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**\*333 THE DOMAIN OF WTO DISPUTE RESOLUTION**

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*(J)udicial law-making is a permanent feature of administration of justice in every society ....*

[FN1] *Recommendations and rulings of the D(ispute) S(ettlement) B(ody) cannot add to or diminish the rights and obligations provided in the covered agreements.* [FN2]I. INTRODUCTION

Many trade diplomats, environmentalists and scholars have expressed concern regarding the magnitude of decision-making power allocated to World Trade Organization (WTO) dispute resolution panels and the WTO Appellate Body. While trade diplomats and scholars have expressed pride at the Uruguay Round achievement of more binding and more “law-oriented” dispute resolution, the same group and a variety of non-governmental organizations (NGOs) and other commentators question the jurisdictional scope of dispute resolution. After all, should these small tribunals, lacking direct democratic legitimacy, determine profound issues such as the relationship between \*334 trade and environmental values or trade and labor values? Many voices, including this author's, have called for greater international legislation [FN3] in these important fields.

This Article is intended to outline a more realistic and nuanced view, based on law and economics analytical techniques. It is intended to suggest the reasons why dispute resolution could be the appropriate place to determine these issues. Conversely, it is intended to suggest a way to predict when these issues might better be determined through more specific legislative action. This Article seeks to begin to delineate the role of dispute resolution in the international trade law system.

In order to do so, the Article first analyzes the function and vocation of WTO dispute resolution. Second, it examines two related analytical techniques of law and economics to attempt to suggest the reasons for the assignment of competences to WTO dispute resolution, as opposed to WTO legislation. These two techniques are (i) incomplete contracts, [FN4] and (ii) rules and standards. [FN5] The incomplete contracts literature considers the reasons for, and implications of, the fact that all contracts (like all treaties) are necessarily incomplete in their capacity to specify the norms that will be applied to particular conduct. In the rules versus standards literature, a law is a “rule” *to the extent that* it is specified in advance of the conduct to which it is applied. A “standard,” on the other hand, establishes general guidance to both the person governed and the person charged with applying the law but does not, in advance, specify in precise detail the conduct required or proscribed. The relativity of these definitions is critical. Furthermore, each law is comprised of a combination of rules and standards. However, it will be useful to speak here generally of rules as distinct from standards.

Finally, the Article applies these techniques to two important examples in the WTO legal system: (a) the kind of trade and environment \*335 conflict exemplified by the recent *Shrimp/Turtle* [FN6] decision of the Appellate Body, and (b) the problem of non-violation nullification or impairment, addressed in the recent *Film* [FN7] panel.

This Article addresses neither of the major debates in international trade law: (i) that between power-

oriented and law-oriented dispute resolution, defined by Professor John Jackson, [FN8] and (ii) that of subsidiarity, the question of whether particular competences should be allocated to member states of the WTO or to the WTO. [FN9] Rather, this Article addresses an interstitial institutional question: once one has decided on the application of law, and once one has decided to empower the WTO, where in the WTO institutional structure should power be exercised?

This interstitial question, however, affects the choice between power orientation and law orientation, as well as the choice between allocation of competences to the state and allocation to the WTO: the design of the institution affects the decision to allocate power to the institution. [FN10] Thus, within the “rule-oriented” approach, there are both rules and standards, as well as possibly lacunae. In brief, where decision-making authority is allocated to a dispute resolution body, less specific standards are consistent with a transfer of power to an international organization--the dispute resolution body itself--while more specific rules are more consistent with the reservation of continuing power by member states. [FN11] From a more critical standpoint, it might be argued that allocation of authority to a transnational dispute resolution body by virtue of standards can be used as a method to integrate *sub rosa*, and outside the visibility of democratic controls. [FN12]

## \*336 II. THEORETICAL FRAMEWORK DEFINING THE ROLE OF WTO DISPUTE RESOLUTION

It will be recalled that article 3(2) of the DSU provides that the vocation of dispute settlement is to preserve and to clarify rights and obligations under the covered agreements “in accordance with customary rules of public international law.” [FN13] This phrase has been interpreted by the Appellate Body to refer to the interpretative rules of the Vienna Convention. [FN14]

This section examines the vocation and function of WTO dispute resolution in order to begin to articulate the distinction and relationship between WTO dispute resolution and WTO treaty-making. To understand the role of dispute resolution, one must recognize that dispute resolution is not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance. [FN15] We must also recognize that today dispute resolution often works in tandem with legislation in that dispute resolution tribunals function in part as agents of legislatures. Moreover, legislatures, intentionally or unintentionally but often efficiently, delegate wide authority to dispute resolution.

### *A. The Vocation and Function of WTO Dispute Resolution*

The WTO dispute resolution process begins with a requirement of consultations. If consultations are unsuccessful, the complaining state may request the establishment of a three-person panel to consider the matter. The panel issues a report which may be appealed to the Appellate Body. The panel report, as it may be modified by the Appellate Body, is subject to adoption by the Dispute Settlement Body (DSB) of the WTO. Adoption is automatic unless there is a consensus not to adopt the report. [FN16]

What is the vocation of WTO dispute resolution? There are several answers. Panels determine the facts. They determine those facts that are relevant under the applicable law, so that they must determine the applicable law and relevant facts concurrently and interactively. Interestingly,\*337 because of a design flaw in the DSU, the Appellate Body has no right of remand. [FN17] Therefore, the Appellate Body is constrained where it determines to apply law for which the panel has made no findings of fact.

Within the determination of the applicable law are several subfunctions. First, panels (and here the Appellate Body acts as well) determine which law is applicable, by virtue of factors including, but not limited to, the activity, the location, the persons, and the timing. Second, where there is a dispute regarding the meaning of the

law, the panel must definitively interpret the law. Third, where the law does not apply by its specific terms but was intended to address the issue, the panel may construe the law. Fourth, the law may have a lacuna and therefore not provide a response. [FN18] Fifth, where two legal rules overlap, the panel must determine whether both were meant to apply or whether one takes precedence. Sixth, where two legal rules conflict, the panel must determine whether the laws are of unequal or equal stature. If they are of equal stature, the panel must determine how to accommodate both. As shall be discussed in more detail below, one persistent problem of the WTO legal system is the recognition and application of legal rules from outside the system. Penultimately, after the complete determination of the applicable law, the tribunal applies the law to the facts. Finally, the tribunal may fashion a remedy: it may recommend a resolution to be adopted by the DSB.

Dispute resolution is of course a socially immanent governance mechanism to be used to establish a particular type of governance in a particular social setting. Where the applicable legal provision has the characteristics of a rule--clear, self-executing, fully specified in advance and not in need of interpretation or construction--once the facts are determined, the dispute resolution process has little more to do. [FN19] This is the economist's, and often the political scientist's, erroneously idealized view of dispute resolution: the economist and political scientist often assume that there is a definite applicable law and a discrete set of facts to which the law applies unequivocally. Given this assumption, they expect and conclude that the only question left for analysis is whether the dispute resolution tribunal's decision will meet with compliance.

Where, alternatively, the legal provision has the characteristics of a standard, with need of interpretation or even construction, then the \*338 determination of the law and the application of the law to the facts become much more complex.

However, there is yet a third possibility, which is something of a chimera. The third possibility is that there is no applicable law. In one recent decision, the Appellate Body, agreeing with the panel that no WTO law applied, *ratione temporis*, [FN20] declined to provide a remedy. [FN21] This decision recognizes that the WTO legal system is a limited one, which does not provide a remedy for every claim. [FN22]

There is, however, perhaps, another kind of lacuna: one in which there is some applicable WTO law. In these cases, there may be a gap in the international system for applying non-WTO international law that may conflict with WTO provisions. The WTO dispute resolution system is clearly not a court of general jurisdiction, competent to apply all applicable international law. [FN23]

WTO law does not represent a complete legal answer in multidimensional disputes in the sense that it does not include other law that may articulate policies beyond trade policies. This is the character of some of the recent environmental decisions of WTO dispute resolution bodies. [FN24] It is not so much a substantive lacuna as a procedural one. There is no mechanism for integrating diverse legal rules, that is, for determining which law takes precedence when diverse laws conflict. The procedural lacuna has substantive effects.

#### *B. The Relationship between Treaty-Writing and Dispute Resolution*

It is clear that dispute resolution arrangements--and more generally *ex post* enforceability--affect the willingness of states to enter into agreements *ex ante*. [FN25] After all, what would be the purpose of entering into an unenforceable agreement? [FN26] Dispute resolution arrangements \*339 are intended to provide some degree of formal enforceability. Before undertaking further analysis, it is useful to review the complementary role that dispute resolution plays in relation to legislation.

It may appear odd that dispute resolution is at the center of world trade governance. Indeed, it is worthwhile

to wonder why the focus is on adjudication, rather than legislation, as the mainstay of legalism in world trade. Of course, dispute resolution plays two roles. First, as noted above, dispute resolution is necessary to the application of legislation. In this regard, dispute resolution is not important for its own sake but as the place where legislation becomes binding and effective. [FN27] Legislation without adjudication at least raises greater concerns regarding the application and effectiveness of the legislation. [FN28] It is only in this sense that dispute resolution may properly be considered the cornerstone of international trade law. Second, dispute resolution, as indicated in the quote from Lauterpacht with which this Article began, inevitably interprets and expands upon legislation. In a common law system, indeed, dispute resolution amounts unabashedly to a type of legislation. Even in a civil law system, [FN29] or one such as the WTO that rejects *stare decisis*, dispute resolution may be a source of persuasive or helpful precedent, that is, of less binding legislation.

### C. Interpretation and Construction

In Anglo-American parlance, interpretation refers to the determination of the meaning of words contained in a contract, statute or treaty while construction refers to the determination of the intent of the parties in connection with a matter not specifically addressed in the text of the document. While the distinction may be a matter of degree, construction raises greater questions of legitimacy, of fidelity to the intent of the parties and--in statutory or treaty contexts--of democracy.

The WTO dispute resolution process often involves interpretation: the parties disagree about the meaning of the promises made in the relevant treaty. Virtually every decision involves some dispute regarding the meaning of a treaty obligation [FN30]--few turn solely on the facts. \*340 This might be expected given the large amount of new treaty obligations that came into formal existence in 1995 as a result of the Uruguay Round. Some dispute resolution proceedings involve construction. Indeed, one group of decisions that might be categorized as construction decisions are those involving non-violation nullification or impairment. In these cases, by definition, no specific provision of a treaty is violated. The question is whether the treaty should be construed to provide a remedy for acts that nullify or impair concessions despite the lack of specific treaty language. In other types of cases, recent WTO jurisprudence has seemingly rejected construction:

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of the treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended .... [FN31] However, construction occurs where concepts that *are* intended are implicit in the text though they are not expressly articulated. Construction under non-violation nullification or impairment involves only the most generally intended concepts. [FN32]

### D. Lacunae

There is only a subtle difference between a context in which construction is called for and a lacuna. [FN33] Construction is called for where the intent of the parties is determinable, while a lacuna is a case where the intent of the parties is not known. Of course, a tribunal must determine which circumstance is involved in particular cases, and the distinction turns on an interpretation of the intent of the parties. The existence of a lacuna, or *non liquet*, "is an expression of the principles of \*341 self-interpretation and polynormativity that are characteristic of the international legal system." [FN34] However, "[t]he view prevailing among writers is that there is no room for *non liquet* in international adjudication because there are no lacunae in international law." [FN35] General principles of law and rules of equity provide rules of decision where custom and convention fail

to do so. [FN36] This perspective is important in light of the *Lotus* doctrine that the principle of sovereignty requires that what is not positively prohibited to states is permitted to them. [FN37]

International trade law approaches lacunae in a different way. As explained below, the law applicable in WTO dispute resolution is a limited body. [FN38] There are two main types of cases where this limitation is relevant. First, there are cases where the question, in a violation-type case, is whether there is an applicable provision of WTO law that restricts the conduct in question. Second, there are cases where WTO law does restrict the conduct in question, but that conduct is required under non-WTO law, including either domestic or international law. Alternatively, within this second category, the WTO law may permit conduct that is forbidden under domestic or other international law. This second group of cases may be described as presenting a choice of law or conflict of laws issue. With regard to domestic law, it is clear that applicable WTO law trumps conflicting domestic law, at least as a matter of WTO law. [FN39] While this outcome is clear in formal legal terms, it raises substantial policy concerns. These policy concerns arise from the fact that the exceptional provisions in article XX of the General Agreement on Tariffs and Trade (GATT) have not been interpreted broadly to except certain types of trade restrictions that arise from the application of non-trade policy. [FN40] The most notorious examples are in the areas of trade and environment and trade and labor. With respect to conflicts between WTO law and other international law, the outcome is less clear. In the environmental field, there has not been a direct\*342 conflict between WTO law and other applicable mandatory international law.

#### *E. References to Non-Substantive versus Substantive Non-WTO International Law in WTO Dispute Settlement*

The mandate to WTO dispute resolution panels, to the Appellate Body, and to the Dispute Settlement Body is clear: apply (directly) only WTO law. [FN41] Several provisions of the DSU provide this limitation. Article 3(2) provides that the dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” [FN42] Article 3(2) further provides that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” [FN43] This language would be absurd if rights and obligations arising from other international law could be applied by the DSB. The standard panel terms of reference provided under article 7 provides for reference only to law arising from the WTO agreements. [FN44] Finally, article 11 of the DSU specifies the function of panels to assess the applicability of and conformity with the covered agreements. [FN45] With so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable.

This limited role of WTO dispute resolution has been confirmed in the recent Appellate Body Report relating to *European Communities--Measures Affecting the Importation of Certain Poultry Products*, holding that \*343 a tariff agreement settling a matter between two WTO members does not constitute WTO law applicable by a panel. [FN46] It is also supported by the recent Appellate Body Report regarding *Argentina--Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, suggesting that a purported agreement between Argentina and the IMF would not modify WTO obligations. [FN47]

While panels and the Appellate Body are only permitted to apply WTO law, they refer to non-WTO international law in two types of cases. First, as specifically authorized by article 3.2 of the DSU, they refer to customary rules of interpretation of international law. This reference does not appear to include substantive non-WTO international law. While article 31(3)(c) of the Vienna Convention, which is taken as reflective of customary rules of interpretation, refers to applicable international law, it does so only to indicate what materials should be taken into account in interpreting treaty texts. Thus, other international law is not directly applicable but is taken into account in a manner similar to the U.S. *Charming Betsy* rule: interpret so as to avoid conflict

where possible. [FN48]

Second, substantive non-WTO international law may be incorporated by reference in WTO law, either by treaty language such as the references in TRIPS to intellectual property treaties [FN49] or by a waiver such as the Lomé waiver in the recent *Bananas III* decision. [FN50] More subtly, substantive non-WTO law may indirectly be incorporated by reference in provisions such as article XX(b) of GATT. [FN51]

*\*344 F. The Choice between Treaty Specification and Delegation to Dispute Resolution*

When trade negotiators select the language of a particular provision, they determine the extent to which subsequent specification is delegated to dispute resolution or other processes, as well as the substantive treatment of an issue. In connection with the Anti-Dumping Agreement, for example, the participants in the Uruguay Round agreed on a scope of review of national measures, intending to leave a defined scope for auto-interpretation by WTO members and to provide for reduced scrutiny by a dispute resolution panel of factual matters established by WTO members. [FN52]

The decision regarding the post-legislative role of dispute resolution is not different in abstract theoretical terms from the decision by a legislature [FN53] to delegate rule-making or interpretative functions to an administrative agency. Recognizing that dispute resolution tribunals engage in interpretation and construction and are stymied by lacunae, it is important to question how and why particular provisions operate to authorize interpretation and construction.

Not only do treaty writers delegate authority to dispute resolution tribunals, they also maintain complex relationships with both the formal and the informal dispute resolution processes. First is the possibility of legislative reversal: if the authors of the treaty become discontented with the manner of its application, they may change the treaty. Second, and relatively unusual in general international law, is a formal “political filter” device. Although it still exists in attenuated form, this political filter was much more important prior to the 1994 changes to WTO dispute resolution.

As is now well-understood and the subject of much commentary, the Uruguay Round brought about a dramatic shift in the structure of dispute resolution in international trade. [FN54] Prior to the establishment of the WTO, GATT dispute settlement suffered from many arguable weaknesses. Chief among the perceived weaknesses was the requirement that consensus among the members of the GATT Council (the full membership) be attained in order for the report of a dispute resolution\*345 panel to acquire legal effect. [FN55] Thus, the loser had the ability to block adoption of the panel report. This was a political filter that did not allow politically objectionable decisions to have legal effect. The change made in the DSU reversed the consensus rule: panel decisions are to be adopted automatically unless *rejected* by consensus. [FN56]

Of course, the representatives of member states continue to have substantial power over the dispute resolution process. One avenue of influence is the ability to establish new treaties or treaty provisions [FN57] and thereby “legislatively” to reverse the outcome of a dispute resolution determination. A second avenue of influence is through the *exclusive* authority to adopt interpretations of WTO agreements. [FN58] A third is to specify the “standard of review,” as mentioned above.

Thus, perhaps like other tribunals, WTO dispute resolution may be seen as a hybrid, or a confluence of these two types of authority. Of course, positive political theory would analyze the interaction of adjudicative and legislative authority in game theoretic and perhaps other terms, examining how the structure of the relationship between these two bodies affects outcomes. [FN59]

### *G. The Assignment of Competences to WTO Dispute Resolution*

This section examines the mechanisms by which competences to address important issues are assigned to WTO dispute resolution. Many of these issues are largely trade issues, such as the determination of applicable tariffs. [FN60] Others exist at the margins of WTO law, implicating “trade and ...” type problems. [FN61] Any of these issues have the capacity to be “big cases”: the *Bananas* [FN62] decision and the *Computers* [FN63] \*346 decision are both “big cases” involving relatively “pure” trade law issues. On the other hand, there are some types of “big cases” that involve non-trade issues, such as the recent *Shrimp/Turtle* decision or the *Film* decision. Of course, the careful reader will respond that the domain of “trade” issues is not so clearly delimited as this paragraph pretends.

The *Shrimp/Turtle* decision is a typical “trade and ...” circumstance, with national environmental regulation criticized as unduly restrictive of international trade and a breach of WTO obligations. These cases are at the margin of WTO law. In these types of cases, there are two foci. First, is this domestic measure subject to article III of GATT? If it is, is it exclusively subject to article III of GATT and removed from the strict scrutiny of article XI of GATT? Second, if it is not (which is generally the case) and the measure would otherwise be found to violate article XI, is there an exception available under article XX of GATT? Each step in this analysis has involved a good deal of creativity on the part of dispute resolution panels and now the Appellate Body: in none of these cases is the language of the treaty viewed as determinate.

The *Film* case demonstrates the limited distance a panel would be willing to travel to find non-violation nullification or impairment. Again, the treaty language is indeterminate.

We may view the indeterminacy (or incompleteness) or standard-like nature of these treaty provisions as delegation to dispute resolution. In other words, as time goes by, one can increasingly view the decision to draft these provisions as they are, or to leave them as they are, as legislative decisions and as delegations. Two related analytical methods that seek to explain these decisions are reviewed below.

### III. WTO DISPUTE RESOLUTION AND THE INCOMPLETE CONTRACTS PERSPECTIVE

This and the following section develop two linked analytical techniques for application to WTO dispute resolution. The first, the incomplete contracts analysis, is largely consistent with the second, the rules versus standards approach.

Professor Hadfield applies an incomplete contracts analysis to statutes which in turn can be applied to treaties. [FN64] Treaties may be optimally incomplete in that they contain appropriate instructions for decision-makers to complete the “contract” in particular cases. The parameters to consider include (i) the costs of advance specification, (ii) the degree to which the future is unpredictable or stochastic, (iii) the ability to customize to particular facts in specific cases and \*347 (iv) the potential value of diversity of compliance techniques. This literature, however, tends to treat the legislature as a unitary actor. It will be exceedingly important to recognize that the legislature in this case (as in Hadfield's) is a group of actors that is subject to strategic and social choice limitations on its ability to act.

Oliver Williamson seeks to link the study of the institutional environment, that is, the general legal context external to particular organizations, to the study of the institutions of governance. [FN65] From a lawyer's perspective, perhaps the most salient difference between the international legal context and the domestic legal context with which Williamson is concerned is the relative thickness of the domestic legal context. This thick domestic legal context is highly articulated and supplies a reliable and predictable mechanism to complete

contracts.

This body of law may specify the terms of a relationship where the parties have not done so; it may complete contracts. Take the example of a commercial contract governed by New York or English law. In the event of a dispute, the parties would have an extremely detailed body of statutory and common law that has responded to an enormous history of commercial disputes. This body of law performs the function of a set of terms automatically incorporated by reference in the contract. *Non-liquet* is not permissible in common law courts. The likelihood that the dispute is not governed by statute or precedent is small, and consequently, the likelihood of proceeding to full litigation is also small.

More saliently, even in the absence of precedent, a common law court will create law to apply. The domestic institutional setting is thick with experience and legislation; it reflects the choices of a complex and relatively comprehensive society. The international institutional setting is thin by comparison. And again, more saliently, the international institutional setting may permit *non-liquet*: where positive law does not exist, the complainant may simply lose by default.

The role of general law in completing contracts reminds us that no institution is an island: each exists in a broader institutional setting. This setting penetrates the institutions at various points, to complete contracts and to supply broader institutional rules where appropriate. Thus, each particular institutional setting is really a complex of interacting institutional settings. However, the WTO generally isolates itself from much of the broader institutional setting of public international law. [FN66] WTO dispute resolution panels and the Appellate Body are limited to the application of substantive WTO law and are not \*348 authorized to apply general substantive international law or other conventional international law. [FN67] On the other hand, as noted above, the rules of interpretation of customary international law have been received into WTO law.

Incomplete contracts give rise to strategic action to capture surplus after the contract is entered into: opportunism. Furthermore, “the prospect of *ex post* bargaining invites *ex ante* pre-positioning of a most inefficient kind.” [FN68] Potential opportunism gives rise to transaction costs in order to forestall opportunistic action; one type of transaction cost is the cost of establishing binding dispute resolution mechanisms. Greater duration and complexity make incompleteness more likely; greater asset specificity accentuates the risks of incompleteness and the concomitant transaction costs. The response will be either to complete the contract by greater anticipation, negotiation and specific advance resolution or to create legislative or judicial institutions to resolve future questions.

Williamson adds a critical dimension to this model, which is change. Change in the environment accentuates uncertainty and the incompleteness of contracts. Williamson distinguishes price-based adaptability in the market from coordination-based adaptability in the firm. He links adaptability to asset specificity and finds that in circumstances where there is both (i) frequent need for modification of relationships, especially where prices are not expected to serve as sufficient coordinating statistics and (ii) high levels of asset specificity, hierarchy (firm) may be more responsive than market (contract) forms of relationship. [FN69] In the context considered in this article, allocation to WTO dispute resolution may be considered more like the firm while allocation to future legislation, with its requirements of log-rolling and deal-making, may be analogized to the market.

By comparison to the domestic context, the international legal context is thin, consisting of two main types of international law: treaty and customary international law. For the purposes of this Article, the first, treaty, corresponds to contract in domestic law: one does not think of it as law emanating from a vertical government in domestic law but instead as “private” promises that the law will enforce. In this context, the second, customary international law, including the law of treaty, is quite limited in scope.



Due to this “thinness,” international treaties are often subject to the problem of incompleteness in a way that domestic contracts are not. \*349 Domestic contract disputes always have an answer: the common law abhors a vacuum. Courts interpret, construct or leave the loss where it falls. In international treaties, especially those without compromissory clauses, [FN70] the loss more often stays where it falls and auto-interpretation would be expected to intensify this effect. Even if international treaty gaps are potentially filled by valid international law, there may be gaps in the dispute resolution structure that leave the international law unenforceable although valid.

There is another more serious incompleteness of the WTO legal system. It does not countenance the possibility of directly applicable [FN71] norms from outside the WTO system. Thus, in addition to *substantive* incompleteness, the WTO suffers from *procedural* or *jurisdictional* incompleteness.

In a domestic legal system, dispute resolution processes can be relied upon to complete contracts, to the extent that the parties find that either litigation or arbitration is a cost-effective means to establish the rights they think are theirs. In the international legal system, similar reliability can be constructed but is generally not available. This is not simply another way of referring to the fact that the international legal system is more horizontal than vertical. Rather, it emphasizes the limited array of institutions available in the international legal system.

Milgrom, North and Weingast point out that the medieval law merchant enforcement system “succeeds even though there is no state with police power and authority over a wide geographic realm to enforce contracts. Instead, the system works by making the reputation system of enforcement work better.” [FN72] The system uses formal institutions to supplement an informal mechanism. Reputation is not simply a non-economic value; rather, it is an important source of transaction cost economizing *ex ante*, where formal institutions are not cheaply available to enforce contracts *ex post*. Appeals to reputation may also assist in enforcement *ex post*. The importance of reputation may be magnified in a context where there are multiple transactions entered into by any one person, as in a village community or an increasingly interdependent international society.

In the international legal system, public international law serves the function that a constitution serves in the domestic legal system: it is a \*350 fundamental component governing the production of the remainder and of the institutional environment for international organizations and for states. It provides a limited set of rules regarding the formation of law and its interpretation, application and enforcement. Thus, it serves as a set of background norms for treaties [FN73] and other less “constitutional” varieties of customary international law.

In international law, there are fewer institutional and legal structures to complete contracts. First, in international law, there is not a very complete body of customary or other general law that can be applied to supply missing terms to incomplete treaties. However, article 38 of the Statute of the International Court of Justice authorizes that tribunal to refer to applicable customary international law and general principles of law. [FN74] Second, in general international law, as opposed to the WTO system, there is usually no dispute resolution tribunal with mandatory jurisdiction. Thus, it is often difficult to rely on the ability to complete contracts through dispute resolution mechanisms.

#### IV. RULES VERSUS STANDARDS

A related literature examines the economics of rules and standards. Instead of dealing with incomplete contracts, this literature deals more directly with different types of law, accepting in advance that there is no *non liquet* in common law. This literature addresses the fact that laws are sometimes established more specifically in advance as rules, or less specifically in advance as standards.

### *A. Defining Rules and Standards*

In the rules versus standards literature, a law is a “rule” to the extent that it is specified in advance of the conduct to which it is applied. Thus, a law against littering is a rule to the extent that “littering” is well-defined. Must there be an intent not to pick up the discarded item? Are organic or readily biodegradable substances covered? Is littering on private property covered? Is the distribution of leaflets by air covered? Any lawyer knows that there are always questions to ask so that every law is incompletely specified in advance and therefore incompletely a rule.

On the other hand, a standard is a law that is, in relative terms, farther toward the other end of the spectrum. It establishes general guidance\*351 to both the person governed and the person charged with applying the law but does not, in advance, specify in detail the conduct required or proscribed.

The relativity of these definitions is critical. A standard is more apparently and intentionally specified in advance in an incomplete manner. Familiar constitutional standards in the U.S. legal system include requirements like “due process,” prohibitions on uncompensated “takings” or prohibitions on barriers to interstate commerce. A well-known statutory standard is “restraint of trade” under the Sherman Act. [FN75] It is worth noting that the distinction between a rule and a standard is not necessarily grammatical or determined by the number of words used to express the norm; the distinction relates to how much work remains to be done to determine the applicability of the norm to a particular circumstance. Furthermore, this distinction assumes, in line with H.L.A. Hart and contrary to certain tenets of critical legal theory, that language may be formulated to have core meanings, penumbral influence and limits of application. [FN76] If all language were equally indeterminate, there would be no distinction between a rule and a standard.

Incompleteness of specification may not simply be a result of conservation of resources. It may be a more explicitly political decision either (i) to agree to disagree for the moment in order to avoid the political price that may arise from immediate hard decisions or (ii) to cloak the hard decisions in the false inevitability of judicial interpretation. It is important also to recognize that the incompleteness of specification may represent a failure to decide how the policy expressed relates to other policies. This is critical in the trade area, where the incompleteness of a trade rule often relates to its failure to address, or incorporate, non-trade policies.

Each law is comprised of a combination of rules and standards. However, it will be useful to speak here generally of rules as being separate from standards.

### *B. The Costs and Benefits of Rules and Standards*

Rules are more expensive to develop *ex ante* than standards because rules entail specification costs, including drafting costs, negotiation costs, and strategic costs involved in *ex ante* specification. In order to reach agreement on specification and to legislate specifically, there may be greater costs in public choice terms. [FN77] This is particularly interesting\*352 in the trade context where treaty-making would be subjected to intense domestic scrutiny while application of a standard by a dispute resolution process would be subjected to reduced scrutiny. On the other hand, in this connection, NGOs have sought to enhance transparency in dispute resolution. In short, while rules require clear decision, standards may serve as an agreement to disagree or they may help to mask or mystify a decision made. [FN78] Under standards, both sides in the legislative process, at least initially, may claim victory.

Rules are generally thought to provide greater predictability. There are two moments at which to consider predictability. The first moment refers to the ability of persons subject to the law to be able to plan and conform

their conduct *ex ante*. This is sometimes known as “primary predictability.” [FN79] The second moment in which predictability is important is *ex post*, after the relevant conduct has taken place. This type of predictability is “secondary predictability.” [FN80] Both types of predictability can reduce costs. For example, where the parties can predict the outcome of dispute resolution, that is, the tribunal's determination of their respective rights and duties, they will spend less money on litigation.

While rules appear to provide primary and secondary predictability, tribunals may construct exceptions in order to do what is, by their lights, substantial justice, and thereby reduce predictability. [FN81] It may be difficult to constrain the ability of tribunals to do this. Furthermore, as noted below, game theory predicts that some degree of uncertainty--of unpredictability--may enhance the ability of the parties to bargain to a lower cost solution. Thus, simple predictability is not the only measure of a legal norm; one must also be concerned with the ability of the legal norm to provide satisfactory outcomes. In economic terms, one must be concerned with the allocative efficiency of the outcome. This Article considers allocative efficiency below as it examines the institutional dimension of rules and standards.

In order to evaluate the relative allocational efficiency of potential outcomes, one must recognize that there is a temporal distinction between rules and standards. Standards may be used earlier in the development of a field of law, before sufficient experience to form a basis for more complete specification is acquired. In many areas of law, courts \*353 develop a jurisprudence that forms the basis for codification, or even rejection, by legislatures. With this in mind, legislatures or adjudicators may set standards at an early point in time, and determine to establish rules at a later point in time. [FN82] It is clear that a rule of *stare decisis* is not necessary to the development of a body of jurisprudence by a court or dispute resolution tribunal. [FN83] It is also worth noting that in a common law setting, or any setting where tribunals refer to precedents, the tribunal may announce a standard in a particular case, and then elaborate that standard in subsequent cases until it has built a rule for its own application.

Kaplow points out that where instances of the relevant behavior are more frequent, economies of scale will indicate that rules become relatively more efficient. [FN84] For circumstances that arise only infrequently, it is more difficult to justify promulgation of specific rules. In addition, rules provide compliance benefits: they are cheaper to obey, because the cost of determining the required behavior is lower. Rules are also cheaper to apply by a court: the court must only determine the facts and compare them to the rule.

### *C. The Institutional Dimension of Rules and Standards*

Another distinction between rules and standards, often de-emphasized in this literature, is the institutional distinction: with rules, the legislature often “makes” the decision; with standards, the adjudicator determines the application of the standard, thereby “making” the decision. Again, it is obvious that these terms are used in a relative sense (this caveat will not be repeated). Economists and even lawyer-economists seem to assume that the tribunal simply “finds” the law, and does not make it. Of course, courts can make rules pursuant to statutory or constitutional authority. The hallmark of a rule is that it is specified *ex ante*, not that it is specified by a legislature. At least in the international trade system, however, rules are largely made by treaty and standards are largely applied by tribunals. [FN85]

But the difference between legislators and courts is an important one; it may affect the outcome. [FN86] The choice of legislators or courts to make particular decisions should be made using cost-benefit analysis. \*354 Such a cost-benefit analysis would include, as a critical factor, the degree of representativeness: which institution will most accurately reflect citizens' desires? There are good reasons why such cost-benefit analysis does not always select legislatures. First, there is a public choice critique of legislatures. Second, even under a

public interest analysis, legislatures may not be efficient at specifying *ex ante* all of the details of treatment of particular cases. Third, the rate of change of circumstances over time may favor the ability of courts to adjust. Finally, the strategic relationship between legislators and courts must be analyzed. Thus, in order fully to understand the relationship between rules and standards, the tools of public choice or positive political theory [FN87] should be brought to bear to analyze the relationship between legislative and judicial decision-making. [FN88]

#### *D. The Strategic Dimension of Rules and Standards*

It is not possible to consider the costs and benefits of rules and standards separately from the strategic considerations that would cause states to prefer a rule as opposed to a standard. Johnston analyzes rules and standards from a strategic perspective. He finds that, under a standard, bargaining may yield immediate efficient agreement, whereas under a rule this condition may not obtain. [FN89] Johnston considers a rule a “definite, *ex ante* entitlement” and a standard a “contingent, *ex post* entitlement.” [FN90] Like Kaplow, he does not here consider the source of the rule, whether it is the legislature or tribunal.

Johnston notes the “standard supposition in the law and economics literature ... that private bargaining between [two parties] over the allocation of [a] legal entitlement is most likely to be efficient if the entitlement is clearly defined and assigned *ex ante* according to a rule, rather than made contingent upon a judge's *ex post* balancing of relative value and harm.” [FN91] Johnston suggests this supposition may be incorrect: [FN92] “[w]hen the parties bargain over the entitlement when there is private information about value and harm, bargaining may be more efficient under a blurry balancing test than under a certain rule.” [FN93] This is because under a certain rule, the holder of the entitlement\*355 will have incentives to “hold out” and decline to provide information about the value to him of the entitlement. Under a standard, where presumably it cannot be known with certainty *ex ante* who owns the entitlement, the person not possessing the entitlement may credibly threaten to take it, providing incentives for the other person to bargain. Johnston points out that this result obtains only when the *ex post* balancing test is imperfect because if the balancing were perfect, the threat would not be credible. This provides a counter-intuitive argument for inaccuracy of application of standards. [FN94]

Interestingly, further research as to the magnitude of strategic costs under rules and under standards might suggest that over time, rules provide some of the strategic benefits of standards. This might be so if tribunals develop exceptions to rules in a way that introduces uncertainty to their application. This increased benefit would, of course, be countervailed to some extent by the reduction of predictability that the development of exceptions would entail.

### V. APPLYING INCOMPLETE CONTRACTS AND RULES/STANDARDS ANALYSIS TO INTERNATIONAL TRADE LAW

In the following two sections, the *Shrimp/Turtle* case and the *Film* case are explored as examples of the relationship between rules and standards. This Article compares the case-based decision-making by the WTO dispute settlement system under these provisions with the possibility of decision-making by the more political processes of the Committee on Trade and Environment, [FN95] for example, or more immediate decision-making or treaty-making by the WTO.

The following table summarizes the factors to be considered as derived from the analysis set forth above and their general application to rules and standards, respectively.

C1-3table 1: Costs and Benefits

## of Rules and Standards

	Rules	Standards
Administrative cost of formulation	Higher cost	Lower cost
Public choice costs of specification, including costs of transparency	Higher cost	Lower cost
Perceived legitimacy; democracy deficit	Lower cost	Higher cost
Primary predictability--predictability for actors ex ante	Lower cost	Higher cost
Secondary predictability--ease of application by dispute resolution tribunal	Lower cost	Higher cost
Opportunity to gain experience prior to specification	Reduced benefit	Increased benefit
Economies of scale with greater frequency	Increased benefit	Decreased benefit
Minimization strategic costs--promotion of bargaining toward efficient agreement	Decreased benefit	Increased benefit

**\*356 A. Shrimp/Turtle: *Trade and Environment***

Tariff bindings under article II of GATT have more the character of rules, [FN96] while norms such as the definition of “like products” under article I or III, the necessity test of article XX(b) and XX(d), the “primarily related” test of article XX(g) or the *chapeau* of article XX of GATT [FN97] seem more like standards. These “standards” involve complex judicial balancing. One could adduce many additional examples.

Thus far, the GATT and WTO Committees on Trade and the Environment have produced no rules. With the exception of the relevant provisions of the Agreement on Technical Barriers to Trade (the “Standards Agreement”) [FN98] and the Agreement on Sanitary and Phytosanitary Measures (the “S&P Agreement”), [FN99] there has been no additional legislation in the GATT/WTO system addressing the problem of the relationship between trade and the environment.

**\*357 1. *Shrimp/Turtle* Panel Decision**

It is worthwhile to describe the facts of this case and the panel report [FN100] before describing the Appellate Body decision [FN101] and comparing resolution of this type of issue through dispute resolution with resolution through legislation: resolution through standards versus resolution through rules.

The panel convened to examine a prohibition imposed by the United States on the importation of certain shrimp and shrimp products under [section 609 of Public Law 101-162](#) (hereinafter “section 609”) [FN102] and associated regulations and judicial decisions. Section 609 prohibited importation into the United States of shrimp harvested with commercial shrimp-fishing technology that may adversely affect sea turtles. It also provided an exception for shrimp imported from states certified thereunder. The relevant portion of this

exception, applicable where sea turtles are otherwise threatened, permits certification if the exporting state adopts a regulatory program governing the incidental taking of sea turtles comparable to that of the United States and with an average incidental taking rate comparable to U.S. vessels. This regulatory program would require “turtle excluder devices” to be used by commercial shrimp trawling vessels operating in areas where turtles are likely to be found.

This case presented an occasion for the Appellate Body to review the contentious trade and environment issues first addressed in 1991 and 1994 in the *Tuna-Dolphin* cases. [FN103] In both *Tuna-Dolphin* panel decisions (each unadopted) the panels found the U.S. embargoes on foreign tuna to violate, *inter alia*, article XI of GATT, [FN104] and were not to be exempted under article XX of GATT. [FN105] Both the 1991 and the 1994 panels found that the U.S. measure, as a regulation of a process rather than a product, was not exclusively covered by article III of GATT, and so was subject to the prohibition of embargoes under article XI. The 1991 panel found that the U.S. measures did not qualify for an exemption under article XX because that provision did not permit the protection\*358 of animals outside the territory of the state adopting the relevant measure. [FN106] Furthermore, it found that the U.S. measures were not “necessary” within the meaning of article XX(b) insofar as the goal sought to be protected by the United States might have been addressed through multilateral negotiations. [FN107] The 1994 panel left open the possibility that article XX could permit the protection of animals extraterritorially. It did find, however, that the U.S. measures did not qualify for article XX because they were designed, not to directly achieve environmental goals, but to coerce other governments into adopting specific environmental policies. [FN108]

The *Shrimp/Turtle* panel took a novel, and ultimately unacceptable, approach to interpreting and applying the exemptive provisions of article XX of GATT. [FN109] Analyzing the *chapeau*, the panel first found that the countries that were certified and those that were not were “countries where the same conditions prevail” and that therefore the U.S. measure was discriminatory. [FN110] The panel did not even evaluate the U.S. position that different conditions prevail in these two types of countries. Thus, the panel implicitly disrespected the regulatory categories established by section 609.

The panel next turned to the question of whether this discrimination was arbitrary or unjustifiable. Specifically, the panel focused on the word “unjustifiable,” arguing that it must be interpreted in light of the purpose of the WTO Agreement [FN111] as a whole. The panel found that the purpose of the *chapeau* is to prohibit abuse of article XX, and, unfortunately, equated “abuse” with frustration of the broadest purposes of the WTO Agreement. [FN112] This approach might be acceptable if the purposes of the WTO Agreement were read to include subtleties like maintaining a degree of local regulatory autonomy. This is not the way that the panel read the purposes of the WTO Agreement. By selecting a limited, unidimensional “object and purpose,” the Panel predetermined\*359 that measures having an environmental object and purpose could not be justified under article XX. The Panel stated that

While the WTO Preamble confirms that environmental considerations are important for the interpretation of the WTO Agreement, the central focus of that agreement remains the promotion of economic development through trade; and the provisions of GATT are essentially turned toward liberalization of access to markets on a nondiscriminatory basis. [FN113] The Panel concluded that derogations from other provisions of GATT are permissible under article XX only so long as they “do not undermine the WTO multilateral trading system.” [FN114] As the United States argued in connection with its appeal, this uncompromising allegiance to the international trading system--this unidimensional teleological method of interpretation-- contradicts the clear intent of article XX. The panel went further, however, to hold that its examination of whether a measure undermines the multilateral trading system

may look not only at the particular measure before the panel but at the possibility of a proliferation of measures that in the aggregate might undermine the system. [FN115] Again this seems to exceed the clear meaning of article XX.

The panel carefully distinguished this case dealing with unilateral measures by the importing state from possible cases where the importing state acts pursuant to a multilateral environmental agreement. [FN116] Although the panel's distinction between these circumstances under WTO law is not clear, the panel effectively reserved judgment on this issue. It stated that the "negotiation of a multilateral agreement or action under multilaterally defined criteria is clearly a possible way to avoid threatening the multilateral trading system." [FN117] Given that multilateral environmental agreements might well be inconsistent with trade goals, one wonders why this is so clear. The panel did not say whether compliance with a multilateral environmental agreement may support the availability of an exception under article XX.

## 2. *Shrimp/Turtle* Appellate Body Decision

In its arguments to the Appellate Body, the United States argued that the panel had misinterpreted the *chapeau* of article XX, thereby effectively "eras[ing]" article XX from the GATT in any case in which \*360 there is a "threat to the multilateral trading system." [FN118] Indeed, the Appellate Body criticized the panel for departing from the text of the GATT and for not examining the ordinary meaning of the text.

In pursuit of this approach, the Appellate Body recalled that in the *Gasoline* case [FN119] it had focused on the use of the reference to the manner in which the measure is applied, clarifying that the *chapeau* is not concerned with the nature of the measure itself. [FN120] The design of the measure itself is addressed in the subparagraphs of article XX. The panel, on the other hand, evaluated whether section 609 itself satisfied the criteria of the *chapeau*. [FN121]

Furthermore, the Appellate Body stated that a teleological interpretation should consider the provision itself being interpreted, not the whole of the WTO Agreement:

Maintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure under the *chapeau* of Article XX. [FN122] The Appellate Body recalled that in the *Gasoline* case, it had examined the object and purpose of the *chapeau*, finding that it is intended to prevent abuse of the exceptions listed in article XX. [FN123] The panel did not examine the question of whether section 609 was applied in a manner that was arbitrary or unjustifiable discrimination or a disguised restriction within the meaning of the *chapeau*. [FN124] The Appellate Body further criticized the panel for examining compliance with the *chapeau* prior to determining compliance with any of the following exceptions. [FN125] It is not possible to determine whether an exception is being abused without first determining whether the exception is otherwise available. [FN126]

In fact, the Appellate Body completely rejected the panel's line of reasoning: "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one \*361 or another of the exceptions (a) to (j) of Article XX." [FN127] In an ideal setting, such a wholesale rejection of the panel's reasoning and conclusion would be a basis for remand to the panel for further findings; in fact, lacking the power of remand, the Appellate Body bravely made its own findings. [FN128]

In a ringing defense of living resources, the Appellate Body found that article XX(g), referring to “exhaustible natural resources,” includes living resources such as sea turtles. [FN129] Referring to the drafting history of article XX(g), which involved discussions of mineral resources, the Appellate Body endorsed an organic approach to interpretation: the words “exhaustible natural resources” “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.” [FN130] Interestingly, the Appellate Body looked to the inclusion of sea turtles on Appendix 1 (species listed are threatened with extinction) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for evidence of the endangered position of these animals. [FN131]

Continuing its analysis of the availability of an exception under article XX(g), the Appellate Body examined whether section 609 “relates to” the conservation of exhaustible natural resources. [FN132] This “relates to” requirement has been construed to require that the measure be “primarily aimed at” this goal. The Appellate Body applied a means-ends analysis, finding that the U.S. measure satisfies this test (despite the fact that it might be construed as aimed at changing exporting state policy, rather than at directly protecting turtles). The Appellate Body also found that the U.S. measure satisfies the third prong of article XX(g): that it is made effective in conjunction with restrictions on domestic harvesting of shrimp. [FN133]

\*362 The Appellate Body then turned to the *chapeau*. [FN134] Here, the Appellate Body relied heavily on its analysis in the *Gasoline* case to the effect that “the measures falling within the particular exceptions must be applied reasonably, with due regard both to the legal duties of the party claiming the exception and the legal rights of the other parties concerned.” [FN135] This formulation, and its use here, sets up a kind of balancing test for availability of exceptions under article XX. The Appellate Body's application of this balancing test is colored by the language regarding “sustainable development” contained in the first paragraph of the preamble to the WTO Agreement. [FN136]

The adoption of this balancing test constitutes a recognition that these types of issues are not addressed by a *rule* of WTO law, but that the parties to the WTO Agreement intended the dispute resolution process, and effectively the Appellate Body, to address these issues. As discussed below, the parties to the WTO Agreement have had opportunities, through the Committee on Trade and Environment and elsewhere, especially since the two *Tuna* decisions, [FN137] to address these issues with rules. Its failure to do so reinforces at least the legitimacy of the dispute resolution process doing so.

By way of engaging in this balancing test, the Appellate Body first engaged in a means-ends analysis, finding the U.S. measure to be too broad and unnecessarily stringent, insofar as it requires foreign governments to adopt essentially the same policies as those applied by the United States. [FN138] The Appellate Body also noted that the U.S. approach failed to consider the different conditions that pertain in other members' territories. [FN139] Furthermore, the Appellate Body questioned whether domestic measures alone can be effective and suggested that unilateral measures are not an effective means to the desired end. [FN140]

During the balancing process, the Appellate Body also found the approach of the U.S. measure, section 609, to be a kind of discrimination in that it does not permit the import of shrimp caught using turtle excluder devices but originating in a state that is not certified. [FN141] The failure of the United States to engage in international negotiations \*363 further weighed against the U.S. measure. The Appellate Body then pointed out that while the United States signed the as yet unratified Inter-American Convention for the Protection and Conservation of Sea Turtles, that convention contains a requirement to respect article XI of GATT. [FN142]

At least in part then, the Appellate Body used the balancing test to examine whether the measure at issue



was the least trade restrictive device available. In this case, it held that the existence of the Inter-American Convention demonstrated that a less restrictive device was available (at least in terms of its consensual origins, if not in terms of its potential to restrict trade). The Appellate Body also referred to the fact that consensual negotiations in the Inter-American Convention context “marked out the equilibrium line ....” [FN143] Perhaps the Appellate Body felt the need to support its standard-based balancing test determination with this reference to a treaty rule-based determination.

Finally, the Appellate Body found real discrimination in the way that the United States (i) negotiated multilateral agreements and (ii) applied phase-in periods to different countries. It considered this discrimination “unjustifiable” within the meaning of the *chapeau*. [FN144] The rigidity of section 609, including its failure to distinguish among countries in which different conditions prevail, as well as the lack of transparency of the certification process, led to the further finding that this discrimination was “arbitrary” under the *chapeau*. [FN145] The Appellate Body went on to impose a requirement of due process in connection with the application of exceptions under article XX of GATT. [FN146]

Upon review, the Appellate Body's decision in *Shrimp/Turtle* proves itself to be careful and conservative, in addition to politically sensitive. The Appellate Body, very importantly, held open the possibility that unilateral measures may be crafted in such a way, and developed in particular contexts, in which they might satisfy the requirements of article XX. [FN147] While the Appellate Body declined to reach a number of important issues, and did not explicitly accept that a multilateral environmental agreement would be a sound basis for an exception under article XX, it welcomed environmental measures, and recommended those that are not unilateral. [FN148]

**\*364** This decision shows a measured, analytical approach to teleological interpretation, helping to develop the jurisprudential tools of international law. The Appellate Body recognized that the unidimensional teleology of the panel was too blunt an instrument for accurate adjudication. The Appellate Body also refined its interpretative tools by rejecting a strict “original intent” interpretation of article XX(g) in favor of a more dynamic interpretation to fit modern circumstances. In doing so, it aggregated substantial power to itself, both to engage in balancing and to “modernize” the interpretation of article XX.

As the WTO addresses the problem of the intersection between international environmental law and international trade law, it will be interesting to observe the extent to which the Appellate Body will determine the nature of this intersection. For now, the Appellate Body has retained jurisdiction to address these relationships and has articulated a standard, a balancing test, that gives the Appellate Body itself wide flexibility in responding to these problems. In addition, it will be worth observing the extent to which the Appellate Body must transform itself from a “trade court” to a general international court in order to deal with intersections between trade values and other vital considerations such as environment.

### 3. The Work of the Committee on Trade and Environment

In 1994, the trade ministers who approved the results of the Uruguay Round also approved a Decision on Trade and Environment. [FN149] This decision called for the formation of the WTO Committee on Trade and the Environment (CTE) with a mandate to make recommendations regarding the modifications of the multilateral trading system needed to “enhance positive interaction between trade and environmental measures.” The CTE issued a report at the Singapore Ministerial in 1996. [FN150] This report did not constitute legislation, and its “approval” at the Singapore Ministerial [FN151] was not a legislative or treaty-making act. In fact, as set forth in more detail below, the CTE has remained a “talking shop,” with no direct legislative impact thus far. However, the lack of direct legislative impact does not mean that the CTE has had no impact on the context of

WTO dispute resolution.

**\*365** a. Cooperation with Dispute Resolution

In its December 9, 1998, report, the CTE noted that in October 1998, Australia, Canada, the European Community and New Zealand expressed satisfaction with the Appellate Body's *Shrimp/Turtle* decision. [FN152] Moreover, Canada stated that the report would be useful in the formulation of a statement on the interaction between multilateral environmental agreements and WTO rules. This is an example of dispute resolution decisions leading the way for a more political legislative process. In effect, the CTE sees itself in a cooperative project with the dispute settlement process to elaborate the application of article XX of GATT to environmental measures. Thus, the CTE requested the Secretariat to prepare a note on the "GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT." [FN153] This report might be viewed as a kind of "restatement of the law" such as those used in common law systems to organize, codify and perhaps develop common law rules.

The Secretariat also states that in the event of a dispute arising due to the application of a trade measure in a multilateral environmental agreement (MEA), "WTO Members are confident that the WTO dispute settlement provisions would be able to tackle any problems which arise in this area, including in cases when resort to environmental expertise is needed." [FN154] This expression seems to suggest that further "legislative" or treaty action is not required to address these types of trade and environment problems. [FN155] Canada also expressed concern that an attempt to legislate more specifically "ran the risk of a result more restrictive than the status quo, which provided, as expressed in the 1996 Report of the CTE, considerable flexibility and would continue to evolve through WTO panels." [FN156]

Norway said that the main task ... was to clarify how two sets of legal commitments (WTO rules and MEAs) were complementary so that conflicts were prevented. There were basically two options: **\*366** (i) rely on evolving jurisprudence (the status quo); or (ii) devise solutions to accommodate MEA trade measures in the WTO. [FN157] Thus, the choice between adjudication and legislation--between standards and rules--is explicit.

The CTE has also addressed the problem of jurisdictional lacunae covered earlier in this Article. In its background note on Trade and Environment in the WTO, the WTO Secretariat states as follows:

A related item concerns the appropriate forum for the settlement of potential disputes that may arise over the use of trade measures pursuant to MEAs; is it the WTO, or is it the dispute settlement mechanisms that exists in the MEAs themselves? There is general agreement that in the event a dispute arises between WTO Members who are each Parties to an MEA over the use of trade measures they are applying among themselves pursuant to the MEA, they should consider in the first instance trying to resolve it through the dispute settlement mechanisms available under the MEA. Were a dispute to arise with a non-party to an MEA, however, the WTO would provide the only possible forum for the settlement of the dispute. [FN158] This statement is notable for two reasons. First, the Secretariat seems willing to cede "adjudicative" jurisdiction where both parties to a "trade and environment" dispute are party also to the relevant MEA despite the clear and strong language of article 23 of the Dispute Settlement Understanding establishing that the WTO dispute resolution mechanism is the exclusive forum for determining violations of WTO agreements. Second, the secretariat leaves unanswered the question, in the context of a dispute with a non-party to an MEA, whether--and in what manner--the WTO dispute settlement forum is authorized to "apply" the MEA.

Another cross-jurisdictional question relates to the effect in the WTO system of MEA rules. For example, in the results of the 1992 U.N. Conference on Environment and Development, many WTO members endorsed Principle 12 of the Rio Declaration that “Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.” [FN159] It is important to note that Principle 12 is not binding law. On the other hand, \*367 the CTE has spoken of the need legislatively to clarify the legality of “discriminatory trade restrictions applied by MEA Parties against non-parties that involve extra-jurisdictional action.” [FN160] As noted above, the Appellate Body in its *Shrimp/Turtle* decision explicitly refused to do so.

#### b. Coordination with MEA Secretariats

In addition to coordinating within the WTO, the CTE has also coordinated with the secretariats of various MEAs. [FN161] This coordination role can assist in formulating MEAs that raise fewer trade issues. In theory, it could also assist in formulating modifications to the WTO legal system to reduce potential conflict.

In addition, a number of WTO dispute resolution panels and the Appellate Body, including most importantly the *Tuna* decisions, [FN162] the *Gasoline* decision [FN163] and the *Shrimp/Turtle* decision, [FN164] have considered whether multilateral measures had been attempted in order to determine the compliance of unilateral measures with article XX. These decisions do not directly apply multilateral rules, but use them indirectly to make determinations under the standards of article XX. The *Shrimp/Turtle* Appellate Body report suggests that the balancing test it uses to apply the *chapeau* of article XX may be short-circuited by examination of the “equilibrium line” negotiated in MEAs. [FN165]

Indeed, in its 1996 Report, the CTE “endorses and supports multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.” [FN166] Thus, there is a delicate interactive process, not strictly dictated by law, by which WTO dispute resolution, WTO legislation and MEA action are, to a degree, coordinated.

#### 4. Explaining the Relative Dominance of Dispute Resolution

What plausible explanations can be posited for the dominance thus far of WTO dispute resolution in addressing the relationship between trade concerns and environmental concerns?

Some WTO members have provided an explanation that is consistent with a rules/standards analysis:

\*368 When account is taken of the limited number of MEAs that contain trade provisions, and the fact that no trade dispute has arisen over the use of those measures to date, some feel that there is no evidence of a real conflict between the WTO and MEAs; existing WTO rules already provide sufficient scope to allow trade measures to be applied pursuant to MEAs, and it is neither necessary nor desirable to exceed that scope. According to this view, the proper course of action to resolve any underlying conflict which may be felt to exist in this area is for WTO Members to avoid using trade measures in MEAs which are inconsistent with their WTO obligations. Any clarification in that respect can be provided, as necessary, ex post through the WTO dispute settlement mechanism. [FN167] This excerpt refers to the relative infrequency, indeed the speculative nature, of possible conflict between MEA obligations and WTO law. Of course, there has been substantially more frequent conflict between unilateral environmental measures and WTO law. As additional disputes occur, the Appellate Body will have opportunities to articulate a jurisprudence that will be influenced by the scope of MEAs, as well as by

decisions of the CTE and the WTO generally. In turn, the Appellate Body's jurisprudence may stimulate a codification or a negative codification--a legislative reversal.

If the table of costs and benefits was filled in the trade and environment context, the following might be the result. This filled-in table is speculative: greater certainty would require more empirical and analytical work. Additionally, it is difficult to quantify and commensurate among the various costs and benefits. This kind of analysis is merely meant as a guide to political discourse which would presumably evaluate each of the categories of costs and benefits.

C1-3table 2: Costs and Benefits  
in Trade/Environment  
Context.....

	Rules.....	Standards.....
Administrative cost of formulation.....	Higher cost.....	Lower cost--status quo.....
Public choice costs of specification, including costs of transparency.....	Very high cost given extreme diversity of perspective.....	Lower cost--status quo.....
Perceived legitimacy; democracy deficit.....	Lower cost.....	Higher cost.....
Primary predictability--predictability for actors ex ante.....	Lower cost, but depends on avoiding development of substantial exceptions through dispute resolution.....	Higher cost, but the shrimp/Turtle decision has enhanced predictability.....
Secondary predictability--ease of application by dispute resolution tribunal.....	Lower cost, but depends on avoiding development of substantial exceptions through dispute resolution.....	Higher cost, but the shrimp/Turtle decision has enhanced predictability.....
Opportunity to gain experience prior to specification.....	Reduced benefit, although the magnitude of reduction declines as experience is already gained.....	Increased benefit, especially as dispute resolution decisions raise opportunities for dialog.....
Economies of scale with greater frequency.....	Increased benefit, and likely to grow as more intersections between trade and environment arise.....	Decreased benefit, but may serve as casuist legislature over time, reaping similar economies of scale.....
Minimization strategic costs--promotion of bargaining toward efficient agreement.....	Reduced benefit, although the magnitude of reduction may decline as uncertainty of result of rules rises with development of exceptions.....	Increased benefit given uncertainty of outcome.....

**\*369** The above table suggests that as more experience is gained, and as more trade/environment conflicts arise (perhaps due to the increase of trade law, the increase of environmental law, or both), one might expect a shift from standards to rules. While the present analysis is insufficient to suggest that it is time for the legislation of rules in the trade and environment area, it serves first to rebut arguments that it is definitely time for such

legislation and second to provide a more discrete matrix of considerations in determining whether rules are appropriate.

### *B. Film: Non-Violation Nullification or Impairment*

In contrast to standards that are designed to import non-trade values to the trade system, this Article next examines a “standard” that is designed to address barriers to trade not specifically addressed in the GATT: the concept of non-violation nullification or impairment \*370 (NVNI). [FN168] This concept may be used to import non-trade values to the trade system, but its use is more limited, as demonstrated by the *Film* decision discussed below. It is a super-standard in the sense that it authorizes substantial construction of norms by dispute resolution. Interestingly, it has been used with remarkable restraint, and in the area of competition policy, has not yet been applied to bind states' actions.

In connection with the recent Kodak-Fuji/United States-Japan dispute regarding access of U.S. photographic materials to the Japanese market, a number of interesting issues were raised as to the coverage of WTO law. The WTO lacks any substantial coverage of competition law, [FN169] nor does it otherwise specifically address issues of domestic business structure or non-discriminatory general domestic regulation, other than regulation of technical standards and sanitary and phytosanitary standards.

As noted above, the concept of NVNI serves as an invitation to construction, or a catch-all, to limit defection by WTO members through the use of avenues of defection with respect to which they have accepted no positive commitment. [FN170] In this sense, NVNI might be considered a “super-standard,” as it invites the WTO dispute resolution system to evaluate the legitimacy of expectations (derived from the text of agreements) and on that basis to provide a remedy where there is no discrete breach. [FN171] As Professor Abbott has pointed out, the “nullification or impairment” touchstone in GATT/WTO dispute resolution is consistent with a “private interests” legal system. [FN172] That is, the question under NVNI is whether one of the parties was deprived of the benefit of its bargain, not whether the general rule of law or broader social interests are demeaned.

Of course, the problem with all of this is in determining what is NVNI, as opposed to a simple exercise of retained sovereignty. This question is not unlike that evaluated above in connection with the *Shrimp/Turtle* case: what is unjustifiable discrimination as opposed to a \*371 simple exercise of *explicitly* retained sovereignty? Both kinds of decision are, thus far, delegated to the dispute resolution process.

#### 1. Construction under Non-Violation Nullification or Impairment

The availability of recourse under article XXIII(1)(b) of GATT and coordinate provisions for NVNI of tariff concessions is a legislative invitation to extraordinary construction. [FN173] The original purpose of this provision appears to have been to allow the construction of rights to recourse where specific treaty provisions provide none. [FN174] There have only been nine cases brought under this concept, but it stands available. Furthermore, the nullification or impairment concept has been construed narrowly because of the dire consequences for sovereignty of broad construction. [FN175] Furthermore, in the most recent, and most celebrated, non-violation case, *Film*, the U. S. claims were firmly rejected. In that decision, the panel carefully examined whether the United States had legitimate expectations as to the non-existence of certain Japanese government measures. [FN176]

#### 2. The Film Panel's Approach to Non-Violation Nullification or Impairment

In the *Film* case, the United States complained about various alleged Japanese governmental and quasi-governmental measures that individually or cumulatively had the effect of excluding U.S. film producers (*viz.*

Kodak) from the Japanese film market. The United States raised complaints based on both violation of GATT and NVNI. The three types of alleged NVNI measures that the United States attacked were (i) measures that encourage and facilitate the establishment of a market structure that restricts access to traditional distribution channels, (ii) the Japanese Large Scale Retail Stores Law of 1 March 1974, as amended 14 May 1979, which the United States claimed restricted the growth of an alternative means of distribution, and (iii) various Japanese legal rules restricting promotional discounts and premia of \*372 various types, which the United States claimed had a disproportionate adverse effect on new market entrants. [FN177] In the background of the U.S. claims was a general perception and argument that Japan had used its Anti-Monopoly Law, and exceptions therefrom, to insulate domestic firms from foreign competition. [FN178]

The *Film* panel viewed NVNI as an “exceptional remedy for which the complaining party bears the burden of providing a detailed justification ....” [FN179] The panel noted that there have only been eight instances in which NVNI has been considered, [FN180] and that most of these have involved subsidies. The panel reviewed whether there was a Japanese governmental measure, whether there was a benefit accruing to the United States and whether the Japanese governmental measure nullified or impaired that benefit. We need not review the question of whether there was a Japanese governmental measure here, but note that the panel reviewed this in a fact-specific, case-by-case procedure. [FN181]

The panel considered benefits that might be nullified or impaired to consist of enhanced market access arising from the change in competitive relationship brought about by tariff concessions, but it found that the United States bore the burden of proof as to its “legitimate expectations” of benefits after successive tariff negotiation rounds. [FN182] In order for the United States to meet this burden, it was required to show that the Japanese measures at issue were not reasonably anticipated at the time the concessions were granted. [FN183] Where the measure at issue was adopted after the relevant tariff concession, the panel established a \*373 presumption, rebuttable by Japan, that the United States could not have reasonably anticipated the measure.

As part of the test for whether the benefits at issue were nullified or impaired by the measures at issue, the panel considered the Japanese argument that the measures at issue were neutral as to origin and not discriminatory against imports. The panel accepted that non-discriminatory measures could not impair benefits, insofar as they had no disproportionate impact on imports. Here, the panel referred to jurisprudence under article III(4) of GATT. [FN184] The critical question, however, is the *de facto* impact of the measure, regardless of intent. Thus, for example, in connection with the Japanese Large-Scale Retail Stores law, the panel found that the measures were neutral, considering lack of intent to hinder imports as only one indicator of neutrality.

By imposing the burdens of proof as to the legitimacy of expectations and anticipation of the subject measures, the panel substantially constrains the scope of NVNI. It is not enough for a benefit to be reduced due to some domestic circumstance. First, the circumstance must be a governmental measure: it must arise from governmental action. This constraint assumes a positive role of government. Government action, not government inaction, is subject to criticism. This is a critical distinction in the competition law context. Second, the complaining party must show that the governmental measures were not reasonably anticipated. Thus, longstanding practices or circumstances are protected. This means that the domestic circumstances, as they are, form a background for all concession. As a matter of negotiations, members of the WTO must recognize this and bear the burden of negotiating an end to existing measures that reduce benefits for which they negotiate.

### 3. Non-Violation Nullification or Impairment and Competition Policy

As noted above, today there is no substantial WTO law relating to domestic competition policy. The Working Group on the Interaction Between Trade and Competition Policy was formed in 1996 pursuant to a

decision taken at the WTO Singapore Ministerial Conference. [FN185] It has engaged in extensive study but has so far made no substantive recommendations. [FN186]

\*374 Nor are there any substantial multilateral agreements regarding domestic or international competition policy. It is fair to say that there is even less international competition law than there is international environmental law, and perhaps it is also fair to say that there is less global consensus on international competition law. [FN187] Using the words of the *Shrimp/Turtle* decision, no legislative “equilibrium line” has been drawn. [FN188] Furthermore, there is no direct invocation of domestic competition law issues anywhere in GATT, comparable to the references to environmental issues in article XX, or the implicit permission for non-discriminatory domestic regulation in article III.

The *Film* panel followed earlier GATT jurisprudence in applying the concept of NVNI conservatively. It sought disproportionate trade impact in order to determine whether a national measure caused nullification and impairment. It sought evidence of what one might call in domestic law “actual reliance” to find “legitimate expectations.” The panel was not asked to mold from NVNI international competition law rules, as perhaps the Appellate Body has been asked to mold from article XX international trade and environment rules. [FN189] Therefore, one cannot expect a “trade and competition” jurisprudence to develop from the *Film* case. There is insufficient textual authorization.

If the table of costs and benefits of rules and standards was filled in the trade and competition policy context, the following might be the result.

C1-3table 3: Costs and Benefits  
in NVNI/Competition  
Context.....

	Rules.....	Standards.....
Administrative cost of formulation.....	Higher cost.....	Lower cost--status quo.....
Public choice costs of specification, including costs of transparency.....	Slightly higher cost, but perhaps less diversity of perspective and less NGO interest than in trade and environment.....	Slightly lower cost; at present, broadest standards or lacuna in international trade law; standard would require agreement on principle.....
Perceived legitimacy; democracy deficit.....	Lower cost.....	Higher cost.....
Primary predictability--predictability for actors ex ante.....	Lower cost, but depends on avoiding development of substantial exceptions through dispute resolution.....	Higher cost, with no substantial experience to date.....
Secondary predictability--ease of application by dispute resolution tribunal.....	Lower cost, but depends on avoiding development of substantial exceptions through dispute resolution.....	Higher cost.....
Opportunity to gain experience prior to specification.....	Reduced benefit, although the magnitude of reduction declines as experience is already	Increased benefit, especially as dispute resolution decisions raise opportunities for dialog.....

	gained.....	
Economies of scale with greater frequency.....	Increased benefit, and likely to grow as more intersections between trade and environment arise.....	Decreased benefit, but may serve as casuist legislature over time, reaping similar economies of scale.....
Minimization strategic costs- -promotion of bargaining toward efficient agreement.....	Reduced benefit, although the magnitude of reduction may decline as uncertainty of result of rules rises with development of exceptions.....	Increased benefit given uncertainty of outcome.....

**\*375** The competition law context differs from the environmental law context insofar as the competition law context is not subject to any relevant WTO law but may, under certain circumstances, be a basis for invocation of the very broadest standard in WTO law, NVNI. The competition law context probably involves lower political costs for agreement of rules than the environmental context because it lacks the NGO attention that environmental policy attracts. Finally, if anything, there has been less experience with competition policy than with environmental policy in the international trade context. Due to the varying effects of these differences, and their incommensurability, it is difficult to say with any certainty that these major differences would indicate that rules would be more likely in the competition policy context than in the environmental context.

**\*376 VI. CONCLUSIONS: RULES, STANDARDS, AND LACUNAE IN INTERNATIONAL TRADE LAW**

This Article begins by exploring the discontinuity between the domain of WTO dispute resolution and the body of general international law. The disparity between the positive law dispute resolution system of the WTO and the more political, natural law style of dispute resolution available in connection with most other forms of international law raises jurisprudential and practical concern. How can a WTO dispute resolution decision ignore other international law? On the other hand, how can the WTO dispute resolution process purport to interpret and apply non-WTO international law? While present WTO law seems clearly to exclude direct application of non-WTO international law, this position seems unsustainable as increasing conflicts between trade values and non-trade values arise. These conflicts may be addressed through standards such as the exceptional provisions of article XX, or by legislated rules regarding the more specific interaction between trade values and non-trade values.

This Article posits that more specific international law is not always a good thing and seeks to provide a taxonomy of factors for consideration in determining the optimal specificity of international law. Lacunae are circumstances where there is no law and no constraint. This is quite different from a standard, where there is law applicable by a dispute resolution tribunal but less explicit guidance to the tribunal as to how to decide. Rules, on the other hand, by definition, leave less discretion to tribunals. Thus, the decision between rules and standards is not a decision between more international law and less international law. While rules may be developed by tribunals, the decision is often an institutional choice between adjudicators and legislators. This observation depends on the perception that tribunals applying standards legislate, even when they purport not to do so. When one chooses between adjudicators and legislators, there is more to consider than simply institutional expertise or competence.

Some of the critical factors in choosing between rules and standards that may change over time include the relative frequency of disputes and the strategic costs of bargaining to an efficient solution under standards versus rules. Interestingly, the public choice costs of specification of rules are increasingly countervailed by the costs in terms of legitimacy of decision pursuant to a standard by a dispute resolution tribunal. The relative costs may



vary in different circumstances, and the variation may well depend on NGO interest. There may come a tipping point, at which continued decision by a tribunal pursuant to a standard becomes so illegitimate as to make it more attractive to specify rules. In any event, it is impossible to determine \*377 without specific analysis the utility of a rule versus a standard in particular cases.

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[FN1]. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 155 (1982). *See generally* THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

[FN2]. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3(2), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404, 405 (1994), 33 I.L.M. 1144, 1227 (1994) [hereinafter DSU]. *See also* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 35 (July 8).

[FN3]. When used in connection with the international legal context, the term *legislate* and all variations thereof refer to the processes and parties involved in specific treaty-making and treaty amendment.

[FN4]. *See* Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 547 (1994). *See also* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992).

[FN5]. For an introduction to the rules versus standards discussion in law and economics, see Louis Kaplow, *General Characteristics of Rules*, in ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert & Gerrit De Geest eds., 1998); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). *See also* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995). The “rules” spoken of in the rules and standards literature are narrower than the category referenced in John Jackson’s dichotomy of “rule-oriented” versus “power-oriented” dispute resolution. In Jackson’s terminology, “rules” encompass both rules and standards. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 109-11 (2d ed. 1997). Finally, in international trade law, “standards” has a specific meaning, referring to product standards. This meaning is separate from the sense in which “standards” is used here.

[FN6]. WTO Appellate Body Report: United States--Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (98-3899) (Oct. 12, 1998) [hereinafter Shrimp/Turtle Appellate Body Report].

[FN7]. WTO Panel Report: Japan--Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (98-0886) (Mar. 31, 1998) [hereinafter Film Panel Report].

[FN8]. JACKSON, *supra* note 5. *But see* OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL SYSTEM* (1985).

[FN9]. See, e.g., Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 HARV. INT'L L.J. 47 (1993); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

[FN10]. See Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 535-38 (1996-97).

[FN11]. On the other hand, where definitive decision-making authority is withheld from the dispute resolution body, standards seem more consistent with retention of state power, facilitating auto-interpretation, while rules seem more consistent with transfers of state power. Furthermore, the nature of the dispute resolution body as a transnational entity versus an inter-national entity affects the analysis of the transfer of state power.

[FN12]. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 Nw. J. Int'l L. & Bus. 681 (1996-97).

[FN13]. DSU, *supra* note 2, art. 3(2).

[FN14]. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. See, e.g., WTO Appellate Body Report: Japan--Taxes on Alcoholic Beverages, AB-1996-2, WT/DS8,10,11/AB/R (95-0000) (Oct. 4, 1996), at 10, *citing* WTO Appellate Body Report: United States-- Standards for Reformulated and Conventional Gasoline, AB-1996-1, WT/DS2/AB/R (95-1597) (Apr. 29, 1996), at 17 [hereinafter Gasoline Report].

[FN15]. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1998).

[FN16]. For a more detailed description of the dispute resolution system of the WTO, see, e.g., Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMM. MKT. L. REV. 1157, 1195 (1994); PIERRE PESCATORE, WILLIAM J. DAVEY & ANDREAS F. LOWENFELD, *HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT* (1991).

[FN17]. See David Palmetier, *The WTO Appellate Body Needs Remand Authority*, 32 J. WORLD TRADE 41 (1998).

[FN18]. Of course, not to respond is to confer victory on the defendant. See, e.g., Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983).

[FN19]. For an intellectual history of this idea and a substantial critique, see Kennedy, *supra* note 15.

[FN20]. *Ratione temporis* means by reason of time. For example, a law might not apply to conduct that occurred prior to its enactment, depending on whether the law is intended to apply retrospectively.

[FN21]. See WTO Appellate Body Report: Brazil--Measures Affecting Desiccated Coconut, AB-1996-4, WT/DS22/AB/R (97-0695) (Feb. 21, 1997).

[FN22]. A claim for which the law does not provide a remedy is referred to as *non liquet*. See Prosper Weil, "The Court Cannot Conclude Definitively ..." *Non Liqueur Revisited*, 36 COLUM. J. TRANSNAT'L L. 109 (1997).

[FN23]. See *infra* notes 41-47 and accompanying text.

[FN24]. See Stefan Ohlhoff & Hannes L. Schloemann, *Rational Allocation of Disputes and "Constitutionalization": Forum Choice as an Issue of Competence*, in *DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION* (James Cameron & Karen Campbell eds., 1998).

[FN25]. See Trachtman, *supra* note 10. See also James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L. ORG.. 269 (1998); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV.. 255 (1991).

[FN26]. By "enforceable," I mean not just enforceability in a court of law but also enforceability through reputation or other informal sanctions. Of course, one can find many examples of unenforceable agreements that nonetheless serve a useful purpose. If they are neither formally nor informally enforceable though, they have no direct effect on the parties and may rather be designed for political theater, that is, to impress domestic constituencies or other onlookers.

[FN27]. For a thoughtful game theoretic analysis of the role of dispute resolution in enforcing trade treaties, see Frieder Roessler, Warren F. Schwartz, & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System*, Feb. 5, 1998 (unpublished manuscript on file with the author).

[FN28]. Note the importance ascribed to the recent Rome Agreement to create an international criminal court. *Rome Statute of the International Criminal Court*, United Nations Conference on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 1002 (1998).

[FN29]. See, e.g., MARTIN SHAPIRO, *COURTS* 28-32 (1981); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 92 (1994).

[FN30]. There are, however, limitations on interpretation. See *Gasoline Report*, *supra* note 14, and text accompanying note 59 *infra* ("[A]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility").

[FN31]. WTO Appellate Body Report: *India--Patent Protection for Pharmaceutical and Agricultural Chemical Products*, AB-1997-5, WT/DS50/AB/R (98-3091) (Aug. 24, 1998), para. 45.

[FN32]. See, e.g., WTO Panel Report: *European Economic Community--Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991) [[[hereinafter EEC--Oilseeds Report]].

[FN33]. See PETERSMANN, *supra* note 16, at 1195; Jacques H.J. Bourgeois, *WTO Dispute Settlement in the Field of Anti-Dumping Law*, 1 J. INT'L ECON. L. 259, 271-72 (1998); Pierre Pescatore, *Drafting and Analysing Decisions on Dispute Settlement*, in *HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT*, *supra* note 16; 15 Developed Countries: *Uruguayan Recourse to Article XXIII*, B.I.S.D. 11S/95 (1963).

[FN34]. Weil, *supra* note 22, at 119. For an example of an international law *non liquet*, see *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 2, at 105.

[FN35]. Weil, *supra* note 22, at 110.

[FN36]. See, e.g., *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)* 1969 I.C.J. 3, 46 (Feb. 20).

[FN37]. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., (ser. A) No. 10, at 18-19 (Sept. 7). See also *Military and*

[Paramilitary Activities in and against Nicaragua \(Nicar. v. U.S.\), 1986 I.C.J. 14, 135.](#)

[FN38]. *See infra* notes 41-47 and accompanying text.

[FN39]. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. XVI(4), THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6, 17 (1994), 33 I.L.M. 1144, 1152 (1994) [hereinafter WTO Agreement]; Vienna Convention, *supra* note 14, art. 27. *See also* John H. Jackson, *The Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992).

[FN40]. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 55 U.N.T.S. 194, 262, *as amended in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 519 (1994).

[FN41]. *But see* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 399 (1998) (arguing that the texts of the WTO agreements “do not exhaust the sources of potentially relevant law”). Palmeter and Mavroidis refer to articles 3(2) and 7 of the DSU as the ostensible basis for incorporation of non-WTO international law. However, these provisions refer only to *interpretation* of relevant provisions of WTO agreements “in accordance with customary rules of *interpretation* of public international law.” *Id.* (emphasis added). They cannot be taken as making the WTO dispute resolution system a court of general international law jurisdiction. *See also* Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT'L & COMP. L.Q. 647, 653 (1998). Schoenbaum argues that article 11 of the DSU, by authorizing panels and the Appellate Body to make “such other findings as will assist the DSB in making the recommendation or in giving the rulings provided for in the covered agreements,” provides a kind of “implied powers” allowing the panels and Appellate Body to decide all international legal issues involved in a dispute properly before them. *Id.* While Schoenbaum adduces reasons why this *should* be so, this instruction to make “such other findings” is too general to overcome the more specific language of the DSU limiting panels and the Appellate Body to the “covered agreements.” *See also* Gasoline Report, *supra* note 14, at 11. (“[T] he General Agreement is not to be read in clinical isolation from public international law.”)

[FN42]. DSU, *supra* note 2, art. 3(2).

[FN43]. *Id.*

[FN44]. *Id.* art. 7.

[FN45]. *Id.* art. 11.

[FN46]. While the Appellate Body allowed that the Oilseeds Agreement might serve as a supplementary means of interpretation of WTO law, it did not apply the Oilseeds Agreement itself as law. WTO Appellate Body Report: European Communities--Measures Affecting the Importation of Certain Poultry Products, AB-1998-3, WT/DS69/AB/R (98-2688), para. 81 (July 23, 1998).

[FN47]. WTO Appellate Body Report: Argentina--Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, AB-1998-1, WT/DS56/AB/R (98-0000), (Apr. 22, 1998), para. 72.

[FN48]. [Murray v. The Schooner Charming Betsy](#), 6 U.S. (2 Cranch) 64, 118 (1804). *See generally* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); Ralph G. Steinhardt, *The Role of International Law as a Canon of*

*Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

[FN49]. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, arts. 2, 3, 9, 10, 16, 19, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 365, 368, 370, 373-74 (1994); 33 I.L.M. 1144, 1199, 1203-04 (1994) [hereinafter TRIPS].

[FN50]. WTO Appellate Body Report: European Communities--Regime for the Importation, Sale and Distribution of Bananas, AB-1997-3, WT/DS27/AB/R (97-0000), (Sept. 25, 1997), para. 164 [hereinafter Bananas Appellate Body Report].

[FN51]. Article XX(b) (as well as paragraphs (a) and (d)) contains a requirement that measures excepted thereunder be "necessary." This requirement has been read on several occasions to require multilateral or bilateral efforts to address the domestic regulatory need. *See, e.g.*, WTO Panel Report: Thailand--Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991).

[FN52]. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 17.6, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 168, 193 (1994).

[FN53]. The term is used here in the traditional sense.

[FN54]. *See, e.g.*, Andreas F. Lowenfeld, *Remedies along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389 (1995); Miguel Montana i Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103 (1993).

[FN55]. In the Omnibus Trade and Competitiveness Act of 1988, the United States expressed as its first trade negotiating objective "to provide for more effective and expeditious dispute settlement." Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(b)(1)(a), 102 Stat. 1107 (codified at 19 U.S.C. § 2901(b)(1) (1988)). *But see* Ernst-Ulrich Petersmann, *Uruguay Round Negotiations 1986-1991*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 501, 555 (ERNST-ULRICH PETERSMANN & MEINHARD HILF, eds., 2d ed. 1991) (arguing that this was not a significant problem).

[FN56]. DSU, *supra* note 2, art. 16(4). Automatic adoption can be blocked by consensus, or can be forestalled by an appeal.

[FN57]. *See* WTO Agreement, *supra* note 39, art. X.

[FN58]. *Id.* art. 9(2). *See also* DSU, *supra* note 2, art. 3(9) providing that the provisions of the "Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement ...."

[FN59]. *See, e.g.*, Robert Cooter & Josef Drexl, *The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers*, 14 INT'L REV. L. & ECON. 307 (1994).

[FN60]. See, e.g., WTO Appellate Body Report: European Communities--Customs Classification of Certain Computer Equipment, WT/DS62, 67, 68/AB/R, (June 22, 1998) [hereinafter Computers Report].

[FN61]. See Joel P. Trachtman, *Trade and ... Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L.. 32 (1998) [hereinafter Trachtman, *Trade and ... Problems*].

[FN62]. Bananas Appellate Body Report, *supra* note 50.

[FN63]. Computers Report, *supra* note 60.

[FN64]. Hadfield, *supra* note 4.

[FN65]. Oliver Williamson, *Comparative Economic Organization: the Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q.. 219 (1994).

[FN66]. See P.J. Kuyper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained Regime of International Law*, 24 NETH. Y.B. INT'L L.. 227 (1994).

[FN67]. For an explication of some of the concerns regarding reference to non-WTO law, see notes 41-47, *supra*, and accompanying text.

[FN68]. Williamson, *supra* note 65, at 279, citing Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POLIT. ECON.. 691 (1986).

[FN69]. Williamson, *supra* note 65, at 277-80.

[FN70]. John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831 (1994).

[FN71]. By "directly applicable" I mean norms that apply by their own terms, rather than by virtue of their incorporation by reference in the WTO legal system.

[FN72]. Paul R. Milgrom, Douglass C. North, & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 19 (1990). The synergistic model that establishes institutions necessary to facilitate private sanctions "appears to have been structured to support trade in a way that minimizes transaction costs, or at least incurs costs only in categories that are indispensable to any system that relies on boycotts and [private] sanctions." *Id.*

[FN73]. For a new institutional economics perspective on treaty law, see Georg Ress, *Ex Ante Safeguards Against Ex Post Opportunism in International Treaties: Theory and Practice of International Public Law*, 150 J. INST. & THEO. ECON.. 279 (1994). See also John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J.. 139 (1996).

[FN74]. *Statute of the International Court of Justice*, June 26, 1945, art. 38, 59 Stat. 1055, T.I.A.S. No. 993.

[FN75]. The Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, § 1 (1990).

[FN76]. H.L.A. HART, *THE CONCEPT OF LAW*, chap. VII (2d ed. 1994). See also FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991).

[FN77]. See Hadfield, *supra* note 4, at 550, citing Linda R. Cohen & Roger G. Noll, *How to Vote, Whether to Vote: Strategies for Voting and Abstaining on Congressional Role Calls*, 13 POL. BEHAV.. 97 (1991).

[FN78]. See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998).

[FN79]. For this use of the terms “primary predictability” and “secondary predictability,” see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV.. 1, 3 (1963).

[FN80]. *Id.*

[FN81]. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV.. 1685 (1976) (for the idea that tribunals construct exceptions); see also *id.* (giving examples of constructed exceptions in the context of primary and secondary predictability).

[FN82]. See Kaplow, *The General Characteristics of Rules*, *supra* note 5, at 10.

[FN83]. Palmeter & Mavroidis, *supra* note 41, at 400-01.

[FN84]. Kaplow, *supra* note 5, at 13-14.

[FN85]. This may be partially a function of the absence of binding precedent in the international trade system. The system also lacks depth and frequency to make tribunals make rules. This is not to say, however, that tribunals may not take an announced standard and then elaborate it into a rule. “Necessity” serves as a good example of this ongoing process. A parallel lies in the infrequency of international law adjudication. The International Court of Justice, for example, rarely speaks.

[FN86]. See NEIL KOMESAR, *IMPERFECT ALTERNATIVES* (1994).

[FN87]. See, e.g., John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992). See also Sunstein, *supra* note 5, at 973.

[FN88]. See Cooter & Drexler, *supra* note 59.

[FN89]. Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256 (1995).

[FN90]. *Id.* at 256.

[FN91]. *Id.* at 257 (citations omitted).

[FN92]. See also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV.. 577 (1988); Joel P. Trachtman, *Externalities and Extraterritoriality*, in *ECONOMIC DIMENSIONS OF INTERNATIONAL LAW*, 642, 675 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

[FN93]. Johnston, *supra* note 89, at 257.

[FN94]. *Id.* at 272.

[FN95]. See *infra* note 149 and surrounding text for a discussion of the work of the Committee on Trade and Environment.

[FN96]. *But see* Computers Report, *supra* note 60.

[FN97]. *See* Trachtman, *Trade and ... Problems*, *supra* note 61.

[FN98]. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 138 (1994) [hereinafter TBT Agreement].

[FN99]. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 69 (1994) [hereinafter S&P Agreement].

[FN100]. WTO Panel Report: United States--Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (98-1710) (May 15, 1998) [[[hereinafter Shrimp/Turtle Panel Report].

[FN101]. Shrimp/Turtle Appellate Body Report, *supra* note 6.

[FN102]. 16 U.S.C.A. 1537, § 609(a). Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat 988 (1989).

[FN103]. WTO Panel Report: United States--Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155, 204, para. 6.3 (1993), *reprinted in* 30 I.L.M. 1594 (1991) [hereinafter First Tuna Report]; WTO Panel Report: United States--Restrictions on Imports of Tuna, DS29/R (1994), *reprinted in* 33 I.L.M. 839 (1994) [hereinafter Second Tuna Report].

[FN104]. First Tuna Report, *supra* note 103, para. 5.18; Second Tuna Report, *supra* note 103, para. 5.10.

[FN105]. First Tuna Report, *supra* note 103, paras. 5.29, 5.34; Second Tuna Report, *supra* note 103, paras. 5.27, 5.39.

[FN106]. First Tuna Report, *supra* note 103, para. 5.27.

[FN107]. *Id.* para. 5.28.

[FN108]. Second Tuna Report, *supra* note 103, para. 5.37.

[FN109]. The “*chapeau*” of article XX of the GATT and the relevant exceptions are as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ....

GATT, *supra* note 40, art. XX.

[FN110]. Shrimp/Turtle Panel Report, *supra* note 100, para. 7.33.

[FN111]. *Id.* para. 7.34, citing the WTO Agreement, *supra* note 39.



[FN112]. Shrimp/Turtle Panel Report, *supra* note 100, para. 7.40.

[FN113]. *Id.* para. 7.42.

[FN114]. *Id.* para. 7.44.

[FN115]. *Id.*

[FN116]. *Id.* para. 7.50.

[FN117]. *Id.* para. 7.55.

[FN118]. Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 15.

[FN119]. Gasoline Report, *supra* note 14.

[FN120]. Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 38.

[FN121]. Shrimp/Turtle Panel Report, *supra* note 100, para. 7.29.

[FN122]. Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 117.

[FN123]. *Id.*

[FN124]. *Id.*

[FN125]. *Id.* para. 118.

[FN126]. *Id.* para. 121.

[FN127]. *Id.* para. 122.

[FN128]. “Having reversed the Panel’s legal conclusion ... we believe that it is our duty and our responsibility to complete the legal analysis ....” *Id.* para. 123. This is a substantial departure from the approach taken by the Appellate Body in the *Computers* report, in which the Appellate Body rejected the panel’s reasoning, but then failed to continue to provide its own legal analysis. *Computers Report*, *supra* note 60.

[FN129]. Shrimp/Turtle Appellate Body Report, *supra* note 6, § VI(B)(1).

[FN130]. *Id.* para. 130.

[FN131]. *Id.* para. 132, *citing* Convention on International Trade in Endangered Species of Wild Fauna and Flora, app. 1, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (1973) [hereinafter CITES]. Importantly, the Appellate Body specifically declined to rule on whether there is a territorial or jurisdictional limitation in article XX(g)--whether the “extraterritorial” nature of the U.S. measure removed it from eligibility for an exception under that provision. It was able to do so because the sea turtles at issue are migratory, migrating to and from U.S. waters. *Id.* para. 133.

[FN132]. Shrimp/Turtle Appellate Body Report, *supra* note 6, § VI(B)(2).

[FN133]. *Id.* § VI(B)(3).

[FN134]. *Id.* § VI(C).

[FN135]. *Id.* para. 151, *quoting* Gasoline Report, *supra* note 14, at 22. *See also* Shrimp/Turtle Appellate Body Report, *supra* note 6, paras. 156, 159.

[FN136]. The relevant language is as follows:

while allowing for the optimal use of the world's natural resources in accordance with the objective of *sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ....

WTO Agreement, *supra* note 39, pmb., para. 1 (italics added).

[FN137]. First Tuna Report, *supra* note 103; Second Tuna Report, *supra* note 103.

[FN138]. Shrimp/Turtle Appellate Body Report, *supra* note 6, paras. 162-64.

[FN139]. *Id.* para. 165.

[FN140]. *Id.* paras. 167-69.

[FN141]. *Id.* para. 165.

[FN142]. *Id.* para. 170, *citing* Inter-American Convention for the Protection and Conservation of Sea Turtles, with Annexes, Caracas, Dec. 1, 1996, signed by the United States, Dec. 13, 1996 [hereinafter Inter-American Convention].

[FN143]. Shrimp/Turtle Appellate Body Report, *supra* note 6, paras. 171-72, *discussing* the Inter-American Convention, *supra* note 142.

[FN144]. Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 177.

[FN145]. *Id.*

[FN146]. *Id.* paras. 182, 183, *citing* art. X of GATT.

[FN147]. Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 186.

[FN148]. *Id.* paras. 185-86.

[FN149]. Decision on Trade and Environment, Apr. 14, 1994, World Trade Organization, Report (1996) of the Committee on Trade and Environment, [[[hereinafter 1996 CTE Report], Annex 1C, WTO Doc. WT/CTE/W/40 (Nov. 7, 1996) [[[hereinafter Decision on Trade and Environment].

[FN150]. CTE Report. *See* Steve Charnovitz, *A Critical Guide to The WTO's Report on Trade And Environment*, 14 ARIZ. J. INT'L & COMP. L. 341 (1997).

[FN151]. World Trade Organization: Singapore Ministerial Declaration, adopted Dec. 13, 1996, 36 I.L.M. 218, 224, para. 16 (1997).

[FN152]. Shrimp/Turtle Appellate Body Report, *supra* note 6.

[FN153]. GATT Secretariat, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paras. (b), (d) and (g) of GATT*, WT/CTE/W/53/Rev.1 (Oct. 26, 1998).

[FN154]. *Trade and Environment in the WTO* (visited Dec. 29, 1998) <<http://www.wto.org/wto/environ/environ1.htm>>.

[FN155]. See also WTO Committee on Trade and the Environment Invites MEA Secretariats to Information Session, and Discusses Items Related to the Linkages between the Multilateral Environment and Trade Agendas, WTO Press Release Press/TE/025 (Aug. 13, 1998) [hereinafter WTO Information Session] (“One point which was noted by Members who spoke on this item was that WTO rules already provide considerable scope for accommodating the use of trade measures necessary for environmental purposes.”).

[FN156]. *Id.*

[FN157]. *Id.*

[FN158]. See *Trade and Environment in the WTO*, *supra* note 154. See also 1996 CTE Report, *supra* note 150.

[FN159]. Rio Declaration on Environment and Development, princ. 12, U.N. doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874, 878 (1992).

[FN160]. 1996 CTE Report, *supra* note 150, at 14.

[FN161]. See, e.g., WTO Information Session, *supra* note 155.

[FN162]. First Tuna Report, *supra* note 103; Second Tuna Report, *supra* note 103.

[FN163]. Gasoline Report, *supra* note 14.

[FN164]. Shrimp/Turtle Appellate Body Report, *supra* note 6.

[FN165]. See Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 170.

[FN166]. See 1996 CTE Report, *supra* note 150.

[FN167]. *Id.* at 14.

[FN168]. See Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J.. 311 (1998).

[FN169]. Compare the originally planned International Trade Organization, which included rudimentary coverage of competition law issues. See, e.g., CLAIR WILCOX, A CHARTER FOR WORLD TRADE (1949); WILLIAM DIEBOLD, THE END OF THE I.T.O. (1952). It is also worth noting the 1960 Arrangement by the GATT Contracting Parties for Consultations on Restrictive Business Practices, Nov. 18, 1960, B.I.S.D. (9th Supp.) at 28 (1961). The 1960 Arrangement provides no substantive rules, but calls for consultations in connection with restrictive business practices.

[FN170]. See Film Panel Report, *supra* note 7, para. 10.35, quoting EEC-Oilseeds Report, *supra* note 32, paras. 144, 148.

[FN171]. In this regard, it is not dissimilar from a general commercial rule requiring “good faith” or indeed the

requirement in article 26 of the Vienna Convention that treaties be performed in good faith.

[FN172]. Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992).

[FN173]. Article 26(1) of the WTO Dispute Settlement Understanding applies special rules to actions under article XXIII(1)(b) of GATT 1994. *See also* Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, B.I.S.D. (26th Supp.) at 210, 216 (1980).

[FN174]. *See* Kuyper, *supra* note 66, at 246-47 (1994). *See also* EEC-Oilseeds Report, *supra* note 32, para. 144.

[FN175]. *See* Film Panel Report, *supra* note 7, para. 10.36.

[FN176]. Film Panel Report, *supra* note 7. The panel found generally that the United States was sufficiently aware of the measures at issue, or of their possible promulgation at the time that relevant tariff concessions were negotiated, and that the United States therefore failed to show the frustration of legitimate expectations. This decision sets a high standard for future nullification and impairment cases, refusing to engage in broad criticism of at least long-standing domestic measures that may have the effect of reducing the value of tariff concessions.

[FN177]. Film Panel Report, *supra* note 7, para. 2.7. It is worth noting the parallel between the latter issue and the concerns of the recent European Union case of Criminal Proceedings Against Bernard Keck and Daniel Mithouard, Joined Cases C-267/91 and C-268/91, 1993 E.C.R. I-6097 1 C.M.L.R. 101 (1993). The European Court of Justice, perhaps for similar reasons, found that it should not evaluate non-discriminatory national regulation of selling conditions under its jurisprudence pursuant to article 30 of the Treaty of Rome. Treaty of Rome, Oct. 2, 1997, E.U., 37 I.L.M. 56.

[FN178]. Film Panel Report, *supra* note 7, paras. 5.380-430.

[FN179]. Film Panel Report, *supra* note 7, para. 10.30.

[FN180]. *See* Film Panel Report, *supra* note 7, para. 10.36, *citing* Report of the Working Party on Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, GATT B.I.S.D. (Vol. 2) at 188 (1952); WTO Panel Report: Treatment by Germany of Imports of Sardines, Oct. 31, 1952, GATT B.I.S.D. (1st Supp.) at 53 (1953); Uruguayan Recourse, Nov. 16, 1962, GATT B.I.S.D. (11th Supp.) at 95 (1963); WTO Panel Report: EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, Feb. 7, 1985 (unadopted), GATT Doc. L/5576; WTO Panel Report: EEC-Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, Feb. 20, 1985 (unadopted), GATT Doc. L/5778; WTO Panel Report: Japan-Trade in Semi-Conductors, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 116 (1989); EEC-Oilseeds Report, *supra* note 32, at 86 (1991); WTO Panel Report: United States Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 228 (1991).

[FN181]. *See* Norio Komuro, *Kodak-Fuji Film Dispute and the WTO Panel Ruling*, 32 J. WORLD TRADE 161, 188-91 (1998).

[FN182]. Film Panel Report, *supra* note 7, para. 10.65.

[FN183]. Film Panel Report, *supra* note 7, para. 10.61.

[FN184]. Film Panel Report, *supra* note 7, para. 10.86.

[FN185]. World Trade Organization, Singapore Ministerial Declaration, Conf. Doc. WT/MIN(96)/DEC/W, para. 20 (Dec. 13, 1996). The declaration cautions that the working group's activities will "not prejudge whether negotiations will be initiated in the future." *Id.*

[FN186]. *See* Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/2 (98-4914) (Dec. 8, 1998) [hereinafter Competition Report].

[FN187]. There are, however, Organization for Economic Cooperation and Development (OECD) statements, as well as bilateral agreements and regional law, for example, with respect to the European Union. Another example is the Australia-New Zealand: Closer Economic Relations-Trade Agreement, Mar. 28, 1983, Austl.-N.Z., [22 I.L.M. 945](#).

[FN188]. Shrimp/Turtle Appellate Body Report, *supra* note 6, para. 171.

[FN189]. And yet, this is a case of intersection between trade commitments and other areas of domestic policy: by definition, a "measure" must be a governmental action.  
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