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Sheriff or Prisoner?

The United States and the World Trade Organization

Paul B. Stephan*

One might think that the recent fiasco in Seattle put an end to the claim that globalization and U.S. hegemony amount to the same thing. The United States advanced itself as the host of the World Trade Organization ("WTO") ministerial meeting to identify the next round of global trade negotiations with U.S. objectives and values, as well as to build the Clinton presidency's claim to a legacy. The refusal of the participants to agree to an agenda for further negotiations, as much as the bizarre street theater that hectorated the delegates, proved a terrible embarrassment. The institution most closely associated with open global markets has faltered, quite in opposition to U.S. desires. If the United States cannot even set the topic of the conversation, how can it be seen as dominating the world economic system?

Yet reports of the demise of U.S. dominance over the post-Cold War international environment may be premature. The last decade has seen a remarkable convergence in economic policies and expansion of the authority of institutions designed to promote them. We still speak of a "Washington consensus" about the way the international economy should work. Around the world politicians, intellectuals, and workers alike decry the extent of U.S. influence, especially in economic matters. Coca-Cola and McDonald's have come to stand for a particular kind of threat to national self-determination, and those symbols ride on the back of the American eagle.

To understand these claims about U.S. hegemony, we need some perspective. I would like to compare two competing accounts of the U.S. role in the global economy. In one version, the United States has built an international system that replicates its ideology, culture and values. This is a unipolar world where a broad range of fundamental choices about political and economic structure reflect Washington's preferences. The United States may not make every meaningful decision in administering the world economy, any more than the headquarters of a multinational corporation dictates precisely what its local managers must do. But in this scenario, the United States has final say on all questions that significantly affect its interests. I will call this the hegemon story.

The contrasting account depicts the United States as a passive instrument subject to forces outside its control. The identification of these forces varies, but often they are seen as some combination of large multinational corporations and

* Percy Brown, Jr. Professor, University of Virginia School of Law. The author is grateful to Curtis Bradley, Jack Goldsmith, Julian Ku, Paul Mahoney, John Setear and Joel Trachtman for comments and criticism.

international technocrats. The regime may advance some interests of the United States, at least in the sense that it produces better outcomes than would genuine international anarchy. But where the goals of the regime conflict with national interest, the regime prevails. This I will call the regime story, because it asserts that some broader regime limits U.S. action.

An essential component of these accounts is the perceived relationship between the United States and the international institutions that help shape the world economy. Those who see the United States as a hegemonic power portray the International Monetary Fund ("IMF"), the World Bank, the WTO, and similar bodies as instruments of U.S. policy. Typical is the renowned historian Eric Hobsbawm, who speaks of the IMF and the World Bank as "de facto subordinated to US policy" and attributes the success of the General Agreement on Tariffs and Trade ("GATT") system "primarily to the overwhelming economic dominance of the USA and of the dollar."¹

In contrast to the hegemon story, the regime account sees these international institutions as imposing significant constraints on what all nations can do, including the world's only superpower. Whether the institutions determine their own agenda or instead act as the instruments of private interests, they lay down and enforce rules that the United States would not choose on its own. These perceptions complement other stories depicting the "hollowing out" of the U.S. government. The broader image is of a world where nation states, including the richest and most powerful of those entities, play a diminished role.²

Our interest in the opposition of these stylized accounts goes beyond developing a workable model of how international relations unfold. The competing stories have different normative implications. A hegemonic perspective implies that one should address the wrongs of the world—pollution, child labor, human rights abuses, maldistribution of wealth—at the level of U.S. policy. But if regimes matter, then one must confront those international forces and structures that produce these ills.

I believe that regimes count for a lot, and that U.S. hegemony has been greatly overstated. There are many ways to advance this position, but I concentrate on one. Since 1995 the WTO has made a dispute resolution process available to member states. The first stage operates like conventional international arbitration before a panel of experts, but with two salient differences. First, the obligation to submit to the dispute resolution process comes bundled with WTO membership. Second, the panels write doctrinal opinions that justify their decisions. Arguments based on legal authority constrain what the panels can do, and other WTO decisions constitute legal authority. The subsequent stage of WTO dispute resolution involves an Appellate Body that operates, for all intents and purposes, like a common law appellate court whose opinions both bind the parties and have precedential effect.

1. Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991*, 274-75 (Pantheon 1994).

2. See, for example, John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 Cardozo L Rev 903 (1996).

After briefly outlining the WTO dispute resolution process, I look at three WTO dispute resolution opinions involving the United States, two of which attacked U.S. law and the third of which sought to vindicate the interests of U.S. producers against Japanese trade barriers. I explore how these decisions both frustrate important U.S. policies and make it more difficult for the United States to organize and maintain a geopolitical hegemony. I then consider whether the apparent thwarting of U.S. objectives in the three cases represents a real constraint on U.S. power and influence. While acknowledging the difficulty of proving that any law-like norm actually constrains a willful actor, I conclude by maintaining that the evidence that the WTO exercises a capacity to displace Washington decision-making remains suggestive if not fully persuasive.

I. THE WTO DISPUTE RESOLUTION PROCESS

In the popular consciousness, the WTO seems to have emerged fully formed, cast up by the tide of privatization and capital flows that have swept over the world in the last decade. The reality, of course, is more complex. The original GATT was formed in a context of largely state-managed economics, where disputes would involve challenges to the exercise of governmental regulatory endowments and would be resolved through a process of bargaining that reflected respective power and the availability of bargaining gains. Diplomats would negotiate these disputes as diplomats had conducted themselves throughout history, seeking compromises of interests rather than fulfillment of abstract normative principles.

Article XXIII of the GATT, the only provision to deal with dispute resolution at all, ascribes to the GATT parties as a whole the power to take action against states that undercut the Agreement. This Article neither specifies a procedure by which the parties could act nor authorizes the delegation of this power to any lesser organ. Despite the implication that dispute resolution would result from flexible deal-making rather than through adjudication and sanctioning, GATT dispute resolution over time took on the character of a disinterested tribunal interpreting rules and applying them to controversial conduct. It became customary to appoint arbitration panels, with respected experts in trade law proposing solutions that derived their authority from the text of the GATT, past arbitral practice and principled arguments. The parties institutionalized this custom in 1979, when, as part of the Tokyo Round Agreements, they adopted a set of rules for forming arbitration panels and determining their authority.³ The panel's reports, however, remained advisory, because a recalcitrant government retained the authority to block indefinitely the adoption of the recommendation. The panel reports, nonetheless influenced the ultimate outcomes of these disputes, and often were adopted as authoritative determinations of GATT obligations.

3. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, 26S GATT BISD 210 (1979).

As part of reconstituting the GATT organization as the WTO, the members designed a new process for settling disputes over the content of GATT obligations. The Agreement on Dispute Resolution, which went into effect in 1995, created a standing Appellate Body to review panel decisions. The full WTO membership has the authority to reverse the Appellate Body, but can do so only by consensus. In other words, a permanent WTO organ now possesses the final power to interpret and apply the Agreement, subject only to the unanimous disagreement of the membership, while before a GATT panel could perform this function only with the unanimous support of the membership.

This restructuring of dispute resolution may not have represented a radical break with prior practice, but the change was significant. The creation of the Appellate Body pushed the dispute resolution process further in the direction of legalization. Because it has the authority to address all cases brought into the process, and because its membership remains stable, the Appellate Body promotes consistency and coherence. The Appellate Body also embraces a common law style, with opinions that address interpretive issues in a manner that self-consciously incorporates both past and anticipated opinions. Moreover, it has manifested a certain assertiveness with respect to its institutional development. A gross indicator of the Appellate Body's efforts to establish its authority is the frequency with which it has asserted WTO rules against the members.⁴ Through 1999, it has found a country in violation of its GATT obligations in twenty-two of the twenty-five cases it has resolved.⁵ The panels demonstrate the same assertiveness; in only two of the eight cases that have not been reviewed did a panel uphold national law against a GATT challenge.⁶

The accessibility of WTO dispute resolution to private interests furthers the impression of a system that operates as an independent check on national power. In form, the process seems closed to all but national governments. Only a WTO member can seek a panel or take an appeal, and only states belong to the WTO. In theory a state would bring a complaint only after assessing its overall national interests. But the actual pattern of WTO disputes suggests that concentrated interest

4. For full information on the WTO dispute resolution process and the opinions that have resulted, see the WTO website < <http://www.wto.org/wto/dispute/distab.htm> > (visited Mar 4, 2000).

5. In the remaining three cases, the Appellate Body dismissed a complaint on procedural grounds, World Trade Organization, Report of the Appellate Body, *Guatemala—Anti-Dumping Investigation Regarding Portland Cement from Mexico*, para 89, WT/DS60/AB/R (Nov 2, 1998), upheld a panel determination of no violation World Trade Organization, Report of the Appellate Body, *Brazil—Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (Feb 21, 1997), and reversed a panel determination of violation World Trade Organization, Report of the Appellate Body, *European Communities—Customs Classification of Certain Computer Equipment*, para 98 WT/DS62, 67, 68/AB (June 5, 1998). In one of the nineteen cases where it found a GATT violation, the Appellate Body substantially broadened a panel determination that national law did not comply with the GATT. World Trade Organization, Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/AB/R (June 30, 1997).

6. See World Trade Organization, Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar 31, 1998); World Trade Organization, Report of the Panel, *United States—Section 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec 22, 1999).

groups can recruit government support even in cases where their goals and general welfare may not coincide. A good example is the banana dispute.⁷ The United States, home of the corporate headquarters of the largest banana producers, attacked the European import preferences for bananas grown in former colonies of EU members. U.S. consumers had no direct stake in the dispute. But the interest of the producer was strong enough to persuade the U.S. government to act on its behalf. Another development favoring private involvement is the Appellate Body's procedure for nongovernmental organizations—typically nonprofit activist groups, but the principle applies equally to firms—to submit briefs and evidence, as long as a government acts as a conduit.⁸ The way seems open to something like the U.S. system of public litigation, which enables self-appointed watchdogs to challenge unwelcome laws, subject mostly to a limitation on standing.

To summarize, the evolution of the GATT system and its transformation into the WTO has created an international institution that, at least in form, has the capacity to promote and enforce an international legal regime that might set limits on U.S. hegemony. Whether it operates in such a manner as to restrict effectively the influence of the United States over the world economy remains another matter. To explore that question, I look at three instances where WTO dispute resolution has impeded U.S. policies.

II. THREE CASES WHERE WASHINGTON LOST

I have selected these WTO cases for closer scrutiny, not because of their representative nature, but rather because of their significance. I acknowledge the shortcomings of this approach, which relies on my subjective assessment of the importance of particular cases and does not document any systematic pattern in WTO dispute resolution. I offer two arguments in its defense. First, we find ourselves in the initial stage of institutional development, with only a small number of cases actually resolved under the WTO structure. Thus the data remains too scant to justify any genuinely systematic pronouncements. Second, during this early period in the institution's history, it seems plausible that some actions may take on greater importance than others. Only later events can validate which decisions cast the longest shadows, but some informed speculation seems defensible.

A. *International Environmental Safeguards*

Whatever Seattle symbolizes, it was not the place where trade and environment first came into conflict. Over the last decade scholars and pundits have devoted great effort to untangling the tensions that exist between a liberal trade regime and optimal

7. World Trade Organization, Report of the Appellate Body, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept 9, 1997).

8. See World Trade Organization, Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para 110, WT/DS58/AB/R (Oct 12, 1998).

enforcement of environmental rules. Proponents of each offer an account of why the other poses a threat to good policy. For free traders, rules that condition the importation of goods on the source country's environmental practices serve the forbidden end of protectionism. Rich country producers, unable to compete effectively with poor countries that enjoy lower production costs, use environmental regulations to bar the import of goods that consumers would prefer to buy. For environmentalists, trade sanctions seem the only sensible means of enforcing rules that protect against wasteful, but superficially attractive production methods. The alternative is a terrible race to the bottom, as nations find themselves forced to relax their environmental safeguards to preserve jobs and attract investment.

The WTO has confronted the issue of the over-harvesting of a common resource in a case manifesting elements of domestic protection.⁹ Sea turtles are endangered, and the use of traditional technologies in shrimp fishing results in incidental kills of these creatures. The United States forbids the importation of shrimp from countries that do not require the use of "turtle exclusion devices" ("TEDs") in shrimp nets. Sea turtles roam across national boundaries, so no one country has the capacity to take sufficient measures to preserve them. The cost of acquiring TEDs disproportionately raises the costs of fishermen from poor countries, especially those who compete most directly with U.S. fishermen. The U.S. subsidizes the acquisition of TEDs for Caribbean fishermen but not those in the Gulf of Mexico. Measures that seem designed to solve a collective action problem mix with those that smack of protectionism.

Four South Asian countries attacked the U.S. legislation in the WTO. A panel ruled that the United States unjustifiably discriminated among shrimp-producing countries. The panel's opinion appeared to leave almost no room for unilateral efforts to address environmental problems with a collective action character and provoked a storm of criticism from the commentators.¹⁰

The Appellate Body upheld the panel's ultimate determination, but based its decision on a narrower reading of the GATT that gave members more flexibility to pursue solutions to collective action problems. There was, of course, no question that the U.S. program treated shrimp imports differently depending on the country of origin, a practice that Article I of the GATT presumptively forbids. The issue was whether the extent of a country's compliance with U.S. environmental goals justified these differences. The Appellate Body framed this question in terms of whether the United States could fit its legislation within one of the provisions of Article XX, which lists reasons for which a country may depart from its general GATT

9. A GATT panel had previously considered a similar issue. See *United States—Restrictions on Imports of Tuna*, 39S GATT BISD 155 (1991). A vast commentary exists, the most comprehensive being Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 Georgetown LJ 2131 (1995).

10. World Trade Organization, Report of the Panel, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998). See, for example, Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32 J World Trade 73 (1998).

obligations.

Interpreting the language of Article XX, the Appellate Body explained that a member could use trade measures, including a selective ban on imports, to pursue protection of a global commons, including preservation of an endangered species that traveled across national boundaries. But Article XX contains a caveat, stipulating that such measures are not to be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail..."¹¹ The Appellate Body concluded that the U.S. program had elements of unjustifiable and arbitrary discrimination. The U.S. did not take into account different local conditions, refused to permit the importation of shrimp caught with the approved technology if they came from the territory of countries that did not require the use of that technology, did not extend the assistance that it rendered Caribbean countries to other shrimp fishermen, and refused to permit countries outside the Caribbean area to adopt gradually the turtle-protective measures it sought. Moreover, the process for certifying countries as "turtle safe," and therefore eligible for importation into the United States, had serious procedural shortcomings. The Appellate Body concluded that the GATT "establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here."¹²

Several aspects of this argument seem noteworthy. First, the Appellate Body, by treating Article XX as extending to efforts to address collective action problems, avoided an irreconcilable conflict between free-trade and environmental-protection goals. This move in turn allowed the Appellate Body to position the WTO system as offering both carrots and sticks to environmentally concerned governments. Those countries that worked within the limits of the GATT, as interpreted by the Appellate Body, could pursue their objectives while enjoying the benefits of WTO membership. Those that went outside those boundaries would have to face retaliatory trade sanctions. The broader message is that the WTO may be an attractive venue for resolving trade-environment conflicts without giving *carte blanche* to environmentalists.

Second, by insisting on a clear correspondence between the rules imposed on each country and the professed environmental objective, the Appellate Body made it more difficult for a government to use environmentally driven sanctions for other purposes, and in particular for pursuing broad geopolitical objectives. The U.S. clearly has reasons to foster a close relationship in the Caribbean countries, but these reasons have nothing to do with saving turtles. The broader message is that the normal tools

11. *Shrimp and Shrimp Products*, para 39, WT/DS58/R.

12. *Id.* at para 183. Nor was this simply a matter of the rich nations imposing their will on poor countries that depended on foreign markets for their revenue. In one case, the contemporary consequences of which I review in the next section, the United States amended the Internal Revenue Code in response to a panel determination that its system for taxing income from the sale of exported goods violated the GATT rules against export subsidies.

for maintaining a well-run hegemony may not be available if they otherwise run up against GATT rules, as many economic incentives will.

Third, the Appellate Body seemed to suggest that the negotiation of incomplete multilateral agreements might be worse than complete unilateralism. In addition to entering into various instruments that dealt with protection of endangered species generally (such as the Convention on Biological Diversity), the United States initiated negotiations that led to the Inter-American Convention on the Protection and Conservation of Sea Turtles, an agreement that directly addresses TEDs and shrimp fishing. This pattern of interaction—where the United States worked out acceptable arrangements with some, but made no attempt to negotiate comparable arrangements with others—indicated to the Appellate Body that the U.S. had the capacity, but not the desire, to reach accommodation with those it had excluded. This reasoning either is perverse, in the sense that the perfect becomes the enemy of the good, or it indicates a presumption against regional alliances. Again, the Appellate Body seemed to disfavor the kind of coalition building on which an effective hegemony might rest.

Finally, the rejection of the U.S. certification scheme as procedurally deficient suggests some interesting things about the Appellate Body's conception of the right to import. U.S. doctrine, as is the case in most countries, regards the ability to move goods across the national border as something entirely subject to governmental control and capable of being withheld for any or no reason.¹³ The Appellate Body, by contrast, appears to regard importation as a kind of property right, which governments may restrict only after undertaking an adversarial hearing. But if the United States must submit to outside scrutiny of how it applies its trade laws, its ability to intervene in particular transactions in response to its international interests will be impaired. Once China joins the WTO, for example, would the United States lose the ability to restrict imports as a means of reacting to human rights abuses or aggression against Taiwan?

In short, the Appellate Body did not forbid the use of trade sanctions to advance environmental ends, but it did contain that option. Its restrictions encumber an environmentally minded government principally by making it difficult to bundle other interests, such as regional security, immigration policy, or human rights, with environmental concerns. These limitations make it harder for governments to assemble domestic political coalitions to pursue environmental objectives, and they frustrate efforts to use environmental measures to exercise international influence, whether for environmental or other ends.

B. *Competition Policy and Trade*

In the abstract, trade and competition policy ought to work harmoniously together. Liberal economic theory prescribes competition as a remedy for most ills,

13. See, for example, *United States v. Bozarov*, 974 F.2d 1037, 1044 (9th Cir. 1992) (exports); *Arjay Associates, Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989) (imports).

which means combining tough rules against private anticompetitive behavior with the renunciation of government restrictions on international commerce. Consumer welfare serves as the touchstone for both policies.

But in reality, conflicts arise frequently. Much of trade policy involves decisions to sacrifice consumer welfare for other goals, whether protecting influential producers or pursuing economic development. Competition policy also will forego consumer welfare for other ends, such as protecting "national champions" and preventing industrial consolidation that would squeeze out politically influential small producers. Moreover, the mechanism of competition policy varies considerably among developed countries. The United States permits private class actions with pretrial discovery, contingency-fee arrangements, and punitive damages. By contrast, most other countries have little or no private enforcement, and such private suits as do exist lack the plaintiff-generous attributes of the U.S. legal system.

The GATT came into being at a time when U.S. competition policy shaped the international agenda. The conflict between the U.S. conception of good antitrust policy and that of its erstwhile allies constituted one of the most salient international economic policy disputes in the immediate postwar period. During World War II, the U.S. Justice Department prosecuted several large multinational cartels. The other industrial powers objected to U.S. assertion of a right to regulate offshore business arrangements, as well as to the content of U.S. policy, and sought to put the issue of competition policy on the agenda of the stillborn International Trade Organization. The United States successfully resisted the submission of its competition practices to any international organization's scrutiny. This standoff led to more than four decades of sporadic conflict between U.S. antitrust enforcers and foreign governments.

One strand of this conflict involved the argument that anything less than fully competitive conditions in a domestic market constitutes a trade barrier against foreign producers. The United States at times embraced this position, largely in the belief that only private trade barriers enjoying tacit government support could explain the failure of U.S. producers to penetrate foreign markets. Guided by these convictions, the U.S. government has threatened various unilateral actions, including bringing antitrust suits and imposing trade sanctions under Section 301 of the Trade Act.¹⁴ These actions have in common a determination by a U.S. organ—the courts in the case of antitrust suits, the U.S. Trade Representative in the case of Section 301—that the structure of a foreign economy constitutes a violation of a positive rule of competition policy, whether U.S. antitrust law or international law.

But unilateral efforts to impose U.S. competition policy on other nations have

14. On unilateral action generally, and the mechanics of Section 301 in particular, see Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, L & Pol in Intl Bus 263 (1992); Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 BU Intl L J 301 (1990); Paul B. Stephan, *Creative Destruction: Idiosyncratic Claims of International Law and the Helms-Burton Legislation*, 27 Stetson L Rev 1341 (1998).

met two obstacles. First, U.S. antitrust law does not purport to advance foreign consumer welfare. The Sherman Act does not focus on the concerns that drive foreign government protection of foreign markets, and U.S. producers can use it as a tool to overcome such barriers only through a willful and innovative reinterpretation of the statute. Second, a claim that nations have an obligation under international law to restrict anticompetitive behavior in their domestic economies runs up against both widespread practice to the contrary and the absence of any specific instrument spelling out such an obligation. And any attempt by the United States to create such an obligation through a naked assertion of power would run the risk of provoking retaliation and upsetting the international arrangements currently in place, with which the United States largely is satisfied.

With the advent of the new WTO dispute resolution process, the Clinton Administration decided to give the U.S. contention about international competition policy a multilateral dimension. It chose to take up the case of Eastman Kodak ("Kodak"), the world's largest purveyor of consumer photographic film and paper. Kodak does not sell much of its products in Japan, a failure it attributes to a conspiracy between Fuji Photo Film and Konica Corporation, its two Japanese competitors, with the collusion of the Japanese government. Kodak argued that the conspiracy involved the denial to Kodak of access to Japanese distributors who could place its products in speciality photography shops and general stores. It contended that a variety of rules regulating advertising and terms of trade, including discounts and other promotional strategies, and the Japanese "Large Stores" Law, which gave small shops an effective veto over the opening up of department stores, worked to protect the entrenched distribution networks enjoyed by Fuji and Konica. These rules, according to Kodak, kept it from offering incentives to distributors to lure them away from its competitors or from developing new outlets for its products in high volume stores. Since the days of the Bush Administration, Kodak had put pressure on the United States to invoke Section 301 to coerce Japan into providing more support for film importers. The Clinton Administration decided to proceed through the WTO instead.

The U.S. government framed its attack on Japanese practice principally in terms of the "nonviolation" prong of GATT Article XXIII(1)(b). Under that provision, a WTO member's application of any governmental measure that nullifies or impairs a benefit enjoyed by another member as a result of the GATT justifies relief, whether or not the member's measure violates any provision of the GATT. The GATT, in other words, does more than impose a set of positive rules of conduct. It also obligates its members to deal with each other in a manner that does not frustrate legitimate expectations formed in the process of GATT bargaining. In the Kodak dispute, Japan had successively reduced its duties on photographic film and paper through a series of GATT negotiating rounds. The United States had every right to expect that the lower tariffs would lead to higher levels of imports. But, the United States argued, Japan had undermined its concession by impairing the ability of importers to compete on an equal footing with domestic producers. In addition, the United States

maintained that Japan had violated several GATT provisions, including the obligations under Article III not to discriminate against imported products and under Article X to maintain a transparent system of import controls.

A GATT panel ruled that the United States had failed to establish a link between the laws and administrative actions to which it objected and Kodak's inability to dent the Japanese market. The panel determined that some of the actions did not constitute government "measures" at all, but rather private sector advisory bodies with no direct lawmaking ability. The rest did not clearly prevent Kodak from establishing effective distribution networks. For essentially the same reasons, the panel found that Japan had not discriminated against imported goods. Finally, the panel determined that the devolution of authority to apply various "fair trade" laws to local governmental bodies did not mean that the Japanese system lacked transparency. The local bodies did not have clear standards or an obligation to explain their decisions, but the existence of an administrative supervisory structure provided an adequate safeguard against arbitrary enforcement.¹⁵

The most interesting aspect of the panel opinion is its refusal to impute an inherent potential for anticompetitive shenanigans to collaborative relationships between domestic industry and government. Kodak, one might argue, had made a *prima facie* case for the existence of trade barriers by establishing a result, an opportunity, and a motive. It had met with otherwise unaccountable resistance to its product; the Japanese producers and the government participated in various formal and informal advisory councils; and the producers and the government had a clear incentive to block the sales of foreign goods, which would result in higher profits for producers and greater rewards to politicians. Relationships by their nature rely on the tacit as much as the specified, and we should not expect parties engaged in a conspiracy in restraint of trade to spell out how they plan to harm their rivals or to leave a convincing paper trail.

On the other hand, plenty of benign reasons exist for domestic producers and the government to cooperate. The government needs to know about misbehavior by importers, such as theft of intellectual property or other unfair trade practices; regulatory objectives require reconciliation with industry practice and objectives; and the government cannot develop its trade policy without reliable information about the impact of imports on domestic producers. The basic question is one of credibility and presumption: should an adjudicator enforcing competition rules assume that all cooperation amounts to collusion, or should it require something more before intervening?

By way of contrast to the WTO panel's approach, consider the Supreme Court's methodology in *Matsushita Electric Industrial Co v Zenith Radio Corp*, the most important modern case dealing with the intersection of U.S. trade and competition policy.¹⁶ The

15. *Photographic Film*, WT/DS44/R (cited in note 6).

16. *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574, 582 (1986).

Court confronted a claim that Japanese producers of consumer electronic products, under the guidance of the Japanese government, conspired in a predatory pricing scheme designed to wipe out their U.S. competitors in the U.S. market. The Court refused to make the logical leap that the capture of a large share of the U.S. market resulted from anticompetitive collusion, because it found the likelihood of a successful predatory pricing conspiracy too slight. It declared, "courts should not permit fact finders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct."¹⁷ To illustrate this point, the Court distinguished between a conspiracy to raise prices and one to lower them. The former accords with normal expectations about producer behavior and therefore has inherent plausibility; the latter does not. *Matsushita's* negative inference, then, is that it should be easier to presume the existence of a conspiracy when one finds opportunity and results consistent with price-increasing collusion, even where direct evidence of the conspiracy's existence cannot be found.

Kodak's story about Fuji, Konica, and the Japanese government had at its root price-increasing strategies. Yet the WTO panel did not apply anything like *Matsushita's* negative inference, and instead insisted that the United States produce the kind of evidence that a reasonably well-run cartel normally should succeed in hiding. Generalizing a bit, the panel indicated a willingness to let formalism obscure arrangements that operate to undermine the liberal norms underpinning the GATT system. By requiring specific evidence of anticompetitive collusion between government and industry—and not simply relying on opportunity, motive and result—it signaled a tolerance of protectionist policies that depend on relationships rather than positive laws.

The panel's conclusion implies something about the bargaining theory that underlies the GATT system. It suggests that the parties who created the GATT assumed a default norm of protection. Governments that hold themselves out as improving the conditions for trade must honor their explicit commitments, but they will not be treated as surrendering any more of their right to protect their producers than the terms of the bargain specifies. Backsliding undermines the system only if it is obvious, as when a government grants subsidies to domestic producers that offsets the ability of importers to compete on price.¹⁸ Governments that obstruct and obfuscate but avoid confrontation act within the scope of prerogatives reserved in the GATT bargaining process.

This willingness to look the other way when a government tacitly undermines its GATT obligations works particularly to the disadvantage of the United States. Lacking as it does a strong sense of historical or cultural continuity, the United States has a somewhat harder time working out implicit understandings in its public life. As a result, political conflict in the United States tends to find its resolution through

17. *Id.* at 593.

18. See, for example, *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, 37S GATT BISD 86 (1990).

explicit, law-like instruments to a greater extent than occurs in most other countries. There is much to be said for this tendency towards openness, but it constitutes a drawback in a world where open actions come under international scrutiny and hidden ones do not. The larger message of the photographic film and paper dispute, then, is that WTO oversight will tend to impose a greater burden on U.S. policy choices than on those of other countries.

C. *International Tax Regimes*

As the global dimension of the economy grows, the ability of governments to coordinate tax policy so as to frustrate these strategies increases in importance. We have entered into something of an arms race, with governments seeking to prevent revenues from fleeing as firms and persons explore new ways of shifting the incidents of taxation to low-tax jurisdictions. The stakes are great. Without a secure source of revenue, the ability of government to carry out a wide range of projects, and especially to redistribute wealth, diminishes.¹⁹

In the most general terms, modern governments mix consumption and income taxation to stoke their revenues. Income taxes fall on owners of production inputs (capital and labor) and lend themselves to a progressive rate structure. Consumption taxes exempt savings and become unwieldy unless they employ a flat rate structure. High income taxes drive away capital and production operations, to the extent either is mobile. High consumption taxes affect the place where people make their purchases, but only to the extent that purchased goods avoid customs controls.

The normal rule for allocating income tax revenues among several jurisdictions is that "source" countries (the place where the income is generated, using customary sourcing rules) have first bite at taxing income, with residual power to tax in the country where the taxpayer resides (in the case of corporations, the place of incorporation). What complicates this system almost to the point of collapse is the ability of integrated firms to create foreign subsidiaries, which normally pay no income tax in their parents' jurisdictions, and to set the price of intra-firm transactions so as to shift income among jurisdictions. Tax authorities have developed an elaborate system of "transfer-pricing rules" to constrain this strategy, but these entail great administration problems. The alternative strategy involves imputing the subsidiary's income to the parent through the device of a "deemed dividend," that is, a constructive dividend of the subsidiary's net income to its parent.

Alone among the large economies, the United States relies largely on the income tax for its national revenue base. U.S. exporters thus face a dilemma. Their customers will pay a consumption tax wherever their goods end up, and the exporters will pay an income tax on profits from their U.S. activities. A conventional means for reducing the U.S. tax involves setting up an overseas sales subsidiary. As a foreign corporation,

19. See Dennis C. Mueller, *Constitutional Constraints on Governments in a Global Economy*, 9 Const Pol Econ 171, 174-75 (1998).

the subsidiary would pay no income tax unless and until it repatriates dividends to its U.S. parent. Assuming that the parent incorporates the sales subsidiary in a low income-tax jurisdiction, the total amount of income subject to any significant income tax would be limited to the value created by making, as opposed to merchandising, the goods.

But overseas sales corporations present an inherent problem. The parent has every reason to underprice the goods it transfers to the subsidiary so as to avoid U.S. taxes and to exaggerate income in the low-tax home of the subsidiary. Transfer-pricing rules, which impose on related parties an obligation to report transactions as if unrelated parties had negotiated their terms at arms length, can check this practice but do not solve the problem, both because they generate high administrative costs and because they fail to reflect rapid price increases due to inflation or spikes in demand for the goods in question. Excessive enforcement of the transfer-pricing rules also may encourage firms to shift production offshore, causing both tax and job losses to the United States. In a limited set of circumstances U.S. tax law obviates all these issues by deeming a dividend from the foreign subsidiary to the parent. But Subpart F of the Internal Revenue Code, which accomplishes this result, is horrendously complex and difficult to apply predictably.²⁰ Moreover, Subpart F does not solve the problem of the firm that chooses completely to expatriate itself by moving its operations offshore.

In 1969, Congress created a special tax status for "domestic international sales corporations" (DISCs). This change allowed exporters to set up domestic subsidiaries (the DISC) which enjoyed some tax deferral on income from export sales. The European Economic Community (a predecessor to the EU) challenged this system, and a GATT panel held that it violated the GATT prohibition on export subsidies. The United States resisted adoption of the panel report for five years. It withdrew its objection only in 1981, when the GATT Council issued a declaration noting, *inter alia*, that "in general, economic processes (including transactions involving exported goods) located outside the territorial limits of the exporting country need not be subject to taxation by the exporting country and should not be regarded as export activities in terms of Article XVI:4 of the General Agreement."²¹ Armed with what it thought was a binding interpretation of the GATT, the Reagan Administration in 1984 procured the enactment of legislation on Foreign Sales Corporations (FSCs) to supersede the DISC system. Unlike a DISC, a FSC had to have an adequate foreign presence as defined in Section 922 of the Internal Revenue Code. As was the case with DISCs, a FSC had a choice among several sets of transfer-pricing rules and could defer tax on a portion of its income, the precise fraction depending on which transfer-pricing rules the FSC used.²² The net effect of the rules is to mimic what happens under a consumption tax: revenue from export sales does

20. IRC §§ 951-64.

21. United States Tax Legislation (DISC), 285 GATT BISD 114 (1981).

22. Subpart F did not apply to FSCs, and the exempt portion of the FSC's income could be transferred to its U.S. parent free of tax. IRC §§ 245(c), 921-27, 951(e).

not enter into the tax base.

However formalistic this response to the subsidy issue might appear, it was not challenged until 1997. At that time, the EU attacked the FSC system as inconsistent with the Agreement on Subsidies and Countervailing Measures (SCM), one of the Uruguay Round instruments that elaborated on the meaning of GATT Article XVI. A panel ruled in favor of the European Union, and the Appellate Body affirmed.²³

The Appellate Body maintained that the appropriate test for determining whether a tax rule constituted a prohibited export subsidy is whether a taxpayer avoids otherwise applicable rules because of its status as an exporter. "A member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free *not* to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations."²⁴ Because the FSC regime produces lower taxes for those taxpayers who elect this treatment than otherwise would have been due, holding everything constant but the FSC election, it violated the SCM.

The main thrust of the U.S. defense rested on the 1981 interpretation of tax rules as subsidies, which, it maintained, found its way into the SCM through a footnote tracking the interpretation's language. The Appellate Body denied either that that SCM footnote represented a ratification of the FSC regime, or that that 1981 interpretation applied of its own force to the Uruguay Round Agreements. "[T]he issue in dispute is whether, having decided to tax a particular category of foreign-source income, the United States is permitted to carve out an export contingent exemption from the category of foreign-source income that is taxed under its other rules of taxation."²⁵ The answer, in the view of the Appellate Body, was no.

At first blush, this conclusion may seem self-evident. The FSC rules completely exclude from tax a portion of income generated by export sales. This outcome goes beyond the reach of the 1981 interpretation, which recognized only the case for deferring a tax on offshore income pending its repatriation. But as a practical matter the distinction between deferral and complete exemption disappears the longer a firm reinvests its profits offshore, as a successful FSC typically will do. Moreover, the exemption of dividends based on foreign sales income carries with it the loss of the foreign tax credit.²⁶ Nor is the exemption from Subpart F's deemed-dividend rules that an FSC enjoys all that remarkable. Subpart F applies in limited circumstances and with extremely complex exceptions and qualifications. Ingenious (and expensive) tax planning normally suffices to take most active foreign subsidiaries out of its scope.

23. World Trade Organization, Report of the Panel, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/R (Oct 8, 1999); World Trade Organization, Report of the Appellate Body, *United States—Tax Treatment for "Foreign Sales Corporations,"* WT/DS 108/AB/R (Feb 24, 2000).

24. Appellate Body Report para 90.

25. *Id.* at para 99.

26. IRC § 901(h).

In most cases the FSC exemption operates more as a safe harbor, ensuring an outcome that it probably would obtain in any event at a lower administrative cost.

The real reason why FSCs have become so popular in the last decade may involve reduction of tax compliance costs, rather than direct tax savings. The failure of the Internal Revenue Service to come up with clear and workable transfer-pricing rules had led to considerable litigation as well as other forms of dispute resolution; by some estimates more than two-thirds of the dollar amount of all tax liabilities currently in dispute involve transfer-pricing issues.²⁷ FSCs have access to special rules that elevate precision over accuracy. These may exaggerate offshore income, but they also avoid the tremendous difficulties of working with the normal arm's length method. They reduce uncertainty as well as accounting costs, benefits that may exceed actual tax savings.

If my speculation about the incentives generated by FSCs is correct, then the interesting problem becomes the breadth of the Appellate Body's holding. It suggests that *any* difference in the treatment of exporters and other taxpayers may violate the SCM. This principle might extend even to a regime that did nothing but make special "safe harbor" transfer-pricing rules available to exporters.²⁸ The opinion stressed that the combination of benefits accorded FSCs—the special transfer-pricing rules, the exemption from Subpart F, the exclusion of dividends from income—constituted a prohibited subsidy. Presumably, Congress could remove the least significant of these qualities—perhaps the Subpart F exemption and the income exclusion—and pass muster. But the panel's conclusion that differences in tax treatment between exporters and others violates the SCM Agreement has broader implications. Once exporters alone are allowed to elect a special status, it is plausible to assume, as the WTO panel did, that firms will make the election only to save taxes. The alternative possibility, that administrative and uncertainty costs largely motivate the election, cannot be proved. If so, then any differences in tax rules that depend on exporting might conflict with the SCM Agreement.

A broad principle that regarded any tax adjustments for exporters as suspect would work particularly to the detriment of the United States. First, income taxes have greater significance for U.S. revenues than for those of the other major economic powers. As a result, such a principle has a larger impact on U.S. firms in terms of how they structure their international activities than do comparable taxes on their foreign competitors. Second, the United States generally would find it more difficult to rely on informal practices and understandings as a way of alleviating the tax burden of its taxpayers than would most other governments. As noted above, the nature of U.S.

27. For a full discussion of the costs attendant in complying with transfer-pricing regimes generally, and with the U.S. regime in particular, see Lorraine Eden, *Taxing Multinationals: Transfer Pricing and Corporate Income Taxation in North America* (Toronto 1998).

28. The panel declined to determine whether the FSC transfer-pricing rules, taken alone, constituted a prohibited subsidy, and the Appellate Body also declined to address the issue. Appellate Body Report at paras 172-73.

society makes informal settlements difficult to maintain. Were the Internal Revenue Service, for example, to develop a practice of settling transfer-pricing disputes with exporters, but not others, on favorable terms, litigation and congressional scrutiny would soon follow, with Freedom of Information Act releases fueling the fire. Most other countries do not have such difficulties reaching and keeping tacit agreements.

The Appellate Body decision raises another, broader issue. The determination that the 1981 interpretation did not constitute binding authority in the post-Uruguay Round world, either of its own force or through the SCM footnote, has unsettling implications. What other understandings worked out in the 47-year history of the GATT failed to survive the Uruguay Round? What deals that the United States believed it had made have come undone?

To be sure, there was nothing exceptional about the Appellate Body's method for putting aside the 1981 interpretation. The Agreement creating the WTO addressed the issue of GATT precedent and made clear that interpretive decisions by the Council, including the adoption or modification of panel reports, did not have the same status as fully negotiated agreements achieved through extended multilateral bargaining. All the same, the Appellate Body did not have to give the earlier agreement such short shrift. It easily could have looked at the sequence of events—adoption of the interpretation, enactment of the FSC legislation, a decade of silence—as informative as to what the SCM Agreement meant to embrace. Its failure to do so suggests a broader agenda for the dispute resolution process.

The Appellate Body's approach, which treats the 1994 Agreements as providing a clean slate, gives the tribunals greater freedom to develop interpretations that accord with their own preferences, rather than compelling adherence to the status quo. This strategy promotes legal innovation over stability, and the discretionary authority of the WTO dispute resolution process over the autonomy of WTO members.

D. General Observations

In the five years that the WTO dispute resolution process has been up and running, the United States has faced setbacks in three important policy arenas. The WTO rejected its efforts to take the lead in protecting migrating wildlife, refused to challenge opaque relationships between bureaucracies and domestic producers that may harm its exporters, and thwarted its attempt to reconcile its income tax with a consumption-tax world. These defeats complicate U.S. efforts to address problems affecting many billions of dollars in trade, investment and revenues. They also suggest serious limitations on the ability of the United States to shape the international environment.

The way the WTO organs have justified their decisions may have even greater significance. They talk as if they have lawmaking power, in the same sense that a common law court creates, and does not just interpret, norms of conduct. Moreover, they exercise their discretionary authority in a manner that expands their power at the expense of the United States. By insisting on a tight fit between trade sanctions and their professed objectives, the organs reduce the ability of the United States to use

economic rewards and punishments to maximize its overall influence. By refusing to assume that industry-government entanglements have an inherent potential for abuse, they maximize their scrutiny of U.S. regulation in relation to that of other major economic powers. And by treating all compromises worked out within the GATT structure, but not memorialized in fully negotiated multilateral instruments, as nonbinding, they increase their capacity to alter the status quo in favor of expanding their own powers.

Or so it seems. Up until this point, my analysis has assumed that the opinions of the Appellate Body and the WTO panels are meaningful, in the sense that the arguments used to justify the results provide valuable information about how these organs will act in the future. When it comes to domestic courts, we take this assumption for granted. But international organs operate in a different legal culture, often with diminished expectations and less direct scrutiny. The presumptuousness of their rhetoric may mask a sense of deep irrelevance. We now must consider whether it makes sense to take the WTO dispute resolution process seriously.

III. DOES THE WTO DISPUTE RESOLUTION CONSTRAIN U.S. POLICY?

The WTO dispute resolution process functions as a significant constraint on U.S. policy if, and only if, two things are true: the WTO has sufficient authority to influence what the United States does, and it exercises this authority to bring about choices that the U.S. would prefer not to make. I explore these issues separately.

A. *Does the WTO Matter?*

The ultimate cost of disregarding WTO pronouncements is retaliatory sanctions that, if pressed far enough, can amount to economic ostracization. A superpower cares about what the WTO says only if the economic consequences of defiance would significantly compromise its interests. But what does the WTO embody to the United States?

First, money matters. A large and growing portion of the U.S. economy comprises international commerce. In 1999, the most recent year for which data exists, the United States exported over \$ 978 billion in goods and services and imported over \$ 1.2 trillion, against a gross domestic product of over \$ 9.1 trillion.²⁹ Of course, a significant portion of these international flows of value either falls entirely outside WTO purview (for example, arms sales) or will come under substantial WTO discipline only some time in the coming decade (agriculture, textiles, most services industries). But even these transactions have a link to the WTO system, both because they remain hostage to any trade war that might occur in the absence of a regime promoting international economic peace and because their good health to some extent depends on the robustness of the economic sectors that the WTO

29. Data taken from *GDP and Other Major NIPA Series, 1959-99*, 79 Survey of Current Business 132, 134 (Dec 1999).

directly supervises. So one fairly may argue that products affected by the WTO system have an enormous impact on the U.S. economy, and that a sudden disruption of these flows would have dramatic political, social and cultural, and economic consequences.

Second, expectations about future behavior that rest on past actions matter. Growth of the global economy depends on perceptions about stable conditions, including tariffs and other trade regulations. The overall sense of predictability and calm that the GATT/WTO system has engendered bolsters the confidence of people entering into international transactions. Take away this confidence, and serious consequences ensue. Governments will replace trust with suspicion, lowering the threshold for economic conflict. Private actors will shy away from international transactions, resulting in missed opportunities and diminished growth.

One might argue that the forces that shape the global economy operate independently of institutions such as the WTO. A strict materialist should regard the WTO as an epiphenomenon that has significance, if at all, only as an expression of the underlying technological and economic base that drives market and production relations. But rigorous adherence to this position also would preclude any serious interest in U.S. political institutions except to the extent they reveal, like shadows on the wall of a cave, the base. A more interesting question is whether the critical forces—whatever they are—enjoy greater autonomy from the WTO than from the aggregate of choices made at the national level.

A theoretical argument for taking the WTO seriously draws on both political economy and institutional economics. Classical liberal theory argues that overall welfare is maximized when nations refuse to protect, even if their exporters face trade barriers elsewhere, because gains to consumer welfare from greater competition exceed the losses that domestic producers suffer from import competition. In practice, however, consumer welfare seldom carries the day by itself, because domestic producers tend to have lower organizational costs and therefore wield disproportionate influence in the political process. Bargaining among states that trades concessions in the direction of liberalizing trade allows individual governments to pit exporting domestic producers against those who fear import competition. The availability of such bargains therefore shifts the political consensus toward results that tend to benefit consumers. The choice of institutional structure in turn can lower the transaction costs associated with this bargaining by standardizing terms, organizing information flows among parties, and decreasing the need to take precautions against defection. A robust international trade organization can increase the credibility of promises that interested groups within individual nations would wish to see made and honored.

There is empirical evidence to suggest that this theoretical explanation for the GATT/WTO system has some explanatory power. At the grossest level, the GATT, succeeded by the WTO, has organized a deep and widespread cut in tariffs on a worldwide basis and has impeded most efforts to erect other kinds of trade barriers. The system has imposed its discipline on reluctant nations without provoking

outright defiance. The results of the WTO dispute resolution process in particular provide good evidence of the system's efficacy. Of the twenty-three Appellate Body or panel decisions that the WTO had adopted formally as of the end of 1999, fifteen produced either outright compliance or commitments to comply, two resulted in the imposition of trade sanctions in place of compliance, and six remain in negotiation. Rich countries have complied at about the same rate as poor ones.³⁰ For most then, it seems that a membership's benefits outweigh its costs. To be sure, this may reflect low costs rather than high benefits. Still, whatever the reason, membership has boomed from twenty-three in 1947 to 135 today, with others (for example, China and Russia) clamoring to join. It may not have the direct clout of the IMF or the World Bank, which can cut off a country's access to both public and private capital. But its seal of approval seems to carry considerable weight.

Moreover, the United States has conducted itself over the years in a manner that manifests some concern about the GATT/WTO system. In particular, it has shown itself willing to comply with adverse rulings. I mentioned earlier the DISC dispute, which produced amendments to the Internal Revenue Code. Also noteworthy is the first decision of the Appellate Body, which attacked U.S. environmental regulations dealing with the content of imported gasoline.³¹ In response, the Environmental Protection Agency withdrew the measure and replaced it with one that the importers deemed acceptable.³² In no instance has the United States greeted a loss in WTO dispute resolution with intransigence.

In sum, a strong case exists for the proposition that the United States much prefers a world with the WTO to one without it, and as a corollary that the United States would bear substantial costs before it would abandon the WTO system. This claim does not depend on the argument that the GATT constitutes a body of international obligations, and that these obligations in and of themselves create a moral commitment. Rather, it maintains that the United States has a significant material stake in the WTO's good health, and that the risks associated with disruption of the WTO system provide a strong disincentive for U.S. noncompliance in the face of WTO opposition to its policies.

B. *Does the WTO Oppose the United States?*

It is one thing to say that the WTO has the capacity to oppose the United States, and another to claim that it does so in any systematic fashion. Perhaps the United States exercises sufficient control over the WTO to marginalize its ability to thwart U.S. policy. Even if the exit option—dropping out of the WTO altogether or

30. The disputes that have resulted in either retaliation or negotiation, rather than full compliance, involve Australia, Brazil, Canada, the European Union, India and Korea. The United States has complied with five adopted decisions and not sought to negotiate out of any.

31. World Trade Organization, Report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (May 20, 1996).

32. See *George E. Warren Corp v EPA*, 159 F3d 616 (DC Cir 1998) (upholding post-WTO regulation).

simply ignoring its mandate—may pose too high a cost, the United States may have a sufficiently strong voice in WTO decision-making to preclude any serious conflicts.

Seen with a broad ideological lens, the WTO serves as an instrument of U.S. policy, not as a check on U.S. ambitions. What the WTO stands for corresponds, in some deep sense, to core U.S. political and economic values. Opening trade, dismantling restrictions on foreign investors and increasing transparency in governmental economic regulation promotes a global business culture in which the United States, with its market traditions, may enjoy an inherent advantage. Hobsbawm's account reflects this perspective. The GATT/WTO system advances U.S. interests in that it organizes international life in a manner that contradicts the Marxist-Leninist agenda.

But this argument works only at the grossest level of generalization. In a world where Soviet-style socialism and U.S.-style capitalism competed as sources of inspiration for political, social and economic policy, one might get away with categories that conflate all efforts to promote traditional liberalism with U.S. interests.³³ But in today's world of ideological exhaustion, an opposition between open politics and market-based economics, on the one hand, and state leadership in all areas of social life, on the other hand, seems unhelpful. We cannot usefully talk of a hegemony that is defined only by the absence of totalitarianism. Rather, it becomes more interesting to look for variations in approaches to less grand issues, all occurring against a background of mixed public and private economic spheres and broadly, if incompletely, accountable governments.

Here we again can turn to political economy and institutional economics for a prediction about why the WTO might operate at cross purposes with the United States. The WTO may generally produce outcomes desirable to its influential members. But the very institutional structure that produces these desirable outcomes also may provide a foundation for resistance to particular U.S. objectives. Because the WTO parties cannot fully specify how the organization should operate, WTO officials have some freedom to pursue their own interests, whether material (shirking, rewarding past supporters, building future careers) or ideological. The governments also have some selfish incentives (future advancement in both public and private life) to respond to focused pressure from well organized and homogenous groups. As long as the costs of such self-interested behavior are less than the costs of imposing greater constraints on the WTO officials—the latter costs including both efforts to monitor the officials and opportunities foregone as a result of overly definite constraints on their behavior—the WTO will take positions that even its most powerful members will regret.

33. The operative word is "might." For a critique of the conventional depiction of the Cold War as a clash between capitalism and socialism, see Paul B. Stephan, *The Fall—Understanding the Collapse of the Soviet System*, 29 Suffolk U L Rev 17 (1995). For a similar perspective by a Russian scholar, see Sergey Vadimovich Kortunov, *Kholodnaya vojna: paradoksy odnoy strategii*, [The Cold War: The Paradox of One Strategy], 8 Mezhdunarodnaia Zhizn [Intl Aff] 23 (1998).

How realistic is this speculation? We know that the United States would not like to have the WTO turn against it. But it is at least as true that the WTO would not like to face the wrath of the United States. A falling out would cause the United States great economic pain, but it would bring into question the continued existence of the WTO. Backed by U.S. economic power, the WTO has power and prestige; stripped of U.S. support, it would do well to match the hollow shell of the League of Nations. Does the threat of mutually assured destruction ensure that the WTO will not pose any serious obstacle to U.S. policy?

This article establishes that the WTO dispute resolution process has reached outcomes that conflict with U.S. objectives. Not only have the cases impeded U.S. efforts to promote environmental goals, to extend its model of open competition based on consumer welfare to other countries, and to allow its progressive income tax to survive in a consumption-tax world, but they have intimated at broader constraints that hem in a wide array of unilateral tools that the U.S. needs to exercise strong international influence.

But what do these cases really prove? Perhaps the shrimp dispute was not about environmental policy, but only about turtle protection; the photographic film dispute not about competition policy but only about Kodak; and, the FSC dispute not about international tax policy, but only about FSCs. One can minimize the significance of these cases by isolating the specific issues in dispute from the broader questions that they implicate. This isolation requires only a separation of result from reasoning. The WTO organs may write lengthy opinions justifying what they do, but that does not mean that the justifications count for much. We should not confuse the common law form of these decisions with their actual instrumental function. If neither the authors of these opinions nor their audience intends to regard them as constraints on future actions, then they do nothing more than announce outcomes of particular controversies.

Both theoretical arguments and empirical observations provide at least soft support for the notion that the justifications, and not just the actions, of the dispute resolution organs matter. We might not be in a position to regard the WTO opinions as canonical interpretations of WTO law, but the likelihood that they provide useful information about how future dispute resolution organs will act is sufficiently high to justify treating the opinions, and not just the rulings, as imposing some constraints on the conduct of WTO members, and especially on the United States.

The theoretical argument follows logically from the claim made above that the WTO system serves as a valuable cost-reducing solution to a collective action problem. If the institution creates value, then the generation of information about its likely future behavior also should be valuable. The dispute resolution organs optimize the benefits of the process they administer by providing reliable indications of how they would act in situations analogous to those before them, and then acting in accordance with those indications. The members can respond to this information in ways that minimize the cost of complying with the rules that the organs will impose.

I do not mean to suggest that the organs have an incentive always to produce

more information about their future actions. A tradeoff necessarily exists between (a) specifying future conduct; and (b) keeping future options open. Decision-makers are likely to optimize the value of their services when they provide substantial information about their future choices but do not adhere rigidly to every implication of what they say. And in an evolutionary environment with competition among different institutional arrangements, one would expect that the arrangement that best optimizes this value will prevail.

This theoretical argument rebuts the claim that the opinions accompanying WTO dispute resolution decisions are empty charades, but it does not predict any particular level of adherence to arguments advanced in prior opinions. More precisely, it justifies "some" adherence but not "complete" adherence without specifying what "some" means. To glean more knowledge about the actual value of the opinions in the real world, we need to look at how the organs and the WTO members have behaved.

A review of both the Appellate Body and panel opinions suggests a serious effort to develop a coherent jurisprudence. The Appellate Body's decisions generally seek to explain outcomes in terms of consistency with prior decisions. Over the short period that the Appellate Body has functioned, it has managed to avoid any serious elisions or contradictions. The internal evidence, then, supports the proposition that WTO opinions have meaning that extends beyond their results.

The external evidence of how the WTO parties respond to the broader messages contained in dispute resolution opinions necessarily is ambiguous, given the short period of time involved. As of February 6, 2000, WTO members had initiated WTO dispute resolution in 147 distinct matters, of which eighty-five resulted in the formation of panels; the remaining sixty-two disputes were in negotiation pending commencement of the formal process. Of the eighty-five matters that reached the stage of forming a panel, twenty-one were pending at the end of 1999, thirty-one ended in a settlement before panel resolution of the matter, and thirty-three resulted in a decision by at least one WTO organ. Of the thirty-three cases that produced a decision, twenty-eight gave at least some relief to the members attacking a country's laws or practices.³⁴

In an adjudication system with a well-developed and credible track record and substantial transaction costs, one normally should expect the number of settlements to exceed the number of decided cases by a significant margin and a roughly equal number of decisions in favor of complainants and of defendants.³⁵ The figures here do not conform to that prediction. The level of settlement is substantial, but lower than one would expect in a mature system, while the ratio of decisions in favor of complainants to those in favor of defendants is remarkably high.

Two explanations for these discrepancies suggest themselves. Either the parties

34. Overview of the State-of-play of WTO Disputes <<http://www.wto.org/wto/dispute/bulletin.htm>> (visited Mar 4, 2000).

35. For a general discussion, see George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1 (1984).

have relatively low transaction costs, or they cannot predict accurately how the WTO organs will decide. Low transaction costs might explain why defendants do not settle even when they have weak cases. They may find changes in the status quo easier to sell to domestic constituencies if those changes come in the form of compliance with a WTO order. On the other hand, that the parties settle a significant number of cases suggests that they do not regard the WTO dispute resolution process as totally random and therefore completely unpredictable. What we have is weak evidence indicating that governments have some ability to predict the outcome of WTO dispute resolution. As the process matures and a greater body of opinion-based information builds up, we should develop a better sense of whether WTO members take seriously the WTO opinions.

The last point suggests yet another argument for minimizing the significance of the U.S. defeats in the WTO. Member governments generally, and the U.S. executive branch in particular, may send disputes to the WTO organs as a way of placating and distracting influential domestic constituencies. The Kodak dispute might be a case in point. There an important producer had exerted pressure on both the Bush and Clinton administrations to force Japan to open up its market. Viewed from the perspective of overall national interest, no measure against Japan may have seemed appropriate, especially with Japan's economy in a serious recession and significant political upheaval under way. The Clinton administration might have used the WTO to pull a bait-and-switch on Kodak, taking up its cause but also sending it down to defeat in a forum it knew to be hostile to the kind of claim that the case presented.

I previously have argued that international institutions such as the WTO produce some displacement in discretionary authority from parliaments to executives.³⁶ To the extent WTO dispute resolution conforms to this pattern, we might interpret signs of its aggrandizement as masking that of the executive branch in relation to Congress, and not as a real loss of national influence. But it also is possible that real growth in discretionary authority occurs in favor of the WTO. First, to the extent the executive branch derives a benefit from WTO dispute resolution through increased leverage over Congress, it might more readily tolerate assertions of independence by the WTO organs. It would see a loss of authority to the WTO as the price of strengthening its hand with Congress. Second, it seems implausible that private parties with a stake in WTO dispute resolution cannot monitor how the government performs. Especially when a single firm has an interest in a matter, as with Kodak, the ability of the government to shirk should be limited.

Where does this leave us? There are reasons to believe that the shrimp, Kodak and FSC decisions might have broad implications, and that those implications would significantly limit the ability of the United States to extend its international influence through economic measures. The opinions suggest that a wide range of economic incentives that the United States would like to use to reward its friends and harass its

36. Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 Nw J Intl L & Bus 681, 695-700 (1996/97).

adversaries may violate the Uruguay Round Agreements, that other nations may use the relatively strong U.S. tendency toward formalism and transparency in public decision-making to their advantage, and that the WTO enjoys a flexibility to withdraw from or modify its commitments to the United States that is not symmetrical with U.S. ability to renegotiate its obligations to the organization.

To be sure, the case is not compelling and must await further evidence. But this uncertainty itself acts as a check on U.S. behavior. The United States does not want to see the WTO system come tumbling down. It cannot know that the WTO organs will not throw down the gauntlet, and should shy away from choices that run a substantial risk of a destructive confrontation.

IV. REGIMES AND HEGEMONY

As the world's only remaining superpower, the United States seems to stand astride the world. Its military power, technological success and economic exuberance serve both as an argument for the U.S. system as a model for other nations and as a means of coaxing balky states to do what the United States desires. If all this power and success does not amount to hegemony, what does?

But this picture of the American colossus assumes that international influence is a force that only nation states exercise on other nation states. A paradoxical effect of the Cold War was the emergence of powerful international organizations undertaking types of economic coordination that superseded state-to-state management of these issues.³⁷ The United States had promoted these bodies as a response to the Soviet challenge, but over time they acquired an agenda of their own and the means to implement it. Their success in grappling with the international economy gave these institutions—the IMF and the World Bank, as much as the GATT—functions that are independent of their original purpose. My concededly casual empiricism bears out what political economy and institutional economics predicts—they now exercise an influence of their own that cabins what even the most powerful nation can do. A focus on state-to-state relations misses this crucial point.

I do not mean to overstate my argument. Shifts in discretionary authority and the capacity to lay down and enforce rules of conduct do not translate into complete displacement. The international economic institutions do not constitute a world government or anything like it. Analogies to the role of the EU in governing Europe would be, to put it mildly, far-fetched. The United States still matters, even if its place in the world economy is less than hegemonic.

Nor do my observations extend beyond the economic sphere. In particular, I do not mean to suggest anything about questions of international security. Thus the claims I make about the growing authority of international institutions do not extend to NATO or the OSCE, much less the United Nations. Concomitantly, I do not

37. I develop this point at greater length in Paul B. Stephan, *The New International Law: Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 *Colo L Rev* 1555 (1999).

seek to untangle the intricate and complex ties between security and economic issues. I believe that money matters a great deal, in international relations as in many other fields, but I cannot specify how much.

I also do not intend to advance a normative judgement as to the value of the WTO and comparable institutions as substitutes for unconstrained U.S. hegemony. In other work I argued that international institutions come with costs as well as benefits, and that we should not always assume that the best solution to an international coordination problem is a robust international organization.³⁸ The drawbacks of U.S. hegemony also should be apparent. However wonderful the open culture and traditions of freedom that (we like to think) characterize the United States, nothing we know about human society suggests that one size comfortably fits all. Nor does complete international anarchy, where collective action problems go unsolved, attract. The specification of arguments in favor of particular mixes of these international structures lies far beyond my ambition.

Rather, I assert that as a positive matter one particular international institution—the WTO and its dispute resolution process—stands in the way of U.S. hegemony with respect to global economic matters. This claim is helpful, given the persistent tendency of many people, especially Americans, to assume that the United States bears full responsibility for whatever goes on in the world. At least in one narrow but important area of international relations—commercial relations across borders—there exists a locus of both administration and politics elsewhere than in Washington. When it comes to trade, the United States is not the world's sheriff, but an occupant of a structure that it helped to build. Whether it has built a castle or dungeon remains to be seen. 🏰

38. Stephan, 17 Nw J Intl L & Bus (cited in note 36); Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue* in George Bermann et al, eds, *Transatlantic Regulatory Cooperation* (Oxford 2000) (forthcoming).