

**Synthesizing Rationalist and Constructivist Approaches to International Organizations:
Lessons from the WTO and WHO**

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International organizations (IOs) are usually seen as secondary actors in world politics. States create these institutions and endow them with resources to serve their own, national purposes. Such a view accurately depicts many aspects of the state-IO relationship, but it does not tell the complete story. IOs – particularly the officials who comprise their staffs or bureaucracies – have a capacity for independent action that is not readily captured by existing theories of international relations. To date, this capacity has emerged most concretely in the European Union, where the staff often pressure states to follow through on their commitments to the organization's mandate (Alter 1997; Pollack 1998; Schimmelfennig 1999). More significantly, some IOs independently seek changes in the organization's mandate and the procedures used to carry out that mandate. Prior to the SARS epidemic, for example, the World Health Organization (WHO) did not issue travel warnings or have the authority to enter a country to determine whether a government was adhering to established practices to reduce communicable diseases. Prior to a World Trade Organization (WTO) case against the United States, non-state actors did not enjoy standing in the WTO dispute settlement process. Analysis of these cases reveals that the primary non-state actors that staff each IO – the WHO's medical professionals and the WTO's judges – launched both sets of changes. Staff preferences in both cases reflected the organization's social or organizational context. Neither IO could advance its preferences without the implicit or explicit support of some member states, but both IOs were able to shift policy away from the states' preferences and toward its own. These examples paint a complex picture in which non-state actors, IO bureaucrats, can have an independent impact on international relations. This paper seeks to identify the conditions under which such outcomes are likely.

Traditional understandings of IOs have difficulty explaining IO autonomy. Realist

approaches see IOs as little more than reflections of state interests (Mearsheimer 1994/1995). Neoliberals similarly accord IOs little agency, since they tend to view these institutions as bodies of rules or procedures rather than as actors (Keohane 1984). More recently, some scholars working in the liberal tradition have offered important insights derived from Principal-Agent (PA) theory. These rationalist approaches (Hawkins et al. 2003; Pollack 1997) identify institutional conditions that enable IOs, the agents, to escape the control of states, the principals. Since these approaches assume that IO and state preferences diverge, however, they provide only a limited understanding of IO preferences. Constructivist approaches (Barnett and Finnemore 1999; Coleman and Barnett 2004; Alter 2004) overcome this problem, but they have yet to delineate the conditions under which IO staffs with independent preferences actually can achieve them. This oversight reflects the tendency of constructivist arguments to focus only on the IO and to offer limited insight into the corresponding actions and capacities of states. The strengths and weaknesses of rationalist and constructivist approaches suggest that a synthetic theoretical approach may yield significant insight into the issue of IO autonomy. Such a “bridge-building” effort, as Alexander Wendt (2001) concludes, can bring increased causal depth to each perspective.¹

In this paper, we combine rationalist and constructivist insights to identify the conditions that enable IO bureaucrats to escape the control of member states and, more specifically, to change the IO’s mandate or procedures. We present a standard sequencing approach. First, we draw insights from constructivist approaches that emphasize the role of organizational culture and social context more generally to explain the origins of IO preferences. Second, we analyze two features of the IO’s contractual environment, the policy instruments or organizational

¹ For a similar position see, Katzenstein, Keohane, and Krasner 1998, 462 and Fearon and Wendt 2002, 52.

capacity delegated by states to the IO and the voting rules that structure the relationship among member states, to explain whether and how the staff can achieve its independent preferences.

The paper proceeds in four parts. Part one explores the question of why and when IOs develop independent preferences. Part two investigates the question of when and to what extent the contractual environment provides IOs the ability to implement their preferences. Part three explores the ability of an IO's administrative element to translate its preferences into action in case studies of the WHO and the WTO. The conclusion discusses the paper's central theoretical and empirical findings.

I. IO Preferences

Why should an IO possess independent preferences? More specifically, why should the IO's administrative element—its “supportive administrative apparatus” (Abbott and Snidal 1998, 4) comprising the personnel appointed to facilitate member state coordination and implement the international body's mandate—hold preferences distinct from those of the states that created it? Students of IOs have approached this question in several ways. Realists and neoliberal institutionalists focus largely on states and, so, do not explore IO preferences.² PA theorists (see Hawkins et al. 2003) assume agents' preferences and assume that they will conflict with those of the principals, since the problem PA theory seeks to overcome is the potential for agents to shirk or slip the control of their principals. As Michael Barnett and Martha Finnemore (1999, 705-6) note, many rationalist approaches assume that IOs' staffs are self-interested actors who seek to secure their own survival through an increase in their resources or authority and these goals are

² For an important exception, see Abbott and Snidal (1998). Keohane (1984, ch. 10) accords significant agency to the International Energy Agency, but it is not clear how this discussion fits within the parameters of his theory.

likely to come at the expense of the member states (see Nielson and Tierney 2002). In this respect, PA theories do not conceptualize IOs as independent actors, whose preferences may be shaped in complex ways by internal organizational dynamics or the environment in which they operate. Some rationalist scholars, however, recognize the need to explore the context of the state-IO relationship to understand states' willingness to cooperate in international institutions (see Moravcsik 2000; Milner 1997; Sandholtz 1996). Still, this line of research remains state-centric. It provides a very narrow conceptualization of institutions, moreover, and fails to entertain "the possibility that the effects of institutions reach deeper, to the level of interests and identity" (Checkel 1998, 329).

Scholars working in the constructivist tradition offer a more detailed exploration of IO interests and preferences, locating their origins in an organization's social context. A central feature of the social context emphasized by constructivists is the organization's internal culture. Organizational culture embodies "a set of collectively held prescriptions about the right way to think and act" (Legro 1997, 36). Such a shared worldview emerges from officials' professional norms and expertise. The fundamental goal of the IO staff remains survival, but unlike the rationalists' conceptualization, constructivists see survival in terms of the organization's efforts to advance the organization's mandate. The staff's goal, in the words of Liv Coleman and Michael Barnett (2004, 3), is "to produce proper policy," by "adapting existing rules and assuming new tasks that allow [the organizations] to be more efficient and effective at their... mandates." How the staff interprets its mandate reflects its particular professional background and area of expertise.³ The staff's training provides it with an understanding of which policy

³ For this reason, not all IOs will form independent preferences. Only those administrative elements comprising professionals or experts are likely to form independent preferences. Those IOs staffed by member state

tools, procedures, and initiatives are more or less appropriate options in any given situation. Since IOs comprise different divisions with different professional expertise, multiple organizational cultures may develop within a single IO. As a consequence, the staff's preferences are unlikely to be monolithic; which set of preferences matters at any given time is a function of the specific environmental triggers and which element of the IO is involved.

The social norms associated with the organizational culture produce countervailing pressures on staff's preferences. Which preferences emerge depends on how the staff conceptualizes its identity and the role pressures associated with it. In particular, the staff is concerned about its image in the eyes of others thought to be legitimate. As Alastair Ian Johnston (2001, 499-500) writes, "[t]here is considerable evidence that identification with a group can generate a range of cognitive and social pressures to conform.... The most important microprocess of social influence, or at least most relevant to international relations theory given the status of language in state discourse, is the desire to maximize status, honor, prestige—diffuse reputation or image—and the desire to avoid a loss of status, shaming, or humiliation or other social sanctions." Such status or legitimacy concerns may lead the staff's preferences to diverge from member states, if the staff comes to identify itself as part of the international community that the IO's mandate serves. The staff may come to see itself not simply as the agent of states, but also as a member of an international community delegated the responsibility of overseeing the community's values. The WHO, for example, is the "trustee of the public health of the people of the world" (Alter 2004); the judges presiding over the WTO's Appellate Body are not simply agents of the member states; they also are caretakers for international

representatives or seconded officials are less likely to share a common worldview. For this argument see, Cortell and Peterson 2004.

society of the international treaty that seeks to facilitate fair and free trade. The logics of appropriateness associated with serving a particular international social purpose or normative value leads the IO to understand its job in ways that may at times run counter to states' preferences.

By contrast, the IO's preferences may hew more closely to those of the member states if the staff sees itself primarily as dependent on states for the agency's existence and resources. In this case, the staff will seek to fulfill its mandate in a manner consistent with member states' preferences. In effect, how the staff seeks to survive is not simply a function of an internally generated organizational culture; it also reflects the IO's subordinate status. The staff thus may experience conflict between the behavior it interprets as consistent with its professional obligations and the behavior it sees as appropriate given its subordinate role vis-à-vis member states. This tension can temper the staff's tendency for independence.

The foregoing indicates that various social contexts create different understandings of appropriate actions, pulling the IO staff to form independent preferences and pushing it to conform to member states' preferences. Which set of dynamics takes precedence in any given case remains a task for empirical investigation, since the salient legitimacy concerns will hinge on the broader environment in which the IO operates. Such contingency reduces the precision of a constructivist explanation of preferences; the perspective nonetheless provides "a heuristic pool of [related] explanatory factors that can guide our attention to relevant factors in a particular case study" (Fehl 2004, 367).

Constructivists' focus on social context illuminates the sources and content of IO preferences. Nevertheless, this perspective cannot identify the conditions that enable the IO staff to achieve its independent preferences. Addressing this question necessitates a focus on the

design of the particular IO and its relationship with member states. PA theory includes such a focus and shows that whether and to what extent an IO can achieve its preferences depends largely on the mechanisms that the member state principals design to constrain their agent.

II. The Contractual Design of the Member State-IO Relationship

The central objective of PA theory is to understand the consequences of delegation relationships and, in particular, the conditions under which principals are best able to get agents to fulfill the delegation contract as the principals intended. PA theorists generally expect some costs to emerge from any delegation, but they focus their attention on the most significant agency losses referred to as “agency slack.” Slack takes two primary forms. Shirking occurs when the agent chooses not to expend its efforts on its assignment, and slippage happens “when an agent opportunistically shifts policy away from its principal’s preferred outcome and toward its own preferences” (Hawkins et al. 2003, 4).

We address this second form of agency slack. More specifically, we seek to identify the scope conditions that enable an IO’s staff to initiate and advance a particular type of slippage, change in the IO’s institutional design. An IO’s design encompasses its formal structures, the tasks delegated to it, and the formal and informal rules or procedures the IO follows in fulfilling its mandate (see Tierney and Weaver 2004). The IO’s charter generally serves as an approximation for members’ intentions regarding their anticipated activities for a specific IO. Since member states can alter an IO’s institutional design without officially modifying its charter, we also focus on members’ public statements regarding the IO’s expected mission,

mandate, responsibilities, and the appropriate procedures for undertaking them.⁴

Agency slippage may take two forms. First, an IO may exhibit autonomy; that is, its administrative element may take unilateral actions outside those procedures established in the delegation contract. Such autonomy may include concrete reforms to the IO's mandate, changes to existing procedures, and/or the creation of new ones. Alternatively, autonomy may take the form of specific actions that contravene and alter existing procedures, even when no formal changes are made to existing rules. In other words, autonomy includes both *de jure* and *de facto* changes in the IO's design, including its mandate and the procedures used to implement that mandate. Regardless of their form, specific actions may be considered autonomous so long as: they involve the staff's unilateral use of its material and normative resources; the actions run counter to the intentions of the collective membership; and the membership cannot overturn the action.

Second, an IO may agenda-set; that is, the agent may persuade the member states to act. These actions—for example, the approval of a new reform of the IO's mandate—are triggered by the staff but approved by the membership. In agenda setting, the staff successfully lobbies its members to alter the terms of the delegation contract, for example, by granting the IO greater discretion. In such cases, the agent acts on its initiative and achieves its preferences, although it does so by convincing the principals of the wisdom of its proposals.

In a seminal work, D. Roderick Kiewiet and Mathew McCubbins (1991, 27-34) describe four institutional mechanisms that can limit undesired IO agency: the design of the contract between the principal and the agent; screening and selection mechanisms that assess the technical expertise and political bias of potential staff; monitoring and reporting requirements

⁴ For a similar approach see, Barnett and Finnemore 1999, 716.

that help balance the information advantage enjoyed by agents; and institutional checks that invest multiple agents with countervailing interests. PA theory provides a simple and elegant model of the potential for IO independence and states' capacity to limit agency losses: where effective and cost-efficient means of monitoring and sanctioning runaway or recalcitrant IOs exist, member states' preferences are likely to determine IO behavior.

Some PA theorists indicate that other factors condition the efficacy of control mechanisms. Some studies show, for example, that IO autonomy depends largely on the extent of agreement among principals. If the parts of a collective principal do not speak with a single voice--that is, if there exists significant preference heterogeneity--the agent can exploit the disagreement and implement its own preferences (Kiewiet and McCubbins 1991, 26-27; Nielson and Tierney 2002; Pollack 1997, 2003; Thatcher and Stone Sweet 2002, 6). At the same time, however, preference heterogeneity is likely to characterize the membership of most intergovernmental organizations to some degree, so its existence does not identify whether or how such differences actually matter for activating oversight mechanisms. Other PA theorists maintain that the efficacy of control mechanisms depends on the functions delegated to the agent (Tallberg 2000). Different types of IOs--i.e., courts, banks, regulators, or bureaucracies--will provide member states with recourse to dissimilar control mechanisms and give supranational institutions differing strategies to advance their agendas.⁵ Together, these arguments suggest that the impact of enforcement mechanisms may hinge on the IO's institutional design, particularly procedures for reconciling preference heterogeneity and functions delegated to the IO.

PA theory tells us, then, that two central variables explain an IO's ability to act on its preferences. First, the IO's organizational capacity, a feature of the delegation contract, captures

⁵ For an earlier approach along these lines see, Cox and Jacobson 1973.

how much direct control states maintain over the IO. Mathew McCubbins and Talbot Page (1987, 411-13) identify three *ex ante* structural arrangements that restrain agents: (1) the scope of the agent's mandate, or the issues that the agent is authorized to handle; (2) the policy instruments available to the agent to implement its mandate, including budgetary and informational resources and specific tools like information gathering and dissemination, rule creation, rule supervision, and adjudication (also see Jacobson 1984, 83); and (3) the procedures that an agent must follow to use its policy instruments. Agents with broader mandates and greater policy instruments will find more opportunities to exhibit independence. Such agents nevertheless may lack the capacity for autonomy, since this capacity hinges on the procedures agents must follow to use the resources and policy tools at their disposal. In the international arena one question is paramount, whether IOs have the authority to employ policy instruments in the fulfillment of their mandate without the specific, prior approval of the member states. In general, then, an IO's organizational capacity depends on the degree of discretion the members have delegated to the administrative element in the delegation contract or, conversely, the extent to which states have written detailed rules for IOs to follow in their fulfillment of the mandate (Hawkins et al. 2003; Keohane et al. 2000); Tallberg 2000, 846).⁶

Organizational capacity varies along a continuum and may vary within a single organization across various aspects of the mandate. Through recontracting, moreover, an IO's

⁶ Organizational capacity is measured differently from the dependent variable: it uses the charter or similar agreement to identify the degree of discretion granted to the IO's staff in its specific areas of competence. The dependent variable focuses on the staff's actions and whether these actions conform to states' expectations for the IO's mandate (e.g., do the staff's actions identify problems or solutions that would be considered new or different in light of the charter's tenets and procedures?). Such actions may modify or fill voids left in the delegation contract. It also is possible that the staff may use its grant of discretion to modify that grant. We measure such a possibility by using the original grant of discretion as the baseline for the independent variable at time₁ (does the charter provide the staff with discretion?), as well as the baseline to determine the existence of a change at time₂ (has the staff taken actions without permission and have these actions resulted in changes to its existing organizational capacity?).

organizational capacity also may change over time. When decision rules provide the organization significant leeway in the use of its policy instruments—that is, when the IO’s actions are not subject to the prior approval of the members—the agent has been delegated the discretionary capacity to fulfill its mandate. When decision rules provide detailed instructions and limitations on how the organization should pursue its mandate—and especially when the administrative element must seek member approval for its actions—the IO’s ability to use its resources and tools is contingent. Some students of international organization might suggest that only those institutions with significant discretionary capacity have been delegated authority, but this claim overlooks the fact that even IOs with more conditional authority are granted the faculty to implement the principals’ decisions and often to decide how to implement them.

The second explanatory variable derived from PA theory is the structure of control or voting rules governing states’ attempts to oversee the administrative element. These rules structure the resolution of preference heterogeneity among principals and determine members’ ability to approve IO behavior, sanction their agent, or reach consensus on a new delegation contract. The structure of control varies along a continuum measuring the distribution of voting authority across the member states. On one end is a structure characterized by unanimity or consensus, in which all members must agree and any one can reject a proposed action. The midpoint in the continuum is majority rule, while super majorities disperse authority to a greater extent because they accord an equal role to a larger number of members. A slightly more concentrated structure of control emerges when a minority or a committee of members can oversee the IO’s actions. The most concentrated structure comprises a single state, which exercises *de jure* authority over the IO, most likely through heavily weighted voting rules.

Contemporary IOs illustrate this range. Voting authority is dispersed in several such

organizations. In the WTO, control is highly diffuse since decision rules are based on consensus among the WTO's 146 members. In other IOs, a less than unanimous majority of members is used to oversee the organization's actions. The WHO uses a majority or supra-majority voting system, depending on the issue, and the EU employs a qualified majority voting system for its members' relationship with the Commission. No contemporary IO approximates a structure with highly concentrated authority. Those that come closest--the International Monetary Fund and the United Nations Security Council--concentrate veto power in a minority of members, but disperse authority for approval of an action across a majority of members.

One additional form of structure of control is possible: no state or group of states, no matter how large, possesses authority to oversee the administrative element. When member states believe that a delegated task is likely to produce few concrete outcomes, anticipated or unanticipated, and/ or that it would be costly for states to oversee the IO, they are relatively unlikely to institutionalize state control. In other cases, states may value a neutral or apolitical IO and seek to make their commitment to its mandate credible (see Alter 2004). In these cases, states "delegate broad, open-ended authority to *trustees* to govern in their stead." Such agents enjoy unlimited discretion and even may "govern those who have delegated in the first place" (Thatcher and Stone Sweet 2002, 7). Constitutional courts illustrate this process. The European Court of Justice (ECJ), for example, is empowered to interpret authoritatively the Treaty of Rome for both European citizens and the member state governments.

Interaction Among the Institutions

In this section, we explore the interaction effects of the two institutions for the type and extent of independence an IO's staff can exercise. Our argument is based on two related

assumptions: Members of an IO possess heterogeneous preferences on at least some issues; and this preference heterogeneity is directly, if imperfectly, related to the number of states in the IO. Table 1 depicts the two variables' effects for the type of agency slippage – autonomy or agenda setting – that an IO's staff can wield.

*Table 1:
Institutional Design and the Potential for IO Slippage*

		Structure of Control		
		Dispersed	Concentrated	None
Organizational Capacity	Contingent	No IO slippage	Agenda setting possible	Not an empirical possibility
	Discretion	IO autonomy possible	Agenda setting possible	IO autonomy possible

An IO's staff is best able to translate its preferences for procedural changes in organizations with discretionary capacity and voting rules that disperse control. Thanks to its organizational capacity, the staff enjoys the discretion to fulfill its mandate as it sees fit and can take unilateral actions that modify existing procedures. This capacity reflects dynamics produced by a dispersed structure of control: it requires that members with diverse preferences reach consensus on the need to overturn the administrative element's actions. Reaching consensus may be difficult given that the collective principal accords multiple members a potential veto. If rules of unanimity also apply to re-contracting, the administrative element's unilateral actions are likely to endure over time.

Although less common, an international organization that enjoys discretion and operates without a structure of control also enjoys the capacity to operate autonomously. Whether the staff actually chooses to do so depends on which social context infuses its preferences; if the

staff understands its identity as emerging from a social context in which the staff is dependent on the member states, then the likelihood that the IO will seek to alter its procedures is diminished. Otherwise, if the staff's professional expertise or the larger community it represents become most salient, then member states can hinder the IO's autonomy only after the fact through alterations in the delegation contract. Yet those focusing on "trustee" relationships maintain that such actions are unlikely, since states create such agents because they value their independent expertise and the legitimacy associated with it.⁷ Karen Alter (2004, 8) concludes, for example, that "it is often more effective for states to seek to influence trustees by appealing to them in the terms of their mandate as a trustee rather than [with] threats and sanctions.... Thus, we enter the world where 'persuasion' and 'legitimacy of behavior' matters more than 'tools of control'..."

Even when IOs are not capable of autonomously changing the IO's procedures, they may play important agenda-setting roles. In organizations characterized by contingent or discretionary capacity and a structure of control that concentrates voting authority, the staff possesses little capacity for autonomy. Sanctions and the possibility for reversal are credible, since members can readily agree on the need to stop undesired actions. Such a situation may lead to tacit control for the principal, since "the more effective the control mechanisms employed by the principals, the less overt sanctioning we should see, since agents rationally anticipate the preferences of the principals and the high probability of sanctions... and adjust their behavior accordingly" (Pollack 2002, 202). The administrative element nevertheless possesses the ability to engage in agenda-setting behavior, regardless of whether it possesses contingent or discretionary capacity. Thanks to the concentrated structure of control, moreover, the staff needs to persuade relatively few states of the merits of an action. The administrative element's

⁷ For a useful discussion of trustee relationships see, Majone 2001.

influence in such conditions hinges on the extent to which it can persuade the relevant member states of the merits of its position through principled or strategic claims. These coalitional dynamics parallel those thought to influence the role of transnational actors in domestic politics. Mathew Evangelista (1995) and Thomas Risse-Kappen (1994) argue that the degree of centralization of a country's decision-making structure plays a key role in determining transnational actors' influence. These actors will be more influential in centralized structures that concentrate political authority, since fewer policymakers need to favor the private actors' positions for them to have an impact.

The prospects for agenda setting increase as the IO's discretionary capacity increases, since the organization can fulfill the delegation contract without seeking members' approval. States expect, in other words, that the administrative element will independently fulfill its mandate. Discretionary capacity then provides the agent with an understanding of which strategies are most effective in fulfilling the members' goals; the agent also comes to understand the obstacles to fulfilling these aims. This experience empowers the agent when the administrative element recommends to the principal modifications in the IO's design. Discretion becomes a resource, giving the administrative element's proposals greater credibility in the principals' eyes. As Coleman and Barnett (2004, 11) point out, many IOs "are conferred authority for a variety of reasons and this authority not only causes others to defer to their judgment but also gives them some autonomy from unwanted demands." As suggested above, this agenda-setting capacity is more likely as the structure of control becomes more concentrated.

The less discretion agents have to fulfill their mandates and the more dispersed the structure of control, the greater state principals' ability to control their agents. In such cases, the organization exercises little autonomy, since any action by the administrative element requires

prior approval, which is likely to be difficult given the large number of states required to approve a modification to the delegation contract.

Our two-step argument, in sum, suggests that IO independence can be understood by synthesizing insights from constructivist and rationalist perspectives. First, a focus on an IO staff's organizational culture sheds light on the source of the IO's preferences and why they may diverge from member states. Second, a focus on the IO's institutional design provides insight into whether and to what extent the IO's staff can advance its preferences for changes in the IO's institutional design. In particular, the staff is most likely to achieve its preferences for change when voting authority is highly dispersed and the administrative element enjoys significant discretionary capacity. Even when IOs lack such autonomy, they may influence states through their agenda-setting capabilities, which is most likely when the IO possesses significant discretionary capacity and voting authority is highly concentrated.

III. Case Studies: The WHO and WTO

This section explores the plausibility of the argument in case studies of the WHO and the WTO. Our case selection strategy reflects Mark Pollack's (2002, 216) conclusion that "the real methodological lesson to draw from past studies is that principal-agent analysts should employ carefully chosen, comparative case studies featuring variation across the hypothesized independent variables; and that the case studies should be disaggregated in ways that allow us to both multiply the 'observable implications of theory' and trace the hypothesized causal mechanisms at work." To increase the number of individual observations, first, we explore the WHO and WTO over time and across different aspects of their mandates. Second, the two cases offer variation across the two institutions. The WTO has a highly dispersed structure of control,

whereas the WHO uses a majority rule structure for most issues and also employs no structure of control in others. Each case also exhibits variations in organizational capacity within the IO across different aspects of their mandates. Third, the longitudinal case studies provide multiple decision points to explore the source of the IOs' preferences and whether they can best be explained by constructivist explanations or more traditional rationalist concerns associated with interest maximization. Although we have sought to increase the rigor of our case selection, their inherent limitations mean that we can use them only to illustrate the plausibility of our argument; the cases do not test all possible combinations of the institutional variables, we cannot isolate these variables' independent effects, and there is limited evidence available to document the preferences of key IO decision-makers.

The World Health Organization

Established in 1948 as the “directing and coordinating authority on international health work,” the WHO is charged with “the attainment by all peoples of the highest possible level of health” (WHO 1948, Preamble). The 192 member states are represented within the IO's highest policy-making body, the World Health Assembly (WHA), on a one-state, one-vote formula. WHA decisions are taken by majority rule, although “important questions”--regulations, resolutions, and amendments to the constitution--require a two-thirds majority of members present and voting (WHO 1948, Art. 60).

The WHO's founders created an administrative element--including the director-general, almost 4,000 staff, and an Executive Board--comprised largely of doctors and other public health experts. The Executive Board is elected by the WHA and includes 32 technical experts whose role is to advise and facilitate the WHA's work. According to WHO doctrine, members of the

board serve as individuals, not as national representatives. The Executive Board nominates and the WHA appoints the WHO's director-general, who oversees a secretariat of nearly 4,000 health and other experts. These officials staff the IO's office in Geneva and six regional offices, as well as thirteen laboratories in ten countries.

The principals invested the WHO's administrative element with largely contingent authority. In the formulation of the WHO's budget and spending priorities, for example, regional and international staff, and particularly the director-general, play substantial, but constrained roles. The WHO has a two-year budget of more than \$2 billion.⁸ Countries submit requests for technical assistance, and these applications are forwarded to regional offices, where the regional director formulates a budget based on guidelines provided by the director-general. Once approved by the regional committee, the budget goes to the director-general, who drafts a budget for the entire agency. S/he may suggest new programs or levels of activity, allocate funds among the regions, or veto staff initiatives. The WHO's administrative element enjoys little discretionary authority in this area, however, since the WHA must approve the final budget with a two-thirds majority of members present and voting. More importantly, the WHO's founders vested the WHA, not the staff, with the authority to apportion expenses to the member states, distribute resources, and set policy by passing resolutions, regulations, and conventions.

The WHO staff enjoy much greater discretion to fulfill its delegated function to "provide information, counsel and assistance in the field of health" (WHO 1948, II, 2,q). WHO staff gather and disseminate information, issue recommendations, and publish expert reports. Regional directors appoint all field personnel in their regions, and the director-general appoints

⁸ Regular contributions from member states comprise nearly \$900 million, and voluntary state contributions and funds from other organizations account for another \$1.3 billion.

expert committees and scientific groups to study particular issues (Jacobson 1973, 201-02). These staff monitor and study a number of international health concerns. Members of expert advisory panels report on developments within their fields, and expert committees and scientific groups study specific issues. These committees, which are appointed by the director-general, must consent to any changes in their reports. Like less formal documents, moreover, reports require only the director-general's approval to be published (Jacobson 1973, 202). These reports, which may not be overturned or altered by any coalition of states, no matter how large, guide WHO personnel and medical professionals worldwide, and they often are reported widely in the media, thereby amplifying their effect. The administrative element, in short, enjoys significant discretion on information gathering, dissemination, and evaluation, although it has no means of enforcing its recommendations.

Traditionally, the staff's discretion is somewhat more narrowly defined in the realm of infectious disease surveillance, where it operates within the confines of the International Health Regulations (IHR). Originally adopted in 1959 as the International Sanitary Regulations and renamed in 1969, the IHR are designed to "ensure the maximum security against the international spread of diseases with a minimum interference with world traffic" (WHO 1983, Foreword). The regulations require member states to notify the IO of outbreaks of three diseases: cholera, plague, and yellow fever. This limited notification requirement was intended to form "the backbone of WHO's international surveillance activities on the diseases subject to the IHR" (Fidler 2004, 33). It also means, however, that states have no legal obligation to report any other diseases, and the WHO has no legal authority to disseminate information obtained by any means other than the required disease reporting by governments.

The WHO's staff is comprised largely of medical professionals who, not surprisingly,

share a common worldview that often has led it to voice preferences at odds with those of the member states. These occasions have been limited, however, and, even when the IO has sought change, its limited discretion and the relatively dispersed nature of voting authority have curtailed its autonomy. After 1960, when the primary recipients of WHO technical assistance--African, Asian, and Latin American states--achieved the two-thirds majority within the WHA necessary to pass resolutions, regulations, and recommendations, WHO actions sometimes reflected the staff's independent preferences. Nevertheless, the administrative element was able to turn its preferences into policies only by allying with developing states within the WHA. For both strategic and principled reasons--the growth of the agency and the health of the developing world--the staff sometimes appealed to member states for support on these initiatives. These appeals often resonated with national delegates, the majority of whom represented developing states that would receive the WHO's assistance.

The alliance between parts of the administrative element and developing states led the organization in several new and controversial directions, but the staff's ability to alter the terms of the delegation contract was limited. First, on the director-general's recommendation the WHO's budget skyrocketed, despite the vocal resistance of the major donor states (Jacobson 1973, 182, 200).⁹ At the same time, however, the director-general's freedom of action on this issue was relatively short lived. In 1967, rather than risk the withdrawal of major donor support, the director-general negotiated guidelines for budgetary growth with key states. The director-general still formulates the budget but by agreement that annual growth will not exceed a certain percentage of the present budget.

⁹ States generally contribute to the budgets of the specialized agencies at the same rate they are assessed for the United Nations budget. The United States provides about 25% of the WHO's budget, while Japan, Germany, Russia, France, and Britain all contribute 5% or more.

Second, on the staff's recommendations, the WHO has expanded its mandate into new health areas, often over the objections of major donors. In 1970, for example, WHO personnel issued guidelines for drug manufacturing quality control despite U.S. opposition. The administrative element also pushed the regulation of the distribution of pharmaceuticals in the Third World (Mingst 1992, 216-18). WHO and UNICEF staffs collaborated for years on an International Code of Marketing of Breast-milk Substitutes and, despite opposition by the Reagan administration, in 1981 the WHA passed the new code (Sikkink 1986; Mingst 1992, 216-17). Largely on the initiative of then Director-General Gro Harlem Brundtland, and relying heavily on expert reports, the WHO began work in 1998 on an international framework convention on tobacco control. The treaty--the first ever negotiated under the WHO's auspices or devoted entirely to a health issue--was completed in 2003, despite opposition by countries with significant tobacco interests (Lazurus 2003; Williams 2003). The administrative element issued recommendations in each of these cases, but it was able to expand the institution's mandate into new arenas only by allying with a two-thirds majority of states within the WHA.

Third, WHO staff sometimes encouraged members of the WHA to assert themselves on a number of explicitly "political" issues. Despite U.S. complaints that the issues were outside the WHO's mandate, the WHA endorsed expert reports on the dangers of nuclear weapons and the epidemiological effects of the Vietnam War (Jacobson 1973, 187; Williams 1987, 63). Most notably, expert reports and WHA resolutions sought a voice for the IO in the Middle East conflict, criticizing Israeli action, demanding WHO visits to occupied territories, and supporting the Palestinians' right to self determination (Jacobson 1973, 187; Mingst 1992, 223; Wells 1991, 9; Williams 1987, 64). In each case, the administrative element's reports and recommendations may have helped move the IO into new issue areas not envisioned by the founders or included in

the mandate, but such change occurred only when a majority of members agreed.

WHO staff have not always advocated, and sometimes have opposed, expansion of the agency's mandate. Both epistemic and bureaucratic incentives sometimes compel caution. First, the doctors and other health professionals on the staff tend to share a medicalized view of the IO's role that would exclude more political issues. As former director-general Brundtland put it, "We can set standards in areas where there is a reasonable agreement about facts and technical medical content. But on the more political front about how to finance healthcare, or what part of the gross domestic product should go to health--all of these issues are deeply political and they certainly are not decided, in any way, by an international institution with just under 4,000 people" (Global War 2002, 26). Second, the staff's shared commitment to the survival and prosperity of its agency has led it to oppose efforts to politicize the agency. In 1983, then Director-General Mahler warned developing states in the WHA:

If we allow ourselves to be lured astray into fields beyond our constitutional competence I am afraid we will find ourselves in those very minefields that we have been trying to avoid in the interest first and foremost of the health of the deprived peoples living in the Third World. None of us would want to blow up our Organization nor would we want to lose the tremendous prestige we have gained as an Organization of 160 member states, able to cooperate with one another for the health of people everywhere without distinction of race, religion, political beliefs, social or economic development--indeed, what our very Constitution demands of us (Williams 1987, 63).

In 1989, then Director-General Hiroshi Nakajima negotiated a compromise when the issue of recognition of the Palestinian Liberation Organization (PLO) threatened to tear the organization apart. The United States promised to withhold its contribution, one-fourth of the WHO's annual

budget, if the PLO's membership application were approved. Nakajima lobbied WHA members to put the health of the agency before politics, and brokered a compromise (Lewis 1989; Randal 1989). In this case, the WHO's staff acted as a brake on change that might have damaged support for the IO among states that were less privileged by the structure of control but important to the financial health of the organization.

Finally, in one area—disease surveillance and response—the WHO has exercised greater autonomy. Here, the staff's discretion to issue expert advice and the lack of an oversight rule meant that the staff could alter the institution's basic procedures, although it rarely sought to do so. The administrative element had long struggled to operate within the IHR and fulfill its mission to “stimulate and advance work to eradicate epidemic, endemic and other diseases” (WHO 1948, II, 2,g). Only three diseases required notification; states routinely violated the regulations by failing to report cases of these diseases; and, later, the IHR proved irrelevant to the growing AIDS pandemic (see Fidler 2004, 35-41). With the approval of the WHO Committee on Communicable Diseases and the Executive Board, Director-General M. Candau in 1970 exceeded the IO's authority by reporting an outbreak in Guinea of cholera, a disease covered by the IHR, without official notification or permission from the Guinean government. The government had ignored repeated appeals by the director-general and refused to report the outbreak, so Candau took matters into his own hands and publicly disseminated information from other sources. In making the public announcement, Candau acknowledged that he was acting outside the IHR but claimed that his actions were necessary to fulfill the IO's functions as outlined in Article 2 of the WHO constitution (Fidler 2004, 64). In short, he sought to alter the terms of the delegation contract but to justify his actions in terms of that contract.

Although there was little fallout from this action, the administrative element exercised

caution and never again exceeded the IHR in this manner. Beginning in 1995, however, it began lobbying member states to revise the regulations. In particular, the WHO sought to augment disease reporting by national governments with epidemiological information acquired from non-state sources and to acquire the authority to report on “public health emergencies,” rather than just specific diseases (WHO 2002). By the mid-1990s the WHO was under attack for its inability to deal effectively with international health issues and particularly for its relative lack of progress on HIV/ AIDS (Godlee 1994a; 1994b). Improvements in information technologies provided one way to enhance the WHO’s performance. In 1994 a non-governmental organization (NGO) initiated an internet-based reporting system, the Program for Monitoring Emerging Diseases (ProMED), which was designed to provide early warnings of infectious disease outbreaks. While the process of revising the IHR inched forward, in 1997 the WHO began using an NGO network, the Global Public Health Intelligence Network (GPHIN) to search non-governmental sources for evidence of disease outbreaks, including many diseases not covered by the IHR. In 1998 the IO began operating its own Global Outbreak Alert and Response Network (GOARN) (Fidler 2004, 63, 66-67). In short, from 1998 to 2001, when the WHA formally approved the gathering of epidemiological information from non-governmental sources, the administrative element was both setting the agenda for change and simultaneously operating outside the delegation contract. In this context, in February 2003, the WHO was alerted to the outbreak of a new disease, SARS. The IO’s behavior in this case constituted a significant break with prior patterns and established new procedures in at least two ways. First, on the basis of non-governmental information suggesting both that the epidemic might have originated in Guangdong province, China and that it was continuing unabated, and in the face of Chinese intransigence, WHO officials repeatedly and publicly accused the Chinese government of

denying their staff access to the province (e.g., Ying and Savadove 2003). According to David P. Fidler (2004, 96), “[i]n an unprecedented move, WHO went on the offensive against China,” which was under no obligation to report cases of a disease not subject to the IHR. “WHO’s public criticism of the Chinese government represented a radical break with the traditional diplomacy that characterizes relations between the Organization and member states” (Fidler 2004, 97).

Second, under Director-General Brundtland’s leadership, on 12 March the WHO issued a rare global health alert. In March and April, moreover, the IO issued a series of unprecedented emergency alerts warning travelers to avoid Hong Kong, Toronto, Taiwan, and parts of China in an effort to curb the spread of the disease. WHO officials imposed conditions for lifting the travel advisories, which were widely perceived to injure tourism and trade in affected countries and which provoked complaints from China and Canada. As Fidler (2004, 139-40) concludes, the WHO was acting not just outside the existing delegation contract, but also “well beyond the authority it was proposing to write into the revised IHR. . . . [T]he most radical of all the WHO recommendations—the geographically-specific travel advisories—were directed at travelers not WHO member states. For the revised IHR, WHO proposed that it would issue ‘recommendations for actions by Member States.’”

As was true when some staff and developing states sought to expand the WHO’s mandate into political issues, staff preferences reflected conflicting pressures. Some staff objected to the decision to issue the travel alerts, for example. If they were wrong about the severity or the crisis, they reasoned, the legitimacy of the IO would suffer (Cohen, Naik, and Pottenger 2003, A6). For most staff, however, their role as health professionals compelled them to advocate strong action. When asked where the WHO’s mandate for this action came from, for example,

current director-general J. W. Lee replied, “[I]n a sense our mandate is . . . the truth” (National Public Radio 2003).

WHO’s administrative element succeeded in changing the organization’s procedures and mandate. After the epidemic receded, the member states acknowledged this change. In late May 2003, the WHA unanimously approved a resolution requesting that in the future the director-general “take into account reports from sources other than official notifications . . . [and] alert, when necessary and after informing the government concerned, the international community to the presence of a public health threat that may constitute a serious threat to neighbouring countries or to international health” (WHA 2003). In short, the WHA now had member state approval for what it had long been doing—utilizing non-governmental information—and for IO actions like those in the SARS case—extending its mandate beyond the specific diseases listed in the IHR.

During the more than half a century that the WHO has existed, its administrative element has often advanced independent preferences. Its ability to exercise autonomy and alter the terms of its delegation contract varied significantly across different substantive areas, however. In many areas, such as the budget or attempts to expand the IO’s operational activities into new substantive areas, the IO staff often lacked consistent preferences for radical change because of fear that such action would hurt the IO’s legitimacy and survival. When the staff did advocate change, it was handicapped by an institutional context that included a contingent grant of authority and a two-thirds decision rule. Once developing states achieved a two-thirds majority in the WHA, it became possible for the staff to exercise agenda-setting capability by convincing states in the WHA to endorse change. Even if the administrative element played a decisive role on these issues, and it is impossible to know whether it did based on available evidence, the

staff's influence on the IO's mandate and procedures depended on its ability to convince a majority or supra-majority of member states of the wisdom of its preferences. In infectious disease surveillance and reporting, however, the IO exercised true autonomy. Here, the staff expressed clear and consistent preferences for broader powers across a wider range of diseases and public health emergencies. The staff played an agenda-setting role in altering the IHR, but it was able to go further autonomously to alter the institution's design. The nature of the problem, controlling infectious disease, meant that the WHO's role remained one of information collection and dissemination—announcing an outbreak in Guinea or China, warning travellers against visiting Toronto or Tapei. Such actions required no approval from member states to have legitimacy with the medical community and the wider public, a process further amplified by media coverage.

The World Trade Organization

Established in January 1995, the WTO seeks to liberalize trade among its 146 members across a range of issues. It is headed by a Ministerial Conference that includes all member states. A General Council, comprising official representatives from each state, oversees the dispute settlement process and the organization's Secretariat. Member state control of the General Council operates on the basis of consensus. If any member objects to a decision, that objection can block the action.¹⁰

The Secretariat's staff of 550 civil servants includes mainly trade economists, international trade lawyers, and translators, and is headed by a director-general. The Secretariat

¹⁰ The organization identifies situations requiring voting, which is based on the principle of one-state, one vote. Depending on the issue, voting is by a majority of two-thirds or three-quarters. Changes in the organization's central principles demand unanimity. See WTO 1994, Art. IX, footnote 1).

comprises twenty-two divisions reflecting its various functional, informational, and liaison roles. These entities have no decision-making power and, instead, support members by providing expert information, organizing meetings, and providing technical assistance to developing country members. Some (Shaffer 2001, 56) have likened the professional staff to an epistemic community, since its members share similar beliefs about the validity of neoclassical economics and the importance of trade liberalization. The secretariat staff may express these preferences, but it finds it difficult to act on them given its contingent capacity and the need for consensus among the large membership to modify the delegation contract. It is possible for the Secretariat's staff to act as honest brokers in disputes between members, particularly when it comes to the agenda for the negotiating rounds. More commonly, the Secretariat's multiple divisions can wield influence over each other, since they provide each other with resources "due to their different professional training, experience, and commitments" (Ehlermann 2003, 473).

Members grant the IO's administrative element greater discretion in its role in the organization's Dispute Settlement Understanding (DSU). States delegate authority to resolve trade conflicts to a two-tiered dispute resolution body that enjoys discretionary capacity. The first tier comprises three-person dispute resolution panels constituted for individual disputes. Panels determine whether a member's actions conform to WTO rules and may not reduce or add to the rights granted to members by the trade agreements. Panels are delegated additional tasks, including determining whether the losing party has complied with the dispute settlement recommendations and, if not, whether the level of compensatory retaliation is appropriate (WTO 1994, DSU article 22).

Panelists are drawn on an ad hoc basis from a small group of officials, many of whom represent member states, yet serve in their individual capacity. Members created several

screening and selection mechanisms to reduce unintended outcomes at this dispute settlement level: members select the pool of potential panelists and may reject a panelist chosen for a dispute involving them; and panelists may not be nationals of the parties to a dispute unless the disputants agree otherwise. Moreover, disputants have the right to screen a panel's report in an "interim review" and comment on its findings and conclusions.

Secretariat officials assist the panels in their work and "it is thus safe to assume that the influence of these officials on the work of individual panels can be considerable" (Ehlermann 2003, 473). These officials can try to agenda set by persuading panels that heretofore unidentified trade practices are unacceptable. Ultimately, however, members must approve panel decisions. The Dispute Settlement Body (DSB), comprising all members of the General Council, employs a reverse consensus procedure. That is, all members must agree not to adopt a panel ruling (WTO 1994, DSU, Article 16 and 17). In practice, the automatic nature of appeal to the second tier of the dispute settlement system limits the likelihood that panels will take action outside the delegation contract. In addition, panelists "want to avoid having their decisions reversed by the Appellate Body (AB)," the permanent, second tier of the DSU, for fear that they will not be reappointed to a future panel (Alter 2003, 790).

The AB is a standing seven-member entity, assisted by a small secretariat, comprising a director and about a dozen lawyers. The AB's members are "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government" (WTO 1994, DSU, Article 17, 3). Presently, the members include five law professors, a former executive director of the Asian Development Bank, and one retired government official. These officials serve four-year terms, renewable once, and are chosen so as to be broadly representative of the membership.

The AB is delegated authority only when the parties to a dispute do not agree with a panel's ruling. It has the power only to uphold, modify, or reverse a panel's findings and may rule only on elements of the panel's legal interpretation appealed by one of the parties. It then lacks remand powers. AB members may seek information from outside experts and are expected to interpret the trade treaty "in accordance with customary rules of interpretation of public international law" (DSU 3.2). Like the panels, the AB's rulings may not decrease or increase a member's treaty obligations. The AB's decision takes effect within 30 days, unless the DSB decides by consensus not to adopt the AB's ruling. In this respect, it is possible for members to vote separately on specific parts of the AB's reports (Ehlermann 2003, 479).

The treaty mandates certain procedures for the AB to follow, including setting strict time limits for reaching decisions and requiring that individual opinions be rendered anonymously. However, the treaty also calls on the AB to develop its own working procedures for appellate review, thereby enhancing its discretion.¹¹ Claus-Dieter Ehlermann (2003, 478), an original AB member who served from 1995 to 2001, concludes that the Working Procedures generally have contributed "to the independence of the Appellate Body, both in an objective and subjective sense." The first general provision (WTO 2003a) provides that "[i]n the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by [the working procedures], a[n AB] division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and the [working procedures]." According to Ehlermann (2003, 478), another working procedure, "the system of exchange of views" among the seven members, has

¹¹ The AB works out these procedures with the chair of the DSB and the WTO director-general. The approval of the latter two officials is not required.

“contributed greatly to consistency and coherence of decision making” and “to the high degree of collegiality among . . . members.” In fact, while the treaty enables individual AB members to offer dissenting opinions, to date the AB has made decisions by consensus.

The DSU grants the panels and AB discretionary capacity. They are expected to offer an independent interpretation of members’ compliance with their treaty obligations and are empowered to recommend how members can make the trade practice in question compatible with their WTO obligations. Panels and the AB need not seek approval before issuing rulings or other interpretations of the international trade treaties. In exercising their discretion, the panels and AB have agreed with complainants, finding in some cases that defendants have passed domestic laws or regulations that contravene WTO rules and impair or nullify the benefits accorded to other members by the treaty. In fulfilling this role, the dispute settlement bodies often become allies of less powerful states, ruling on several occasions for example against the United States. The losing parties to disputes may see the outcomes as undesirable, but the actions of the panels and the AB reflect the original delegation contract as delineated in the treaty.

Thanks to the AB’s organizational structure, it has developed its own independent identity. The reflections of James Baachus, one of the original seven members of the AB, shed light on his eight-year experience, particularly the source of his and his colleagues’ preferences. He became the AB’s chairman and longest serving member in 2002. In this capacity, he participated in more appeals than any other member. His reflections remain carefully worded, since the AB’s rules of conduct limit its members’ capacity to expand on previous decisions and deliberations beyond what is contained in their existing, collective judgments. Baachus (2003, 6-7) maintains that although the seven members of the AB come from different cultures and

countries, they “share one guiding philosophical approach that shapes [their] perspective and, therefore, shapes as well the results of our work.”

On the Appellate Body, we believe that a willingness to engage in reasoned and reasonable deliberation through the principled practice of mutual criticism is one of the keys to creating and sustaining human freedom. We also believe that one of the best ways to enlarge the circle of human sympathy is by enlarging the circle of our thinking through the considerable power of mutual, rational thought. We believe that, by listening to one another, we can learn from one another, and we can learn also to trust one another. We believe, too, that trust sought and secured in this way can serve the cause of human freedom Our “range of duty” is to the entire population of all of the 146 Members of the WTO. Five billion people are with us whenever we sit together at our table Their needs, their longing, their passions, their aspirations for a fuller and truer humanity – their fondest hopes for freedom – are all ever with us as we reason together in our efforts to help the Members of the WTO clarify and uphold their international treaty obligations. We believe that, by reasoning together, we can best serve all their hopes for freedom.

Bacchus’s depiction of the collective process suggests that the AB quickly formed a distinctive understanding of its role and the most appropriate actions associated with it.

At the same time, the AB members recognized that their “shared goal from the very start was the establishment of an independent, quasi-judicial institution that would serve all the Members of the WTO equally and effectively.” As Baachus (2003, 7 and 5) continues:

The Members of the WTO. . . have invented the WTO dispute settlement system as a way of upholding the trading rules on which they have all agreed. They have invented the

small circle of the Appellate Body as a way of helping them clarify their obligations under those rules so they can uphold them within the ever-enlarging circle of the world trading system. . . . Thus, we each serve all 146 members of the WTO.

The AB operates, it seems, with a keen sense that it is part of two social contexts: one involving the member states' governments and a second involving those individuals affected by the WTO's rules and international trade more generally.

The impact of these two contexts on the AB's preferences and actions can be illustrated when the AB deals with procedural issues that arise during its efforts to resolve trade disputes. It is in this realm that the AB is delegated the most discretion. In the "Banana case," for example, one procedural issue emerged regarding whether members could be represented by private lawyers. Baachus (2001) explains:

One of the procedural issues raised on appeal was whether members of the WTO – specifically, a group of the developing countries in that appeal—could have private counsel in the WTO appellate proceedings. Basically, we concluded that it was not for us to second-guess a member of the WTO on who that member wanted to include in its delegation in an Appellate Body proceeding. So we let in the lawyer. . . . [T]his was the first time in the fifty years of experience under the GATT, and then the WTO, in which a country had been represented by private counsel.¹²

The AB's report (WTO 1997, 11) provides an additional reason for the decision: "given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body

¹² The text lacks pagination. The "Banana case" is officially the *European Communities – Regime for the Importation, Sale, and Distribution of Bananas (EC- Bananas III)*. See WTO 1997.

proceedings.” In effect, the ruling would enable the AB to do its job more effectively. The AB then examined the relevant rules in a manner that the vast majority of states had not. While some states, including the United States, did not support this decision, overturning it was difficult given the reverse consensus rule. St. Lucia, the state desiring to use private counsels, would support the AB’s decision. This procedural change underscores the AB’s ability to advance its own understanding of appropriateness, even when doing so produces an unanticipated transformation in the IO’s standard practices. Private counsels now participate in all levels of dispute proceedings (see Steger 2002, 778-9).

A similar outcome emerged in another situation involving NGOs’ participation in dispute settlement. Their potential involvement had been debated during the Uruguay Round negotiations, but a majority of members opposed the inclusion of friend-of-the-court (*amicus*) briefs in the treaty creating the DSU. The AB ruled (see WTO 1998; WTO 2000a) that the DSU grants it and panels the discretion to accept *amicus* briefs from NGOs. This action reflected the AB’s sense of commitment to the wider population affected by the WTO (see too Ehlermann 2003, 484). As Baachus (2004, 4) subsequently explained, “[t]he opportunity to submit *amicus* briefs can give those from the wider world the chance to have their say – without in any way undermining the essential intergovernmental nature of such proceedings. *Amicus* briefs can provide an additional and valuable point of view – as they do for judiciaries throughout the world.” A vast majority of states opposed this decision, noting that the AB’s actions altered members’ obligations. The representative from Mexico (see WTO 2001, 14) voiced the position of many developing states.

There was no provision [in the Treaty] which provided at any point, even implicitly, for submissions from any person or entity other than the parties or third parties to the appeal.

. . . When the DSU provisions were being negotiated in the Uruguay Round, there were already proposals that panels should be able to receive *amicus curiae* briefs. If such a possibility had not been included in the DSU provisions, it was because WTO members had decided that it was not appropriate. In other words, Members were not faced with a situation where they had accidentally created a legal lacuna as a result of not having foreseen that this kind of problem might arise in the future. Members had deliberately decided not to include that possibility in the DSU.

There was not unanimous opposition to the AB's action, as several states, including the United States, supported NGO participation. Without a consensus to overturn the AB's unilateral, if implicit decision to amend the Treaty, the AB was able to act autonomously. Ehlermann (2003, 485) points out that until three-quarters of the members agree to change the treaty's terms on this issue, "nobody can – or should – expect the Appellate Body to change its interpretation of the DSU."

A different outcome emerged in November 2000, however, when the AB established a procedure for the submission of friend-of-the-court briefs for the Asbestos case. The AB division's secretariat posted the procedure on the IO's website and the Secretariat's External Relations Division sent "an email . . . to the subscribers of the NGO bulletin as per established procedure" (WTO 2000b, 2000c, 9). The AB (WTO 2000c, 1) claimed authority for this action from the WTO's treaty and justified its decision "in the interests of fairness and orderly procedure in the conduct of this appeal," the empowering language of the Working Procedures. The Secretariat (WTO 2000b, 3) explained its action by reference to "its own procedures for increasing the knowledge and understanding of interested individuals and institutions" about the IO. These actions occurred after the 1999 Seattle demonstrations and increasing complaints

about the institution's lack of transparency and distance from non-state actors, which the procedures were envisioned to help satisfy. Most members considered both entities to have overstepped their competencies, however, by entering into procedural areas reserved for states.

A special session of the General Council convened to address the matter. Based on members' negative reaction, the Chair of the Council (WTO 2000c, 28) instructed the AB to "exercise extreme caution in future cases until Members had considered what rules were needed." This constrained response reflected the consensus-voting rule, which made it difficult for members to overturn the AB's action, since a minority of members supported it. The AB subsequently rejected all 17 *amicus* briefs that followed its new procedures (WTO 2001). One explanation for the AB's restraint reflects the ongoing review of the DSU and the possibility that the members would fix loopholes in the DSU to rein in the AB. Yet since a minority of members welcomed the participation of NGOs, the consensus-voting rule makes such reforms unlikely.¹³ A more persuasive explanation emerges, in Ehlermann's words (2003, 484), from the fact that "this decision had given rise to a major diplomatic row" and, in doing so, called into question the AB's status and reputation. In a revealing reflection written after the episode, Bacchus (2002, 1035) suggests that the AB soon realized that it had overstepped its competence and, thus, lost some legitimacy in the eyes of its key constituency: "it is neither my role nor my place to make suggestions to the Members of the WTO about their rule-making. The Members have established an effective system for settling disputes about existing rules. It is for the Members of the WTO to decide how best to establish an effective system for making new rules."¹⁴ Member

¹³ In fact, members remain at odds over appropriate reforms and recently postponed the deadline for revisions. See WTO 2003b.

¹⁴ Baachus (2004, 4) continues to believe in the need for such rules as he explained in a speech following his departure from the AB: "The participation of *amicus curiae* in dispute settlement proceedings . . . can – and should

state protest became a more significant determinant of the AB's status than its mandate to bring procedural clarity and fairness.

The WTO's structure of control and the AB's discretionary capacity put the AB in the position to advance its independent preferences when its seven members form them. Their preferences reflect their identification with at least two social contexts. Determining which context will drive the AB members' preferences is difficult given the decision rules the members employ. As Baachus (2002, 1030-1) explains:

I have been joined around our table in Geneva by distinguished international jurists of the very highest quality. They have been students of history and philosophy as well as students of economics and jurisprudence. They have been seekers of the better world that yet can be—if we succeed in our shared efforts to secure the international rule of law. . . . Given this, we seven are very much of the view that we owe it to the Members of the WTO, and to all the people of the world that we seven serve through the Members of the WTO, to examine every last shade of nuance of every single legal issue that is raised in every single appeal.

Yet the uproar over the AB's procedures for NGOs indicates that the AB is likely to subordinate its concern for the people of the world when the vast majority of member states do not view its actions as legitimate.

Conclusion

This paper combines rationalist and constructivist insights to identify the conditions that

– be governed and controlled in a reasonable way by reasonable rule – as it is in judiciaries throughout the world. The rule used by the Appellate Body several years ago in the asbestos case is a good place for the Members of the WTO to start in addressing this issue.”

enable IO bureaucrats to exercise autonomy. We develop a standard sequencing model in which constructivism explains the origins of IO preferences, while rationalism explains the ability of IOs to achieve their preferences. The two case studies provide strong empirical support for the plausibility of the approach developed here. In doing so, they indicate that realist and neoliberal approaches provide incomplete explanations of IO behavior, since these perspectives tend not to view the IO's staff as an independent actor. While the resources and design of an IO may reflect the distribution of power in the system and the norms associated with the IO may foster cooperation among its member states, these dynamics do not provide the analytical tools to understand why and when the WHO's staff of health professionals or the members of the WTO's Appellate Body developed their own preferences and achieved them. Rationalist PA approaches focusing on the institutional context underpinning the member state-IO relationship shed light on the conditions that enable an IO's staff to advance its independent preferences, but provide little insight into the sources of these preferences. Constructivists usefully draw our attention to the impact of the IO staff's organizational culture and its larger social context as the source of the staff's preferences, but they fail to identify the conditions under which the staff can achieve its preferences. A synthetic approach combining these two perspectives provides a more complete account of when an IO is likely to become an independent actor in world politics.

The cases do not paint a picture of the WHO and WTO as rogue actors. At the same time, however, the cases clearly show that under some institutional conditions the staffs of the two IOs were able to advance their interests as they defined them. For the IOs' staffs to advance their independent preferences often necessitated the explicit or tacit support of one or more member states given that the two IOs were created by states to serve their members' interests and the members supply the staff with the organization's material resources. The autonomy

exercised by the WTO's Appellate Body, for example, on the question of NGO or private counsel participation in the dispute settlement process required that at least one state agree with the AB. Otherwise, the members could convene the Dispute Settlement Body and vote to reverse the action. The difficulty of gaining the agreement of all member states enabled the AB's unanticipated, unilateral decisions to stand. The organizational capacity and the structure of authority within the WHO allowed the staff autonomously to disseminate infectious disease information without explicit member state support. These actions were unanticipated and clearly outside the delegation contract, but the member states did little to modify the delegation contract to hinder similar, future unilateral actions. While the actions were outside the delegation contract, in other words, the states viewed them as a desirable means of protecting the international community against highly infectious diseases like SARS. In fact, member states perceived the threat from SARS to be so great and the possibility of other similar public health threats emerging in the future so likely that they ultimately altered the terms of the delegation contract in 2003 to institutionalize the staff's understanding of appropriate procedures.

A constructivist approach usefully draws our attention to the impact of an organization's social context on preference formation. It is unclear, however, which social context will drive the staff's preferences at any given time. In this respect, preference formation remains contingent. This point is well documented by Bacchus's characterization of the AB's decision-making process: which identity matters depends on a careful reading of the issues specific to each case. Yet when push came to shove, Bacchus and his colleagues recognized that their legitimacy hinged most significantly on the reactions of member states, hence their about-face on the NGO procedures even though they saw these as being appropriate for the judicial process they were overseeing. This finding is consistent with others' (e.g., Alter 2004) expectations for

international judicial bodies' preference formation. A similar dynamic also characterized the actions of the WHO staff. The institutional context provided its staff with the opportunity to advance autonomous actions with respect to infectious diseases. At the same time, the staff's shared commitment to the survival and prosperity of the agency led it to oppose efforts to politicize the agency because such efforts might diminish the IO's legitimacy in the eyes of its member states.

The empirical evidence also indicates the importance of a factor not raised in the explanation developed here: the media. The staff of the WHO was empowered by the organization's institutional context, but its authority was amplified by the media's interest in the WHO's recommendations. This non-organizational platform helped to disseminate the staff's preferences to members of the larger international community who could act on the staff's recommendations. In the process, the media helped the staff to bypass state-established procedures by having a direct impact on the constituency designed to benefit from IO: the affected populations. The medical and health expertise of the WHO led the media to be interested in what the staff had to say and in circulating the staff's recommendations as a public service. The media certainly was interested as well in the Appellate Body's decisions, but its dissemination of the AB's reports could not in and of itself bring about a change in the organization's mandate or procedures.

In sum, the approach offered here provides a blueprint for a synthetic approach to the study of IO institutional change. Our two-step approach focusing on preferences and the institutional conditions for achieving them provides an avenue for blending rationalist and constructivist understandings of the conditions that enable and constrain IO autonomy.

Sources

- Abbott, Kenneth and Duncan Snidal. 1998. "Why States Act Through Formal International Organizations." *Journal of Conflict Resolution* 42,1 (February): 3-32.
- Alter, Karen. 2004. "International Courts are not Agents: The Perils of the Principal-Agent Approach." Paper prepared for presentation at the International Studies Association Conference, Montreal, Canada, 17-21 March.
- _____. 2003. "Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System." *International Affairs* 79,4: 783-800.
- _____. 1998. "Who are the Masters of the Treaty? European Governments and the European Court of Justice." *International Organization* 52,1 (Winter): 121-47.
- Baachus, James. 2004. "Open Doors for Open Trade: Shining Light on WTO Dispute Settlement." Remarks to the National Foreign Trade Council, Mayflower Hotel, Washington, DC. 29 January.
- _____. 2003. "Leaky's Circle: Thoughts from the Frontier of International Law." Address to the Institute of Advanced Legal Studies, University of London, London, 10 April.
- _____. 2002. "Table Talk: Around the Table of the Appellate Body of the World Trade Organization." *Vanderbilt Journal of Transnational Law* 35,4 (October): 1021-39.
- _____. 2001. "The Role of Lawyers in the WTO." *Vanderbilt Journal of Transnational Law* 34,4 (October): 953-62.
- Barnett, Michael and Martha Finnemore. 1999. "The Politics, Power, and Pathologies of International Organizations." *International Organization* 54:4 (Autumn): 699-732.
- Burley, Anne-Marie and Walter Mattli. 1993. "Europe before the Court: A Political Theory of Legal Integration." *International Organization* 47,1 (Spring): 41-76.
- Checkel, Jeffrey. 1998. "The Constructivist Turn in International Relations Theory." *World Politics* 50,2: 324-48.
- Cohen, Margot, Gautam Naik, and Matt Pottinger. 2003. "Inside the WHO As It Mobilized For War on SARS," *Wall Street Journal*, 2 May, p. A1.
- Coleman, Liv and Michael Barnett. 2004. "Crafting Design at Interpol." Paper prepared for presentation at the Conference on Theoretical Synthesis in the Study of International Organizations, Washington, DC, 7 February.
- Cortell, Andrew P. and Susan Peterson. 2004. "Institutional Design and IO Independence: NATO, the World Health Organization, and the World Trade Organization." Paper prepared for presentation to the International Studies Association Conference, Montreal, Canada, 17-21 March.
- Cox, Robert W. and Harold K. Jacobson, eds. 1973. *The Anatomy of Influence: Decision Making in International Organization*. New Haven: Yale University Press.
- Ehlermann, Claus-Dieter. 2003. "Experiences from the WTO Appellate Body." *Texas International Law Journal* 38: 469-88.
- Evangelista, Matthew. 1995. "The Paradox of State Strength: Transnational Relations, Domestic Structures and Security Policy in Russia and the Soviet Union." *International Organization* 49,1 (Winter): 1-38.
- Fearon, James and Alexander Wendt. 2002. "Rationalism vs. Constructivism: A Skeptical View." In *Handbook of International Relations*, eds. Walter Carlsnaes, Thomas Risse and Beth Simmons. London: Sage.

- Fehl, Caroline. 2004. "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches." *European Journal of International Relations* 10, 3 (September): 357-94.
- Finnemore, Martha. 1996. *National Interests in International Society*. Ithaca: Cornell University Press.
- Global War. 2002. Interview with Gro Harlem Brundtland, director-general of the World Health Organization, *Foreign Policy* (January/ February): 24-36.
- Godlee, F. 1994a. "WHO in Crisis." *British Medical Journal* 309, 1424-28.
- _____. 1994b. "WHO in Retreat: Is It Losing Its Influence." *British Medical Journal* 309, 1491-95.
- Hawkins, Darren, David A. Lake, Daniel Nielson, and Michael J. Tierney. 2003. "Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory." Paper prepared for presentation at the Delegation to International Organizations Conference, San Diego, CA, 19-20 September.
- Jacobson, Harold K. 1984. *Networks of Interdependence: International Organizations and the Global Political System*. 2nd ed. New York: Alfred Knopf.
- _____. 1973. "WHO: Medicine, Regionalism, and Managed Politics." In *The Anatomy of Influence: Decision Making in International Organization*, ed. Robert W. Cox and Harold K. Jacobson. New Haven: Yale University Press.
- Johnston, Alastair Ian. 2001. "Treating International Institutions as Social Environments," *International Studies Quarterly* 45,4 (December): 487-515.
- Katzenstein, Peter, Robert Keohane, and Stephen Krasner. 1998. "'International Organization' and the Study of World Politics." *International Organization* 52,4 (Autumn): 645-85.
- Keohane, Robert O. 1984. *After Hegemony*. Princeton: Princeton University Press.
- Keohane, Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution: Interstate and Transnational. *International Organization* 54,3: 457-88.
- Kiewiet, D. Roderick and Mathew McCubbins. 1991. *The Logic of Delegation*. Chicago: The University of Chicago Press.
- Lazurus, David. 2003. "Bush Tries to Weaken Tobacco Treaty." *San Francisco Chronicle*. 30 April, A1.
- Legro, Jeffrey. 1997. "Which Norms Matter? Revisiting the Failure of Internationalism." *International Organization* 51,1 (Winter): 31-63.
- Lewis, Paul. 1989. "U.N. Health Agency Seeks Compromise on P.L.O." *New York Times*, 7 May, A5.
- Majone, Giandomenico. 2001. "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance," *European Union Politics* 2,1: 103-22.
- McCubbins, Mathew D. and Talbot Page. 1987. "A Theory of Congressional Delegation." In *Congress: Structure and Policy*, eds. Mathew McCubbins and Terry Sullivan. Cambridge: Cambridge University Press.
- Mearsheimer, John. 1994/95. "The False Promise of International Institutions." *International Security* 19,3 (Winter): 5-49.
- Milner, Helen. 1997. *Interests, Institutions, and Information: Domestic Politics and International Relations*. Princeton: Princeton University Press.
- Mingst, Karen A. 1992. "The United States and the World Health Organization." In *The United States and Multilateral Institutions: Patterns of Changing Instrumentality and Influence*,

- eds. Margaret P. Karns and Karen A. Mingst. London: Routledge.
- Moravcsik, Andrew. 2000. "The Origins of Human Rights: Democratic Delegation in Postwar Europe," *International Organization* 54,2 (Spring): 217-52.
- National Public Radio [NPR]. 2003. "Disease Gatekeeper." *The Connection*. Available at www.theconnection.org/shows/2003/08/20030808_a_main.asap
- Nielson, Daniel L. and Michael Tierney. 2003. "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform." *International Organization* 57,2 (Spring): 241-76.
- Pollack, Mark. 2003. *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*. Oxford: Oxford University Press.
- _____. 2002. "Learning from the Americanists (Again): Theory and Method in the Study of Delegation." *West European Studies* 25,1 (January): 200-19.
- _____. 1997. "Delegation, Agency, and Agenda-Setting in the European Community." *International Organization* 51,1 (Winter): 99-134.
- Randal, Jonathan C. 1989. "PLO Defeated in Bid to Join World Health Organization." *Washington Post*. 13 May, A1.
- Risse-Kappen, Thomas. 1994. "Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures, and International Institutions." In *Bringing Transnational Relations Back In*, ed. Thomas Risse-Kappen. Cambridge: Cambridge University Press.
- Sandholtz, Wayne. 1996. "Membership Matters: Limits of the Functional Approach to European Institutions." *Journal of Common Market Studies* 34,3 (September): 403-29.
- Schimmelfennig, Frank. 2001. "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union." *International Organization* 55,1 (Winter): 47-80.
- Shaffer, Gregory. 2001. "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters." *Harvard Environmental Law Review* 25,1: 1-93.
- Sikkink, Kathryn. 1986. "Codes of Conduct for Transnational Corporations: The Case of the WHO/UNICEF Code." *International Organization* 40,4 (Autumn): 815-40.
- Steger, Debra. 2002. "The Rule of Law or the Rule of Lawyers?" *The Journal of World Investment* 3,5: 769-92.
- Stein, Rob. 2003. "WHO Gets Wider Power to Fight Global Health Threats." *Washington Post*. 28 May, A15.
- Tallberg, Jonas. 2002. "Delegation to Supranational Institutions: Why, How, and with What Consequences?" *West European Politics* 25,1 (January): 23-46.
- _____. 2000. "The Anatomy of Autonomy: An Institutional Account of Variation in Supranational Influence." *Journal of Common Market Studies* 38,5 (December): 843-64.
- Thatcher, Mark and Alec Stone Sweet. 2002. "Theory and Practice of Delegation to Non-Majoritarian Institutions." *West European Politics* 25,1 (January): 1-22.
- Tierney, Michael and Catherine Weaver. 2004. "Principles of Principals? The Possibilities for Theoretical Synthesis and Scientific Progress in the Study of International Organizations." Paper prepared for presentation at the Conference on Theoretical Synthesis in the Study of International Organizations, Washington, DC, 7 February.
- Wells, Robert N. 1991. *Peace by Pieces*. Metuchen, NJ: Scarecrow Press.
- Wendt, Alexander. 2001. "Driving with the Rearview Mirror: On the Rational Science of

- Institutional Design.” *International Organization* 55,4 (Autumn): 1021-53.
- Williams, Frances. 2003. “Tobacco Treaty ‘Could Be In Force Within a Year.’” *Financial Times*. 22 May, 12.
- Williams, Douglas. 1987. *The Specialized Agencies and the United Nations*. New York: St. Martin’s Press.
- World Health Assembly [WHA]. 2003. *Revision of the International Health Regulations*, WHA56.28, 28 May http://whqlibdoc.who.int/wha/2003/WHA56_28.pdf
- World Health Organization [WHO]. 2003. *International Travel and Health*.
- _____. 2002. *Global Crises—Global Solutions: Managing public health emergencies of international concern through the revised International Health Regulations* (Geneva), <http://www.who.int/csr/resources/publications/ihr/en/whocdsgar20024.pdf#Top>
- _____. 1983. *International Health Regulations 1969*, 3rd annotated ed. http://policy.who.int/cgi-in/om_isapi.dll?infobase=Ihreg&softpage=Browse_Frame_Pg42
- _____. 1948. *Constitution of the World Health Organization*.
- World Trade Organization [WTO]. 2003a. Working Procedures for Appellate Review. WT/AB/WP/7. 1 May.
- _____. 2003b. Report by the Chairman, Ambassador Peter Balas, to the Trade Negotiations Committee. TN/DS/9. 6 June.
- _____. 2001. *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products: Report of the Appellate Body*. WT/DS135/AB/R. 12 March.
- _____. 2000a. *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead & Bismuth Carbon Steel Products Originating from the United Kingdom--Report of the Appellate Body*. WT/DS138/AB/R. 10 May.
- _____. 2000b. *European Communities: Measures Affecting Asbestos and Product containing Asbestos--Communication from the Appellate Body*. WT/DS135/9. 8 November.
- _____. 2000c. *General Council--Minutes of Meeting--Held in the Centre William Rappard* WT/GC/M/60. 22 November.
- _____. 1998. *United States: Import Prohibition of Shrimp and Shrimp Products--Report of the Appellate Body*. WT/DS58/AB/R. 12 October.
- _____. 1997. *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*. WT/DS27/AB/R. 9 September.
- _____. 1994. *Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*. Geneva: The GATT Secretariat.
- Ying, Leu Siew, and Bill Savadoce. “WHO Says Mainland Officials Continue to Hinder Investigation.” *South China Morning Post*, 1 April

