like claims cognizable under the Alien Tort Claims Act.¹¹⁰

It is unnecessary, for purposes of this argument, to evaluate the ultimate merit of invoking the Act to serve these purposes. Suffice it to say that the practice of U.S. states in creating private rights of action to vindicate human rights norms, such as California's recent statute vindicating the interests of Holocaust survivors, suggests that future developments in this area are likely.¹¹¹ Creative lawyers can exploit these litigation opportunities to vindicate interests that are inadequately addressed through the political process, much as civil rights activists in the United States creatively invoked long-buried principles of racial equality in the U.S. Constitution to seek judicial remedies to entrenched discrimination. The enforcement of such "civil" judgments would arguably fall within the ambit of a treaty solution to the recognition of judgments grounded on commercial rights. Some kind of balance would need to be struck in defining the kinds of civil judgments that would further trade interests and those that would further non-trade interests. What protection each would receive under international law would need to be determined. Perhaps hardest of all, rules for dealing with cases in which both trade and non-trade interests are implicated would need to be fashioned. Yet, this is a matter of increasing importance as U.S. trade flows continue to shift toward non-European suppliers and export markets,¹¹² where the conflicts between U.S. and foreign environmental and labor values would seem to be the greatest.

II.

A PROPOSED SOLUTION AT THE HAGUE CONFERENCE

Nonetheless, an attempt to address this problem in the context of a multilateral convention like the traditional Hague private law conventions is neither negotiable nor likely to be effective in achieving U.S. trade-related goals. The treaty would be ineffective largely because the means by which such treaties are

107. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980) (holding an act of torture committed by an alien against an alien on foreign territory was nonetheless actionable in U.S. courts as a cognizable violation of the law of nations within the meaning of the Alien Tort Claims Act).

108. See *Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (Scalia, J, plurality opinion).

109. See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D. N.Y.1984).

110. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 241-42, para. 29 (July 8), 35 I.L.M. 809 (emphasizing the importance of international environmental obligations).

111. CAL. CIV. CODE § 354.5 (West 2000).

112. See International Trade Administration, US Foreign Trade Highlights, US Commodity Trade by Geographic Area, <http://www.ita.doc.gov/d/industry/otea/usfth>.

implemented and amended preclude the kind of legal mutation required in the politically-charged balance between trade and non-trade concerns. The treaty would be non-negotiable because, under a straightforward application of game theory, the negotiating dynamic of a multilateral convention discourages stakeholders from achieving optimal joint gains in trade and non-trade values. Finally, even if the treaty could be implemented and negotiated, the rules orientation of the Hague Convention model would encourage continued bilateral responses to conflicts concerning the treaties' implementation rather than a multilateral bargaining process in which rational and transparent negotiations might lead to better results.

A. *Barriers to Effective Implementation of a Hague Convention*

With respect to implementation, the central objection is that a Hague Treaty cannot serve effectively as a vehicle for political evolution. Once it is concluded, a Hague Convention would create permanent sets of proponents and opponents. If such a multilateral treaty ever did enter into force, changes in the political basis for supporting the tradeoff between trade and non-trade values would undercut support for the rules of the treaty reflecting the political consensus at the Hague Conference. Multilateral treaties of this kind are rarely, if ever, amended. Without an effective formal mechanism to adapt the treaty to respond to changing political views, the treaty would become anachronistic. It might be honored in the breach, through more frequent use of the escape devices that would inevitably be built into it. To the extent that judicial interpretation reflects changing political consensus in a particular country, the implementation of the treaty would vary substantially. This variation would defeat the treaty's chief objective of overcoming disincentives to cooperation among states in their pursuit of global free trade goals. In the absence of an agreed upon final interpreting mechanism, auto-interpretation of the treaty would erode its value in assuring a stable set of commitments, even if cabined by the doctrine of good faith.¹¹³

Moreover, it seems unlikely that mutation or common interpretation could be achieved through a supranational dispute resolution mechanism. States would probably not accept a final supranational arbiter of the disputes that would typically be governed by the treaty. For example, it was extremely difficult for the United States to agree to allow the Canada-U.S. Dispute Settlement Panel to determine whether U.S. courts were applying the appropriate standard under the Canada-U.S. Free Trade Agreement in their assessment of antidumping and countervailing duty cases.¹¹⁴ The domestic constitutional questions attending that issue are as yet unresolved. Moreover, that was a public law

113. See J. F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 83 (1991); but see Antonio F. Perez, *Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Safeguards* 34 *V.A. J. INT'L L.* 749, 774-81 (1994) (questioning the utility of the concept of good faith in the case of auto-interpretation).

114. See generally Charles M. Gastle, *Policy Alternatives For Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms*, 26 *LAW & POL'Y INT'L BUS.* 735 (1995) (discussing the difficulties of dispute resolution in the area of antidumping cases).

controversy. Many would consider it even more problematic for the U.S. to agree to allow supranational case-by-case review of judicial interpretation of private law controversies where established domestic values are enshrined in common-law principles in property, tort and contract law. In the absence of supranational case-by-case review, however, states would be allowed to vary their interpretation of the treaty in accordance with their own values.

It is likely that states would find it difficult to balance effectively trade and non-trade values in this context. This is because the treaty would likely be implemented directly into national law with little, if any, additional legislative attention to the tradeoffs between trade and non-trade values. This is likely because treaty proponents would try to avoid complicating its adoption with what they perceive to be extraneous concerns. If, however, implementing legislation did address non-trade related concerns, the particular views expressed in each ratification process would lead to amendments that would undercut prospects for widespread ratification. On the other hand, if ratification were secured through a legislative strategy that did not formally address the balance between trade and non-trade concerns, the task of addressing those issues would devolve to an unelected and politically-unaccountable judiciary. The judiciary might lack the political capacity to adjust the meaning of the treaty to changing political conceptions, assuming it is even desirable for a judiciary to do so. One might risk reenactment of the era when U.S. federal courts struck down labor agreements as contracts that violated antitrust laws.¹¹⁵ Moreover, the judiciary, especially the state judges who would hear most of the common-law claims subject to the proposed Hague Convention, would probably not have the experience in foreign legal systems and economic practices sufficient to assess the validity of certain business practices. Thus, even if some judges could apply provisions of the treaty that balanced trade and non-trade concerns to take account of changing domestic values, it is doubtful that most could get it right uniformly. The judicial error rate is bound to be significant.

B. Barriers to Effective Negotiation of a Hague Convention

Even if a Hague treaty could adapt to changing political circumstances, it is doubtful that the treaty could effectively balance trade and non-trade concerns, even at its inception. Because a multilateral treaty is not capable of mutating in meaning to correspond to a changing global political balance, stakeholders in the treaty would perceive the initial negotiation as a one-shot deal. Although proponents of trade and non-trade values would have an interest in cooperating to achieve their respective goals, stakeholders might perceive the situation as a Prisoner's Dilemma, in which cooperation involves risking exploitation during the implementation phase. For example, a proponent of labor rights attempting to invoke a treaty provision requiring enforcement of a judgment relating to defective products produced through substandard working conditions, might find that the domestic understanding of substandard working conditions varied

115. See HOVENKAMP, ANTITRUST LAW, *supra* note 5.

from the international understanding embedded in the treaty. An advocate of labor rights might fear that the non-enforceability of a judgment on substandard working conditions might further entrench the practice rather than raise the costs of employing it.

Game theory suggests, however, that iterated (repeat play) games – even Prisoners’ Dilemma games – may foster cooperation that would not occur in single-play games. This is because iterated games allow players to signal their cooperation, reward reciprocal cooperation, and penalize non-cooperation. One might consider, therefore, whether a multilateral treaty that is perceived by stakeholders as a game that encourages non-cooperation might nonetheless permit cooperation in advancing both trade and non-trade values if it were perceived as an iterated game. Yet, this possibility is unlikely to be realized for several reasons.

First, the defined time horizon would undercut the perception of iteration. Admittedly, the stakeholders, particularly in countries like the United States which can treat a treaty as *non-self-executing* domestically, might perceive the negotiation as involving an additional requirement to implement legislation domestically. But game theory also predicts that an iterated game with a defined endpoint where most of the payoffs occur is functionally identical to a single-play game. This is because each player calculates whether the other player has the incentive and capacity to exploit efforts to cooperate. If so, the game reduces to the final moves of each player and, thus, a single-play game. Accordingly, for international stakeholders whose gains come from domestic treaty implementation, domestic implementation would not change the nature of the negotiating incentives at the international level.

Second, stakeholders in the multilateral negotiation might not perceive the domestic negotiation as a meaningful iteration of the same multilateral game. This would be true if, for example, non-trade-related stakeholders have substantially less access to the negotiation process and to the process of formulating the negotiating position of each national participant than they would have in the domestic implementation phase in the legislative process. Even in the United States, where public rights of participation are substantial, it is not clear that those who participate in U.S. multilateral negotiations are the same people who would influence domestic advice and consent to ratification. Public choice theory predicts, for example, that groups with lower costs of organizing, and therefore monitoring and participating in the negotiating and implementing processes, would have a relative advantage over groups with higher costs of organization in the bureaucratic process within the State Department controlling negotiation of the treaty compared to the relatively more transparent, legislative process for treaty ratification and implementation. This is true even though the negotiating process is informed by some political participation through the State Department Advisory Committee on Private International Law and its Study Groups on the Judgments Convention.

In fact, domestic negotiation might even be antithetical to the interests of the stakeholders prevailing at the multilateral negotiation, further weakening

their capacity to threaten retaliation against non-trade interests at the domestic implementation phase. Any savvy participant in the multilateral negotiating process would understand the boundaries for disciplinary retaliation in the domestic implementation phase and would therefore perceive significant room for deviating from prior commitments. Finally, politically savvy trade negotiators would know that domestic implementation could erode trade-related gains. The negotiator would therefore discount the value of negotiating partners' concessions and would make fewer commitments in return. Similarly, stakeholders relatively disadvantaged in the multilateral setting might have less of an interest in making concessions in the multilateral setting because they would believe that domestic implementation would give them an opportunity to achieve a relatively better result. Thus, knowing all this, the stakeholders who were relatively advantaged in the formulation of the U.S.'s multilateral negotiation position would not perceive the domestic negotiation on implementation to be a suitable vehicle for disciplining opportunistic behavior by other participants in the multilateral negotiation.

In sum, the negotiating dynamic of a single-play game is not improved, and appears likely to be worsened, by incorporating a domestic legislative phase of implementing a multilateral treaty produced at the Hague Conference. A multilateral treaty would likely be perceived as a single-play game because the limits on consensual mutation render each stage in the process a single-play game for the relevant sets of players. Game theory therefore predicts that stakeholders in the tradeoff between trade and non-trade values will engage in a sub-optimal level of cooperation in a negotiating setting like the Hague Conference on Private International Law.

This would not be a serious concern if all it signified was a failure to achieve gains that might otherwise be possible. However, to the extent the Hague process does succeed in achieving some tradeoff between trade-related and non-trade-related gains, it could have deleterious long-term effects. Any effort to increase the recognition and enforcement of judgments that create mainly trade-related gains would necessarily privilege or lock-in trade values against non-trade values. This is because proponents of trade liberalization might now oppose even a renegotiation that promised total welfare gains and even trade gains. If, by hypothesis in a renegotiation, externalized costs of trade are internalized to a greater degree than trade-related gains are created through the renegotiation, this second attempt to address the tradeoffs between trade and its externalities could reduce net returns for trade-related interests. Thus, trade-related stakeholders could prefer to forgo the opportunity to achieve greater absolute gains for trade because of the risk of suffering relative losses. In effect, any solution at the Hague Conference would raise the opportunity costs for trade interests succeeding in the Hague process of negotiating later at another forum structured as an iterated game where joint gains could be more easily achieved. Thus, the Hague Conference approach is not only unlikely to achieve the optimal level of joint gains but it is also likely to make achieving the optimal level of joint gains more difficult in any later negotiation for proponents of both trade

and non-trade concerns. A possible example of this phenomenon is the difficulty environmental interests now experience in protecting environmental values at the WTO.

C. After the Hague: The Danger of Bilateralized Dispute Resolution

Finally, even if it were possible to surmount the barriers to successful implementation of a multilateral convention like the Hague Conference model, the substance of the tradeoff could not be negotiated in terms that would facilitate a multilateral balance between trade and non-trade concerns. Because it would develop norms that would ultimately address courts, the Hague Conference would likely formulate rules rather than balancing principles. International negotiators prefer to formulate rules when creating directives to courts because they presume that rules are more acceptable to civil law cultures that purport to deny their judiciaries the power to make law. Accordingly, the likeliest result of the Hague Conference negotiation would be a framework of rules that purports to provide a specific resolution to each case. The failure to enforce the treaty rules in a particular case would constitute a breach. The rules orientation therefore compels a binary solution: either the treaty norm is followed or it is not.

Accordingly, the ordinary remedy for breach of obligations in civil law and public international law is an order of specific relief, such as specific performance in contract law and the duty to make reparations in international law. Substitutional relief like that rewarded in American contract law is not the ordinary case. Thus, the ordinary remedy for breach of a Hague Convention obligation would likely be an international tribunal's directive to comply with the treaty norm rather than some measure of damages for losses that the treaty was negotiated to protect. However, when a municipality favors one interest over another in a dispute between trade gains and the externalities of trade, the appropriate remedy should be measured in terms of the lost non-trade gains (in other words, the externalized costs of trade). Substitutional relief that compels a stakeholder to internalize the externalities of trade through the payment of compensatory relief would not be feasible under the international remedial law that has traditionally been applied; even if it were feasible to award substitutional relief for failure to comply with the treaty's requirements, it would be undesirable to measure harm to the interests protected by the treaty in terms of the losses to individual litigants who are denied the benefit of the treaty right. Awarding litigants damages calculated in terms of losses of treaty-protected interests that might bear no relation to the litigants' actual losses would be equally undesirable because it would produce either a windfall recovery or a grossly inadequate award from the litigant's perspective.

Moreover, any attempt by judicial authorities to consider a treaty's underlying desire to balance trade and non-trade interests would be seen as illegitimate, not only in rules-oriented civilian cultures that abjure judicial discretion but also in the United States under the evolving Supreme Court jurisprudence of choice of international law. On par with the highly context-sensitive choice-of-law revolution reflected in the work of the Restatement (Third) of the Foreign Rela-

tions Law of the United States for international conflicts of law, U.S. courts expressed receptivity to judicial interest balancing until the recent *Hartford Insurance* case.¹¹⁶ In that case the U.S. Supreme Court moved away from a balancing approach and signaled a preference for bright-line rules. A rules approach to conflict between two states' laws informs political actors that they must accommodate their conflicting interests because the courts will not do that job for them. Accordingly, courts will likely eschew discretionary balancing of competing state interests in international cases following *Hartford Insurance*.

The net effect of (1) binary conceptions of the applicability of Hague Convention rules, (2) remedial laws that direct parties to give specific relief in the event of breach and (3) the inability of courts to balance the tradeoffs between trade and non-trade values embedded in the multilateral treaty is to drive the breaching and nonbreaching parties to treat the dispute in any individual case as a simple conflict over the recognition and enforcement of a trade-related judgment. The parties ignore the other state values and interests that might be implicated. More important, because the dispute is conceptualized as a private law dispute between citizens or domiciliaries of two interested states, any third state's interests in resolution of the dispute are ignored. Thus, resolution of disputes under the Hague Convention on a bilateral basis would defeat the objective of a globally-accepted tradeoff between trade and non-trade concerns.

The following section explains why the WTO can provide a framework for addressing the weaknesses of the Hague Convention approach and for exploiting the possibilities for more narrowly-tailored arrangements for balancing trade and non-trade concerns.

III.

THE WTO ALTERNATIVE TO THE HAGUE CONVENTION

The weaknesses of the Hague approach offer a roadmap for an alternative solution to the problem of discrimination against foreign country judgments in trade law. That solution falls, arguably, under the auspices of the WTO. Even if existing trade law is insufficient to give a WTO complainant a reasonable prospect of success, this article will now argue it is reasonable to reformulate and extend the substantive trade law of the WTO in order to achieve precisely the kind of security of trade expectations WTO law is generally designed to protect. This approach would draw on the WTO's recent innovations in lawmaking to reach into areas of domestic policy-making previously reserved to national discretion, such as antimonopoly policy in the telecommunications sector. A new WTO agreement could easily build on the technical work accomplished thus far at the Hague Conference. The precise structure of the mixed, double convention – with required bases of jurisdiction, enforceable in every participating state; permitted bases of jurisdiction, enforceable at the discretion of participating

116. Compare *Hartford Fire Insurance v. California*, 509 U.S. 764 (1993) (rejecting comity), with Restatement (Third) the Foreign Relations Law of the United States, § 403 (1987) (favoring comity).

states; and prohibited bases of jurisdiction – might be modeled on the Subsidies Code, a regime the WTO already has experience implementing. Relying on the subsidy model would invoke the conceptual apparatus of subsidy law, and there is already WTO doctrine that states that inferior remedial opportunities for trade-related rights can impair the competitive relationship secured through negotiated tariff reductions and, by parity of reasoning, negotiated non-tariff concessions. Finally, incorporating the issue of recognition and enforcement of foreign judgments into WTO law would relate the trade effects of non-recognition to the negotiated trade relationship between participating WTO countries; it would redefine a broad range of substantive law claims – such as environmental claims or child labor practices that operate as implicit subsidies – as claims affecting welfare measured along both trade and non-trade parameters and thus subject to WTO discipline when litigated outside the safe harbor jurisdictional rules incorporated into the WTO. Political interests operating at both national and supranational levels would then have an incentive to influence WTO negotiations in order to preserve jurisdictional practices that permit the vindication of non-trade values. Those political interests would then rather join the WTO than destroy it. This article will address each of these points in turn.

A. Remedial Systems and the WTO: Violation and Non Violation Claims

With time and experience, WTO law has developed into a complex, yet relatively clear, body of doctrine. Thus, according to a member of the WTO legal staff, it is now generally accepted by WTO member states that only dispute settlement claims based on nullification or impairment of the benefits secured during negotiating rounds may be brought under WTO law, despite language suggesting that claims are also possible if “attainment of any objective” of a WTO agreement “is being impeded.”¹¹⁷ A prima facie case of nullification or impairment of benefits may be established if a WTO rule is violated.¹¹⁸ Otherwise, the complainant must show that its reasonable expectations of trade benefits were undercut by an unanticipated act by the defendant.¹¹⁹ When the rules

117. See Werner Zdouc, *WTO Dispute Settlement Practice Relating to GATS*, J. INT'L ECON. L. 295, 297, nn.5-6 (1999) [hereinafter Zdouc, *WTO Dispute Settlement Practice*] (also noting that, in theory, GATT Article XXIII also provides for claims based on “the existence of any other situation,” although the language has never been invoked in GATT or WTO dispute settlement).

118. GATT practice appeared to treat violation of a GATT rule as a prima facie showing, and arguably an “irrefutable presumption,” of nullification or impairment of negotiated GATT benefits. See *id.* at 298, n.8 (citing WTO Panel Report on US – Taxes on Petroleum and Certain Imported Substances (“Superfund”), adopted on June 17, 1987, GATT B.I.S.D. 34S/136, 158, para. 5.1.9). One might question whether the presumption is truly “irrefutable” if at the remedial phase of a proceeding the complainant must still prove that its retaliatory suspension of concessions, assuming the defendant does not comply with a ruling requiring it to withdraw its offending measure, corresponds to the value of the benefits that were nullified or impaired.

119. The non-violation theory supposes that competitive opportunities bargained for in the negotiating round are vitiated by an otherwise WTO legal measure, such as creation or expansion of a free trade area or customs union. See, e.g., EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991) (Report of the GATT Panel). In theory, as Zdouc observes, the GATT dispute settlement system also has competence over “the existence of any other situation” that either nullifies or impairs benefits or impedes the attainment of any objective of a covered agreement. Zdouc, *WTO*

of the DSU are extended to dispute resolution for a WTO agreement, they apply to interpretation and enforcement of that agreement.¹²⁰ The violation and non-violation theories thus might give rise to two distinct methods of bringing the recognition and enforcement of foreign judgments into WTO law: first, through judicial innovation; and second, through legislative innovation.¹²¹

1. *Judicial Lawmaking at the WTO/DSB*

Judicial innovation could immediately introduce recognition of foreign judgments into the WTO/DSU domain based on an analogy to existing WTO precedent. The best available analogy for extending the law of the WTO to recognition and enforcement of foreign judgments, namely the core nondiscrimination principles of national treatment principle and most-favored-nation treatment, is *U.S. – Section 337 of the Tariff Act of 1930*.¹²² This pre-WTO panel report concluded that the differences between U.S. procedures for the enforcement of foreign and domestic patent rights operated as a violation of the national treatment principle of GATT because section 337 provided domestic patent holders more immediate and extensive remedies with respect to imported products than were available to similarly situated foreign patent holders before federal district courts. The panel rejected the U.S. argument that the federal district court procedure's unfavorable elements and remedies were not discriminatory because section 337 relief for domestic holders of patents could be reduced on public policy grounds, restoring the balance of competitive opportunities.¹²³ One possible reading of the panel report, which the panel understood to be applicable also to cases outside the realm of intellectual property,¹²⁴ is that any dif-

Dispute Settlement Practice, *supra* note 116, at n.6. But the absence of any evidence of claims based on such theories suggests that these possible claims should, for purposes of analysis of the recognition of foreign judgments, be subsumed under the non-violation, nullification or impairment of benefits theory.

120. See WTO/DSU, art. 3.2, which provides:

The dispute settlement system of the WTO is a central element in providing security and predictability in the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of the Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

See Adrian T. L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 *BERK. J. INT'L L.* 171, 175 (1998) (affirming incorporation of GATT *acquis*) (citations omitted) [hereinafter Chua, *Precedent and Principles*].

121. See generally Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *HARV. INT'L L.J.* 333 (1999) [hereinafter Trachtman, *Domain of WTO Dispute Resolution*] (analyzing the process of WTO lawmaking in the DSU and negotiating rounds through the two optics of incomplete contracting and the rules/standards dichotomy and arguing against lawmaking through judicial gap-filling of incompletely negotiated WTO agreements or judicial elaboration of standards in the absence of negotiated rules).

122. Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345.

123. *Id.* at para. 5.14; see also Chua, *Precedent and Principles*, *supra* note 120, at 194 (describing this holding).

124. Nov. 7, 1989 GATT B.I.S.D. (36th Supp.) at para. 5.5; see also Chua, *Precedent and Principles*, *supra* note 120, at 180 (describing this dictum).

ferences between judicial procedures and remedies for nationals and procedures and remedies for foreigners, such as the invocability of a public policy exception, violate the national treatment principle. This reading would be consistent with the WTO Appellate Body's emerging tendency to utilize common-law concepts of holding and dicta to describe the reasoning of panel reports as precedent.¹²⁵ It could also be supported by the Appellate Body's treatment of panel reports as subsequent practice, also capable of establishing the meaning of the GATT law carried over by the DSU and now applicable in WTO dispute settlement.¹²⁶

Analyzing the trade impact of enforcement procedures may be equally applicable to the recognition of foreign judgments. Enforcing domestic judgments without the exceptions that are available under either federal law or state common or statute law accords a preference to domestic judgments thereby discriminating against claims that are adjudicated in foreign jurisdictions.¹²⁷ Claims brought in a foreign jurisdiction may be adjudicated there because that country's law provides a basis for jurisdiction that might be considered exorbitant in the enforcing jurisdiction.¹²⁸ Public policy grounds for non-enforcement of such exorbitant foreign judgments are in effect objections to a foreign jurisdiction's attempts to aid plaintiffs willing and able to exploit favorable foreign jurisdictional law. Arguably these practices burden either the most favored nation or national treatment principles by determining judicial enforcement rights on the basis of the improper criterion of nationality.

It is argued, however, that the national treatment norm is not necessarily violated when specific exorbitant grounds for the exercise of jurisdiction are applied against non-nationals solely because of their non-domiciliary status.¹²⁹ The effect of the domicile criterion may be to discriminate on the basis of nationality, but the fact that the measure permits, but does not require, nationality-based discrimination may protect it against being labeled a national treatment violation and thus prima facie a nullification or impairment of benefits. This is so because it now appears settled that the mere potential for discriminatory treatment is not sufficient to establish a violation.¹³⁰ More important, the trade-related features of the *U.S. – Section 337 of the Tariff Act* were plain on their face because the procedural and remedial advantages afforded to U.S. patent holders operated directly at the border and thus immediately affected the competitive relationship between domestic producers and foreign importers of pat-

125. See Chua, *Precedent and Principles*, *supra* note 120, at 181-82 (relying on Canada – Certain Measures Concerning Periodicals, June 30, 1997, WT/DS31/AB/R, where the Appellate Body carefully distinguished prior panel reports and described some cited authority as obiter dicta, and as evidence of the precedential effect of pre-WTO GATT jurisprudence).

126. See *id.* at 185 (quoting statement to this effect in Japan – Taxes on Alcoholic Beverages, Appellate Body Report, Nov. 1, 1996, WT/DS8//AB/R, WT/DS10//AB/R, WT/DS11//AB/R, at 17).

127. See *supra* text accompanying notes 67 – 91 (discussing origins and evolution of U.S. law).

128. See *supra* notes 27-28 (identifying the so-called exorbitant grounds of jurisdiction under E.U. law).

129. See REIMANN, A GUIDE THROUGH THE JUNGLE, *supra* note 99, at 71.

130. See Chua, *Precedent and Principles*, *supra* note 120, at 191-93, n.141 (citing U.S. – Taxes on Petroleum and Certain Imported Products, *supra* note 116, para. 5.2.2).

ented products otherwise protected by U.S. intellectual property law. The same cannot be said for recognition and enforcement of judgments.

Nonetheless, the reasoning behind finding a violation of the national treatment principle may support a non-violation claim. Refusal to enforce a foreign judgment on public policy or other grounds may operate as a defensive trade measure that nullifies or impairs negotiated benefits without violating a rule of the WTO. In effect, then, undisciplined use of public policy or other exceptions may lead to a progressive undermining of the negotiated balance of advantages. This would occur because competitive opportunities created under WTO negotiations would not be exploited fully by private actors when the security of their trading interests would not be protected by judicial procedures and remedial systems that adequately vindicate their substantive rights. The jurisprudence of the GATT/WTO confirms that the actual effect on the competitive relationship established in a negotiating round would need to be proven under a non-violation theory.¹³¹ More important, to make out a claim that the balance of advantages secured through the negotiated reciprocal tariff reductions was nullified or impaired, one would need to show that the nonrecognition and enforcement of a foreign judgment actually undercut a reasonable expectation of judgment enforcement that was actually part of the bargained-for exchange of trade concessions in a prior negotiating round.¹³² It would be hard to show this for discriminatory non-enforcement of foreign judgments, a practice so settled in the fabric of international economic law as to defy any suggestion that world trade law has ever disciplined ordinary domestic rules relating to international judicial cooperation.

Moreover, it might be imprudent to extend the GATT *acquis* to the recognition and enforcement of judgments solely on the basis of a creative reading of GATT precedent. The concept of precedent is strictly speaking applicable only to judge-made law and is in tension with Article 3.2 of the DSU's command that dispute settlement systems must not affect the rights and duties of parties to the covered WTO agreements.¹³³

2. Legislative Innovation at the WTO

New WTO legislation could draw on the evolving approach to the scope of activities subject to WTO disciplines evidenced in the new telecommunications regime. The so-called Reference Paper¹³⁴ incorporates competition law princi-

131. See Panel Report on Australian Subsidy on Ammonium Sulfate, adopted on April 3, 1950, GATT B.I.S.D. II/188, para. 12; Panel Report on EEC – Oilseeds, GATT B.I.S.D. 39S/91, 114-115, para. 77; Japan – Film, WT/DS44/R, at 391, para. 10.72 and 394, para. 10.82; see also Zdouc, *WTO Dispute Settlement Practice*, supra note 117, at 307 (summarizing WTO/GATT doctrine).

132. See EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds, supra note 117, at 128-29; see generally Zdouc, *WTO Dispute Settlement Practice*, supra note 117, at 306 (analyzing WTO doctrine).

133. See WTO/DSU, art. 3.2, supra note 120.

134. Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications, Apr. 24, 1996, 36 I.L.M. 354, 367 [hereinafter the Reference Paper].

ples into the law of the WTO¹³⁵ and thus makes national regulatory policy on domestic market structure a potential matter of trade concern. WTO/DSB precedent suggests, however, that the extension of competition principles throughout the body of substantive WTO law would require more than reasoned elaboration of the national treatment principle as it relates to non-violation claims.¹³⁶ Admittedly, then, the Reference Paper only operates in a specific area of WTO law: trade in basic telecommunications services.¹³⁷ Moreover, it is not a WTO agreement in its own right. Rather, it is included in WTO law only when each Member specifically includes it in its offer for basic telecommunications services during the negotiating round.¹³⁸ Nonetheless, this legislative precedent suggests that domestic regulatory policy can be made a subject of bargaining, so that compliance with specific regulatory principles that have trade implications could be bargained for as a trade benefit in a WTO negotiating round.

The precise structure of the Reference Paper does not, however, supply a model for drafting an illustrative agreement on the recognition and enforcement of foreign judgments. The Reference Paper is based on policy science underlying competition law. It reflects a particular solution to a particular problem: the transformation of monopolized telecommunications industries in developing countries into free market-oriented entities. By contrast, the draft Hague Agreement suggests that it will be necessary to divide the exercise of judicial jurisdiction into categories that reflect the diversity of practices and domestic requirements of the world's various legal systems. For example, it would need to address the U.S.'s anomalous constitutionalization of personal jurisdiction¹³⁹ and its unsettled law with respect to the outer perimeters of federal non-legisla-

135. See Zdouc, *WTO Dispute Settlement Practice*, *supra* note 117, at 305-06 (stating that the Reference Paper holds governments "responsible for anti-competitive conduct by 'essential facilities' for, or 'major suppliers' of, telecommunications services even if actions of such entities have only a remote link to the government").

136. See Panel Report on Japan – Measures Affecting Consumer Photographic Film and Paper, DS/44, Jan. 30, 1998, adopted March 31, 1998 (rejecting non-violation claim by U.S. asserting that Japanese producer, Fuji Film, through a system of restrictive distribution arrangements, and with the acquiescence of the Japanese government through its failure to enforce Japanese competition law, foreclosed the U.S. importer, Kodak, from the Japanese market, thus effectively undercutting the competitive relationship the U.S. had obtained through bargained-for tariff reductions).

137. See generally General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL TEXTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 44 [hereinafter the "GATS"]; Fourth Protocol to the GATS, Apr. 15, 1997, 36 I.L.M. 154 [hereinafter Fourth Protocol].

138. Laura B. Sherman, "Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services, 51 FED. COMM. L.J. 61, 87 (1998).

139. See generally Brand, *Due Process*, *supra* note 88; see also Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269 (1998) [hereinafter Weintraub, *Negotiating the Tort*] (arguing that, although treaty makers do not have constitutional authority to extend U.S. jurisdiction beyond constitutional limits, treaty makers do have constitutional authority to require federal and state courts to forgo the exercise of particular bases of jurisdiction, including the most problematic forms of jurisdiction – general, "doing business" and "transient," or so-called tag, jurisdiction).

tive preemption of a state's exercise of jurisdiction.¹⁴⁰ A model subtler than the Reference Paper is necessary to address these incompatibilities.

B. The Subsidies Code Model: Substantive and Procedural Dimensions

In contrast to the Reference Paper, which does not accommodate the diversity of practices among the world's legal systems, the WTO Subsidies Code¹⁴¹ provides a model that accounts for these differences. It factors national regulatory policies into a baseline, a so-called level playing field, from which comparative advantages of nations are measured.¹⁴²

A recent complaint before the WTO/DSB demonstrates that the subsidy concept can be extended to problems that amount to an asymmetrical exercise of jurisdiction. In *United States – Tax Treatment for Foreign Sales Corporations*,¹⁴³ the EC challenged the United States' creation of certain exemptions. The U.S. claimed that the exemptions were needed to compensate U.S. exporters for the trade disadvantages they faced because the U.S. employs a world-wide system of taxation and competing nations employ a territorial taxation system.¹⁴⁴ Asserting principles of "tax sovereignty," the U.S. went on to argue that "the WTO should not penalize a country using a world-wide system for incorporating elements of a territorial system," such as the exemptions for Foreign Sale Corporations, "in order to obtain comparable tax treatment for its exporters."¹⁴⁵

The Panel rejected the U.S. arguments. The Panel Report asserted that, while the U.S. was free to maintain any type of tax system it wanted, the Subsidies Code mandated that a nation cannot "establish a regime of direct taxation, provide an exemption from direct taxes specifically related to exports, and then claim that it is entitled to provide such an export subsidy because it is necessary to eliminate a disadvantage to exporters created by the US tax system itself."¹⁴⁶ In sum, the Panel Report acknowledged the tax, or jurisdictional, sovereignty of the United States, but nonetheless compelled the U.S. to pay for exercising this

140. See Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 947-49 (raising the question whether the non-extraterritoriality and non-violation of international law interpretive canons apply in the absence of federal legislation to compel state courts to exercise restraint in exercising jurisdiction in foreign commerce cases). See also *Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288 (2000).

141. Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, THE LEGAL TEXTS – RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1125 [hereinafter the "Subsidies Code"].

142. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 42, at 237 (noting that at one point the Brazilians argued that their comparative advantage in trade was Brazil's capacity to absorb a greater amount of pollution than other countries).

143. WT/DS108/R, Oct. 8, 1999, 38 I.L.M. 173.

144. The Panel Report noted: "The United States argues that world-wide systems of taxation, such as that of the United States, place exporters at a disadvantage relative to exporters from countries with territorial tax systems, because, under a territorial system, whenever activities relating to an export transaction occur outside the territory of the taxing jurisdiction, income from such activities is not taxed." *Id.* at para 7.121, 38 I.L.M. at 205.

145. *Id.*

146. *Id.* at para. 7.122, 38 I.L.M. at 205.

right by not allowing it to bend WTO rules in order to compensate for the fact that the U.S. taxation system burdens U.S. exporters with trade disadvantages.

This reading of the Panel Report analysis of tax jurisdiction suggests that the Subsidies Code itself provides a workable model for a trade-related regime for global standards on the exercise of judicial jurisdiction. The Subsidies Code distinguishes between three types of subsidies: (1) expressly permitted or “non-actionable” subsidies (so-called “green light” measures), (2) expressly prohibited subsidies (so-called “red light” measures), and (3) an intermediate class of “actionable” subsidies (so-called “yellow light” measures) that may be permitted or prohibited depending on their effects on trade.¹⁴⁷ The Hague Conference proposal favored by the U.S. would make precisely this kind of distinction among bases of jurisdiction. It distinguishes among judgments that are: (1) expressly permitted and enforceable on the basis of jurisdiction, (2) permitted but not necessarily enforceable on the basis of jurisdiction, and (3) prohibited and thereby necessarily unenforceable on the basis of jurisdiction.

Thus, one could draw on the insights of *United States – Tax Treatment for Foreign Sales Corporations* to translate The Hague Conference proposal into a WTO agreement enforceable at the WTO/DSB. Judgments based on expressly permitted jurisdictional grounds would not violate trade law, while judgments based on prohibited grounds of jurisdiction would operate as violations of trade law and establish prima facie cases of nullification or impairment of benefits. By contrast, the exercise of jurisdiction to render a judgment on a basis that is neither expressly permitted nor expressly prohibited may or may not confer a trade advantage to the state authorizing that exercise of jurisdiction.

Whether or not a trade advantage is conferred may not even be clear in a particular case. States will therefore need to conduct overall assessments of the trade effects of the regular exercise of each basis for jurisdiction. If, for example, U.S. “doing business” jurisdiction were neither permitted nor prohibited, one might still imagine that even the threat of U.S. courts exercising “doing business” jurisdiction would require foreign firms to structure their activities so as to avoid the risk of U.S. litigation. This could in theory impose considerable costs on foreign firms. Yet, a state that wanted to claim that its trade rights had been violated would have to produce evidence of judicial practice and the actual use of the questionable bases of jurisdiction. Therefore, it would be imperative that the U.S. and other nations avoid conclusory reasoning about the discriminatory character of their trading partners’ practices in recognizing and enforcing foreign judgments.¹⁴⁸ If the U.S. is not prepared to harmonize its jurisdictional practices with those of the rest of the world, then it must at least wish to demonstrate that its practices are not yielding adverse trade effects for its trading partners in the WTO. Ultimately, however, the U.S. might agree to trade off the right to exercise “doing business” jurisdiction, if it is so internationally offensive that persuading other nations to accept it could only be done at a prohibitively

147. See generally *id.* at 290-93.

148. See Juenger, *A Hague Judgments Convention?*, *supra* note 66, at 115-16; Weintraub, *How Substantial is Our Need*, *supra* note 66, at 170-71.

high cost in trade concessions.¹⁴⁹ This might happen either at the front end in the form of bargaining trade opportunities for rights to preserve national jurisdictional autonomy or at the back end of litigating claims that arise from the trade effects of those practices.

Moreover, domestic understanding of the questionable character of U.S. jurisdictional and other litigation practices will be enriched by the domestic political debate about the relevant policy tradeoffs, and this enriched debate may well minimize the deadening effect of xenophobia on political discourse. As the next section will argue, reducing this xenophobia is ultimately at the heart of the argument for moving the recognition and enforcement of foreign judgments from the Hague Conference to the WTO.

C. *Jurisdictional Law as the Mediator for Trade and Non-Trade Values*

A Subsidies Code model for incorporating recognition and enforcement of foreign judgments into the law of the WTO has two advantages: (1) it draws on the policy and precedent of WTO law and (2) it focuses attention on developing a calculus for balancing trade and non-trade values. These advantages lead to a third important advantage. Bargaining over specific tradeoffs will strengthen public interest in the WTO decision-making process and thereby increase the legitimacy of outcomes negotiated and enforced under the auspices of the WTO.

For example, those who believe that child labor unfairly subsidizes domestic production may be prepared to urge their national representatives and lobby foreign governments to expend scarce negotiating capital to secure either (1) substantive trade rules declaring such practices to be subsidies or (2) jurisdictional rules that facilitate domestic judgments against foreign producers engaging in such practices. These judgments would be enforceable under WTO law. Failure to respect this type of foreign judgment produced in accordance with agreed upon WTO rules would in turn authorize retaliatory suspension of trade concessions.

The preceding example serves to illustrate how trade and non-trade values can be mediated in the WTO.¹⁵⁰ In effect, one would monetize – in the cur-

149. Cf. Weintraub, *Negotiating the Tort*, *supra* note 139, at 1281 (“Whether or not the judgments project [at the Hague] reaches a successful conclusion, the process of negotiation will make clear to us in what ways our methods of adjudication are disapproved abroad. Such knowledge can have a salutary effect of causing us to revise some of the least attractive aspects of our administration of justice.”).

150. Another possible example may well be the line of U.S. cases, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which has culminated in the assertion of tag jurisdiction in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), where an Alien Tort Claims Act suit was initiated against a visiting head of government of an unrecognized state for conduct allegedly constituting human rights and humanitarian law violations under international law and occurring on territory and affecting persons unconnected to the forum. This context does not appear to generate a claim of nullification and impairment of trade benefits. Rather than carve out of the WTO these kinds of potentially exorbitant attempts to exercise judicial and legislative jurisdiction, it would seem to be preferable to rely on the requirement that nullification and impairment of benefits be shown to deny a WTO plaintiff a right to a WTO remedy. Thus, there should be no danger that pure human rights cases, having no trade effects, would be chilled by the failure to include a human rights exception in a WTO agreement on recognition and enforcement of foreign judgments.

rency of tariffs and related concessions – the obligation to enforce judgments relating to conduct that may produce trade effects. The negotiating process would help define the scope of activities that produce trade effects in terms of the type of jurisdiction states are free to assert over the production or consumption effects of the imported products or services covered by the WTO. While some argue plausibly that (1) an exporting state's domestic policies with only domestic effects are not of international concern because they do not prevent global welfare maximization¹⁵¹ and that (2) treating production processes as trade issues could unravel the international trade system by providing loopholes for disguised protectionism,¹⁵² these questions should not be answered a priori. Rather, they should be determined within the international political process.¹⁵³

IV.

CONCLUSIONS AND IMPLICATIONS: A CIVIC REPUBLICAN VISION

Addressing the recognition and enforcement of foreign judgments explicitly as a trade issue through a WTO agreement has two benefits. The first benefit relates to the political legitimacy of the WTO. The other concerns the quality of WTO decision-making. The legitimization argument turns on the premise that, as much as increased transparency of its legislative and adjudicatory functions will increase the procedural legitimacy of WTO decision-making, the WTO also needs to increase its substantive legitimacy. This means that interest

By contrast, civil judgments relating to human rights violations might naturally be included in the scope of a Hague Judgments Convention. See John F. Murphy, *Civil Liability of the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. L.J. 1, 56 (1999) (suggesting the issue be on the Conference's agenda). However, since a Hague Conference Convention would operate without the benefit of the additional requirement of a showing of nullification or impairment of trade benefits, the precise scope of coverage of such judgments would need to be defined. This difficult issue could well be a deal breaker in that context.

151. See Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Community and the International Community*, 83 VA. L. REV. 1331, 1335 (1997) (“[I]n the case of process standards not coupled with trade restrictions, there is no divergence between the in-state calculus and the global social calculus.”).

152. See JACKSON, *THE WORLD TRADING SYSTEM*, *supra* note 42, at 237 (“Whether an importing nation could use border restrictions or taxes to equalize the price of imported goods with domestic costs of health and safety regulation is as yet an unresolved issue for the world trading system. It is an issue fraught with dangerous potential. If this principle were extended to many types of government regulation – for example, minimum wage or other labor regulations – it could be the basis of a rash of import restrictions, often defeating the basic goals of comparative advantage. Government regulations vary so greatly that the already difficult conceptual questions of the world's rules on subsidies would pale in significance beside the problems that the costs of regulation equalization would create”).

153. See *infra* text accompanying notes 168-95 (relating the substance of WTO law and institutions to a republican conception of international political process); see also Steve Charnowitz, *World Trade and the Environment: A Review of the New WTO Report*, 12 GEO. INT'L ENVTL. L. REV. 523, 535 (2000) (criticizing the WTO Secretariat Report of Oct. 14, 1999 as failing to provide an integrated analytical structure that would recognize that “environmental and economic phenomena are two lenses for looking at the same phenomena”). Charnowitz calls for greater WTO attention to the enforcement aspects of the environmental dimension to welfare maximization, and he notes that vague WTO references to “structured cooperation” will not do. *Id.* at 534. In that spirit, the central thesis of this article is that making the domestic effects of the production process a matter of international enforcement cannot be separated from the stimulation of an international political process, that is, the WTO bargaining process.

groups need more than a voice in WTO decision-making. They need their interests tolerably satisfied. Judgments enforcement, if it effectively vindicates interests arising from the failure of import prices to reflect the true social costs of production and consumption, will provide WTO opponents with a reason to exercise whatever voice increased transparency gives them. Opponents of the current trade regime will then begin to see the WTO as an appropriate institutional vehicle through which to address their concerns.

Moreover, to the extent that effective policy-making supports political legitimacy, treating judgments recognition and enforcement as a WTO bargaining subject may also improve the quality of WTO lawmaking and adjudication. Transforming trade agendas at WTO negotiations into more inclusive discussions of trade and non-trade values should broaden the database for policy-making, thereby yielding a better balance of competing values. As the recent disruption at the WTO Millennium Round opening makes clear,¹⁵⁴ both an increased commitment to the WTO process from potential stakeholders and an increased sensitivity to non-trade concerns among trade negotiators are needed if the WTO is to succeed in the next negotiating round. Attempting to conceal value differences between nations and transnational groups by asking courts to continue to take primary responsibility for resolving value conflicts in specific cases is neither politically sustainable nor just.¹⁵⁵

These benefits may not come without a cost, however. One consequence of including non-trade interests in WTO decision-making may be that the mode of expressing those interests is transformed. Outside of the WTO, non-trade interests employ a populist, grass-roots political style that draws on the moral sense of the community. The ethical demands that occur when citizens of first-world states encounter labor conditions in the developing world and the intergenerational ethical demands arising from abuse of the current world ecosystem make trade a matter of moral relevance. This lays the groundwork for a political style that Max Weber usefully described as an "ethic of ultimate ends."¹⁵⁶ This passionate style of politics confronts the established order and demands its reconstruction. It is not a style well suited to the kind of marginal decision-making that characterizes choice within an institution like the WTO. The Seattle protests in November 1999 proved that grassroots politics is a potent source of

154. See *After Seattle: A Global Disaster*, THE ECONOMIST, Dec. 11, 1999, at 19 (attributing the collapse of talks as much to U.S. arrogance and the inflexibility of E.U. negotiators as to the effect on these negotiators of the protests against WTO policies alleged to be insensitive to non-trade concerns).

155. See Philip J. McConaughay, *Reviewing the Public Law Taboo in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 283-86 (1999) (arguing against judicial invocation of conflict of laws tools, such as comity, to address transnational public law disputes on grounds of courts' lack of democratic legitimacy, their institutional incompetence in achieving predictability, and the likely practical effect of preventing or discouraging explicit public regulation of important social problems through legislative action or international negotiation); cf. Russell J. Weintaub, *The Extraterritorial Application of Antitrust and Securities Law: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1817 (1992) (comity undercuts the capacity of political branches to negotiate agreements with foreign countries).

156. MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 120 (Gerth & Mills eds., 1976).

political creativity that is needed to overcome institutional resistance to change. The rationalization of non-trade politics therefore produces a potential downturn in political creativity.

Describing incorporation of non-trade values into the WTO law as “rationalization” may, however, conceal a potential advantage of making a place for their proponents at the WTO. The term “domestication” is perhaps more revealing even though it is overused in the literature of international law. In fact, it may unfortunately suggest that populist politics of this kind would be caged in a Weberian historical inevitability of bureaucratization, which in turn risks encouraging the mass, faceless politics of the corporatist states of the first half of the 20th century.¹⁵⁷ Moreover, “domestication” might suggest more of a domestic analogy than is warranted by the current development of international civil society. Nonetheless, “domestication,” unlike “rationalization,” suggests an important and, if one believes that pluralist politics is morally and pragmatically desirable, beneficial consequence of incorporating non-trade concerns into WTO law: the possibility that interest group politics will begin to overshadow subversive expression.

Nonetheless, even if non-trade values require some institutional recognition, some argue instead for the establishment of a separate non-trade organization to develop global standards for labor and the environment.¹⁵⁸ However, in the absence of an organization or organizations that could make non-trade policy, and thereby either merit some deference by the WTO¹⁵⁹ or impose some binding sanctions itself,¹⁶⁰ the WTO is the only player in town. Indeed, without WTO involvement, the international private sector cannot by itself insist that environmental and labor values be extended to reflect rationally the balance of needs and interests of all interested parties, rather than merely the precise correlation of power between business groups and host states.¹⁶¹ Perhaps a strategy that locates trade and non-trade value protection in separate international institutions rests principally on the fear that protecting labor and environmental concerns through the mechanism of the WTO’s dispute resolution system would allow countries to evade genuine trade commitments in order to increase protectionism under the pretext of non-trade values.¹⁶² Yet this argument betrays a

157. See RALF DAHRENDORF, *SOCIETY AND DEMOCRACY IN GERMANY* 42 (1967) (in his now classic analysis of the origins of German Fascism, critiquing as unsound the then received capitalist-origins explanation, which, Dahrendorf argued, one “may trace back to Max Weber whose concept of capitalism with its preconditions in economic attitudes and consequences of bureaucratic organization displays traces of an historical necessity à la Hegel”).

158. See *Why Greens Should Love Trade*, *THE ECONOMIST*, Oct. 9, 1999, at 17-18 (editorial suggesting there is a case for a global environmental agreement separate from the WTO).

159. See Perez, *WTO and U.N. Law*, *supra* note 31, at 377 (noting absence of such a regime in the environmental area).

160. See, e.g., Dan C. Esty, *Stepping Up to the Global Environmental Challenge*, 8 *FORDHAM ENVTL. L.J.* 103, 111 (1996).

161. But see Jennifer L. Johnson, *Public-Private Convergence: How the Public Actor Can Shape Public International Labor Standards*, 24 *BROOK. J. INT’L L.* 291 (1998) (arguing for private, rather than public, sector management of norm evolution in this area).

162. See *Clueless in Seattle*, *THE ECONOMIST*, Dec. 4, 1999, at 17 (arguing that the Clinton Administration in arguing that labor and environmental concerns should be part of the Millennium

fear that a politically-accountable process at the WTO would yield outcomes different from those that global elites might prefer.¹⁶³

We need not reach the merits here of whether increased protection of non-trade interests threatens to undermine the protection of legitimate trade interests at the WTO, because genuine concerns about the legitimacy of the WTO political process need to be satisfied first.¹⁶⁴ Creating real channels of representation for communities and interest groups is critical to sustaining the WTO's legitimacy. Indeed some argue that even transnational organizations risk disconnecting the representation of non-trade interests from its democratic roots and domestic electoral accountability when they focus their political activities on getting non-trade interests a voice in the WTO.¹⁶⁵ This critique draws on public choice theory's prediction that transnational private groups, whether they be corporations or non-commercial associations, organize and thereby achieve political results that might not otherwise flow from more broadly inclusive political processes disciplined by accountability to constituents.¹⁶⁶

Increased transparency and accountability in WTO decision-making would, of course, mitigate the force of the public choice critique, particularly in WTO adjudication.¹⁶⁷ However, the inevitable secretiveness of WTO lawmaking

Round negotiating agenda has conceded the erroneous premise of the protesters that free trade may not be welfare enhancing; see also *Who Needs the WTO?*, THE ECONOMIST, Dec. 4, 1999, at 74 (arguing that a WTO that allowed its dispute settlement system to be employed to further labor and environmental concerns would reduce free trade and undercut growth in the developing countries by authorizing retaliation by developed countries in the form of additional trade restrictions against developing country exports). See also Sykes, *Regulatory Protectionism*, *supra* note 41; JACKSON, THE WORLD TRADING SYSTEM, *supra* note 42, at 237.

163. See Perez, *Who Killed Sovereignty?*, *supra* note 56 (criticizing argument that international governance calls for reliance on the work of technocratic elites as its primary mode of legitimization).

164. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 660 (1996) (arguing that the WTO as currently constituted is incapable of addressing non-trade values, thus undermining the support of member states; Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Non-Government Parties*, 17 U. PA. INT'L ECON. L. 295 (1996); G. Richard Snell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. INT'L ECON. L. 359 (1996).

165. See *Citizens' Groups: The Non-Governmental Order*, THE ECONOMIST, Dec. 11, 1999, at 21 (asking: "Are citizens' groups, as their many supporters claim, the first steps toward an 'international civil society, (whatever that might be)? Or do they represent a dangerous shift of power to unelected and unaccountable special interest groups?"); see generally, Spiro, *New Global Potentates*, *supra* note 54.

166. Embedded in public choice analysis are the assumptions that the distortions produced by public lawmaking would be greater than those of private lawmaking; or, equivalently, that the harms identified by the public choice critique would be outweighed by the benefits – that otherwise would not be achieved in a given institution – the so-called "public goods" critique. See Paul Stephan, *Interdisciplinary Approaches to International Economic Law: Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745, 750 (1995) [hereinafter Stephan, *Barbarians*].

167. See generally Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017, 1021 (1999) (arguing for a revised standard of review in WTO environmental cases, which would "require national governments to balance the competing trade and environmental interests by means of transparent rules and procedures. In order to satisfy the requirement of transparency, governments must ensure that the decision making procedures that produce environmental trade measures afford a meaningful

would limit the degree to which increased transparency in WTO adjudication could remedy the biases of WTO lawmaking.¹⁶⁸

Yet, a second-best theory offers a possible rebuttal to the welfare-reduction aspect of the public choice critique. An emerging literature that catalogues the underproduction of “global” public goods¹⁶⁹ suggests it may be warranted to tolerate the disproportionate influence of groups that stimulate the production of such goods. In other words, the political process failure of non-transparent and unaccountable groups stimulating the “overproduction” of measures protecting non-trade values at the WTO could in theory rectify a public goods failure in the “underproduction” of environment and labor protecting measures.¹⁷⁰ This question must ultimately be answered by a self-correcting political process, one that in extraordinary moments is capable of making informed judgments about whether and how to correct for ordinary politics’ failure to achieve a global balance in the production of private and public goods.

In practice, then, the case for incorporation of non-trade values into the WTO dispute settlement system presupposes that WTO political and legal policy-making procedures accommodate global trade and non-trade interests effectively. This may be a questionable assumption, for no one can claim that the transnational political process – whether it be at the United Nations or the WTO – currently represents a world community of the kind that one usually associates with the modern nation-state. That said, one readily observes that many nation-states are characterized by a fragmented national political community and identity. They are separated into multiple *demoi* and identities, both in cases of dissolution of previously fictive national communities such as the former Yugoslavia¹⁷¹ and in emerging consolidated supranational communities such as the European Union.¹⁷² But global politics should not be based on the level of legitimacy experienced in former Yugoslavia. Neither would one want to em-

opportunity for foreign interests to present their views, receive a reasoned response, and to obtain review in a neutral tribunal”).

168. See generally Stephan, *Barbarians*, *supra* note 166.

169. See generally GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul, Isabelle Grundberg & Marc Stern eds., 1999).

170. There are, of course, examples of non-transparent, unaccountable processes which, although in large part produced private gains, at the same time unavoidably produced a public good that otherwise would be under-produced. See, e.g., J. Lawrence Broz, *Origins of the Federal Reserve System: International Incentives and the Domestic Free-Rider Problem*, 53 INT’L ORG. 39 (Winter 1999) (arguing that the establishment of the Federal Reserve system as a public good, creating, among other things, a stable domestic currency, was made possible by the private benefits the system gave to money-center banks). Assuming that the private good and public good are true joint goods – that is, they cannot be produced separately – then the ancillary production of a private good may be a necessary evil in the optimal production of the public good. On this reasoning, gains achieved by environmental or labor activists may be necessary evils in the production of globally efficient levels of non-trade, public goods.

171. See generally SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* (1995) (outlining the Bosnian crisis that developed in the multicultural states of the former Yugoslavia).

172. See generally J.H.H. WEILER, *ESSAYS ON EUROPE* (1995); compare MICHAEL WALZER, *THICK AND THIN MORAL ARGUMENTS AT HOME AND ABROAD* (1994) (meditating on the tension between a deeply-rooted or “thick” identity politics and a “thin” politics of common association in civil society based on more superficial compatibilities between otherwise distinct groups).

ploy the degree of coercion necessary to compel global compliance with norms that industrialized democracies would accept. As James Madison once argued, this would be “worse than the disease.”¹⁷³

We may therefore be left with the chicken-and-egg problem that good substantive rules presuppose good politics, which in turn presuppose good constitutional rules, which in turn presuppose good constitutional politics, which in turn presuppose the prospect of good substantive rules. This seems to be a very bleak picture, at least for now. However, one cannot assume that the quasi-market solution of choosing between trade and non-trade policies, either through competition between the WTO and a similar non-trade organization or through competition between trade and non-trade values, will always be superior to alternative institutional approaches.¹⁷⁴ A better comparative institutional analysis would account for the possibility that the transnational political process will transform into a process that more effectively disciplines parties that abuse WTO law and its dispute settlement system. This analysis would focus both on avoiding the exploitation of non-trade exceptions for protectionist purposes as well as accounting for the genuinely welfare-reducing effects of global free trade policies. It is impossible to determine *a priori* whether the WTO requires radical reformation before it can effectively address non-trade concerns, or whether it is timely to co-opt non-trade political groups when the transnational political process is only just beginning to address non-trade issues. It should be enough to dismiss as analytically incomplete any argument for excluding non-trade concerns from the Millennium Round negotiations that is based on a static conception of global governance. Governments may well break law in order to stimulate the creation of new and better law,¹⁷⁵ thus publicizing an issue that is incompletely addressed by black letter law.¹⁷⁶ Moreover, transnational networks of interest groups operating at the international institutional level may well produce the “social capital” necessary for the formation of a global civil society¹⁷⁷ that, by supplementing the activity of states, could help

173. THE FEDERALIST NO. 10 (James Madison) (“There are again two methods of removing the causes of faction: the one, by destroying the liberty essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests . . .”).

174. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 14 (arguing that only comparative institutional analysis, that is analysis of costs of each institutional option, can provide an adequate basis for choosing an institutional alternative to achieve policy goals, because a costly institutional choice may yet be better than its even more costly alternatives).

175. See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 312 (1997) (describing Tuna-Dolphin Ban as “creative unilateralism,” notwithstanding 1993 GATT Panel Report deciding that the U.S. violated the national treatment rule and could not defend its extraterritorial attempt to protect dolphins under the GATT environmental and conservation exceptions).

176. See Trachtman, *Domain of WTO Dispute Resolution*, *supra* note 121, at 346-50 (developing incomplete contracting analysis of WTO dispute resolution).

177. Cf. Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 285 (1997) (citing and analogizing to Robert Putnam’s work about the role of civic organizations in creating the social capital necessary for robust democracy at the national level).

produce rules that are closer to the gravitational center of the global political process.¹⁷⁸

In sum, when national and global politics work together with each ultimately representing the interests and values of individuals and communities, they constitute an evolving political system. As this system evolves, so must its concept of law. A theory of global law mapping this dynamic dimension would be, as James Madison put it, a “republican remedy for the disease most incident to a republican government.”¹⁷⁹ Needless to say, the necessary global civic republican theory has not yet been fashioned,¹⁸⁰ but it is clear that civic republicanism’s potential for addressing non-market values has already caught the attention of domestic theorists.¹⁸¹ Indeed, only a republican theory accounting for transnational interest group politics could also account for the probable superiority of “legal,” as opposed to international relations theory, approaches to globalization at a time when the state will remain the most important actor in global politics.¹⁸² In other words, only republicanism respects both the center and the periphery. More importantly, only civic republicanism respects both cosmopolitan and nationalist loyalties, for the problem of dual or multiple loyalties will surely become a central fixture in virtually all trade-related issue areas, perhaps even the most sensitive national security areas,¹⁸³ of the emerging structure of global governance.

This article’s proposal for an agreement on the recognition and enforcement of judgments that works as a baseline for the negotiation of tariff bindings is demonstrably superior to the private law approach of the Hague Conference on Private International Law. It takes into account the dynamic dimensions of the relationship between substantive WTO law and the domestic and global political processes that increasingly form the dual criteria for national negotiating positions. It recognizes the need for states to build domestic political support for the WTO through judiciaries capable of giving effect to private rights beyond

178. See generally COMMISSION, OUR GLOBAL NEIGHBORHOOD, *supra* note 61, at 25-62 (1995) (report of elite group of global notables, inter alia, discussing the role of private and non-governmental organizations in the emerging global political process).

179. THE FEDERALIST NO. 10 (James Madison).

180. See generally NICHOLAS GREENWOOD ONUF, THE REPUBLICAN LEGACY IN INTERNATIONAL THOUGHT (1998) (describing the loss and emerging rediscovery of civic republican conceptions of global community as the foundation for international law); but see John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 918-19 (1996) (analogizing post-Cold War Bretton Woods institutions to 19th century U.S. free trade federalism, offering a conception of global governance as a regime of very limited government).

181. See generally Jane B. Baron and Jeffrey L. Dunoff, *Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory*, 17 CARDOZO L. REV. 431 (1996) (noting the “unlikely convergence” of anti-market perspectives in “such diverse contexts as environmental ethics, civic republicanism, and commodification theory”).

182. See Peter J. Spiro, *Globalizations, International Law, and the Academy*, 32 N.Y.U. J. INT’L L. & POL. 567, 586-87 (2000).

183. See generally Linda Mabry, *Multinational Corporations and U.S. Technology Policy: Re-thinking the Concept of Corporate Nationality*, 87 GEO. L. J. 563 (1999) (discussing the U.S. legislative response to the tension between national security and other interests in the production and control of highly sensitive U.S.-origin technology and the increasingly transnational identities and perspectives of multinational U.S. firms producing such technology).

mere parchment declarations. Most important, it recognizes that in building a global city-state, the *civitas maxima* of classical republican political theory, this political dimension must be coupled with the additional legal requirement that, under the imperative of avoiding globally-enforceable trade sanctions, the remedies of domestic legal systems must be enforceable everywhere the global political community extends.