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Judicial Law-Making, Internal Transparency, and External Transparency:
Recent Institutional Developments at the WTO*

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This article describes, explains, and evaluates from a political perspective three sets of important institutional developments¹ that have been unfolding at the World Trade Organization (WTO) since its founding. First, developing country governments have been championing greater WTO internal transparency, which would broaden their opportunities to participate more fully and actively in trade negotiations that are part of the WTO's legislative activities. This campaign has been complemented by efforts to build the institutional capacity of developing country states and missions in Geneva, often through technical assistance, so that they can take advantage of such opportunities.

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¹ Institutional developments refer to changes in WTO rules, principles, procedures, or practices. The concept is similar to that of "changes in a regime," used by some political scientists. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* (Stephen Krasner ed., Cornell University Press 1983).

Second, the EC² and the United States-- spurred by some non-governmental organizations (NGOs)-- have stepped up their efforts to increase the WTO's external transparency, which would make it easier for civil society to monitor, evaluate, and participate in various WTO activities, including legislative and judicial processes. Third, the legalized process of GATT/WTO³ dispute settlement, which is guided by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes⁴ (DSU), has taken a form characterized by expansive judicial law-making.

Part I of this article argues that these developments may be fruitfully explained by politics and evaluated in terms of their impact on the political sustainability of the WTO. Institutions must remain in sync with the underlying political environment. If institutional developments at the WTO do not keep pace with underlying changes in the political environment, then political support for the organization will diminish. Economic, legal, and democratic approaches to evaluating WTO institutional developments are considered briefly in order to highlight some of their distinctive insights and prescriptions that bear on the institutional developments being considered,

² EC is used to refer to the European Community, the European Communities, or the European Economic Community. The European Economic Community was "seated" at GATT meetings from about 1960. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 102 (The Michie Company 1969). With conclusion of the Maastricht Treaty in 1992, the name changed from European Economic Community to European Community, which then became a Member of the WTO at its inception. At various times and in various contexts, the European Communities have also been recognized at the GATT and the WTO.

³ GATT/WTO refers to the institutional system of the General Agreement on Tariffs and Trade and its successor organization, the World Trade Organization.

⁴ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, [hereinafter WTO DSU], Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement] Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, *reprinted in* 33 I.L.M. 12 (1994).

and to show that each may be complemented by political analysis of the type undertaken here.

Parts II through IV offer political analysis of the three recent institutional developments, respectively. Increased internal transparency would marginally change the GATT/WTO's consensus-based legislative process. The WTO's most powerful Members-- the EC and the United States-- are largely satisfied with that process: they have been able to use sources of power extrinsic to formal rules to invisibly weight outcomes and have found the existing process to be effective and efficient at generating important information about developing country interests. The EC and the United States have resisted most of the proposed internal transparency changes, which could complicate and undermine the legislative process they have dominated, and diminish the efficiency of information-generation that has been central to that process. At the same time, the EC and the United States have supported capacity-building, partly to enable developing countries to more fully comply with and implement their WTO commitments. This has improved many developing countries' institutional capacity to participate in the WTO's formal legislative and judicial processes. While increased institutional capacity and cooperation among developing countries has complicated WTO negotiations, these developments have not yet significantly reduced EC and U.S. dominance of the legislative process-- dominance that derives ultimately from their market power.

External transparency has increased marginally through reforms in the WTO and in national institutions of trade policy-making. Taken together, this reform process— which is still underway-- is beginning to address some concerns about inclusiveness in WTO decision-making. Nonetheless, EC and U.S. negotiators oppose any substantial

reduction of secrecy in legislative processes, which they fear could jeopardize their ability to successfully conclude trade agreements. Moreover, developing countries oppose substantial additional increases in external transparency, which they see as enhancing the political influence of Northern-dominated NGOs. For these reasons, external transparency developments have not kept pace with the demands of non-business NGOs from Europe and the United States.

The Appellate Body-- an institution that has only indirect accountability to the Members-- has engaged in law-making to an extent not contemplated by many of those who negotiated or approved the DSU. Yet the Appellate Body is acting within a strategic space defined by the bounds of legal discourse, which may be constrained by constitutional rules-- both of which are constrained by WTO politics. The Appellate Body may employ alternative aspects of legal discourse to interpret the WTO agreements, ranging from international law doctrines through which it exercises restraint to those that engage it in substantial law-making. In contrast to the rules of the GATT dispute settlement system,⁵ the WTO DSU maintains weak constitutional constraints on this range of discursive alternatives, which has afforded the Appellate Body leeway to take a discursive stance that favors expansive law-making through clarification of ambiguities, gap-filling, and dynamic interpretation of WTO agreements. In that context, politics is an important constraint on judicial law-making. In particular cases, Appellate Body law-making has engendered complaints from losing Members-- but not from the winners; its pattern of law-making in the area of trade remedy laws has clearly irritated

⁵ Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.) at 61-67 (1990) [hereinafter GATT DSU].

the U.S. government. Nonetheless, analysis of Members' signals about WTO dispute settlement suggests that Appellate Body's pattern of law-making has not fundamentally shifted the balance of WTO rights and responsibilities to the disadvantage of both of its most powerful Members-- the EC and the United States-- so the Appellate body has operated within its political space for law-making.

Part V concludes that the WTO institutional changes examined here are part of an institutional evolution to accommodate changes in the political environment-- but that evolution is incomplete. In the long run, the WTO will enjoy sustained political support only if its institutional rules, principles, procedures, and practices accord with the underlying political environment and changes in it. The process of GATT/WTO institutional change has not been smooth and some outputs have yielded political protest. Moreover, GATT/WTO institutional change usually lags behind changes in the political environment, so some aspects of the institution may be out of sync with the contemporary political-economy of globalization. Nonetheless, on the whole, the WTO is moving in a direction that is consistent with the interests of powerful Members (and the balance of interests within those Members' states).

I. Evaluating WTO Institutional Developments: Politics, Economics, Law, and Democracy

How should we explain and evaluate institutional developments at the WTO? Trade law and economics scholars have provided a lens for evaluating rules and institutional change at the GATT/WTO (and elsewhere), assessing law by the criterion of

whether it maximizes efficiency.⁶ More traditional law scholars offer a lens for evaluating WTO institutional developments according to whether they foster compliance with, predictability of, and completeness and coherence in the organization's legal system.⁷ More recently, some political theorists and activists have evaluated GATT/WTO institutional rules and practices according to democratic criteria.⁸ Each of these approaches offers useful insights that bear on the institutional developments examined here, but each benefits from complementary insights offered by a fourth approach: political analysis of WTO institutional developments.

Analysis of WTO Institutional Developments-- Political Perspectives

The approach used here explains institutional developments at the WTO as a function of Member state interests (particularly the interests of powerful states) and powerful non-governmental actors within those states. It evaluates institutional developments according to whether they maintain, increase, or diminish political support for the organization. In order to survive, every organization needs to maintain or increase underlying political support.⁹ The WTO is no exception. The political discord that has

⁶ See, e.g., Alan Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998).

⁷ See, e.g., JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (Royal Institute of International Affairs 1990); Joost Pauwelyn, *The Role of Public international Law in the WTO: How Far Can We Go?*, 95 AJIL 535 (2001); Gabrielle Marceau, *A Call for Coherence in international Law: Praises For the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement*, 33(5) J. WORLD TRADE 87, 87-152 (1999).

⁸ See, e.g., Robert Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* (Ian Shapiro & Casiano Hacker-Cordon eds., Cambridge University Press 1999); Robert O. Keohane & Joseph S. Nye, Jr., *Democracy, Accountability and Global Governance*, in *GLOBALIZATION AND GOVERNANCE* (Peter Gourevitch & David Lake eds., Princeton University Press, 2002).

⁹ JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* (Free Press 1989).

been associated with the GATT/WTO in the last decade-- including developing country vitriol about process and outcomes, the 1990 riots in Seattle, and complaints on Capitol Hill about judicial activism at the WTO-- reflects sources of political disenchantment with the organization. And each element of that discord is related to the three institutional developments examined here.

This political approach is explanatory-- and prescriptive in so far as it suggests solutions for increasing political support for the WTO. It offers a heuristic for understanding variance in political support for the WTO, explaining demands for institutional change there, and explaining which demands or activities succeed in catalyzing sustained institutional change-- and which demands and activities fail.¹⁰

The approach advanced here relies primarily on three sets of well-accepted insights about international organizations and politics. First, multilateral organizations that are not supported by the world's most powerful states will either collapse or become irrelevant.¹¹ They must effectively perform functions that are supported by powerful states and they must respond to changes in the political, material, or ideational environment in a manner consistent with the underlying power structure.

Second, understanding and assessing changes in trade institutions can be understood only by simultaneously considering domestic and international trade

¹⁰ In calling for the WTO system to move away from economic technocracy and back towards embedded liberalism, Robert Howse has recently captured a tension between the economic analytic and a political analytic. But a political analytic has nowhere been specified or applied. Robert Howse, *From Politics to Technocracy-- and Back Again: The Fate of the Multilateral Trading Regime*, 96(1) AJIL 94 (Jan. 2002).

¹¹ Stephen D. Krasner, *supra* note 1.

politics.¹² State interests may be seen as deriving from domestic political preferences.¹³ As domestic politics shifts, so may state negotiating positions in the WTO. The political sustainability of an international organization depends on the harmonized operation of domestic and international political processes: domestic institutions must effectively aggregate domestic trade interests in a way that is consistent with the operation of international institutions, and domestic and international political processes must be mutually supportive.¹⁴

Third, in some instances, international organizations or their organs become agents for the member states, their principals. In particular, the judicial function of an international organization may be legalized, characterized by delegation of authority to interpret and apply law.¹⁵ In such instances, the court may become a semi-autonomous strategic actor, enjoying limited autonomy to make law.¹⁶

Taken together, these three insights suggest that analysis of institutional change at the WTO should focus on the extent to which the organization adapts to change in its political environment. To what extent do WTO institutional rules, principles, procedures,

¹² Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42(3) INT'L ORG. 427, 427-60 (1988).

¹³ See, e.g., Andrew Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45(1) INT'L ORG. 19, 19-56 (1991); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51(4) INT'L ORG. 513, 513-53 (1997).

¹⁴ Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54(3) INT'L ORG. 603, 603-32 (2000).

¹⁵ Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Legalization and World Politics*, 54(3) INT'L ORG. 385, 385-400 (2000).

¹⁶ See, e.g., Anne-Marie Burley Slaughter & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41, 41-77 (1993); Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54(3) INT'L ORG. 489 (2000); Robert O. Keohane, Andrew Moravcsik & Anne-Marie

and practices catalyze political support from, and respond to political opposition by, powerful states and non-state actors within those countries? In the case of the WTO's semi-autonomous dispute settlement system, the challenge is to understand the extent to which it is constrained so as to act in ways fundamentally consistent with the interests of those states and non-state actors.

This political approach does not imply that the WTO should be supported politically without regard for normative objectives. But for those who embrace a complementary prescriptive objective for the WTO (such as increased efficiency, completeness and dynamism in the legal system, or democratization), understanding variance in the extent of political support for the WTO should be important. Hence, political support for the WTO is not the only metric that should be used for evaluating institutional change there, but it is an important metric that-- for purposes of analytic clarity-- will be considered here largely in isolation from other bases for evaluation of WTO institutional developments. Before turning to political analysis of these specific institutional developments, three primarily prescriptive approaches are considered so as to illustrate the complementarity of political analysis.

Trade Economics' Efficiency Perspective

Law and economics has focused its analysis of legal rules on the extent to which they maximize economic efficiency, usually evaluated in terms of Pareto-superiority.¹⁷

Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54(3) INT'L ORG. 457, 457-88 (2000).

¹⁷ BRUCE ACKERMAN, *ECONOMIC FOUNDATIONS OF PROPERTY LAW* (Bruce Ackerman ed., Little, Brown 1975). Many political-economy analyses emphasize the extent to which international organizations facilitate cooperation between states that would not otherwise occur, leading to Pareto-improvement among states. See, e.g., Robert Keohane, *After Hegemony* (Princeton University Press 1984). Other rationalist

Many trade economic analyses of the GATT/WTO center on microeconomic improvement of efficiency, building off the basic theory of comparative advantage classically formulated by Smith¹⁸ and Ricardo¹⁹, and neoclassically formalized by Heckscher and Ohlin.²⁰ While many trade economists attempt to address equity issues in international trade,²¹ most leading trade economists²² and trade law and economics scholars²³ have for a generation focused on evaluating the rules of the world trading system and national trade laws in terms of the inefficiencies resulting from barriers to free trade.

Efficiency is an important, appropriate, and central objective for the world trading system, and no movement in the North American academy has been more coherent, vocal, and influential in trade policy than trade economics. However, as with many

analyses emphasize how international institutions may be designed to maximize attainment of given interests. Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55(4) INT'L ORG. 761, 761-800 (2001). These rational choice arguments may be considered economic in their approach, although the interests and relationships that are assumed in the models are usually derived from some other discipline, such as politics or sociology.

¹⁸ ADAM SMITH, *WEALTH OF NATIONS* (Prometheus Books 1991).

¹⁹ DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (Prometheus Books 1996).

²⁰ ELI F. HECKSCHER & BERTIL OHLIN, *HECKSCHER-OHLIN TRADE THEORY* (Harry Flam et al. eds., MIT Press 1991).

²¹ See, e.g., J. Michael Finger, *Development Economics and the GATT*, in *TRADE THEORY AND ECONOMIC REFORM*, J. DeMelo and A. Sapir, eds. (Basil Blackwell 1991); and BERNARD M. HOEKMAN, PHILIP ENGLISH, AND AADITYA MATOO, *DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK* (World Bank 2002).

²² See, e.g., JAGDISH N. BHAGWATI, ARVIND PANAGARIYA & T. N. SRINIVASAN, *LECTURES ON INTERNATIONAL TRADE* (The MIT Press 1988).

²³ See, e.g., Alan Sykes, *supra* note 6; Alan Sykes, *Countervailing Duty Law: An Economic Critique*, 89 COLUM. L. REV. 199 (1989); Alan Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1995); THOMAS M. BODDEZ & MICHAEL J. TREBILCOCK, *UNFINISHED BUSINESS: REFORMING TRADE REMEDY LAWS IN NORTH AMERICA* (C.D. Howe Institute 1993).

normative metrics, a positive evaluation of the feasibility of its prescriptions is extrinsic to the metric. Maximization of efficiency does not maximize political support for liberal, multilateral trade, partly because efficiency maximization can not explain interest groups' relative political power on trade policy issues. For example, consumers who benefit from trade liberalization often face a collective action problem²⁴ in attempting to organize in support of pure free trade, whereas producers, some of whom are protectionist import-competitors, can more easily organize to bias the political calculations of elected officials. Moreover, to the extent that the political effects of non-efficiency interests are unaccounted for, an efficiency-oriented approach cannot accurately estimate the political sustainability of the liberal trade orthodoxy it typically favors. While a safety net for economic and social dislocations resulting from liberalization may be paid for from efficiency gains, efficiency does not inherently imply the extent to which those equity problems should be resolved.²⁵ And many environmentalists have concerns that transcend traditional notions of economic value.²⁶ Hence, the efficiency approach does not intrinsically explain or value the political sustainability function of maintaining "safety valves" (such as some trade remedy laws) or the "embeddedness" of liberal

²⁴ MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION: GOODS AND THE THEORY OF GROUPS* (Harvard University Press 1971).

²⁵ *See generally*, ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (The Brookings Institution 1975).

²⁶ ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (Ballantine Books 1990) (articulating the classic view that nature is valuable for its own sake and not as a resource to be valued instrumentally).

trade,²⁷ which are usually treated as second best institutional elements and explained by an appended political argument.

International Trade Law Perspectives

International law commentators and practitioners also offer institutional prescriptions for the GATT/WTO system. While there are notable exceptions,²⁸ much of the work of European and U.S. trade law commentators has prescribed increased legalization for the GATT/WTO system: more precise rules; increased delegation of dispute resolution to judicial authority; and more obligatory compliance by Member states.²⁹ Various GATT/WTO legal commentators have been championing interpretive approaches that aspire toward completeness and predictability in the WTO legal system, largely through gap-filling and clarification of ambiguities,³⁰ as well as compliance,³¹ coherence,³² and dynamism in the legal system.

Without doubt, the GATT/WTO system has become increasingly legalized since 1970 when a "legal culture" began to emerge among members.³³ The Uruguay Round

²⁷ John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, in INTERNATIONAL REGIMES (Stephen D. Krasner ed., Cornell University Press 1983).

²⁸ Robert Hudec has been more cautious than most other trade law commentators about legalization of the WTO. See, e.g., Robert E. Hudec, *Judicialization of GATT Dispute Settlement*, in WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE (Michael Hart & Debra P. Steger eds., 1992); Robert Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999).

²⁹ This elaboration of legalization is adapted from Goldstein & Martin., supra note 14.

³⁰ See, e.g., Pauwelyn, supra note 7; Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L. L.J. 333 (1999).

³¹ John H. Jackson, *The WTO Dispute Settlement Understanding -- Misunderstandings on the Nature of Legal Obligation*, 91(1) AJIL 60, 60-64 (Jan. 1997).

³² Marceau, supra note 7.

³³ ROBERT HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2nd ed. 1990)

agreements clearly moved the GATT/WTO system towards more precise rules and increased delegation to the dispute settlement system.³⁴ And since its creation, the WTO Appellate Body has rendered many decisions that rely on public international law³⁵ and have increased the precision of WTO rules.

Some of these prescriptions and the nature of the legalization trend (discussed below) may not be well-aligned with the politics of the trade regime. For example, while there is a legal obligation to comply strictly with WTO dispute settlement body decisions,³⁶ compliance may not be appropriate politically in all contexts. Under some circumstances, when domestic political forces are strongly or popularly aligned against compliance, a state may need to pay "compensation," by means of lowering its tariffs on products from countries suffering nullification or impairment of a WTO benefit as a result of the contravention.³⁷ Where compensation liberalizes a volume of trade equal to the trade closure resulting from the contravention, the result has net economic efficiency effects virtually equivalent to those brought about by compliance. The difference is that the compensated breach would be more efficient politically -- the breaching Member will have decided that it is better off breaching and paying compensation than complying, and the Member harmed by non-compliance will be no worse off than under the *status quo ante* because it will have been compensated. Hence, the contractual, efficient breach

³⁴ See, CLAUDE BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY 20-24 (AEI 2002); M. M. I Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of Trade Disputes*, 31(1) COLUM. J. TRANSNAT'L L. 104, 104-79 (1993); Michael K. Young, *Dispute Settlement In the Uruguay Round: Lawyers Triumph Over Diplomats*, 29(2) INT'L LAW 389-409 (1995).

³⁵ David Palmetier & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92(3) AJIL 398 (1998).

³⁶ Jackson, *supra* note 31.

approach permits resolution of trade disputes through a set of institutional alternatives that may be more politically sustainable than a legalistic, strict compliance approach.³⁸

More broadly, completeness, predictability, coherence, and dynamism are appropriate objectives for the WTO legal system. But achieving those objectives through Appellate Body action requires judicial law-making, which could either weaken or strengthen political support for the organization. Political analysis is necessary for understanding the parameters within which judicial law-making must operate if it is to avoid weakening political support for the organization.

Democracy Perspectives

Some new nonstate actors and commentators complain broadly of a "democratic deficit" at the WTO. They complain about the WTO's lack of external transparency (i.e., its "secrecy") and limited opportunities for NGO participation in WTO trade policy-making and dispute settlement.³⁹ One critic has argued that WTO decision-making processes should more closely resemble the "accepted and the legitimate practices that are broadly shared by liberal democratic states."⁴⁰ At the same time, many developing country negotiators complain of a lack of "internal transparency" at the WTO, claiming

³⁷ Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AJIL 416 (1996).

³⁸ Robert Lawrence makes a similar point in Robert Z. Lawrence, *Crimes and Punishments? An Analysis of Retaliation Under the WTO* (November 14, 2002) (unpublished book manuscript, prepared for presentation at the Institute for International Economics).

³⁹ Lori Wallach, *The FP Interview: Lori's War*, 118 FOREIGN POLICY 37, 37-47 (2000).; Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001); Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L. 401 (Fall 2000); Steve Charnovitz, *WTO Cosmpolitics*, 34(2) N.Y.U. J. INT'L. L. & POL 299, 299-354 (Winter 2002).

⁴⁰ Raustiala, *supra* note 39, at 416.

that the negotiating process is "undemocratic" and biased against them. Sophisticated analysts of democratic shortcomings at the WTO are quick to disaggregate "democracy" in an effort to measure WTO performance and prescribe solutions.⁴¹ For example, Robert Howse focuses his democratic critique of the WTO on the problem of agency costs.⁴² More broadly, Keohane and Nye frame their concerns as related to attenuated accountability of international organizations like the WTO.⁴³

"Democracy" has undeniable rhetorical power in much of the world and so democratic attributes of the WTO bear upon its legitimacy and political support for the organization. But from the perspective of those interested in maintaining or increasing political support for the WTO and trade liberalization, even the most sophisticated democratic critiques of the WTO are simultaneously underinclusive, since they limit legitimacy concerns to democratic concerns and do not consider other factors affecting political sustainability, and overinclusive, since they may include moral philosophy considerations that are not central to political support of the organization. Moreover, at the international level, a fully democratic process would be politically unsustainable: for

⁴¹ Without disaggregation, "democratic deficit" is a problematic way to frame procedural problems at the WTO. Robert A. Dahl has concluded that "international organizations are not and are not likely to be democratic." Dahl, *supra* note 8. In order for an international organization to be democratic, there must be an international *demos*, which is impossible to identify in the absence of a sense of global political community. Politics within states, where political communities exist, may be democratic, but an international organization like the WTO should be seen essentially as an instrument that states use to achieve common purposes. Moreover, as an organization operating on the principle of the sovereign equality of states, the WTO respects each state as a sovereign entity and gives formally equal voice to countries with radically different population sizes. To expect such an international organization to be fully democratic is to engage in what philosophers call a category mistake. Keohane & Nye, *supra* note 8.

⁴² Robert Howse, How to Begin to Think About the 'Democratic Deficit at the WTO, (2002) (unpublished manuscript).

⁴³ Keohane & Nye, *supra* note 8.

example, powerful trading countries would withdraw from a trade regime with population-weighted voting; and developing countries are bitterly opposed to increasing external transparency, which they see as a vehicle for increased WTO penetration by Northern-dominated NGOs.

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Purely efficient, legalistic, and democratic prescriptions for the GATT/WTO system may be appropriate for achieving an ideal of liberal multilateralism, but they are largely normative approaches that do not fully consider the WTO's political sustainability. These approaches must be complemented by political analysis of WTO-related institutions. Pushing too hard and too quickly for orthodox liberalism, hard and complete legalization, and greater democratic accountability risks destroying political support for the WTO. The political approach may be seen by economists, law scholars, or democracy champions as helping frame "second best" alternatives to institutional designs that would maximize efficiency, rule of law, or democracy. More affirmatively, the political approach points to institutional innovations that are consistent with underlying political forces in the organization.

II. Internal Transparency and Capacity-Building-- In Political Perspective

Developing country demands for greater internal transparency-- sometimes framed in terms of "democratizing" the organization-- and capacity-building are rooted in their aspiration for greater influence over legislative processes and outcomes. While marginally increased internal transparency and developing country capacity-building have changed the WTO negotiating environment, the WTO negotiating process has

remained largely a story of transatlantic domination in the shadow of transatlantic market power.

In demanding greater internal transparency, developing country negotiators have argued that the Green Room⁴⁴ should be formally representative of different types of developing countries, and that all proposals and negotiating documents should be available equally to all WTO Members. At the same time, developing country negotiators have demanded assistance in capacity-building, including: technical assistance to build state institutional capacity and greater understanding of trade issues within developing countries; enhanced research capacity and training for developing countries at the WTO; and enhanced staffing of developing country delegations in Geneva.

These demands for greater internal transparency and capacity-building are at least partly a reaction to domination of the Uruguay Round negotiating process and outcomes by the EC and the United States.⁴⁵ The Dillon, Kennedy, Tokyo, Uruguay, and Doha rounds were each launched by agreement to include in the negotiating mandate more-or-less vague references to issues of interest to all parties. But hard law at the GATT/WTO has been generated not from the launch of these rounds, rather by their conclusion.

In the Uruguay Round, closure was achieved by employing the enormous market power of the EC and the United States. Shortly after conclusion of the round, both

⁴⁴ The Green Room is an informal diplomatic caucus in which powerful WTO Members and a representative group of other interested Members (chosen after consultation between the Secretariat and powerful Members) hammer out the details of important texts that are subsequently considered formally and jointly by the Members.

⁴⁵ The following analysis of the WTO legislative process employs ideas presented in Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56(2) INT'L ORG. 339, 339-374 (Spring 2002).

parties withdrew from GATT 1947,⁴⁶ disengaging from their most favored nation (MFN) commitment to developing countries. In the same period, the EC and United States entered into the Agreement Establishing the World Trade Organization, which included GATT 1994⁴⁷ (and its MFN guarantee) and required adherence to all the WTO multilateral agreements, such as TRIPs, which the developing countries had previously refused to sign. This legal-political maneuver-- exercised as the "single undertaking" approach to closing the Uruguay Round-- presented the developing countries with a *fait accompli*: either sign onto the entire WTO package, or lose the legal basis for continued access to the enormous European and U.S. markets.

From the time the transatlantic powers agreed to that approach in 1990, they definitively dominated the agenda-setting process (the formulation and drafting of texts that would be difficult to amend⁴⁸). In the WTO, the agenda-setting process has taken a form sometimes referred to as the "concentric circles" approach to trade negotiations:⁴⁹ proposals are first formulated and texts are drafted through transatlantic consultations; then progressively larger circles of countries are included in the negotiating process, starting with the Quad group (Canada, EC, Japan, and the United States) and expanding to the G-7/8 (or, sometimes, OECD); then the drafts are taken to the Green Room to get

⁴⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

⁴⁷ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol.1 (1994), 33 I.L.M. 1125 (1994).

⁴⁸ George Tsebelis, *The Power of the European Parliament as a Conditional Agenda-Setter*, 88 AM. POL. SCI. REV. 128 (1994).

⁴⁹ Richard Blackhurst, *Reforming WTO Decision-Making: Lessons from Singapore and Seattle*, in THE WORLD TRADE ORGANIZATION : FREER TRADE IN THE TWENTY-FIRST CENTURY 295-310 (Klaus Gunter Deutsch & Bernhard Speyer eds., Routledge 2001).

information and reactions from a carefully selected, roughly representative group of interested countries. Texts that emerge from the Green Room are typically presented to the plenary body of negotiators for approval.

Many developing countries have seen increased internal transparency and capacity-building as twin solutions to transatlantic domination of the agenda-setting process. They favor mandating increased internal transparency (so the developing countries can be included in the Green Room and so that they have access to all texts in real time) and capacity-building (so that they can understand and react to that process).

Substantial developing country capacity-building is taking place. The WTO secretariat is organizing more technical assistance than ever, which is favored by those who want developing countries to have the institutional capacity to implement their WTO commitments. Developing countries are also enjoying greater lawyering capacity, retaining privately retained lawyers for dispute settlement cases,⁵⁰ and receiving legal assistance through *pro bono* arrangements with private firms and from the recently created Advisory Centre on WTO Law. Developing countries are also receiving considerable research support from UNCTAD. And WTO Director-General Supachai Panitchpakdi has advanced a set of capacity-building proposals, such as the establishment of a possible WTO presence in Africa, and greater secretariat research assistance for developing countries.

Internal transparency changes have been more modest. The concentric circles and Green Room process has been an efficient way of collecting information on the interests

⁵⁰ European Communities - Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, (Sept. 25, 1997), paras. 5-10, [hereinafter EC – Bananas], *available at* <http://www.wto.org>.

of various countries so that powerful states can draft and finalize texts. The collection of such information is crucial to the powerful countries negotiators' task of matching negotiated obligations to national power: developed country diplomats must develop a package of undertakings that "fills the boat to the brim but does not sink it." This requires a clear understanding of the preferences of weaker countries as well as powerful ones. The outcome from the legislative process is an asymmetric contract of rights and responsibilities that reflects the relative interests and power of WTO Members. Powerful countries that have traditionally played the role of agenda-setter have objected to formalizing the Green Room process on the grounds that it would diminish its efficiency at information-generation and would rigidify the process. Moreover, they argue that it will not work: if powerful states can not get their work done efficiently in the Green Room, then they will simply convene informal caucuses where the real business will get done.

The net result of these internal institutional demands and changes has been little fundamental change in the politics and processes of WTO negotiations and legislation: the transatlantic powers are likely to continue dominating as long as their market power puts them in a position to call the shots at the end of the day through, for example, the single undertaking approach described above.

There are three qualifications to this conclusion. First, developing country demands for increased internal transparency, minor changes in transparency, and the increased capacity of developing countries to negotiate and litigate, have made the negotiating environment at the WTO increasingly complex. It is more difficult and time-consuming than ever to engage in the diplomacy of multilateral negotiations. Second,

substantial transatlantic tensions over a long list of bilateral trade disputes could adversely affect the ability of the EC and the United States to cooperate successfully in the Doha Round agenda-setting and round-closing processes. Third, a decision has not yet been made about the extent to which the EC and the United States are willing to employ their market power to close this round and set its agenda. However, if Brussels and Washington resume their tradition of cooperating in the GATT/WTO agenda-setting and round-closing process, then they will remain highly influential at the WTO, where they still account for over sixty percent of WTO gross domestic product⁵¹-- which is their ultimate source of trade bargaining power. Contrary to concerns raised by some, recent internal institutional changes do not amount to an UNCTADization of the WTO.⁵² However, in the long term, dispersion of power in the WTO or divergence of EC-U.S. interests would make it more difficult to legislate by the practice of transatlantic agenda-setting and the consensus procedure.

III. External Transparency Reforms-- In Political Perspective

Non-business NGOs, primarily from Europe and the United States, want increased external transparency so they can have greater direct influence over WTO law-making, in both the legislative and the judicial processes. These NGO demands-- often framed in terms of "democratizing" the WTO-- have arisen at this time due mostly to the

⁵¹ This calculation is based on 2000 data from CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK (2001); WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE: 2000 TRENDS AND STATISTICS 54, table III.30 (2000).

⁵² Since the conclusion of the Tokyo Round, U.S. trade negotiators have been concerned to varying degrees about entrenched North-South conflict and aggressive tactics by developing countries at the GATT/WTO, which they have referred to as the possible

emergence of "new" issues on the trade agenda, such as environment, labor, and human rights issues. As liberalization has deepened, new issues have been brought to the fore. These spillovers from previous rounds of liberalization⁵³ have engaged new nonstate actors-- namely, the non-business NGOs. Before 1990, most non-business NGOs faced exclusion from domestic and international processes of trade policy-making, processes that were institutional legacies from previous eras of trade policy-making. Institutions did not fully keep pace with these spillovers.

In this context, non-business NGOs demanded increased external transparency in trade policy-making. In response, external transparency has increased, at both the domestic and the WTO level. In the United States in the last decade, these NGOs have enjoyed increased WTO transparency through the Office of the United States Trade Representative's (USTR) release of more information on its negotiating position on various issues, public release of its dispute settlement briefs, regular inclusion of environmentalists and organized labor representatives on the Advisory Committee on Trade Policy and Negotiations, and the establishment of a Trade and Environment Policy Advisory Committee. NGOs have enjoyed increased transparency indirectly through expanded congressional oversight, participation by more congressional committees, and by the Trade Act of 2002's establishment of a Congressional Oversight Group.⁵⁴ At the WTO, NGOs have enjoyed increased transparency through increasingly favorable document derestriction policies, an increasingly accessible and informative website, the

"UNCTADization" of the GATT/WTO Steinberg, *In the Shadow of Law or Power?*, *supra* note 45 at 357-59.

⁵³ ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950-57* (Stanford University Press 1958).

⁵⁴ 19 USCS § 3807 (2002).

establishment of an annual WTO Public Symposium, and the possibility of filing *amicus curiae* briefs, pursuant to the Appellate Body's *U.S. - Shrimp-Turtle*⁵⁵ decision.

Further increased external transparency of the legislative process will be dampened by two factors. First, in the negotiating-legislative process, there are virtues of secrecy that trade negotiators in Brussels and Washington are likely to view as counterbalancing the democratic accountability and legitimating virtues of transparency. Secrecy has proved important tactically, particularly in EC-U.S. negotiating approaches toward third countries. Simply put, EC and U.S. negotiators may pursue a host of tactics that "divide and conquer" or otherwise coerce third countries into accepting particular negotiating results. The success of many of those tactics would be jeopardized by making them transparent.⁵⁶

Moreover, negotiators have found uncertainty about the content of international negotiating texts to be valuable in forestalling the mobilization of domestic interests until trade round packages were complete.⁵⁷ In trade negotiations, the uncertainty created by secrecy about who will win and who will lose forestalls domestic political mobilization over a treaty until it is complete.⁵⁸ Transparency would diminish that uncertainty,

⁵⁵ United States - Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Feb. 24, 2000) [hereinafter *U.S. - Shrimp-Turtle*], at <http://www.wto.org>.

⁵⁶ See generally, Richard H. Steinberg, *The Prospects for Partnership: Overcoming Obstacles to Transatlantic Trade Policy Cooperation in Asia*, in *THE PROSPECTS FOR U.S.-EUROPEAN COOPERATION ON ASIAN TRADE: PARTNERS OR COMPETITORS?* (Richard H. Steinberg & Bruce Stokes eds., Rowman & Littlefield 1999).

⁵⁷ The tension between secrecy in international negotiations and political or normative demands for transparency is not new. See George Finch, *The Peace Conference of Paris, 1919*, 13(2) *AJIL* 159, 159-186 (Apr. 1919).

⁵⁸ Barbara Koremenos, *Open Covenants, Clandestinely Arrived At 2* (Oct. 2002) (unpublished manuscript).

mobilizing domestic political battles before the trade agreement is complete, making it much harder to conclude the agreement⁵⁹ and unraveling them in the same way that U.S. domestic interests were able to pick apart trade agreements in the years before the "fast-track" institutional innovation.⁶⁰ In addition, there are psychological and economic reasons that groups losing trade protection as a result of liberalization are more likely to mobilize in opposition to an agreement than groups gaining export markets are likely to mobilize in support of an agreement.⁶¹ Hence, transparency can precipitate decisive, organized opposition to a trade agreement earlier than otherwise-- even if the final agreement were a net benefit to the country as a whole. For these reasons, few negotiators have championed substantially increased external transparency in the WTO legislative process.

In contrast, in the dispute settlement process, the benefits of secrecy are minimal and are viewed by many as outweighed by the virtues of transparency. Information is crucial to the proper operation of enforcement and dispute settlement functions. NGOs may offer a "fire alarm" approach to information-generation for the dispute settlement process that may complement a state-centric "police patrol" approach.⁶² NGOs may be

⁵⁹ For a clear analysis of this phenomenon in the context of environmental agreements, see Oran Young, *The Politics of International Regime Formation: Managing Natural Resources and the Environment*, 43(3) INT'L ORG. 349, 349-75 (1989)

⁶⁰ For an account of the unraveling of the Kennedy Round agreements, see John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 21-58 (1980).

⁶¹ Goldstein & Martin, *supra* note 14, at 605-609.

⁶² Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 2 AM J. POL. SCI. 165, 166 (1984); Kal Raustiala, *Police Patrols, Fire Alarms, and Treaty Review under the NAAEC*, in THE NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION: AN ASSESSMENT (John Knox & David Markell eds., Stanford University Press 2002).

better than states at generating certain types of information. Moreover, the GATT dispute settlement system benefited from secrecy, which allowed negotiators and lawyers to frankly recommend solutions to panelists that might be politically acceptable yet not legally elegant or robust,⁶³ but the WTO dispute settlement process is so legalized and cases are so deeply lawyered that legal accuracy and robustness are central and the political functions once served by secrecy are now less relevant. For these reasons, and because of the legitimating effects of increased transparency, EC and U.S. negotiators have supported measured, increased transparency in the WTO judicial process.

Second, most developing countries oppose increased external transparency at the WTO because they fear increased influence by Northern NGOs. This opposition will make it more difficult for the WTO to accept greater external transparency, even in the dispute settlement process, and the EC and U.S. government would likely have to “pay” for further external transparency reforms with commercial concessions to developing countries.

In short, few WTO Members are likely to support substantially increased external transparency in the WTO *legislative* process, and increased external transparency in the *judicial* process is likely only if the EC and the United States are willing to pay for it.

IV. Legalized Dispute Settlement and the Expansion of Judicial Law-Making -- In Political Perspective

The range of possible doctrinal approaches to interpretation of WTO agreements, and the place of that discourse in the WTO's constitutional and political systems, has provided an opportunity for strategic action by the Appellate Body. A legal discourse

⁶³ Interview with Chip Roh, in Washington, D.C. (Sept 11, 2002).

that supports law-making, largely through clarification of ambiguities and gap-filling, has emerged in the Appellate Body. Thus far, that law-making has not been so extensive and fundamentally biased against any group of powerful states as to engender a political crisis at the WTO. The Appellate Body is successfully operating within the strategic space made possible by public international law discourse, WTO constitutional structure, and politics.

The Function of WTO Legalization as Originally Conceived

The negotiating history behind the legalization of GATT/WTO dispute resolution suggests that it was not intended to lead to expansive judicial law-making. The switch to automatic, binding dispute resolution, and the establishment of an Appellate Body, were seen by the United States as an opportunity to foster compliance with a set of comprehensive substantive commitments that would result from the Uruguay Round agenda-setting process that the United States and the EC were dominating. A legalized dispute settlement process, which could culminate in an authorization of the withdrawal of concessions for continued non-compliance, would legitimate of the use of retaliatory sanctions against non-compliance that were central to Section 301 of the Trade Act of 1974, as amended. Thus, the United States was careful to condition its support for legalization of dispute settlement on the establishment of detailed, substantive commitments that it supported.⁶⁴

Other countries saw increased legalization of the judicial process as a means of constraining U.S. unilateralism (i.e., action pursuant to Section 301), effectively forcing

⁶⁴ See, *Dispute Settlement, U.S. Objectives for Brussels*, THE U.S. DELEGATION BRIEFING BOOK FOR THE BRUSSELS MINISTERIAL (USTR, December 1990) (on file with author).

the United States to seek decisions from the WTO Dispute Settlement Body before imposing sanctions for alleged non-compliance with WTO obligations.

In that political context, the main intended function of WTO dispute settlement was to help ensure faithful implementation of the deals struck in the legislative process-- even if those deals were legally incomplete (i.e., contain ambiguities or gaps), not optimally efficient, or considered inequitable. That political view of the judicial function suggests considerable restraint (i.e., deference to the positivist principle that state consent is the foundation of international law) in interpreting and applying WTO law, for judicial law-making that were to shift powerful Members' rights and responsibilities in a systematic way (e.g., more liberal than the embedded liberal contract suggests) would contradict the delicate political balancing act that characterizes the legislative process described above.

Evaluating WTO Jurisprudence: The Emergence of Liberalizing Judicial Law-Making

Few, if any, architects of increased legalization at the WTO foresaw the institutional development that would follow: largely in the interests of completeness, coherence, and internal consistency of WTO law,⁶⁵ WTO judicial decisions have created

⁶⁵ Arguments for judicial activism that are advanced typically in the domestic context do not resonate in international jurisprudence. For example, in domestic debates, some proponents of judicial activism argue that their approach is more democratic than judicial restraint insofar as it gives judges leeway to achieve substantive justice in individual cases. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 455-56 (1994). But abstract conceptions of justice have not been criteria for judicial action at the GATT/WTO. Similarly, many American legal scholars argue that judicial activism is justified when a discrete and insular minority, which does not have political redress against a tyrannical majority, is having its rights infringed. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harvard University Press 1981). But the WTO is composed of member nations that must consent to enactment of new international obligations if they are to be bound by them, and usually must implement those obligations into domestic law by domestic

an expansive body of new law. WTO judicial law-making has two dimensions: filling gaps and clarifying ambiguities,⁶⁶ sometimes in areas that had been the subject of diplomatic deadlock. These dimensions of WTO judicial law-making are illustrated in more detail below; the suggestion is not that these cases were decided incorrectly, nor that the Appellate Body has exceeded its authority,⁶⁷ but that substantial judicial law-making is taking place at the WTO.

1. Judicial Law-Making: Gap-Filling.

The DSU's silence on many procedural questions has been seen by some as an invitation to the Appellate Body to make procedural rules. In some cases, the Appellate Body has created law that fills procedural gaps in WTO agreements, even though the existence of the gap has resulted from sharp disagreement among Members about how to fill it. For example, in *United States - Import Prohibition of Certain Shrimp and Shrimp Products (U.S. - Shrimp-Turtle)*,⁶⁸ the Appellate Body decided -- without clear guidance from WTO agreements-- that dispute settlement panels could consider *amicus curiae* briefs submitted by nonstate actors. In so ruling, the Appellate Body relied on general language in DSU Article 13, which provides that panels have a right to seek information

legislative action, so it is difficult to characterize any group of WTO members as tyrannized by a majority.

⁶⁶ Gap-filling refers to judicial law-making on a question for which there is no legal text directly on point, whereas ambiguity clarification refers to judicial law-making on a question for which there is legal text but that text contains ambiguity. Ultimately, the distinction between gap-filling and ambiguity clarification may be fragile, but the distinction is respected here out of convention. See generally, H.L.A. HART, *THE CONCEPT OF LAW* (Clarendon Press 1961) at 121-150.

⁶⁷ See generally, William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. of Int'l Econ. L. 79 (2001).

⁶⁸ *U.S. - Shrimp-Turtle*, *supra* note 55.

and technical advice from any individual or body which it deems appropriate.⁶⁹

Regardless of the merits on the question, the Appellate Body's interpretation of Article 13 was made in the context of several years of North-South deadlock on the question of whether to permit *amicus* briefs: few developing countries would have consented to an agreement with that outcome, yet the Appellate Body chose to interpret the DSU as supporting it.

Similarly, in *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC - Bananas)*,⁷⁰ the Appellate Body established that private lawyers may represent Members in its oral proceedings, despite EC and U.S. opposition on grounds that the practice from the earliest years of the GATT was to permit presentations in dispute settlement proceedings exclusively by government lawyers or government trade experts. The Appellate Body acted at odds with nearly fifty years of GATT practice, reasoning that nothing in WTO agreements, customary international law, or the "prevailing practice of international tribunals. . . prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings."⁷¹ At the panel stage, this practice of permitting participation by non-government lawyers was adopted in *Indonesia - Certain Measures Affecting the Automobile Industry (Indonesia - Autos)*.⁷²

⁶⁹ DSU, *supra* note 4, art. 13.

⁷⁰ EC – Bananas, *supra* note 50.

⁷¹ EC - Bananas, *supra* note 50, ¶ 5-10.

⁷² Indonesia - Certain Measures Affecting the Automobile Industry, WT/DS54-55-59-64/R, ¶ 4.1-4.35 (Feb. 07, 1998), at <http://www.wto.org>.

2. *Judicial Law-Making: Clarifying Ambiguity.*

The WTO Appellate Body has engaged repeatedly in a form of law-making by which it has given specific meaning to ambiguous treaty language. Such clarifications may cause a negative political reaction by Members or non-governmental stakeholders that engaged in behavior that was within a range of possible meanings, given the ambiguity. In some of these cases, the ambiguity clarified by the Appellate Body seems to have resulted from the negotiators' failure to anticipate a particular fact pattern. For example, in *U.S. - Shrimp-Turtle*, the Appellate Body decided whether the United States could rely on GATT Article XX(g) to ban the importation of certain shrimp and shrimp products from Members that did not maintain laws that guaranteed particular methods of protecting endangered sea turtles in the process of shrimp fishing.⁷³ GATT Article XX(g) excepts certain measures from the GATT's affirmative obligations if they are necessary for the "conservation of exhaustible natural resources," but the provision is ambiguous through silence on the question of whether such exhaustible natural resources must be located within the jurisdiction of the country invoking the exception. The Appellate Body offered a dynamic interpretation of the conditions under which the GATT Article XX(g) exception for conservation of exhaustible natural resources could be invoked, stating that it must be read "in light of contemporary concerns of the community of nations about the protection and conservation of the environment."⁷⁴ After reaching a decision at odds with GATT jurisprudence on the jurisdictional scope of

⁷³ Similarly, in *Japan - Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WT/DS44/R, (Apr. 22, 1998), the panel interpreted the GATT Article XXIII:1(b) non-violation nullification or impairment standard, arguably clarifying ambiguities in a way that has left a narrow basis for claims based on that standard.

⁷⁴ *U.S.- Shrimp – Turtle*, supra note 55, ¶ 129.

GATT Article XX(g),⁷⁵ and concluding the measures in question fell within the meaning of Article XX(g), the Appellate Body interpreted the chapeau to Article XX and established at least five specific factors that would apply in considering whether a measure contravenes the terms of the chapeau. Some of the factors had no textual lineage (e.g., whether the respondent's actions have an "intended and coercive effect on the specific policy decisions of other members"⁷⁶). In short, the Appellate Body ruling provided an approach to balancing trade-environment issues, despite WTO Members having been deadlocked for a decade about how to achieve balance on the question.⁷⁷

In other instances, the Appellate Body has given precise and narrow meaning to language that was intentionally left vague by negotiators, either because they could not agree on more specific language, or in order to permit a range of alternative behaviors or national practices.⁷⁸ For example, in three decisions,⁷⁹ the Appellate Body fleshed out

⁷⁵ On the jurisdictional question, the Appellate Body decision differs from the view expressed in the unadopted *Tuna-Dolphin I and II* panel decisions. *U.S.-Shrimp – Turtle*, *supra* note 55, ¶ 133; *U.S.-Restrictions on Imports of Tuna*, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993), reprinted in 30 I.L.M. 1594 (1991) (unadopted) [hereinafter *Tuna/Dolphin I*]; *U.S.-Restrictions on Imports of Tuna*, GATT Doc. DS29/R (June 16, 1994), reprinted in 33 I.L.M. 839 (1994) (unadopted) [hereinafter *Tuna/Dolphin II*].

⁷⁶ *U.S.-Shrimp-Turtle*, *supra* note 55, ¶ 161.

⁷⁷ See Richard H. Steinberg, *Explaining Similarities and Differences Across International Trade Organizations*, in *THE GREENING OF TRADE LAW: INTERNATIONAL TRADE ORGANIZATIONS AND ENVIRONMENTAL ISSUES* 281 (Richard H. Steinberg ed., Rowman & Littlefield 2002)

⁷⁸ In still other instances, it is not clear whether ambiguity was intentional or not, but the Appellate Body did make law by interpreting the ambiguity. *See, e.g.*, *European Communities - Customs Classification of Certain Computer Equipment*, Report of the Appellate Body, WT/DS62-67-68/AB/R (June 22, 1998), at <http://www.wto.org>; *European Communities - Customs Classification of Certain Computer Equipment*, Report of the Panel, WT/DS62-67-68/R, (May 02, 1998), paras. 5.26-5.42, at <http://www.wto.org>.

⁷⁹ *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177-178/AB/R, (May 1st, 2001) [hereinafter

the causation analysis to be used in safeguards cases, which Uruguay Round negotiators intentionally left ambiguous.⁸⁰ Relying on the obligation not to attribute injury from other causes to imports that were the subject of a safeguards investigation, the Appellate Body established an affirmative requirement that national authorities analyze not only the nature but also the "extent" of other causes.⁸¹ A similar approach was taken in the anti-dumping context in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (U.S. - Japan Hot-Rolled Steel)*.⁸² The U.S. government and commentators have identified several other cases in which the Appellate Body or dispute settlement panels have given a specific and narrow interpretation of language in WTO agreements that was intended by at least some of its negotiators to be ambiguous and to permit a range of national practices.⁸³

U.S. - Lamb Meat], at <http://www.wto.org>; United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R, (Dec. 22, 2000) [hereinafter U.S. - Wheat Gluten], at <http://www.wto.org>; and United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, (Feb. 1st, 2002) [hereinafter U.S. - Line Pipe], at <http://www.wto.org>.

⁸⁰ In the Uruguay Round negotiations, U.S. negotiators refused to agree to a test that would require national authorities to quantify the relative effects of imports and other factors on domestic industry. In so refusing, the U.S. negotiators intended to enable the ITC to continue using its qualitative approach to analysis of the "substantial cause" question in safeguards cases. Interview with Tim Reif, Democratic Chief Trade Counsel, U.S. House Committee on Ways and Means, in Washington, D.C. (Apr. 2002).

⁸¹ U.S.-Lamb Meat, *supra* note 79, ¶ 185.

⁸² Relying on the Antidumping Agreement obligation not to attribute injury caused by other factors to the dumped imports, the Appellate Body established a requirement to "separate and distinguish" the effect of the dumped import from the effects of other factors. United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body, WT/DS184/AB/R, ¶ 226 (July 24th, 2001) [hereinafter U.S. - Japan Hot-Rolled Steel].

⁸³ See, e.g., Sec'y of Commerce, *Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body 8-10*, in REPORT TO THE CONGRESS TRANSMITTED BY THE SEC'Y OF COMMERCE, (Dec. 30, 2002) [hereinafter Report to Congress]; Daniel K. Tarullo, *The Hidden Costs of International Dispute*

Finally, a conflict between GATT/WTO texts (or between text and GATT practice) may create an ambiguity. In a handful of cases, the Appellate Body has read language across GATT/WTO agreements cumulatively in a way that has generated an expansive set of legal obligations. Perhaps most controversially, in *U.S. - Lambmeat* and *Argentina - Safeguard Measures on Imports of Footwear*⁸⁴ (*Argentina - Footwear*), the Appellate Body ruled that national authorities imposing a safeguards measure must demonstrate the existence of "unforeseen developments." In the 1952 *U.S. - Hatters' Fur* case,⁸⁵ a GATT Working Party agreed that the application of Article XIX safeguards measures could be based on an argument that an unexpected degree of change in consumer tastes that increased imports constituted demonstration of "unforeseen developments." Given that implicitly broad interpretation of the phrase, which would seem to allow almost any increase in imports to constitute "unforeseen developments," subsequent GATT panels did not require national authorities to demonstrate "unforeseen developments" prior to imposing safeguards measures. Moreover, the WTO Safeguards Agreement⁸⁶ makes no reference to a requirement to demonstrate "unforeseen developments," and the negotiators expressly considered and rejected inclusion of any

Settlement: WTO Review of Domestic Anti-dumping Decisions, __ LAW & POL'Y INT'L BUS. __ (forthcoming Winter 2003); CLAUDE E. BARFIELD, FREE TRADE, DEMOCRACY, SOVEREIGNTY: THE FUTURE OF THE WORLD TRADE ORGANIZATION (The AEI Press 2001).

⁸⁴ *Argentina - Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, (Dec. 14, 1999) [hereinafter *Argentina – Footwear*].

⁸⁵ See GATT Doc. SECRET/CP/19 and Add. 1, GATT/CP/140 and Add. 1, L/9, L/851 and Add. 1, based on a GATT 1947 Article XIX:3 action by Argentina, Belgium, France, Benelux, May 22, 1952. See also, Jackson, *supra* note 2, at 560-61.

⁸⁶ The WTO Safeguards Agreement, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125 (1994).

such requirement.⁸⁷ The cumulation of GATT practice, relevant texts, and negotiating history created an ambiguity over whether "unforeseen developments" must be demonstrated in safeguards cases. Focusing on GATT Article XIX:1(a), the Appellate Body read all of the relevant GATT/WTO law and practice cumulatively in a way that led to the conclusion that a demonstration of "unforeseen developments" must be shown if a safeguards measure is to be applied.

Explaining Judicial Law-Making at the WTO:
Defining the Appellate Body's Strategic Space

While these are not a random or representative sample of cases of judicial law-making at the WTO, it is noteworthy that virtually all of these instances of law-making facilitated market-opening interpretations of WTO law-- only one decision (*U.S. - Shrimp-Turtle*) created law that may support market closure. Others have argued that the Appellate Body's decisions on trade remedy cases have frequently leaned in a market-opening direction.⁸⁸ Liberalization has often been perceived as the *raison d'etre* of the GATT/WTO system, despite the more nuanced view that the WTO agreements represent a politically delicate balance of rights and responsibilities, some liberal and some intentionally illiberal, captured by the concept of "embedded liberalism."⁸⁹

What explains judicial law-making at the WTO-- and its apparently liberalizing (i.e., market-opening) direction? In the last decade, the debate about WTO dispute settlement has been framed largely in terms of whether the system should be more

⁸⁷ Argentina - Footwear, *supra* note 84, ¶ 49.

⁸⁸ Tarullo, *supra* note 83.

⁸⁹ Ruggie, *supra* note 27.

politically sensitive⁹⁰ or more highly legalized.⁹¹ Political scientists have engaged in a parallel debate about the virtues⁹² and risks⁹³ of international legalization. The merits of the normative questions aside, there is reason to believe that an insulated, full-time judicial body, backed by the power to issue legal sanctions (such as the WTO Appellate Body) would be more likely than a system of exclusively ad hoc panels (which characterized the GATT judiciary) to engage in strategic political action.⁹⁴ Permanent bodies that face a shadow of the future are more likely to think in terms of legal precedent and incremental development of law,⁹⁵ rather than addressing merely the political problem at hand. Moreover, the power to enforce rulings through the authorization of sanctions may embolden a judiciary to issue rulings that would be untenable without that power.

These factors explain the possibility of judicial law-making and strategic action by the Appellate Body, but they do not fully account for constraints on judicial law-making. The Appellate Body's strategic space for law-making is constrained by legal

⁹⁰ Hudec, for example, has long shown sensitivity to politics in evaluating the WTO legal system. See, e.g., Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999). See also, Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 107(7) COLUM. L. REV. 1832, 1832-1911 (Nov. 2002).

⁹¹ JACKSON, *supra* note 7, at 56-80; ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* (1997); and J. H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, Harvard Jean Monnet Working Paper 9/00, Harvard Law School.

⁹² See, e.g., Slaughter et al., *supra* note 16.

⁹³ See, e.g., Goldstein & Martin, *supra* note 14.

⁹⁴ See Keohane et al., *supra* note 16.

⁹⁵ Slaughter & Mattli, *supra* note 16; and J. H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2403-2483 (1991).

discourse, constitutional rules, and politics. The discursive space may be seen as nested within the constitutional space, both of which are nested in the WTO's political environment.

The Appellate Body's Discursive Space: Deference Versus Completeness and Dynamism

Under DSU Article 3.2, the Appellate Body should "clarify the existing provisions of" the covered WTO agreements "in accordance with customary rules of interpretation of public international law." In doing so, the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements."⁹⁶ In the special case of interpreting the Anti-dumping Agreement, where a panel "finds that a provision of the Agreement admits of more than one permissible interpretation, the panel shall find the [national] authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."⁹⁷

Just as there are alternative judicial approaches to statutory interpretation in the United States-- ranging from restrained textualism,⁹⁸ to originalism,⁹⁹ to an activist,

⁹⁶ WTO DSU, *supra* note 4, arts. 3.2 & 19.2.

⁹⁷ Anti-dumping Agreement, art. 17.6, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND (1994), 33 I.L.M. 1125 (1994).

⁹⁸ At the restrained extreme, textualists rely exclusively on legislative text. They reject attempts to understand legislative intent in the application of law, often viewing legislative intent as a fiction and arguing that public choice literature has shown that practices such as logrolling and side payments make it difficult to determine legislative intent. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 685 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

⁹⁹ Originalists take a more activist position, relying on legislated texts plus an understanding of legislative intent in order to give effect to the original intent of legislators. Legislative intent is conceptualized by originalists in one of two alternative ways: intentionalists argue that jurists should "imaginatively reconstruct" what a legislature would have decided if it had been faced with the issue at hand; purposivists argue that jurists should base their interpretations on their understanding of the

dynamic approach¹⁰⁰-- the customary rules of interpretation of public international law offer alternative approaches to interpreting WTO agreements. These approaches range from those that are restrained and highly deferential to Members, to those that suggest more expansive judicial law-making in the interests of completeness and dynamic interpretation of WTO legal texts.

At the restrained end of the continuum, public international law doctrines permit international judicial bodies to be highly deferential to states when interpreting the extent of their legal obligations. Such a deferential approach is based ultimately on the positivist notion that states may be bound only through consent, strictly construed,¹⁰¹ which finds its expression in two doctrines. *In dubio mitius* is a well-established canon of treaty interpretation that attaches deference to state sovereignty when a rule is ambiguous. The principle dictates that if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or

legislators' purposes in enacting a statute. See Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539 (2001); William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA L. REV. 275 (1988); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1078-79 (1992); and Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal System Values*, 21 SETON HALL LEGIS. J. 233, 281 (1997).

¹⁰⁰ At the most activist extreme, some advocate a dynamic approach, which accepts as its premises that jurists perform *de facto* a quasi-legislative function and that there is a need for the law to change with environmental shifts. The dynamic approach therefore favors basing judicial decisions on policy considerations, particularly where changes in society and law make original intent seem irrelevant to modern problems. Eskridge, *supra* note 99; Zeppos, *supra* note 99.

¹⁰¹ See generally, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions on the parties.¹⁰²

The doctrine of *non liquet* may apply if a court cannot produce a substantive legal conclusion on the ground that there is no law to be applied. The possibility of its application is particularly relevant in cases where there is a gap in the law. The concept is based on the principle that whatever is not explicitly prohibited by international law is permitted. The clearest rationale for the doctrine is found in the *Lotus* case,¹⁰³ where the International Court of Justice reasoned that "rules of law binding upon states emanate from their own will and restrictions upon the independence of states cannot therefore be presumed." According to the doctrine, international law leaves to states a wide measure of discretion which is limited only in certain cases by prohibitive rules, without which every state remains free to behave in ways it regards best and most suitable. States are bound by a rule of law only because they have consented to it; without a prohibitive rule, the freedom to act remains unlimited.¹⁰⁴

Several policy arguments may be advanced in support of using these deferential doctrines. Those negotiating WTO agreements often intended certain provisions to be vague, or to exclude rules governing certain behavior, so that their national governments could adopt or maintain national laws that reflect any one of several possible

¹⁰² LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW I-1278 (R. Jennings & A. Watts eds., 9th ed. 1992); James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L COMP. L. Q. 248, 254 (2001).

¹⁰³ The Case of the S.S. "Lotus," Judgment 9, 1927, PCIJ, Series A, No. 10, p.19.

¹⁰⁴ See generally, Prosper Weil, *The Court Cannot Conclude Definitively. . . Non Liquet Revisited*, 36 COLUM. J. TRANSNAT'L L. 109, 111-113 (1997); Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 381c and General Principles of Law*, 5 DUKE J. COMP. & INT'L L. 35, 56-60 (1994).

interpretations. In such cases, they were consenting to a range of interpretations -- not to a single "best interpretation." Any effort to impose a particular interpretation on such gaps or ambiguities risks contradicting state consent, the touchstone of contemporary public international law. Moreover, any effort to do so risks interpreting WTO language in ways that contradict the intent, national laws, and behavior of powerful WTO Members or upsetting the delicate balance of rights and responsibilities reflected in WTO agreements. Robert Hudec has suggested that the Appellate Body may have been wise to employ *in dubio mitius* in the *EC - Beef Hormones* decision, because in doing so it enhanced its legitimacy by signaling its deference to national sovereignty.¹⁰⁵ Finally, a deferential orientation is consistent with Article 3.2 of the DSU: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations of Members."

At the other end of the spectrum, international law doctrine may be read to permit courts to make law by filling gaps and clarifying ambiguities to establish completeness, precision, coherence, and dynamism. The modal position among international trade law scholars is closer to this view than the deferential perspective. Some commentators argue that *non liquet* and *in dubio mitius* are impossible because the international legal system is logically or inherently complete-- or should be.¹⁰⁶ Other commentators take a somewhat softer position, arguing that the international legal system offers primary and secondary mechanisms of interpretation that enable judges to fill gaps and clarify ambiguities in almost all circumstances.¹⁰⁷ Croley and Jackson have argued that

¹⁰⁵ Hudec, *supra* note 90, 30-31.

¹⁰⁶ See Weil, *supra* note 104, at 112 (recounting that position, but not endorsing it).

¹⁰⁷ Weil, *supra* note 104, at 110; Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90(2) AJIL 193, 193-213 (1996); Pauwelyn, *supra* note 7. See also, Layla Hughes, *Limiting the*

customary rules of interpretation of public international law, which must guide dispute settlement panels and the Appellate Body, are aimed at resolving ambiguities in texts of international agreements-- even in cases involving the Anti-dumping Agreement, which prescribes (in Article 17.6) deference to a range of national government interpretations.¹⁰⁸

Several policy arguments support the completeness and dynamism position.¹⁰⁹ WTO agreements are imperfect, filled with gaps that either do not instruct how to deal with specific factual situations or with ambiguities that could plausibly be read in more than one way. In creating a legalized dispute settlement system, Uruguay Round negotiators implicitly accepted the public international law norm that demands international judicial bodies offer the best interpretation of treaty language. When faced with an appeal, the Appellate Body is required to decide the case, leaving it on one side or the other of a political dispute, even if it were to rely on a deferential doctrine. Some argue that the WTO's legislative system is so slow and culminates so infrequently in new rules that the judicial branch must engage in law-making if gaps and ambiguities are to be addressed and if the system is to respond in a timely manner to environmental change. Moreover, they argue that it is well established in public international law that some provisions of treaties are to be interpreted in an evolutionary fashion.

Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision, 10 Geo. INT'L ENVTL. L. REV. 915, 919-22 (1998) (arguing that the Appellate Body's invocation of *in dubio mitius* was unnecessary, given other methods of interpretation).

¹⁰⁸ Croley & Jackson, *supra* note 107.

¹⁰⁹ See generally, Croley & Jackson, *supra* note 107; Pauwelyn, *supra* note 7; and Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27(2) COLUM. J. ENVTL. L. 489, 514-19.

The Appellate Body has leaned toward the less deferential approach to interpretation of WTO agreements, favoring completeness and dynamism. In one case, the Appellate Body agreed with the panel's decision not to provide a remedy on grounds that there was no applicable law, but the absence of applicable law was attributable to a temporal gap caused by the transition from the GATT to the WTO legal system--an exceptional circumstance.¹¹⁰ In another case widely mentioned as demonstrating judicial restraint, the Appellate Body overruled a panel decision that had filled a gap with an affirmative obligation: the Appellate Body rejected the panel's inference that a *de minimis* standard in provisions on countervailing duty investigations had to be applied in sunset reviews.¹¹¹ But generally, as illustrated above, the Appellate Body has often made law by filling gaps and clarifying ambiguities. The doctrine of *non liquet* has never been invoked by either a WTO panel or the Appellate Body to permit or excuse Member behavior.¹¹² *In dubio mitius* has been invoked by the Appellate Body only once, in *EC - Beef Hormones*,¹¹³ to reject the panel's view on a tangential question that did not stop the Appellate Body from finding the measures in question WTO-illegal. Even where the deferential standard of Article 17.6 of the Anti-dumping Agreement (which some argue is

¹¹⁰ Brazil - Measures Affecting Desiccated Coconut, Appellate Body Report, WT/DS22/AB/R, (Feb. 21, 1997), available at <http://www.wto.org>.

¹¹¹ United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Appellate Body, WT/DS213/AB/R, November 28, 2002.

¹¹² Indeed, the only reference to *non liquet* in any WTO panel report or Appellate Body decision was critical of using the principle. India - Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products, Report of the Panel, WT/DS50/R, para. 3.119 (Apr. 6, 1999), available at <http://www.wto.org>.

¹¹³ EC - Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R at 41-42 (Jan. 16, 1998), available at <http://www.wto.org> (hereinafter, *EC- Beef/Hormones*).

redundant in light of the *in dubio mitius* principle) must be applied, the Appellate Body has not been deferential,¹¹⁴ concluding in one case that most issues under the Antidumping Agreement can be resolved definitively by applying customary rules of interpretation of international law, limiting the situations in which members may adopt differing interpretations of ambiguous provisions.¹¹⁵

While the Appellate Body has implicitly emphasized completeness over deference in its approach to treaty interpretation, WTO legal discourse is not without constraints on judicial law-making. The Vienna Convention on the Law of Treaties¹¹⁶ and the customary law it represents, which are endorsed by WTO jurisprudence, establish a rigorous set of mechanisms for treaty interpretation that require adherence to the "ordinary meaning" of a treaty's terms¹¹⁷ and resort in case of ambiguity to specified, supplementary means of interpretation.¹¹⁸ There are also significant limits on the extent to which substantive non-WTO international law may be imported into the WTO,¹¹⁹ although those limits are under considerable pressure.¹²⁰ In these respects, under current

¹¹⁴ Tarullo, *supra* note 83.

¹¹⁵ U.S. - Japan Hot-Rolled Steel, *supra* note 82, ¶ 57.

¹¹⁶ Vienna Convention on the Law of Treaties, May 23, 1969, Vol. 1155 U.N.T.S. 331, *reprinted at* 8 I.L.M. 679.

¹¹⁷ Vienna Convention, *supra* note 116, art. 31.1.

¹¹⁸ Vienna Convention, *supra* note 116, art. 32. See also, Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Oxford University Press 1998) at 19-24.

¹¹⁹ Trachtman, *supra* note 30, at 338-44. See also, European Communities - Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, ¶ 81, July 23, 1998 (holding that a tariff agreement between two WTO Members does not constitute WTO law applicable by a panel), *available at* <http://www.wto.org>.

¹²⁰ Marceau, *supra* note 7; Pauwelyn, *supra* note 7; Trachtman, *supra* note 30.

practice, WTO legal discourse does constrain the extent of judicial law-making by the Appellate Body.¹²¹

The Appellate Body's use of principles that favor completeness and dynamism through judicial law-making has been complemented by practice that supports *stare decisis de facto*. The *stare decisis* principle is not followed formally by international tribunals, partly because most civil law systems do not adhere to the principle. In public international law, past decisions may be persuasive, but not binding.¹²² The WTO Appellate Body is not supposed to make definitive interpretations: Article IX:2 of the WTO Agreement states "the Ministerial Conference and General Council shall have the exclusive authority to adopt interpretations of this Agreement and the Multilateral Trade Agreements."¹²³ And the Appellate Body has, on occasion, reached decisions that seem inconsistent with precedent.¹²⁴ But in general, previous decisions and doctrine are so highly persuasive in WTO jurisprudence, and their use is so central to the discourse of dispute settlement, that it may be said that the WTO observes *de facto stare decisis*.¹²⁵

¹²¹ A broader discussion of the determinacy of international law discourse is beyond the scope of this article. See generally, David Kennedy, *A New Stream of International Law Scholarship*, 7 WISC. INT'L L. J. 1 (1998).

¹²² Brownlie, *supra* note 118, at 1-30.

¹²³ WTO Agreement, *supra* note 4, art. IX:2.

¹²⁴ Compare, e.g., *Tuna/Dolphin II*, *supra* note 74, with *U.S. - Shrimp-Turtle*, *supra* note 55, on the jurisdictional scope of GATT Article XX(g); and *Japan - Alcoholic Beverages*, Panel Report Adopted on November 10, 1987, GATT BISD 34S/83 (employing a textual approach to application of GATT Article III), with *U.S. - Malt Beverages*, Report of the Panel adopted on June 19, 1992, GATT BISD 39S/206 (employing an "aim-and-effects" approach to application of Article III), and with *Japan- Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, October 4, 1996 (rejecting use of the "aim-and-effects" test and employing a textual approach).

¹²⁵ Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part I of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT'L L.

This practice is reinforced by the Appellate Body's procedure of meeting *en banc* to discuss each case¹²⁶ and to ensure consistency across decisions, despite the decision in each case resting with a three member division of the Appellate Body.¹²⁷

Why has the Appellate Body leaned toward the end of the discursive spectrum that favors completeness and dynamism over doctrine that favors deference to sovereign states? And why does so much of its law-making lean in a liberalizing direction? Any answer must be speculative, but several possibilities may be suggested. Perhaps members of the Appellate Body share an ideological predisposition that favors market-opening (particularly as it relates to trade remedy laws that many see as trade-restrictive), which may be effectuated through judicial law-making.¹²⁸ Perhaps the discourse among international trade law commentators, which tends to favor completeness and liberalization, has shaped Appellate Body members' perceptions of their duty. Or perhaps Appellate Body members are using the European Court of Justice as a historical jurisprudential model. A definitive answer is beyond the purpose of this article.

& POL'Y 1 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. J. INT'L L. 837 (2001).

¹²⁶ See Working Procedures for Appellate Review, WT/AB/WP/4, Jan. 24, 2002, para. 4(3).

¹²⁷ It may be argued that judicial law-making by the Appellate Body, the importation of public international law into WTO dispute settlement, *de facto stare decisis*, and the development of a legitimizing legal culture among Appellate Body members and their staff, are ratcheting WTO law forward in a way that is similar to the way common law develops. John Ragosta et al., *WTO Dispute Settlement: The System is Flawed and Must be Fixed*, at http://www.dbtrade.com/publications/wto_dispute_settlement_is_flawed.pdf. See also, Joseph H. H. Weiler, *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* (Oxford Univ. Press, 2000).

¹²⁸ Tarullo, *supra* note 83.

The Constitutional Space

The discursive space in which the Appellate Body operates is nested in a constitutional space, which defines checks on and balances against the Appellate Body. Hence, an analysis of constitutional constraints is necessary for understanding the permissive conditions under which judicial law-making has emerged at the WTO.

The discursive shift toward expansive judicial law-making at the WTO was made possible by the change in constitutional checks that accompanied the move from the GATT system. In the GATT dispute settlement system, panels had to be careful about making law because any party to a dispute could block adoption of the panel report.¹²⁹ Generally, the United States did not block adoption of panel reports that found it in contravention of GATT obligations, but it did block adoption of reports that made what it considered to be bad law.¹³⁰ GATT panels had to be somewhat deferential to disputants' interpretation of law if they wanted consent to adoption of their reports. In contrast, under the WTO system, an Appellate Body report is adopted unless there is a consensus to block its adoption,¹³¹ which is unlikely-- and has never happened-- because the prevailing party can be expected to break any consensus to block adoption. This leaves

¹²⁹ GATT DSU, *supra* note 5, ¶ G:2.

¹³⁰ Telephone interview with A. Jane Bradley, former Assistant United States Trade Representative for Dispute Settlement (Jan. 14, 2003). *See, e.g., United States Tax Legislation (DISC)*, Report of the Panel, L/4422, 12 November 1976, GATT BISD 23S/98 (United States permitted its adoption only in conjunction with a Contracting Parties decision, the substance of which was negotiated between the EC and the United States, interpreting various points of GATT law). *See also, Canada - Discriminatory Application of Retail Sales Tax on Gold Coins*, Report of the Panel (unadopted), 12 February 1986 (Canada agreed with certain parts of the report and rescinded the tax, but blocked adoption of the report because it disagreed with findings relating to the MFN principle).

¹³¹ WTO DSU, *supra* note 4, art. 17.14.

the Appellate Body with more constitutional space than was available to GATT panels in which to make law.

In theory, the WTO's legislative system could balance and correct judicial law-making with which the Members disagree. However, as Claude Barfield has argued, legislative action in the GATT/WTO system has been neither smooth nor continuous, and the legislation of new obligations requires a consensus among Members. Hence, there is no effective legislative means of correcting judicial law-making. Taken together, Barfield considers these two consensus requirements-- the consensus required to block an Appellate Body report and the consensus required to legislate-- the WTO's "constitutional flaw."¹³²

Some have suggested that judicial law-making may be curbed, within the existing constitutional scheme, by greater substantive clarity in WTO agreements or by incorporating an expressly restrained and deferential standard of review in more WTO agreements.¹³³ This approach suggests a superficial view of the roots of judicial law-making. The suggestion that the problem may be solved by greater clarity in agreements contradicts a well-established legal observation that there will always be gaps and ambiguities in legislation,¹³⁴ and ignores the fact that ambiguities in international agreements are frequently intentional agreements to disagree and to permit a range of national practices. The suggestion that a restrained standard of review might solve the

¹³² CLAUDE E. BARFIELD, *FREE TRADE, DEMOCRACY, SOVEREIGNTY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (AEI Press 2001). In citing this argument, the author neither endorses nor challenges the claim of a constitutional flaw.

¹³³ Interview with Andrew Stoler, Deputy Director-General of the WTO, in Geneva (July 5, 2002). Mr. Stoler did not personally endorse this position.

¹³⁴ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 155 (Praeger 1982).

problem is contradicted by the Appellate Body's failure to adhere to the purportedly restrained standard in the Antidumping Agreement, and to instead favor the "best interpretation" approach that some argue is implicit in public international law.¹³⁵

The Political Space: Engendering Cooperative or Unilateral Political Reequilibration

The WTO's legal discourse and constitutional rules are nested in politics. Since WTO legal discourse permits the Appellate Body to engage in significant law-making, and WTO constitutional rules offer no meaningful check on or balance against such law-making, politics imposes the ultimate constraint. This understanding is consistent with other analyses that have found strategic action by international judicial bodies to be tenable within limits defined by politics.¹³⁶ Under what conditions will politics operate as a constraint on WTO judicial law-making?

Robert Lawrence has recently suggested that a WTO Member should be permitted to not comply with a politically unpalatable decision and to instead pay compensation or suffer retaliation. If it decides that doing so would make it better off than complying, and the level of compensation or retaliation were equivalent to the level of nullification or impairment suffered by the prevailing Member, then the decision would be Pareto-improving (in a political sense). Presumably, a dossier of judicially made rules could become a subject of negotiation in a subsequent trade round.¹³⁷

While such a solution is possible in fact under the current system, as a formal matter it is extra-constitutional in so far as it dispenses with a legal obligation to

¹³⁵ Tarullo, *supra* note 83; Croley & Jackson, *supra* note 107.

¹³⁶ See, e.g., Alter, *supra* note 16; Slaughter & Mattli, *supra* note 16.

¹³⁷ Lawrence, *supra* note 38, at 103-5.

comply¹³⁸ in favor of a contractual approach to the WTO. Politically, breach and retaliation might be efficient in any single case, or in any set of cases in which the net outcome for each Member were neutral (i.e., if each Member were to "win a few and lose a few"). But the approach would not work if it needed to be employed frequently by a powerful Member in response to judicial law-making that adversely and fundamentally changed its balance of WTO rights and responsibilities. In such a case, the aggregate shift of property rights associated with each decision would likely engender a political reaction, for the balance of WTO rules and responsibilities would no longer match underlying power and interests.

Judicial law-making that constituted such a shift could catalyze unilateral action by a powerful Member. For example, some have suggested that the United States should exit the WTO in reaction to judicial law-making that is allegedly weakening U.S. trade remedy laws.¹³⁹ More plausibly, others have suggested that the United States block a consensus on the appointment of proposed Appellate Body members who do not pass a "litmus test" of commitment to judicial restraint. As with the EC's "Luxembourg compromise," unilateral acts like these may constrain future law-making behavior, but such a constraint would likely be flexible and ill-defined.¹⁴⁰

¹³⁸ Jackson, *supra* note 31.

¹³⁹ John Ragosta, Comments at the American Bar Association/Georgetown University Law Center 2002 International Trade Law Symposium, Washington, D.C. (Sept. 12, 2002).

¹⁴⁰ In 1966, after France had walked out of the EC Council in protest of various proposals and refused to take part in any more Community business, EC Member States agreed to the Luxembourg Accords: wherever one Member State raised "very important interests" before a vote in the Council was taken, it was agreed that the matter would not be put to a vote. As time passed, the status of the Luxembourg Accords became increasingly questionable. *See*, Damian Chalmers, EUROPEAN UNION LAW: LAW AND EU GOVERNMENT, VOLUME ONE (Dartmouth 1998) at 20-24.

The hardest constraint on the Appellate Body would be catalyzed by judicial law-making that fundamentally and adversely shifted the balance of rights and responsibilities of several powerful Members-- particularly the EC and the United States. Such a pattern of law-making would engender cooperative action by those Members. If the EC and United States were to act cooperatively, they could employ their power-- in the same way they concluded the Uruguay Round through the single undertaking approach, described above-- to affect constitutional change in one of several forms. For example, Barfield has proposed a more stringent check on the Appellate Body, replacing the negative consensus rule on adoption of Appellate Body reports with a rule that would permit one-third of the Members to block adoption.¹⁴¹ Others have suggested a legislative balance against judicial law-making that could be seen as constitutionally equivalent to Barfield's proposal: permit the legislation of new obligations by a two-thirds vote of the Members.¹⁴² Still other constitutional changes could be imagined if judicial law-making were to catalyze EC and U.S. action: reestablish an affirmative consensus rule for adoption of Appellate Body reports (like that used in the GATT system); expand and "pack" the Appellate Body with persons committed to judicial restraint; abolish the

¹⁴¹ Barfield, *supra* note 30, at 125-129. Such a rule would break with the consensus decision-making practice at the GATT/WTO, raising many problems similar to those that have deterred a shift away from consensus decision-making generally. For example, the particular proposal made by Barfield: would advantage Members than can muster a one-third vote with relative ease in certain circumstances (such as some developing countries or the EC) over other Members; would provide the Appellate Body with a continuation of constitutional space in which it could make law, provided it had the support of at least two-thirds plus one of the Members; and could thereby allow the judicial process to shift the balance of rights and responsibilities concluded in the last round.

¹⁴² According to Barfield, both Keohane and Cottier have suggested this possibility. *See*, Barfield, *supra* note 30, at 223, n. 15. This proposal suffers from vulnerabilities similar to those of Barfield's proposal. *See supra* note 139.

Appellate Body. Or powerful Members could impose substantive rules they prefer. This analysis suggests that the Appellate Body has substantial political leeway because its hardest political constraint-- cooperative reequilibration-- can be reached only by a pattern of law-making that upsets both the EC and the United States.

Has the Appellate Body Exceeded the Bounds of Its Strategic Space? Reading the Signals

The Appellate Body has perhaps demonstrated sensitivity to politics in several decisions. For example, in *EC- Asbestos*,¹⁴³ the Appellate Body accepted a public health basis for distinguishing whether products were "like," to conclude that cement and asbestos-containing cement were not like products within the meaning of GATT Article III. And its *U.S. - Shrimp-Turtle* decision eventually enabled the United States to maintain measures banning the importation of shrimp from certain countries that do not require the use of turtle-excluder devices in shrimp-net fishing.¹⁴⁴

But at least as often, the Appellate Body has rendered decisions that run against strong political currents. For example, it ruled against the WTO-legality of the EC's ban on the importation of beef from hormone-treated cattle,¹⁴⁵ and against the U.S. system of taxing Foreign Sales Corporations-- twice.¹⁴⁶ The point is not that these cases were

¹⁴³ *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, March 12, 2001.

¹⁴⁴ *U.S.-Shrimp-Turtle* decision, *supra* note 55; and *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 by Malaysia, Report of the Panel, WT/DS58/R/W, June 15, 2001.

¹⁴⁵ *EC- Beef/Hormones*, *supra* note 113.

¹⁴⁶ *United States - Tax Treatment of "Foreign Sales Corporations,"* Report of the Appellate Body, WT/DS108/AB/R, February 24, 2000, and *United States - Tax Treatment of Foreign Sales Corporations*, Recourse to Article 21.5 of the DSU by the European Communities, Report of the Appellate Body, WT/DS108/AB/RW, January 14, 2002.

decided rightly or wrongly, or that they entailed judicial law-making, but they may have run contrary to a view with mass appeal or that is supported by powerful non-state actors.

How could we know-- and, more importantly, how could the Appellate Body know-- that its law-making was exceeding the bounds of its strategic space? Members dissatisfied with a particular decision, or judicial law-making in general, are likely to signal disapproval, casting the shadow of politics over the Appellate Body. For example, when the Appellate Body decided to permit panels, at their discretion, to consider *amicus curiae* briefs submitted by nonstate actors¹⁴⁷ -- which most developing countries had long opposed -- dozens of developing country negotiators intervened at the following WTO Council meeting to voice protest. Subsequently, panels have been circumspect about accepting *amicus* briefs. Similarly, the Africa Group's proposal in the Doha Round DSU negotiations declares that "the panels and the Appellate Body have in several instances exceeded their mandate and fundamentally prejudiced the interests and rights of developing country Members as enshrined in the WTO Agreement."¹⁴⁸ And high ranking Secretariat officials have met with and advised members of the Appellate Body to show restraint, when those officials perceived that the Appellate Body was tending towards an activist stance.¹⁴⁹ Signals like these inform the Appellate Body about Members that disapprove of instances of judicial law-making. Based on that information, the Appellate Body can get a sense whether it may be operating near or over the edge of its strategic space.

¹⁴⁷ U.S.-Shrimp-Turtle decision, *supra* note 55.

¹⁴⁸ Negotiations on the Dispute Settlement Understanding, *Proposal of the Africa Group in the WTO*, at para. 2 (Oct. 2002) (on file with author).

¹⁴⁹ Interview with WTO Deputy Director-General Andrew Stoler, in Monterey, California (Jan. 2002).

A review of signals suggests that, thus far, the Appellate Body has not engaged in a pattern of judicial law-making that has fundamentally and adversely shifted the balance of rights and responsibilities of powerful Members. Both the EC and the United States have won some important cases, and lost some. Many in the United States complain about the pattern of judicial law-making on trade remedy laws, but the EC is generally pleased with those decisions. The EC and the United States are not cooperating to propose significant constitutional change relating to dispute settlement. This suggests that cooperative reequilibration is unlikely anytime soon and that the Appellate Body is operating within the strategic space defined by its hardest political constraint.

Currently, the most politically important source of dissatisfaction with the Appellate Body comes from the United States. Several U.S. commentators and politicians complain about judicial "activism" at the WTO.¹⁵⁰ At least one prominent U.S. commentator has shown that through clarification of ambiguities the Appellate Body has frequently found U.S. antidumping decisions and rules to be WTO-inconsistent.¹⁵¹ And in the Trade Act of 2002, the United States Congress required that the executive branch transmit to Congress a report setting forward its strategy "to address concerns regarding whether dispute settlement panels and the Appellate body. . . have added to obligations or diminished rights, of the United States."¹⁵² The report transmitted pursuant

¹⁵⁰ See especially, Barfield, *supra* note 130; Raustiala, *supra* note 39 claims that the dispute settlement process is undemocratically insular and generative. Senator Max Baucus has claimed that WTO panels are "making up rules that the U.S. never negotiated, that Congress never approved, and I suspect, that Congress would never approve." *US DSU Proposal Receives Mixed Reactions*, BRIDGES Weekly Trade News Digest, Vol. 6., No. 43, Dec. 20, 2002, p. 10.

¹⁵¹ Tarullo, *supra* note 83.

¹⁵² 19 USCS § 3801 (2002).

to that mandate concluded that the disputes that have been referred to the DSB generally "have been handled expeditiously and with professionalism," and that WTO dispute settlement has "benefited a wide range of U.S. industries and their workers." However, the report adds that "the United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes," and criticizes several specific instances of judicial law-making in trade remedy cases. In the end, it proposes some relatively minor changes to the DSU that it claims would offer "greater Member control over the dispute settlement process."¹⁵³ Judicial law-making at the WTO has become a political irritant in the United States and U.S. government signals should be read to indicate that continued Appellate Body law-making that weakens U.S. trade remedy laws risks catalyzing unilateral political action by the United States. Nonetheless, it is difficult to conclude from the foregoing signals that the U.S. government currently perceives that judicial law-making has fundamentally prejudiced its interests.

V. Conclusion: Recent Institutional Developments as Part of an Ongoing Adjustment Process

The developments examined here are part of an ongoing institutional evolution to accommodate changes in the WTO's political environment. Marginal increases in internal transparency and capacity-building are responses to developing country demands for greater participation in WTO affairs, and to the EC and U.S. interest in improving the institutional capacity of developing countries to assume the responsibilities of WTO membership. External transparency reforms have been a response to the demands of non-

¹⁵³ Report to Congress, *supra* note 83, pp. 8-12.

business NGOs, largely from Europe and the United States, for greater participation in WTO affairs, which have increasingly affected their interests as integration has broadened and deepened. Judicial law-making has been made possible by WTO legalization, which both legitimizes and constrains retaliation.

Institutional evolutions such as these are rarely smooth and quiet.¹⁵⁴ At the outset, a mismatch between the political environment and the institution usually leads to political complaints. In the GATT/WTO context, non-business NGOs and politicians who represent them have complained about external transparency, and some have demonstrated or rioted over the issue. Developing countries have demanded increased internal transparency and capacity-building, complaining that they were shut out of the last round. And in the late GATT years, U.S. negotiators complained that the dispute settlement process alone was not adequately facilitating compliance with WTO rules-- while negotiators abroad complained that U.S. unilateralism was illegal and illegitimate.

The process of institutional adjustment and fine-tuning is often incremental, generating noise along the way. For example, external transparency reforms have responded to some of civil society's demands for greater participation, but further reform at the WTO has been resisted by developing countries. The continuing gap between the institution and the environment will generate continuing calls for reform. Similarly, while most judicial law-making has pertained to highly technical issues that have little mass appeal,¹⁵⁵ judicial law-making is sure to catalyze signaling by countries displeased

¹⁵⁴ See generally, March & Olsen, *supra* note 9.

¹⁵⁵ Burley and Mattli, *supra* note 16, argue that European Court of Justice decisions that addressed technocratic issues, instead of issues with popular appeal, helped enable the Court to engage in judicial law-making and establish its place in the European constitutional order.

by particular Appellate Body decisions, continuously defining the Appellate Body's strategic space.

The institutional adjustment process may also cause quieter political complications. For example, increased developing country willingness to engage in WTO negotiations, and the associated increase in internal transparency and developing country capacity, will make it trickier for European and U.S. negotiators to control the WTO agenda-setting process. At the same time, increased external transparency presents new challenges to European and U.S. trade negotiators, even though they have been careful to avoid changes that radically compromise secrecy where it is beneficial. At the least, increased transparency may require greater use of non-papers and informal caucuses.

In the long term, WTO institutions could come under greater pressure as a result of more fundamental changes in the political environment. For example, diminishing transatlantic power (e.g., as a result of expanded WTO membership and greater cooperation among developing countries) or a fundamental divergence of EC-U.S. interests would undermine the practice of transatlantic agenda-setting. And as a result, the strategic space for judicial law-making would expand, as it would become more difficult to establish and sustain political cooperation necessary to check Appellate Body action.

Despite the political turbulence generated by institutional change, the WTO has been evolving in politically healthy ways. By re-matching institutional rules, principles, procedures, and practices with the underlying political environment, the institutional developments examined here are enhancing political support for the WTO, particularly

from its most powerful Members. Recent internal and external transparency changes (and current negotiations on those topics) remain Member-controlled, reflecting the underlying structure of state power (and the underlying interests of non-state actors within powerful states) in the WTO, and so maintain or reinvent political support for the institution. While the Appellate Body has significant political leeway for law-making, the substance of its decisions is constrained by WTO legal discourse and politics, and the Appellate Body has operated in a strategic space within which it has marginally advanced liberalization without fundamentally upsetting the balance of rights and responsibilities embodied in the WTO agreements.

Hence, taken together, the institutional developments analyzed here have not significantly reduced EC and U.S. influence in the WTO. The transatlantic powers cooperated to dominate the consensus decision-making process in the Uruguay Round and the transparency changes examined here are not likely to undermine their capacity to dominate that process anytime soon. Moreover, judicial law-making has not fundamentally upset the asymmetric package of rules that emerged from that process in the last round. While institutional developments may lag behind underlying environmental shifts so that some aspects of the institution may be out of sync with the contemporary political-economy, the WTO is developing along paths that are garnering on-going support from the two Members that matter most to its political survival: the EC and the United States.