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Articles

WTO and U.N. Law: Institutional Comity in National Security

Antonio F. Perez[†]

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[†] Associate Professor, Columbus School of Law, The Catholic University of America; A.B. 1982, Harvard University; J.D. 1985, Columbia University; Department of State, Office of the Legal Adviser, 1987-93. The research for this Article was made possible by a grant from the Columbus School of Law. I thank Professor Phil Trimble for comments on an earlier draft, Professors Bill Fox and Detlev Vagts for encouragement on this project, and Reed Russell (Columbus School of Law, Class of 1999) for invaluable research assistance.

I. INTRODUCTION

Is security too important to be left to the politico-military community? Is economic welfare too important to be left to the business community? Is there any doubt that a failure to consider the security implications of trade measures or the trade implications of security measures will lead to failed policies in each area? These broad questions are posed by the current disconnect between the two arguably most important organizations in global governance in international security and international trade: the United Nations Organization and the World Trade Organization (WTO). To begin to explore this emerging set of questions, this Article considers one subset of the legal issues posed by the relation between trade and security—that is, how to implement the security exception found in the law of the WTO. This exception, which on its face gives any member of the WTO the right to decide unilaterally whether its security interests may trump its trade commitments,¹ potentially encroaches on the regime for the management of global security issues. Accordingly, how the provision is interpreted tells us a great deal about how the existing supranational institutional structure will address conflicts between trade and security values. It should also yield insights about whether the institutions mediating global governance are moving along trajectories that will encourage the evolution of institutions of supranational governance that are both effective and democratic—institutions that, like those of legitimate municipal governance, facilitate the accommodation of diverse values and interests under the banner of the larger community's needs. To articulate an approach for assessing these questions, this Article will critique the two main existing views on the relationship between WTO and U.N. law, which are premised on misconceptions of the WTO law as either a limited bargain among states or as a constitutional authority that “doth bestride the narrow world like a Colossus.”² It offers, instead, an intermediate view, calling for a comity between the WTO and the United Nations in the interpretation of their own spheres of competence when they intrude into areas more clearly within the expertise of the other.

It should be noted that the meaning of the WTO security exception, as well as the larger questions it implicates, is no longer merely an abstract question. Some months ago, the United States and the European Union (EU) reached what appeared to be a settlement of the ongoing dispute over the Cuban Liberty and Democratic Solidarity Act, better known as the Libertad or Helms-Burton Act.³ The most notorious provision of Helms-Burton, creating a private right of action in U.S. courts for Cuban-Americans whose property had been expropriated by the Castro regime, was repeatedly

1. See *infra* note 16 (providing text of relevant provisions).

2. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ll. 135-36, in THE UNABRIDGED WILLIAM SHAKESPEARE 949, 951 (William G. Clark & William A. Wright eds., 1989).

3. Pub. L. No. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997)).

suspended by President Clinton in return for an EU commitment to increase pressure on Cuba to move toward democratization.⁴ Yet the European Union continued to object vociferously to the threat of future liability in U.S. courts should the President discontinue suspension of the private right of action, as well as against the codification of the preexisting embargo and the denial of visas for travel to the United States for those “trafficking” in confiscated properties.⁵ In an April 4, 1997, Memorandum of Understanding (MOU), the United States and the European Union took steps to address these issues in the context of settling broader U.S.-EU disagreements concerning the legal regime for the protection of investments and the lawfulness of extraterritorial assertions of jurisdiction.⁶ But blocking and clawback statutes enacted in Europe and elsewhere remained in effect.⁷

The MOU’s most salient achievement, at least in terms of its immediate effect, was to put a hold on the pending EC legal challenge to Helms-Burton before the WTO Dispute Settlement Body (WTO/DSB).⁸ Because the suspension of the case preempted the European Community’s first submission, its legal theory thus far is stated best in its Request for the Establishment of a Panel of October 3, 1996, in which it asserted both that Helms-Burton violated particular provisions of the 1994 General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). The European Community also asserted that, regardless of whether it violated the GATT or GATS, Helms-Burton nullified or impaired trade benefits to which it was entitled under the GATT and GATS, and the Act impeded attainment of the Community’s objectives.⁹ But it was the U.S.

4. See *United States: Statement by the President on Suspending Title III of the Helms-Burton Act*, 36 I.L.M. 216, 216–17 (1997) (reporting President Clinton’s announcement of six-month suspension on implementation of Title III of Helms-Burton); *Transcript of a White House Press Briefing by Sandy Berger and Peter Tarnoff*, U.S. NEWSWIRE, July 17, 1996, available in LEXIS, News Library, Curnws File. The President cited the European Union’s December announcement of a “Common Position” to push for reforms in Cuba as one of the reasons for the suspension. See *United States: Statement by the President on Suspending Title III of the Helms-Burton Act*, *supra*, at 217; *Clinton Statement on Cuba*, U.S. NEWSWIRE, July 16, 1997, available in 1997 WL 5714184 (extending previous suspensions of Libertad Act). With the expiration of this initial six-month suspension, the precise status of the WTO standstill provisions of the understanding is now somewhat murky.

5. See Lionel Barber, *EU to Outlaw Helms-Burton Co-operation*, FIN. TIMES (London), July 31, 1996, at 6; *EU May Retaliate Over U.S. Cuba Law*, WASH. POST, July 13, 1996, at A14; cf. *Saying Boo to Helms-Burton*, ECONOMIST, Oct. 19, 1996, at 49 (discussing Canadian and general international condemnation of Helms-Burton).

6. See European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act, Apr. 11, 1997, 36 I.L.M. 529 (1997) [hereinafter U.S.-EU MOU].

7. See *Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act*, 36 I.L.M. 111, 111–13 (1997); *European Union: Council Regulation (EC) No. 2271/96, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country*, 36 I.L.M. 125, 128–29 (1997); *Mexico: Act to Protect Trade and Investment from Foreign Norms that Contravene International Law*, 36 I.L.M. 133, 133 (1997); Theodor Meron & Detlev F. Vagts, *The Helms Burton Act: Exercising the Presidential Option*, 91 AM. J. INT’L L. 83, 84 (1997); *Cuban Legislature Approves Helms-Burton Countermeasure*, ASSOCIATED PRESS, Dec. 25, 1996, available in 1996 WL 5429566.

8. U.S.-EU MOU, *supra* note 6, at 530.

9. See World Trade Organization, *United States—The Cuban Liberty and Democracy Act*:

threat to invoke the relevant national security exceptions under these agreements, in which the United States claimed it was entitled to determine whether its "essential security interests" justified the enactment of Helms-Burton, that seems to have prompted a settlement, for now at least, although other U.S. sanctions comparable to Helms-Burton could well result in a separate challenge at the WTO/DSB.¹⁰ Indeed, the United States coercively had threatened that it might not even "show up" at the WTO Dispute Settlement Body (WTO/DSB) to defend its case,¹¹ potentially undermining the WTO and recalling the strategy the United States had employed in the merits phase of Nicaragua's case before the International Court of Justice ten years earlier.

Helms-Burton raises serious and important questions under international law, including the WTO,¹² the North American Free Trade Agreement (NAFTA),¹³ and customary international law.¹⁴ It is conceivable that these issues ultimately need not be addressed by international dispute resolution—if, for example, a U.S. court effectively nullifies Helms-Burton by construing it, in accord with one view of its legislative history, so as not to violate international law.¹⁵ Yet the central question posed by the

Request for the Establishment of a Panel by the European Communities, para. (f), WT/DS38/2 (Oct. 8, 1996) [hereinafter EC Panel Request].

10. Cf. Sue Kendall, *Increasing Pessimism over International Investment Accord*, Agence France Presse, Feb. 13, 1998, available in LEXIS, Nexis Library, Allnws File (reporting that U.S. Iran-Libya Sanctions Act (ILSA) sanctions against French oil company Total's U.S. operations were undercutting efforts to conclude Multilateral Agreement on Investment).

11. Paul Blustein & Anne Swardson, *U.S. Vows to Boycott WTO Panel; Move Escalates Fight with European Union over Cuba Sanctions*, WASH. POST, Feb. 21, 1997, at A1 (quoting unnamed senior administration official).

12. See EC Panel Request, *supra* note 9; see also Pawel K. Chudzicki, *The European Union's Response to the Libertad Act and the Iran-Libya Act: Extraterritoriality Without Boundaries?*, 28 LOY. U. CHI. L.J. 505, 520-25 (1997) (discussing WTO implications of Helms-Burton); Jonathan R. Ratchik, *Cuban Liberty and Democratic Solidarity Act of 1995*, 11 AM. U. J. INT'L L. & POL'Y 343, 351-57 (1996) (discussing WTO issues of earlier version of Helms-Burton); Brian Welke, *GATT and NAFTA v. the Helms-Burton Act: Has the United States Violated Multilateral Agreements?*, 4 TULSA J. COMP. & INT'L L. 361 (1997) (analyzing whether Helms-Burton Act violates NAFTA and GATT).

13. See *Opinion of the Inter-American Juridical Committee on Resolution AG/DOC 3375/96 "Freedom of Trade and Investment in the Hemisphere"*, OEA/ser. G/CP, doc. 2803/96, para. 6 (Aug. 27, 1996), available in 35 I.L.M. 1322 (1996); W. Fletcher Fairey, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U. L. REV. 1289, 1322-24 (1997).

14. See generally Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419 (1996) (discussing legality of extraterritorial application of U.S. law); *EU/U.S.: EU Member States Approve Deal to End Cuba Row*, EUR. REP., Apr. 19, 1997, available in 1997 WL 8516582 (reporting Canada's intent to pursue NAFTA Panel if U.S.-EU talks on Cuba fail); Joel Glass, *Fresh U.S. Exclusions Set to Anger Canada*, LLOYD'S LIST INT'L, Mar. 17, 1997, at 3, available in 1997 WL 4461858 (reporting Canadian trade minister's earlier charge that Ottawa would seek NAFTA Panel if United States used Helms-Burton to "curtail[]" travel of Canadian citizens in United States); Larry Herman, *U.S. Shows Bad Form in Ignoring WTO's Helms-Burton Panel*, FIN. POST, Mar. 4, 1997, at 27 (citing Canada's plans to seek Panel under NAFTA similar to WTO Panel sought by European Union); Peter Morton, *EU Gets Warning from U.S.: Formal Complaint to World Trade Organization About Anti-Cuba Sanctions Could Spark Backlash in Congress*, *Trade Official Says*, FIN. POST, Nov. 21, 1996, at 7 (reporting Canadian and Mexican demands for NAFTA Panel on Helms-Burton).

15. See Fairey, *supra* note 13, at 1326 n.235 (arguing that Congress's intent not to violate international law should supersede measures it enacted that are later determined to violate international

legislation has become the appropriateness of, as well as the likely reaction to, a U.S. claim that the WTO national security exceptions are applicable in this case.¹⁶ The most important aspect of this larger question is whether, in the parlance of the exceptions, they are indeed self-judging—that is, free from second-guessing by the WTO/DSB once a state has decided to invoke them. It is argued that the self-judging interpretation of the national security interests exception advanced by the United States may well undercut the legal character of the new WTO.¹⁷ At the same time, the European Community's decision to invoke its GATT rights against U.S. trade sanctions, where those U.S. measures were not motivated by the kind of protectionist sentiments that the WTO was intended to discipline,¹⁸ may signal the encroachment of the WTO legal regime into areas that previously have been governed by other international institutions. The application of the exception in this case thus has already publicly posed fundamental questions about the nature of the WTO legal order.

law, given legislative history revealing that key proponents, Representative Burton and Senator Coverdell, thought that Helms-Burton would not violate international law).

16. Article XXI of GATT provides for three distinct security exceptions:

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Text of the General Agreement on Tariffs and Trade 1947, art. XXI, IV GATT B.I.S.D. 1 (1969) [hereinafter GATT] (GATT agreement as amended and modified prior to adoption of WTO). The GATT 1947 is incorporated into the GATT 1994, which was adopted with the founding of the WTO. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 1(a), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 21 (1994), 33 I.L.M. 1154 [hereinafter GATT 1994].

Formulations nearly identical to GATT Article XXI are also found in GATS Article XIV bis, see General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 325 (1994), 33 I.L.M. 1167 [hereinafter GATS], and TRIPs Article 73, see Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement on Establishing the World Trade Organization, Annex 1C, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 365 (1994), 33 I.L.M. 1197 [hereinafter TRIPs].

17. See Robert S. Greenberger, *U.S. Asserts Foreign Policy Is Involved in Its Dispute with the EU over Cuba*, WALL ST. J., Feb. 21, 1997, at A2 (quoting Professor John Jackson's assertion that U.S. action may cause other countries to abuse national security exception); John H. Jackson & Andreas F. Lowenfeld, *Helms-Burton, the U.S., and the WTO*, FLASH INSIGHT (Am. Soc'y Int'l L., Washington, D.C.), Mar. 21, 1997, at 3 (on file with author).

18. But see Louis F. Desloge, *The Great Cuban Embargo Scam*, WASH. POST, Mar. 3, 1996, at C1 (suggesting that certain factions in the United States may well have had economic interests in securing Helms-Burton's enactment).

This Article argues that the U.S. and EC views of the national security interests exceptions reflect competing conceptions of the WTO legal order. Under the first, the WTO is viewed as merely an agreement between states governing a limited issue area, the disciplining of protectionist policies, under which other issue areas are reserved to sovereign state decisionmaking or, alternatively, whatever other international institutions states have separately granted competence for management of the issue. Under this view, the United States might well argue that its Helms-Burton sanctions are outside the jurisdiction of the WTO and instead within the jurisdiction of the United Nations (and, particularly, the Security Council).

Under the alternative conception, the new WTO represents a legal order in which states have conceded quasi-constitutional authority for management, not only of domestic protectionism, but also of national policies pursued for any non-trade-related reasons that affect trade interests. Under this view, the WTO legal order itself supplies the basis for restraining the exercise of national security policies that impinge on trade interests. Thus, the European Community might argue, based on a careful reading of GATT history, that the essential security interests exception may not now be invoked by the United States.

This Article suggests yet a third mode of interpreting the essential security interests exception that mediates between the two competing conceptions. Drawing on choice of law principles, it argues that the WTO legal order should look to the practices of the United Nations to ascertain the circumstances under which a state could legitimately invoke the essential security interests exception—in particular, to whether the Security Council has ever found a similar situation to warrant international enforcement action.

Before articulating this view and applying it to the U.S.-EC dispute, Part II of this Article discusses the alternative conceptions of the WTO that underlie the competing U.S. and EC legal positions. It does so by explicating the debate between Judith Hippler Bello and John Jackson concerning the WTO remedial system, in which Bello suggests a bargain theory of the new WTO as a contract between sovereigns and Jackson argues from the premises of a public law, perhaps even quasi-constitutional, conception. Part II further explores the presuppositions inherent in Jackson's analysis of the administrative law concept of deference as a possible tool for describing the relationship between WTO dispute settlement and national adjudication of antidumping claims. Part III then employs these competing perspectives to develop arguments for and against self-judging interpretations of the WTO national security exceptions and shows how each approach fails to resolve adequately the tension between the supranationalizing effect of WTO law and the enduring importance of national sovereignty. Part IV considers the relationship between the WTO legal order and other structures of governance in the international legal order that are implicated by the two conceptions. It does so by reexamining the

question of whether and how, in light of the establishment of an "Organization" for the management of world trade, WTO law can function as a special legal regime, separate from the general principles and rules of international law or the influence of other international institutions. Finally, Part V advances a choice of law approach for interpreting the essential security interests exception that addresses the weaknesses of the bargain and constitutional conceptions. It then applies the choice of law approach to the Helms-Burton dispute.

In brief, under the choice of law view, the United States plausibly could defend its trade-related measure from GATT challenge if it could articulate its rationale for acting in terms of the types of circumstances that previously have given rise to decisions by the United Nations that a matter affects international peace and security. In the particular case of Cuba, the United States might argue that the use of force by Cuba against U.S. nationals in international air space, together with the broader threat of mass migration from Cuba, could provide an objective basis for the assertion in good faith of the essential security interests exception. The European Community, on the other hand, could argue that Cuba's use of force failed to persuade the Security Council that international peace and security were threatened by Cuba's action and that the General Assembly has consistently condemned the American trade embargo.

The Article concludes that, although the choice of law approach would not necessarily resolve particularly hard cases, such as that between the United States and European Union over Cuba, it would provide an objective basis for addressing disputes of this kind. It would also encourage principled decisionmaking within each institution, thus benefiting the broader community by publicizing the relationship between issue areas and the tradeoffs and bargaining that occur at the supranational level, furthering the rational allocation of decisionmaking competence and buttressing the legitimacy of the structure of international institutions as a whole.

II. COMPETING CONCEPTIONS: WTO AS BARGAIN OR CONSTITUTION

The bargain and constitution conceptions of WTO law articulated by Bello and Jackson may well reflect their different experiences: Bello was, until quite recently, a U.S. government official and trade law practitioner, and Jackson is chiefly known as the foremost academic authority on GATT and now WTO law, although he too is also a former government official. Thus, it is not surprising that Bello would suggest a modest degree of supranational intrusion, while Jackson would envision a more dramatic concession of state sovereignty. Their differences also may reflect the longstanding dichotomy in GATT scholarship between so-called trade realists, who regarded the GATT as a structured negotiating forum, and so-called trade legalists, who focused on the GATT's role in cabinining national

trade policies through international rules.¹⁹ Nonetheless, their conceptions are the first major efforts to grapple with the new WTO's impact on state sovereignty. Their two conceptions reflect alternative views of the effect of the formal establishment of a World Trade Organization, after decades of ad hoc institutional existence for the GATT, on the degree to which states must comply with the rulings of the new WTO/DSB. The reasons Bello and Jackson advance for their different views reveal underlying conceptions of the relation between the new WTO and state sovereignty, which may well be more determinative than the institutional commitments and scholarly traditions inspiring their formal legal analyses. To make sense of Bello's and Jackson's impressive technical assessments of GATT and now WTO law, however, one needs to understand the historical context for the relevant provisions of GATT and WTO law, as well as the larger supranationalizing project from which the new WTO arose.

A. *Old GATT Wine into a New WTO Bottle*

The GATT sprang from the ashes of the failed International Trade Organization (ITO), which the U.S. executive branch had advanced after the Second World War as a counterpart to the Bretton Woods institutions that would be responsible for international economic reconstruction and development. Congressional resistance led the executive branch to withdraw support for the project and, instead, to seek an agreement for the provisional application of the core trade rules embodied in the ITO without formally establishing an international institution. Yet, through time and need, the parties to the Protocol of Provisional Application, operating on the basis of consensus, created a de facto international institution. But by calling each other "contracting parties" rather than "members" and referring to decisions of the GATT as those of "the Contracting Parties" acting collectively, they preserved the legal reality that no true organization existed.²⁰

Given this anomalous legal origin, the GATT functioned for most of its history primarily as a forum for multilateral negotiations leading to agreed tariff rates. The GATT reached settlements through a series of multilateral negotiating "rounds" in which each state accepted trade benefits in the form of lower tariff rates for its exports to all importers of a particular product in return for its own concession of lower tariffs on other products.²¹ The "balance of advantages" thus negotiated was predicated, however, on

19. See *infra* note 43 (contrasting Robert Hudec's trade realism with Jackson's trade legalism).

20. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 293-301 (3d ed. 1995).

21. This is something of an oversimplification. Negotiations were conducted under agreed procedures that tended to reflect the economic power of larger economies, such as the principal supplier rule, under which the principal exporter of a product negotiated the terms of its importation. See *id.* at 379; see also Jock A. Finlayson & Mark W. Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, in *INTERNATIONAL REGIMES* 273, 303 (Stephen D. Krasner ed., 1983) (describing effect of principal supplier rule in enhancing power of large economies).

compliance with the rules of the GATT, which included the most favored nation principle as the structuring principle for negotiation of tariff concessions and rules prohibiting quantitative restrictions and requiring national treatment as the principal bulwarks against dilution of the trade opportunities achieved through the negotiated concessions. The negotiated balance of advantages was also premised on the reasonable expectations of trade opportunities that would flow from the agreed tariff rates, based on the circumstances underlying the negotiation. Accordingly, the GATT remedial system contemplated the possibility of a remedy for measures by states that, although not in violation of any of the particular rules of the GATT legal system, nonetheless would "nullify or impair benefits" to which another contracting party was entitled.²²

Given this legal complexity, the GATT included specific provisions governing the relationship between the "Contracting Parties" in a case of nullification or impairment of "benefits accruing" under the GATT's dispute resolution rules. Article XXIII called first, for negotiated "satisfactory adjustment" of the balance of advantages; second, for recommendations or rulings by GATT dispute settlement Panels, which ordinarily came to include withdrawal of the challenged measure; and, finally, if all else failed, for "[authorization for] a contracting party or parties to suspend the application to any other contracting party or parties of such obligations or concessions under [the] Agreement as they determine to be appropriate in the circumstances."²³ Indeed, the weight attached to the original GATT's apparent remedial goal of withdrawal of the offending measure, rather than damages, may explain jurisprudence under the GATT-related Tokyo Round Government Procurement Agreement holding that "provision of compensation had been resorted to only if the immediate withdrawal of the measure was impracticable and as a temporary measure pending the withdrawal of the measures which were inconsistent with the General Agreement."²⁴

Over time, an increasingly sophisticated dispute resolution system of quasi-adjudicative "Panels" evolved to address so-called violation and non-violation complaints by the Contracting Parties under the GATT itself and a family of GATT-related agreements negotiated during a series of tariff

22. JACKSON ET AL., *supra* note 20, at 348-49. One important so-called non-violation case that clarified the nullification or impairment of benefits concept involved the U.S. assertion that the expansion of the European Community distorted U.S. export opportunities. *See* EEC 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) (Report of the Panel). The negotiated tariffs had been premised for the United States on competitive opportunities for the United States which were vitiated by the reduction of tariffs in competing products between the former members of the European Community and new members of the European Community pursuant to the otherwise GATT-legal expansion of the EC. *See id.*

23. GATT art. XXIII, para. 2.

24. Norway Procurement of Toll Collection Equipment for the City of Trondheim, para. 4.21, GATT Doc. GPR.DS2/R (Apr. 28, 1992) (Panel Report) adopted May 13, 1992 by the Committee on Government Procurement; *see also* JACKSON ET AL., *supra* note 20, at 551-56 (discussing Tokyo Round Government Procurement Agreement).

negotiating rounds. Increasingly, Contracting Parties resorted to this evolving GATT dispute resolution system to pursue "legal" rather than "political" resolution of their differences. But concern, particularly in the United States, about the ability of the losing party to block consensus required for the adoption by the Contracting Parties of a GATT ruling called into question the effectiveness of the GATT system. Accordingly, the recent Uruguay Round for tariff reductions was coupled with extraordinary proposals for institutional reform which led ultimately to the establishment of a World Trade Organization.²⁵

The new WTO supposedly enabled the new WTO members to create a dispute resolution system with teeth. While the overall remedial structure of the old GATT was retained in the new WTO,²⁶ it was located in a new institutional context. The key revision from the GATT practice requiring the consensus of the Contracting Parties for the adoption of a Panel Report was that now, in most cases, Panel rulings automatically would be adopted by the WTO/DSB unless rejected by consensus of the members.²⁷ In addition, the governing bodies of the WTO now have the power to interpret authoritatively the provisions of the WTO Agreement establishing the Organization as well as the Multilateral Trade Agreements (MTAs) setting forth specific rules governing trade.²⁸ This might provide the basis for overruling an interpretation advanced by the WTO/DSB, although not the particular ruling in which it was found.²⁹ The law-creating power of the

25. See JACKSON ET AL., *supra* note 20, at 338-43.

26. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 3(1), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 404 (1994), 33 I.L.M. 1226 [hereinafter DSU]; see also *infra* text accompanying notes 226-230 (discussing DSU rules on remedies).

27. See DSU, *supra* note 26, arts. 16, 17. For discussion of the new DSU as a move toward legalism, see Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994); Miquel 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, 128-41 (1993); and Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389, 396-406 (1995). For a critique of GATT legalism on democratic grounds, see Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016, 1029 (1985), in which the author states: "In my view the value of representative government outweighs the value of free trade." Even after the end of the Cold War, Trimble's doubts about this aspect of international institutions are widely shared. See, e.g., Jose E. Alvarez, *The Once and Future Security Council*, 18 WASH. Q. 5, 12 (1995) (expressing concern over democratic deficit at United Nations); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2412 (1991) (identifying democracy deficit as constraint on consolidation of European Union).

28. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. IX(2), THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 21 (1994), 33 I.L.M. 1144 [hereinafter WTO AGREEMENT].

29. See, e.g., *World Trade Organization: Hearings Before the Committee on Foreign Relations* (statement of John Jackson, Hessel E. Yntema Professor of Law, University of Michigan) (June 10, 1994), available in 1994 WL 14188767 [hereinafter *WTO Hearings*]. The power to interpret is not unlimited, since it may not in theory "be used in a manner that would undermine the amendment provisions in Article X." WTO AGREEMENT art. IX(2). Because the WTO Agreement permits three-fourths of the membership of the WTO to exercise this power, however, it might be exercised to correct "legislatively" an erroneous interpretation of the WTO/DSB that could be corrected otherwise only by consensus. Under the DSU, the particular Panel ruling would bind the parties, although its legal reasoning would have no generative power. See *infra* text accompanying

WTO is further buttressed by the WTO Agreement's amendment provisions, which contemplate the possibility of amendments that would in some instances bind members without their consent.³⁰

On the other hand, important limits on the power of the new WTO remain. The expanded amendment power is subject to exceptions entrenching the most favored nation principle and the basic institutional rules governing the creation of new WTO law.³¹ Moreover, subject to WTO amendment or reinterpretation, WTO Dispute Settlement Understanding (DSU) adjudication remains limited by the exceptions stated in the MTAs, such as the general exceptions supplied by article XX of the GATT for, among other things, environmental, conservation, and anti-monopoly concerns,³² as well as the security exception in article XXI of the GATT.³³

notes 139-150 for discussion of precedential effect of Panel decisions.

30. Article X(4) provides that amendments of "a nature that would not alter the rights and obligations of the Members, shall take effect for all Members upon acceptance by two thirds of the Members." WTO AGREEMENT art. X(4). Noting that "all amendments at least indirectly change the rights and obligations of Members," Frieder Roessler, Director of the Legal Affairs Division of the GATT Secretariat, stated that "[w]hat was meant was that amendments which do not change the policy obligations of Members towards each other, such as amendments relating to the institutional structure or the procedures of the WTO, could be made applicable to all." Frieder Roessler, *The Agreement Establishing the World Trade Organization, in THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS' PERSPECTIVE* 67, 75 (Jacques H.J. Bourgeois et al. eds., 1995). In addition, even amendments that "alter the rights and obligations of the Members" may become binding upon members on pain of expulsion if three-fourths of the members decide that the amendment is "of such a nature that any Member which has not accepted it . . . shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference." WTO AGREEMENT art. X(3). This artfully phrased expulsion power, see Roessler, *supra*, at 74, thus expands the law-creating power of the WTO. It suggests the possibility that new multilateral agreements in major issue areas can be purchased by a WTO supermajority and imposed on dissenting members who cannot bear the price of expulsion. *But see* Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *Nw. J. INT'L L. & Bus.* 398, 454 (1997) (stating that new WTO practices "have been tightened so as to better accommodate concerns with protecting national sovereignty and preventing imbalances in rights and obligations").

One might say that, by accepting the WTO, members have consented *ex ante* to any amendments consistent with these rules. However, the legitimacy of this formalistic notion of consent is rather problematic. See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 49 (1990) (describing process-legitimacy as function of various factors: determinacy, symbolic validation, coherence, and adherence). Thus, whether we are prepared to find persuasive a justification based on *ex ante* consent to particular rules or results will depend to a great extent on the context in which it is employed. Compare LEA BRILMAYER, *AMERICAN HEGEMONY* 95-108 (1994) (critiquing theory of advance consent in problematic context of membership in United Nations operating as consent to enforcement action authorized by U.N. Security Council against member state), with Frederick Kirgis, *Specialized Law-Making Processes*, in 1 *UNITED NATIONS LEGAL ORDER* 109, 124 (Oscar Schachter & Christopher C. Joyner eds., 1995) (after describing World Intellectual Property Organization rules, noting that entry into force for all parties upon supermajority's approval "seems to be catching on for other multilateral regulatory treaties negotiated under the auspices of U.N. specialized agencies, if the treaties deal with fairly narrowly defined subjects and do not call for detailed annexes that need to be amended more easily"). How the WTO fits into this continuum of legitimacy is a central concern of this essay. See *infra* Part IV (discussing whether WTO law is closed regime).

31. See WTO AGREEMENT art. X(2).

32. Article XX of the GATT provides that:

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

Exceptions protecting sovereignty concerns cannot, however, swallow the WTO's new supranationalizing rules. Indeed, an entirely self-judging security exception would pose the risk of recreating, at least in theory, the power of the losing party to block adverse Panel rulings. Concededly, there always would be some political cost to abuse of the security exception, perhaps even a cost so great that the WTO membership would amend or reinterpret the security exception to eliminate the risk of such abuse in the future. But even the theoretical risk of the very defect of pre-WTO/DSB GATT adjudication that led to the WTO compels one to focus carefully on whether a truly fully self-judging security exception would deviate from the WTO's overall purposes. Bello's and Jackson's analyses of the legal effect of WTO/DSB rulings are crucial in facilitating this project, for they lay the groundwork for Part III's assessment of the WTO/DSB's possible responses to an assertion of the security exception.

B. *WTO as Bargain*

Bello has argued recently that "WTO rules are simply not 'binding' in the traditional sense."³⁴ Rather,

a government could renege on its negotiated commitment not to exceed a specified tariff on an item, provided it restored the overall balance of GATT concessions through compensatory reductions in tariffs on other items. That is, a government could change its mind about and raise a particular tariff, provided it offset such 'nullification and impairment' of the delicate GATT balance through compensatory tariff reductions.³⁵

Therefore, "any WTO member may exercise its sovereignty and take action inconsistent with the WTO Agreement, provided only that it compensates adversely affected trading partners or suffers offsetting retaliation."³⁶ Thus, on the surface at least, by channeling the WTO remedial system toward

contracting party of measures:

....

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

....

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the enforcement of [state] monopolies . . . ; [and]

....

(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 art. XX.

33. See *supra* note 16.

34. Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416-17 (1996). For an earlier statement of Bello's view, see Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095, 1103 (1994), which notes that "[e]ven if the United States as a defendant loses some WTO dispute settlement cases, it is not required to change its law or practice to come into conformity with a WTO dispute settlement verdict."

35. Bello, *supra* note 34, at 417.

36. *Id.*

substitutional relief rather than specific performance, the bargain conception treats the WTO as a rather limited constraint on national sovereignty.

Bello's focus on "the fundamental nature of the negotiated bargain among sovereign member states"³⁷ may well reflect a deeper view of the function of remedial law in the trade area. Modern American contract doctrine on remedies finds its origins in Holmes's famous dictum that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it."³⁸ Indeed, under contract law, thought Holmes, a party remained "free from interference until the time for fulfillment ha[d] gone by, and therefore free to break his contract if he chooses."³⁹ The American preference for substitutional relief in contract was fed by concern over the potential intrusion on private liberty and doubts concerning the efficacy of judicial supervision of specific relief,⁴⁰ as well as by the presumption that most contract cases involve commercial values readily measurable in reference to actual or hypothetical markets.⁴¹

37. *Id.*

38. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Holmes added:

If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

Id. Thus, Holmes's remedial theory of contract was of a piece with his underlying jurisprudential approach of objectifying judicial decisionmaking and treating private lawmaking as the maximization of social welfare. See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 148-95 (1993). This view further manifested itself in Holmes's reticence to restrict legislative power through value-laden constitutional rules. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

39. O.W. HOLMES, JR., *THE COMMON LAW* 301 (Boston, Little, Brown, & Co. 1881). Modern contract doctrine, indeed even English doctrine well-established in Holmes's time, cast doubt on Holmes's major premise for his conclusion that a party was always free to breach, for many contracts were understood to create relationships that established interests in the reliability of performance in the future that could be undercut in the present. See, e.g., *Hockster v. De La Tour*, 118 Eng. Rep. 922 (Q.B. 1853) (establishing doctrine of breach by anticipatory repudiation, albeit giving rise only to damages). Compare U.C.C. § 2-609(1) (1972) (giving right to demand adequate assurance of due performance prior to time performance is due), with RESTATEMENT (SECOND) OF CONTRACTS § 251 (1981) (setting forth comparable rule). See generally Ian R. Macneil, *Contracts: Adjustment of Long-Term Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978) (focusing on role of contract law in maintaining relationships between parties rather than imposing remedies affording substitutional relief for noncompliance).

40. *But cf.* *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1952) (granting injunction that, although not requiring singer to perform her original contract, enjoined her from performing contract with third party for engagement making performance of her original obligation impossible).

41. The efficiency of breach from a global wealth-maximizing perspective thus follows, since it is argued that the breaching party would not breach its obligations unless the gains from breach exceeded the costs of breach, including the duty to pay substitutional relief. See Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 686-710 (1986); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 130-45 (5th ed. 1998). *But see* Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989) (arguing that substitutional relief rule in contract fails on efficiency grounds because it does not account for third-party interests); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 275-77, 284-87 (1979) (arguing, among other things, that damages are likely to be undercompensatory and that defaulting parties are best positioned to estimate true costs of their breach, so that rule favoring

These considerations appear to support a substitutional remedial rule for the WTO as well, given the importance of state sovereignty and the market-oriented character of WTO law. The WTO/DSB, argues Bello, has no authority to impose remedies or coerce compliance.⁴² More important, focusing on the reciprocal concessions negotiated by states, the bargain conception treats the GATT rules against protectionist measures, such as the ban on quantitative restrictions and the most favored nation principle, merely as instruments for assuring the stability of the negotiated balance of advantages. This in turn suggests that the balance of trading power reflected in the WTO is its central defining feature, placing the bargain conception of the new WTO on the realist side of the historic split in GATT theology between those who treated the GATT as a negotiating forum in which the existing balance of power is reflected and those who saw the GATT from a rule-oriented perspective in which global welfare is advanced.⁴³

The supremacy of the balance of advantages in WTO law under the bargain conception thus emphasizes the mercantilist dimension of the GATT, for trade is seen simply as "state policy," in Clausewitz's immortal expression, by "other means."⁴⁴ This view of the GATT bargain as a struggle for power among states echoes the Holmesian view that contracts are amoral struggles for power between individuals and further reflects an atomistic portrait of international law, one that draws largely from the Hobbesian state of nature as a war of all against all.⁴⁵ It thus supplies an argument for a broad reading of the security interest exception.

In some ways, however, the bargain conception may be more intrusive on state sovereignty than it first appears, even in cases involving the national security exception. Bello claims that detractors of the new WTO "oppose the light it sheds on the costs of economic protectionism and of subordinating

specific performance would encourage negotiation of truly compensatory settlements).

42. "When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas." Bello, *supra* note 34, at 417.

43. Compare ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990), and Robert E. Hudec, "Transcending the Ostensible": *Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211 (1987) (advancing power-oriented view), with JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990) (espousing rule-oriented approach); see also Philip M. Nichols, *Realism, Liberalism, Values, and the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 851, 873-82 (1996) (discussing place of "institutionalism" within realist/liberal debate).

44. KARL VON CLAUSEWITZ, *ON WAR* at xxix (O.J. Matthjis Jolles trans., 1943); see also ALBERT O. HIRSHMAN, *NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE* 34-40 (expanded ed. 1980) (focusing on Nazi grand strategy to demonstrate that economic dependency yields political power).

45. See THOMAS HOBBS, *LEVIATHAN* pt. I, ch. XIII (C.B. Macpherson ed., Penguin Books 1968) (1651); cf. Theodore H. Moran, *Grand Strategy: The Pursuit of Power and the Pursuit of Plenty*, 50 INT'L ORG. 175, 192-93 (1996) (pursuing analogy to Hobbes and Locke, and their respectively competitive and cooperative views of domestic state of nature, to articulate national leaders' assumptions about international state of nature in formulation of international trade policy).

trade objectives and obligations to nontrade objectives."⁴⁶ She goes on to suggest that

the United States may impose primary and even secondary embargoes of imports for environmental or other nontrade purposes—but not necessarily for free. If a member's measure is inconsistent with the WTO, a specific, identifiable price will be paid Some special interest groups would prefer to keep such costs hidden, since their publication is likely to reduce political support for using trade tactics for nontrade objectives.⁴⁷

The breadth of this formulation, together with Bello's statement that "[t]he only sacred WTO imperative is to maintain [the balance of negotiated concessions] so as to maintain political support for the WTO Agreement by members,"⁴⁸ suggests that even measures nullifying and impairing benefits accrued under the GATT that are adopted for such nontrade purposes as national security might confer upon affected states a right to substitutional relief.⁴⁹

Subject to the potential caveat that even nonprotectionist national security measures that undermined the benefit of the GATT bargain would entail a price, however, the bargain conception treats the WTO as a modest institution. In fact, the WTO would fall squarely within a traditional international model in which states retain their full sovereignty and separateness, the so-called billiard ball model, under which self-help through countermeasures is the principal means of enforcement of international obligations.⁵⁰ Yet, such a narrow conception of the WTO would likely undermine Bello's goal of preserving the domestic political basis for support for the WTO.⁵¹ It has been argued that a trade regime that is fundamentally indifferent to the social values in which trading communities are rooted is doomed to undermine its own political support.⁵² Perhaps Bello recognized as much, in conceding—oddly, when viewed from the traditional conception of international law implicit in her argument—that the new WTO is "essentially a confederation of sovereign national governments," albeit one

46. Bello, *supra* note 34, at 418.

47. *Id.*

48. *Id.* at 417.

49. One might argue that equating the balance of advantages negotiated under the GATT with national security perversely supports a right to compensation even when the essential security exception is invoked, for the advantages a state gains by invoking the exception should be balanced by equivalent national security losses in order to restore the balance to reflect the power relationships the negotiated reciprocal concessions embodied. *See infra* text accompanying note 89.

50. *See* ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES 39–40 (1984).

51. *See* Bello, *supra* note 34, at 418.

52. *See* Philip M. Nichols, *Trade Without Values*, 90 *Nw. U. L. Rev.* 658, 660 (1996).

Nichols argues that the WTO,

as currently envisioned, fails to take into account the fundamental nature of societal values, and creates little or no space in which such laws can exist. This intemperance may diminish the already fragile support for the international trade regime, which in turn may hinder the ability of member countries to support the World Trade Organization.

Id.

that relies on “voluntary compliance” for enforcement.⁵³ A “confederation” suggests a somewhat greater transfer of sovereignty than Bello seems otherwise prepared to accept. In endorsing most of the passage in which this statement is found, Professor Jackson seems to indicate his agreement with this broader view of WTO law.⁵⁴

C. *WTO as Constitution*

The constitutionalist premises of Jackson’s argument are fully revealed only through a careful and extended assessment not only of his critique of Bello’s argument that WTO/DSB rulings are not binding but also of his recent analysis of the deference the WTO/DSB might give to a WTO member’s initial effort in applying WTO law governing antidumping determinations. As this Article will argue, Jackson’s expansive view of WTO law cannot be explained adequately through traditional international law categories concerning the relation between treaty and customary law or the language of the longstanding debate between monists and dualists. Rather, Jackson employs new categories for evaluating WTO law that depart from traditional conceptions. Although this new constitutional approach captures an important dimension of the WTO, as this Article will argue, it overshoots the mark by isolating the WTO from other sources of international law that could redress the deficit of substantive law that the security exception would otherwise create.

Jackson’s analysis of the effect of WTO remedial law reveals his view of the uniqueness and supremacy of WTO law generally. His assessment of Bello’s thesis distinguishes between two cases: on the one hand, complaints of nullification or impairment based on violation of the GATT; and, on the other, so-called non-violation complaints. Jackson notes that the DSU specifically provides that “where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure.”⁵⁵ Jackson argues that this statement “strongly implies that in violation cases there is an obligation to perform.”⁵⁶ In short, a violation of GATT/WTO rules amounting to a prima facie case of nullification or impairment under the DSU would have important remedial consequences, depriving the breaching member of the option of paying compensation rather than withdrawing the offending measure. A violation of

53. Bello, *supra* note 34, at 417.

54. See John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 61 (1997). Jackson specifically takes issue only with Bello’s statement that “[l]ike the GATT rules that preceded them, the WTO rules are simply not ‘binding’ in the traditional sense.” *Id.* (quoting Bello, *supra* note 34, at 416).

55. *Id.* at 63 (quoting DSU art. 26(1)(b)).

56. *Id.* (emphasis omitted). One might quibble with Jackson’s textual analysis, since the quoted language excluding any obligation to withdraw in non-violation cases could still be consistent with a Holmesian view of an alternative obligation to perform or pay damages in the violation context. Jackson also identifies, however, a series of DSU provisions he believes make clear that the DSU “establishes a preference for an obligation to perform the recommendation.” *Id.* (emphasis omitted).

GATT/WTO rules in and of itself would then assume greater significance, for it would serve not only the instrumental function of reducing the costs of WTO litigation by simplifying nullification and impairment of benefits findings but also reflect the WTO membership's willingness to adhere to WTO rules. In brief, Jackson's partial rejection of Bello's Holmesian theory of the WTO remedial law arguably supposes a deepened quasi-constitutional commitment of states to WTO rules.

The constitutional character of this view should not be confused with an argument for the incorporation of WTO law into domestic law. Indeed, Jackson has made clear that the constitutional dimension of his argument does not flow from the idea that WTO law has become part of the constitutional order of U.S. law. Jackson has argued recently that many domestic legal systems, such as that of the United States, do not give GATT rules direct, statute-like effect.⁵⁷ The EC and U.S. reluctance to give the GATT/WTO direct effect in their respective legal orders surely reflects the competitive aspect of the balance of advantages bargained for under the WTO/GATT, under which states cooperate to improve their common position yet continue to engage in mercantilist struggles over the exact distribution of the gains from cooperation.⁵⁸ Indeed, the most vigorous advocate of the constitutionalization of free trade principles has favored direct effect for the GATT, arguing that the "new mercantilism" is a "constitutional failure."⁵⁹ Constitutionalization of WTO law in the sense of

57. See *id.* at 64; see also John H. Jackson, *U.S. Constitutional Law Principles and Foreign Trade Law and Policy*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 65, 74-75 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) [hereinafter NATIONAL CONSTITUTIONS]. The European Community has thus far also treated GATT as a bargain between sovereigns, rather than as a statute that has become part of the EC legal order. See Fernando Castillo de la Torre, *The Status of GATT in EC Law, Revisited—The Consequences of the Judgment on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements*, 29 J. WORLD TRADE L. 53, 68 (1995) (concluding that failure to treat WTO/GATT as having direct effect in EC legal order reflects "the perception that GATT is a matter for the policy-making institutions, and that the Court [of Justice] will only intervene when a policy decision is made by the institutions in secondary legislation to the effect that some weight be given to the enforcement of international obligations"). According to Castillo de la Torre, however, the EC Commission's position that GATT is not to be given direct effect under EC law, in part because of the U.S. failure to make GATT self-executing under U.S. law or enforceable by private citizens in U.S. courts, is arguably inconsistent with EC jurisprudence that does not require reciprocity. See *id.* at 67-68.

58. Compare Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 487 (1988) (arguing that states focus on relative gains rather than absolute gains), with Duncan Snidal, *International Cooperation Among Relative Gains Maximizers*, 35 INT'L STUD. Q. 387, 388 (1991) (conceding that relative gains concerns impede cooperation only in situations involving small numbers of states).

59. Ernst-Ulrich Petersmann, *National Constitutions and International Economic Law*, in NATIONAL CONSTITUTIONS, *supra* note 57, at 3, 38-44 (arguing for judicial review of individual free trade claims as check on mercantilist behavior by states). See generally ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991) (examining international economic relations from constitutionalist standpoint, under which free trade principles are seen as aspect of private liberty that state should not be free to undercut without judicial review).

On the other hand, rent-seeking might be reduced and trade-related, as well as other, private rights might be vindicated by establishing mechanisms through which third parties might be given a hearing at the WTO. See Phillip M. Nichols, *Extension of Standing in World Trade Organization*

giving private persons direct rights to judicial relief in domestic courts would raise profound concerns about the democratic legitimacy of WTO law.⁶⁰ Given his dualist rejection of the direct effect of WTO law in U.S. courts, it is thus difficult to argue that Jackson's objection to the bargain conception of WTO remedies derives from a monist concern that WTO law should be part of the U.S. constitutional order.

Neither should Jackson's objection to Bello's remedial theory be explained as a disagreement about the nature of the traditional international law remedies, although Bello and Jackson might well have expressed their disagreement in these terms. In theory, international law might be relevant by way of the use of customary and general principles of law to fill in the gaps of WTO law,⁶¹ for the DSU plainly recognizes that the dispute settlement system is to "preserve the rights and obligations of the Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law."⁶² Such "preservation" and "clarification" might include elaboration of the remedial consequences of the breach of substantive obligations, relying on the general international law of remedies.⁶³

Jackson thus might have argued that Bello's international law remedial theory ignores the preference for specific performance implied in the Permanent Court of International Justice's dictum in the *Chorzow Factory*

Disputes to Non-government Parties, 17 U. PA. INT'L ECON. L. 295, 300-03 (1996); Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2291 (1997) (arguing that private right of action might prevent United States from using its economic and political power to avoid resolution of Helms-Burton dispute at DSB); G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. INT'L ECON. L. 359, 367-68 (1996).

60. See Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 209-10 (1993) (arguing that Madisonian values of pluralism and deliberative democracy require dualist conception of law under which international legal rules that are not produced through appropriate processes may be less legitimate than domestic legal rules and, thus, calling into question canons of statutory construction that favor international law over domestic law). But compare *infra* text accompanying notes 305-319 for an argument that pluralism and deliberative democracy in international lawmaking are furthered by deference by one international institution to the law of another international institution.

61. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides, as a general rule of interpretation, for reference to "any relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, para. 3(c), 1155 U.N.T.S. 340 [hereinafter Vienna Convention].

62. DSU, *supra* note 26, art. 3(2).

63. A technical objection to this line of argument might be that remedial law as such may be excluded from "the customary rules of interpretation of public international law," since the rules concerning breach stated in the Vienna Convention do not clarify the remedial consequences of breach. On the other hand, the interpretive question of whether a treaty regime incorporates "relevant rules" of international remedial law or instead specifies a special remedial regime, is clearly a question of interpretation; the DSU mandates that its interpretation be in accordance with customary rules of public international law. Cf. NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY LAW* 141-44 (1994) (treating question of whether new customary law, other than new *jus cogens* norms, affects the meaning of earlier treaty as essentially question of interpretation of whether the original treaty was intended to create *lex specialis* that would be free from effects of new custom).

case, which has been widely understood to suggest that *restitutio in integrum* is the preferred remedy in international law.⁶⁴ Jackson did not cite *Chorzow Factory* or even assert the proposition that some form of specific performance is the preferred remedy in international law, however.⁶⁵ Rather, like Bello, he explicitly framed his analysis in terms of the remedial law of the WTO itself, without reference to its relation to general international law principles.⁶⁶ In sum, Jackson's position, like Bello's, treats the WTO as a separate legal regime which operates, in some sense, as a "confederation," except that, unlike Bello's bargain conception, his view entails an obligation for specific performance at least in violation cases.

Given the weakness of other possible explanations, the probable best explanation for Jackson's objection to the bargain conception is suggested by the vision of the WTO as an autonomous supranational legal regime presented in Jackson and Steven Croley's discussion of the standard of review of national decisions in antidumping cases.⁶⁷ Jackson and Croley maintain, in an argument that on its surface seems to support state sovereignty, that the WTO/DSB should accord a particular brand of deference to national administrative agencies initially applying the GATT Antidumping Code, following its injunction that: "Where [a] panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in

64. The PCIJ stated:

The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

Chorzow Factory (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).

65. Christine Gray has shown, in any event, that the received view that specific performance is the preferred international law remedy may well be incorrect. See CHRISTINE D. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 16 (1987) ("There is little, if anything, to support the primacy of *restitutio in integrum* in international arbitral practice."). Compare *International Law Commission: Draft Articles on State Responsibility*, art. 44, 37 I.L.M. 440, 445 (1998) (implying preference for *restitutio in integrum*: "The injured State is entitled to . . . compensation for damage . . . if and to the extent that the damage is not made good by restitution in kind."), with *United States Comments on Draft Articles on State Responsibility*, 37 I.L.M. 468, 479 (1998) (questioning primacy of *restitutio in integrum*, except in small class of exceptional cases, such as restoration of cultural property; otherwise "compensation appears to be the preferred and practical form of reparation in state practice and international law").

66. Jackson specifically stated: "I do not here address another interesting legal question of the WTO and the DSU; namely, whether the new text of the DSU imposes an obligation on states to refrain from all international law remedies for redress of a complaint other than those provided in the DSU." Jackson, *supra* note 54, at 64 n.12; see also *infra* text accompanying notes 223–231 (discussing whether WTO is "closed regime").

67. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194–95 (1996). Analysis of this set of rules is particularly revealing since the standard of review in this class of cases was among the central issues holding up the conclusion of the Uruguay Round. See *id.* at 194.

conformity with the Agreement if it rests upon one of those permissible interpretations."⁶⁸

Jackson and Croley correctly observe that the provision seems to conflict with general principles of treaty interpretation, which arguably reject the possibility of there being more than one correct interpretation of a legal text. The DSU explicitly provides that the DSB is to "clarify" WTO agreements "in accordance with customary rules of interpretation of public international law,"⁶⁹ and the Antidumping Code itself provides that "the panel should interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law."⁷⁰ The interpretive rules in the Vienna Convention are usually regarded as a codification of the customary rules of interpretation of public international law, and these rules appear to suppose the existence of a single best interpretation.⁷¹ General international law rules and principles, in addition to the treaty's legislative history would, in theory at least, resolve doubts as to which of many plausible interpretations is, at the end of the day, the best and therefore the only one that is "permissible."⁷² Noting the discrepancy, Jackson and Croley characterize the deference rule in the Antidumping Code as "the fruit[] of compromise," whose meaning is somewhat indeterminate.⁷³

What is particularly suggestive, however, is the construct Jackson and Croley explore as a possible resolution of this indeterminacy: namely, the deference U.S. federal courts accord determinations of law by federal administrative agencies under *Chevron U.S.A., Inc. v. National Resources Defense Council*.⁷⁴ They defend recourse to U.S. administrative law as an analogy on the grounds that "an apparently similar standard-of-review issue, raising analogous questions, figures prominently in U.S. administrative law (the same is probably true for other countries as well)."⁷⁵ Arguably, implicit in their analogy is the "confederation" model Bello suggested, perhaps in a

68. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 17(6)(ii), Marrakesh Agreement Establishing the World Trade Organization, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 168 (1994) [hereinafter Antidumping Code].

69. DSU, *supra* note 26, art. 3(2).

70. Antidumping Code, *supra* note 68, art. 17(6)(ii).

71. See Croley & Jackson, *supra* note 67, at 200–01. But see MARK VILLIGIER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 327–43 (1985) (arguing that Vienna Convention rules did not reflect customary international law of treaty interpretation at time they were formulated and have not been rigorously followed by international tribunals in interim). But even if Jackson and Croley err in equating the Vienna Convention rules with the "customary rules of public international law" incorporated by the WTO, Jackson and Croley may yet be right if the parties to the WTO intended their reference to those customary rules to mean the Vienna Convention rules, thus supporting the overall conclusion that customary rules of treaty interpretation eschew legal indeterminacy of the kind suggested by DSU Article 17(6)'s theory of multiple "permissible" interpretations. See H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 127–36 (1966) (arguing that *non liquet*, or gap in law, is forbidden in contentious cases as matter of international law).

72. Croley & Jackson, *supra* note 67, at 200–01.

73. *Id.* at 200.

74. 467 U.S. 837 (1984).

75. Croley & Jackson, *supra* note 67, at 202.

slip of the pen, to which Jackson implicitly subscribed. Under this view, national administrative agencies and their reviewing domestic courts operate much as technical experts implementing policies adopted by a supranational legislature.⁷⁶

Jackson and Croley nonetheless reject the *Chevron* analogy as a basis for explaining or guiding the mode of deference commanded by the Antidumping Code, although they ultimately endorse deference for other reasons. They reject the *Chevron* analogy because none of its rationales in U.S. domestic law is translatable to the WTO context; unlike judicial deference to U.S. administrative agencies, WTO dispute settlement Panel deference to legal interpretation of national administrative bodies would not further accuracy or uniformity, since national administrative agencies are no more likely to understand WTO law than the WTO dispute settlement Panels, and deference to national authorities might yield multiple national interpretations. More important, *Chevron* deference is supported by the democratic legitimacy argument, in that supervision of administrative agencies by a politically accountable executive yields greater accountability to the political community than does supervision by unelected judges. In the WTO context, deference to national administrative agencies replaces accountability to one nation's political community with supervision by the international political community that, as a whole, adopted the WTO.⁷⁷ Jackson and Croley's recognition that *Chevron* rationales for deference to national administrative bodies would exacerbate the democracy deficit in the WTO constitution seems to presuppose the importance of accountability to the WTO *polis* as a whole. Thus, Jackson's pragmatic style of argumentation may mask a deep idealism that presupposes a supranational constitutional dimension to the WTO legal order.⁷⁸

76. The precise role of national courts in the resolution of GATT antidumping disputes is somewhat unclear. For an argument that the Uruguay Round Agreement should be interpreted to accord with the general international law rules requiring exhaustion of local remedies, including in the case of antidumping disputes resort to national judicial review of national administrative body determinations, before a question may be taken to the WTO Dispute Settlement Body, see Pieter-Jan Kuyper, *The New WTO Dispute Settlement System: The Impact on the Community*, in THE URUGUAY ROUND RESULTS: A EUROPEAN LAWYERS' PERSPECTIVE, supra note 30, at 87, 106-09.

77. See Croley & Jackson, supra note 67, at 208-11. For an earlier discussion making many of the same points, see Andrew W. Stuart, "I Tell Ya I Don't Get No Respect!": The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals, 23 LAW & POL'Y INT'L BUS. 749, 789-90 (1992). See also James R. Cannon, Jr. & Karen L. Bland, *GATT Panels Need Restraining Principles*, 24 LAW & POL'Y INT'L BUS. 1167 (1993) (supporting deference); Timothy M. Reif, *Coming of Age in Geneva: Guiding the GATT Dispute Settlement System on Review of Antidumping and Countervailing Duty Proceedings*, 24 LAW & POL'Y INT'L BUS. 1185 (1993) (same). But see David Palmeter & Gregory J. Spak, *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict*, 24 LAW & POL'Y INT'L BUS. 1145 (1993) (rejecting deference).

78. "An imaginary trade constitution, liberal trade ideas, national and international political judgments, a decentralized regime of bargained reciprocity: Jackson presents all these as facts rather than commitments." David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 671, 714 (1995).

Indeed, the constitutional dimension of Jackson and Croley's argument is underscored by their failure to pursue a possible version of *Chevron* deference that might be consistent with traditional international law doctrine. Thomas Merrill has suggested that *Chevron* deference in U.S. administrative law should be reconceptualized as a rule of discretionary deference to executive precedent, replacing its current dichotomized "mandatory deference to administrative agencies or mandatory independent judgment" mode of analysis, which rests on the legal fiction of whether a clear result is mandated by traditional statutory interpretation techniques.⁷⁹ Merrill's approach would appear to fall squarely within the Vienna Convention, particularly with reference to the Convention's inclusion of state practice as a primary means of interpreting international agreements, with the difference that the practice of individual states may be given greater weight than the Vienna Convention approach would demand.⁸⁰ Jackson and Croley's failure to consider this version of *Chevron* deference fuels the inference that their argument cannot be expressed in the language of classical international law's doctrine of sources or conception of state sovereignty.

Moreover, given their constitutionalist project, it is ultimately unsurprising that Jackson and Croley would explicitly extend the Antidumping Code's deference concept to other sovereignty-protecting provisions in WTO law, such as the exceptions found in article XX of the GATT.⁸¹ But they ostensibly would do so on a ground, national sovereignty, that they themselves recognize as questionable because it admits no limitation and, taken to its logical conclusion, would defeat the very object and purpose of the new DSU. Thus, in an important rhetorical move, their definition of sovereignty perversely reinforces the constitutionalist dimension of their rhetoric by suggesting a federalist argument for deference.⁸²

79. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1010–12 (1992). It has been similarly argued that U.S. courts should in particular defer to executive branch interpretation of treaties, given the special executive branch role in the creation and implementation of this particular kind of U.S. law. See, e.g., *The Role of International Law in U.S. Foreign Policy Making*, 86 AM. SOC. INT'L L. PROC. 434, 440 (1992) (remarks by Alan Kreczko, Deputy Legal Adviser, U.S. Department of State).

80. The Vienna Convention gives effect to subsequent practice which "establishes the agreement of the parties regarding its interpretation." Vienna Convention, *supra* note 61, art. 1, para. 3(b).

81. As Jackson and Croley note, the WTO Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade provides that the deference standard "shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application." Croley & Jackson, *supra* note 67, at 198 (quoting Decision). They therefore suggest that the deference standard be extended to the remainder of the GATT; for example, by revising the current understanding of the word "necessary" in the Article XX exceptions of the GATT so as "to recognize that governments should be authorized to have some choice among several government measures (not mandated to choose, e.g., the 'least restrictive' measure), as long as the choice does not unduly detract from the basic broader policy goals of the treaty." *Id.* at 211 n.71.

82. They suggest: "[I]f one is willing to recognize that nations-states *ought* still to retain powers for effective governing of national (or local) democratic constituencies in a variety of contexts and cultures—perhaps using theories of 'subsidiarity'—then a case can be made for at least *some* international deference to national decisions . . ." *Id.* at 211. The subsidiarity concept, which has played a central role in legitimating the centralization of decisionmaking authority in the European

Others also have suggested a federalist analogy, namely the U.S. Dormant Commerce Clause, for assessing the relation between GATT law's promotion of free trade as a public interest and its respect for private nontrade interests. Under this view, GATT Article XX, as well as more specialized exceptions under the GATT Agreement on Sanitary and Phytosanitary Restrictions and the GATT Standards Code, are understood as rules serving federalist values.⁸³ The GATT Standards Code, which is relevant to GATT Article XX exceptions, suggests that among the local values to be protected under this federalist conception is national security.⁸⁴

It is not too much of a stretch to view article XXI's general exception with respect to a state's essential security interests through the same lens. Indeed, even the U.S. constitutional system does not completely transfer responsibilities concerning states' interests in their own security to the national government, given the constitutional guarantees concerning the preservation of state militias and states' rights to engage in self-defense without advance federal authorization.⁸⁵ The precise contours of this deferential mode of review of the exercise of the national security exception would need elaboration, but one possible approach is suggested by the interpretation Jackson and Croley would give to the term "necessary" under their federalist reading of article XX of the GATT, under which a state would no longer need to show that it has selected the "least trade-restrictive means" available to satisfy the "necessity" criterion.⁸⁶ The GATT Article XXI national security exception, because it is not so limited, could already be interpreted in accordance with the constitutionalist, albeit federalist, premises of Jackson and Croley's proposal. Deference under this approach would not signal abdication of the WTO/DSB's responsibility under the legalist paradigm.

Community, is regarded as an analogue to federalism in the U.S. domestic context. *See, e.g.*, George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 357-58 (1994) (analogizing doctrine of preemption of Member State law to American and German legal concepts). The analogy has its limits, given the fact that subsidiarity in EC law appears to have a solely utilitarian dimension, *see* Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J. 846, 852-65 (1994), while federalism in the United States is premised largely on classical liberal political philosophy. *See generally* SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993) (examining national theory of American federalism as question of political philosophy). Jackson and Croley's use of the term "subsidiarity" may well reflect their preference for a utilitarian, instrumentalist approach to international governance.

83. *See* Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1418-31 (1994).

84. *See* Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2.2, Marrakesh Agreement Establishing the World Trade Organization, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 138 (1994) [hereinafter 1994 Standards Code] ("[T]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective . . . Such legitimate objectives are, inter alia, national security requirements.")

85. *See* U.S. CONST. amend. II (granting right to bear arms); *see also id.* art. I, § 10, cl. 3 (granting right to engage in war when "actually invaded, or in such imminent Danger as will not admit of delay").

86. *See supra* note 81 (describing Jackson and Croley's extension of deference analysis to GATT Article XX exceptions).

In sum, Jackson's vision of the WTO as supranational constitution implicitly treats the WTO as what some have called a self-contained regime—that is, one in which a state is free to exercise only the remedial rights specifically contained within the regime itself and may not resort to rights under general international law.⁸⁷ Thus, when the constitutional approach is extended to the security exception, it implies a remedial law deficit in addressing the problem posed by the substantive gap that would be created by a self-judging security exception, for states would not be free to respond outside the WTO by invoking the right to countermeasures under general international law or to seek redress at other international adjudicatory fora. As this Article will argue, the substantive gap can be filled, although not by looking solely within the largely indeterminate four corners of the WTO, but rather by looking to the law of the United Nations.⁸⁸

III. BARGAIN AND CONSTITUTIONAL INTERPRETATIONS OF THE NATIONAL SECURITY EXCEPTION

The bargain and constitutional conceptions thus suggest competing perspectives for interpreting the law of the WTO. In the context of determining whether the national security exception can be invoked without DSB review, moreover, they are likely to yield antithetical conclusions—one emphasizing the Contracting Parties' sovereignty and freedom of action, and the other seeking to give effect to the WTO members' decision to discipline unilateralism through a strengthened DSU. The use of the bargain and constitutional approaches to WTO law in this Part of the Article to address the problem of interpreting the security exception reveals how the two conceptions fail to yield adequate results in simultaneously preserving state sovereignty and giving effect to the supranationalizing effects of the new WTO. That analysis thus sets the stage for Part IV of this Article, which explores a revision of the constitutional conception to accommodate the sovereignty concerns underlying the bargain conception. This in turn lays the foundation for Part V's proposal for institutional comity between the WTO and United Nations as a means of better resolving tensions between trade and security values of the member states, and increasing the capacity of these two institutions to encourage the development of supranational governance in ways that further democratic values.

In sum, Section III.A articulates the bargain conception's view of the security exception and shows that its self-judging interpretation does not fit with the larger structure of international law. Section III.B extends the reasoning of the constitutional conception to the problem of the security exception. While Subsection III.B.1 shows that the security exception probably would be best understood under the old GATT as entirely self-

87. See *infra* Section IV.A.

88. See *infra* Section IV.B.

judging, Subsection III.B.2 argues that the exception now would probably best be interpreted under the new law of the WTO so as to permit second-guessing by the WTO/DSB of a state's decision to invoke its rights. Subsection III.B.3 demonstrates, however, that the paucity of sources within the body of WTO law makes it difficult, if not impossible, for the DSB to supply principled criteria that would allow WTO members to know when they risk finding themselves outside the security exception's safe harbor.

A. *The Bargain Argument for a Self-Judging Exception*

The bargain argument focuses on the specific language governing national security concerns in the WTO's multilateral trade agreements, particularly the GATT.⁸⁹ In the case of U.S. trade sanctions under Helms-Burton, the United States appears to be relying on article XXI(b)(iii), which provides: "Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations."⁹⁰

The language, however, might take on a particular meaning depending on the precise context in which it is used.⁹¹ This kind of language has been used in the arms control context, for example, where states are concerned that the law governing multilateral treaties might excessively limit their rights to withdraw; for in multilateral treaties, material breach by one party does not necessarily give another party the right to withdraw, and *rebus sic stantibus* might also be inapplicable. Thus, to secure their vital interests in arms control agreements, states have insisted on withdrawal rights framed in self-judging language, limited perhaps only by the obligation of performance in subjective good faith.⁹² Nonetheless, in the arms control context a subjective requirement of good faith in withdrawal may be sufficient to avoid rendering those treaties a legal nullity, because the additional requirement that the matter leading to withdrawal be referred to the Security Council channels the situation to the only place where it could be resolved.⁹³

89. See *supra* note 16.

90. *Id.*; see also *supra* text accompanying notes 11–15 (noting U.S. claim that its action is not subject to WTO review).

91. See Vienna Convention, *supra* note 61, art. 31, para. 1 (mandating that "treat[ies] shall be interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context").

92. See Antonio F. Perez, *Survival of Rights Under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT'L L. 749, 787–90 (1994) (discussing limits on withdrawal imposed by treaty law that withdrawal clause was intended to circumvent). The obligation of good faith is a central part of international law, see Vienna Convention, *supra* note 61, art. 26 (providing that treaties must be performed in good faith), but its precise meaning is open to dispute, see J.F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 83 (1991) (noting that it is disputed whether breach of obligation of good faith is "abuse of right" entailing legal consequences or rather breach of moral duty entailing only political consequences).

93. See, e.g., Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, art. X, para. 1, 21 U.S.T. 483, 493 [hereinafter NPT] (withdrawing state must give

This treaty law failure rationale for a special right of withdrawal does not appear to apply in the trade context, however, since the WTO affords states a plenary right to withdraw.⁹⁴ One might indeed rely on the right of withdrawal from the WTO to frame the context for interpreting the security exception, for the right itself may undercut the very notion that WTO law should be understood as a supranational constitution.⁹⁵ That said, the practical impossibility of withdrawal from the WTO, given the importance of the expectations of trade benefits it confers on each member, makes any formal criteria for defining supranational organizations quite beside the point in this case.

Another context for interpreting the WTO security exception is the family of international trade agreements. The national security exception was deemed sufficiently important to preserving national sovereignty that it was included also in NAFTA,⁹⁶ which like the WTO contains mostly binding dispute resolution procedures.⁹⁷ NAFTA, however, also contains a non-self-judging security exception for disputes concerning trade in energy "goods."⁹⁸ The recent U.S.-Canada dispute relating to strategic trade in

notice of its intention to withdraw to Security Council and include "statement of the extraordinary events it regards as having jeopardized its supreme interests").

94. See WTO AGREEMENT art. XV (requiring six months' notice); cf. NPT, *supra* note 93, art. X(1) (requiring three months' notice).

95. See HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 61, at 42 (3d rev. ed. 1995) (positing that "fundamental characteristics" of supranational institution include, among other things, absence of unilateral right of withdrawal). *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287-90 (1997) (defining supranational organizations in terms of their capacity to establish direct links with subnational entities); Jose E. Alvarez, *Constitutional Interpretation in International Organizations* 68 (n.d.) (unpublished manuscript, on file with author) (focusing, from lawyer's perspective, on whether international organizations exercise "independence" from states).

96. NAFTA Article 2102 contains exceptions similar to GATT Article XXI, except that NAFTA Article 2102(1)(b)(iii) replaces GATT Article XXI(b)(i)'s exception "relating to fissionable materials" with an exception for actions "relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices." North American Free Trade Agreement, Dec. 17, 1992, art. 2102(1)(b)(iii), 32 I.L.M. 289, 32 I.L.M. 605 [hereinafter NAFTA]. Arguably, this exception includes not only export control regimes mandated by treaties, such as the NPT, but also supplier guidelines not expressly required by the NPT but consistent with its larger purposes. See, e.g., *Communication Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology* 5, IAEA Doc. INFCIRC/254, Annex A (Feb. 1978) (including restraints with respect to technology transfer, notwithstanding absence of limits on technology transfer in NPT except possibly in respect of nuclear weapon state's obligation not to assist another state in acquisition of nuclear weapons). NAFTA also contains a narrow security exception covering only the energy sector. See NAFTA, *supra*, art. 607; *infra* notes 98-99.

97. See David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 166-68 (1997).

98. Article 2102 of NAFTA (providing general national security exception) is expressly made subject to article 607. See NAFTA, *supra* note 96, art. 2102(1). Article 607 provides a national security exception to the prohibition on restrictions of energy trade, an exception which holds as between the United States and Canada—but not Mexico. See *id.* annex 607 (exempting Mexico from article 607). Article 607 states that

no Party may adopt or maintain a measure restricting imports of an energy or basic petrochemical good from, or exports of an energy or basic petrochemical good to, another Party under Article XXI of the GATT or under Article 2102 (National Security), except to the extent necessary to:

uranium and uranium enrichment services, in which the United States agreed to Canadian demands for modification of the NAFTA- and GATT-illegal U.S. program for importing uranium derived from dismantled Russian nuclear warheads, suggests that the non-self-judging energy sector exception may have played a role in limiting U.S. freedom of action to pursue national security-related policies.⁹⁹

By contrast with NAFTA's non-self-judging national security exception, a plausible case for a broad reading of the WTO national security exceptions can be derived that is consistent with the bargain theory's commitment to fulfill the intentions of the parties as expressed in their own words. The fact that the NAFTA countries included a non-self-judging exception in an agreement directly related to the GATT suggests that at least Canada, Mexico, and the United States assumed that the usual self-judging language in the general NAFTA exception, and perhaps the WTO/GATT as well, would free a state from review of its conduct in a dispute resolution proceeding. As between the NAFTA countries, this might be a persuasive approach in interpreting the comparable provisions of the WTO,¹⁰⁰ but absent evidence that the WTO members specifically acquiesced in this special understanding, it could hardly be deemed compelling evidence in a dispute between a NAFTA country and a non-NAFTA member of the WTO, such as the European Community.

Nonetheless, in terms of treaty purpose,¹⁰¹ one possible justification for a broad exception protecting national security might be the anti-free trade argument that the strategic, or mercantilist, dimension of trade requires sovereign freedom of action as much in the trade area as in the traditional national security area of arms control.¹⁰² A related, but potentially pro-free trade, justification might be derived from the insights of public choice theory: namely, that national security exceptions are subject to pretextual use

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- (a) supply a military establishment of a Party or enable fulfillment of a critical defense contract of a Party;
 - (b) respond to a situation of armed conflict involving the Party taking the measure;
 - (c) implement national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or
 - (d) respond to direct threats of disruption in the supply of nuclear materials for defense purposes.

Id. art. 607. The article 607 formulation thus narrows the grounds for which the exception may be invoked. See Anne Marie Godin, *Canada's International Obligations to Provide Energy Under the EIP, GATT, and NAFTA*, 1 GREATER N. CENT. NAT. RESOURCES J. 71, 98 (1996). But the chief difference between articles 607 and 2102 is that the former does not employ the self-judging "it considers" language found in the latter.

99. U.S.-Russian cooperation in this area continued, without apparent harm to U.S. national security. See Antonio F. Perez, *To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers—Beating Nuclear Swords into Plowshares in an Imperfectly Competitive World*, 20 HASTINGS INT'L & COMP. L. REV. 331, 400-08 (1997).

100. See Vienna Convention, *supra* note 61, art. 31, para. 4 (providing that "[a] special meaning shall be given to a term if it is established that the parties so intended").

101. See *id.* art. 31, para. 1 (providing that "[a] treaty shall be interpreted . . . in the light of its object and purpose").

102. See Perez, *supra* note 99, at 365-67.

for offensive strategic trade policies as well as unnecessary defensive policies, in addition to protectionism,¹⁰³ much as antidumping and countervailing duties exceptions are susceptible to excessive protectionism. Just as the new WTO accepts the risk of some protectionism through deference to national administrative agencies,¹⁰⁴ the WTO rationally would tolerate a politically optimal level of abuse of the national security exception that would facilitate ex ante negotiations for reciprocal tariff reduction.¹⁰⁵ Thus, a broad reading of the national security exception might well support the bargain conception's larger view of the WTO as a vehicle for negotiating trade expansion as well as a particular balance of advantages.

Yet, despite the potential technical arguments in its favor, the bargain theory's broad reading of the WTO security exception might well fail, even within the terms of the traditional tools of treaty interpretation bargain theory requires. Arguably, the self-judging interpretation conflicts with the important rule that a treaty should be read in light of general principles of law.¹⁰⁶ In particular, international agreements should not be illusory; although there is no strict doctrine of consideration in international law to assure the avoidance of legal nullities, the notion of a quid pro quo has made its way into international jurisprudence.¹⁰⁷ A self-judging national security exception in the trade area is not cured by the procedural protection of notice to the Security Council that makes tolerable the entirely subjective withdrawal clause in arms control treaties. The text of the national security exception requires no explanatory statement, thus inviting the United States in the Helms-Burton case to suggest that it did not need to appear before a GATT Panel to state its grounds for asserting the exception.¹⁰⁸ In such circumstances, it would be impossible to determine whether the WTO member truly was prepared to assert in good faith its legal rights under the security exception.

103. National security tests have been perceived by most commentators as especially susceptible to manipulation. See, e.g., Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 B.U. INT'L L.J. 301, 319 (1990) (analyzing national security tests in context of discussing U.S. domestic "national security" exception under which President is authorized not to impose sanctions under Section 301 of U.S. Trade Act, and noting that "questionable appeals to 'national security' may expose the USTR (and the Administration) to considerable political criticism for being weak on trade issues").

104. See Croley & Jackson, *supra* note 67, at 211.

105. Based on public choice theory, it has been argued that the GATT contemplated a politically-optimal level of protectionism, meaning that the right to engage in a certain level of protectionism during implementation of a trade agreement would give states the confidence necessary to move to make trade concessions at the negotiation stage. See Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 259 (1991); see also Perez, *supra* note 99, at 404 (extending argument to national security).

106. See Vienna Convention, *supra* note 61, art. 31, para. 3(c) ("There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.").

107. See, e.g., *Fisheries Jurisdiction (Ice. v. U.K.)*, 1973 I.C.J. 3 (Feb. 2). In this case, the ICJ employed a quid pro quo concept to determine whether an agreement granting the ICJ jurisdiction was a nullity when rights obtained in return for the agreement to accept jurisdiction of the ICJ were later separately acquired as matter of customary international law. See *id.*

108. See *supra* text accompanying note 14.

The International Court of Justice (ICJ) has implicitly rejected giving effect to a state's refusal to explain itself in such cases. In the *Military and Paramilitary Activities Case* over a decade ago, the ICJ insisted on examining its own competence regardless of whether a party appeared to argue that jurisdiction was wanting.¹⁰⁹ The U.S. tendency to suggest that national security escape clauses are in effect jurisdictional barriers was also rebutted in the recent *Oil Platforms Case*.¹¹⁰ Article XX(d) of the U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights of 15 August 1955 provided that "the present Treaty shall not preclude the application of measures . . . necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."¹¹¹ The ICJ rejected the argument made by the United States in its submission that this language was a limit on the jurisdiction of the Court, concluding that "[a] violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means."¹¹² The ICJ explicitly recalled its decision in *Military and Paramilitary Activities* that such language was to be considered a defense on the merits.¹¹³ Yet, as Judge Schwebel pointed out,¹¹⁴ the United States had withdrawn this contention in oral argument, making the ICJ's holding unnecessary except, particularly in light of the reference to the *Military and Paramilitary Activities Case*, as a slap on the wrist to the United States. Even though the national security exception addressed in *Oil Platforms* does not include the self-judging language found in the WTO/GATT exception, the ICJ opinion evinces judicial reluctance to adopt an interpretation that would allow a state invoking a national security exception to escape without defending its use of the exception in a manner that a court of justice can assess—such as through an objective test for good faith.

Finally, and most recently, in the *Lockerbie Case*, the ICJ rejected the argument that a Security Council Resolution under chapter VII of the Charter adopted after a state has submitted its application to the Court can retroactively defeat the ICJ jurisdiction or render the application inadmissible.¹¹⁵ The possible import of this decision is that the substantive

109. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 38 (June 27) (applying multilateral treaty reservation to U.S. acceptance of ICJ jurisdiction, but with effect, because jurisdiction was based on other grounds, only of "barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law").

110. See *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. (Dec. 12) (visited Mar. 11, 1998) <<http://www.cornell.law.edu/icj/icj5/obj-eng.htm>>.

111. *Id.* para. 20.

112. *Id.* para. 21.

113. See *id.* para. 20 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 116, 136).

114. See *id.* at *4-7 (separate opinion of Vice-President Schwebel, dissenting), (visited Apr. 3, 1998) <<http://www.cornell.law.edu/icj/icj5/schw.htm>>.

115. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, 1998 I.C.J. (Feb. 27) (visited Mar. 23, 1998) <<http://www.icj-cij.org/idoCKET/ilukjudgment/ilukjudgementcontent.htm>>.

legality of even a chapter VII resolution can well be reviewed by the Court in the merits phase. At a minimum, the decision established that a respondent asserting the preemptory effect of a Council resolution as a defense must do so in the merits phase of World Court litigation, where the fact and interpretation of the resolution will be in issue.¹¹⁶

In sum, much as the doctrine of consideration facilitates the contract bargaining process by inducing caution and deliberation, as well as sometimes assuring that for each of the parties there is at least some benefit from the bargain,¹¹⁷ an objective approach to the interpretation of the WTO national security exceptions might better facilitate negotiations for reciprocal tariff reductions. Yet, objective standards could also serve as a tool in pursuit of a more ambitious goal at the international level for the integration of individuals participating in a common project as members of the same community.¹¹⁸ Accordingly, as detailed in Subsections III.B.1 and III.B.2 of this Article, because it focuses on the development of the supranational community, the constitutional conception might more faithfully follow the spirit of important international jurisprudence calling for independent review of a state's attempt to avoid its international legal obligations on national security grounds. That said, as detailed in Subsection III.B.3, WTO law itself fails to supply determinate law that could give this internationalist spirit the flesh it needs to live in a world where state sovereignty has not yet died.

B. *The Constitutional Argument Against a Self-Judging Exception*

The constitutional conception would interpret the national security exception by focusing on the role the exception plays in the new, legalist approach to dispute resolution embodied in the WTO.¹¹⁹ Concededly, the

116. See generally Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996) (describing and critiquing various schools of thought on permissibility of substantive ICJ review of legality of Security Council resolutions).

117. See P.S. Atiyah, *Contracts, Promises and the Law of Obligations*, 94 LAW Q. REV. 193, 195 (1986) (arguing that only fully executed exchanges warrant expectation measure of damages); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941) (detailing evidentiary, cautionary, and channeling functions of contract law); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (suggesting "substantive" unconscionability as corrective for process-oriented bargain theory).

118. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 97-101 (1980) (applying, in context of domestic contract law, notion of "common conscience" drawn from Durkheim). Among merchants, for example, the Uniform Commercial Code adopts a definition of "good faith" that looks to objective standards. See U.C.C. § 2-103(1)(b) (1972) (requiring "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade").

119. See Lowenfeld, *supra* note 27, at 481-87 (describing procedure used by Dispute Settlement Body); Montana I Mora, *supra* note 27, at 159 ("Post-Uruguay panel bodies will resemble an international court after the proposed reforms."); Young, *supra* note 27, at 396-406 (discussing legalist paradigm of GATT coming to fruition in WTO). Indeed, one author has already relied on a quasi-constitutional analysis to argue that the transformation of the GATT into the WTO requires reinterpretation of the security interests exception because the WTO is an "emergent" community of principle and, therefore, a non-self-judging interpretation of article XXI(b) is no longer tenable. See Rene E. Browne, Note, *Revisiting "National Security" in an Interdependent World: The GATT Article*

WTO Uruguay Agreements adopted the same apparently self-judging language as was employed in the original GATT,¹²⁰ which under the bargain conception might arguably be properly interpreted as self-judging. Nevertheless, the argument that the new GATT under the WTO has a meaning different from the old GATT—despite their identical language—seems more persuasive when one notes that, from an institutional standpoint, the new GATT/WTO represents both the continuation of the GATT and a departure from the informal status of previous GATT procedures. For example, it includes features that institutionalize management of international trade and new international legislation.¹²¹ To the extent that it is a continuation of the GATT, the new GATT within the framework of the WTO may continue the meaning of the old GATT by reenacting the old GATT rules as interpreted by the GATT Contracting Parties. On the other hand, to the extent that the WTO represents a new institutional structure, it arguably changes the meaning of particular rules of the old GATT to conform to views that reflect the common intentions of the Members of the WTO as to the effect of old GATT rules in a new institutional framework.¹²²

XXI Defense after Helms-Burton, 86 GEO. L.J. 405, 417–20 (1997). Notably, even though recognizing the perceived illegitimacy of the WTO's intruding on national security considerations, *id.* at 413, the author's analysis is limited to WTO law and fails to grapple with the probable indeterminacy of an interpretation based solely on WTO sources of law. Compare *infra* text accompanying notes 174–214 (arguing that, assuming new WTO transforms security exception into non-self-judging defense, indefinite meaning of exception would make it difficult for it to operate as effective or legitimate law), with *infra* text accompanying notes 215–238 (arguing for resort to non-WTO legal sources to resolve these shortcomings of constitutional perspective).

120. For a suggestion that this argument should be refuted, see Perez, *supra* note 99, at 408–10.

121. See JACKSON ET AL., *supra* note 20, at 301–04 (discussing fruition of FOGS, or Future of the GATT System, in new Trade Policy Review Mechanism (TPRM) for international surveillance of national policy, and creation of WTO as new international organization, but one which would “promote a sense of legal and practice continuity with the GATT”). Professor Jackson has suggested that the new institutional structure “offers more flexibility for future inclusion of new negotiated rules or measures which can assist nations to face the constantly emerging problems of world economics.” *Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Finance*, 103d Cong. 114 (1994) (statement of John H. Jackson, Hessel E. Yntema Professor of Law, the University of Michigan Law School).

122. The distinction drawn here is analogous to that, in customary law, between *lex lata* and *lege ferenda* in that the WTO might have simply codified a settled meaning or adopted, in a new law-creating act, an emerging legal principle. See LOUIS HENKIN ET AL., *CASES AND MATERIALS IN INTERNATIONAL LAW* 74 (3d ed. 1993) (describing *de lege ferenda* as emerging law reflecting initial state practices rather than repeated instances that make it law); *id.* at 492 (employing *lex lata* to mean currently binding legal rules). An analogy to rules governing the development of customary international law seems particularly appropriate since the dispute resolution process under the GATT reflects as much improvisation by the Contracting Parties as the GATT itself. See JACKSON ET AL., *supra* note 20, at 339.

Customary law is always relevant to the interpretation of a treaty. See Vienna Convention, *supra* note 61, art. 31, para. 3 (“There shall be taken into account, together with the context . . . (c) any relevant rules of international law applicable in the relations between the parties.”). This includes “international custom, as evidence of a general practice accepted as law.” Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1(b), in U.S. DEP’T OF STATE, *THE INTERNATIONAL COURT OF JUSTICE, SELECTED DOCUMENTS RELATING TO THE DRAFTING OF THE STATUTE* 151 (1946) [hereinafter *Statute of the ICJ*]. Custom, the ICJ has held, can bind a subset of the world community. See, e.g., *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Nov. 20) (premising its analysis on possibility of existence of regional customary law rule concerning right of asylum binding only in geographical

The national security exception is new in the WTO in the straightforward sense that it is included in the new multilateral trade agreements, which contain the old GATT national security exception.¹²³ Moreover, from the perspective of the WTO, these exceptions are also new in the sense of having a fundamentally different meaning. Accordingly, a coherent “constitutional” account of the national security exception needs to begin at the beginning, just as much of American constitutional law begins with an inquiry into the statutory and common law background of colonial and English law.

1. *The National Security Exception at the Founding*

Under accepted principles of treaty interpretation, determining the meaning of article XXI of the old GATT requires looking first to its text in good faith and in light of its object, purpose, and context; then to subsequent practice of the parties; and finally to its negotiating history.¹²⁴ Article XXI’s language is clearly self-judging, but under the Vienna Convention and customary international law, decisions of the Contracting Parties and the GATT Panels might qualify as “subsequent agreements” or “subsequent practice” authoritatively interpreting the GATT’s provisions.¹²⁵

But articles 31 and 32 of the Vienna Convention allow resort to nontextual sources of interpretation only where a provision’s text is ambiguous. The language of article XXI seems expressly to confer upon the GATT contracting party the power to make an unreviewable unilateral determination, since the provision applies to what “it considers” its “essential security interests.”¹²⁶ One might argue, however, that this conclusion conflicts with the central premise of treaty interpretation of “good faith.”¹²⁷ Nonetheless, the self-judging interpretation finds support in

region of Latin America). Custom cannot, however, fill in gaps that do not exist and thus rewrite a treaty. *But see* Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception*, 12 MICH. J. INT’L L. 558, 618–20 (1991) (questioning GATT Panel reticence to apply customary international law in GATT cases); Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549, 1557 (1991) (arguing that contemporary treaties create obligations that change in evolving circumstances).

123. Although parts of Subsection III.B.1’s analysis of the GATT security exception overlap with Section III.A’s explication of the bargain conception’s interpretation of the WTO security exception through the use of traditional tools of treaty interpretation, *see supra* text accompanying notes 89–118, the analysis is restated here to establish separately the baseline for evaluating in Subsection III.B.2 the transformation arguably effected by the adoption of the WTO.

124. *See* Vienna Convention, *supra* note 61, art. 31 (providing for primary means of interpretation such as text and subsequent practice); *id.* art. 32 (providing for secondary means of interpretation such as negotiating history).

125. *See id.* art. 31, para. 3(a) (defining “subsequent agreement”); *id.* art. 31, para. 3(b) (defining “subsequent practice”).

126. GATT art. XXI.

127. Vienna Convention, *supra* note 61, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); *see also* Perez, *supra* note 92, at 778–82 (discussing limited usefulness of this principle in arms control context, given, *inter alia*, salience of classified information).

negotiating history,¹²⁸ subsequent agreements,¹²⁹ and subsequent practice¹³⁰—most notably, in the Contracting Parties' discussion in 1949 of the U.S. claim that its security interests warranted imposition of sanctions against Czechoslovakia in what was apparently the first attempt by a state to assert the security exception. The summary of the discussion recorded the following view: “[E]very country must have the last resort on questions relating to its own security. On the other hand, the CONTRACTING PARTIES should be cautious not to take any step which might have the effect of undermining the General Agreement.”¹³¹ Authoritative legal

128. See James R. Wilch, *GATT and the Half-Life of Uranium Industry Protection*, 10 Nw. J. INT'L L. & BUS. 150, 182 nn.199–200 (1989) (reporting GATT drafters' reliance on only “the spirit” of exception as check against its abuse) (citations omitted).

129. See Decision Concerning Article XXI of the General Agreement, Nov. 30, 1982, GATT B.I.S.D. (29th Supp.) at 23–24 (1982) [hereinafter 1982 Decision]. The operative provisions state:

1. Subject to the exception in Article XXI(a), contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.
2. When action is taken under Article XXI, all contracting parties affected by such actions retain their full rights under the General Agreement.
3. The Council may be requested to give further consideration to this matter in due course.

Id.

The language seems to confirm the self-judging character of article XXI: Operative paragraph 1 is only precatory; operative paragraph 2 reaffirms only whatever rights parties may have under the GATT, without specifying what those rights, if any, might be; and operative paragraph 3 indicates the possibility of further action by the GATT Council, thus confirming that there may be a need for further action. *But see* Hahn, *supra* note 122, at 575 (reading these clauses to support non-self-judging interpretation of article XXI); P.J. Kuyper, *The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?*, 1994 NETH. Y.B. INT'L L. 227 (criticizing 1982 Decision as suggesting that claim of nullification or impairment of benefits might, as non-violation claim, survive assertion of exception or waiver as defense to *prima facie* case of nullification or impairment of benefits based on violation).

130. See Request of the Government of Czechoslovakia for a Decision Under Article XXIII, June 8, 1949, available in 1949 GATTPD LEXIS 2, at *7 (statement of U.K. representative Mr. Shackleton) [hereinafter Czechoslovakia Request]. This statement has been relied on by authoritative commentary on the GATT to manifest the self-judging character of article XXI. See JACKSON ET AL., *supra* note 20, at 984.

There have been only a handful of other cases of unilateral economic sanctions relying explicitly or implicitly on the GATT security exception. Commentators have discussed the following cases, although some do not involve explicit invocations of article XXI: Peru's import ban against Czechoslovakia in 1955; Ghana's ban on imports from Portugal in 1961 in relation to Portugal's continuing colonization of Angola; the U.S. ban on trade with Cuba since 1962; import bans by certain states of the German Federal Republic on Icelandic fish; Sweden's footwear import quota in the mid-1970s, terminated prior to GATT review; and the EC sanctions against Argentina because of the Falklands Islands invasion. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF THE GATT* 750–51 (1969); Donald N. Zillman, *Energy Trade and the National Security Exception to the GATT*, 12 J. ENERGY & NAT. RESOURCES L. 117, 124–26 (1994); see also Hahn, *supra* note 122, at 572–73 (noting that German Federal Republic, without relying expressly on article XXI, went so far as to argue that its import ban was justified as countermeasure for Iceland's prior extension of its exclusive fisheries zone in violation of customary international law, and that GATT was inapplicable); Richard Sutherland Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603, 619 nn.99–101 & nn.103–04 (1987) (noting Swedish claimed need to maintain domestic “production capacity in vital industries”). But none of these cases seems to depart from the received understanding of the Czechoslovak case.

131. Czechoslovakia Request, *supra* note 130, at *7 (statement of Czechoslovak representative Mr. Augenthaler).

commentary appears to have attached the greatest weight to the Czechoslovak case.¹³²

This is not to say that the Contracting Parties' discussion is not amenable to a contrary interpretation. The U.K. statement in the discussion of the U.S.-Czechoslovakia dispute may not be dispositive for at least two reasons. First, only one sentence, by using the imperative word "must," even suggests that the exception is self-judging. Meanwhile, the second quoted sentence may well undercut this suggestion. It refers to a need for "caution" by the "CONTRACTING PARTIES," which refers to caution by the GATT Contracting Parties acting in their collective capacity. Collective action by the Contracting Parties in this context must refer to action on the Czechoslovak complaint. It is not clear whether the CONTRACTING PARTIES' acceptance of an improper, though lawful, exercise of the self-judging right in article XXI or their rejection of the U.S. defense, perhaps driving the United States out of the GATT, "would have" had a greater effect in "undermining the General Agreement."

Second, treating the GATT debate as a formal opinion, the precise language of the summary was at best merely dictum. The nub of Czechoslovakia's complaint was that the United States had invoked article XXI in an overbroad way, "because the narrow reference in the text to war materials had been construed by the United States Government to cover a wide range of goods which could never be so regarded."¹³³ The United States, on the other hand, maintained that its reliance on article XXI was narrow and tailored to deny Czechoslovakia only a limited class of items, so that "there were no grounds for the accusation that the provisions of article XXI were extended to cover everything; for the commodities thus controlled constituted an extremely small proportion of the exports of the country."¹³⁴ Thus, the summing-up statement by the Chairman—that "the United States justified any discrimination which might have occurred in [sic] the basis of Articles XX and XXI and particularly on the ground of security covered by the latter"¹³⁵—was arguably a conclusion about the merits of the U.S. defense. Indeed, because the summation did not distinguish between article XX, which is clearly a defense on the merits, and article XXI, which under a self-judging interpretation is merely a procedural condition, it suggests that both could be seen as defenses on the merits. Therefore, the earliest, and thus most persuasive, example of subsequent practice may also be read not to require a self-judging interpretation of article XXI.

In sum, it is possible to read GATT precedent to leave open the possibility of a non-self-judging exception. Indeed, the view that the Czechoslovak case establishes the exception as self-judging is not universally

132. See, e.g., JACKSON ET AL., *supra* note 20, at 984.

133. See Czechoslovakia Request, *supra* note 130, at *7 (Statement of Czechoslovak representative Mr. Augenthaler).

134. *Id.* at *8 (statement of U.S. representative Mr. Evans).

135. *Id.* (statement of Chairman).

held.¹³⁶ Moreover, even before the new WTO, some had even expressed doubt whether, regardless of the best reading of the old GATT law, the United States could as a practical matter avoid an adverse outcome were it ever to submit itself to the jurisdiction of the GATT on this issue in the post-Cold War 1990s.¹³⁷ Nonetheless, most commentators continue to take the view that the old GATT began only where national security interests, as determined by the Contracting Parties, ended.¹³⁸

2. *Revised State Practice Leading to the WTO*

Even if GATT Article XXI was originally self-judging, the WTO's adoption might have rendered the exception non-self-judging. As part of the *travaux préparatoires*, broadly conceived, of the new WTO, Panel Reports and related materials might support this interpretation.¹³⁹ An alternative rationale could be drawn from an analogy to U.S. administrative law that might well be consistent with the constitutional conception, given Jackson and Croley's consideration of the administrative deference rationale.¹⁴⁰ Under the administrative law analogy, the "reenactment" of the GATT national security exception by the members of the WTO, as well as its extension to the other multilateral trade agreements, "without making any material changes in wording," would permit a WTO dispute settlement Panel to "presume that [WTO membership] intends to incorporate authoritative . . . interpretations of that language into the reenacted" national security exceptions.¹⁴¹ To develop these arguments, we need to consider the legal significance of GATT Panel reports, both as subsequent practice and as precedent.

136. For example, under at least one commentator's reading of even the GATT 1947 negotiating history, it was expected that invocations of article XXI would be "subject to review in principle." Hahn, *supra* note 122, at 568; cf. Wilch, *supra* note 128.

137. See Andreas F. Lowenfeld, *Economic Sanctions: A Look Back and a Look Ahead*, 88 MICH. L. REV. 1930, 1943 (1990) (reviewing BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS* (1988)). Lowenfeld, a former Deputy Legal Adviser, thought it "doubtful that the United States would prevail in the GATT Council in the 1990s as it did at the height of the Cold War." *Id.*

138. See Clinton E. Cameron, Note, *Developing a Standard for Politically-Related State Economic Action*, 13 MICH. J. INT'L L. 218, 246-47 (1991) (discussing national security with respect to GATT 1947 and treaties of Friendship, Commerce, and Navigation); Richard D. Porotsky, Note, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 929 (1995) (discussing national security with respect to GATT 1947 and GATT 1994).

139. See Vienna Convention, *supra* note 61, art. 31, para. 4 (permitting "a special meaning" to be "given to a term if it is established that the parties so intended"); *id.* art. 32 (permitting "recourse . . . to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion" to "confirm the meaning resulting from the application" of the primary means of interpretation "or to determine the meaning when the interpretation" is "ambiguous or obscure . . . or leads to a result which is manifestly absurd or unreasonable").

140. See *supra* text accompanying notes 74-78.

141. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 814 (2d ed. 1995) (citing Lorillard v. Pons, 434 U.S. 575 (1979)).

Under old procedures, the GATT Contracting Parties could adopt Panel Reports only by consensus.¹⁴² An adopted Panel Report would certainly be given, even if not *stare decisis* effect (given the formal absence of such a doctrine in international adjudication), at least persuasive effect in future GATT deliberations as authoritative evidence of the meaning of the GATT.¹⁴³ But normal principles of treaty interpretation militate against treating an unadopted GATT Panel Report as an authoritative interpretation of the old GATT.¹⁴⁴ That said, the particular circumstances of a report, even if it were not adopted by the Contracting Parties, might give it legal significance in the development of a new or emerging view about the meaning of particular language of the GATT.¹⁴⁵ This indeed appears to be

142. The GATT text is not unambiguous on whether consensus is required. Compare GATT art. XXV(4) ("Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast."), with *id.* art. XXV(1) ("Whenever reference is made in this Agreement to the contracting parties acting jointly they are designated as the CONTRACTING PARTIES."), and *id.* art. XXIII(2) ("The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate."). Subsequent GATT practice is clear, however. See JACKSON ET AL., *supra* note 20, at 342-43 (describing GATT practice for "decisions" to be made by consensus).

143. See JACKSON, *supra* note 43, at 68.

144. Article 31(3)(a) admits only a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," and article 31(3)(b) admits only subsequent practice that "establishes the agreement." See Vienna Convention, *supra* note 61, at 93-94. However, only the adoption of a Panel Report by the Contracting Parties might be said to be an "agreement between the parties," setting aside the further question whether the adoption constitutes an agreement with the legal reasoning employed in the Panel Report "regarding the interpretation or application" of the GATT. Moreover, an unadopted report cannot be said to "establish the agreement" of all the Contracting Parties, particularly when the losing state blocked its adoption by the Contracting Parties. As John Jackson has argued: "It would seem that such reports would not be particularly influential in the GATT and would not even bind the parties to the particular dispute as to that dispute itself. . . . Furthermore, it seems clear that the unadopted report is in no way a 'decision' of the Contracting Parties" JACKSON, *supra* note 43, at 68; see also John H. Jackson, *The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections*, in TOWARD MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS 149, 160 (Niels Blokker & Sam Muller eds., 1994) [hereinafter TOWARD MORE EFFECTIVE SUPERVISION] (noting also, albeit with some reservations, that agreement of the Contracting Parties might be established "[i]f later panels follow prior panels, this would add to the evidence of practice, and if there were no considered counter examples").

145. Jackson notes:

[An unadopted Panel Report] may have some influence because it is well reasoned and the panelists have a high reputation. Thus, even such a panel report could conceivably be part of the overall practice of GATT, which could be used at some future time in interpreting the GATT. This would be particularly so when, after time elapsed, it appeared that most or all Contracting Parties had accepted the implications of the panel report. Yet, if even one Contracting Party involved in the panel proceeding remained adamantly opposed to it, general principles of international law would suggest that that party would not be bound, and furthermore such holding out would undermine the practice.

JACKSON, *supra* note 43, at 68; cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102 cmt. d (1987) ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."). But see HENKIN ET AL., *supra* note 122, at 88-89 (noting that "[s]tates have rarely claimed or granted an exemption on the basis of the dissenting state principle (sometimes described as the principle of the persistent objector)") (citations omitted). Jackson's approach, equating dissent to precedent with the so-called "persistent objector" exception to customary international law, hints at civil law's efforts to assimilate precedent as a kind of customary law in legal systems that ordinarily do not concede that

the approach adopted by the WTO/DSB Appellate Body, which has refused to treat even GATT Panel Reports adopted by the Contracting Parties as “subsequent practice” under customary rules of treaty interpretation. It has, however, regarded them as *de facto* precedent, since they “create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”¹⁴⁶

Indeed, while the Appellate Body’s rhetoric has reaffirmed the bargain conception,¹⁴⁷ in practice the Appellate Body and DSU Panels have employed precedent as a tool for constitutional reasoning that seeks to realize the larger purposes, rather than the specific intentions, of the WTO membership. For example, in *Japan Taxes on Alcoholic Beverages*, the Appellate Body cited a series of GATT Panel Reports, particularly *Brazilian Internal Taxes*, to establish that the national treatment obligations extended both to products bound under article II of the GATT and to those products that are not bound.¹⁴⁸ The Appellate Body intimated that these precedents—even though, strictly speaking, they were not even subsequent practice—had higher status in the interpretive hierarchy under WTO law than preparatory materials. The principles stated in these precedents, the Appellate Body asserted, were “confirmed by the negotiating history of Article III.”¹⁴⁹ Panel

judges can make any law. See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW, CASES-TEXT-MATERIALS* 620–22 (5th ed. 1988).

146. See World Trade Organization, *Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body* *9, WT/DS8/B/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996), available in 1996 WL 738800 [hereinafter *Japanese Alcoholic Beverages Appellate Body Report*], *overruling* World Trade Organization, *Japan—Taxes on Alcoholic Beverages, Report of the Panel*, para. 6.10, WT/DS8/R, WT/DS10/R, WT/DS11/R (July 11, 1996) [hereinafter *Japanese Alcoholic Beverages Panel Report*]. In reaching its conclusion, the Appellate Body attached particular weight to the fact that the new WTO conferred upon WTO political bodies power to adopt interpretations by a supermajority, thus implying, the Appellate Body argued, that other methods of interpretation were foreclosed. See *Japanese Alcoholic Beverages Appellate Body Report, supra*, at *8; cf. Jackson, *supra* note 144, at 158 (noting that “there clearly is a ‘*de facto*’ precedential effect operating” under GATT dispute settlement system).

The DSU’s behavior in this respect does not distinguish it from the ICJ. For the views of a former judge of the ICJ, see MOHAMMED SHAHABUDDEN, *PRECEDENT IN THE WORLD COURT* 165–71 (1996), which argues that, despite the absence of a formal doctrine of *stare decisis* in its Statute, the ICJ nonetheless follows precedent.

147. The Appellate Body stated: “The WTO Agreement is a treaty—the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain.” *Japanese Alcoholic Beverages Appellate Body Report, supra* note 146, at *9.

148. See *id.* at *10, *20 n.38 (citing *Brazilian Internal Taxes*, June 30, 1949, II GATT B.I.S.D. at 181, para. 4 (1952)).

149. *Id.* at *10. It should be noted, however, that in this particular case the negotiating history of the GATT was especially unclear. One delegate justified the extension of the national treatment principle to unscheduled items on the ground that the rule was designed to channel all protectionist national policies toward permitted forms, such as tariffs or subsidies; another delegate argued, by contrast, that the extension of the rule to unscheduled items could be defended as necessary to avoid renegotiation of what would be included in the schedule. See *id.* at *20 n.39 (citing EPCT/TAC/PV.10 at 3, 33). Thus, the negotiating history presented a conflict between the GATT as a system of rules to discipline national protectionism versus the GATT as a forum for negotiation and enforcement of a balance of advantages. Given this discrepancy, it is possible the Appellate Body relied on negotiating history only to confirm principles established by precedent in order to avoid having to resolve the divergent strands of the negotiating history.

Reports have been equally receptive to the use of precedent to protect the basic policies of the WTO.¹⁵⁰

Reading Panel Reports from this point of view facilitates taking account of the dissatisfaction expressed by the parties to the GATT in the final decade of the Cold War, when the use of economic sanctions by major powers proliferated and the Contracting Parties expressed a desire that the article XXI exception should be made more predictable.¹⁵¹ The more difficult question, however, is divining what particular interpretation of article XXI recent GATT Panel Reports reflected. This is especially true for the GATT cases involving U.S. economic sanctions at the end of the Cold War, which laid the foundation for the constitutional approach's argument for a non-self-judging national security exception.

In *United States Imports of Sugar from Nicaragua*,¹⁵² the United States declined to invoke article XXI or to block adoption of the Panel Report in Nicaragua's claim that the United States had violated article XIII(2) by cutting short Nicaragua's sugar import quota without consultations. The United States chose not to invoke article XXI even though it would later argue that Nicaragua's activities during roughly the same time frame, to which the United States had responded with covert paramilitary operations and which presumably motivated the U.S. action on Nicaragua's sugar quota, had implicated U.S. national security interests.¹⁵³

By contrast, in *United States Trade Measures Affecting Nicaragua*,¹⁵⁴ after U.S. paramilitary operations became public and Nicaragua brought an application to the ICJ, the U.S. President took steps under U.S. law to

150. See World Trade Organization, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Report of the Panel, para. 7.15, WT/DS33/R (Jan. 6, 1997) (relying on Japanese Alcoholic Beverages Appellate Body Report, *supra* note 146, to conclude that it was not bound by precedent, but nonetheless distinguishing precedents cited by parties as interpreting "different agreements in different contexts"); World Trade Organization, *Canada—Certain Measures Concerning Periodicals*, Report of the Panel, paras. 5.7–9, WT/DS31/R (Nov. 8, 1996) (relying on precedent to reject Canadian argument for broadening scope of article XX(d) exception in way that would have permitted Canada to protect its cultural integrity); World Trade Organization, *United States—Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, Report of the Panel, paras. 7.8–10, WT/DS24/R (Oct. 17, 1996) (relying on "previous panel reports" to reject argument for extension of deferential standard of review to dispute arising under Agreement on Textiles and Clothing, which, unlike GATT Antidumping Code, does not specifically provide for such standard); World Trade Organization, *Brazil—Measures Affecting Desiccated Coconut*, Report of the Panel, para. 261, WT/DS22/R (Oct. 17, 1996) (distinguishing cited precedent as "made in different circumstances under a different regime of obligations").

151. See 1982 Decision, *supra* note 129, at 24, para. 3.

152. See *United States Imports of Sugar from Nicaragua*, Mar. 13, 1984, GATT B.I.S.D. (31st Supp.) at 67 (1985) (Report of the Panel).

153. See *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 116 (June 27) (holding inapplicable the provision in U.S.-Nicaragua Friendship, Commerce and Navigation (FCN) Treaty which allowed United States to escape that Treaty's obligations if United States considered it in its "essential security interests"; but noting that, unlike GATT exception which contained subjective language, FCN Treaty contained objective formulation); *cf.* Whitt, *supra* note 130, at 630 (calling for amendment of GATT to conform to FCN formulation).

154. See *United States Trade Measures Affecting Nicaragua*, para. 1.3, at *2–3, available in 1986 GATTPD LEXIS 1 (G.A.T.T. Oct. 13, 1986) (unadopted Report of the Panel) [hereinafter *Nicaragua Trade Measures*].

define the situation in Nicaragua as a threat to U.S. security interests.¹⁵⁵ At this point, the United States, reportedly with the support of Australia, Canada, and the European Union, argued before the GATT that there was “no basis for GATT Contracting Parties to question, approve, or disapprove the judgment of each Contracting Party as to what is necessary to protect its national security interests.”¹⁵⁶ Nonetheless, at U.S. insistence, the terms of reference of the Panel convened to address Nicaragua’s claims explicitly precluded consideration of the motivation or validity of the U.S. assertion of article XXI.¹⁵⁷

The import of these precedents is debatable. Because the United States did not assert its article XXI rights before either Panel, it is possible that the *Nicaragua Trade Measures* Panel’s language questioning its right to do so was at best dictum or even, as the United States argued, *ultra vires*.¹⁵⁸ Yet, because the Contracting Parties failed to adopt the Panel Report only because Nicaragua objected to the Panel Report as insufficiently critical of the United States,¹⁵⁹ it is hard to say that the Contracting Parties rejected this dictum. Given such doubts, the Panel Report itself might be largely irrelevant, so that the U.S. success in obtaining terms of reference that precluded consideration of the validity of its assertion of the national security exception would confirm, as one noted commentator has suggested, the “common law” under the GATT that the exception was self-judging.¹⁶⁰

155. The U.S. failure to assert article XXI in the GATT Panel, and subsequent adoption by the Contracting Parties, may have been connected to the fact that the original U.S. measures challenged by Nicaragua—the withdrawal of Nicaragua’s sugar quota in violation of article XIII(2), was not explicitly grounded by the U.S. on its “essential security interests.” It was only later, in 1985, that President Reagan imposed economic sanctions against Nicaragua pursuant to domestic legal authorities that required him to determine that Nicaragua posed a “threat” to U.S. “national security.” JACKSON ET AL., *supra* note 20, at 984–85 (citing Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985)); *see also* International Emergency Economic Powers Act, 50 U.S.C. § 1701(a) (1994) (granting certain authorities to President in case of “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States,” if President “declares a national emergency with respect to” that threat). *But see* Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162, 1210 n.199 (arguing that United States “would have been wise” to invoke article XXI in sugar quota case and explaining U.S. decision to do so in subsequent case as reflecting its “possibly having learned from experience”).

156. *See* JACKSON ET AL., *supra* note 20, at 985 (quoting U.S. Ambassador Peter Murphy and citing 2 Int’l Trade Rep. (BNA), No. 23, at 765 (June 5, 1985)); 2 Int’l Trade Rep. (BNA), No. 23, at 765 (June 5, 1985) (quoting Ambassador Murphy as saying further that “[the] GATT is not an appropriate forum for debating political and security issues”). One might ask whether the European Union’s position in that case raises an estoppel against its challenging the United States’s assertion of the exception in the Helms-Burton case.

157. *See* *Nicaragua Trade Measures*, *supra* note 154, para. 1.3, at *2–3 (citing meeting of Council on Mar. 12, 1986).

158. *See id.* para. 4.5 n.1, at *13 (noting U.S. objection to inclusion in report of comments relating to article XXI on grounds that this was outside terms of reference).

159. *See* JACKSON ET AL., *supra* note 20, at 986.

160. Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE HARMONIZATION: PREREQUISITES FOR FREE TRADE? 95, 147 & n.171 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (citing Nicaragua case terms of reference as evidence that “GATT has arrived at a common-law understanding that bars any GATT review of the justification for [national security] measures”).

Nonetheless, the fact that the United States felt the need to insist on specific terms of reference on this point and the power of the reasoning of the Panel Report itself tell a different, and perhaps more compelling, story. Even though its terms of reference precluded analysis of whether the United States had violated the GATT in invoking article XXI, the Panel nonetheless felt required to consider Nicaragua's argument that, even if article XXI provided a defense or excuse for any violation of the GATT, the jurisprudence of the GATT still gave Nicaragua a claim for so-called non-violation nullification or impairment of benefits. According to the Panel, this theory, if successful, might have entitled Nicaragua to a GATT recommendation that the United States remove the embargo.¹⁶¹ In responding to this remedial theory, the United States explicitly argued that under its article XXI rights, it was not required to, and therefore would not, comply with a recommendation that it terminate its embargo against Nicaragua, a recommendation that the United States considered *ultra vires* for the Panel as well as for the GATT.¹⁶²

The Panel agreed with the U.S. conclusion but not with its reasoning. Relying on GATT jurisprudence in non-violation cases, the Panel stated that a recommendation would be appropriate only if it "appears to afford the best prospect of an adjustment of the matter satisfactory to both parties."¹⁶³ Thus, in pointing to the United States's expressed unwillingness to revoke the embargo to buttress its conclusion that "recommending the withdrawal of the embargo would not seem to offer the best prospect of an adjustment of the matter satisfactory to both parties,"¹⁶⁴ the Panel accepted the U.S.

161. See Nicaragua Trade Measures, *supra* note 154, para. 4.8, at *17. The new DSU, as Jackson makes clear in *Misunderstandings*, would have defeated the argument for mandatory withdrawal of measures in non-violation cases. See Jackson, *supra* note 54, at 63.

162. The United States maintained that

earlier panels which had examined non-violation cases had recommended that the party complained against consider ways and means to remove the nullifying or impairing measure because they considered this recommendation to be appropriate in the circumstances. In the present case, such a recommendation would not be appropriate because the United States had made it clear from the outset that the embargo was *motivated by security considerations* and that any change in it was wholly dependent on such considerations. . . . The United States further said that normally the question of nullification or impairment required an examination of the "reasonable expectations" of the parties concerned. However, in such an examination the United States would argue that it had no expectation that the security situation giving rise to the embargo would arise, and the Panel would be drawn into a consideration of the political situation motivating the United States to invoke Article XXI. Such consideration was properly excluded by the terms of reference and to arbitrate such matters would be outside the competence of the Panel and of the CONTRACTING PARTIES.

Nicaragua Trade Measures, *supra* note 154, para. 4.9, at *18-19 (emphasis added); see also *id.* para. 4.15, at *26-27 ("[The United States] had cautioned from the outset that the GATT dispute settlement procedures were ill-suited to help resolve cases involving the invocation of Article XXI.").

163. *Id.* para. 5.10, at *33-34 (quoting Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, II GATT B.I.S.D. at 188, 195 (1952)).

164. *Id.* para. 5.10, at *34. Similarly, in response to Nicaragua's request for a "decision to authorize Nicaragua to suspend the application of obligations to the United States," the Panel held that, given the U.S. position on the continuation of the embargo, such a decision—entailing review of the "basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party"—would be equally moot. *Id.* para. 5.11, at *35.

assertion only as a factual predicate for the exercise of its remedial discretion. By endorsing only this dimension of the U.S. argument, the Panel implicitly refused to lend credence to the U.S. position that article XXI was self-judging, a claim that had formed the basis for the United States's theory of the case in respect of a remedy for non-violation nullification and impairment. Indeed, when the Panel specifically called into question the ability of the GATT to resolve disputes between Contracting Parties, it cited only the terms of reference as a limit on its power to review article XXI,¹⁶⁵ implying perhaps that article XXI itself, contrary to the U.S. argument, would not preclude such review.

One might, therefore, characterize the Panel Report's theory as a manifestation of the limitations of the procedural framework of GATT Article XXIII, which grew out of a non-judicial model of dispute resolution as a negotiating forum for the satisfactory resolution of disputes.¹⁶⁶ In this connection, a purely procedural interpretation of article XXI—one in which a state needs only to satisfy the procedural condition of invoking the security exception—would have been consistent with the expressed intention of the GATT drafters that the GATT dispute resolution mechanism “serve as the limit on Article XXI.”¹⁶⁷ But the new Dispute Settlement Understanding of the WTO, which conceives the dispute settlement system as “a central element in providing security and predictability to the multilateral trading system,” entrenches a more adjudicative model as the framework for WTO dispute resolution.¹⁶⁸ Because each nation could block consensus on adoption of a Panel Report under the old GATT system, its concurrence on terms of reference for a Panel was essential. With the new requirement for negative

165. The Panel asked the following rhetorical question:

If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in the provision? If the CONTRACTING PARTIES give a panel the task of examining a case involving an Article XXI invocation *without authorizing it* to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2? Are the powers of the CONTRACTING PARTIES under Article XXIII:2 sufficient to provide redress to contracting parties subjected to a two-way embargo?

Id. para. 5.17, at *41–42 (emphasis added).

166. See JACKSON, *supra* note 130, at 163–89 (tracing evolution of GATT dispute resolution procedures from politics to law).

167. Michael Gaugh, *GATT Article XXI and U.S. Export Controls: The Invalidity of Nonessential Non-Proliferation Controls*, N.Y. INT'L L. REV., Summer 1995, at 51, 69; see also Wilch, *supra* note 128, at 182 n.200 (citing U.N. Doc. E/PC/T/A/SR 33, at 4–5 (1947)).

168. See DSU, *supra* note 26, art. 3(2). The new regime of presumptive adoption of Panel and Appellate Body Reports absent consensus to the contrary is a manifestation of this new adjudicative structure of the WTO/DSU. See *id.* art. 16.4 (providing for adoption of Panel Reports); *id.* art. 17.14 (providing for adoption of appellate body reports); *id.* art. 22.6 (providing for authorization of suspension of concessions or other obligations). Some commentators have even questioned whether the WTO/DSU goes too far, risking the legitimacy of the dispute settlement system by empowering Panels to render decisions binding on the parties in cases where compliance might be wanting. See ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 364 (1993).

consensus to block adoption, the new adjudicative system eliminates blocking power with respect to terms of reference as well.¹⁶⁹

Accordingly, the central premise for the Panel Report's reasoning in *Nicaragua Trade Measures* no longer obtains: WTO dispute settlement bodies, unlike GATT Panels, are no longer colleges of arbitrators applying only the legal rules, and sometimes only problematical versions of the legal rules, that the parties to the dispute agree for them to apply.¹⁷⁰ It is thus fair to translate the reasoning of the Panel Report concerning substantive issues to the new procedural context created by the WTO/DSU. The Panel's suggestion that only the terms of reference precluded it from reviewing the validity and motivation for the U.S. invocation of article XXI thus reflects an emerging view of a preferred interpretation of GATT Article XXI that is more coherent with the new adjudicative structure of the WTO/DSU than the earlier view that invocation of article XXI is not a matter fit for Panel review.¹⁷¹

In sum, an interpretation based on the structural effects of the new dispute resolution procedures for GATT remedial law should have implications for a substantive clause, like article XXI, that previously was viewed entirely as a procedural condition.¹⁷² No Panel Report has yet

169. See JACKSON ET AL., *supra* note 20, at 342-43 (discussing move from positive consensus for adoption of Panel Report to adoption absent negative consensus in cases of "violation of obligations or other nullification or impairment of benefits under the covered agreements") (citing DSU, *supra* note 26, art. 23.1). Similarly, the WTO/DSU automatically permits retaliation by way of suspension of concessions to the losing party. See *id.* at 343-44; cf. George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 392 (1996) ("We believe that the negotiating history of the WTO demonstrates that the more demanding levels of cooperation achieved by the Uruguay Round would not have been possible without its having reduced," through automatic authorization for retaliation, "the likelihood of self-interested exploitation by member states.").

170. Cf. Hahn, *supra* note 122, at 620 (calling precisely for standardized terms of reference that would allow Panels "to examine [article XXI], *sua sponte*, if necessary"). Presumably, Hahn's recommendation would include a case between two WTO members in which one invoked article XXI but both took the position that article XXI was self-judging. It should be noted that the GATT did issue standardized terms of reference that did not on their face permit a state to exclude Panel review of the legality of its invocation of article XXI. See Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT B.I.S.D. (36th Supp.), at 63 (1989) [hereinafter Decision on Procedures] (providing, in paragraph F(b), that "Panels shall have [certain] terms unless the parties to the dispute agree otherwise"). The effect of this improvement is limited, however, since paragraph F(b) does not disturb each party's preexisting right to block consensus on the formation of a Panel, thus affording each the opportunity to compel the other party to agree to revised terms of reference, as is permitted by paragraph F(b).

171. The argument draws on the transformation of WTO dispute settlement to effect a substantive change in article XXI. This legal argument should not be confused with the practical point that, even if a Panel purported to review the invocation of article XXI, the DSU will now no longer permit the losing state to block consensus. Cf. Gaugh, *supra* note 167, at 71 (drawing connection between article XXI and new DSU but only in this latter, practical sense).

172. The failure of Nicaragua and Argentina to secure an interpretive note to article XXI in the Uruguay Round negotiations specifically supplying content for an interpretation of article XXI does not disturb this structural interpretation of the relation between article XXI and the WTO/DSU. The absence of consensus on the precise meaning of article XXI is a better explanation for the failure to agree on an interpretive note than the objections of only a few states that article XXI should remain self-judging. *But see* THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 1877-78 (Terence P. Stewart ed., 1993) (discussing Nicaraguan proposal and giving credence to both rationales: "Other delegations, however, asserted that any attempt to devise a test for the application

addressed the issue, however.¹⁷³ But if Helms-Burton were to lead to a Panel Report on the issue that adopted the constitutional perspective and reviewed the legality of the invocation of the national security exception in accordance with a standard of objective good faith, the Panel still would need to find an adequate basis for determining when that standard was met.

Subsection III.B.3 will show that the WTO/DSB would likely fail in that effort—if its legal analysis were limited, as the constitutional approach requires, to arguments framed solely in terms of WTO law. In light of that failure, Part V of this Article will attempt to synthesize the insights of the bargain and constitutional conceptions and advance an alternative approach for interpreting WTO law.

3. *An Authoritative Interpretation Deficit in WTO Law*

Unlike treaty interpretation, which permits resort to “any relevant rules of international law,”¹⁷⁴ constitutional interpretation presupposes that the “constitution,” however it is defined,¹⁷⁵ is the ultimate manifestation of the will of the sovereign, however that term is defined.¹⁷⁶ Thus, the

of Article XXI was unrealistic in light of the sensitivity of the issues involved, and because ultimately only the contracting party imposing the measure could be in a position to judge its national security interest.”) (citing Note on Meeting of 27–30 June 1988, GATT Doc. No. MTN.GNG/NG7/8 (July 21, 1988), at 2). The conclusion that the new exceptions under the WTO are non-self-judging is underscored by the fact that Nicaragua sought an “interpretive note,” rather than a revision of article XXI, thus suggesting that the only question technically before the CONTRACTING PARTIES was whether to confirm the Nicaraguan understanding that article XXI was not self-judging. The decision not to adopt an interpretive note is thus fully consistent with the conclusion that none was necessary in light of the common understanding that, whatever article XXI actually meant, it would not be self-judging.

173. Nor did any GATT Panel address the question again under the GATT 1947 regime. Nonetheless, in *United States—Restrictions on Imports of Tuna*, available in 1994 GATTPD LEXIS 7 (G.A.T.T. June 14, 1994) (Report of the Panel) [hereinafter *Restrictions on Imports of Tuna*], a case that arose under pre-WTO dispute settlement procedures, Australia as an interested third party sought to distinguish article XX exceptions from article XXI exceptions by arguing: “Article XX was more restrictive. Article XX exceptions could not be invoked to justify any trade measure applied for the purposes of adoption or enforcement of any policy or practice.” *Id.* at para. 4.10, at *123. One reading of Australia’s distinction is that it believed article XXI does permit “any” trade measure, so long as it is invoked “for the purpose” articulated in that provision. A GATT Panel’s scrutiny of the motive for invocation of article XXI then would be implicit.

174. Vienna Convention, *supra* note 61, art. 31, para. 3(c).

175. See Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter*, 31 TEX. INT’L L.J. 353, 373–81 (1996) (discussing, preliminary to defense of fundamental revision in meaning of U.N. Charter without formal amendment, rationales for employing constitutional interpretation to describe U.N. law); see also *infra* note 274 (relating H.L.A. Hart’s suggestion for locating in multilateral treaties “rules of recognition” in international law to this Article’s argument for extension of comity by WTO for law of United Nations).

176. See, e.g., W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 869 (1990) (arguing that international law now protects “the people’s sovereignty rather than the sovereign’s sovereignty”). If “constitutional” international law protects the “people’s sovereignty,” then it must grapple with the question of whether a global community exists sufficient to constitute a global “people.” See *id.* For a recent debate on this point, compare THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 11 (1995), noting that there is “an emerging sense of global community,” with Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV.

constitutional conception of WTO law employed in Subsection III.B.2 to construct the non-self-judging interpretation of the security exception relied only on arguments drawn from WTO sources. The question this Section considers is whether the substance of the security exception can be defined, also using only WTO sources, in a way that supplies adequate standards for WTO/DSB review.

Of course, this formulation of the issue begs the prior question of what constitutes an "adequate" level of determinacy that would enable the WTO/DSB effectively to review a state's assertion of the security exception. At the extreme, one might argue that that practice under NAFTA suggests that even a vague non-self-judging interpretation of the national security exception might be useful in deterring abuse. For example, the possible influence of the clearly non-self-judging NAFTA security exception for the energy sector on U.S. policy on uranium imports from Russia suggests that a non-self-judging exception could play a role in constraining state conduct even if its applicability were doubtful.¹⁷⁷ In that case, however, the agreed non-self-judging character of the exception in the energy sector established a clear baseline for establishing GATT and NAFTA violations.¹⁷⁸

Other practice, however, suggests that, in some cases at least, there might be means short of invalidating the assertion of the security exception that provide adequate deterrence from abuse. In implementing GATT Article XXI(a)'s separate injunction that the GATT not be construed "to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests,"¹⁷⁹ the U.S. Department of Commerce reconciled competing demands for access to sensitive information in unfair trade practice cases against the national security interest in avoiding disclosure by giving less weight than it otherwise would to the evidence actually supplied in the proceeding by the state pleading the exception.¹⁸⁰ But this technique for accommodating the competing interests of disciplining protectionism and protecting essential national security interests might not be available under GATT Article XXI(b)'s broader safe harbor that the GATT "not be construed . . . to prevent any contracting party from taking any action."¹⁸¹ Burdening the exercise of a WTO member's rights under GATT Article XXI(b)—unlike merely drawing

1944, 1951 (1997) (book review), stating, in a review of Franck's book, that "there is no global community of people (as opposed to an artificial, legally constructed community of states)."

177. See *supra* text accompanying notes 99–105.

178. See *supra* text accompanying note 98.

179. GATT art. XXI(a).

180. The Department of Commerce occupied a similar stance in the instance of Yugoslav nitrocellulose dumping. In respect of Yugoslavia's invocation of article XXI(a)'s right not to "furnish any information the disclosure of which" it considered "contrary to its essential security interests," the Department of Commerce took the position that it would not be appropriate either to burden Yugoslavia's exercise of its article XXI rights by drawing adverse inferences from its refusal to furnish requested information or to eviscerate U.S. antidumping laws and undercut the GATT Antidumping Code by using without question information supplied by Yugoslavia favorable to its position in the dispute on the merits. See *Final Determination of Sales at Less than Fair Value; Industrial Nitrocellulose from Yugoslavia*, 55 Fed. Reg. 34,946, 34,947–48 (1990).

181. GATT art. XXI(b).

adverse inferences from the failure, pursuant to article XXI(a), to supply evidence in an single unfair trade practice case—may well come dangerously close to “preventing” the exercise of those rights. In any event, even if indirect approaches could in the short term provide some level of deterrence for abuse of the security exception, it is doubtful that constructive ambiguity in the legal standard could in the long term prevent an ostensibly non-self-judging security exception from becoming a dead letter. The boy was able to cry wolf only so many times. Thus, the integrity of the security interests exception as a legal construct demands that it have at least some core meaning, even if there is substantial vagueness at its perimeter.¹⁸²

The logical place to look for a core meaning is in cases implicating the traditional policies of the GATT from which the WTO arose. From this standpoint, the threat posed by the security exception consists of theoretically limitless possibilities for a state taking an especially broad view of what constitutes its economic security and arguing that its “essential” interests under article XXI are jeopardized, a danger that may have been exacerbated during the period immediately prior to the creation of the WTO.¹⁸³ Perhaps overreacting to this risk, one commentator has argued that the national security exception is inapplicable even to civil nuclear power trade,¹⁸⁴ notwithstanding the well-known risk that civil nuclear power can translate into military potential. Another commentator has argued the exception should be limited to cases where it is invoked to respond to an unlawful act.¹⁸⁵ Rather than ignore the concerns underlying the security

182. Determinability can never be exact, of course. See JULIUS STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 268–74 (1964), reprinted as Julius Stone, *The Indeterminacy of Holdings*, in *ANALYTIC JURISPRUDENCE ANTHOLOGY* 164–66 (Anthony D'Amato ed., 1996) [hereinafter *ANTHOLOGY*] (noting that precedents operate at various levels of generality). But the weight of law as a constraint on behavior is not fatally undermined by this inescapable fact. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 181–86 (1991), reprinted as Frederick Schauer, *Generalizations*, in *ANTHOLOGY*, *supra*, at 166 (arguing that “it is a mistake to assume that the decision-maker . . . is largely unconstrained in determining what events are assimilable with what other events”).

183. One commentator has suggested that the end of the Cold War has changed the meaning of security to include economic factors. See Zillman, *supra* note 130, at 124–26. But he fears that the “extension of ‘essential security interests’ beyond the purely military . . . could justify almost any trade restriction under GATT Article XXI.” *Id.* at 126.

184. For an argument that even the “fissionable materials” and “supplying a military establishment” exceptions were unavailable for subsequently phased-out restrictions on U.S. enrichment of foreign source uranium, on the theory that the exception does not apply to trade in uranium used for civilian power plants if a separate supply is available, see Wilch, *supra* note 128, at 185–87 nn.223–30. See also Leonard E. Santos, *The National Security Exception to Free Trade*, 30 *FED. BAR NEWS & J.* 293 (1983). Interestingly, Wilch also seems to believe that the maintenance of a domestic uranium industry is as weakly related to the “supply of a military establishment” as the maintenance of the Swedish footwear industry was for Sweden’s military establishment, given the availability of alternative channels of supply. See Wilch, *supra* note 128, at 186; cf. THEODORE H. MORAN, *AMERICAN ECONOMIC POLICY AND NATIONAL SECURITY* 93 (1993) (framing this insight as corollary of antitrust principles). Moran also notes a cartoon lampooning the Swedish footwear position. See *id.* at 47; cf. Whitt, *supra* note 130, at 619 (discussing Swedish footwear national security argument).

185. See Hahn, *supra* note 122, at 617. This position has no textual foundation and seems to suppose that the WTO remedial system should be subordinated to the general international law of remedies. See *id.* at 610 (expressing dismay at Panel’s statement in Nicaragua Trade Measures, *supra*

exception, as these proposals seem to do, it would be better to interpret the security exception so as to balance the competing goals of disciplining the protectionist policies of members against preserving member states' legitimate right to protect, as the text of article XXI demands, only their "essential" security interests.

If so, then the paradigm case for discovering the core meaning of the security exception is a state's employment of strategic trade policies—particularly given the risk of abusive reliance on the exception for protectionist purposes that are not at the heart of essential security interests.¹⁸⁶ In a strategic trade policy case, theoretical tools might be able to frame an objective test for determining whether a state has legitimate grounds for fearing that another state could secure a trade-related national security advantage. It has been argued, for example, that a state's acquisition of market share that would take an international market over a specified level of concentration would be of strategic significance.¹⁸⁷

In practice, however, market power tests based on market share are difficult to implement. There almost certainly will be a shortage of reliable information that would facilitate a consensus on various factual determinations—such as determining price elasticities of demand,¹⁸⁸ relevant geographic and product markets,¹⁸⁹ and whether there are barriers to entry¹⁹⁰—that might permit reliable assessments of market power, perhaps

note 154, that it was "limited to examining the matter 'in the light of the relevant GATT provisions'"). Moreover, Hahn seems to generalize too easily from West Germany's position in the Icelandic Fisheries case. *See id.* at 572-73. Simply put, protection of essential state interests is not merely a matter of remedial law but also of national survival, which may be threatened well before a breach of international legal obligation occurs.

186. *See* JACKSON, *supra* note 130, at 751-52 (noting that security exception might be used improperly to shelter domestic industry and that "international economics is so intimately related to politics that it is impossible to insulate the two from each other").

187. Moran has suggested employing the numerical thresholds used in U.S. antitrust analysis, such as the four-firm concentration ratio test used by U.S. courts under section 7 of the Clayton Antitrust Act, the specific antimerger provision of U.S. competition law. *See* MORAN, *supra* note 184, at 46. Under this test, "if the largest four firms (or four countries) control less than 50 percent of the market, they lack the ability to collude effectively even if they wish to exploit or manipulate recipients." *Id.* at 46. Moran argues that the rule's "use for national strategists lies in signaling a credible threat of denial on the part of foreign firms (or their home governments)." *Id.* at 93 n.55; *see also* The Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 (1992) (supplying sophisticated numerical criteria for evaluating proposed merger and nuanced "analytical process" for assessing context in which to evaluate numerical criteria).

188. *See generally* William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 app. at 983-86 (1981) (demonstrating that market power is greater where there are no effective substitutes for good in question, i.e., where price elasticity of demand is lower).

189. Market definition can also be understood in terms of elasticity of supply, such that an attempt to exercise market power, i.e., lowering output to raise price, causes expanded supply either through increased output by other current producers or market entry by potential competitors. *See* POSNER, *supra* note 41, at 324-28.

190. Much rent-seeking behavior employed as part of a neomercantilist national security strategy might be described as an attempt to create artificial barriers to entry. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 238-39 (1986) (discussing collusive method of "cartel ringmaster"). *See generally* Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE

even in the clearly defined markets involved in the “fissionable materials” national security exception in article XX(b)(i).¹⁹¹ Compounding the empirical problems of applying any antitrust-based model to the WTO’s national security exception would be the absence of a clear criterion for determining which “goods and materials,” for purposes of article XX(b)(ii) at least, plausibly could be traded “for the purpose of supplying a military establishment,”¹⁹² although focusing on market power could provide a principled tool for screening out many of the most egregious security exception abuse cases.¹⁹³ Even if these definitional problems could be overcome so as to clarify the meaning of the article XXI(b)(i) and (ii) national security exceptions covering trade in fissionable materials and traffic in arms or goods for the purpose of supplying a military establishment,¹⁹⁴ it is doubtful that antitrust methodology could be employed in economic sanctions cases, such as Helms-Burton, implicating article XXI(b)(iii)’s separate safe harbor for “any” action “taken in time of war or other emergency in international relations.”¹⁹⁵

More importantly, even if antitrust reasoning could supply the foundation for interpreting the security exception,¹⁹⁶ nothing in the Uruguay

L.J. 284, 315-21 (1977) (discussing alternative predatory pricing strategies).

191. GATT art. XXI(b)(i).

192. *Id.* art. XXI(b)(ii).

193. Moran has argued that the virtue of the focus on concentration of production is that, given the absence of concentration in most product markets, the market concentration test would, in most cases, defeat national security arguments for subsidies for the production of such peripherally-related goods, such as fabrics employed to clothe soldiers. *See MORAN, supra* note 184, at 46-49.

194. *See* GATT art. XXI(b)(i) and (ii). One recent example of use of regulatory policy arguably for strategic reasons is the European Union’s attempt to block the merger of Boeing and McDonnell Douglas. *See* Steven Pearlstein & Anne Swardson, *U.S. Gets Tough to Ensure Boeing, McDonnell Merger*, WASH. POST, July 17, 1997, at C1 (reporting that Acting U.S. Attorney General for Antitrust said that “vital” U.S. interests were at stake in merger). It is unclear whether the European Union blocked the merger solely on competition policy grounds or for fear that the protection of the European Union champion, Airbus, was necessary for Europe’s maintenance of the capability to have an independent military aircraft infrastructure. Nonetheless, in suggesting that it might bring the case to the WTO, *see id.*, the United States may have opened the door to a possible assertion of the national security exception by the European Union, much as the United States has threatened to invoke the exception in the Helms-Burton case. In any event, the possibility of WTO dispute resolution may have sparked a settlement, with Boeing agreeing to give up the exclusive dealing arrangements that most troubled the European Union. *See* Steven Pearlstein, *Europeans Relent, Back Boeing Merger*, WASH. POST, July 24, 1997, at E1.

Both Helms-Burton, which concerns extraterritorial application of U.S. law, and the Boeing-McDonnell merger, which implicates antitrust principles, lie outside the normal confines of WTO law. It was therefore unsurprising that the disputes have encouraged the business community to call for transatlantic policy harmonization. *See id.* In this sense, both disputes reflect the incompleteness of the WTO legal order and therefore the need to supplement the WTO through further negotiations, *see infra* text accompanying notes 343-348 (discussing U.S.-EU investment negotiations resulting from Helms-Burton), or through the institutional comity approach suggested in this Article, which expands the WTO legal order through interpretation. *See id.*

195. GATT art. XXI(b)(iii).

196. Ultimately, the suggested feasibility of harmonization of antitrust enforcement policy could well founder on the rocks of the need, entailed by harmonization, for consensus about the nature of markets’ social context. Before antitrust reasoning could be employed as the conceptual bedrock for a meaningful security exception, antitrust policy itself would need to be harmonized—a task that will be fraught with difficulties. *See, e.g.,* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT’L L. 1 (1997) (analyzing intersections between trade and competition policy and

Round explicitly authorizes interpreting the article XXI exception to incorporate an antitrust dimension.¹⁹⁷ In fact, GATT Article XX(d)'s separate safe harbor for certain state monopolistic practices¹⁹⁸ seems to militate against reconstructing article XXI(b) in terms of market power rationales. Rather, the evident intent of the Uruguay Round is to remedy the constitutional defects of GATT by creating a WTO/DSB empowered to resolve disputes through adoption of Panel Reports without positive consensus and conferring various quasi-lawmaking powers on the WTO organs.¹⁹⁹

Perhaps, however, one could find in the WTO's authority to "make" law a future basis for giving meaning to the security exception. The WTO would then reserve for itself authority to resolve national security-related claims other than those controlled explicitly by the Supremacy Clause of the U.N. Charter.²⁰⁰ GATT Article XX(c) confirms this obligation by ensuring, as if there might be some doubt, that the GATT would be not be interpreted "to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."²⁰¹ Indeed, under the constitutional conception of WTO law, the explicit confirmation of the supremacy of certain U.N. law may indicate that the WTO is free to disregard U.N. law, practice, and policy except where GATT Article XXI(c) specifically dictates a different result. Thus, the WTO would be free through its own authoritative interpretation of its own law—perhaps through reasoned case law,²⁰² perhaps through formal interpretations of each of the national

developing agenda for policy harmonization, including new WTO Plurilateral Agreement).

197. At least the text of the new WTO and its related agreements reveals no change. *See* Porotsky, *supra* note 138, at 929 n.136 (noting that "it appears that GATT 1994 made no significant changes with respect to economic coercion") (citing GATT SECRETARIAT, RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994) (compiling GATT 1994 documents)).

198. GATT art. XX(d).

199. *See* WTO AGREEMENT art. VIII (providing for international legal personality and functional capacity for WTO); *id.* art. IX (providing for decisionmaking powers, including adoption of formal interpretations and waivers); *id.* art. X (providing for possibility of amendments that may take effect for all parties even without assent of all parties). That said, the constitutional characteristics of the new WTO, particularly in respect of the protection of individual rights, may be limited. *See generally* Mary F. Dominick, Book Review, 88 AM. J. INT'L L. 862 (1994) (reviewing NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993)).

200. Of course, the supremacy of the U.N. Charter resolves any question of direct conflict with the Security Council's exercise of its powers. *See* U.N. CHARTER art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

201. *See supra* note 16.

202. Ordinarily, the doctrine of *stare decisis* technically has no place in international adjudication. *See, e.g.,* Statute of the ICJ, *supra* note 122, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."). Nonetheless, judicial decisions may be referred to as "subsidiary means for the determination of rules of law." *Id.* art. 38(1)(d). Nothing in the WTO Dispute Settlement Understanding appears to overturn this balance. Indeed, GATT practice, which the Understanding to a large degree codified, suggested substantial reliance by the Contracting Parties on the pronouncements of Panels as authoritative interpretations of the GATT. *See* JACKSON, *supra* note 43, at 67-68; *see also supra* notes 119-125 and accompanying

security exceptions in the MTAs under the WTO Agreement²⁰³—to supply meaningful principles of restraint for invoking these exceptions in the future.

In making quasi-constitutional common law through the process of interpreting the specific provisions of the MTAs, the WTO might draw on structural principles defining its relation to sovereign states, principles much like the federalism that informs U.S. constitutional analysis. Even if the WTO law of the security exception might not be clear enough, at least initially, over time the WTO could supply specific interpretations in concrete cases that could fill the gap. One possible analogy for this approach might be the U.S. Supreme Court's daring and ingenuity in fleshing out the meaning of the so-called "constitutional" Sherman Antitrust Act, whose broad language and vague legislative history required considerable judicial creativity.²⁰⁴ Deference to national judgments could still be part of this methodology, as federalist deference to state judgments was in the U.S. antitrust context.²⁰⁵

Arguably, the WTO may already have located a structural principle that could advance this interpretive agenda. Because the presumption against extraterritorialism performs sovereignty-protective functions similar to those served by a variety of similar federalist-based deference concepts,²⁰⁶ it might well serve to control the exercise of the exceptions in articles XX and XXI of the GATT that protect state sovereignty. Thus, explication of article XXI might be guided by *United States Restrictions on Imports of Tuna*, in which a GATT Panel held illegal U.S. conservation measures imposed pursuant to GATT Article XX exceptions, largely because they were applied extraterritorially.²⁰⁷ This reasoning may have been reaffirmed by the

text (discussing various theories of status of GATT precedent).

203. See WTO AGREEMENT art. IX(2) ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements [such as article XXI of the GATT]."). Admittedly, the power would need to be exercised carefully, as required by the WTO, such that it "not be used in a manner that would undermine the amendment provisions in Article X [of the WTO]." *Id.*

204. See *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911) (announcing "rule of reason" under which only some—the anticompetitive—restraints in trade were considered unlawful notwithstanding statutory language proscription of "[e]very . . . restraint in trade"); see also *Appalachian Coals Inc. v. United States*, 288 U.S. 344, 359–60 (1933) ("As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

205. See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943) (fashioning federalism-based exception for Sherman Anti-Trust Act for state-authorized and -supervised monopolies); Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 *FORDHAM INT'L L.J.* 18, 20–21 (1996) (describing states' active roles in antitrust enforcement).

206. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812–21 (1993) (Scalia, J., dissenting in part) (describing rules of comity and principles of interpretation, requiring, where possible, avoidance of conflict with international law and rebuttably presuming non-extraterritoriality, as related concepts); *American Banana Co. v. United Fruit*, 213 U.S. 347, 356–58 (1909) (refusing to apply Sherman Act extraterritorially, arguably on Act of State grounds).

207. See *Restrictions on Imports of Tuna*, *supra* note 173, para. 5.26, at *176. The Report noted:

If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their

WTO/DSB Appellate Body in *United States Standards for Reformulated and Conventional Gasoline*.²⁰⁸ In that case, a Panel rejected the U.S. argument that deviation from national treatment was required by the difficulty of extraterritorial criminal enforcement of U.S. information-gathering requirements relative to the enforcement of environmental requirements for imported gasoline. The Panel justified its decision by asserting that “the usual measures available in international trade for determination of origin and tracking of goods (including documentary evidence and third party verification)” were sufficient.²⁰⁹ Accepting the U.S. claim that a protectionist measure would be justified as an alternative to extraterritorial enforcement might have, instead, buttressed the latter’s legitimacy. This the DSB refused to do.

On closer inspection, however, it is not certain that these cases could serve as precedents for employing the presumption against extraterritoriality to interpret the exceptions in article XX of the GATT. Arguably, the validity of extraterritorial enforcement solely for environmental or conservation reasons was never squarely before the GATT and WTO dispute settlement bodies in these two cases. The measures at issue in *United States Restrictions on Imports of Tuna* and in *United States Standards for Reformulated and Conventional Gasoline* may have had protectionist effects that called into question the purity of U.S. motives.²¹⁰ Thus, when protectionist concerns are not implicated at all, as is perhaps the case in the Helms-Burton dispute,²¹¹ it is not clear that the WTO has as yet treated the presumption against extraterritorialism as a structural principle that could inform its interpretation of the security exception and still take account of the core interest of states in protecting their national security—rather than their protectionist—interests.

In sum, the constitutional conception seriously risks legal indeterminacy when extended to the substantive meaning of the security exception. The WTO’s text, context, purpose, or *travaux* reveal no

own jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired.

Id. The Panel Report did, however, leave open the possibility that the GATT posed no general barrier to extraterritorialism. *See id.* para 5.16, at *166 (“It could not therefore be said that the General Agreement proscribed in an absolute manner measures that related to things or actions outside the territorial jurisdiction of the party taking the measure.”).

208. *See* World Trade Organization, *United States—Standards for Reformulated and Conventional Gasoline, Report of the Panel*, WT/DS2/R (Jan. 29, 1996) [hereinafter *United States—Standards for Gasoline Panel Report*]; *see also* World Trade Organization, *United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body*, WT/DS2/AB/R (Apr. 29, 1996) (adopted by DSB on May 20, 1996) (affirming Panel Report).

209. *United States—Standards for Gasoline Panel Report, supra* note 208, para. 6.26.

210. *See id.* para. 6.23 (noting U.S. failure to adopt 1994 executive branch proposal for implementing reformulated gasoline requirements that would have been GATT-legal).

211. *But cf.* Desloge, *supra* note 18 (arguing that Helms-Burton benefits special interest group of wealthy Cuban expatriates by allowing them to sue foreign corporations doing business in Cuba and then to settle out-of-court for share of current profits from Cuban nationalized assets, thus letting them functionally participate in Cuban economy and thwarting intent of Helms-Burton, and also claiming that White House was aware of this special interest-benefiting feature).

persuasive criteria for interpreting the security exception as WTO law. Even the structural principles that would flow from conceiving the WTO as a constitutional order may not supply the basis for legislating a more determinate security exception as a species of WTO constitutional common law. This failure will leave a gap in WTO law that in effect renders the national security exceptions self-judging in an unmanageable number of cases, endangering the WTO's capacity to deter abuse. Would this require the WTO/DSB to throw up its hands²¹² and invoke a political question doctrine for abstention, either because security issues are exclusively the province of some other body or because they are inherently nonjusticiable?²¹³ Nominally, at least, existing ICJ precedent would counsel against this solution.²¹⁴ Where, then, could the WTO look to resolve such cases when text, context, purpose, past GATT practice, negotiating history, and even WTO structure supply insufficient material to yield practical results?

Part IV will explain why the WTO should look outside itself. This analysis will qualify the constitutional conception by reformulating the bargain conception's central insight: namely, that treating WTO law as a self-contained regime would undercut its legitimacy. Treating the WTO in this manner would ignore other purposes and policies, those that represent the will of the states, groups, and individuals participating in global affairs; the international community has established an equally, if not more, important supranational institution for these purposes and policies—the United Nations.

212. One might then take the view that GATT Panels would be required not to decide the case as *non liquet*. See Julius Stone, *Non Liquet and the Function of Law in the International Community*, 1959 BRIT. Y.B. INT'L L. 124, 130–38 (arguing that, unlike municipal law, international law is not complete legal system for which every set of facts is capable of legal resolution). *But see* 1 OPPENHEIM'S INTERNATIONAL LAW 12–13 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (arguing that every international law case can be decided under existing rules or principles).

213. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803) (advancing political question rationale for judicial abstention; “the President is invested with certain important political powers, in the exercise of which he is to use his own discretion”); see also *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing doctrine as applicable to several cases, but relying principally on textual commitment of discretion to coordinate political branch of government and absence of judicially-manageable standards); cf. *infra* note 293 (making similar argument based on case of GATT abstention on political question concerning China's admission to GATT that, in mid-1960s at least, was understood to be more properly within province of Security Council).

214. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 431–32, (rejecting U.S. argument that only U.N. Security Council was competent to review matter involving international peace and security); *id.* at 436–37 (rejecting U.S. argument that situation involving ongoing armed conflict lacked attributes necessary for adjudication). *But see* Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997) (arguing that recent practice of ICJ does in fact establish its willingness to use variety of devices that together operate in effect as political question doctrine for international adjudication).

IV. WTO LAW: LINKAGES BETWEEN THE REMEDIAL, SUBSTANTIVE, AND INSTITUTIONAL DIMENSIONS OF THE NATIONAL SECURITY EXCEPTION

Just as Jackson and Croley refute the *Chevron* analogy from the constitutionalist perspective on grounds of democratic legitimacy,²¹⁵ the federalist deference Jackson and Croley suggest might be deeply problematic if it undercut a more democratic WTO. From the bargain perspective, assigning the WTO/DSB competence over questions not strictly within trade policy would be inconsistent with the limited bargain struck by states, as well as with constitutional notions of limited government.²¹⁶ Yet, although it might be questionable to characterize the WTO as a supranational legislature, the constitutional dimensions to the new WTO cannot now be ignored. The WTO Agreement formally established new international institutions and thereby cured the perceived illegitimacy of the de facto institutions of the GATT that emerged, despite what Jackson describes as its “flawed constitutional beginnings” in the stillborn International Trade Organization.²¹⁷

One might respond that under traditional conceptions of the law of international organizations, constitutional status means simply international juridical personality—in short, the capacity to act as a subject of law with the power to enter into international legal relationships, accept obligations, and assert rights.²¹⁸ However, the functional justification, and therefore functional limits, of international institutions are increasingly under attack on the ground that the emerging reality of transnational community,²¹⁹ together with the growth of transnational bureaucracies exercising governmental responsibilities,²²⁰ belies “absolute” state sovereignty and signifies the emergence of “sovereign” supranational institutions.²²¹

215. See Croley & Jackson, *supra* note 67, at 208–11.

216. Conservatives and liberals formed an unholy alliance to criticize the WTO as a threat to democratic legitimacy by undermining U.S. sovereignty. One should compare the statement of Senator Jesse Helms, who called the WTO the “U.N. of world trade, without the veto,” *WTO Hearings*, *supra* note 29, (statement of Senator Jesse Helms, Foreign Relation Committee), available in 1994 WL 14188760, with the testimony of Ralph Nader, who argued that the WTO would lead to “bottom-up democratic impulses replaced by pull-down mercantile dictates.” *Id.* (statement of Ralph Nader), available in 1994 WL 14188790.

217. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 29–39 (1989). For example, the GATT never entered into a relationship agreement with the United Nations, in part because of its dubious constitutional status. See Stephen Zamora, *Economic Relations and Development*, in 1 UNITED NATIONS LEGAL ORDER, *supra* note 30, at 503, 509 n.16.

218. See, e.g., *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (recognizing formally, in Advisory Opinion, international juridical capacity of United Nations).

219. See FRANCK, *supra* note 176, at 12–13 (noting that “multiple linkages, making different regimes interdependent, are evidence of community” and that “[s]ociety is starting to perceive itself as a community of states and, simultaneously, as a community of persons”).

220. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1–28 (1995).

221. See David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte*, 36 VA. J. INT’L L. 275, 377 (1996) (“The idiom of juridical personality for institutions is no longer absolute either, yielding now to its conceptual twin of

Thus, for Jackson's federalist—or, in Bello's vocabulary, confederalist—conception of the WTO, the balance struck between the central organs of supranational government and state authorities under the WTO cannot be analyzed without considering how the other organs of supranational government affect WTO law. An account of WTO law that does justice to the insights of both the bargain and constitutional conceptions, yet redresses their shortcomings, needs to consider the relationship between WTO law and the law of other similar international organizations functioning in the quasi-constitutional capacity characterizing the WTO. This inquiry would begin by addressing the question Jackson identified, but explicitly eschewed answering, in his rebuttal of Bello's claim that WTO obligations are not binding: Is the WTO a self-contained remedial regime?²²² An even more important question, which Part V will address, is: What does the answer to this prior question imply for locating the substance of the security exception when the internal sources of WTO law do not supply an answer?

A. *The WTO as a Closed System of Remedial Law*

Bruno Simma, explicating the ICJ's decision in the *Hostages Case*, analyzed the concept of a self-contained regime largely in terms of the international law of remedies.²²³ Thus, Simma uses the concept to suggest that only the remedies specified in the special regime may be invoked by an injured party in consequence of breach.²²⁴ Pieter-Jan Kuyper's insightful analysis of this question in terms of the GATT suggests that, even if remedial law might in the abstract be distinguished from substantive law, determining whether the WTO is a self-contained remedial system necessarily entails exploring the relationship between WTO remedial and substantive law, including the law governing the GATT exceptions.²²⁵

Kuyper argues that the self-contained character of the GATT/WTO regime has been increased significantly by article 23 of the new DSU, which "emphasizes that WTO Members shall seek redress for violations of obligations under the WTO and its annexes only through the dispute settlement system of the DSU and shall suspend concessions or other obligations *only* in accordance with the rules of the DSU."²²⁶ Kuyper suggests that the ability of states to block dispute settlement Panel Reports

community and community interest in international law.").

222. See Jackson, *supra* note 54, at 63 n.12.

223. See Bruno Simma, *Self-Contained Regimes*, 1985 NETH. Y.B. INT'L L. 111, 111-13; see also United States Diplomats and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40 (May 24) (identifying diplomatic law as "self-contained régime").

224. Simma suggests narrowing the definition to "designate a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules"; that is, "a subsystem which is intended to exclude more or less totally the application of general legal consequences of wrongful acts, in particular the application of the countermeasures normally at the disposal of an injured party." Simma, *supra* note 223, at 117.

225. See Kuyper, *supra* note 129, at 239-57.

226. *Id.* at 251-52.

under the old GATT system meant that the “remedy of reprisal or *exceptio non-adimpleti contractus* under general international law could be reasserted and applied.”²²⁷ The new, binding DSU makes resort to alternative remedies unnecessary.

Arguably, this view of the WTO as a self-contained remedial system shapes Kuyper’s understanding of the effect of asserting a waiver or exception as a defense to a nullification or impairment of benefits claim. Because the right to a remedy under any legal system presupposes a breach of a legal obligation, Kuyper rejects the notion of “non-violation” nullification or impairment of benefits under the GATT; any nullification or impairment of benefits not cured by an exception is itself an unexcused breach of the GATT. While recognizing the existence of possibly contrary authority,²²⁸ Kuyper then argues that it would be “totally improper” to find a right to compensation for nullification or impairment of benefits resulting from waivers or exceptions under the GATT, “where by definition there can be no reasonable expectation of the continuation of the tariff concession.”²²⁹

Kuyper’s reasoning is compelling, however, only when the exception or waiver gives sufficient notice of the range of instances in which it might be invoked, so that its subsequent application does not undercut the reasonable expectations of the parties. Kuyper’s argument for the absence of a right to a remedy when a party asserts the national security exception would not obtain, therefore, if the exception were entirely unpredictable. Thus, even if Kuyper is right that the WTO is now a closed system in Simma’s remedial sense, his focus on the reasonable expectations of the parties suggests that a remedy should still be available in a nullification and impairment case in which a state wrongfully asserted an exception, either

227. *Id.* at 251. Reprisal is a countermeasure in response to a breach of an international obligation that would otherwise be unlawful; *exceptio adimpleti contractus* is reciprocal nonperformance in response to material breach of a treaty. See HENKIN ET AL., *supra* note 122, at 570–72.

228. See Kuyper, *supra* note 129, at 249 n.69 (citing 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, 261 (1991)). Arguably, however, Kuyper might have treated this waiver precedent as inapposite to the case of exceptions, for waivers might be distinguishable from exceptions. A waiver operates potentially only as a relinquishment of part of the Contracting Parties’ negotiated benefit, namely the right to withdrawal of a measure that would otherwise violate the GATT; it thereby preserves for the contracting party the remainder of its negotiated benefit, namely the right to compensation in the event of nullification or impairment of benefits. An exception, by contrast, is part of the landscape for the negotiation of the balance of advantages. If this analysis is correct, Kuyper is on even stronger ground, in terms of GATT precedent at least, in arguing against the survival of a residual claim for compensation for nullification or impairment of benefits when an exception operates as a defense to the duty to withdraw a measure that violates the GATT and, by parity of reasoning, for a measure that does not violate the GATT yet nonetheless nullifies or impairs benefits.

229. *Id.* at 249. Kuyper specifically criticizes the GATT CONTRACTING PARTIES decision (prompted by Argentine protests about sanctions during the Falklands/Malvinas conflict) that, in the case of measures based on the national security exceptions, “affected parties retain all their GATT rights (meaning all rights under Article XXIII, inclusive of non-violation).” *Id.* Kuyper criticizes this on the grounds that it suggested that there might be a right to compensation for nullification and impairment of benefits even if an exception or waiver were applicable. See *id.* (citing GATT B.I.S.D. (29th Supp.) at 23 (1982)).

because the assertion of the exception would be ineffective or because the wrongful assertion of the exception would itself constitute an independent breach.²³⁰ In sum, Kuyper's thorough analysis of WTO remedial law demonstrates that the essential inquiry—whether in a case of wrongful assertion of an exception or of nullification or, alternatively, in a case of non-violative nullification or impairment of benefits—should be the same, namely, what is the substance of the national security exception?

The point that WTO remedial law implies particular assumptions about the substantive law of the WTO does not necessarily, in my view, imply the converse position that WTO substantive law is law only insofar as it implies the right to a remedy.²³¹ This Article brackets the jurisprudential foundations of WTO law, exploring instead how to determine the meaning of WTO substantive law in light of the best understanding of what states accomplished in transforming the GATT into a fundamentally new institution that not only protects the reasonable expectations of the parties but also serves supranational public purposes.

B. *International Public Law and the WTO*

If Kuyper's central insight is that the new DSU so strengthens WTO remedial law that it closes the door to international law remedies, his correlative failure is not recognizing that international law remedies will then no longer be available to redress deficiencies in substantive WTO law. Neither the bargain nor constitutional law arguments, moreover, seem overwhelmingly persuasive in filling the hole left in the fabric of WTO law by the national security exception, largely because neither conception fits securely within a settled community interpretation of WTO law. Both failures flow from understanding the WTO as a self-contained regime—the bargain theory simply sees the WTO as too small, and the constitutional theory sees it as too large.²³²

230. Kuyper in effect concedes the relevance of the Contracting Parties' reasonable expectations of when an exception might be invoked when he acknowledges that, even in the case of an exception, a remedy might be available for misuse, and thus a breach, of the exception. *See id.* at 249. Indeed, Kuyper has identified cases that he would consider examples of lawful and unlawful assertions of the national security exception. Compare Pieter Jan Kuyper, *Trade Sanctions, Security and Human Rights and Commercial Policy*, in *THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION* 387, 417 (Marc Maresceau ed., 1993) (discussing lawfulness of threatened EC sanctions against Yugoslavia during latter's civil war), with PIETER JAN KUYPER, *THE IMPLEMENTATION OF INTERNATIONAL SANCTIONS: THE NETHERLANDS AND RHODESIA* 180 (1978) (arguing that, while it would be "highly doubtful . . . [although] not altogether improbable" to consider that Rhodesia's unilateral declaration of independence was "an emergency" in its international relations for Netherlands, it would be "impossible, however, to argue that the 'essential security interests' of the Netherlands and other West European contracting parties to the GATT were affected by the situation in Rhodesia; therefore their action was illegal").

231. *See, e.g.*, JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 21–29 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (discussing law as enforceable command of sovereign).

232. *See supra* text accompanying notes 34–88.

Arguably, these failures flow from envisioning the relationship of WTO law to the general international law of remedies as much like the relationship between the "law of contract" and the "law of *the* contract."²³³ For the bargain conception, analogous to the common law of contract, the will of the parties expressed in the law of the contract takes priority over the social interest expressed in the law of contract. Under the constitutional conception, the common interests the parties embodied in WTO law trump any other private interests they might have, including not only interests reflected in their other contractual international agreements, but also those reflected in their agreements creating other international institutions.

The distinction between private and public interest, in some perspectives, can be collapsed, since the public interest at the supranational level might well be described as the sum of the "private" interests of states as members of the community, whose own "public" interests with respect to their constituents could be described as the sum of the private interests of their constituents.²³⁴ But the distinction remains important from a constitutional standpoint because it reflects a view about the neutrality of dispute resolution in the settlement of private conflict: To the extent that the WTO is a public institution, its dispute settlement system strives to induce the parties to implement particular outcomes. Indeed, Kenneth Abbott has argued forcefully that it is useful to consider GATT issues in terms of the dichotomy between public interests and private interests, where "the term 'public' refers to the common interests of the nations forming the world trading community, while 'private' refers to the particular interests of the individual states, the contracting parties of GATT."²³⁵ Thus, suggests Abbott, "the role of international institutions of justice is to apply community policy, not merely to resolve private conflicts."²³⁶

233. This is not to suggest that the public/private law distinction is much more than a heuristic device. Private law is now widely understood to reflect public policies structuring private choices. See, e.g., Daniel A. Farber & Philip R. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 884-88 (1991). It is even questionable whether private preferences can ever be expressed in a fully neutral private law system given the role of legal rules in structuring private preferences. See generally Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (setting out numerous arguments for conclusion that legal system should reject use of private preferences as exogenous variables).

234. See Joel P. Trachtman, *Conflict of Law and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 1034 (1994) (treating private/public distinction as "merely the beginning of a continuum of vertical levels of analysis"); 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, 511 (1996-97) (treating states simply as mediating institutions between supranational institutions and individuals).

235. Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31, 32 (1992) [hereinafter Abbott, *GATT As a Public Institution*]. For a similar argument, see Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111, 113-14, drawing on Bruce Ackerman's and Mirjan Damaška's dichotomy between the "active" state and the "reactive" state. See BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 23-37 (1984); MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 71-96 (1986).

236. Abbott, *GATT as a Public Institution*, *supra* note 235, at 35. The distinction Abbott develops thus owes as much to the Hart and Sacks legal process methodology as to Ackerman and

Accordingly, if we recognize that the public purposes states have expressed in establishing the WTO as an independent international organization compete and cooperate with the public purposes embodied in other institutions, then we must focus on the relationship between substantive rules and institutional structure.²³⁷ Such a public law approach might be more useful in interpreting and applying WTO law than either the bargain or constitutional conceptions. Under this view, the WTO itself is a legislative enactment of an organic statute. Its precise meaning would be found not only by processes of vertical synthesis, in which superior WTO law is read together with applicable municipal laws, but also by horizontal synthesis of WTO law with the law of other coequal, legislative enactments of supranational bodies.

A more fundamental justification for looking to the law of other institutions to fill the gaps left in the national security exception might be found in the WTO's substantive legitimacy. Taking account of the ethical values of the supranational community requires some mechanism for harmonizing or selecting among competing values expressed in the relevant institutions; dispute resolution between institutions, as between states and institutions,²³⁸ cannot be permanently neutral as to competing conceptions of the good. Accordingly, if the WTO remedial system is to do more than merely reflect the bargain struck in the concessions negotiated under the GATT, it must also do more than authorize self-help by means of retaliatory suspension of concessions. In some cases, for example the U.S. embargo against Nicaragua in the mid-1980s, the non-defaulting GATT party lacks an effective retaliatory option. In that case, the U.S. veto also impaired the effective functioning of the Security Council in addressing the situation,

Damaška, for the legal process approach was organized precisely around the distinction between the role of law in facilitating private settlements and its functioning as a "series of institutionalized processes for settling by authority of the group various types of questions of concern to the group." William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to THE LEGAL PROCESS*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* at xi, lxxxiii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (citation omitted) (quoting Hart). It was the purposive quality of law, that is, to achieve agreed social ends, that distinguished the legal process school and that ultimately betrayed it when social ends no longer were agreed. *See id.* at cxii-cxxv. The policy-oriented jurisprudence of the Yale School bears important resemblances to this model. *See generally* MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* (1981) (collecting essays relating to "the global constitutive process of authoritative decision to the more comprehensive processes of effective power and social interaction"). The notion of "community policy" should not, therefore, be used without some skepticism.

237. *See* Thomas Cottier, *Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings in the EFTA Experience*, in NATIONAL CONSTITUTIONS, *supra* note 57, at 409, 418-23 (arguing that limited institutional law-creating capacity of European Free Trade Association problematized its wholesale incorporation of EC law); *see also* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 301-03 (1975) (articulating structure-substance pairing concept in domestic context).

238. *See* BRILMAYER, *supra* note 30, at 141-67 (arguing for substantive justification for international use of force); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747, 773-74 (1989) (arguing that "supreme authority" of law as "standard of conduct" is based on moral dimensions).

leaving Nicaragua without an effective remedy at the United Nations as well.²³⁹ But that does not mean, as the next Part of this Article will argue, that there is no U.N. "law" relevant to the WTO national security exception that could fill the gaps left by the action of either the WTO or United Nations alone.

V. INSTITUTIONAL COMITY IN INTERNATIONAL PUBLIC LAW

If Kuyper was right to close the exit out of the WTO through which its members could seek remedies under general international law, then the door must be reopened to allow the law of coordinate institutions to cure the substantive gaps in the WTO legal system. The price of this new WTO law, however, is requiring the WTO, when the need arises, to subordinate its policies and interests to those of coordinate institutions. This might be called institutional comity.

Because U.S. experience with reconciling the competing interests of multiple sovereignties has led to a flourishing of its judiciary's analysis of interjurisdictional conflicts under the rubric of "choice of law" analysis, Part V of this Article advances an institutional comity approach for interpreting the WTO national security exceptions that is described in terms of modern U.S. choice of law principles. Because international organizations are not expressions of territorial sovereignty, choice of law principles that are ordinarily based on competence over territory are inapposite.²⁴⁰ Rather, the modern U.S. choice of law principles described as governmental interest analysis might provide a plausible framework for implementing institutional comity.²⁴¹

Section V.A articulates the choice of law approach and considers preliminary objections. Section V.B then justifies on comity grounds deference by the WTO to the law of the United Nations. It considers in detail the explicit relationship between U.N. and WTO law; it explores the more subtle, indirect relationships between U.N. and WTO law; it reevaluates the differences between the bargain, constitutional, and comity approaches; and, lastly, identifies important limits on the appropriateness of deference by the WTO to U.N. policy. Finally, Section V.C applies the

239. See generally THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (Lori F. Damrosch ed., 1987) (evaluating future of Court in wake of Nicaragua debacle).

240. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 42, 55, 64, 81 cmt. d, 323, 325, 377-78, 384 (1934) (stating that dispute is governed by law of place where last event necessary to create right occurred). For an elaboration of the territorial conception written by the *Restatement's* Chief Reporter, see 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 5.2 (1935).

241. See *infra* text accompanying notes 242-247. Admittedly, as Professor Trimble has suggested to me, even interests analysis is territorial in the sense that it allocates authority over territory. In this sense, all choice of law theory that has emerged from conflicts between different territorial sovereigns is grounded in values that must respect territorially-based concerns. Nonetheless, employment of interests analysis as part of the conceptual apparatus for WTO interpretation transcends, as this Article will argue, the territorial origin of choice of law analysis and can lay the foundation for accommodating non-territorially-based allocations of authority in a global political and legal system in which states are no longer the only relevant actors.

comity approach to the problem of Helms-Burton in a preliminary, and necessarily inconclusive, assessment. Part VI of the Article concludes that the institutional comity approach, notwithstanding its failure to give a compelling solution in the Helms-Burton case, offers the best prospect for giving meaning to the WTO security exception.

A. *The Choice of Law Method and Preliminary Objections*

The institutional comity approach elaborated in this Part draws on modern American choice of law principles, which no longer automatically apply the law of the jurisdiction in whose territory a right vested and instead apply the law of the jurisdiction with the most significant relationship to the matter in question.²⁴² The earliest versions of governmental interest analysis would have established forum law as the default rule in the case of conflict between policies of sovereigns having an interest in a matter.²⁴³ But modern governmental interests analysis calls for a careful assessment of the interests supporting a particular sovereign's potentially applicable law and, where possible, identifying so-called "false" conflicts in which closer inspection reveals that the interests underlying one jurisdiction's law in fact would not be served by its application.²⁴⁴ Even in cases of true conflicts, some schools of modern governmental interests conflicts doctrine would balance the competing policies of interested jurisdictions, so that the forum would defer wherever its interests are comparatively less impaired than are those of the non-forum jurisdiction.²⁴⁵ Congruently, building on the traditional concept of comity, explicit balancing of interests became a major theme in modern analysis of transnational conflict of laws, implying much greater deference to non-forum law.²⁴⁶ In international cases, this line of development

242. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (listing relevant factors); see also WALTER W. COOK, *THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS* 3-90 (1942) (challenging vested rights theory); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) (calling for choice of law method of analysis that avoids mechanical rules); Willis L.M. Reese, *Conflict of Laws and the Restatement (Second)*, 28 LAW & CONTEMP. PROBS. 679 (1963) (reviewing and analyzing different policies regarding choice of law rules). But see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 143-44 (1998) (criticizing tendency to describe balancing of governmental interests as "the choice of law method" to exclusion of other choice of law methods such as vested rights or local law approaches).

243. See BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183 (1963) ("Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.").

244. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) (softening his earlier preference for forum law by arguing that, even when forum initially found true conflict, on reconsideration of question "a more moderate and restrained interpretation" of forum law would result in forum's not applying its own law); Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 233-44 (1958).

245. See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963) (advancing "comparative impairment" approach, under which, in case of conflicting "external" objectives of forum state and another state, state whose "internal objective will be least impaired" should defer).

246. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 616 (9th Cir.

culminated in the complex rules of the *Restatement (Third) of the Foreign Relations Law of the United States*, which turned to comity as the mechanism for resolving conflicts of state interests in transnational disputes concerning prescriptive, as well as adjudicative, jurisdiction.²⁴⁷ Thus, if interests analysis can be used to resolve conflicts of laws problems through balancing public policy interests expressed in municipal statutes, it might also resolve conflicts between the policies expressed in the “statutes” establishing international institutions.

Before considering how the institutional comity approach might be applied to the WTO national security exceptions, however, it would be useful to consider preliminary objections to the assumptions upon which the method is founded: namely, that governmental interests choice of law reasoning is not applicable to conflicts of public law; and that, even if it were, it fails the test of democratic legitimacy. First, choice of law approaches to public law conflicts have not gone uncriticized. Relying on the traditional distinction between private law, the historic domain of conflicts theory, and public law, some experts have questioned whether choice of law principles are applicable to the public law context.²⁴⁸ Yet it would seem that modern governmental interests analysis’s focus on the relatively slight public interest in disputes governed by private law, such as contract and tort, would be even more appropriate in the case of conflicts between jurisdictions over relatively more important public interests expressed in statutory regimes.²⁴⁹

Indeed, comity in choice of public law is functionally equivalent to less explicit, but less controversial, interpretive techniques. Well-accepted, traditional doctrines expressing restraint in the extraterritorial application of

1976) (adopting jurisdictional rule of reason in extraterritorial application of Sherman Antitrust Act).

247. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(3) (1987) (applying neutral criteria by selecting law of state whose “interest is clearly greater”). Yet, territorialism survives in interests analysis under a version implemented through a conception of territorial effects that remains dominant, if much disputed, in public law. Compare Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a “Choice-of-Law” Approach*, 70 TEX. L. REV. 1799, 1817–18 (1992) (arguing that choice of law methods, including effects test, are inappropriate in cases involving public law), with Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT’L L. 975, 998, 1030–56 (1993) (arguing that “a conflict of laws for public law is needed” and proposing method built around effects test). Territorialism also has revived in the private international law context, where the comity principle expressed in the *Restatement (Third)* has been construed narrowly by the U.S. Supreme Court to require deference only when the law of the foreign state compels particular conduct. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–801 (1993) (applying Sherman Act extraterritorially to U.K. conspiracy having effects in United States). But see *supra* note 241 (alluding to territorial dimensions of interest arguments).

248. See Jean-Gabriel Castel, *The Extraterritorial Effect of Antitrust Law*, 179 RECUEIL DES COURS D’ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 9, 110 (1983); Friedrich K. Juenger, *Constitutional Control of Extraterritoriality?: A Comment on Professor Brilmayer’s Appraisal*, LAW & CONTEMP. PROBS., Summer 1987, at 39, 42; Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Private and Public International Law*, 76 AM. J. INT’L L. 280, 289 (1982).

249. See Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interactions*, 163 R.C.A.D.I 321, 325–29 (1979 II) (proposing employment of governmental interests choice of law approach to analysis of conflicts of “legislative” jurisdiction); Trachtman, *supra* note 247, at 1030–38 (1994).

forum law—such as the presumption that statutes are not ordinarily intended to apply extraterritorially²⁵⁰ or to conflict with international law²⁵¹—reflect the underlying policy considerations buttressing the comity principle's deference to the law of a foreign jurisdiction with a greater interest than the forum in the matter under dispute.²⁵² Thus, one could view institutional comity from the standpoint of a rule of interpretation rather than as an external limit on prescriptive jurisdiction. It might function as the equivalent of an interpretive canon in international organizations' own assessments of their powers, but with the advantage that results turn on explicit evaluation of competing interests rather than conclusory application of canons of statutory construction.

Drawing on similar arguments made in related contexts, the second, arguably more telling, objection to supranational institutional comity might be framed in terms of the democratic legitimacy of supranational institutions.²⁵³ Similarly, some regard comity as a mediating principle mitigating the conflict between state sovereignties, but at the price of subordinating public values to private interests.²⁵⁴ Institutional comity also might risk subordinating public values expressed in the new WTO's commitment to trade legalism to the "private" state sovereign interest in freedom of action under the national security exception.

Arguably, political conflict between the relevant international organizations might be desirable because it would force the political communities represented to negotiate a specific arrangement.²⁵⁵ Indeed, this claim may be compelling in the domestic lawmaking context. There, subject to the public choice prediction of deviations from politically representative outcomes due to rent-seeking behavior by the better organized,²⁵⁶ one might

250. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257–59 (1991) (supporting non-extraterritorial application of federal statutes unless Congress manifests clear intention to contrary).

251. See generally *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.) (stating that congressional statutes are intended by Congress to accord with international law, unless Congress manifests clear intention to contrary).

252. See *Hartford Fire*, 509 U.S. at 812 (Scalia, J., dissenting). Justice Scalia has also suggested that the act of state doctrine, in which the forum defers to the law of the state in which the act of state occurred rather than the law, including the international law, of the forum might also be understood as a choice of law rule. See *W.S. Kirkpatrick & Co. v. Environmental Tectonics Co.*, Int'l, 493 U.S. 400, 403–08 (1990) (Scalia, J.). It should be noted that the presumption against non-extraterritorial application and the act of state doctrine, understood as conflict of laws rules, draw from the vested rights territorial theory that underlay the Bealian *Restatement*. See *supra* note 240 and accompanying text. It is, therefore, not surprising that like vested rights theory, these interpretive canons do little to explicate the underlying policy conflicts that should guide reasoned decisionmaking.

253. See generally Trimble, *supra* note 176 (questioning, in light of their obviously increasing authority, democratic legitimacy of supranational institutions such as WTO).

254. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 61–63 (1991).

255. See Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1819 (1992) (arguing that application of *lex fori* induces negotiation of transnational legislative solutions by forcing policymakers to confront conflicts between their and other jurisdictions' policies); see also Dodge, *supra* note 242 (favoring judicial unilateralism rather than multilateralist attempts to balance conflicting state policies to select one jurisdiction's law alone as applicable).

256. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL*

assume vigorous political processes in which politically accountable governments whose policies conflict should be able to negotiate agreements that reflect the common interests of their constituents. But at the supranational level it is doubtful that political conflict will lead, in the short term, to representative outcomes, given the greater opportunities for rent-seeking by private interest groups²⁵⁷ and the current bias in the transnational political process toward elite decisionmaking.²⁵⁸ There is no reason to think choice of law brinkmanship will not lead to protracted institutional conflicts or that resolution of such conflicts will not reflect elite bargaining rather than accountability to the larger public.

Taking this concern to its logical conclusion, one might even argue that the risk of elite management and private interest group rent-seeking is so great in international institutions that purely reasoned decisionmaking by judicial organs might be preferable to any sort of political process in which the interests of states and their constituents are represented. Under this view, institutional choice of law would treat the United Nations and WTO as completely independent legal systems, for the most part, yet recognize that their specific provisions might yield particular rules that should be followed simply because they are a "better" law.²⁵⁹ Although the institutions would not be organically connected, the policies of one organization might yet influence the law of another on the theory that analogous legal reasoning might be useful. Analogy as a legal construct draws from a common law notion that courts find law through reasoned examination of precedents, and their underlying rationales, as applied to similar or even new circumstances.²⁶⁰ Yet an analogy's underlying justification is an argument from reason that knows no democratic justification, except to the extent that the legislator does not overturn precedents or enact laws reflecting alternative policy rationales.

But fear of rent-seeking and elite government is not ultimately a compelling argument against political, rather than legal, decisionmaking; for it would amount to throwing out the proverbial baby with its bath water. Rather, a democratic justification for importing into WTO law principles and

INTRODUCTION 68-69 (1991).

257. See Paul Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 699 (1997).

258. See Antonio F. Perez, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. J. INT'L L. 463, 475-76 (1996) (reviewing CHAYES & CHAYES, *supra* note 220).

259. See ROBERT ALLEN LEFLAR ET AL., *AMERICAN CONFLICTS OF LAWS* 297 (4th ed. 1986) (picking better law in light of "socioeconomic jurisprudential standards"); Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 366-67 (1974) (proposing Solomonic outcomes whereby plaintiff might receive half of her entitlement).

260. See M.J. Peterson, *The Use of Analogies in Space Law*, 51 INT'L ORG. 245, 269 (1997). Peterson shows how analogical reasoning by international lawyers structured discussion by policymakers on establishing legal regimes for outer space law, and how analogies were "used to create definitions of the issue and what it is at stake, establish regulatory rules for conduct, and even establish the symbolic meanings that permit creation of the social and institutional facts needed for successful management of an issue or cooperation on solving a problem." *Id.*

policies derived from the practice of the United Nations would focus on the role of principled decisionmaking in furthering deliberative democracy. It would conceive of the WTO and United Nations as separate sovereignties, not territorial sovereignties in the classic sense, but rather institutional sovereignties encompassing competing epistemic communities.²⁶¹ Admittedly, sociological analysis of this kind may be too imprecise for international lawyers to fathom and operationalize,²⁶² even if the insights it suggests are sound. Professional international lawyers need to express the relationship between international institutions in terms of familiar conceptual categories, such as the role of comity in mediating private law disputes involving the interests of different territorial sovereigns where both sovereigns have an interest but where no controlling legal principle, such as a treaty or rule of customary international law, gives priority to the claim of one sovereign.²⁶³

Finally, the concept of comity may not only provide a language for articulating the relationship between competing international institutions but also could serve as a vehicle for reconfiguring the relationship between the collective identities of the two institutions and the communities of interests they represent. Political scientists studying international organizations traditionally have fallen between two camps, which at the risk of oversimplification for the purpose of exposition might be described as follows: neorealists who, focusing on the interests of states, claim that the behavior of international organizations is always explicable solely in terms of the interests of the states that constitute them; and neoliberals or liberal institutionalists who, observing the role international institutions play in the system of states, argue that international institutions, once established, can take on an independent existence and pursue activities that are not reducible to the interests of the states that initially created them.²⁶⁴ The new constructivist school, however, argues that “both identities and interests may be reconstituted in the political process; [for] it is through the political process that roles and policies are adopted and challenged.”²⁶⁵ Mediating

261. See Bederman, *supra* note 221, at 373–74 (treating international organizations as, in language of political scientists, “epistemic communities”). See generally Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992) (setting forth concept of epistemic communities).

262. For example, even the sociological approach’s advocates, such as David Bederman, recognize that for international lawyers, “[t]here is a sense of discomfort in looking to sociological, group-dynamic theories to explain how international legal rules are made and enforced, particularly in institutions.” Bederman, *supra* note 221, at 374.

263. See Paul, *supra* note 254, at 5–8.

264. See Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT’L ORG. 555, 558–61 (1997) (describing neorealism and neoliberalism as prelude to constructivist account). Compare John J. Mearsheimer, *The False Promise of International Institutions*, INT’L SECURITY, Winter 1994/95, at 5 (presenting neorealist account), with ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD ECONOMY* (1984) (presenting neoliberal or liberal institutionalist account). See generally Anthony Clark Arend, 38 VA. J. INT’L L. 107 (1998) (offering more nuanced exposition of neorealist, “rationalist” institutionalist, and constructivist political science scholarship and their relation to international law).

265. Mlada Bukovansky, *American Identity and Neutral Rights from Independence to the War*

between realist and liberal institutionalist political science, constructivism thus “adds to our understanding by focusing on the constitutive aspects of legitimizing discourse and analyzing how those aspects interact with the more obvious, interested struggles for wealth and power.”²⁶⁶

Because institutional comity also articulates the relationship at the level of supranational governance between liberal institutionalism’s “legitimizing discourse” and neo-realism’s “struggles for wealth and power,” it provides a legal vocabulary for appropriating constructivism’s insights. Drawing upon constructivism as its foundation in political science, institutional comity posits the mutability, through legitimizing discourse, of the collective interests, values, and identities expressed in supranational institutions. Indeed, constructivism’s central insight—that political communities evolve in the process of interacting through a process of legitimizing discourse with other political communities—implies that in order to be persuasive, rhetorical strategies must appeal in principle to the perspectives of both relevant political communities. The act of speech thus transforms the speaker, engaging her capacity to empathize with the “foreign” perspective. Comity, as a legal construct, builds on this insight, employing rules of reasonableness and principles of deference as its verbal formulas and emotive qualities in its transformative and, in the end, harmonizing project.

Thus, engaging supranational institutional structures in the management of conflicting policies through the medium of the principled decisionmaking in their respective spheres of competence would have the advantage of inducing decisionmakers in one institution to develop and articulate their decisions in terms of their implications in other legal settings as well. By making the tradeoffs more public, and thus educating the broader public about the principles and policies at issue, one might increase the prospects for the negotiation of globally agreed tradeoffs that are representative of the global public interest, to the extent such an animal exists.²⁶⁷ Transparency and reasoned deliberation play important roles in perspectives as diverse as Madisonian federalism,²⁶⁸ public choice theory,²⁶⁹

of 1812, 51 INT’L ORG. 209, 211 (1997). Bukovansky employs a “constructivist” methodology to resolve conflicts between neorealist and liberal institutionalist explanations for the development of the U.S. commitment to neutrality principles. *See also* Reus-Smit, *supra* note 264, at 570–83 (relating international dispute resolution to organizing principle of legitimacy in international society through comparison of ancient and modern dispute resolution). *See generally* Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992) (developing constructivist approach fully for first time).

266. *See* Bukovansky, *supra* note 265, at 240.

267. *See* Trimble, *supra* note 176, at 1767–68.

268. *See* THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961) (discussing factions and publicity of factional agendas; noting that “where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary”).

269. *Cf.* Stephan, *supra* note 257, at 685–88 (arguing that both legal process and public choice schools of statutory interpretation are troubled by defects in international lawmaking process); Turley, *supra* note 60, at 239–59 (discussing, from public choice perspective, rent-seeking behavior in international lawmaking).

and socialism,²⁷⁰ from which theories of supranational politics could be constructed. Some might object that deliberative politics of this kind presuppose the existence of a global community as deeply formed as a typical nation-state. Professor Trimble in fact argues that Professor Franck's focus on the emergence of a single global community is fundamentally misplaced, for then Franck "cannot take advantage of the commonalities of the world's many subcommunities"²⁷¹—implicitly referring to subcommunities of religion and ethnicity whose divisions today, if Professor Huntington is correct (and Professor Trimble finds him persuasive),²⁷² may be permanent features of international society. This Article hopes to begin to address Professor Trimble's objection to the concept of global community by showing that comity between supranational institutions both respects the expression through particular supranational organizations of "commonalities" of the world's "subcommunities" of power and trade, then discursively mediating their conflicting interests, values, and identities to form shared interests, values, and identities that would qualify as a global community.

Supranational institutional comity thus may provide a language for expressing a possible set of relationships between the WTO and United Nations and the subcommunities they represent, as well as a vehicle for continuing evolution, in a democratic yet deliberative process, of the relationship between the trade and security legal regimes. Section V.B turns to the task of articulating these relationships.

B. *Institutional Comity Between the WTO and United Nations in International Security*

Any WTO/DSB Panel attempting to implement institutional comity would look for sources of legal evidence to define the WTO's relationship with other international institutions. As Subsection V.B.1 shows, WTO and U.N. text and history, as well as the jurisprudence of the ICJ, supply a basis for inferring the need for policy coordination between the WTO and United Nations in the management of security issues. Subsection V.B.2, drawing on illustrative related precedents, describes how institutional comity furthers the mandate for policy coordination in interpreting the WTO security exception. Subsection V.B.3 shows how institutional comity's interpretation of the security exception is superior to those offered by the bargain and constitutional conceptions. Finally, Subsection V.B.4 describes potential limits, even in the area of national security, on employing institutional comity to interpret the WTO.

270. See Joshua Cohen, *The Economic Basis of Deliberative Democracy*, Soc. PHIL. & POL'Y, Spring 1989, at 25, 33 (emphasizing that choices must be made in "deliberative way," and not "simply . . . conform to the preferences, convictions, and ideals of citizens") (emphasis omitted).

271. Trimble, *supra* note 176, at 1954.

272. See *id.* at 1954 n.13 and accompanying text (discussing SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1996)).

1. *The Relationship Between the WTO and United Nations in National Security*

In implementing institutional comity, a WTO/DSB would nonetheless mine the core provisions of the WTO to establish a boundary or framework for deference to the law of another supranational institution. Article X of the WTO Agreement identifies two sets of such provisions—one substantive, the other institutional—that may not under any circumstances be amended except by the consent of all the members of the WTO. The substantive rules that may not be amended are the most favored nation clauses of each of the multilateral trade agreements, as well as the related tariff binding rule of the GATT. The institutional rules that may not be amended are articles IX and X of the WTO itself, which specify the decisionmaking, interpretive, and amendment rules of the WTO.²⁷³ But neither of these “rules of recognition”²⁷⁴ specifically identify the relationship, if any, between the WTO and other international organizations. Nonetheless, the obvious institutional relationship, suggested both by the basic subject matter of article XXI—national security—and article XXI(c)’s specific textual reference to the U.N. Security Council,²⁷⁵ is between the WTO and the United Nations. Indeed, the WTO, which is in a sense the realization of the initial dream to create an International Trade Organization (ITO) to fill the institutional gap for trade left by the Bretton Woods Agreements after World War II, owes its very existence to the United Nations, whose Economic and Social Council in its first meeting called for the establishment of an ITO.²⁷⁶ Therefore, one would think that completeness in elaborating a transnational constitutional structure for addressing the security dimension of international

273. See WTO AGREEMENT art. X(2).

274. A rule of recognition, H.L.A. Hart postulated, “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.” H.L.A. HART, *THE CONCEPT OF LAW* 94 (2d ed. 1994). Hart adds that an “ultimate rule” of recognition is a rule of recognition that specifies lower-order rules. *Id.* at 105. WTO rules, namely the particular provisions that can only be amended by unanimous consent, may well embody rules of recognition for the WTO legal order. Consider, for example, the position of Kent Greenawalt, who evaluates whether the amendment provisions of the U.S. Constitution could serve as an ultimate rule of recognition for U.S. law; ultimately, he concludes that a full specification of the ultimate rule of recognition would require a far more complicated account of the interaction of institutional and customary law created by the various law-making actors in the U.S. legal system. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987). Setting aside the potential complexity of its statement, Hart doubted whether even in theory there was a single ultimate rule of recognition in the international legal order, although he left open the possibility that the international legal system could evolve in that direction. But Hart supposed that, if there were an international law ultimate rule of recognition, “[multilateral] treaties would in fact be legislative enactments and international law would have distinct criteria of validity for its rules.” HART, *supra*, at 236. Under this view, the WTO as such a legislative enactment would then need to be synthesized with other, related legislative enactments, arguably as proposed in this Article.

275. Cf. Perez, *supra* note 92, at 784–85 (discussing how requirement of notification prior to withdrawal from NPT transfers management responsibility over situation that gave rise to state’s decision to withdraw to Security Council).

276. See JACKSON, *supra* note 217, at 32 & n.41 (citing E.S.C. Res. 13, U.N. ESCOR, U.N. Doc. E/22/Rev. (1946)).

economic law would require institutional linkages between the WTO and U.N. legal orders.

Some linkages between the WTO and United Nations are stated in specific textual commitments in the U.N. Charter and the WTO Agreement and its annexes and are, therefore, straightforward and incontestable. The U.N. Supremacy Clause, and the absence of a similar clause in the WTO, ensures that in the case of a direct conflict, any state member of both the United Nations and WTO would be compelled to observe its U.N. obligations.²⁷⁷ In particular, Security Council decisions, subject at a minimum to the limitations stated in article 24,²⁷⁸ become binding on members by operation of article 25 of the Charter and thereby benefit from article 103's supremacy clause effect. Moreover, article 48 of the Charter expressly provides that the Security Council's "decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."²⁷⁹ Presumably, even without correlative provisions in the WTO annexes, these provisions would be sufficient to import the law of the United Nations into the law of the WTO. But article XXI(c) of the GATT also specifically provides that "[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security,"²⁸⁰ thereby confirming the relationships that would flow directly from the Charter provisions themselves.²⁸¹ Whether the

277. See U.N. CHARTER art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."). The legal situation might be somewhat more complicated for customs territories authorized to become members of the WTO pursuant to the explanatory notes to the WTO Agreement. See WTO AGREEMENT, Explanatory Notes, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS—THE LEGAL TEXTS 18 (1994), 33 I.L.M. 1152. Such customs territories would ordinarily be part of states that are members of the United Nations and thus, under principles of treaty interpretation reflected in article 27 of the Vienna Convention, the state would be bound. See Vienna Convention, *supra* note 61, art. 27 ("A party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.").

Another complicating scenario would arise for states that are members of the WTO but not the United Nations. In that context, articles 2(5) and 2(6) of the U.N. Charter, under which members are obligated to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action" and the United Nations is obligated to "ensure that states which are not Members of the United Nations act in accordance with [its] Principles so far as may be necessary for the maintenance of international peace and security." U.N. CHARTER arts. 2(5), 2(6). One clearly anomalous case is, of course, Switzerland, which is the home of the WTO bureaucracy yet is not a member of the United Nations.

278. See U.N. CHARTER art. 24(2) (stating that "the Security Council shall act in accordance with the Purposes and Principles of the United Nations"). See generally Perez, *supra* note 175 (assessing whether and how domestic jurisdiction principle stated in article 2(7) constrains Security Council decisionmaking).

279. U.N. CHARTER art. 48(2).

280. GATT art. XXI(c).

281. See Richard H. Lauwaars, *The Interrelationship Between United Nations Law and the Law of Other International Organizations*, 82 MICH. L. REV. 1604, 1611-17 (1984). Lauwaars discusses the Dutch Government's refusal to impose sanctions against South Africa recommended by General Assembly and notes the paucity of precedents under article XXI(c), but he nonetheless asserts

recommendation of the Security Council and General Assembly are covered by this provision has not, however, been authoritatively determined.²⁸²

Yet, there may also be more subtle linkages between the United Nations and the WTO. Historically, the GATT's basic structure was significantly affected by the U.N. legal order. In 1964, for example, the U.N. Conference on Trade and Development proposed preferential tariffs for developing countries, notwithstanding the GATT most favored nation principle, which were ultimately implemented by the Contracting Parties acting collectively through a "waiver" granted in 1971 for a ten-year period and later by a "decision" in 1979.²⁸³ Because the "decision" was not explicitly labeled a "waiver," its exact legal status within the GATT system was regarded as unclear.²⁸⁴ The GATT, unlike other international organizations, was not given specific authority to interpret its constitutive instrument through a formal interpretive procedure.²⁸⁵ The decision was not, moreover, adopted as a formal amendment to the GATT to address the concerns of developing countries, as was Part V of the GATT in 1966.²⁸⁶ Thus, U.N.-derived policies in an area squarely within the United Nations's competence²⁸⁷ stimulated lawmaking by the GATT that seemed problematic when viewed solely through the GATT lens. Under a different lens, one that considers both the direct and indirect relationships between the United Nations and the WTO, the GATT's response to U.N. input becomes much more comprehensible. By analogy, U.N. law and practice in areas other than economic development should also have indirect implications for the law of the WTO.

that "emergency in international relations" under article XXI(b)(iii) has been interpreted broadly. *Id.*; cf. KUYPER, *supra* note 230, at 180 (noting that application of sanctions to Rhodesia was GATT-illegal given lack of true threat to security).

282. See Lauwaars, *supra* note 281, at 1612.

283. See JACKSON, *supra* note 217, at 278-79 (citing Generalized System of Preferences, GATT B.I.S.D. (18th Supp.) at 24 (1971) (Waiver), and Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, GATT B.I.S.D. (26th Supp.) at 203 (1980) (Decision)).

284. See JACKSON, *supra* note 217, at 279 (nonetheless describing decision as "the enabling clause" for Generalized System of Preferences (GSP) implemented by Contracting Parties notwithstanding their MFN obligation under GATT).

285. See Articles of Agreement of the International Monetary Fund, art. XXIX, 60 Stat. 1401 (1946), *reprinted in* 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 321 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter IMF Articles of Agreement] (providing for explicit power to interpret). Indeed, one might well regard article IX(2) of the WTO Agreement's provision authorizing formal interpretations of the WTO and its annexes as an effort to cure the gap in the original GATT, subject to article IX(2)'s injunction against the use of the power to interpret. Under this view, article IX(2) would allow circumvention of the more onerous requirements of the provisions governing amendments in article X of the WTO Agreement, thereby avoiding interpretations that, like the 1979 decision authorizing the GSP, operate as de facto amendments. *But see* Jackson, *supra* note 144, at 158-60 (arguing that GATT practice established that power to take joint action under article XXV included power to issue "definitive interpretation as well as elaboration of the GATT").

286. See JACKSON, *supra* note 20, at 1112-13.

287. See U.N. CHARTER art. 1(3) ("[t]o achieve international co-operation in solving problems of an economic . . . character"); *id.* ch. IX ("International Economic and Social Co-operation"); *id.* ch. X (establishing "The Economic and Social Council").

Recent developments in the law of international institutions suggests why this might be so. The ICJ has now invoked the principle of specialty, or specialization, of international organizations to decide that the World Health Organization (WHO) was not competent to request an advisory opinion from the Court concerning the legality of the use of nuclear weapons. The ICJ concluded that the United Nations's special competence in international peace and security removed such issues from the WHO's domain.²⁸⁸ The ICJ's reasoning thus confirms that the special competence of the Security Council in matters affecting international peace and security cannot be disregarded by the WTO, even when the precise provisions of the U.N. Charter and the WTO do not specify a particular result.

Moreover, in the context of discussing the law of the United Nations, its organs, and its specialized agencies, former ICJ president Mohammed Bedjaoui has argued that a counterpart principle of coordination between international institutions may also be derived from the principle of specialty and its related principles of nonsubordination (i.e., that international organizations retain autonomy) and competence (i.e., that as part of this autonomy they retain the right to interpret the Charter as necessary to perform their functions).²⁸⁹ In the context of the law of U.N. organs, Bedjaoui supposes that overall authority resides in the General Assembly, "even though it has itself to respect the three principles" under which it must "perform a work of co-ordination which, being bound to generate some form of control, has at least the potential for testing the validity of the acts of other organs."²⁹⁰ With the caveat that in international peace and security the U.N. Charter makes the General Assembly subordinate to the Security Council,²⁹¹ extension of this reasoning to the relationship between the United Nations and the WTO supposes "co-ordination" of U.N. law with WTO law.

2. *Mediating Between the Conflicting Interests of the WTO and United Nations*

Giving effect to the indirect relationships between the WTO and United Nations will be a delicate task. It should not be oversimplified. One might, for example, trivialize the problem by unnecessarily invoking the supremacy of the United Nations—thereby obfuscating the need for choice because the decision seems preordained. This error would perversely have the same effect of obviating choice that flows from the application of governmental interests methodology in conflict of laws to defer to the law of another

288. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. No. 93, para. 25–26 (July 8).

289. See Mohammed Bedjaoui, *On Efficacy of International Organizations: Some Variations on an Inexhaustible Theme . . .*, in *TOWARD MORE EFFECTIVE SUPERVISION*, *supra* note 144, at 7, 20–21.

290. See *id.* at 22.

291. See U.N. CHARTER art. 12.

jurisdiction in cases of so-called "false conflicts"; that is to say, where only one state has an interest in applying its law and the mere fact that the tort, for example, occurred in the territory of the forum state does not truly implicate that state's interests.²⁹² Under this oversimplified approach, one might describe the national security exception in trade as part of a species of cases involving international security that is outside the competence of the WTO and that therefore should be addressed by the Security Council.

Although it has been intimated by one scholar that the GATT national security exception should be addressed in this fashion, it is doubtful that GATT practice would support such an approach.²⁹³ Indeed, the 1982 Decision on the Falklands/Malvinas case and the 1989 Montreal Improvements to GATT dispute settlement seem to undercut any such suggestion.²⁹⁴ Moreover, the "false conflicts" solution, entailing absolute deference in all security-related cases, ignores the strategic trade dimension of some protectionist policies. Such policies are explicitly recognized in the article XX(b)(i) and (ii) exceptions and may well be relevant to some cases under article XX(b)(iii).²⁹⁵

There is, on the contrary, precedent for a more nuanced comity approach in the law of international organizations related to the GATT. Much as GATT law on development evolved to authorize the Generalized System of Preferences in derogation of the core GATT Most Favored Nation Principle in response to U.N. policymaking input,²⁹⁶ some International Monetary Fund (IMF) lawmaking in the national security area has evaluated the relevance of GATT law in a way consistent with the comity approach.²⁹⁷ The IMF faced the prospect of restrictions on payments and transfers on current international transactions that were inconsistent with the IMF's Articles of Agreement²⁹⁸ but were undertaken, ostensibly, for national security reasons by the United States and other countries against the Soviet

292. Cf. Cavers, *supra* note 242, at 180-81 (arguing against oversimplified analysis ignoring consideration of justice).

293. Richard Lauwaars employed a version of this method in citing a 1965 statement by the Chairman of the GATT Contracting Parties in 1965 to the effect that it had been GATT policy "to avoid passing judgment in any way on essentially political matters and to follow decisions of the United Nations on such questions." Lauwaars, *supra* note 281, at 1612 (quoting JACKSON, *supra* note 130, at 125). What Lauwaars did not say, however, was that this statement was not made in the context of considering the national security exception but rather in response to the question of China's membership in the GATT. See JACKSON, *supra* note 130, at 125.

294. See *supra* text accompanying notes 129-130 (discussing 1982 Decision); *supra* note 170 (discussing 1989 Montreal Improvements).

295. See *supra* text accompanying notes 177-212 (presenting possible interpretive approaches for non-self-judging theories of national security exception such as would permit defensive policies but not offensive policies).

296. See *supra* text accompanying notes 283-284.

297. See JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW 451-81 (1996).

298. Article VIII, section 2(a) of the IMF's Articles of Agreement provides, in pertinent part, that "no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions." IMF Articles of Agreement, *supra* note 285, art. VIII(2)(a). It was the practice of the IMF to treat a "no objection" as the equivalent of "approval" pursuant to article 8(2)(a). See GOLD, *supra* note 297, at 455.

Union and North Korea. The U.S. Executive Director at the IMF defended the U.S. action by reference to article XXI of the GATT.²⁹⁹ After some debate, the IMF Executive Board ultimately decided that, although “[the prohibition] applies to all restrictions on payments and transfers for current international transactions, whatever may be the motive for the restrictions and the circumstances in which they are imposed . . . ‘[t]he Fund does not, however, provide a suitable forum for discussion of the political and military considerations leading to actions of this kind.’”³⁰⁰ In adding that “the Fund must exercise the jurisdiction conferred upon it by the Fund Agreement in order to perform its functions and protect the legitimate interests of its members,”³⁰¹ however, the Executive Board made clear that the IMF had jurisdiction in the case, notwithstanding the GATT national security exception, but simply was not exercising it.³⁰² Thus, the U.S. argument that the IMF should defer to the policy stated in the GATT, which in turn deferred to national security interests, in effect prevailed on comity grounds, even though the text of the IMF Articles of Agreement itself contained no such clause.³⁰³

The central point is that the IMF retained jurisdiction but implicitly made a prudential judgment that countervailing U.N. policy counseled in favor of deference to national action that was consistent with U.N. policy on Korea in the early 1950s. Thus, the choice of law approach outlined here for interpreting the WTO national security exceptions conforms to an important early precedent in interpreting the GATT national security exception. Neither is the institutional comity approach inconsistent with the early jurisprudence of the WTO/DSU Appellate Body, which suggests it too is “concerned to make it very clear that the WTO is not a unique international organization that only needs look at its own terminology and practices for guiding principles.”³⁰⁴

299. See GOLD, *supra* note 297, at 452.

300. *Id.* at 453–54 (quoting IMF Decision No. 144, Selected Decisions, at 345).

301. *Id.* at 454 (quoting IMF Decision No. 144, Selected Decisions, at 345).

302. See *id.* (questioning distinction drawn in IMF’s decision between restrictions imposed for security reasons and restrictions imposed for economic reasons, since very purpose of restrictions imposed ostensibly for security reasons are intended to have economic effects).

303. The IMF’s deference to national decisionmaking in the context of security-related justifications for deviation from substantive rules of the IMF, such as article 8(2)(a)’s prohibition against restrictions on current transfers, is contrasted by its rejection of Czechoslovakia’s attempt to assert a security justification for its refusal to comply with IMF reporting requirements. See *id.* at 458–62. The IMF even rejected Czechoslovakia’s theory that it was entitled to withhold information from the IMF under article XXI of the GATT because information submitted to the IMF would make its way to the GATT. See *id.* at 461.

304. Jeffrey Waincymer, *Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora out of a Chapeau?*, 18 MICH. J. INT’L L. 141, 165 (1996) (discussing extensive citation of decisions of International Court of Justice by Appellate Body in *United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body*, *supra* note 208).

3. *The Choice of Law, Bargain, and Constitutional Approaches Compared*

The choice of law approach described here is arguably superior to the bargain or constitutional conceptions of WTO law. Unlike the bargain conception, which leaves the national security exception to be judged according to subjective good faith,³⁰⁵ comity eliminates the self-judging character of the exception, thereby furthering the pro-legalist policies of the WTO's revised DSU. Unlike the constitutionalist approach, under which an argument for a non-self-judging security interests exception might be constructed out of the ashes of the *Nicaragua Trade Measures* case, albeit with little other precedent, the much greater and more detailed practice of the Security Council could establish objective measures of the good faith required in the exercise of the national security exception. This, in turn, might allow members of the WTO to develop expectations about the operation of the national security exception that could make misuse of the exception a basis for compensation in a nullification and impairment of benefits claim even if the DSB could not order withdrawal of the measure.³⁰⁶ The objective good faith standard made possible by the comity approach thus accords with the larger purposes of the new WTO.

Comity in this context is supported by the same rationales, both technical and democratic, that in the administrative law context support deference to a national regulatory agency.³⁰⁷ Comity among international organizations fosters decisionmaking by the organizations with special expertise in the issue area. It thereby encourages uniformity and avoids institutional forum shopping. But, most important, it maximizes political accountability to the whole community that created an international institution by channeling the community's focused attention on the full legal implications of the development of rules and policies governing an issue area at a particular institutional forum. This channeling of attention may well broaden and deepen the international political process by creating opportunities for tradeoffs between different interests, such as the conflicts between trade and traditional national security policies, at the lawmaking forum with special competence over the issue. In the case of international peace and security, this forum is primarily the Security Council of the United Nations but also to some degree the General Assembly as well.³⁰⁸

Finally, structural considerations further support the comity approach. Unlike the bargain conception, which ignores the overall community interest in compliance with WTO/GATT rules, the comity approach gives due

305. See *supra* text accompanying notes 89–118.

306. See generally Kuyper, *supra* note 129 (rejecting possibility of compensation, except in case of breach of GATT through misuse of exception); see also Croley & Jackson, *supra* note 67, at 195–98 (discussing DSU's refusal to require withdrawal in pure nullification and impairment cases).

307. See *supra* text accompanying notes 74–78.

308. Article 12 of the Charter excludes the Assembly from this area only when the Council "is exercising in respect of any dispute or situation the functions assigned to it." U.N. CHARTER art. 12.

respect to the ways in which states have ceded portions of their sovereignty in attempting to create a new and more stable framework for global trade. Unlike the constitutional conception, the comity approach relates the effort to establish a global regime for trade with the other, related cessions of sovereignty by states. Without resorting to absolute state sovereignty as a limiting principle, the logic of which Jackson and Croley recognized might destroy the WTO,³⁰⁹ comity among international institutions checks, on behalf of sovereign state interests, the lawmaking power of each international institution.

A possible analogy is the role of process-based limits in federal decisionmaking in the United States in preserving state autonomy.³¹⁰ Under the political process account for the preservation of state sovereignty, lawmaking—including the checking function performed by the U.S. Congress on lawmaking by administrative agencies—is constrained by state sovereignty through, among other things, the necessary involvement of the U.S. Senate.³¹¹ Similar protection for state sovereignty is secured in the international system through the principle of sovereign equality, which expresses itself through one-state, one-vote rules at the WTO³¹² and the United Nations.³¹³ This voting rule partially counteracts the influence of power and population in the WTO through the leverage that larger economies have in negotiating tariff concessions, thereby tilting the balance of advantages in their favor, and in the United Nations through the veto the U.N. Charter accords to five states, which happen to be the nuclear powers and are among the largest, most populous, and wealthiest countries.³¹⁴

309. See *supra* text accompanying note 77. Arguably, “subsidiarity,” Jackson and Croley’s other suggestion, is inadequate because it lacks any cultural or historical justification for treating territorial units as worthy of respect. See Perez, *supra* note 175, at 394–96.

310. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (“State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”). *But cf.* Printz v. United States, 117 S. Ct. 2365 (1997) (invalidating as unconstitutional conscription of state resources under federalism principles in Constitution, federally-imposed requirement that state officers perform background checks on handgun purchasers); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 819–25 (1996) (discussing implications of “necessary and proper clause”); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 22–36 (1988) (drawing limits on federal intrusion on state autonomy from federal guarantee of “Republican” form of government); Thomas H. Odom, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657, 1658–67 (1987) (discussing Garcia’s process-based theory); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 365 (describing process-based jurisprudence as “an elaboration of judicial standards, the justification of which does not rely on the desirability of specific substantive results but rests instead on the identification of some defects in the political process that prevent it from operating in accordance with the function assigned to it”).

311. See *Garcia*, 469 U.S. at 551 (citing U.S. CONST. art. I, § 3 for proposition that States receive equal representation in Senate).

312. Article IX(1) of the WTO Agreement provides that “where a decision cannot be arrived at by consensus, the matter at issue shall be settled by voting” and “each Member of the [WTO] shall have one vote.” WTO AGREEMENT art. IX(1).

313. Article 27, paragraph 1 of the U.N. Charter provides: “Each member of the Security Council shall have one vote.” U.N. CHARTER art. 27, para. 1.

314. See Perez, *supra* note 92, at 754–55 (discussing distinction between de jure nuclear-

Reliance on the product of Security Council process thus redresses the WTO's failure, as some have called it, to provide for the weighted voting procedures employed at other major international economic institutions.³¹⁵

In the particular case of the national security exception, however, the most important factor in checking wealth, power, and population is the way by which structure of the Council facilitates principled decisionmaking.³¹⁶ When, for example, states, particularly the smaller states that rotate through the Council,³¹⁷ agree and find a situation to be a threat to international peace and security, they are not unaware that they establish a precedent.³¹⁸ This is not to say that chapter VII findings by the Security Council are necessarily legal determinations subject to judicial review.³¹⁹ Nonetheless, the patterns and practices of the Security Council even as a political organ generate expectations of likely future behavior, or at least of the kinds of arguments of a prudential character that might be given weight in particular factual contexts. In making or rejecting factual arguments about what might constitute a threat to international peace and security, the Council's members establish objective criteria that they know may well come back to haunt them in future cases. Therefore, the practice of the Security Council should reflect sovereignty concerns of Council members, particularly the nonpermanent

weapon states, which owing to France and PRC's adherence to NPT are same group as permanent members of Security Council, *see* U.N. CHARTER art. 23(1), and de facto nuclear weapons states, that are thought to possess nuclear weapons capability not legitimized by NPT).

315. *See* JACKSON, *supra* note 217, at 49 (describing failed efforts at GATT to develop consultative mechanism including only largest economic powers).

316. *Cf.* Bukovansky, *supra* note 265, at 217 (arguing that diverse interests shape state system); Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law From an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 149-79 (1995) (identifying principles that, operating as shared understandings, limit expression of power in international lawmaking process); Wendt, *supra* note 265, at 406 (advancing, from political science perspective, related approach focusing on relationship between construction of legal norms and construction of community self-identity which in turn generates interests that are advanced through exercise of power).

317. *See* U.N. CHARTER art. 23(2) ("The non-permanent members of the Security Council shall be elected for a term of two years."). Article 27(3) of the U.N. Charter, moreover, assures that the nonpermanent and permanent members each have significant voting power, since "decisions of the Security Council," except on procedural matters, "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." *Id.* art. 27(3). Thus, at least four nonpermanent members must join the permanent members in potentially reducing national sovereignty by determining that a situation is a threat to international peace and security that, in theory, could warrant collective measures. *See* U.N. CHARTER art. 39 (determination requirement as predicate recommended measures under article 41 or mandatory non-military and military measures under articles 41 and 42, respectively).

318. *See* Perez, *supra* note 175, at 421-36 (discussing deliberative democracy at Security Council, including concern of members of Security Council over precedent-setting implications of chapter VII findings).

319. *See, e.g.,* W. Michael Reisman, *The Constitutional Crisis of the United Nations*, 87 AM. J. INT'L L. 83, 90-91 (1993) (rejecting World Court supervision); Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 12 (1994) (rejecting possibility that chapter VII standard employed by Security Council is legal standard); *cf.* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. (Feb. 27), at *13-14 (visited Mar. 23, 1998) <<http://www.icj-cij.org/idoCKET/ilukjudgment/ilukjudgmentcontent.html>> (holding that chapter VII resolution does not retroactively defeat jurisdiction or admissibility that existed as of date application is submitted, but leaving open question whether ICJ is free to ignore substantive effect of such resolution in the merits phase of dispute).

members who will not in the future be able to protect their sovereignty through the exercise of the veto. Thus, the political process rationale through which state sovereignty is protected at the U.S. national level may well also suffice to address any federalism concerns against subjecting the WTO national security exceptions to the supervision and control of the DSB.

4. *Limits to the Usefulness of Security Decisionmaking as a Source of WTO Law*

The particular approach outlined here for incorporating the activity of the Security Council in the work of the DSB is not, however, without potential objections. At least one possible criticism is that the Security Council's decision not to impose sanctions in a particular case should foreclose reliance on the national security exception in that case. However, the decision to impose or authorize collective sanctions is a prudential judgment about the likely effect of economic sanctions in resolving the situation that caused the threat to international peace and security. Thus, the Council's failure to authorize collective sanctions in a particular case need not be read as evidence that the Council believes it would not be within its power to do so. Similarly, an individual state might nonetheless have an objectively well-founded basis for considering its security threatened and thereby be entitled to invoke the WTO national security exception.

A broader, and perhaps more compelling objection, is that the WTO members may have expressed a different intention by not tying the WTO to the United Nations. This suggests that their commitment to an independent trade order supersedes their understanding that the transnational political process, even in the security area, needs to be governed through the institutions and principles embodied in the United Nations. It will be recalled that because of the ambiguous legal statutes of the GATT, given the stillbirth of the ITO, the GATT never entered into a relationship agreement with the United Nations.³²⁰ There is, moreover, evidence that the current WTO Secretariat even now is reticent to enter into such an agreement³²¹—perhaps on the premise that the WTO is a preferred nexus for supranational constitutional development and should be free from U.N. influence until U.N. reform modeled on the achievements of the Uruguay Round is achieved.³²² It is suggested that the WTO institutional structure, which

320. See Zamora, *supra* note 217, at 509 n.16.

321. See Stephen Zamora, *Economic Relations and Development*, in THE UNITED NATIONS AND INTERNATIONAL LAW 232, 237 n.13 (Christopher C. Joyner ed., 1997) (noting that despite WTO's status as formal organization, WTO has yet to conclude agency agreement with United Nations and remains allied only informally). Conversely, the WTO concluded in April 1997 an agreement for cooperation and collaboration with the World Bank, providing for, inter alia, reciprocal observer status in decisionmaking bodies, and established a similar agreement with the IMF in December 1996. See *WTO and World Bank Sign Cooperation Agreement*, Apr. 28, 1997 (World Trade Organization news release) (visited May 5, 1998) <<http://www.wto.org/wto/press/press72.htm>>.

322. For a discussion of this issue by a former GATT legal advisor, see Petersmann, *supra* note 30, at 457-68, which argues that liberal democratic values can be "constitutionalized" through

facilitates multiple negotiations on several issues simultaneously—permitting “global package deals” between, for example, services and intellectual property—and thereby facilitates bargained tradeoffs, “may enable results that were never possible . . . in UN bodies like the UN Conference on Trade and Development.”³²³ But it is doubtful whether the WTO is by itself an adequate vehicle for continued global constitutional development, given the limits imposed by its underlying philosophy, institutional structure, and textual commitment to join the family of international institutions.

First, law and economics modes of reasoning—even in explicating federalist values as subsidiarity, thereby justifying decentralization solely on efficiency grounds—pervade the WTO epistemic community.³²⁴ Thus, the WTO’s bias toward trade values ignores other human values that are ordinarily a central part of the political processes of most communities³²⁵ and calls into question its viability for serving as the exclusive vehicle, or even model, for developing supranational institutions that facilitate strengthening of the transnational political process.³²⁶ Rather, supranational constitutionalism could be grounded on premises that, unlike the utilitarian premises of subsidiarity, are more sensitive to the need to develop a true supranational community through a supranational political process involving deliberative democracy over values instead of involving merely economic well-being.³²⁷

Second, even WTO advocates recognize that its current amendment process is structured to channel constitutional change toward negotiation of supplementary agreements that will not be binding on all the parties, which “could again lead to a ‘WTO à la carte’ system. This might later prompt WTO countries to repeat the Uruguay Round approach and replace the WTO Agreement by a new agreement.”³²⁸ Accordingly, it would seem preferable

radical institutional reform of the United Nations, following the WTO model.

323. *Id.* at 442; *see also id.* at 454 (arguing that WTO facilitates “package deal negotiations”).

324. *See, e.g.,* Joel P. Trachtman, *L’Etat, C’est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT’L L.J. 459, 468–71 (describing various interpretations of principle of subsidiarity); *see also* Croley & Jackson, *supra* note 67, at 211 (suggesting, in article’s conclusion, that issues of “local” governance within international system be addressed “perhaps using theories of ‘subsidiarity’” but making no reference to federalism).

325. *See, e.g.,* CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 4–17 (1996) (rejecting comprehensive theories of legal reasoning, such as law and economics school); *see also* Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 CAL. L. REV. 265, 280 (1997) (reviewing SUNSTEIN, *supra*) (arguing for extension of institutional analysis of decisionmaking that, unlike law and economics, “employs a complex model of individual behavior based on self-interest, altruism, opportunism, ideology, and meaning” to the behavior of courts as well).

326. *See* Nichols, *supra* note 52, at 709–18 (questioning whether WTO, as currently configured, suffers legitimacy deficit because it fails to account for nontrade values).

327. *See* Perez, *supra* note 175, at 393–94 (articulating justification of federalism based on role of reasoned debate in forming community committed to ideals of human perfection as organizing principle for U.N. constitutional development).

328. Petersmann, *supra* note 30, at 454. Similarly, just as states might defect from the WTO if they dissented from new WTO agreements that focused excessively on WTO values, they might defect from the WTO if WTO interpretation by the DSB made the same mistake. Accordingly, even Petersmann, one of the foremost advocates of WTO-centered global policymaking, acknowledges that

to develop analytic approaches for relating existing supranational institutions rather than waiting for each to be perfected. Under the comity principle suggested in this Article, for example, the lawmaking organs of the United Nations and the WTO's multiple councils could function as "laboratories of democracy."³²⁹ In implementing a pluralist version of federalism calculated to stimulate reasoned debate leading to a supranational community, they would give "full faith and credit"³³⁰ to each other's exclusive judgments and, where their interests conflict, accord appropriate deference based on the comity principle.

Finally, the WTO Agreement's text specifically provides that the WTO "shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the [WTO]."³³¹ It is hard to see how, consistent with this provision, the WTO can avoid the implications of U.N. law on its activities and its legal development. In short, the WTO Agreement itself recognizes that no international organization is "an island," but rather that each must be "a part of the maine."³³²

That said, one might not necessarily conclude that international agreements have established institutions fully responsible for management of areas other than international trade and international security. It might not be appropriate for the WTO to accord institutional comity to the decisions of every other existing institution. For example, as much as one might be desirable, there exists now no equivalent of the United Nations or WTO for environmental law.³³³ Accordingly, the institutional comity approach would not appear to undercut the conclusion of the 1994 GATT Panel on the Restriction on Imports of Tuna that environmental agreements "that were not concluded among the contracting parties to the General Agreement, and . . . did not apply to the interpretation of the General Agreement or the application of its provisions," or "practice under" that agreement, did not affect interpretation of the GATT.³³⁴ This conclusion, asserting the

"worldwide trade agreements, like GATT and the WTO Agreement, are an integral part of the international legal system and not 'self-contained regimes' isolated from other areas of international law." ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* at xvi (1997); *cf. supra* text accompanying notes 223-231 (explicating concept of self-contained regime).

329. *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single state may . . . serve as a laboratory.").

330. *Cf.* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.").

331. WTO AGREEMENT art. V(1).

332. John Donne, *For Whom the Bell Tolls*, in *SELECTED PROSE* 100-01 (Helen Gardner & Timothy Healy eds., 1941).

333. For a proposal for the creation of a "new international environmental regime," see Daniel C. Esty, *Stepping Up to the Global Environmental Challenge*, 8 *FORDHAM ENVTL. L.J.* 103, 111 (1996).

334. *Restrictions on Imports of Tuna*, *supra* note 173, para. 5.19, at *167-68.

superiority of WTO law within the WTO legal system, was expressed in the ordinary language of article 31 of the Vienna Convention.³³⁵ Yet, for different reasons, it remains valid under the choice of law theory as well. Nonetheless, institutional comity suggests a means by which states could circumvent the Vienna Convention's requirement that all the parties to the WTO accept new environmental obligations as modifications, either directly through amendment of WTO law or indirectly as a separate agreement intended to relate to WTO law. Instead, something less than all the members of the WTO could create a new institution with coordinate responsibilities in management of the world's environment which would, accordingly, be entitled to deference in matters within its area of responsibility.

C. *The Comity Approach Applied to the Helms-Burton Dispute*

However rich the recent practice of the Security Council may be, one must candidly admit that, even if the practice of the United Nations offers a set of precedents that reduces uncertainty in the application of the national security exception, a close study of Security Council behavior might not yield determinate solutions in every case.

In the case of Helms-Burton, for example, one might question the legality of continued U.S. sanctions against Cuba, measures that previously had been justified on the basis of the Cold War with the Soviet Union.³³⁶ Yet post-Cold War Security Council rationales for authorizing enforcement action might still justify the United States's determining that Cuba's conduct or probable conduct threatens its essential security interests.³³⁷ Thus, massive state-sponsored emigration along the lines of the earlier 1980 Mariel episode might have justified the imposition of sanctions. Yet the United States had come to an agreement with Cuba resolving this issue,³³⁸ leaving

335. *See id.*

336. *See* Jerry W. Cain, Jr., *Extraterritorial Application of the United States' Trade Embargo Against Cuba: The United Nations General Assembly's Call for an End to the U.S. Trade Embargo*, 24 GA. J. INT'L & COMP. L. 379, 394 (1994) ("As a result of the end of the Cold War, the United States is no longer justified in claiming such an exemption from GATT provisions under Article XXI.").

337. *See* Porotsky, *supra* note 138, at 929 n.145 (arguing that United States could plausibly argue that maintenance of repressive dictatorship near its borders, leading to refugee crisis, would implicate U.S. security interests). Porotsky's argument would be buttressed by the Security Council's recent decision under chapter VII of the U.N. Charter to authorize use of force by the United States, among others, to restore democracy in Haiti, at least in part because of the threat created by Haitian refugee flows. *See* S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg. at 51, U.N. Doc. S/INF/50 (1994).

338. *See U.S.-Cuba Joint Communique on Migration* (Sept. 9, 1994), in 5 DEP'T ST. DISPATCH 603, 603 (1994) (agreeing to ensure "safe, legal and orderly" migration); *U.S.-Cuba Joint Statement on Migration* (May 8, 1995), in 6 DEP'T ST. DISPATCH 397, 397 (1995) (agreeing to continue policy of humanitarian parole for those currently residing at Guantanamo Bay's "safe haven," but crediting them towards annual immigration goals as they are transferred); Peter Turnoff, *U.S. Policy Toward Cuba*, Address Before the Western Hemisphere Subcommittee of the Senate Foreign Relations Committee (May 22, 1995), in 6 DEP'T ST. DISPATCH 446, 450-51 (1995) (explaining drawdown of Cuban refugees at Guantanamo Bay and expressing concern that earlier disclosure of agreement could have incited mass migration).

only the February 1996 shutdown incident apparently as the sole security-related justification. An unnamed senior U.S. official was reported to have said: "Our position is that matters related to national security and foreign policy should simply not be considered at the WTO, but rather at the U.N. or NATO or whatever."³³⁹ Yet, when the United States took the matter of the shutdown to the Security Council, only a mild condemnation of Cuba's action followed.³⁴⁰ The United States has been unable to persuade the Security Council—much less the General Assembly, which has consistently criticized U.S. sanctions against Cuba³⁴¹—that Cuba represents a threat to U.S. security interests.

Nonetheless, the United States objectively was the victim of the use of force against its nationals. Moreover, the Cuban government's decision to embark on this provocative course might reasonably have signaled to the United States the possibility of escalation, including the threat of state-sponsored mass migration. Arguably, a foreign policy crisis was precisely what the Cuban government needed to divert attention from its concomitant crackdown on the internal Cuban dissident movement.³⁴² Given the Cuban government's history, it is not entirely unreasonable for the United States to have concluded that some coercive measures, short of the use of force, might deter further escalation of Cuba's provocative strategy—or so, at least, the United States should be prepared to argue before the WTO, if this is indeed its rationale.

In brief, in engaging in this debate, the comity approach would provide the United States and European Union with more than enough precedent for one side to cite, and the other to distinguish, thereby giving more settled meaning to WTO law in national security cases, such as Helms-Burton sanctions, that fall outside the strategic trade component of the WTO national security exceptions.

339. Paul Blustein, *WTO Powers Are Put to the Test; Dispute over Cuba Sanctions Has U.S. Crying Foul Early in the Game*, WASH. POST, Feb. 22, 1997, at D1 (quoting unnamed U.S. official).

340. See *Statement of Acting Security Council President*, U.N. SCOR, 51st Sess., 57th plen. mtg., at 1, U.N. Doc. S/PRST/1996/9 (1996) (stating that Security Council "strongly deplore[d]" incident).

341. See, e.g., G.A. Res. 17, U.N. GAOR, 51st Sess., Agenda Item 27, at 1, U.N. Doc. A/RES/51/17 (1996) (calling for United States to end trade sanctions and expressing "concern" over continued "promulgation" of laws such as "Helms-Burton").

342. Cf. *Current and Projected National Security Threats to the United States and its Interests Abroad: Hearing Before the Select Comm. on Intelligence of the United States Senate*, 104th Cong. 49 (1996) (Prepared Statement of Toby T. Gati, Assistant Secretary of State for Intelligence and Research) (stating that Cuba's "desperate economic straits" created "potential" of "yet another mass migration"); Max J. Castro, Editorial, "Another Mariel" an Unlikely Threat, SUN SENTINEL (Ft. Lauderdale, Fla.), Mar. 25, 1996, at 15A (discussing fear in United States that sanctions against Cuba for shutdown would result in mass migration).

VI. CONCLUSION

With the suspension of the case before the WTO, implicitly in return for, among other things, U.S. relaxation of Helms-Burton sanctions,³⁴³ the United States may never need to explain its legal reasoning before the WTO/DSB. But the settlement, if it holds, is about more than U.S. and EU neuralgias over Cuba. The United States may have been justifiably motivated by the economic—but nonprotectionist—concern that foreign investors in Cuba benefit from formerly U.S.-owned properties in Cuba, probably the only truly new development in American interests. The sale of such properties triggered broader U.S. interests in the stability of its overseas investments and thereby motivated in part the congressional effort to enact Helms-Burton.³⁴⁴ Accordingly, the United States may have used its threat to invoke the national security exception in the Helms-Burton dispute for the related purpose, not covered by the security interest exception, of inducing Europe to accept restrictions on profiting from unlawful expropriation in negotiations for a new WTO multilateral investment regime—although arguably only with prospective effect, thus removing preexisting investments in Cuba from the scope of negotiations.³⁴⁵ The United States also obtained European agreement to negotiations “to address and resolve through agreed principles the issue of conflicting jurisdictions, including issues affecting investors of another party because of their investments in third countries,”³⁴⁶ an issue that has historically bedeviled transatlantic relationships.³⁴⁷

Through bargaining “in the shadow of” the WTO,³⁴⁸ it appears that the United States and the European Union may have avoided the costs of litigation. Moreover, if the EU threat of WTO adjudication and the U.S. retaliatory threat of asserting the national security exception encourage

343. See U.S.-EU MOU, *supra* note 6, at 529.

344. See Therese Raphael, *U.S. and Europe Clash over Cuba*, WALL ST. J., Mar. 31, 1997, at A14 (“Mr. Castro’s wholesale expropriation of American property without compensation happened nearly four decades ago, but only recently has the hard-pressed dictator started actively peddling it to foreigners. For example, the Italian state-owned phone company Stet is now a large investor in the Cuban phone system, expropriated from an ITT subsidiary.”).

345. See U.S.-EU MOU, *supra* note 6, at 529 (“[D]isciplines should inhibit and deter future acquisitions of investments . . . expropriated . . . in contravention of international law, and subsequent dealings in covered investments”); see also Paul Blustein & Thomas Lippman, *Trade Clash on Cuba Is Averted; U.S.-Europe Pact Seeks to Ease Helms-Burton*, WASH. POST, Apr. 12, 1997, at A1 (describing agreement to “try to negotiate common ‘disciplines and principles’ for protecting the rights of companies and individuals whose property is seized in violation of international law. Such measures might, for example, impose penalties on a future purchaser of property that had been expropriated . . .”); Robert S. Greenberger, *Clinton, EU Ease Tension on Cuba Issue*, WALL ST. J., Apr. 14, 1997, at A3 (reporting statement of Marc Thiessen, spokesman for Senator Jesse Helms, that preexisting investments must also be covered in new investment agreement).

346. US-EU MOU, *supra* note 6, at 529-30.

347. See JACKSON ET AL., *supra* note 20, at 967-72 (discussing EC objections to U.S. efforts to impose sanctions extraterritorially).

348. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing how law aids negotiation outside of courtroom).

harmonization of policy on the extraterritorial application of law and the protection of foreign investment, it is hard to quibble with the result. Bargaining in the shadow of the WTO will continue to be fruitful, however, only if the WTO continues to serve as a Sword of Damocles for both sides in disputes implicating national security issues. The comity approach to interpreting the WTO as a member of the family of "sovereign" supranational institutions properly balances the constitutional purposes of the WTO against the need for a measure of state sovereignty in the national security area, at the same time ensuring that the shadow cast by the United Nations marks the shape of a law otherwise left invisible by the WTO.

In conclusion, by most accounts we live now in an era characterized by the declining power of the state and the increasing authority of supranational institutions. We need, therefore, to reconceive the relationships between individual states, between states and supranational organizations, and—as argued here—between supranational organizations. Together, these relationships will generate a large and now only dimly-perceived set of interpretative tasks for philosophers, economists, political scientists, and even for international lawyers. The Bello-Jackson debate over the remedial powers of the WTO and states' duties of compliance thus foreshadows the larger debates that lie ahead concerning the effect of the changing structure of international society on the doctrinal tools we lawyers use to make sense of our world. Institutional comity may at the end of the day turn out not to provide the best possible theoretical foundation for these tasks. But, for now, unlike the contract or constitutional conceptions of WTO law, institutional comity will provide an agenda for research and analysis that does not blind itself to the new world before us.

