

FREE TRADE, SOVEREIGNTY, DEMOCRACY

The Future of the World Trade Organization

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Emerging Constitutional Problems and Substantive Deficiencies

The new dispute settlement system is nearing the end of its “shakedown” phase. Assessments of the technical details of the system and the larger implications of the “judicialization” of the multilateral trade regime have already begun. In addition, the Uruguay Round negotiators mandated a review of the system by the end of 1998. Because of the difficulty in achieving a virtual unanimity of consensus, this review, which was suspended after the WTO Ministerial Conference in Seattle in December 1999, notably failed to produce significant results; and little progress is expected until member states agree to a new round of trade negotiations.¹

In this chapter, we shall analyze constitutional flaws in the dispute settlement system and examine areas where substantive deficiencies are already causing major difficulties for the new system. The chapter begins with a description of the implications and effects of the asymmetry between the efficiency of the dispute settlement system and the inefficiency of the WTO legislative process. Next, the study examines three instances where, after the legislative process failed, the panels and the Appellate Body arguably went on to “create” new law. Then the chapter explores the special difficulties for the DSU presented by two complex regulatory issues: the competition policy challenges that are looming in the services sector, using telecommunications as the example; and the complex mixture of science, risk assessment, and trade policy at the core of decisions relating to food safety, genetically modified organisms, and use of the precautionary principle. The chapter concludes with an analysis of the potential for, and implications of,

major substantive changes in the mandate of the WTO as a result of the use of soft and customary law.

Negotiated Rules versus Judicial Activism

Even during the brief period that the DSU has been operating, a lively debate has emerged regarding important structural or constitutional questions that are inherent in the WTO system. The most important of these constitutional questions can be traced to the asymmetry between the relative efficiency of the decision-making process of the DSU and the practical difficulties inherent in creating new substantive rules and amending or interpreting existing rules. A second, and equally important, question relates to the ability of the DSU to handle complex regulatory issues—particularly where the underlying WTO text is unclear or contradictory and where national systems of regulation diverge markedly in their methods for achieving market-oriented deregulation.

In describing the consequences of this legislative-judicial asymmetry, trade scholar John Jackson has warned of the “constitutional dangers of a tendency for the WTO diplomacy to rely too heavily on the dispute settlement system to correct the many ambiguities and gaps in the . . . Uruguay Round texts.”² Marco Bronckers, a noted European trade lawyer and scholar, echoed these same concerns when he expressed the fear that “governments may too easily think that progress can be made in the WTO *through* enforcement; that litigation in the WTO is a faster, more convenient way to resolve difficult issues than an open exchange at the negotiating table. That is troubling because it undermines democratic control over international cooperation and rule-

making, and it prevents a more broad-based participation of all stakeholders in the formulation of international rules. Litigation is not subject to parliamentary approval.”³

The Problematic Legislative Function. The most productive and fruitful legislative advances in the WTO are undoubtedly a result of the package deals put together at the end of periodic trade rounds. Certainly, the Uruguay Round demonstrated this reality: it established sweeping new rules for services, intellectual property, investment and subsidies, agriculture, and textiles; and it created the new WTO and the dispute settlement system that is the subject of this study.

Relying on major trade round negotiations to create new rules or clarify and amend existing rules is fraught with problems. First, trade rounds occur infrequently, and thus are inefficient vehicles for creating new disciplines in additional program areas. Seven years elapsed between the end of the Tokyo Round and the beginning of the Uruguay Round. Indeed, the more realistic time frame for the creation of new rules would be from the end of Tokyo Round until the *end* of the Uruguay Round, a period of thirteen years. More than six years have passed since the completion of the Uruguay Round in 1994, and the failure during the 1999 Seattle Ministerial Conference to reach agreement on launching a new round means that it will be at least 2002 before the so-called Millennium Round begins. Assuming a three-year time frame for the next round, as many WTO members desire, the total lapsed time for the creation of new rules or the amendment of old rules will be at least nine years. Given the magnitude of the problems and the speed with which technology and global integration are raising major new substantive issues, rule-making by trade rounds is not a viable solution.

The time factor is not the only problem. The nature and characteristics of the rules that emerge from the negotiating process are even more important. Because the WTO is a large and diverse organization, the big package deals negotiated at the end of trade rounds necessarily contain numerous gaps, ambiguities, and even contradictions. This problem was first identified after the 1973–1979 Tokyo Round, which ventured in significant ways into nontariff barriers and behind-the-border domestic rules that impeded trade. But it was the sweeping results of the Uruguay Round—combined with the highly judicialized DSU created at the end of that round—that really brought these issues to the forefront.

A number of commentators have argued retrospectively that the reform of the dispute settlement system took aim at the wrong target. The real problems that emerged with dispute settlement in the 1980s stemmed largely from flaws in the underlying substantive GATT rules. In several prescient analyses just after the new DSU became operational, leading U.S. trade lawyers took note of the dangers and contradictions embodied in the new DSU and the inadequacies in the substantive body of WTO law. In 1995, Judith Bello and Alan Holmer, Washington trade lawyers at the time, pointed out, “Most disputes [under the GATT] . . . were resolved fairly, if not speedily. The significant breakdowns in settling disputes occurred where the substantive rules themselves were inadequate.” In 1996, Alan Wolff and John Ragosta, two other prominent members of the U.S. international trade bar, warned, “A fast-track, binding international litigation procedure cannot yield a satisfactory result where there are no precise or clear substantive rules . . . [and] there are hundreds of unresolved questions in WTO agreements.”⁴

Robert Hudec, who conducted the most extensive academic analysis of the new DSU, made two essential points about the old and the new systems. First, Hudec observed that the old system had received a “bad rap” and that, in fact, between 1948 and 1990, more than 90 percent of decisions were resolved or partially resolved to the satisfaction of the winning party. Second, and more important, Hudec shared the doubts about the adequacy of basic WTO law:

The [dispute settlement] crisis had nothing to do with the strength or weakness of the GATT litigation process. . . . [Arguing that the reform stemmed] from a failure in the litigation procedure is actually sort of a cover-up, an attempt to shift the blame to the GATT’s litigation procedures when in fact responsibility lies in the earlier negotiating failures of the Tokyo Round. . . . The point here is not that the . . . dispute settlement reforms are wrong, but that they are not enough. . . . [A] scaled-down agreement that papers over basic differences . . . is not an evil result, but one in which . . . a strong dispute settlement reform would be an invitation to disaster.⁵

In recent papers and books, WTO legal observers have listed a plethora of major gaps, unclear definitions and articles, and contradictory elements that represent a potential source of painful disagreements among WTO members. These include elements of the subsidies codes; a substantial portion of the language in the trade-related intellectual property rights (TRIPs) agreement; the issue of parallel imports; competition law in the telecommunications agreement; elements of the new antidumping rules; and a number of unanswered questions in the area of sanitary and phytosanitary regulations.

Amendment and Clarification Barriers. Short of major revisions of WTO rules pursuant to trade round negotiations, use of the WTO regular legislative procedures for creating new rules or amending or interpreting old rules is very difficult. As Bronckers

has aptly stated, “Clarifying the rules is practically impossible,” and “[a]dopting new rules is cumbersome.” The reason, as John Jackson has noted, is that after creating sweeping new trade rules and a much more binding DSU, “In the last months of the Uruguay Round negotiations, the diplomatic representatives at the negotiation felt it was important to build in a number of checks and balances in the WTO charter, to constrain decision-making by the international institution which could be too intrusive on national sovereignty.”⁶

Only the Ministerial Conference and the General Council can enact clarifications or interpretations of treaty rules. Interpretations can be adopted only with the support of three-quarters of the overall WTO membership, and such interpretations may not amend the treaty—a change that would be subject to more stringent procedures. To date, no attempt to utilize new interpretations or clarifications to resolve ambiguities in the new WTO rules has been successful.

The process of amending the rules is even more complicated. In most cases, amendments can be proposed by the Ministerial Conference and adopted with the vote of two-thirds of WTO members. If the amendment is determined to affect the rights and obligations of member states, however, then members opposed to the amendment are not bound by it unless three-quarters of the overall WTO membership votes to give them the option of either accepting the amendment or withdrawing from the WTO. Furthermore, amendments to certain rules—those involving WTO decision-making, most favored nation (MFN) status, tariff schedules, and dispute settlement, for example—must be enacted by consensus, which is defined as no individual member dissenting publicly.⁷

Implications for WTO Governance and National Sovereignty

The bottom line, then, given the extreme difficulty of using normal legislative procedures in the WTO, is that the dispute panels and the Appellate Body will be under increasing pressure to legislate through interpretation and filling in the blanks in WTO disciplines.⁸

This is occurring despite the clear injunction in the Uruguay Round text that “recommendations and rulings of the DSB cannot add to or diminish rights and obligations provided in the covered agreements” (DSU Article 3.2).

Some legal scholars applaud this trend as inevitable and regard it as a means of producing greater predictability and clarity in the rules of the international trading system. Thus, Raj Bhala of George Washington University has written, “Like it or not, the distinctions between the judges [of the Appellate Body] as bureaucrats/arbitrators, on the one hand, and as lawmakers/legislators, on the other hand, is crumbling in the WTO. A most obvious symptom of this decay is the Appellate Body’s use of precedent.”

In a series of three comprehensive and exhausting articles, Bhala makes the case that through the increasing use of *de facto stare decisis* (judicial precedent) by the Appellate Body, one can observe “the emergence of an international common law of procedure . . . and an emerging substantive common law.” In his view, judges in the Appellate Body have also repudiated Montesquieu’s theory of judges as “inanimate beings” who merely “pronounce the words of the law.”⁹

Rather, the judges are “not mere passive beings. They are actively involved in construction of the international rule of law. . . . The Appellate Body members work in an arena where the imperfections of ‘legislators’—the trade negotiators who produced the Uruguay Round agreements and all its progeny—are all too plain. They are compelled to

resolve issues that are not addressed adequately, or at all, by the legislators in trade agreements. The adjudicators have no choice but to legislate (at least interstitially).” In the third piece of the trilogy, Bhala argues that at some point in the future, the WTO should amend its rules, establish *de jure stare decisis*, and make Appellate Body reports “a formal source of international trade law.”¹⁰

Similarly, another prolific and distinguished legal scholar, Joel Trachtenberg of Tufts University, has stated, “To understand the role of dispute resolution, one must recognize that dispute resolution is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and governance.” Explaining the theme of an article he wrote in 1999, Trachtenberg stated that it is “intended to suggest the reasons why dispute resolution could be the appropriate place to determine . . . the relationship between trade and environmental values or trade and labor values. . . . [It] is [also] intended to suggest a way to predict when these issues might be better determined through more specific legislative action.”¹¹

Bhala and Trachtenberg are representative of a number of legal scholars who have written to applaud or predict increased lawmaking through the judicial process of the WTO. These analyses, however, often ignore deeper questions of legitimacy and accountability stemming from the “democratic deficit” inherent in this process.

The Democratic Process: International versus Domestic Law. Traditionally, international law—created and controlled by sovereign, independent nations—has consisted of carefully circumscribed obligations and rights with few legal remedies for redress of grievances. A leading eighteenth-century authority on international law, Swiss

diplomat Emmerich de Vattel, was the first to take the principle of national sovereignty as fundamental. A distinct view of international relations and treaties then flowed from this premise. Jeremy Rabkin of Cornell University has described this view as follows: “The relevant ‘law of nature’ was the law that applies in a ‘state of nature’ where there is no common judge and each individual is free to do as he likes, if he does not violate the rights of others. Relations among nations were seen as governed, ultimately, by that law of nature because sovereign nations, acknowledging no higher authority, remained in a state of nature with respect to each other.”¹²

In recent times, the boundaries between international and domestic law have blurred. Still, clear distinctions and differences grow out of the matrix of democratic institutions and practices that surround domestic laws and institutions. The old GATT dispute settlement system avoided some of the potential “democratic deficit” problems that would emerge under the new Dispute Settlement Understanding. Although it evolved over time, the old system remained heavily dependent upon mediation and conciliation for resolving disagreements among GATT members. Most important, decisions of the quasi-judicial panels could be blocked by any GATT member. Consequently, one could argue that the very act of achieving a “consensus” on panel decisions (particularly if it were alleged that these decisions constituted new norms or rules) produced a rough, though highly imperfect, system of representative democracy among GATT contracting parties.

Under the new system, however, the consensus process is reversed, and no individual nation or even a large group of nations can block a panel or Appellate Body

decision once it is handed down. Thus, the WTO is the “supreme court of world trade disputes” and the “top court of the global economy,” in the view of outside observers. And therein is the problem.

International law—and specifically the WTO DSU—lacks the fundamentals of democratic legitimacy that make judicial enforcement palatable in domestic legal systems. Individuals and organizations in the United States and other nations have recourse to democratic procedures to elect representatives, change laws, correct flawed judicial decisions, and remove judges if necessary. Dispute settlement in the WTO, however, is not embedded in such democratic surroundings; the sovereign nations that comprise its membership have only limited recourse against “unconstitutional” decisions by the panels and Appellate Body.

The challenges that international law presents for national democratic norms and practices have been set forth in a thoughtful analysis by Kal Raustiala of the UCLA Law School.¹³ Raustiala suggests that, with regard to democratic theory, two problems are inherent in the workings of international law: its generativity and its insularity. By generativity, Raustiala means the ability of international law to produce new substantive rules or amend old rules through a judicial process, as in the WTO, or through nonconsensual decision-making procedures, as in some environmental agreements (majority or supra-majority rule-making). Insularity can take several forms: it can mean the degree to which the executive (as opposed to the legislature) participates in a particular international institution and its decisions, or it can mean the degree to which the public (individuals, NGOs, and corporations) participates in the international institution.¹⁴

Clearly, generativity and insularity are linked, and this study will argue that the two forms of insularity (executive control and public participation in international institutions) present quite different challenges and require different solutions. Chapter 7 offers recommendations on greater democratic oversight and participation in international institutions by national legislatures (see pages XX-XX), as well as recommendations on participation by NGOs and corporations in the WTO (see pages XX-XX).

Regarding generativity, Raustiala points out correctly that the WTO is one of the “most problematic” international institutions because its “active dispute settlement process . . . elaborates and defines WTO rules and standards *ex post*.” WTO panels and the AB have done this by using an “‘evolutionary’ theory of interpretation” and by incorporating otherwise nonbinding international standards (e.g., food safety standards)—which themselves are evolving—into the binding WTO dispute settlement system.¹⁵

Raustiala notes that in domestic law, generativity by administrative agencies has been reined in through an administrative procedures act, judicial and congressional oversight, and budget control. But he observes that “[s]uch parallel controls [for international institutions] have not been provided.” Further, though domestic courts are generative (and insular), Raustiala concludes that “perhaps the difference between domestic courts and WTO panels is the long acceptance of domestic courts in the larger constitutional scheme of the U.S. and the knowledge that we have transparent, political procedures for staffing them, an active practice of dissent, extensive openness to *amici curiae*, and the means to overrule judicial decisions that do not depend, as in the WTO, on achieving political consensus.”¹⁶

Judicial Creativity

Since the new DSU took effect in 1995, there has been relatively little time for controversial “legislative” decisions to be completed and published. Nevertheless, some actions have already caused concern, even among supporters of the new system. This section will review three difficult issues where, at least in the view of some observers, the panels or the AB have indulged in “judicial creativity.” The three issues of concern are (1) the right of unilateral action against nonproduct-related processes and production methods (PPMs) for imported goods; (2) whether panels or the AB can accept *amicus curiae* submissions; and (3) whether the AB erred in substituting its judgment for that of WTO Councils on matters relating to balance-of-payments issues and regional trading agreements.¹⁷ Clearly, the first two issues, PPMs and *amicus* briefs, are the most politically sensitive and have produced the most divisive reactions among WTO members.

Unilateral Action against PPMs. The issue of PPMs has figured in several cases, including the tuna/dolphin decision and the more recent shrimp/turtle case. The issue revolves around the scope and meaning of Article XX, the WTO rule that sets forth exceptions to WTO obligations, including those related to the protection of health or human, animal, or plant life. Article XX has been the focus of many of the controversies relating to the intersection—and potential clash—of trade and the environment. In many instances, Article XX exceptions are connected to the national treatment obligations of the GATT’s Article III, which mandates that imported goods receive the same treatment as domestic goods.¹⁸

Traditionally, Article III has been interpreted in a manner that would treat products that have the same physical forms as “like” products even if they have been produced in different ways. Thus, no member can give special advantages to a particular product, or discriminate against a particular product, because of the process by which it was produced. Yet in recent years, particularly with the advent of the new DSU, environmental and human health exceptions under Article XX have been subjected to challenges alleging, in part, that discrimination on the basis of the production process has violated national treatment obligations.¹⁹

The Tuna/Dolphin Case. The best known recent case is the 1993 tuna/dolphin case brought against U.S. restrictions on the importation of tuna from Mexico (there were two so-called tuna/dolphin cases; the case discussed herein is tuna/dolphin I). In this instance, the United States had unilaterally stopped imports of tuna from countries that did not protect against the killing of dolphins in tuna nets. Mexico argued first, that this violated GATT’s Article III because tuna was a “like” product with U.S. domestic tuna and with tuna imported from other countries and second, that the U.S. action was an attempt to ban a *process* (i.e., a method of fishing) by banning a product.

In deciding against the United States, a WTO panel pointed out that allowing import restrictions on the basis of differences in process actually amounted to allowing restrictions on the basis of “differences in environmental policies” and that this course would force the WTO to *legislate* comprehensive criteria for judging such policies. The panel stated that “if the contracting parties were to permit import restrictions in response to differences in environmental policies under the General Agreement, they would need to impose limits on the range of policy differences justifying such responses and to

develop criteria so as to prevent abuse.” The panel then stated a central point of relevance for this study: “If the contracting parties were to decide to permit trade measures of this type in particular circumstances, it would therefore be preferable for them to do so not by interpreting Article XX but *by amending or supplementing the provisions of the General Agreement or waiving obligations thereunder*” [italics added]—and not by judicial interpretation through the DSU.²⁰

While the substantive details of the product/process doctrine are not the main concern of this study, it should be noted that the issues raised in these cases are profound and have implications far beyond the environmental protection of tuna, dolphin, or shrimp. As John Jackson of Georgetown University Law School has warned, allowing nations to coerce other nations into replicating the importing country’s production process “is the start of a slippery slope.” And Jackson asks, “What other conditions could be addressed (such as minimum wage standards or gender discrimination) and what other process possibilities should we consider? One could think of thousands of them, and they could become serious obstacles for the trade policies we are trying to promote.”²¹

The Shrimp/Turtle Case. The tuna/dolphin panel’s strong argument against judicial rule-making in this area was challenged—at least implicitly—by a 1998 Appellate Body decision in the shrimp/turtle case.²² In that case, four nations complained about a U.S. ban on the importation of shrimp caught by trawlers that do not employ a special device in their nets to protect sea turtles from being trapped and killed. Once again the issue of the extraterritorial applications of U.S. standards (and processes) was the central question.

The importance of the decision stemmed more from what the AB did not state than from what it actually stated. The Appellate Body judges ruled against the United States on the grounds that its particular solution amounted to “a means not just of unjustifiable discrimination, but also of ‘arbitrary’ discrimination between countries where the same conditions prevail.”²³ The key point was essentially a procedural one—that the United States had erred in giving different deadlines to different nations for compliance with its unilateral action.

The question left open, however, was what would have happened if the United States had applied the standards extraterritorially but in a *nondiscriminatory* manner. The AB did not answer this question directly, but other elements of the decision have led some commentators—including U.S. trade officials—to argue that the Appellate Body, at least in this case, had implicitly endorsed the use of unilateral, extraterritorial sanctions based on PPMs.²⁴

The ruling recognized the validity of “unilateralism” in seeking to implement the rights of some nations under Article XX. Further, it adopted what some observers labeled an “evolutionary interpretation” of Article XX, stating that it had to be “read in light of contemporary concerns of the community of nations about the protection and conservation of the environment.”²⁵

When the full Dispute Settlement Body convened to review the judgment, U.S. trade officials trumpeted their “victory” and asserted that PPMs could be the basis for restrictive trade measures in the future. This provoked outrage from developing country representatives. Thailand responded, “This [decision] was a fundamental and impermissible alteration of the present balance of rights and obligations of Members

under the WTO agreement.” And India argued that if the decision established a precedent, “the door would be open to unilateral measures aimed a discrimination based on nonproduct PPMs.”²⁶

Outside observers worried about the implications for the long-term viability of the DSU have echoed the concerns of the developing countries. Thus, Arthur Appleton, a European trade lawyer who writes frequently on WTO legal issues, argued in 1999 that, while the AB’s decision presented valid substantive arguments, the opinion also bowed in the direction of political expediency and “demonstrated the Appellate Body’s determination to maintain a degree of public support for the WTO among what is frequently termed ‘civil society.’” Appleton went on to state,

The Appellate Body’s decision is sound from a political and policy perspective. . . . That being said, by transgressing certain limits, however impractical, established by the DSU, the Appellate Body risks losing the confidence of certain WTO members. . . . The WTO dispute settlement system depends on member confidence. It will only remain successful if the members believe that the Appellate Body is interpreting the covered agreements as negotiated, as opposed to modifying them. . . . While the [AB] can be expected to make temporary patches for the holes that are discovered in the covered agreements on a case-by-case basis, such ad hoc repair work is no substitute for the consensual modification of these agreements, in particular the DSU, by the members.²⁷

In a study of the WTO and the environment published in 2000, Gary Sampson, a former director of the GATT/WTO, explained,

Perhaps rulings such as this have some short-term merit in finding immediate “solutions” to politically sensitive matters, but in the long term, policy choices as important as the legitimacy of unilateral applications of

trade measures to enforce domestic societal preferences extraterritorially should not be left to litigation of this nature, with confusing and uncertain outcomes. These should be the subject of policy debates with the participation of representatives from all WTO members.²⁸

Finally—and ironically—an important environmental group, which disagreed with the shrimp/turtle decision for very different substantive reasons, fully supported the argument that the panel had gone beyond its judicial mandate. In comments on the decision, the Earthjustice Legal Defense Fund stated, “The panel went beyond its legitimate dispute settlement role and authority to create new rules concerning the application of Article XX. . . . Such a task is inappropriate for a dispute resolution panel. Rather the creation of new rules is a legislative function legitimate only to governments directly responsible to the people affected.”²⁹

Amicus Briefs. The second major issue that has raised questions about judicial rule-making is whether panels and the AB are obliged to accept *amicus* briefs from NGOs or other outside sources.³⁰ Once again, the shrimp/turtle case is at the center of the debate. The United States attached three NGO briefs to its submission and argued that nothing in the DSU prohibits panels from considering information from any source in the pursuit of information concerning the dispute. The panel, however, agreed with the complaining countries that accepting such briefs would be incompatible with DSU rules and pointed out that only parties to the dispute and agreed-upon third parties could submit information directly to the panels. Subsequently, the AB overruled the panel, stating that it “erred in its legal interpretation” because the right of a panel to “seek” information

logically must include the right to consider unsolicited briefs and documents. The AB ruling states that “the thrust of Articles 12 and 13 taken together is that the DSU accords to a panel . . . ample authority to undertake and to control the process by which it informs itself . . . of the relevant facts of the dispute. . . .”³¹

Proponents of the AB ruling have argued that there is a simple logic in granting wide authority for panels to use whatever information is available under their mandate to “seek” out all relevant facts in reaching an “objective assessment.”³² But as critics of this decision have pointed out, the issue is actually more complicated than it first appears. The United States, by including the briefs, purposely left unclear (and refused to specify) which arguments it agreed with, stating only that these were not separate issues to which the AB had to respond. The complaining countries argued that this could lead to internal substantive contradictions within the briefs and to major procedural flaws in the process. Complainants, for example, could not be certain which arguments they should respond to, a potentially crucial omission in persuading the panel or AB to rule in their favor.³³

The issue has become ever more complicated—and controversial—as a result of Appellate Body actions in two cases: a recent case concerning subsidies, countervailing duties, and the privatization of British Steel; and a Canadian appeal against a panel ruling that upheld a French ban on chrysotile asbestos.³⁴ In the British Steel case, a panel ruled against the U.S. contention that the benefits from subsidies provided to state-owned British Steel by the U.K. government were passed on to its successor firms when the company was privatized in 1988. The Appellate Body concurred with the results but based its decision on much narrower grounds related to the facts of this particular case

alone, leaving unsettled the larger issues regarding the ability to countervail against privatized state-owned companies.

Two aspects of the Appellate Body's decision were particularly controversial: the Appellate Body's rejection of the EU's contention that the AB lacked authority to accept *amicus* briefs submitted independently by U.S. steel producers; and the AB's acceptance of the U.S. government's argument that the AB had authority to accept unsolicited submissions as part of its mandate to control the process by which it informs itself of the relevant facts and applicable legal norms and principles. The AB stated that individuals and countries that were not WTO members had no legal right to make submissions, but that nonetheless the AB on its own could accept or refuse such submissions. Specifically, the AB judges asserted the right to accept briefs when "we find it pertinent and useful to do so." But they added, "In this appeal, we have not found it necessary to take the two *amicus* briefs into account in rendering our decision."³⁵

That portion of the British Steel decision produced a strong negative reaction, as more than a dozen WTO members lashed out at the AB. Countries as diverse as Japan, Canada, India, and Mexico made their objections known. Japan and Canada pointed out that this was a legislative matter for the WTO members, not the AB, to decide. Japan found the Appellate Body's reasoning "not at all convincing." And India noted that the finding would result "in a situation where not only nongovernment voluntary organizations, but also powerful business associations . . . are able to intervene in the dispute settlement process. We do not consider this to be a good development from the point of view of the long-term health of the dispute settlement system, which is meant to be a mechanism for resolution of disputes *between members* [italics added]."³⁶

Despite these strong warnings, the AB once again blundered on the issue of *amicus* briefs at the end of 2000. The result was an “unprecedented reprimand” from the chairman of the WTO General Council. The criticism was triggered by a November 8, 2000, document setting forth procedures for *amicus* briefs in a Canadian appeal against a WTO panel ruling upholding a French ban on chrysotile asbestos. In an attempt to preempt critics, the AB announced that these were procedures for this case alone, and not new working procedures; the critics were not mollified. Thirteen briefs were submitted, including five from environmental NGOs. Just before the deadline for final documents, however, the AB announced without explanation that it was rejecting all of the briefs—a move that infuriated outside parties but did not assuage the anger of most WTO members.³⁷

On November 23, at a meeting of the DSB, more than forty delegations registered their strong opposition to the AB’s action. Only the United States, Switzerland, and New Zealand came to the AB’s defense. India’s WTO ambassador echoed the anger of many members that, despite their clearly expressed opposition to such moves, the AB had pressed ahead to include outside briefs in the appellate proceedings: “[The AB] has obviously ignored the overwhelming sentiment of members against acceptance of unsolicited *amicus curiae* briefs. . . . [It] wants to introduce procedures which amount to soliciting *amicus curiae* briefs from NGOs.”³⁸

As with the shrimp/turtle and British Steel decisions, two themes dominated these comments: first, that the AB was usurping the legislative function of the WTO councils; and second, that it was changing the balance of rights and obligations of WTO members. On the question of legislative prerogatives, the Canadian WTO ambassador, Sergio

Marchi, stated that in Canada's view, "the members, not the dispute settlement system, should decide how the issue of *amicus* participation should be dealt with in the future. . . . Members must ensure that the government-to-government nature of the dispute settlement process is not weakened or compromised by the procedural initiatives of panels or the Appellate Body."³⁹ India, Mexico, and other developing countries also feared that the deep pockets of U.S. and EU multinational companies *and* of developed-country NGOs would overwhelm the dispute system with highly sophisticated and novel arguments that the developing countries would be hard pressed to answer and rebut.

Most important, however, was the argument by complaining nations, particularly developing countries, that the AB had on its own altered the balance of rights and obligations of certain WTO members. The point was that WTO members who were not either direct parties to the dispute or agreed-upon third parties could not present written submissions.⁴⁰ In effect, the AB had granted rights to NGOs that WTO members themselves did not enjoy.⁴¹ As Gary Sampson has stated, in the view of a number of countries, "The Appellate Body had diminished the rights of members and intruded upon members' prerogatives as negotiators to establish the bounds of participation in the WTO. Such issues should be decided by members."⁴²

Balance-of-Payments Restrictions and Regional Trade Agreements. The final example of alleged judicial creativity and usurpation relates to the powers and authority of two political (executive) organs of the WTO—the Committee on Balance-of-Payments Restrictions and the Committee on Regional Trade Agreements.⁴³ Before the WTO was established, GATT panels had examined certain aspects of the relationship between the

executive committees and the dispute settlement system. The most extensive discussion of this relationship concerned a case relating to tariff preferences given by the EC to Mediterranean countries as part of certain regional trading agreements. After long consultations and then a formal complaint, a GATT panel concluded that “examination . . . and reexamination of Article XXIV [regional trading agreements] was the responsibility of the contracting parties” and not an appropriate topic for GATT dispute settlement panels. It reasoned that “this should be done clearly in the context of Article XXIV [regional trading agreements] and not Article XXIII [dispute settlement], as an assessment of all the duties, regulations of commerce and trade coverage, as well as the interests and rights of all contracting parties were at stake in such an examination and not just the interests and rights of the contracting party raising a complaint.”⁴⁴

In the Uruguay Round negotiations, the United States requested language that would have changed the rule to allow for a broader review of unresolved issues relating to balance-of-payments questions. The U.S. position was not adopted; instead, the WTO rules allowed limited review of the application of specific restrictive measures taken for balance-of-payments purposes. Similar language was constructed for review of regional trade agreements.

The issue has recently come up again in several cases, with the result that the AB has reversed the earlier decisions and injected the dispute settlement system deeply into the determination of the legality of balance-of-payments and regional trading agreements. In 1999, two panels (Turkey–Textile Products and India–Quantitative Restrictions) reached diametrically opposing conclusions regarding the new WTO rules in these areas. The Turkey–Textiles panel, dealing with provisions of an EU–Turkey customs union,

followed earlier GATT precedent and found that jurisdiction over the legality of regional trading agreements generally was the responsibility of the Committee on Regional Trade Agreements. The India–Quantitative Restrictions panel adopted a more expansive view of the DSU’s jurisdiction in relation to both regional trading agreements and balance-of-payments restrictions, in effect taking a position against earlier GATT panel rulings.⁴⁵ The issues were appealed in two proceedings before the Appellate Body.

In both decisions, the AB boldly upheld the expansive views of the India–Quantitative Restrictions panel. In the Turkey–Textiles appeal, it ruled that “the competence of the panel to review all aspects of balance-of-payments restrictions should be determined in the light of Article XXIII of the GATT, as elaborated and applied by the DSU.” The AB added, “If panels refrained from reviewing the justification of the balance-of-payments restrictions, they would diminish the explicit procedural rights of members under Article XXIII. . . .” In a separate ruling on India–Quantitative Restrictions, the AB made clear that the logic of this decision also applied to a panel’s competence and authority to rule on the overall consistency of regional trading agreements with Article XXIV.⁴⁶

In a review and critique of the AB ruling in these cases, Frieder Roessler, head of the GATT Legal Affairs Division from 1989 to 1995, argued that in both instances—balance-of-payments and regional trading arrangements—it was inappropriate to settle the issues through judgments for or against individual members. As Roessler explained, “Since each regional trade agreement affects the overall trade policy of members, the consistency of that policy cannot be appropriately addressed in disputes between individual members.” Further, he argued,

A panel that determines the overall consistency of balance-of-payments or regional trade agreements thus passes a judgment on an entire trade regime. . . . Since there are no agreed standards for determining the adequacy of monetary reserves and the scope of trade integration required by Article XXIV has deliberately been left undetermined, the panel must pass its judgment without having received any prior normative guidance from the WTO membership and therefore engage essentially in a legislative or political task.⁴⁷

Roessler concluded, “Just as modern states, the WTO must ensure that its judicial organs exercise their powers with due regard to the jurisdiction assigned to the other parts of its institutional structure. . . . This ruling has shifted decision-making authority from the political to the judicial organs of the WTO, and consequently changed the negotiated institutional balance in the WTO.”⁴⁸ He went on to argue that, despite the ruling, in the future “WTO panels should respect the competence and discretionary powers of the political bodies established under the WTO.” According to Roessler, “If the legal status of a regional trade agreement or a balance-of-payments restriction has been determined by the competent WTO body, panels should not reverse that determination; if the competent WTO body has not yet made its determination, panels should not step in and preempt that determination.”⁴⁹ It remains to be seen whether panels and the Appellate Body will take this advice.

Each of these examples presents complex issues over which legal experts and trade negotiators can legitimately disagree. In these and other areas, however, the WTO dispute settlement system is operating at the frontier between policymaking and mere

judicial interpretation. A pattern of stepping across that boundary in creating “new” law will almost certainly threaten the legitimacy of the WTO.

Regulatory Issues

At a June 2000 forum on the WTO in the new millennium, Gary Horlick, a leading U.S. trade lawyer, opined, “The big cases, the truly interesting cases in services, intellectual property, food safety . . . [i.e., major regulatory areas] have not yet surfaced.”⁵⁰ Horlick’s statement points to an important concern—that is, whether in plunging deeply into the economic and social complexities inherent in national regulatory systems, the WTO has overreached. Given the widely divergent philosophies of these systems and the lack of clarity in the underlying WTO rules, the DSU may not be able to deliver credible analyses and decisions. For this study, some of the difficult questions relating to telecommunications and food safety will serve as illustrations.

Telecommunications. The Agreement on Basic Telecommunications Services took effect in February 1998, with the signatures of seventy WTO members. By virtue of the agreement, these WTO members have agreed to abolish existing public monopolies over time and to create rules for competition not only between foreign firms and monopolies, but also between foreign firms and large incumbent private firms. In effect, with the telecommunications agreement and accompanying “Reference Paper,” the WTO has created a competition policy regime, at least for telecommunications.⁵¹

In the Reference Paper, three examples of anticompetitive behavior that will invoke government intervention are listed: anticompetitive cross-subsidization,

anticompetitive use of information, and anticompetitive withholding of (technical) information. These seem rather straightforward at first, but with at least one prohibition—anticompetitive cross-subsidization—the situation is quite complicated and potentially harmful to the DSU.

Commenting on “anticompetitive cross-subsidization,” European trade lawyer Marco Bronckers observed, “This somewhat mysterious, pejorative term refers to a practice, which, in actual fact, is common to almost all companies.”⁵² All companies that sell multiple products or services cross-subsidize at one time or another. For instance, book and music sellers produce thousands of products each year, aware that only a few will be clear profit centers and that these large profits will cover the losses incurred by other releases.

Potential problems arise, however, when monopolies or dominant firms in a sector undertake to cross-subsidize various products or services. A monopolist could use profits from a monopoly product or service to cross-subsidize a product or service that is produced under competition, forcing competitors to charge prices that will produce a profit. This could violate competition laws if the monopolist, through intent or result, squeezes competitors out of the market to increase prices. But current economic theory holds that this behavior is rare and that government intervention itself can rapidly produce anticompetitive, welfare-reducing effects. From the standpoint of economic efficiency, the line of intervention is difficult to draw.

Furthermore, to make a credible case in WTO disputes, governments must become deeply knowledgeable about the company’s costs and prices; in addition, they must rely on comparable accounting systems when judging between the allegedly

offending company and its competitors. Governments must also have access to information that companies consider highly sensitive and confidential. Given the extremely short time frames in which WTO panels must work and the relative lack of discovery power to uncover the facts of a case, the WTO dispute settlement process would be hopelessly handicapped in handling such complaints.

Even for national regulatory systems, this is a difficult area. This has been amply demonstrated by the EU, which for ten years has been struggling to reach a consensus on a definition of what constitutes an anticompetitive cross-subsidy. Recently, the European Commission was sued for failure to act against the cross-subsidization practices of the Deutsche Post, Germany's communications monopoly. According to press reports, the reason the commission failed to act was that its legal staff had strenuously argued that there was no way to distinguish lawful from unlawful cross-subsidy within a company—even if the company is a monopoly.

After recounting this experience in light of the new WTO prohibitions, Bronckers stated,

When reading the WTO norm, one remains blissfully unaware of these controversies and difficulties. Members have said no more than that they would act against 'anticompetitive cross-subsidization' by powerful telecommunications companies. . . . [W]hat if a country decides to litigate in the WTO? The outcome of such a dispute by a WTO tribunal can only be a complete surprise, not least for the companies concerned. This is regrettable, in my opinion, and damaging to the credibility of the WTO.⁵³

Genetically Modified Organisms, Food Safety, and the “Precautionary Principle.”

Sanitary and Phytosanitary (SPS) rules are measures that protect human, animal, or plant life within a WTO member's territory from diseases, pests, and disease-carrying

organisms, as well as additives, contaminants, and toxins in foods and beverages. SPS measures were included in the original GATT agreement as part of more general rules regarding domestic standards (the Agreement on Technical Barriers to Trade), but only in the Uruguay Round were SPS rules elevated to a separate agreement: the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. The rules and obligations promulgated as part of the new agreement became subject to the new dispute settlement system.

Broadly speaking, the most important provisions of the SPS agreement recognize the right of WTO members to adopt measures that result in any given level of health protection for their citizens, but also require that these measures be founded on scientific evidence and applied only to the extent necessary to achieve public health goals. Another SPS provision states that if scientific evidence is “insufficient,” a member may adopt protective measures “on a provisional basis” while seeking additional information about potential hazards. This is a variation of the so-called “precautionary principle,” which allows nations to take action even though scientific risk has not been proven. Trade-related sections of the SPS rules forbid application of measures in a discriminatory fashion or in a manner that constitutes a disguised restriction on trade. International standards, such as those developed in the Codex Alimentarius (food code), are recognized, and nations that want to legislate higher standards than these internationally recognized standards must provide scientific evidence to back their decision.⁵⁴

The disputes emerging from the new SPS standards and the revolutionary advances in genetics and biotechnology have involved dauntingly complex issues. One dispute, the beef hormones case, illustrates many of the points of uncertainty and

disagreement. The initial clash, which pitted the United States and Canada against the EU, began in the 1980s after the Europeans instituted a ban on the sale, distribution, and importation of hormone-treated beef. An actual case was initiated in 1996—after the new dispute settlement system eliminated the possibility of blocking action by either party, and the United States renewed an earlier request for a dispute settlement panel.

The United States, later joined by Canada, argued that the EU ban violated the SPS agreement in several ways: the ban was invoked without sufficient scientific evidence; it constituted a disguised restriction on international trade; it was not based on any international standard; and it provided a higher level of protection than required by existing international standards. The central scientific case presented by the United States and Canada pointed out that numerous studies had found no danger from the levels of hormones in the animals and that the residues were within levels that complied with existing international standards.

In its response, the EU challenged the conclusiveness of the scientific reports and argued that none had established beyond reasonable doubt that the use of these hormones was safe for human health. The EU noted that all of the existing studies examined the hormones in isolation and therefore could not weigh synergistic effects; it pointed out that no studies could determine long-term effects at this time. A second line of defense dealt with the issue of “appropriate level of protection.” The EU argued that a judgment about the level of protection was a societal value judgment and that this sovereign right was acknowledged in the SPS agreement.

Both the panel and the Appellate Body offered significant and precedent-setting findings. In its 1997 report, the panel generally agreed with many of the arguments

advanced by the United States and Canada. It held that the EU ban was not based upon an adequate risk assessment supported by scientific evidence; that the ban was not based upon existing international standards; that the EU had failed to present scientific evidence for the higher level of protection embodied in the outright ban; and that the ban was arbitrary and unjustifiably at variance with levels of protection provided by other EU measures relating to these same hormones (e.g., allowing the hormones to be added to pork feed).

In its 1998 decision, the Appellate Body agreed with many aspects of the panel's findings but disagreed with the legal reasoning in several important respects, which in the future would favor defendants such as the EU. First, it reversed the burden of proof for demonstrating that deviation from international standards was scientifically based. Henceforth, the complaining party would have the responsibility of showing that the defendant's alternate system was not based on adequate science. While the results did not change the adverse conclusion for the EU in this instance, defendants would have an easier time with this issue in future cases. Of equal importance, the Appellate Body signaled that even a few minority opinions among scientists must be given due weight in determining risk; it also agreed with the EU that social and cultural factors could be included in risk determination. In general, the Appellate Body exhibited greater deference to a WTO member's own legal and administrative procedures when determining risk.⁵⁵

Finally, the panel introduced a distinction between risk assessment and risk management. Risk assessment was meant to encompass only the purely technical scientific analysis that would underpin regulatory actions. Risk management added elements of economic, social, or value judgments that would also be considered before

making a final regulatory decision. The Appellate Body rejected this clear definitional division, but then reintroduced it using opaque language that seemed aimed at achieving the same result without provoking accusations that the AB was legislating analytic criteria independent of the language of the underlying text. The AB stated, “It is essential to bear in mind that the risk that is to be evaluated in a risk assessment . . . is not only risk ascertainable in the science laboratory . . . but also risk ascertainable in human societies as they actually exist; in other words, the actual potential for adverse effect on human health in the real world where people live and work and die.”

This ringing political statement provides no guidance to nations or subsequent panels as to how to determine acceptable risk beyond the bounds of a scientific assessment.⁵⁶ As two critics of the AB’s reasoning have written,

While this reference helps to make this ruling politically acceptable, it constitutes an unnecessarily broad interpretation of risk assessment. . . . It will be extremely difficult to replace the “scientific” route chosen by the SPS with a new approach taking socioeconomic considerations into account without opening Pandora’s box, and allowing WTO members to introduce protectionist measures.⁵⁷

In this area, the dispute settlement system is being asked to deal with extraordinarily complex technical—and political and social—issues with little guidance from the textual results of negotiations. Even strong supporters of the system worry that these sanitary and phytosanitary disputes represent “a bridge too far.” This is true not only because of such papered-over decisions as the one just described, but also because, given the deep feelings about genetically modified organisms (GMOs) in many countries, nations may well defy rulings that go against them indefinitely, as illustrated by the current stalemate over the beef hormones case.

Just before the Appellate Body was to demand a settlement of the beef hormones case, the EU announced that it had commissioned seventeen studies to review the risks related to the six hormones, separately and in combination. These studies would be completed sometime in the year 2001. In retaliation, the United States imposed annual sanctions amounting to \$117 million worth of EU imports, ranging from beef and pork to cheese and foie gras. At this writing, a standoff on this case continues.⁵⁸

As the beef hormones case illustrates, in the area of food and biological standards, many questions remain unanswered. The WTO dispute settlement process is only beginning to confront these issues. One of the most important questions relates to the use—and abuse—of the “precautionary principle.”⁵⁹

No agreed-upon definition of this principle exists.⁶⁰ To some, it means that WTO members should be encouraged to use caution and prudence when reviewing new technologies—in this case new food compounds or additives. To others, however, it means banning all actions—the addition of GMOs to the food chain of animals or humans—until proponents can demonstrate conclusively that the action is free of all risk. Noting this state of confusion, one study concluded that the precautionary principle is a “culturally framed concept . . . muddled in policy advice and subject to the whims of international diplomacy and the unpredictable public mood over the true cost of sustainable living.”⁶¹

At present, the SPS language adopts a portion of the precautionary principle (Article 5.7) and allows bans or restrictions “on a provisional basis” with the clear implication that such actions are to be temporary, pending a fairly quick emergence of new scientific evidence. As the actions and views of the EU in the beef hormones case

make clear, however, some countries view “provisional” as a much longer-term circumstance.

A more troubling question is how the relationship between trade and the precautionary principle will be resolved. In the beef hormones case, the AB waded into the morass of conflicting international legal opinion about the status of the precautionary principle in international law, but it was faced with a deeply conflicted and divided international legal community on the subject.

Those who argue that the precautionary principle is now enshrined as a binding principle of international law adopt the increasingly popular tactic of pointing to general principles (soft law) enumerated in various environmental agreements. James Cameron, cofounder and former director of the London-based Foundation for International Environmental Law and Development, and Karen Campbell of West Coast Environmental Law write that the precautionary principle is “arguably now an established principle of international environmental law. Its most universal statement is in Principle 15 of the Rio Declaration.” They go on to argue that WTO panels should respect domestic laws based on the precautionary principle, such as the EU hormones ban, because “to not do so would be contrary to public international law.”⁶² While the AB in this case declined to accept this connection between environmental agreements, it also signaled that it was willing to consider such reasoning on a case-by-case basis.

The issue is highly contentious among WTO members, with developing countries deeply suspicious that it will be used to deny them access to the markets of the developed world. Writing in January 2000, a member of the Argentinean Foreign Service warned in a Washington newspaper that “the EU may try to smuggle the so-called precautionary

principle into the [Millennium Round] negotiations.” He warned of a great danger that the principle would be used to close markets against developing countries:

During the next agricultural negotiations, developing countries will seek to obtain better market access for their products. They will seek the opportunity to compete fairly in the market place, not by subsidizing exports, but by lowering prices and improving quality. If the precautionary principle is smuggled into those negotiations, it will be traded against those expectations. And this should be prevented.⁶³

Clearly, WTO members are deeply divided on this issue and, as the examples presented in this chapter illustrate, questions surrounding the invocation of the precautionary principle should not be left to judicial interpretation but rather should be thrashed out in negotiations.⁶⁴ The balance of this chapter is devoted to a discussion of “soft law” and customary law, and their potential impact on WTO dispute settlement cases.

Soft Law, Customary Law and Progressive Interpretation

This section briefly describes the issues and controversies surrounding soft and customary law and how they relate to developing trends in—and outside pressures on—case law in the DSU. Soft law originates with declarations, preambles, frameworks, and statements of principles rather than with formal treaties. Soft law often emanates from declarations in the UN General Assembly, or UN agreements in areas such as the environment or human rights, or even from international conferences. These documents are “affirmative of good intentions” rather than commitments to act in a particular way. The hope of those who propose them is that they can be “eased into practice and then hardened, either in subsequent treaties or by acceptance as customary international law.”⁶⁵

Customary international law consists of obligations that are established through the general practices of states, that is, “what is habitually done by states out of a sense of legal obligation.”⁶⁶ Customary law—“the law of nations”—developed in the eighteenth century from practices established over a long period of time relating to matters such as rules of the sea, seizure of contraband, and piracy. In the last two decades, the concept has been used, amidst great controversy, to attempt to establish wide-ranging international legal norms in areas such as the environment, human rights, women’s rights, and racial and sexual discrimination.

In invoking the original eighteenth-century doctrine of the law of nations, courts look to the actual cases for evidence of actual practice. In contemporary practice, what nations say—that is, declarations at conferences or signatures on nonbinding agreements—is given equal weight, despite the vehement protests of some legal theorists. Jeremy Rabkin, a critic of the contemporary usage of customary law, has described the process as follows:

[Customary law] is not the product of court rulings, but of international conferences. Abstract pronouncements are enough. At that, they need not even to be authoritative pronouncement of supreme government authorities. Words spoken by diplomats at conferences are given much weight, and then the reconfiguring of those words by commentators is supposed to give more weight, and the repetition of the words by yet other commentators is thought to lend still more weight to contentions about the law. Soon there is a towering edifice of words, which is then treated as a secure marker of “customary international law.”⁶⁷

On substantive grounds, the arguments of those who oppose incorporating customary international law into U.S. law are similar to the arguments raised against

alleged “lawmaking” by WTO dispute settlement bodies. Philip Trimble of the UCLA Law School, in a self-styled “revisionist” view of international customary law, states:

The story of customary international law...does not fit the American political tradition. . . . The American eighteenth-century tradition exalting limited and responsive representative government lives on in today’s rhetoric and political philosophy. . . . It is one thing to delegate authority to Congress and the President, checked and balanced by each other, and elected by different groups within the political constituency. But if customary international law can be made by practice wholly outside the United States, it has no basis in popular sovereignty at all. Many foreign governments are not responsive to their own people, let alone to the American people.⁶⁸

In a recent analysis, Paul Stephan of the University of Virginia Law School has also discussed the implications of the penetration of customary international law into the U.S. legal system. He first distinguishes customary international law from the “new” international law that originates in the negotiation and interpretation of international agreements and treaties. The new international law poses questions for national democracies: it strengthens the hand of the executive and the power of bureaucracies, while increasing the ability of concentrated interest groups to get their way. But enactment requires democratic procedures and mechanisms; Congress must pass the agreements and can force amendments.

With customary international law, however, the encroachment on national democratic practices and institutions is potentially much greater. As Stephan explains,

The uncritical incorporation of customary international law in U.S. law encroaches on democracy by taking off the table choices that democratic institutions, whether federal, state or local, wish to make. To be sure, common law adjudication generally poses issues for a democracy, because the power to make law vests in the judiciary. . . . But customary international law exacerbates this problem to the extent it involves a displacement of the common law process. It is one thing for courts,

surveying precedent and relying on a variety of substantive and process preferences, to choose a rule that governs our conduct. It is another for courts to take over a prefabricated system of rules and norms, constructed by a loose alliance of like-minded academics and international law specialists through a form of advocacy that involves no democratic checks.⁶⁹

The new theories of customary law were endorsed in 1987 by the *Restatement of the Law (Third): Foreign Relations Law of the United States*, which is the most highly regarded nonofficial statement and survey of U.S. law on foreign relations. Still, vigorous dissent within the U.S. legal community over these issues continues. This led John Jackson, in his authoritative treatment of the world trading system, to conclude, “Unfortunately, customary international law norms are quite often ambiguous and controversial. On many propositions of customary international law, scholars and practitioners disagree not only about their meaning but even about their existence. The traditional doctrines of establishing a norm of customary international law leave a great deal of room for such controversy.”⁷⁰

How does the controversy over customary international law affect the DSU and rulings by the panels and Appellate Body of the WTO? Recent rulings appear to bow in the direction of accepting expansive and “dynamic” interpretations of WTO law, along with the consequences of placing WTO law within the overall context of regular norms of international law, including customary international law.

In its very first ruling, the AB firmly placed the WTO dispute settlement system firmly within the confines of general international public law. This meant that it incorporated into the DSU the canons of treaty interpretation as set forth in the *Vienna Convention on the Law on Treaties*, the standard guide and set of rules for interpreting

international treaties—including, the ruling stated, “the customary rules of interpretation of public international law.”⁷¹ It left for future case determination the complexities of meshing WTO rules with other international legal regimes—particularly the growing body of environmental agreements, declarations, and preambles to agreements.

In the shrimp/turtle case, the AB began serious work toward melding WTO law with more general international legal norms and treaties. In deciding how to deal with the exceptions allowed in Article XX, the AB adopted a dynamic interpretation of the article, arguing that it must look at the text in light of “contemporary concerns of the community of nations about the protection and conservation of the environment.”⁷² Among the sources it cited as a guide in its decision (in addition to several multilateral environmental treaties) was the soft law embodied in Principle 12 of the Rio Declaration.⁷³

In addition, the AB expanded the traditional interpretation of “renewable resources” in Article XX to include biological as well as mineral resources. It did so by elevating the importance of the objective of “sustainable development” in the preamble to the agreement that established the WTO. The AB stated that the preamble would be used to give “color, texture and shading to the rights and obligations of members under the WTO Agreements,” and further defended its new definition of renewable resources as a response to the “recent acknowledgement by the international community of the importance of concerted bilateral and multilateral action to protect living natural resources.”⁷⁴

Critics argued that, whatever the high-mindedness of the goals, the high-handedness of the judicial interpretation in this case was disturbing. As one close observer of the history of the dispute stated,

Principles expressed in preambles are general legal commitments rather than specific legal obligations of states. . . . This objective [sustainable development] is certainly recognized and supported by WTO members. The manner in which it is translated into rights and obligations [however] can fundamentally change the character of the exceptions provision [Article XX on exceptions to free trade] of the WTO. Indeed, a number of WTO members believe that it rendered inoperable one of the principal paragraphs of the exceptions provisions.⁷⁵

Environmental groups have been quick to pick up on the potential expansion of environmental exceptions in the WTO through public international law—and the potential that the AB in the future will, through judicial interpretation, endorse that expansion. Thus, briefs and papers submitted by the World Wildlife Fund, the Center for International Environmental Law (CIEL), and the Sierra Club press the argument of the increasingly binding force of customary law. The Sierra Club’s *amicus* brief in the shrimp/turtle case argued,

A general obligation arises from customary international law, and can be derived from treaty law, that requires states to supervise and control activities within their jurisdiction that undermine the conservation status of endangered species. These obligations are derived from, among others, the 1972 Stockholm Declaration on the Human Environment, the Convention on Biological Diversity, the Bonn Convention on Highly Migratory Species, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and UN General Assembly resolutions.⁷⁶

The brief went on to provide more detail about the ties between declarations, nonbinding commitments, and the shrimp/turtle case:

Several instruments dealing with the conservation of sea turtles are not in themselves binding but engage good faith obligations to act consistently with the clearly expressed political commitment or lend content to the more general rules established above or evidence a pattern of state

practice. . . . The World Conservation Union lists all seven species of turtles. . . . [T]he listing of species does not create obligations directly, there being no Treaty, but its expertise and wide membership provide strong evidence of custom when a clear decision is taken by the Union.⁷⁷

What is interesting about this list is the intermixing treaty obligations (some have potential trade sanctions and some do not) with hortatory declarations and resolutions, giving them equal status as binding upon WTO member states. A number of legal scholars strongly support the legal theories of interest groups such as the Sierra Club. These scholars espouse a vision of using the WTO dispute settlement process, in combination with soft and customary law and “progressive” interpretations of the basic underlying WTO legal texts, to expand the WTO substantive mandate to encompass many of the goals of civil society.⁷⁸

Differences among these scholars exist, of course. Nevertheless, Robert Howse of the University of Michigan has effectively illustrated the major common elements of their “advanced” vision. In a discussion of the shrimp/turtle decision, Howse strongly applauds the AB “decision to provide [an] interpretation of the treaty language [in this case, the term ‘exhaustible natural resources’] based on *evolving* international law, rather than the purported original understanding of the negotiators of the 1947 GATT.”⁷⁹ He defends an expansive interpretation because “retrospective, originalist interpretation almost inevitably privileges the supposed intentions and expectations of a fairly narrow ‘interpretative’ community, that of the treaty negotiators, over the broader community [affected] by interpretative decisions, the community implicated in the notion of democratic and social legitimacy.”⁸⁰ (For an extensive discussion of the issue of democratic legitimacy, see Chapter XX.)

Howse forthrightly defends the legitimacy of a judicial legislative function in the WTO in light of what he asserts is a “democratic defect in rule-*creation*.” As Howse explains,

Given this democratic defect in rule-*creation*, social legitimacy in rule interpretation may exist as *democratic* social legitimacy, where the exercise of the judicial power properly handles a conflict of values held by diverse stockholders. . . . WTO interpretation . . . reflects the emerging law of the ‘other’ agenda of globalization. . . . This may include international environmental law, international labor law, and international human rights law, as it is developing in light of an “equity-oriented” agenda . . . focused . . . on equity and distributive questions in the context of a globally integrated economic system with immense inequalities in the profit-making capacities of firms and the earning capacities of households.⁸¹
[*Whew!*]

With Howse, we have come a long way, but in good cognitivist terms, ideas have consequences. Although Howse’s own brand of utopianism may never reach fruition, his views demonstrate the new milieu in which WTO decisions are made. This chapter stands as a warning that Jeremy Rabkin’s argument—namely, that the WTO was different from other international organizations and presented fewer sovereignty issues—is under attack. The WTO may well evolve in ways that Rabkin did not foresee—and would oppose. Dispute settlement bodies do not operate in a vacuum. Despite their intentions to uphold the letter as well as the spirit of WTO law, they show signs of bending to prevailing winds, which, even before the events in Seattle, were moving toward expanding the “linkage policies” that Rabkin decries.⁸²

Major Recommendations

The recommendations made in this study admittedly cannot be put into place in the current climate of deep division within the WTO and given the high hurdles that face any attempt to create new rules or amend old rules under the current system. Change on the order recommended here will be possible only as a part of an overall negotiating package in a future trade round. And it will come about only after a significant number of WTO members—from both developing and developed countries—recognize that, while the new WTO is and should remain an important force for more open markets and enhanced competition among countries, its current constitution is actually an obstacle to achieving those goals.

The recommendations advanced in this book also come in the midst of major reevaluations of the Bretton Woods institutions established at the end of the Second World War. In 2000, the Meltzer Commission issued a scathing report on the IMF and World Bank, arguing that these institutions had greatly exceeded their original mandates, were overextended, and could not deliver on the goals they set for themselves.²² The WTO is in somewhat better shape; the Uruguay Round of multilateral trade negotiations took an important first step toward reforming and reshaping the institution to meet new challenges during the coming decades.

John Jackson has noted the “folly” of the desire of “some people in the United States [to] reverse course and take the WTO back to the time when it was only responsible for border measures. . . .”²³ This study argues that (1) to deal with the complex new issues presented by national regulations inside the border, the WTO will have to adopt a less rigid, more flexible dispute settlement system, one that does not

promise a “correct” legal answer to every problem; and (2) the best means of achieving continued democratic legitimacy is for the WTO to remain a government-to-government organization, one in which governments take decisions in the WTO after having sorted through and resolved the conflicting claims and demands of competing interests in the domestic political process.

The principal recommendations of this study, presented in detail in Chapter 7, concern five key areas of reform: constitutional reform; transparency; participation; congressional oversight; and the creation of an Eminent Persons Group.

Constitutional Reform

A Safety Valve: Conciliation, Mediation, and Voluntary Arbitration. The goal of this recommendation is to move the WTO dispute settlement system partially back in the direction of the original “diplomatic” model for dispute settlement, and away from the judicial model introduced by the new Dispute Settlement Understanding of the Uruguay Round. With that aim in mind, the first recommendation is that the Director-General (DG) or a special standing committee of the Dispute Settlement Body (DSB) be empowered to step in and direct the contending WTO member states to settle their differences through bilateral negotiations, mediation, or arbitration by an outside party. The DG or DSB committee would take such action in situations where the highly divisive political nature of the contest could permanently damage the WTO; or in situations where, in the judgment of the DG or DSB committee, there is no established legislative rule or the existing language masks deep substantive divisions between WTO members.

Repairing a Constitutional Flaw: A Blocking Minority. The goal of the second recommendation is to redress the imbalance between the highly efficient dispute settlement system and the ineffective, consensus-plagued, rule-making procedures. This would be accomplished through a minority blocking mechanism: thus, at any time that at least one-third of the members of the Dispute Settlement Body, representing at least one-quarter of the total trade among WTO members, register opposition to a panel or Appellate Body decision, that decision should be set aside—blocked—and the DSB should affirm that the decision will not become binding WTO law. Subsequently, the normal legislative process of the WTO should be invoked through action by the General Council to either amend existing rules or establish new rules. If the General Council cannot reach consensus and agreement, then the issue would be set aside and settled, as part of a larger package of compromises, at the next major round of WTO trade negotiations. Even if these “diplomatic” escape clauses (mediation and a blocking minority) are established, the vast majority of disputes would likely be handled through the Dispute Settlement Understanding negotiated during the Uruguay Round.

Compliance: Substitute Compensation for Retaliation. Under this proposal, the existing option of compensation would become the sole remedy for noncompliance with a panel or Appellate Body ruling. Two alternative methods of compensation should be considered. First, compensation could be exacted through a monetary fine on the offending nation, with the sum of the fine calculated by a neutral third party or subcommittee of the DSB. Second, the offending WTO member could agree to institute trade liberalization equivalent in commercial value to the cost of the trade barrier(s) to the

complaining country. Again, a neutral third party would determine the commercial cost of the trade barrier.

Direct Effect. Under the doctrine of direct effect, a nation agrees that its domestic laws will be bound by rules negotiated under a treaty. Direct effect gives a private citizen the power to demand relief from, or make a claim against, another private citizen or the state itself pursuant to the terms of an international agreement. Clearly, adherence to the direct effect doctrine alters the relationship between the state, private actors, and domestic courts. The recommendation of this study is that Congress continue to deny direct effect and the self-execution of a treaty, as it has done in four recent trade agreements. Recent multilateral, regional, and bilateral trade agreements have produced rules that attempt to regulate areas such as services, intellectual property, and investment, which are central to domestic governance. Consequently, national legislatures, including the U.S. Congress, must be more vigilant in retaining final determination over the content of these core elements of domestic regulation.

Transparency

Publication of Documents. The WTO should establish rules that provide for the publication of all government documents submitted pursuant to a panel or AB proceeding at the time those documents are presented. Such documents should be posted on the Internet. Information that is confidential for businesses would continue to be protected.

Public Access to Dispute Settlement Proceedings. If, as recommended here, all government documents are published when presented, it would also make sense to provide for public access to the opening sessions of both the panels and the AB. This

would allow interested parties and the public to observe the opening arguments of all participants, including third parties. It would also protect the process from undue pressure during subsequent questioning and dialogue, and at the same time foster widespread knowledge of the basic, underlying issues of the dispute.

Amicus Briefs. The Dispute Settlement Body should exert strong pressure on the Appellate Body to review and withdraw its decision to allow the panels and AB to accept *amicus* briefs. Australia has taken the lead in urging WTO members to begin drafting rules on *amicus* briefs that will ensure the “preservation of members’ equity, transparency, and due process” and impose “necessary disciplines” on acceptance of such briefs. As developing country representatives have argued, the issue goes beyond questions of process and raises issues of equity, because smaller countries could be continually outgunned by the vast legal resources of multinational corporations and NGOs. In the future, the WTO may well decide to allow outside documents to be included in dispute settlement proceedings; but this decision, and the conditions surrounding the introduction of such documents, should be negotiated by WTO members, and not introduced through the back door by the Appellate Body.

Participation

Greater Diversity of Panelists. The language of the DSU clearly foresees that, in addition to trade experts, nontrade specialists should be recruited for cases that involve issues that extend beyond commercial rules. The WTO should take advantage of this flexibility and move quickly to assemble expert panelists from such allied fields as the environment, food safety, genetics, and intellectual property. The net should be cast

widely, with scientists and social scientists added to the usual list of lawyers, legal scholars, and retired diplomats.

Public Hearing during Conciliation and Mediation Proceedings. If the proposal for a less judicialized mediation and conciliation mechanism is accepted, a corollary recommendation would be in order: contending parties should give the Director-General the authority to convene a public hearing at which a moderator would take testimony from experts and then suggest a solution acceptable to all parties. Even if the moderator failed to satisfy the parties, the process would benefit from the expert testimony and a public exploration of the issues.

Formal Consultation. Building on the experience of the WTO Committee on Trade and the Environment, the WTO should institute a much more regularized system of consultation with outside interest groups and experts, including NGOs, scientific and professional societies, and corporate associations. The WTO Secretariat should be encouraged and empowered to convene a continuing series of seminars, symposia, and larger conferences to inform WTO members and staff of the technical issues raised by WTO rules and disputes among members.

Congressional Oversight

Bipartisan Commission. As a means of increasing the democratic accountability and legitimacy of the WTO, national legislatures should become much more involved in, or at least aware of, the construction of rules and regulations that international organizations promulgate. This study recommends that, as a first step, the U.S. Congress should establish a bipartisan commission that would be assigned two tasks: (1) to report

on the implications of the WTO dispute settlement system for the U.S. constitutional system and for U.S. domestic laws and regulations; and (2) to report on the cumulative impact of rulings, pronouncements, and resolutions that have emerged from major UN organizations such as the Economic and Social Council, the International Labor Organization, the World Health Organization, and the Food and Agricultural Organization (thereby including the impact of actions taken by groups concerned with the environment, human rights, health policy, social development, population policy, and children's and women's rights). The goal of this commission would be to provide the Congress with a greater understanding of the full implications of the growing number of international policy pronouncements on U.S. domestic policy.

Congress should also consider establishing a permanent joint committee to provide continuing oversight of international bodies and the rules they promulgate to determine the impact of those rules on U.S. domestic laws and regulations.

Eminent Persons Group

Creation of an Eminent Persons Group. The WTO should establish an Eminent Persons Group (as its predecessor did with commendable results during the 1980s) to examine the systemic problems and issues surrounding WTO governance and the relationship between the WTO and other international regimes, particularly its future relationship with multilateral environmental agreements. Regarding WTO governance, two issues would lead the agenda: (1) how to reform the executive functioning of the WTO to streamline the decision-making process and, at the same time, accommodate the complaints of exclusion by developing countries; and (2) how to reform the legislative

and judicial functions to achieve a more viable balance, thereby relieving pressure on the dispute settlement system to create law and change the rights and obligations of WTO members.

Notes

Chapter 4. Emerging Constitutional Problems and Substantive Deficiencies

1. William J. Davey, “Improving the WTO Dispute Settlement” in *The Next Trade Negotiating Round: Examining the Agenda for Seattle*, ed. Jagdish Bhagwati (proceedings of conference at Columbia University, New York, N.Y., 23–24 July 1999), 226. For a review of a number of proposals for dispute settlement reform and change advanced over the past several years, see John H. Jackson, “Dispute Settlement and the WTO” (background note for Conference on Developing Countries and the New Round of Multilateral Trade Negotiations, Harvard University, Cambridge, Mass., 5–6 November 1999, photocopy), 1–13.
2. John H. Jackson, “Dispute Settlement and the WTO: Emerging Problems,” *Journal of International Economic Law* 1, no. 3 (1998): 329.
3. Marco C. E. J. Bronckers, “Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO,” *Journal of International Economic Law* 2, no. 4 (1999): 550.
4. Judith H. Bello and Alan F. Holmer, “Rewriting the Rule of Law and Trade,” *Legal Times*, 20 March 1995, 11; and Alan Wm. Wolff and John A. Ragosta, “Will the WTO Result in International Trade Common Law? The Problem for U.S. Lawyers,” in *The World Trade Organization: Multilateral Trade Framework for the 21st Century and U.S. Implementation Legislation*, ed. Terence P. Stewart (Washington, D.C.: American Bar Association, 1996), 695–717.
5. Robert Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT System* (Salem, N.H.: Butterworth Legal Publishers, 1993), 364; and Robert Hudec, “Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments,” *Minnesota Law Review* 72 (1987): 114.
6. Bronckers, “Better Rules for a New Millennium,” 551–552; Jackson, “Dispute Settlement and the WTO,” 345.
7. Jackson, *The World Trading System*, 71–73. Also see Bronckers, “Better Rules for the New Millennium,” 551–552, 556–564. Bronckers gives several illustrations of the failure since 1995 to fulfill mandates in original negotiations or to mend obvious inconsistencies in the rules, such as unresolved questions regarding subsidies, parallel imports, and competition policy. It should also be noted that the Uruguay Round text mandated a review of the DSU beginning in 1998. That review, which ended with the Seattle Ministerial meeting in December 1999, failed to produce any consensus on even minor—much less major—changes in the DSU process; see Jackson, “Dispute Settlement and the WTO,” 345.

8. Early on, Alan Wolff and John Ragosta quite presciently diagnosed the most important flaws in the new DSU and the conditions whereby panels and the AB would be pressed to create law: “Recent history has shown that even GATT 1947 panels are increasingly activist, reticent only in their unwillingness to find that lack of clarity prevents a definitive answer to a complaint. Under WTO dispute settlement, ‘non-answers’ and indefinite outcomes will be even less likely, especially as a body of decisions develops. There is a danger that extension, rather than interpretation, may become not uncommon. Terms that members used to express ambiguous concepts and differing interpretations, and applications of those terms, will be defined. Panels may decide, often, what members could not. One can only hope that answers will be developed with the greatest circumspection, and with due respect to members’ understanding the continuing paradigm that a country cannot be bound by what it has not agreed to.” See Alan Wm. Wolff and John A. Ragosta, “Will the WTO Result in International Common Law?” 703.

9. Raj Bhala, “The Myth about *Stare Decisis* and International Trade Law,” *American University International Law Review* 14 (1999): 847. The other two articles are “The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication,” *Journal of Transnational Law and Policy* 9 (1999): 206–297; and “The Power of the Past: Towards *De Jure Stare Decisis* in WTO Adjudication,” *George Washington University Journal of International Law* (2001, forthcoming).

10. Bhala, “The Precedent Setters,” 264–265; see 208 for a description of the theme of the third piece of the trilogy.

11. Joel P. Trachtman, “The Domain of WTO Dispute Resolution,” *Harvard International Law Journal* 40 (1999): 333–336. To be fair and accurate, Trachtman’s article is a nuanced, highly sophisticated, and balanced analysis of circumstances when explicit rules are appropriate for normal legislation and when “standards” (more broadly based general guidance) are called for, with a role for dispute settlement bodies. Clearly, however, he contemplates a substantial legislative role for panels and the Appellate Body, and in only one place (335) does he acknowledge potential problems of democratic legitimacy: “From a more critical standpoint, it might be argued that allocation of authority to a transnational dispute resolution body by virtue of standards can be used as a method to integrate *sub rosa*, and outside the visibility of democratic controls.”

In another piece analyzing the issues related to the direct effect of international rules on domestic law and the tradeoffs between strong and weak compliance with such rules, however, Trachtman sets forth quite clearly the connection between compliance with rules and democratic legitimacy: “The natural condition of law is rough and imperfect, like our society, and like us. To say that the natural condition of law entails direct effect, or perfect compliance, is surely incorrect. . . . Denial of direct effect and weak mechanisms of compliance may be viewed not necessarily as gaps in compliance, but as mechanisms to reinforce democratic legitimacy, to the extent that the state is the locus of democratic legitimacy. . . . Direct effect without more direct democratic participation in formulation of the directly effective law raises as many issues as it

resolves.” See Joel Trachtman, “Bananas, Direct Effect, and Compliance,” *European Journal of International Law* 10 (1999): 677–678.

12. Jeremy Rabkin, *Why Sovereignty Matters* (Washington, D.C.: AEI Press, 1998), 26–27.

13. Kal Raustiala, “Sovereignty and Multilateralism,” *Chicago Journal of International Law* 1 (2000): 401–419.

14. *Ibid.*, 410–411.

15. *Ibid.*, 412.

16. *Ibid.*, 413. Raustiala is not alone in his concerns. In a recent article, Julian G. Ku analyzes the constitutional problems and strains that flow increasingly from international delegations of authority—that is the “transfer of constitutionally assigned federal powers—treaty-making, legislative, executive, and judicial powers—to an international organization.” Ku notes that how one decides the propriety of international delegations is highly dependent on whether a formalist or a functionalist constitutional interpretation is utilized. Formalists evaluate constitutional questions by relying heavily on the Constitution’s text, structure, and history, while functionalists take a more expansive view of constitutional interpretation and look beyond text to the broader purposes of the constitutional structure. Formalists will likely take a more skeptical view of international delegation than functionalists do. Ku, however, argues strongly that a formalist approach is necessary in the international arena “because such delegations are meaningfully different from delegations to states and private parties [that is, *domestically*] in at least two important ways. First international delegations place an unusually heavy strain upon the ideal of political accountability that animates much of the Constitution’s structural design. Second, international organizations lack an independent source of political legitimacy. . . . The peculiar characteristics that make the new breed of international organizations so exciting also make them uniquely unaccountable entities within the U.S. constitutional system. The Founders’ concern with maintaining lines of political responsibility, and the continued emphasis by courts and commentators on the dangers of political unaccountability suggests that the delegation of federal power to international organizations creates substantial constitutional stress.” Ku argues that U.S. courts must take the lead in defining the bounds of such international delegations. See Julian G. Ku, “The Delegation of Federal Power to International Organizations: New Problems with Old Solutions,” *Minnesota Law Review* 85 (November 2000): 72, 76, 125–126.

17. In addition to the three examples given in the text, two other recent illustrations of judicial overreach could have been added: (1) a developing backlash in the United States against the panels and AB for their alleged flouting of WTO rules and overturning of national import-relief measures (antidumping and safeguards actions); and (2) a similar backlash in response to a case relating to an allegation that a WTO member impaired the rights of another WTO nation through one or more of its trade policies, even though those policies did not legally violate an agreement.

The area of import relief is particularly sensitive for the future of the WTO because of the political power of industries that defend the current administration of U.S. laws. (In May 2001, sixty-one U.S. senators sent a letter to President Bush warning against any weakening of U.S. trade remedy laws in the next WTO trade round.) During the Uruguay Round, the United States demanded and largely got language that it thought insulated the administration of antidumping and safeguards decisions from second-guessing by WTO panels and the AB. This was thought to be the case with antidumping in particular because Article 17.6 of the WTO text instructs the panels and AB to defer to national officials in areas where there is more than one permissible interpretation of the WTO text—even though the panels and AB might have chosen another interpretation.

But in a series of at least five decisions (other cases are in the pipeline) relating to antidumping and safeguards actions, panels and the AB have overturned U.S. actions, labeling them “impermissible” under WTO law. These cases include the following: *U.S.–Antidumping Act of 1916*; *U.S.–Antidumping Measures on Stainless Steel from Korea*; *U.S.–Antidumping Measures on Hot-Rolled Steel from Japan*; *U.S.–Safeguards Measures on Wheat Gluten from the EU*; and *U.S.–Safeguards on Lamb Meat from Australia*.

Both antidumping and safeguards actions are fraught with highly technical and intricate rules—designed so purposefully by industries and their legal retainers in an effort to insulate such largely protectionist actions from fundamental economic analysis and scrutiny. And it is true that in each of these cases, lawyers for both sides can spin out quite elaborate attacks and defenses on what the WTO panels and AB have decided. Although I am very much opposed to the current administration of U.S. antidumping and safeguards laws, after plowing through the cases and scholarly interpretations, I believe that the critics have a reasonably strong case that, in the words of one such critic, these decisions are “creating a body of WTO case law that imposes obligations on members that go well beyond those to which they thought they were subscribing when the Uruguay Round Agreements were negotiated.”

For arguments against the recent decisions, see Paul C. Rosenthal, “WTO Rulings against U.S. Import Relief Measures” (remarks for a conference on WTO Rulings against U.S. Import Relief Measures, International Trade Committee of the American Bar Association, Washington, D.C., 21 May 2001); Rosenthal’s remarks are quoted in the preceding paragraph. See also Paul C. Rosenthal and Robert T.C. Vermylen, “The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objective during the Uruguay Round?” *Law and Policy in International Business* 31 (2000): 871–909; and *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellant Submission of the United States before the WTO Appellate Body, (AB-2001-2), World Trade Organization, Geneva, Switzerland, 7 May 2001.

For arguments supporting the legal interpretations of the panels and AB, see Lewis Leibowitz, “Impermissible Interpretations of the New WTO Antidumping and Safeguards Rules,” Trade Policy Briefing, Cato Institute, Washington, D.C., forthcoming. The aforementioned letter from sixty-one U.S. Senators is reported in Gary Y. Yerkes,

“Senators Urge President Bush Not to Weaken U.S. Trade Laws,” *International Trade Reporter* 18 (10 May 2001): 755.

In addition, as noted at the outset of this note, questions have been raised concerning the much-discussed film case between the United States and Japan, or more accurately between the Kodak and Fuji companies. The WTO panel ruled against the United States, but interestingly, two U.S. lawyers who represented Fuji and thus agreed with the results of the case, have recently written a law review article that is severely critical of the legal reasoning of the panel (the panel’s findings were not appealed). The most important legal principle in the case involved the concept of “non-violation nullification and impairment (NVNI),” which, stated simply, allows a WTO member to raise claims against another member even if that member has not taken measures that violate a specific GATT/WTO obligation. As a result of their analysis, the two lawyers conclude, “In our view, the panel adopted several legal interpretations that go beyond the language of the treaty text and the original intent of the drafters. . . . In our view, these interpretations are legally flawed. If WTO members are to live with such a broad NVNI remedy, *they should expressly adopt it* [italics added]. It is quite ironic that the country [the United States] that has complained the loudest about preserving its domestic policy autonomy has now triggered the most open-ended legal cause of action in the history of the GATT/WTO.” See James P. Durling and Simon N. Lester, “Original Meanings and the *Film* Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification and Impairment Remedy,” *George Washington Journal of International Law and Economics* 32 (1999): 215, 269.

18. For a general treatment of Article XX, see Jackson, *The World Trading System*, 232–238.

19. Legal scholars are also vigorously debating the validity of the product/process distinction in relation to GATT/WTO jurisprudence. In an e-mail to the author in response to an early draft of the book, Robert Hudec suggested that I make clear to readers that the product/process doctrine relating to Article III remained very much intact: “The product process doctrine is alive and well. It has been approved by every panel to consider it. . . . What the Appellate Body did [in the shrimp/turtle case] was to indicate that it would approve an Article XX(g) exception to the Article III violation.” E-mail from Robert Hudec to author, 27 November 2000. See also Robert E. Hudec, “GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices, in *Fair Trade and Harmonization: Prerequisites for Free Trade?* vol. 2, eds. Jagdish N. Bhagwati and Robert E. Hudec, (Cambridge, Mass.: MIT Press, 1996), 95–174.

But see the symposium and debate in the spring 2000 issue of the *European Journal of International Law*, where University of Michigan legal scholars Robert Howse and Donald Regan directly challenged the more traditional interpretations, arguing that “there is no real support in the text and jurisprudence of the GATT for the product/process distinction.” In turn, John Jackson rebutted, “The proposition that there is no ‘justifiable text’ to support the essence of the product/process distinction is

questionable. There is ‘justifiable text.’” He went on to characterize the Howse/Regan theory as “somewhat remote from reality, and particularly remote from the institutional context of the WTO and its relationship to trade policy.” At the moment, Howse and Regan are distinctly in the minority among legal scholars. See Robert Howse and Donald Regan, “The Product/Process Distinction—An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy,” and John Jackson, “Comments on Shrimp/Turtle and the Product/Process Distinction,” *European Journal of International Law* 11 (2000): 249–289 and 303–307, respectively.

It should be added that Jackson has recently agonized in print over the correctness of the tuna/dolphin versus the shrimp/turtle decision. Writing in 1992, he praised the decision of the tuna/dolphin panel to decline to rule and to call for a legislative mandate, and even today, he supports the distinction between product and process: “In that sense, the tuna/dolphin case was praiseworthy, and in a broader sense should be pursued by the environmentalists who dislike the outcome. It suggests a certain ‘judicial restraint.’” See John H. Jackson, “World Trade Rules and Environmental Policies: Congruence or Conflict?” *Washington and Lee Law Review* 49 (1992): 1254. Recently, however, Jackson has revised his views because of the lack of resolution of the issue through negotiation. In the *European Journal of International Law* symposium, Jackson stated: “At the time of the [tuna/dolphin] case, it could be argued (and I have so argued) that the panel took an appropriate approach. But it is my belief, that if after ten years no progress has been made using other procedures, then there is an institutional argument that there should be more accommodation within the ‘judicial process.’ This may not be the only way, but there is certainly an argument for it.” See Jackson, “Comments on Shrimp/Turtle,” 305. As noted in the text, however, Jackson also points out that allowing unilateral banning of imports on the basis of production methods is a “slippery slope” that could open the door to widespread protectionist actions. While I am sympathetic to the reasons for Jackson’s puzzlement and equivocation, this study contends that use of the DSU to settle divisive policy issues will ultimately undermine, and potentially destroy, the system itself.

20. *Ibid.*, 238. Writing in 1996, Hudec advanced a response to the tuna/dolphin decision that would provide “the most sustainable legal approach to really effective legal disciplines over unilateral trade restrictions.” Under this approach, the importing nation would apply for a waiver to allow temporary restrictions for environmental purposes; and as a condition for granting the waiver, the importing nation would agree to enter into longer-term negotiations toward a multilateral solution to the problem. Despite the negative reaction to the tuna/dolphin decision in the United States and from international environmental organizations, Hudec pointed out that all of the other GATT members who spoke out (thirty-nine members) strongly supported the prohibition against unilateral sanctions in this case. See Hudec, “GATT Legal Restraints,” 117, 152–154.

21. Jackson, “Comments on Shrimp/Turtle,” 306.

22. For analysis of the problems presented by the AB’s decisions in the Shrimp/turtle case, see Gary P. Sampson, *Trade, Environment, and the WTO: The Post-Seattle Agenda*,

(Washington, D.C.: Overseas Development Council, 2000), 106–120; and Arthur E. Appleton, “Shrimp/Turtle: Untangling the Nets,” *Journal of International Economic Law* 2, no. 3 (September 1999): 476–496. There is also a brief, but insightful review of these issues in Gary P. Horlick, “The World Trading System at the Crossroads of Science and Politics,” in *The Next Trade Negotiating Round: Examining the Agenda for Seattle*, ed. Jagdish Bhagwati (proceedings of conference at Columbia University, New York, N.Y., 23–24 July 1999).

One legal scholar, Jeffrey L. Dunoff of Temple University School of Law, believes that because of the high political costs involved and major questions regarding the legitimacy of the WTO DSU in matters relating to “trade and” issues (environment and labor, for example), WTO panels and the AB should avoid where possible making decisions in these areas. Citing work by Alexander Bickel, a noted judicial theorist, Dunoff argues that the WTO bodies should adopt “mediating techniques,”—raising questions of standing, ripeness of the issue for adjudication, and justifiability—to avoid handing down evaluations of certain contested decisions (or nondecisions) made during trade round negotiations: “It is politically naïve to urge WTO panels to ‘struggle openly’ with the value conflicts raised by ‘trade and’ issues. In this context, open struggle will be self-defeating. . . . The fledgling WTO dispute resolution system should not be expected to ignore the political costs that accompany the unsatisfactory resolution of ‘trade and’ disputes. More importantly, the suggestion that panels abstain from deciding certain issues is not an invitation for the exercise of ‘unchanneled, undirected, and uncharted discretion.’ Rather, it should be understood as a call for the exercise of prudence in the name of principle.” See Jeffrey L. Dunoff, “The Death of the Trade Regime,” *European Journal of International Law* 10 (1999): 756, 761.

23. Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R), World Trade Organization, Geneva, Switzerland, 1998; Sampson, *Trade, Environment, and the WTO*, 109.

24. Sampson, *Trade, Environment, and the WTO*, 110. Sampson frames the larger issue in the following manner: “Can WTO obligations be breached to ensure that certain standards deemed appropriate by the importing country are applied in the exporting country as a precondition for doing business? Much to the chagrin of many environmentalists, the traditional interpretation has been that trade measures related to environmental standards should be taken only with respect to the fauna and flora and natural resources within the boundaries of the country taking action. The implications are clear. Countries are free to adopt whatever regulations they wish to reflect standards within their own borders, but they cannot restrict trade on the grounds that other countries do not apply these standards domestically. In practical terms, this means that while a country may adopt whatever fishing practices for tuna or shrimp it wishes to protect dolphins, turtles, or any other sea life, it cannot refuse to import tuna or shrimp from countries that choose not to adopt the same or equivalent standards.”

25. Appleton, “Shrimp/Turtle,” 481–483, 491–492; John Jackson believes that the conditional tense used at crucial points in the decision means that the AB has given no

definitive judgment on this issue: “The shrimp-turtle [decision] has a very nuanced statement... which some people have interpreted as recognizing unilateralism, but I think use of the word “may” in the crucial sentence indicates that the Appellate Board division did not entirely make up its mind yet on this question.” E-mail from John Jackson to author, 1 October 2000. There is some language in the AB decision to support Jackson’s contention. Thus, the AB stated, “Perhaps the most conspicuous flaw in this measure’s application is related to its intended and actual coercive effect on the specific policy decisions made by foreign governments. . . . It is not acceptable in international trade relations for one WTO member to use an economic embargo to require other members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal . . . without taking into account different conditions which may occur in the territories of those other members.” See Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, paragraphs 161, 164.

26. Sampson, *Trade, Environment, and the WTO*, 110–111.

27. Appleton, “Shrimp/Turtle,” 495–496. Appleton (482) also criticized the “evolutionary” approach taken by the AB to Article XX, stating, “Tinkering with the exceptions in Article XX through the application of an ‘evolutionary’ approach is likely to alter the rights and obligations now viewed as present in the substantive provisions of the GATT 1994.”

28. Sampson, *Trade, Environment, and the WTO*, 111. Sampson also criticizes the AB for translating general language in the preamble to the WTO agreement into legal obligations. The preamble speaks of applying WTO principles in light of the necessity for “sustainable development” and the need to “protect and preserve the environment.” In challenging the AB’s interpretation of the obligations flowing from the language, Sampson (112) writes the following: “Principles as expressed in preambles are general legal commitments rather than specific legal obligations of states. In making a ruling to the contrary, the Appellate Body clearly assigned importance to promoting sustainable development and preserving the environment, something that appears only in the preamble. This objective is certainly recognized and supported by WTO members. The manner in which it is translated into rights and obligations can fundamentally change the character of the exceptions provisions of the WTO.”

29. Quoted in Daniel Bodansky, “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?” *American Journal of International Law* 93 (1999): 606, n. 57. Bodansky also agrees that legislative amendments are needed in this case, as do two other noted legal scholars, Thomas Schoenbaum and John Jackson. See Thomas J. Schoenbaum, “Free International Trade and Protection of the Environment: Irreconcilable Conflict?” *American Journal of International Law* 86 (1992): 717; and John H. Jackson, “World Trade Rules and Environmental Policies: Congruence or Conflict?” *Washington and Lee Law Review* 49 (1992): 1254. In praising the decision of the panel to decline to rule and call for a legislative mandate, Jackson (1254) wrote: “In that sense, the tuna/dolphin case was praiseworthy, and in a broader sense should be praised by the environmentalists who

dislike the outcome. It suggests a certain ‘judicial restraint.’ A contrary approach, with the panel seizing the issue and going forward with it, might in some future case be severely contrary to the interests of environmental policy.”

Finally, it should be noted that the controversy over environmental and health and safety exceptions to Article XX continues unabated. In March 2001, the Appellate Body upheld the French government’s ban on the importation of chrysotile asbestos against Canada’s argument that this action violated Article XX. The AB accepted the argument that the asbestos was a cancer-causing agent and that the French government was allowed to ban it for health and safety reasons. In May 2001, in another wrinkle in the shrimp/turtle case, a WTO panel rejected Malaysia’s contention that the United States should be forced to lift its ban on the importation of shrimp from Malaysia. In so doing, the panel, at least by implication, made legal the banning of goods based upon how they are produced so long as the WTO member imposing the ban does not discriminate among WTO members. Neither the panels nor the AB, however, have directly tackled the issue of Article XX environmental exceptions directly. For a description of the two recent decisions, see Daniel Pruzin, “United States Scores WTO Victory in Defense of Its Shrimp-Turtle Ban,” *International Trade Reporter* 18 (17 May 2001): 795–796.

30. For analyses of the issues presented by *amicus* briefs, see Sampson, *Trade, Environment, and the WTO*, 112–114 (critical of the AB’s reasoning); and Robert Howse, “The Legitimacy of the World Trade Organization” (University of Michigan Law School, Ann Arbor, Mich., 2000, photocopy), 33–37 (favorable to the AB’s decision. For more general treatments, see Andrew W. Shoyer and Eric M. Solovy, “The Process and Procedure of Litigating at the World Trade Organization: A Review of the Work of the Appellate Body,” (paper prepared for the Georgetown University Law Center Conference on the First Five Years of the WTO, Washington, D.C., 20–21 January 2000), 7–13; and Staff Report, “Review of the Dispute Settlement Understanding: Operation of Panels” paper prepared for same conference at Georgetown University Law Center), 11–14.

31. Howse, “Legitimacy of the WTO,” 36.

32. *Ibid.*, 35–37.

33. Sampson, *Trade, Environment, and the WTO*, 113–114; Shoyer and Solovy, “Process and Procedure of Litigation,” 9–10.

34. Daniel Pruzin, “Appellate Body Upholds Panel Ruling against U.S. Steel Duties,” *International Trade Reporter* 17, no. 20 (18 May 2000): 788–789. I am grateful to John Ragosta for pointing out the narrow basis of the AB decision. E-mail from John Ragosta to author, 18 December 2000. For a description of the controversy over the Canadian/French case, see Daniel Pruzin, “WTO Appellate Body under Fire for Move to Accept *Amicus Curiae* Briefs from NGOs,” *International Trade Reporter* 17, no. 47 (30 November 2000): 1805–1806.

35. Pruzin, “Appellate Body Upholds,” 789.

36. These statements were all reported in Daniel Pruzin, “Key WTO Members Score Appellate Body for Decision to Accept *Amicus* Briefs,” *WTO Reporter*, 8 June 2000.

37. Pruzin, “WTO Appellate Body under Fire,” 1805–1806; see also “WTO: Briefs in a Twist,” *The Economist*, 9 December 2000, 85. When their petitions were rejected, the environmental NGOs complained bitterly. A spokesperson for Greenpeace stated, “Once again, the WTO has arbitrarily dismissed the input of civil society, fueling concerns about the secretive way in which it makes decisions that impact on human lives and the environment.” (Quoted in Pruzin, 1806.)

38. Pruzin, “WTO Appellate Body under Fire,” 1805.

39. *Ibid.*, 1806.

40. India also rejected arguments that WTO members could always file *amicus* briefs as did other organizations that did not formally belong to the WTO. Indian WTO ambassador Srinivasan Narayanan stated, “I do not think that any WTO member would be particularly pleased at the prospect of having to characterize itself as something other than a member just for getting the privileges which nonmembers are being given by the Appellate Body.” (Quoted in Pruzin, 1805.)

41. Before this case emerged, Shoyer and Solovy had pointed out that it also appeared that quite specific language in the DSU precluded the AB from accepting *amicus* briefs. See Shoyer and Solovy, “Process and Procedure of Litigation” (9–10): “The relevant DSU provisions seem to make it quite difficult for the Appellate Body to justify the consideration of an independently submitted *amicus* brief. Article 13 of the DSU, under which the AB stated that a panel could consider a free-standing *amicus* brief, addresses only panels, not the AB. Furthermore, Article 17 of the DSU and Rule 24 of the Appellate Working Procedures state only that ‘third parties’ may make a submission to the AB. In turn, ‘third parties’ are defined as members of the WTO.”

42. Sampson, *Trade, Environment, and the WTO*, 114.

43. The material in this section is taken from Frieder Roessler, “The Institutional Balance between the Judicial and the Political Organs of the WTO” (paper presented at the Conference on Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium, Kennedy School of Government, Harvard University, Cambridge, Mass., 1–2 June 2000). For a very different view of the facts and legal meaning of these cases, see paper presented at the same conference by William J. Davey, “A Comment on Balancing Judicial and Political Power in the World Trade Organization.” Robert Hudec also expressed his disagreement with Roessler’s reading of these cases in an e-mail to the author, 27 November 2000.

44. Roessler, “The Institutional Balance,” 2–3.

45. Ibid., 10–12.

46. Ibid., 12–16.

47. Ibid., 9, 24.

48. Ibid., 2

49. Ibid., 23.

50. “Are There Better Means for Resolving Trade Disputes?” (panel discussion, Forum on Trade Disputes: The Challenges Ahead, Georgetown University Law Center, Washington, D.C., 26 June 2000).

51. The details of this section are taken largely from Bronckers, “Better Rules for a New Millennium,” 559–564. The “Reference Paper” can be found on the WTO web site at www.wto.org (accessed on 31 July 2001).

52. Ibid., 561.

53. Ibid., 562–563.

54. For descriptions of the SPS agreement and the beef hormones case set forth in this paper, see Donna Roberts, “Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations,” *Journal of International Economic Law* 1 (1998): 377–405; and Thomas Cottier, “SPS Risk Assessment and Risk Management in WTO Dispute Settlement: Experience and Lessons” (paper presented at the Conference on Risk Analysis and International Agreements, Melbourne, Australia, 10–11 February 1999), 1–22. For broader assessments of the connections between health and safety regulations and WTO rules, see Steve Charnovitz, “The Supervision of Health and Safety Regulation by World Trade Rules,” *Tulane Environmental Law Journal* 13 (2000): 271–301; and Joost Pauwelyn, “The WTO Agreement on SPS Measures,” *Journal of International Economic Law* 2 (1999): 641–664.

In addition to the beef hormones case described in the text, there have been two other SPS WTO cases: Australia–Salmon and Japan–Agricultural Products. See Charnovitz, “The Supervision of Health and Safety Regulation.”

55. See Cottier, “SPS Risk Assessment.” For another analysis of the findings of the panel and the Appellate Body, see James Cameron and Karen Campbell, “Challenging the Boundaries of the DSU through Trade and Environment Disputes,” in *Dispute Resolution in the WTO*, eds. James Cameron and Karen Campbell (London: Cameron May, 1998), chap. 10.

56. Reinhard Quick and Andreas Bluthner, "An Appraisal and Criticism of the Ruling in the WTO *Hormones Case*," *Journal of International Economic Law* 2 (1999): 618, 639; see also Cottier, "SPS Risk Assessment," 13–17, 21.

57. Quick and Bluthner, "Has the Appellate Body Erred?" 639.

58. For these later developments, see Gary G. Yerkey, "Corporate Leaders Say U.S.-EU Disputes Harming Business, Urge Quick Resolution," *International Trade Reporter* 17 (23 November 2000): 1774–1775.

59. For a discussion of the "sound science" and "precautionary principle" as they relate to the SPS agreement, see Gary N. Horlick, "The World Trading System at the Crossroads of Science and Politics," in *The Next Trade Negotiating Round*, ed. Jagdish Bhagwati, (proceedings of conference at Columbia University, New York, N.Y., 23–24 July 1999), 257–260.

60. The deep substantive disagreements, and the highly emotional responses to the invocation of the precautionary principle were both on display at a conference convened in late September 2000 by the Harvard University Center for International Development. Some experts strongly questioned the validity of the concept, a view typified by the following statement by Gary Marchant, a law professor from Arizona State University: "[The precautionary principle] thrives because it is ambiguous. What you end up with is arbitrariness." Meanwhile, critics of biotechnology charged that behind these criticisms was a plot by industrial interests to undermine the principle for their own purposes (and they charged that the Harvard Center, by merely convening the conference, was playing into the hands of biotech companies). Thus, Philip Bereano of the University of Washington argued, "The precautionary principle is now becoming enshrined in international law, and that is upsetting some powerful interests." Not surprisingly, at the end of the day, Calestous Juma, who convened the meeting for the Harvard Center, concluded, "It is evident that there is no real agreement on what the precautionary principle means and how it should be applied." See Colin MacIlwain, "Experts Question Precautionary Approach," *Nature*, 5 October 2000, 551.

61. T. O'Riordan and J. Cameron, "The History and Contemporary Significance of the Precautionary Principle," in *Interpreting the Precautionary Principle*, eds. T. O'Riordan and J. Cameron (London: Earthscan, 1994).

62. James Cameron and Karen Campbell, "Dispute Settlement in the WTO," chap. 10, 218–219.

63. Hector Rogelio Torres, "Precaution Meets Protectionism at the WTO," *Journal of Commerce*, 13 January 2000, 6.

64. It must be admitted that at times political divisions among negotiators produce contradictory mandates that can hopelessly complicate the resolution of issues. Take, for example, the controversy over the definition and reach of the "precautionary principle"

and the jurisdiction of WTO rules versus the rules laid down in environmental treaties and agreements. The issue has become quite complicated as a result of contradictory language in the 2000 Biosafety Protocol to the Convention on Biodiversity (the Cartagena Protocol). One article of the protocol states that “the Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements [i.e., the WTO]. . . .” But another article states that “. . . the above recital is not intended to subordinate this Protocol to other international agreements.” How a WTO panel or the AB would handle such a dispute is anybody’s guess. From the perspective taken in this study, both should adopt the stance of the tuna/dolphin panel and send the dispute right back to the WTO member states for resolution. For a highly critical analysis of the negotiations leading to the Cartagena Protocol, see Hon. Andrew Thomson, Member of Parliament, Australia, “The Dangers of Secret Treaty-Making: The Biosafety Protocol as a Case Study,” *Institute of Public Affairs Review* 52 (June 2000): 21–23.

65. Rabkin, *Why Sovereignty Matters*, 32-33. For a description of the evolution of soft law as it relates to the concept of sustainable development and the status of women, see Kenneth W. Abbott, “‘Economic’ Issues and Political Participation: The Evolving Boundaries of International Federalism,” *Cardozo Law Review* 18 (1996): 979–986.

66. Philip R. Trimble, “A Revisionist View of Customary Law,” *UCLA Law Review* 33 (1986): 668. International law is governed by two sets of rules: customary law as described above, and treaty law that consists of obligations negotiated freely by nation-states.

67. Rabkin, *Why Sovereignty Matters*, 55. For a critique of techniques used by legal theorists to establish the legitimacy of current customary law, written by an author who is sympathetic to environmental causes, see Daniel Bodansky, “Customary (and Not So Customary) International Environmental Law,” *Indiana Journal of Global Legal Studies* 3 (1995): 105–119.

68. Trimble, “A Revisionist View,” 718-719, 721. For other powerful critiques of the so-called modern view of customary international law, see Curtis A. Bradley and Jack L. Goldsmith, “Customary International Law as Federal Common Law: A Critique of the Modern Position,” *Harvard Law Review* 110 (1997): 800–840; and Jack L. Goldsmith and Eric A. Posner, “A Theory of Customary International Law,” *University of Chicago Law Review* 66 (1999): 1113–1177. Goldsmith and Posner employ IR theory to explain the dynamics of customary international law and the behavior of nations with regard to such law. Rather than arising from a heightened sense of legal or moral obligations to common norms, they argue (1113) that nations adopt customary law solely in the pursuit of national self-interest, adopted to different situations in “discrete historically contingent contexts.” Using empirical historical tests, they find four different conditions that will lead to adoption of customary international law by individual nations: coincidence of interest with other states; the ability to coerce one or more other states into compliance with a certain principle; cooperation in order to escape a repeated prisoners’ dilemma situation; and coordination where the interests of several states converge. In IR terms,

they base their theory on two traditions, realism and institutionalism: “Realism emphasizes that states act rationally to further their perceived national interest, and that the distribution of national power determines international behaviors. Realism is skeptical about international cooperation and international law. By contrast, the second tradition—institutionalism—is more optimistic about international cooperation and international law. It argues that states acting rationally to further their own interests can sometimes overcome conflicts of interest to achieve mutually beneficial cooperative outcomes. But institutionalists put their faith in international organizations. . . . They ignore [customary international law] which, by definition, arises from decentralized and noninstitutional state acts.” (1176). For more details on realism and institutionalism, see Appendix 1, pp. **XX**.

69. Paul B. Stephan, “International Governance and American Democracy,” *Chicago Journal of International Law* 1 (2000): 238. For a view challenging the assertions that international customary law threatens U.S. democratic institutions, see Joel Richard Paul, “Is Global Governance Safe for Democracy?” *Chicago Journal of International Law* 1 (2000): 263–271. Paul argues that there are sufficient checks and balances within the U.S. political system to thwart this threat, including, for example, appeals from lower court rulings and the final authority of Congress to determine whether customary law becomes U.S. law.

70. Jackson, *The World Trading System*, 26. The full citation to the *Third Restatement is Restatement of the Law (Third): Foreign Relations Law of the United States* (Washington, D.C.: American Law Institute, 1987).

71. “Reform of the WTO’s Dispute Settlement Mechanism for Sustainable Development,” World Wildlife Fund Discussion Paper (Gland, Switzerland: World Wildlife Fund, July 1999), 6.

72. *Ibid.* See also Robert Howse, “The Legitimacy of the World Trade Organization,” 42.

73. I am grateful to Robert Hudec for suggesting that the precise issues presented here revolve around the status of the Vienna Convention in WTO law. The DSU, as agreed to by all WTO members, explicitly directs the panels and the AB to interpret WTO law in light of existing international law; and the Vienna Convention is acknowledged as the reference source and guide for the treaty interpretation (although, interestingly, the United States has never formally agreed to this convention). Further, the Vienna Convention expressly directs nations to interpret treaty words and phrases in the total “context” of the treaty, including preambles and other introductory or hortatory language. E-mail from Robert Hudec to author, 27 November 2000.

While I agree that the AB must interpret all treaty language in its “context,” I would still argue that preambles, hortatory declarations, and other soft law should not be accorded the same binding force as *specific* treaty commitments freely negotiated by national officials and ratified by home legislatures.

74. Sampson, *Trade, Environment, and the WTO*, 111–112.

75. *Ibid.*, 112.

76. World Wildlife Fund *Amicus* Brief, Shrimp-Turtle Dispute (Gland, Switzerland: World Wildlife Fund), 2.

77. *Ibid.*, 13–15.

78. Robert Hudec argues that that even though “environmental advocates will claim any good idea to be customary international law,” through the use of “sloppy standards, . . . this is not the definition of customary international law employed by the world’s leading international law scholars.” He points to the strict definitions of the International Law Commission of the UN, which, he asserts, “would not call any of these environmental norms ‘customary international law.’” E-Mail from Robert Hudec to author, 27 November 2000.

Other international legal scholars strongly disagree with Hudec’s view that the process of incorporating customary international law into international or domestic law is both deliberate and conservative (as to interpretation). See articles cited in this chapter by Trimble; Stephan; and Goldsmith with several coauthors. Rabkin has pointed out that international law journals now speak of “instant customary international law;” and he cites authors who argue that, because no nation opposed treaties regarding genocide and the peaceful use of outer space, these treaties became “instant” customary law. See Rabkin, *Why Sovereignty Matters*, 135, n. 22.

79. Howse, “Legitimacy of the WTO,” 42.

80. *Ibid.*, 43.

81. *Ibid.*, 44.

82. Rabkin, *Why Sovereignty Matters*, 89–92.