

Northwestern Journal of International Law & Business

Volume 17

Issue 1 *Winter*

Winter 1997

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Recommended Citation

Paul B. Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 Nw. J. Int'l L. & Bus. 681 (1996-1997)

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Accountability and International Lawmaking: Rules, Rents and Legitimacy

*Paul B. Stephan**

The domain of legal rules laid down by international bodies has grown enormously. Laws that have an international source influence a far larger portion of the world's commerce today than they did sixty or even twenty years ago. The enhanced significance and consequences of these laws raises an important question: What safeguards do we employ to increase the chances that they will do some good? More specifically, what processes hold international lawmakers accountable for their decisions?

The debate in the United States over the adoption of the North American Free Trade Agreement (NAFTA) and the Uruguay Round Agreements has brought these questions to the fore. Critics on both the left and the right decry what they claim is a surrender of national sovereignty to secretive and unaccountable international technocrats. They assert that the establishment of NAFTA and the World Trade Organization (WTO) will mean that state and federal legislatures no longer may decide what kind of environmental safeguards or standards of consumer and worker protection we will have. They predict

* Percy Brown, Jr., Professor, and Barron F. Black, Research Professor, University of Virginia School of Law. I am grateful to Pamela Clark, Jeffrey L. Dunoff, Jack Goldsmith, Herbert Hausmaninger, Edmund W. Kitch, Robert E. Scott, John K. Setear, Anne-Marie Slaughter, Joel Trachtman and participants in the Conference on Institutions for International Economic Integration, organized by the American Society of International Law's International Economic Law Interest Group, and the Virginia Legal Theory Workshop for comments on and criticism of earlier versions of this paper. I am particularly indebted to Dr. Ernst-Ulrich Petersmann for his remarks. All errors and misjudgments that remain are mine alone.

that international bodies will impose bad rules that we will be hard pressed to avoid.¹

The shrill and often dubious manner in which some of those critics press their attack should not deter us from considering the serious issues they raise. When it comes to domestic law, we regard accountability as fundamental. Unaccountable lawmakers are in some deep sense illegitimate. In free and democratic societies, we insist on both a right to investigate and criticize lawmakers and the existence of some mechanism for removing them when they have dissatisfied us. To be sure, in modern states a great deal of practical lawmaking rests in the hands of bureaucrats and judges, neither of whom have to face an electorate to remain in office. But both of these institutions remain subject to legislative discipline, and legislators in turn have to answer to the voters for the way in which they manage these officials. Mediated accountability may be weaker, and some would argue that it is insufficient, but it still exists.

International lawmakers largely face weaker constraints on their behavior. They normally receive their mandate from a consortium of executive branches of national governments. Only some of these executives must stand for direct elections, and in many cases the exercise of the authority they delegate to international lawmakers is not subject to subsequent legislative ratification. The European Union offers the most important example of international lawmaking substantially freed from parliamentary oversight.²

Even when domestic legislatures must approve an internationally generated law, legislators may have less freedom to alter or repudiate the proposal than they do with respect to domestic measures. As a practical matter, most national legislatures have only two means of disciplining international lawmakers, because substituting a different

¹ For attacks from the left, see, e.g., *Public Citizen v. United States Trade Representative*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994); Ralph Nader, William Greider & Margaret Atwood, *THE CASE AGAINST FREE TRADE: GATT, NAFTA AND THE GLOBALIZATION OF CORPORATE POWER* (1993); *THE CASE AGAINST THE GLOBAL ECONOMY: AND A TURN TOWARD THE LOCAL* (Jerry Mander, Edward Goldsmith & Barbara Ras eds. 1996); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). On the right, see, e.g., S. 16, 104th Cong., (1995) (bill to create domestic tribunal to review WTO dispute resolution decisions); H.R. 1434, 104th Cong., 1st Sess. (1995) (same); H. ROSS PEROT & PAT CHOATE, *SAVE YOUR JOB, SAVE OUR COUNTRY: WHY NAFTA MUST BE STOPPED - NOW!* (1993).

² In theory, the European Parliament might impose a check on EU Council lawmaking. At the present time, however, the Parliament plays an insignificant role in the legislative process. Cf. J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995).

rule is not an option. They can reject the rule generated through the international process, or they can withhold funds from the lawmaking body. With respect to multilateral bodies, each of these variants is problematic. Rejection or a dues default may entail exit from the organization generating the rule, not simply negation of a particular proposal. But these organizations offer significant benefits to their members, and few international rules impose costs on a particular country so great as to justify resigning from a desirable club.

I want to consider the question of accountability for international lawmakers from both positive and normative perspectives. To what extent do international bodies operate without effective constraints on their lawmaking, and what influence do accountability deficits have on the content of the rules these bodies generate? To the extent we should worry about lack of accountability in international lawmaking, how might we address the problem? Finally, in what ways should our understanding of how international lawmaking operates affect what we write and teach about the rules it generates?

In the first part of this paper, I describe the lawmaking processes of several international bodies with an eye toward identifying disciplinary mechanisms. In the second part, I attempt a theory of the political economy of international lawmaking. In particular, I suggest what factors may motivate international lawmakers and how weak constraints on their behavior may influence what they do. In the third part, I test this theory. The conclusion wrestles with the normative implications of the theory.

I. THE MAKING OF INTERNATIONAL LAWS

The term "international laws" needs definition, because so many scholars and advocates invoke international law in so many different contexts for so many different purposes. I will concentrate on two kinds of rules: those that govern the primary conduct of private persons and government organs in their dealings with private persons, and those that tell national and subnational governments what kinds of rules of the first sort they may and may not promulgate. The formula "a person who by acting unreasonably causes harm must compensate the injured person" is a rule of the sort I want to examine, as is the formula "a state may not regulate conduct unless it bears some reasonable relationship to the regulating state."

What I am not interested in are administrative matters, such as that expressed by the formula "the Trade Representative will conduct all international trade negotiations on behalf of the United States."

Issues that largely involve state-to-state relations, such as the recognition of governments, the permissible uses of force, and state boundaries, fall outside the scope of this essay. Accordingly, I am leaving out of my inquiry large bodies of material that many specialists would consider at the heart of international law.

This focus stems from an assumption about accountability and an intuition about how accountability works. I assume that the kinds of accountability that matter are those by which the governed exercise control over their governors. When the state makes demands of its subjects, accountability means that the subjects have some means of affecting those demands, either by choosing in some fashion who may exercise the power to make those demands (voice) or by taking steps to place themselves outside their scope (exit).³ My intuition is that subjects are largely concerned with the content of rules governing their behavior and the processes by which those rules are formed. That is to say, I believe U.S. voters may care greatly about the content of international trade agreements that affect how much they pay in import duties and what kinds of goods and services they may import and export, but do not have much interest in which government agency crafts the proposal that the President ultimately submits to the Congress for approval. This intuition is not meant to dismiss all questions of administration, as voters clearly care whether a government employs its resources effectively or not. Most of all, voters pay close attention to what benefits they get from the government and at what cost. But it seems reasonable to believe that, issues of cost and benefit aside, subjects are largely indifferent to how a government is run and, with respect to international relations, how governments conduct their relations with one another, up until that moment where the government begins issuing them orders.

International bodies promulgate laws, so conceived, in a variety of ways. Public international organizations such as the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD) and the Council of the European Union (EU) legislate rules of general applicability with the expectation that member states will implement them.⁴ Yet other organizations, such as the United Nations Commission for International Trade Law (UNCI-

³ The allusion, I hope obvious, is to ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

⁴ Specialists will recognize that the European Union was, until 1994, the European Communities, comprising the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community. Throughout this paper I will use the term "EU" to refer to both the present body and its predecessors.

TRAL) and the privately constituted International Chamber of Commerce (ICC), International Institute for the Unification of Private Law (UNIDROIT) and Hague Conference on Private International Law (Hague Conference), draft conventions and model contracts for individual states to enact and private parties to adopt. Some international adjudicative organs generate something like a common law through the resolution of particular problems. For example, the WTO's Dispute Settlement Body and the European Court of Justice behave in a fashion that looks more like lawmaking than law finding. The staff of bodies such as the International Monetary Fund (IMF) offers advice as to how general international rules apply to particular cases. What these processes have in common is that they produce rules that purport to govern the future conduct of particular actors over some specified range of activity. For the sake of clarity of analysis, I will distinguish among the public legislating, private legislating, dispute resolution and administrative interpretation functions.

A. Public Legislation

The constitutions of most international bodies establish a procedure by which the member states, acting collectively either by consensus or through some sort of majority or supermajority voting, may promulgate rules governing activities within the body's competence. The Agreement Establishing the World Trade Organization, for example, provides for both interpretation and amendment of the various WTO agreements, in some cases by a three-quarters vote of the membership and in others by unanimous consent.⁵ The IMF Articles of Agreement contain comparable provisions.⁶ The Convention on the Organization for Economic Cooperation and Development authorizes the members collectively to issue binding norms governing subjects such as competition policy and bribery.⁷ In each instance, the rules these bodies have the authority to adopt are both legislative, in that they take the form of generally applicable norms, and public, in that membership of the lawmaking body is limited to representatives of

⁵ Final Act Embodying the results of the Uruguay Round of Multilateral Trade Negotiations: Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. IX (1994), *reprinted in* OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994) [hereinafter WTO Agreement].

⁶ Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, arts. III, XII, XV, *as amended*, 20 U.S.T. 2775; 29 U.S.T. 2203; T.I.A.S. No. 11898.

⁷ Convention on the Organization for Economic Co-operation and Development, Dec. 14, 1960, art. 5(a), 12 U.S.T. 1728, 1734, 888 U.N.T.S. 179, 185.

states, rather than private organizations, and the formation of the rule is complete when the international body has acted.

Much public legislating by international bodies addresses two sets of actors – member states and the organs of the lawmaking body. For example, were the WTO, acting through its Council, to interpret one of the Uruguay Round agreements, the organization would expect member states to conform their behavior to that interpretation, and the WTO Dispute Settlement Body would apply that interpretation where relevant. But neither the component organs of member states, in particular their judicial bodies, nor private persons could regard such rules as directly applicable to their conduct. As is true in many areas of international law, the various agreements constituting the WTO by their terms require each member to enact domestic laws implementing these accords. This legislation, not the international agreements, establishes the operative rules for domestic actors.⁸

In one important case, however, the public legislation of an international body does purport to regulate the primary activity of private persons and to supply a rule for national courts to enforce. Legislation of the Council of the EU, a body comprising representatives of the executive branches of the fifteen member states, supersedes the members' domestic law and binds their domestic courts. The members of the EU, and in particular their judicial bodies, have embraced the "direct effect" doctrine first articulated by the European Court of Justice. As a result, domestic courts that otherwise have no power of judicial review may nullify national legislation that, in their view, conflicts with EU law.⁹

⁸ I am putting aside the question of whether rules promulgated by organizations such as the WTO or the OECD would have direct effect in those countries, such as Germany, Italy, Japan and Russia, whose constitutions announce a commitment to applying international law in cases where international and domestic norms conflict. At least for WTO rules and EU members, the problem does not appear to exist, because the decision of the Council adopting the Uruguay Round Agreements explicitly reserves for the EU organs the authority to implement the Agreements. WTO Agreement art. XVI(4); cf. Opinion Pursuant to Article 228(6) of the EC Treaty, 1994 E.C.R. 5627. See generally 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*, J. WORLD TRADE, Feb. 1995, at 53.

⁹ See *Costa v. ENEL*, 1964 E.C.R. 585. One should note that, at least in theory, the legitimacy of EU law does not necessarily depend on the consent of even the executive of every member state. In areas where the EU is specifically empowered by one of the provisions of the Treaty of Rome, the Council may adopt legislation by a "qualified majority," consisting of 62 out of the total of 87 size-weighted votes allocated among the 15 members, with no fewer than 10 members voting in favor. Decision of the Council of the European Union of 1 January 1995 Adjusting the Instruments Concerning the Accession of New Members to the European Union. 1995 O.J. (L 1) 3. This rule was further modified by the so-called Ioannina Compromise, which commits the Council to respect even smaller blocker minorities. Furthermore, lurking in the

Putting aside the issue of domestic effect, one may discern several fundamental characteristics of international public legislation. Where international bodies legislate, it is the executive branches of the member states that vote. Occasionally legislatures will tell the executive what to do, but in many, although not all, countries such direction occurs infrequently and may be disregarded.¹⁰ More often, legislatures rely on the terms by which they initially accede to an international organization to limit what their executives, acting through those organizations, can accomplish. And when international organizations later supersede such restrictions, the legislature may be left with a take-it-or-leave-it proposition. At a minimum, it will not be able to modify what the organization produces without forcing an additional round of negotiations. And if it refuses to accept the internationally agreed product and cannot force other countries to make changes, the legislature either will have to accede to an action that disregards its previous instructions or force the executive to resign from the organization.¹¹

Some international bodies organize formal bargaining sessions with the express purpose of allowing members to promulgate new legislation affecting the organization's functions. Perhaps the most significant example is the General Agreement on Tariffs and Trade (GATT) negotiating rounds. The last two iterations of this process produced significant new commitments by the members and a wholesale restructuring (and renaming) of the organization. These rounds operate much like a conventional legislature, with the parties free to reach compromises and log-rolling solutions where their interests conflict. National legislatures tend to impose the greatest restraints on this type of international lawmaking. The United States, for example, normally requires its executive branch to seek congressional approval before entering into serious multilateral trade negotiations, and then

background remains the Luxembourg Accords of January 1966, pursuant to which the members agreed to disagree as to whether, where "very important interests of one or more" members are at stake, a member may insist on unanimity. *BULLETIN OF THE EUROPEAN ECONOMIC COMMUNITY* 8 (Mar. 1966). Some observers argue that the Single European Act of 1986 superseded the Luxembourg Compromise, but the French government, at least, has hinted to the contrary. See generally 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 (1997).

¹⁰ For examples of a legislative attempt to direct the executive with respect to an international organization, see, e.g., Bretton Woods Agreements Act, 22 U.S.C.A. §§ 286c, 286e-6, 286e-11 (West 1996).

¹¹ See generally J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991); J. H.H. Weiler, *Alternatives to Withdrawal from International Organizations: The Case of the European Economic Community*, 20 *ISR. L. REV.* 282 (1985).

insists on submission of the finished product to Congress for further consideration. Even these restrictions, however, are different from what the Congress typically imposes on executive lawmaking. In reviewing trade agreements, Congress waives its power to amend the submitted proposal and to use supermajority voting in the Senate. In the eyes of some, these restrictions substantially diminish the ability of Congress to obtain changes in the agreements or other kinds of concessions.¹²

Aside from the indirect discipline that voters impose on legislators and executives who participate in international lawmaking, the principal mechanism for limiting the effect of international public legislation is the opportunity member states have to choose how to implement what the international body enacted. But often this provides only a weak constraint on what international legislation does. In the case of the EU, this check does not exist; members can avoid the effect of Council legislation, if at all, only by withdrawing from the organization.¹³ In many other instances, the choices facing a member state are only slightly greater. A refusal to carry out the international body's mandate may invite retaliation by the other members.

Executives not only legislate international rules, but they play a complex and powerful role with respect to domestic implementation. Whatever their commitment to the internationally generated rule, they are free to hide behind what may be called the veil of collective mandate. They may make arguments about honoring international commitments to deflect responsibility for what international public legislation does. That is to say, executives may act more or less secretly within the international body to shape the rule adopted, and then carry out the international mandate, either directly or by lobbying its domestic legislature, while disavowing responsibility for the rule's content.

B. Private Legislation

Private legislatures are organizations that draft laws in the hopes that other bodies will adopt them.¹⁴ They do not purport to enact legislation themselves, but they often enjoy sufficient prestige to make

¹² See Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOKLYN J. INT'L L. 143, 161 (1992).

¹³ Whether a member of the EU may secede from that body remains a subject of scholarly debate. See generally J.H.H. Weiler, *Alternatives to Withdrawal from International Organizations: The Case of the European Economic Community*, *supra* note 11.

¹⁴ In my discussion of private lawmaking, as well as in many other parts of this article, I draw heavily on the work of Robert Scott and Alan Schwartz. See Robert E. Scott, *The Politics of*

their recommendations significant. In the case of international private legislatures, some bodies, such as the ICC, UNIDROIT and the Hague Conference, select their membership without any governmental constraint. Others, such as UNCITRAL and the other agencies of the United Nations, ostensibly rely on governments to nominate representatives, although the choice of nominee often reflects co-option of the candidate by existing participants in the organization's work.¹⁵

In the field of international commerce, private legislatures have enjoyed substantial influence. They have promulgated model laws that many national legislatures have enacted, such as the Convention on Contracts for the International Sale of Goods (CISG), the Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules), the Convention on the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Arbitration Convention), the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention) and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention). They also have developed detailed form contracts, such as the Uniform Customs and Practice for Documentary Credits and the Incoterms, that private parties widely adopt by reference and that domestic courts normally embrace as permissible expressions of contractual intent.¹⁶

Private legislatures by definition are not directly accountable to anyone. Their influence and prestige, however, depends on their success in promulgating recommendations that other lawmakers will find acceptable. The greater the success of particular proposals, the greater the pressure individual states face to adopt them. This result reflects the consequences of network externalities: once a model law takes on the character of an international standard, a state or private

Article 9, 80 VA. L. REV. 1783 (1994); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

¹⁵ This discussion elides the question of whether the formation of an "international consensus" about a particular norm constitutes lawmaking. Especially in the field of international human rights, norms seem to emerge more on the basis of a perceived osmosis of opinions among internationally reputable jurists than as a result of a formal instrument produced through collective negotiation. I mean to take no stand on the question of how and when international consensus becomes law, but my analysis of private legislating is generally applicable to the process by which common practice may be transmuted into a binding norm.

¹⁶ See generally John A. Spanogle, Jr., *The Arrival of International Private Law*, 25 GEO. WASH. J. INT'L L. & ECON. 477 (1991).

commercial actors derive benefits from conforming to it that are independent of the intrinsic virtues of the particular rules contained in the law.

C. Adjudication

Most international organizations engage in dispute resolution of one sort or another, but historically much of this has been ad hoc and, except at the most abstract level, unprincipled. Moreover, those international bodies engaged in adjudication, whether arbitral or multilateral, traditionally adopted the conceit that they were lawfinders rather than lawmakers. That is to say, these adjudicators tended to present the norms that they applied as preexisting and based on received and authoritative principles, rather than as the adjudicator's distinctive and potentially idiosyncratic contribution to the process of norm formation.

More recently, however, several international adjudicatory bodies have rather openly assumed the posture of promulgators of rules that supplement international legislation. Perhaps the most remarkable of these institutions has been the EU's European Court of Justice. That body has played a crucial role in the laying of the foundations of a future European federal state.¹⁷

But the Court of Justice, although the most intriguing, is not the only example of international lawmaking through adjudication. Dispute resolution panels organized under the old GATT and the new WTO also have undertaken to develop a jurisprudence of international economic law. A number of decisions, building on opinions issued by earlier panels, have staked out ambitious and controversial positions that have had the effect of expanding the scope of GATT rules.¹⁸ These bodies may set a pattern for other tribunals under similar multilateral agreements. For example, the special panels for resolution of environmental standards disputes established by one of the

¹⁷ See generally *EUROPEAN BUSINESS LAW – LEGAL AND ECONOMIC ANALYSES ON INTEGRATION AND HARMONIZATION* (Richard M. Buxbaum et. al. eds., 1991); *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (Mauro Cappelletti et. al. eds., 1986); *COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE* (Terrance Sandalow & Eric Stein eds., 1982); PAUL B. STEPHAN ET. AL., *INTERNATIONAL BUSINESS AND ECONOMICS – LAW AND POLICY* 107-08 (2d ed. 1996).

¹⁸ See, e.g., *United States Tax Legislation* (DISC), Nov. 12, 1976, GATT B.I.S.D. (23d Supp.) at 98 (1977); *United States – Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) at 155 (1993); *United States – Restrictions on Imports of Tuna*, No. DS29/R, 1994 GATTTPD LEXIS II (GATT Panel Report June 16, 1994); *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (WTO Appellate Body Report May 20, 1996) <<http://www.wto.org/wto/dispute/gas1.ufm>>.

NAFTA side agreements, although not yet in action, potentially have the authority to impose significant new obligations on the NAFTA parties.¹⁹

With respect to the EU, few mechanisms exist to constrain the Court of Justice's lawmaking. The system of judicial tenure, as well as the tradition of anonymity that prohibits concurring opinions and dissents, protect individual judges from retaliation for their actions. In some cases the Council may have the power to invalidate or undermine Court of Justice rulings, for example by refusing to exercise the authority conferred by the Court, but often that body seems happy to wield whatever powers it can. The only remaining alternatives for overruling the Court is amendment of the treaties on which the EU rests or (arguably) withdrawal from the EU. Rarely if ever do these options seem realistic.

For other international adjudicators, another layer of control exists because the parties to the dispute do not regard the decisions as self-executing.²⁰ The losing side may refuse to comply with the adjudicator's disposition, leaving the winning side with the sometimes unsatisfactory option of imposing potentially self-defeating retaliatory sanctions. In a famous early GATT dispute, for example, a determination that the Netherlands had the right to retaliate against the United States for the latter's illegal (or more precisely, GATT-inconsistent) restrictions on cheese imports proved pointless.²¹ The Netherlands found itself unable to devise a sanction against U.S. exports that did not entail unacceptable costs to its consumers.

In many instances, however, a country that has come out the loser in an international adjudication faces substantial pressure to implement the tribunal's decision. First, some disputants can make credible threats of retaliation against the noncomplying loser. Second, as an international dispute resolution process matures, the participants may develop a stake in the system's effectiveness that exceeds the costs and benefits at issue in particular disputes. In recent years, for example, the United States mostly has gone along with GATT panel deci-

¹⁹ See North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Sept. 13, 1993, arts. 22-36 (1993), reprinted in UNITED STATES GOVERNMENT PRINTING OFFICE, NAFTA SUPPLEMENTAL AGREEMENTS (1993).

²⁰ Cf. *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078 (Ct. Int'l Trade), *appeal dismissed*, 43 F.3d 1486 (Fed. Cir. 1994).

²¹ Netherlands Action Article XXIII:2 to Suspend Obligations to the United States, Nov. 8, 1952, GATT B.I.S.D. (1st Supp.) at 62 (1953).

sions that condemned certain of its laws or administrative practices.²² One reason for this virtuous behavior may be the success that the United States has enjoyed in other cases, where GATT panels have forced U.S. trading partners to eschew practices that the United States disliked.²³ But as this stake in the adjudicative process grows, the international adjudicator has less need to worry about the wrath of popularly elected legislators, and thus faces weaker constraints on its behavior.

D. Administrative Interpretation

Many international organizations employ substantial bureaucracies to carry out their mission. The organization's staff in turn has the authority to interpret the various treaties under which the organization operates and to apply those interpretations to particular problems. The staff of the IMF, for example, interprets its Articles of Agreement whenever it decides on the criteria a borrowing member must meet to obtain access to funds. In practice these conditions can be quite stringent and encroach on areas normally committed to domestic legislative discretion. Examples of such conditions include stipulating a ceiling to government spending and directing the kinds of economic development a country may promote. Even where the members' representatives, acting as the Board of Governors, must approve the staff's decisions – as is the case with certain significant IMF disbursements – the representatives remain sufficiently dependent on the staff to accord the latter wide discretion.

In addition, the staff of an international organization, acting either on its own behalf or through recommendations to the organization's governing body, can offer advice to national administrative bodies and courts as to the meaning of these treaties. For example, in cases where domestic legal issues might be seen as depending on an interpretation of the IMF Articles of Agreement, several courts have relied on the determinations of the IMF staff (or of the IMF Executive Directors acting in accordance with the staff's advice) as authority for their decisions. Thus a lawsuit asserting a debt claim against a Mexi-

²² E.g., *United States — Tax Legislation (DISC)*, Nov. 12, 1976, GATT B.I.S.D. (23d Supp.) at 98 (1977); *United States — Section 337 of the Tariff Act of 1930*, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990).

²³ E.g., *European Economic Community — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, Jan. 25, 1990, GATT B.I.S.D. (37th Supp.) at 86 (1991); *European Economic Community — Follow-up on the Panel Report — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, GATT B.I.S.D. (39th Supp.) at 91 (1993).

can bank turned on an IMF bureaucrat's determination that Mexico's exchange controls accorded with the IMF Articles of Agreement.²⁴

In theory the staff must answer to the organization's members for its interpretations of international law. Using either their lawmaking or budgetary authority, the members as a collective body can discipline the staff, and individual members may threaten to resort to the exit option to rein in the organization's bureaucracy. But the exercise of any of these disciplinary mechanisms entails costs. The individual staff members of most international organizations enjoy the equivalent of U.S. civil service protection, which frees them from the most rigorous forms of discipline except for egregious misconduct. And to thwart the staff, the members normally must act collectively after having reached a consensus. Not all of the staff's activities require access to new funds, which individual members might tie to the imposition of specific constraints. And for all the reasons previously discussed, exit often is not an effective means of controlling what an international organization does.

II. THE POLITICAL ECONOMY OF INTERNATIONAL LAWMAKING

Having developed a typology both of international lawmaking and of mechanisms through which international lawmakers are made accountable for their actions, I now will discuss the incentives for creating international law. As the term "political economy" implies, I will rely on the conventional, although by no means uncontroversial, analytic constructs some economists use to explain political processes. This approach focuses on hedonistic factors and portrays institutional actors as fundamentally selfish. While acknowledging that inspiration and ideology may motivate particular actors to behave in a way that runs counter to their self interest, economic analysis does not attempt

²⁴ See, e.g., *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987) (Mexican currency control did not constitute an expropriation in violation of international law because IMF staff had approved control as consistent with IMF Articles of Agreement); see also *Loeffler-Behrens v. Beerman, OLG Karlsruhe, Internationales Privatrecht: Rechtsprechung*, 1964-65 No. 194 (court accepts IMF staff determination that provisions of Articles concerning exchange controls do not apply to domestic law specifying what currencies private parties may use in financial contracts); *International Bank for Reconstruction and Development v. All America Cables & Radio, Inc.*, 17 F.C.C. 450, 466-469 (1953) (interpretation by IMF and World Bank executive directors of Articles of Agreement is binding on U.S. administrative agency).

to explain this phenomenon. Thus, my account of the production of international law is incomplete, but I hope not without its uses.²⁵

A. The Demand for International Law

My analysis focuses primarily on the supply side of international law, which is to say the factors that motivate the producers of this good. As an initial matter, however, one should note the importance of the demand function. The fundamental virtue of international rules, and one of the reasons that the demand for them is as great as it is, is that they may serve as beneficial solutions to collective action problems. Other mechanisms, such as the tit-for-tat strategy, exist for reinforcing cooperative arrangements, but credible and enforceable promises to adhere to an express norm often will provide the best way for deriving the greatest value from cooperation.²⁶ And it should be obvious that now more than ever, international cooperation may bring about great and widely dispersed benefits for a technologically sophisticated, globally interconnected world culture.

Of course, not all cooperation is beneficial. When discussing the demand for domestic rules, a conventional analysis incorporates the insights of public choice theory. This body of thought specifies the conditions under which cohesive minorities may obtain laws for their discrete benefit to the detriment of unorganized majorities. Similarly, any analysis of the demand for international law must account for rent-seeking by interest groups. The OPEC cartel serves as one prominent example where international cooperation may have led, at least for a short time, to significant losses in global welfare. To take another example, a more successful cartel among importing countries, the Multifibre Arrangement (MFA), for decades has put a ceiling on imports of textiles produced by poorer countries into the rich world.²⁷

²⁵ I previously surveyed the advantages and drawbacks of this methodology in Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995). I will not repeat that discussion here.

²⁶ On the role of the tit-for-tat strategy in international law, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 365-66 (1989); John K. Setear, *Responses to Breach of a Treaty and Rationalist IR Theory: The Rules of Release and Remediation in the Law of Treaties and of State Responsibility*, 83 VA. L. REV. (forthcoming 1997); Paul B. Stephan, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133, 151-152.

²⁷ See Horst Günter Krenzler, *The Multifibre Arrangement as a Special Regime under GATT*, in THE EUROPEAN COMMUNITY AND GATT 141, 144 (Meinhard Hilt et. al. eds., 1986); Henry R. Zheng, *Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT*, 25 STAN. J. INT'L L. 45, 62 (1988). One of the Uruguay Round Agreements purports to wind down the MFA over a ten-year period. Whether countries such as the United States that possess a significant but failing textiles sector

The MFA in particular illustrates the darker side of the demand for international cooperation. Collusion among the importing countries has created a regime that increases their producers' welfare through protection from competition but harms their consumers by reducing competition. There is substantial evidence to indicate that the MFA injures the importing countries that maintain it, over and above the unambiguous costs it inflicts on producers in the exporting countries. In other words, in some instances interest groups may induce countries to engage in international lawmaking that disserves the populations of the nations promoting the legislation. The illumination of the conditions under which such outcomes occur is one of the central tasks of public choice theory.

B. The Supply of International Law

What inspires particular actors to produce international law? Different persons and entities have distinctive institutional roles. Each has its own incentives. I will discuss in turn the executive branches of governments of individual states, national parliaments, private legislators, international adjudicators and international bureaucrats.

1. *Executive Branches*

With respect to international public legislation, representatives of executive branches of governments invariably are the legislators. One simple explanation of why these actors participate in this process is that they have good reasons to respond to demand. In some countries, such as the United States, the leader of the executive branch must stand for election. In others, such as the United Kingdom and Canada, selection of the head of the executive depends on party success in legislative elections rather than personal electoral triumph. In either case, these persons reasonably might believe that the winning and retention of office have something to do with both increasing the overall welfare of their country and satisfying discrete and powerful interest groups.

Independent of the rewards to be obtained from delivering particular international laws to those who want them, executive branches

will conform to this schedule remains to be seen. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations: Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing The World Trade Organization, Annex 1A, THE RESULTS OF THE URUGUAY ROUND OF MULTINATIONAL TRADE NEGOTIATIONS 85 (GATT Secretariat ed., 1994).

have an incentive to engage in international lawmaking. This claim is a corollary of the assertion that the executives are less accountable for the consequences of the international rules they generate than they are for their domestic actions. All other things being equal, executive branches want to be seen as active and engaged. International negotiations allow executives, with their more or less unified hierarchy, to operate at a comparative advantage in relation to multitudinous and therefore less coherent legislators. These negotiations also benefit persons within the executive but at some remove from the top, who get access to foreign travel, media exposure and opportunities for advancement. Thus, to the extent that they are not disciplined for their lawmaking activities, executive branches will tend to indulge in more rather than less of this activity.

One implication of this hypothesis is that governments will seek to produce open-ended rules that produce no significant effect on the status quo. Several arguments support this prediction. First, incumbent governments, by the very fact that they hold office, ordinarily would not want to upset the conditions that brought them to power. Second, often the outcome of a substantial restructuring of an international regime would be uncertain, and governments must fear the possibility that a change with which they would be associated would have negative consequences for their country as a whole. Third, competition among interest groups tends to produce a stalemate, with the players preferring no change to any move that would bring about specific injuries to a well organized constituency. The only way governments can cope with such a stalemate without abandoning the lawmaking project is to adopt rules that have the form of legal norms but are sufficiently indeterminate to pose no threat to anyone.

Consider, for example, a hypothetical international regime that commits each party not to impose its competition rules on international business transactions to a greater extent than would be reasonable under all the circumstances.²⁸ Although on its face this norm appears to limit what states may do, a decisionmaker seeking to apply it would find little guidance. Most likely a court, for instance, would employ this norm only to support the result that it would have reached in any event.²⁹

²⁸ Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

²⁹ Cf. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (majority and dissent each assert authority of Restatement).

More controversially, this hypothesis also suggests that executive branches may be more willing than are legislatures to facilitate rules that favor special interests at the expense of the general welfare. If executives derive compensation from such interests (e.g., campaign contributions, future employment) for the rules that they produce and if a lower level of accountability decreases the political and other costs of pandering to them, then at least some executives will surrender to the temptation to benefit these groups. Moreover, the formation of rules that favor special interests still would be international lawmaking, which executives should prefer for all the reasons outlined above.

At first glance, this review of what motivates executive branches may seem unilluminating. It suggests that, acting in their capacity as international legislators, executives may produce public-regarding agreements that provide general benefits for their nations, welfare-diminishing agreements that reflect successful rent-seeking by well organized interest groups and vague generalities that appear to do something without helping or harming anyone. But as this list comprises the full range of possibilities for lawmaking, it adds nothing to our understanding of the process.

But the analysis does not purport only to describe possible outcomes. It also suggests something about the distribution of legislative products. In particular, it predicts that, compared to a more disciplined process such as one generally encountered in domestic legislating, international legislation may tend to contain a somewhat higher portion of rules that benefit discrete interest groups and a considerably larger portion of vague, essentially content-free norms. To understand the basis for these predictions, one must analyze the role of national parliaments in supervising the international lawmaking of executive branches.

2. National Parliaments

In some instances, notably with respect to some (but not all) of the members of the EU, national parliaments have little or no control over the international legislation that their executives generate. Even in those cases where international legislation requires their approval, and the demands of party loyalty and interest do not bind the parliament to the executive, the all-or-nothing posture of the legislature's choice may diminish its ability to constrain the executive.

Consider the position that the U.S. Congress found itself in when it took up adoption of the Uruguay Round Agreements in 1994. For 46 years the United States had belonged to the GATT. During this

time that organization had served as a means for opening up other economies to U.S. exports and as a forum for resolving trade disputes. In spite of occasional setbacks in the GATT dispute resolution process, on the whole the United States seemed to derive substantial benefits from its GATT membership. But once the executive branch had signed the various instruments that made up the Uruguay Round Agreements, Congress faced a stark choice. It either had to accept the Agreements as they were, with terms requiring the creation of the WTO with substantial powers not possessed by the predecessor GATT organization, or it had to withdraw the United States from the only international regime that purported to provide comprehensive rules for international commerce. The one alternative that no longer existed was continuation of a generally satisfactory status quo.

For members of the EU, the choices are even less satisfactory. Legislation of the Council of the EU, which comprises the executive branches of each member's government, often does not require any action on the part of national parliaments before it goes into effect. Moreover, Council decisions on a wide and growing range of subjects do not even have to be unanimous. Once confronted with a decision it does not like but for which it has no legal basis to object, a EU member must either acquiesce or secede from the Union. And even putting aside the question of whether the Treaty of Rome permits this step, secession would mean a sudden imposition of significant economic barriers on what is for each member a large portion of its commerce.

To be sure, take-it-or-leave-it propositions put pressure on both sides to avoid a breakdown. Just as the legislature will hesitate to repudiate an entire international regime because of one unsatisfactory product, executives will avoid putting legislatures to that choice.³⁰ But it seems a reasonable guess that in the context of international commitments emerging out of otherwise valuable multilateral arrangements, the legislature will be more fearful of a breakdown than will executives. First, executives have the advantage of going first, in the sense that they present the question for the legislature to decide. By framing the proposal to the legislature in a way that maximizes the costs, in terms of opprobrium and retaliation associated with rejection,

³⁰ See generally Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221 (Spring 1995). The League of Nations represents an important example where an overly ambitious Executive pushed the Congress into forcing U.S. nonparticipation, an outcome that the Executive would have liked to avoid.

they may decrease the chances of breakdown. Second, executives normally will have an informational advantage over the legislature. They typically remain in continuous contact with the executives of other nations and therefore should have a better sense of what the market will bear in terms of renegotiated agreements. The legislature, by contrast, normally must discount the possibility of salvaging something if it repudiates the proposals.

The argument that, under these conditions, international rules will reflect a somewhat higher rate of rent-seeking is subtle and far from airtight. It posits that interest groups tend to have somewhat lower costs of expressing their preferences to executives engaged in international lawmaking than in conveying their wishes to domestic legislators, and that the general public has higher monitoring costs with respect to international lawmaking. First, the persons representing the executive in this process, and the agents chosen by interest groups to represent their concerns, typically are specialists and repeat players. Such actors find it easier to reach accommodation than do outsiders with little opportunity to engage in log-rolling and other types of long-term bargaining. Second, international lawmaking tends to involve somewhat greater secrecy than does domestic lawmaking, because each player may invoke national interest as a grounds for hiding its bargaining position from the other nations involved in the negotiation. Secrecy, in turn, further helps insiders. Finally, the opportunity for national leaders to deflect responsibility for the content of international arrangements by hiding behind the veil of collective mandate may give these persons greater freedom to satisfy rentseekers than they have in the domestic context.³¹ To be sure, none of these points is overwhelming, but taken together they are at least suggestive.³²

³¹ Cf. Joel R. Paul, *Comity in International Law*, 32 HARV. J. INT'L L. 1, 70-74 (1991).

³² In an earlier article I offered with some diffidence an argument in support of the opposite position, namely that interest group capture may be more difficult to achieve with respect to international agreements than with respect to domestic legislation. Stephan, *supra* note 25, at 756-57. I noted that an interest group might have to obtain the support of all the governments participating in the negotiations, not just a single lawmaker, and that the costs to the group of obtaining what it wants would increase with the number of parties. What that argument did not take into account is the possibility of log-rolling among the governments engaged in bargaining over an international agreement. As with individual legislators crafting legislation, individual governments can both advance a private interest's agenda and offer reciprocal concessions to those governments that the group has not captured. Presumably the difficulty of obtaining a desired result where numerous governments must vote for the rule is not intrinsically greater than that entailed in gaining the support of the majority of numerous legislators, and the individual governments' lack of full accountability may make capture less difficult.

The claim that international legislation will contain a greater portion of open-ended norms that essentially reify the status quo is easier to explain. The production of domestic legislation entails some costs. Almost all legislatures have gatekeepers who can charge for their help in getting a bill enacted. Moreover, for the most part, legislators do not derive advantages from the process of lawmaking simpliciter, as opposed to the content of the laws with which they are associated. To the contrary, a substantial body of literature indicates that legislators derive most of the benefits of office through servicing constituent interests with respect to the executive branch. As a result, domestic legislatures are less likely to enact laws that do not serve any purpose. But, as noted above, executive branches do gain from engaging in international lawmaking even if they do not accomplish much. All other things being equal, then, one should expect executives of many nations to work together to generate inoffensive international rules. And for the reasons already stated, one should not anticipate that parliaments will do much to obstruct them.

3. *Private Legislators*

In a groundbreaking article on private lawmaking groups, Robert Scott identified four attributes of these bodies which distinguish them from conventional legislatures: (1) because they work on a project-by-project basis, log-rolling among proponents of different projects is difficult, if not impossible; (2) members of the group act as individuals without independent political power; (3) members of the working groups that draft proposals have considerably more information about the subject they address than do other members of the group; and (4) members of the working groups have a stronger preference for changing the status quo than do other members of the group.³³ Scott argued that where projects undertaken by these organizations attract the attention of competing interest groups, the organization will either reject reform or embrace only vague and unenlightening rules. Where a project deals with a matter of concern to a single cohesive interest group, it is more likely that the organization will propose more focused and constraining rules which generally accord with the goals of the interest group. A later article coauthored with Alan Schwartz formalized and generalized these insights.³⁴

Organizations such as UNCITRAL and the ICC, as well as similar private groups engaged in the creation of international legal

³³ Scott, *supra* note 14, at 1812-16.

³⁴ Schwartz & Scott, *supra* note 14.

norms, share the characteristics of the private law-making groups analyzed by Scott and Schwartz. They use specialized committees or working groups to generate proposals for the larger body to approve. Legislative projects arise episodically, with new working groups formed for each project. As a result, committee members rarely if ever have an opportunity to bargain with persons in the larger body over the content of other projects. Nor do members of these organization have political power that they may exercise to influence the positions of other members. The projects normally rely on working groups that comprise specialists from particular industries, such as the banking law experts that dominate the composition of the ICC's Uniform Customs and Practice for Documentary Credits.³⁵ Others include representatives of competing interests, such as the first-world and developing-world experts who worked on UNCITRAL's Convention on Contracts for the International Sale of Goods.³⁶

Scott and Schwartz argue that a significant portion of the rules produced by private legislatures will correspond to what they call "Model II." These are rules that exhort the decisionmaker to do its best, but do not provide much concrete guidance as to how that discretion should be exercised. In a smaller number of cases the work product should constitute Model I rules. These are precise and therefore constrain the decisionmaker. Scott and Schwartz predict that the Model I rules, unlike the Model II product, in most cases will serve the purposes of one specific interest group.

The argument that private international lawmakers will produce a large portion of open-ended rules that largely confirm the status quo is straightforward. People are more likely to join working groups or comparable drafting committees because they want to accomplish something, not because they want to frustrate the lawmaking process. Organized interests not represented in working groups will lobby the general membership if they find a proposal threatening, but not if it seems innocuous. The membership-at-large of private international lawmaking bodies has no reason to expend much effort to reject proposals that offend no one. Accordingly, working groups will prefer to propose rules that accomplish little (e.g., in situation X, the deci-

³⁵ A list of the members of the most recent drafting committee and their professional affiliation can be found in INTERNATIONAL CHAMBER OF COMMERCE, PUBLICATION NO. 500, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 6-7 (1993) [hereinafter UCP]. See generally Ross P. Buckley, *The 1993 Revision of the Uniform Customs and Practice for Documentary Credits*, 28 GEO. WASH. J. INT'L L. & ECON. 265 (1995).

³⁶ See generally Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984).

sionmaker should do what it believes is desirable) to not adopting anything, and the membership and outside interest groups will have no reason to oppose the adoption of such rules.

The argument that such specific and constraining rules as private international lawmakers propose often will correspond to the goals of a coherent interest group rests on several assumptions about the dynamics of private lawmaking. First, the membership as a whole of a private lawmaking organization often will know less about the possible effects of a proposal than either representatives of an affected interest group or would-be reformers who join study groups. When this is the case, the membership will have to make a relative judgment about the claims advanced by interest groups and reformers. Scott and Schwartz make the counterintuitive argument that in general an interest group presenting a coherent and unopposed position will have greater credibility than a reform party comprising academics and other detached advocates of change. They assert that interest groups will not press for the adoption of a proposal (as distinguished from opposing a proposal that they believe to be harmful) unless they perceive the chances of adoption as good. As repeat players in the lawmaking process, interest groups also will tend to have more invested in their reputation for credibility than would reformers, who tend to attach themselves to single projects. Finally, members of the lawmaking organizations tend to prefer the status quo to any radical change, a predisposition that will make them generally unsympathetic to calls for reform. Given this balance of forces, the membership will tend to approve rules that clearly will alter the way future decisionmakers dispose of issues only if an affected interest group presses for that result and no other group opposes the proposal.

4. *Adjudicators*

Forests have been felled in pursuit of insights into what adjudicators should do to make the world a better place. A conventional analysis sees adjudicators as agents of the lawgiver. These adjudicators serve to ensure that rules once promulgated will be enforced, and that the compromises underlying particular legislative products will be respected. Debate turns on how much freedom lawgivers should or do want adjudicators to have to cope with the unanticipated.³⁷ What

³⁷ See, e.g., Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-822 (1983). In civil law countries, an effort was made to implement an especially restrictive version of this theory; it forbade judges from any attempt to divine how the legislature would deal with situations not expressly contemplated in the legisla-

this discussion largely neglects, however, is a positive analysis of what motivates adjudicators. One may accept the parallel propositions that adjudicators have good reason to honor explicit constraints imposed on their discretion and that no lawgiver can completely eliminate the space adjudicators have to create law. What legal literature largely neglects is the question of what, other than a vision of the good, true, or beautiful, motivates adjudicators to create law in areas where their mandate permits but does not demand such creativity.³⁸

This paper is not the place to find a comprehensive answer to that question. What I would like to do is distinguish two kinds of adjudicators that have a role in the creation of international law. The first type consists of arbiters selected on an ad hoc basis to wrestle with particular disputes. What these decisionmakers have in common is that their jurisdiction is permissive, in the sense that disputants do not face large costs if they choose not to bring their claim before any particular person or tribunal. Examples include both the jurists who hold themselves out for selection to arbitration panels and bodies such as the International Court of Justice, the workload of which largely depends on the consent of the parties.³⁹

The second type consists of professional adjudicators who have mandatory jurisdiction over certain categories of disputes. These adjudicators have greater independence, in the sense that how they decide the cases before them will not have much of an impact on what kinds of cases will come to them in the future. To be sure, their power is not completely unchecked. Lawmakers may amend legislation or constitutions to deprive them of jurisdiction if they push their authority too far. But at least for tribunals that have established themselves sufficiently well to make assaults on their jurisdiction costly, the need

tive bargain. See generally John H. Merryman, *The French Deviation*, 64 AM. J. COMP. L. 109 (1996).

³⁸ There are important exceptions to the statement in the text. See Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941 (1995); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL ED. 518 (1986); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

³⁹ Even where a country announces in advance of any dispute that it will accept International Court of Justice jurisdiction over a specified range of subjects, it has the power, if not the right, to renege on this commitment. Perhaps the most controversial example of the exercise of this power was the decision of the United States to refuse to recognize the authority of the Court to address Nicaragua's complaints about U.S. involvement in the struggle against the Sandanista government. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26). The absence of any power on the part of the Court to enforce its judgment further compromises its independence.

to please either disputants or the authors of the rules that come into dispute must be less.

While most national legal systems have at least some adjudicators of this second type, until recently international law did not. International adjudicators have served mostly in an ad hoc manner, with tribunals formed to meet the occasion. It seems reasonable to assume that those who wanted to serve more than once tried to develop a reputation for reliability. One also may assume that these adjudicators understood at some level that surprising and alarming outcomes, including ambitious claims of decisionmaking authority, would tend to scare off future disputants.

But with the emergence of the European Court of Justice and the establishment of a standing Appellate Body attached to the WTO, we are beginning to see the work of independent and professional adjudicators. Secure both in tenure and jurisdiction, people who sit on these bodies may have arrived where they are due to a reputation for reliability but do not have to cultivate this further. They may now surrender to other forces. The question thus becomes, what are the temptations most likely to beguile them?

One possibility is that some adjudicators benefiting from job tenure and independence will seek simply to maximize leisure, while others will invest some effort in increasing the stature of the tribunal and the prestige associated with it. Much of the literature studying organizational forms supports the hypothesis that agents freed from substantial constraints – and who could be freer than a tenured, independent judge – tend to shirk.⁴⁰ At the same time, much of what we know of human nature suggests that persons unable to pursue more material rewards often will respond to dignitary incentives. Moreover, shirkers presumably will offer little opposition to those seeking to dignify the institution with which they are associated, as long as the increased status of their position does not entail more work. Thus, we might expect that a dedicated minority of adjudicators will strive to increase the stature of the bodies to which they belong, and that an indifferent majority will not obstruct them in this pursuit.⁴¹

⁴⁰ See, e.g., Armen A. Alchian & Harold Demsetz, *Production Information Costs and Economic Organization*, 62 AM. ECON. REV. 777, 781 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976).

⁴¹ For an earlier sketch of this argument in reference to the U.S. Court of International Trade, see Paul B. Stephan, *Further Reflections on the Implementation of Comparative Advantage Principles in Trade Law*, 2 J. LEG. ECON. 111 (1992).

Anecdotal, if perhaps idiosyncratic, evidence in support of this proposition comes from the decisions of the first four decades of the United States Supreme Court (Court). Several of the members of that Court were famously lethargic and most completed their service without undertaking anything of significance.⁴² But due to the energy and ambition of a few members, notably Chief Justice Marshall and Justice Story, the Court significantly expanded the scope and importance of its authority. It asserted and largely won acceptance of its power to review acts of federal and state legislatures as well as the decisions of state courts. And by taking a generous view of congressional power and restricting state lawmaking authority, it enhanced the significance of the principal for which it was the primary judicial agent.⁴³

One cannot dismiss the possibility that this pattern of institutional stature-building may be an artifact of the U.S. culture, and that elsewhere adjudicators are more content to serve exclusively as law finders. But consider briefly how the national courts of EU members have reacted to the imposition of EU law. Great Britain and Ireland aside, the legal systems of these members historically offered their regular judges little or no opportunity to determine the legitimacy, as opposed to the meaning, of parliamentary enactments and otherwise discouraged overt judicial lawmaking. But the organs of the EU, especially the Court of Justice, have asserted that EU law applies directly to the members, much as the Supremacy Clause of the U.S. Constitution requires the states to apply federal law. Domestic courts have embraced this doctrine, in large part because it provides a basis for them to review national laws for consistency with EU norms. In other words, these civil law judges also have seized the opportunity to enhance the stature of their office.⁴⁴

To be sure, this account of the process by which civil law judges have exercised their powers under the EU treaties is not the only way

⁴² Cf. David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481 (1983).

⁴³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁴⁴ See *Van Gend En Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; *Commission of the European Communities v. Council of the European Communities (In re Draft International Agreement on Natural Rubber)*, 1979 E.C.R. 2871; *Costa v. ENEL*, 1964 E.C.R. 585; *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837; *Defrenne v. Sabena*, 1976 E.C.R. 455; *Commission of the European Communities v. Council of the European Communities (ERTA)*, 1971 E.C.R. 263. See generally J.H.H. Weiler, *supra* note 11, at 2425-28.

to interpret these events. The treaties seem rather clearly to anticipate the outcome that transpired, and the civil law judicial culture places great emphasis (at least as seen from a U.S. perspective) on following orders, however much they may discomfit the judge. One may argue that the judges simply did what they were told, and did not "seize" any authority that was not handed to them. But at a minimum the judiciary of the EU states have not evaded the greater authority that those treaties provided. Their actions, if not their words, and hence what an economist would call their revealed preferences, are consistent with the picture of a judiciary with some institutional bias toward expansion of powers.

5. *Bureaucrats*

The literature on bureaucrats is more developed than that on the judiciary, although hardly free from controversy. A strong claim with substantial explanatory power is that, all things being equal, bureaucrats seek to maximize their budgets.⁴⁵ Put more broadly, studies support the common-sense intuition that administrators in command-and-control organizations tend to prefer greater discretion to dispose of larger amounts of assets.

As applied to international organizations, this proposition would have several implications: (1) the staff of these organizations would lobby their members for larger contributions; (2) the staff would seek to insulate expenditure decisions from oversight by the members; (3) strategies for reducing oversight would include decreasing transparency and tying expenditure choices to popular programs ("offers that can't be refused"); (4) increases in overhead and administration should decrease transparency and link outlays to the organization's continued survival; (5) in addition to the organization's express budget, the staff would try to control or influence expenditures by other bodies, including national governments; and (6) the staff would attempt to maximize the value of incentives it may offer compliant governments. I will take up the evidence that such behavior occurs in international organizations in the next section.

III. THE EVIDENCE OF INTERNATIONAL LAWS

What I cannot do in this paper is prove empirically that the institutional and interest-group rentseeking associated with international lawmaking exceeds by some observable amount that stemming from

⁴⁵ See William A. Niskanen, *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 618 (1985).

domestic law. Rigorous tests of this proposition will have to await further research and the development of experimental strategies. What I can do here is review several significant examples that illustrate the potential of international law for serving private welfare at the cost of the public good. At this stage in my investigation, I would be happy if I could convince the reader only that these illustrations suggest that this thesis should be taken seriously.

I did not choose these examples randomly. They all involve international rules with potentially large economic consequences, and together they implicate all of the kinds of international lawmaking that I discussed above. Others may offer counterexamples. One should remember, however, that my thesis is not that international lawmaking is incapable of achieving many good and even great things. Rather, my focus is on the relative costs of the process.

For the most part, I also have not tried to document the proposition that international lawmaking often results in platitudinous Model II rules. Even a casual review of much of the important trade agreements of the past few years should convince the reader that much of what was achieved at best constitutes "soft law" that may provide a conceptual framework for decisionmaking but does not seriously constrain decisionmakers. Instead I will focus largely on rules that provide a specific return to particular groups.

A. Cultural Preservation Legislation

I will begin by examining a fairly straightforward example of rentseeking legislation enacted at the international level. In 1989, the Council of what was still the European Economic Community (EEC) issued a directive on what kinds of television programs broadcasters could transmit within the Community.⁴⁶ The directive required that, "where practicable and by appropriate means," EEC members should ensure that broadcasters reserve a majority of their time for European programs. By European programs, the directive meant works that either were produced within the EEC or other European parties to the Convention on Transfrontier Television, or were made elsewhere in Europe as part of a coproduction agreement with EEC companies. What the directive demanded in practical terms was that the governments of the EEC keep programs originating in the United States from taking up more than half of the broadcast time. This directive

⁴⁶ Council Directive 89/552 of Oct. 3, 1989, Coordination of Certain Provisions Laid Down by Law, Regulation, or Administrative Action in Member States Concerning the Pursuit of Television Broadcast Activities, 1989 O.J. (L 298/23).

remains binding on EU members, although its implementation has proceeded by fits and starts.

Why would the EU as a collective body admonish its members to purge the airways of Hollywood's excretions? Broadcasters try to give their audience what they want, and the sad truth seems to be that Europe's viewers would rather watch *Baywatch* and *Melrose Place* than the products of their own cultural idiom. If broadcasters want to satisfy these desires, and if the viewers they serve have them, what would motivate the governments of the EU members to frustrate the viewers?

One explanation is that the governments believe that culture is a public good akin to clean air or national security. Culture, the argument goes, both creates and enriches the social space in which people interact. Erosion of a common language and the associations that underpin it may impoverish a nation every bit as much as an economic slump. The state has an interest in promoting the transmission of culture, including, when necessary, using coercive measures to make the population work in their national tradition rather than surrendering to some flashy import.

One might not accept this explanation even as applied to a monoglot national tradition such as France's. It is at least suspicious, although hardly surprising, that so much of the articulated support for active state promotion of culture comes from producers of culture and some high-use consumers. But when transported to an international organization representing many official languages and diverse, historically antagonistic cultural traditions, the argument loses all credibility. The claim that, for example, French culture will be served by Britain's *Benny Hill* reruns but not by *Your Show of Shows* from the United States fails to pass the straight-face test.

If the protection of cultural integrity or some other public-goods argument does not explain the directive on programming, then one must look for a rent-seeking explanation. Fortunately, one need not look far. Many but not all of the members of the EU subsidize the production of both films and television programs. These state-supported producers have seen a large decline in their market share in the face of U.S. competition. A single government, acting alone, may have difficulty telling its electorate that television viewers will have to give up some of the shows they want to see to shore up the value of a failing industry that had captured the government's support. But by recasting the decision as a European-wide choice, the governments

can deflect to Brussels whatever criticism will follow from this decision.

The choice of structure of this measure, namely as a Council directive, facilitates the evasion of accountability. An EU directive orders the member governments to take certain steps, in this case to establish quotas for non-European programming, rather than laying down those rules directly. Normally the steps involve administrative action rather than new legislation, which might involve a potentially recalcitrant parliament. Thus the governments that vote for the directive do not have to accept responsibility for any particular measure undertaken to fulfill its mandate, but may use the directive to shield themselves from criticism: "Is having the chance to see *Baywatch* worth the loss of EU membership?" In addition, those governments which for whatever reasons feel less of an obligation to protect producers of television programming from competition may drag their heels on implementing the directive, while those who feel a strong obligation to that industry may do their duty by the directive with vigor and enthusiasm.

How typical is the 1989 television programming directive? Casual empiricism suggests that the EU not infrequently enacts legislation protecting private economic interests that individual governments would have a difficult time justifying to their voters. Some, such as the programming directive, become the subject of trade tension with the country where the prohibited products originate. Others may slip by without much notice. The latter outcome is more likely if the non-European producers are dispersed and poorly organized, as is often the case with respect to low-technology industries in developing countries.

The larger point is not that the EU lawmaking structure makes inevitable rent-seeking legislation of the sort exemplified by the programming rules, but rather that it facilitates the enactment of such rules. How much that structure expedites rent-seeking, and how much it enables the member governments to surmount collective action problems to promulgate welfare-enhancing legislation beyond the reach of individual members, remains a subject for further research. For present purposes, it should be enough to see the programming directive as an illustration of how a reduction in accountability may lead to the imposition of a rent-seeking international legal regime.

B. Trade Agreements and National Parliaments

The programming directive may be seen as a naked case of rent seeking enacted at the international level. More subtle problems arise when international agreements require domestic legislation to take effect. The involvement of national parliaments means that a greater number of domestically accountable lawmakers must participate in the lawmaking process, even if the degree of accountability is somewhat attenuated.

The multilateral trade agreements negotiated through the GATT institutions typify the process of domestic legislative implementation of international rules. Very little in those agreements smack of private interest protection. Instead, one usually finds the signatories making broad if often vague commitments to open up various sectors of their domestic economies to foreign competition. Reservations and grandfathering provisions may dot the landscape, but these tend to be minor deviations from a general commitment to liberalization that does not fit comfortably into a special-interest story.

By contrast, the domestic legislation that fulfills these agreements often enacts rules and procedural devices that clearly benefit specific interests. Often the domestic bargains are quite explicit and have little to do with trade liberalization. This pattern seems to present a paradox. If accountability problems means that one should expect more rentseeking at the international level than at the domestic, why does the critically important area of trade regulation produce the opposite result?

Take the Tokyo Round Agreements of 1979. Among those instruments was the so-called Subsidies Code.⁴⁷ Signatories to the Code accepted the obligation to make countervailing duties more difficult to impose by, *inter alia*, limiting their use to cases where domestic producers could establish a causal link between countervailable subsidies and their economic injuries. Many advocates of free trade believe that governments undercut the tariff concessions they make through the GATT negotiating rounds by facilitating dubious claims of unfair trade practices, such as assertions of countervailable subsidies associated with imports. A conventional analysis portrays domestic producers as an interest group seeking to use measures such as countervailing duties as a means of protection from competition, to the detriment of domestic consumers and, in most cases, the general

⁴⁷ Agreement on the Interpretation and Implementation of Article VI, XVI and XXIII, GATT B.I.S.D. (26th Supp. at 56) (1980).

welfare of the nation. The Subsidies Code thus appear to restrict rather than promote rent-seeking by making countervailing duties less accessible.

But when implementing this thoroughly liberal agreement, the United States substantially revised the administrative procedures and judicial review mechanisms for these duties.⁴⁸ The new procedures both reduced the discretion of the Commerce Department's International Trade Administration and the International Trade Commission, each of which must make certain findings before countervailing duties may be assessed, as to whether to impose those duties, and made it much easier than before for domestic producers to challenge their decisions not to. Thus chastened, the agencies and the courts proceeded to entertain a huge surge of countervailing duty petitions and to impose an unprecedented number of countervailing duty orders.⁴⁹ One cannot prove that these procedural changes by themselves caused the expansion of these orders: foreign governments may have increased subsidies to their producers, or more U.S. producers may have felt the need for protection in the face of the 1979-82 recession. But the new procedural rules, entirely the product of domestic legislation rather than any GATT obligation, certainly did nothing to stem the growth of countervailing duties in the years following their adoption.

If the implementing legislation for trade agreements generally reflects a higher level of rent seeking than does the corresponding agreement, does it follow that my hypothesis about the link between lower accountability and higher rents is wrong? Not if one conceives of the agreement and the legislation as an integrated package, with the latter's pandering to interest groups occurring only because of the successful conclusion of the former. Governments use these agreements, one may argue, as a means of shaking down domestic interests. The vaguely worded international commitment contains a threat to groups currently enjoying protection from competition, but the language also gives the implementing states sufficient leeway to accommodate many if not all of the potential targets. An extreme version of this argument would claim that governments enter into trade agreements so that they may conduct the exercise that is implementing legislation.

⁴⁸ Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 101-107, 93 Stat. 144, 150-93 (1979)(codified as 19 U.S.C. §§1671-1677 (1982)).

⁴⁹ For a description of the increase in petitions, see Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 199-200 (1989).

Consider examples from U.S. implementation of the Uruguay Round Agreements. Superficially these agreements committed the United States, among other things, to reducing the protection it gives domestic farmers and textile manufacturers, and as such won praise from trade liberals. But during the period that Congress deliberated whether to approve these agreements, the Clinton administration increased the level of federal monetary support given to farmers who export their crops and modified the rules for determining where textiles originated for purposes of administering ongoing import quotas. The American Farm Bureau Federation and the American Textile Manufacturers Institute, lobbying groups representing the affected domestic producers, responded to these naked interest-group handouts by shifting their positions on the Agreements.⁵⁰

More generally, a recent study by Andrew Dick documents the relationship between tariff-lowering agreements and disguised protection. Dick studied the implementation of the Kennedy Round tariff cuts negotiated during the mid-1960s, which the United States phased in between 1968 and 1972. His research indicated that roughly one-fourth of the affected domestic industries received significant protection during this period through to the creation of new nontariff barriers, with the industries most threatened by import competition receiving the greatest special protection. Although this evidence cannot establish a conscious link between the prior international agreement and the subsequent special interest favors, the sequence is suggestive.⁵¹

Perhaps this story seems too pat and assumes too much strategic sophistication on the part of governments. But one should recall the remarkable study of the U.S. tax legislative process produced by Richard Doernberg and Fred McChesney a decade ago.⁵² They linked the successive waves of tax reform that overtook the United States during the seventies and eighties to campaign contributions received by members of the responsible congressional committees, especially the chairs. They argued that the threat of tax reform triggered a response from interested groups, while the enactment of legislation made the threats credible. The campaign contributions reflected the success of this strategy.

⁵⁰ *Farmers Get GATT Funding Assurances; Textile Rule Change Angers Retailers*, 11 BNA INT'L TRADE RPTR. 1547 (1994).

⁵¹ Andrew R. Dick, *Explaining Managed Trade as Rational Cheating*, 4 REV. INT'L ECON. 1 (1996).

⁵² Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987).

It does not seem far-fetched to argue that a similar process occurs with respect to international trade regulation. If anything, the fact that governments may reach these agreements without the direct participation of their potentially obstructionist parliaments, and then may present those parliaments with something tantamount to a *fait accompli*, makes soft commitments to international trade liberalization an even more attractive vehicle for extorting rents from interest groups. And unlike rents derived from threatened tax reform, a larger portion of the side payments triggered by putative trade liberalization would tend to go to the executive branch, which has greater control over the agenda of trade negotiations.

To be sure, evidence that some governments use trade liberalization agreements as a pretext to sustain protection does not prove that such agreements are necessarily pernicious, any more than the Doernberg and McChesney study makes a case against tax reform. Properly implemented, liberal trade agreements may reduce the overall cost of rent-seeking by forcing domestic producers to compete through better and cheaper products and devaluing the help that governments can provide. My point is only that what passes for international liberalization on closer scrutiny may turn out to be special interest legislation, and that as a historical matter some trade agreements have enhanced the value of services rendered by governments to discrete interest groups.

C. The Convention on the International Sale of Goods and the Uniform Customs and Practice

Among private legislatures that make international rules, the International Chamber of Commerce and UNCITRAL deserve special attention. First, their memberships differ substantially, even though they share the avowed goal of promoting harmonization of the legal rules governing specific bodies of commercial law. Second, the content of the rules they produce also differs significantly. Third and perhaps most important, their products include some of the most influential bodies of private law governing international commercial transactions. I will focus on each body's most well-known project, namely the UNCITRAL Convention on the International Sale of Goods (CISG) and the ICC Uniform Customs and Practice for Documentary Credits (UCP).

John Spanogle, a former U.S. delegate to several UNCITRAL Working Groups, has described how that organization prepares its legislative proposals:

The process adopted by UNCITRAL often commences with the convening of a "group of experts" which meets over a long period of time in a Study Group to do initial investigation of issues. Then, representatives of States meet in a Working Group to draft the proposed convention – again over a long period of time.⁵³

Both the experts and the representatives tend to be law professors rather than professional diplomats or private lawyers. In the case of the CISG, UNCITRAL in 1968 took over a project that had begun in 1928 under the auspices of the Hague Conference on Private International Law. The Working Group proposed a draft in 1978, which a UN-sponsored conference embraced in 1980. Professor Allan Farnsworth of Columbia Law School headed the U.S. delegation, which contained several other prominent academics, and a Hungarian scholar presided over the conference.

The Scott-Schwartz model predicts that a process such as UNCITRAL's, with no permanent lawmaking groups and no direct participation of interest groups in its work, will produce largely Model II rules. A review of the CISG confirms this. Many key provisions are completely open ended, while others contain internal contradictions that permit decisionmakers to reach whatever result they wish. Arthur Rosett has identified several of the key indeterminacies, including the Convention's scope,⁵⁴ its rules of interpretation,⁵⁵ the rule for open price and quantity terms,⁵⁶ and the content of obligation of good faith and fair dealing.⁵⁷ The cumulative effect of these provisions is in many cases to allow courts to reach almost any result they want under the guise of following the CISG.⁵⁸

The ICC, by contrast, represents international businesses rather than academic and governmental élites. Like UNCITRAL, it prepares packages of off-the-rack contractual provisions that at least in theory are elective for the parties. But unlike UNCITRAL's Working Groups, the ICC Working Groups tend to comprise only representatives from a single interested industry. The Working Group that

⁵³ Spanogle, *supra* note 16, at 498. See also John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979).

⁵⁴ Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/Conf/97/18, art. 1 (1980), reprinted in 52 Fed. Reg. 6264 (1987) [hereinafter CISG]; see Rosett, *supra* note 36, at 274-81.

⁵⁵ CISG, *supra* note 54, at art. 8; see Rosett, *supra* note 36, at 286-88.

⁵⁶ CISG, *supra* note 54, at arts. 14, 55; see Rosett, *supra* note 36, at 288-89.

⁵⁷ CISG, *supra* note 54, at art. 7; Rosett, *supra* note 36, at 289-90.

⁵⁸ Another indication of the CISG's indeterminacy is the work of scholars who have used it to impose their own analytic template. Like the common law of contracts, the CISG permits a wide range of substantive moves. See, e.g., Steven Walt, *For Specific Performance Under the United Nations Sales Convention*, 26 TEX. INT'L L.J. 211 (1991).

prepared the 1993 revision of the UCP, for example, consisted entirely of law professors specializing in banking law and persons who worked for banks; even law professors had been excluded from previous drafting bodies.⁵⁹ One therefore should expect the UCP to contain many Model I rules that largely reflect the interests of the banking industry.

Banks issue documentary credits on behalf of customers and for the benefit of persons to whom the customers anticipate making a payment, normally after the beneficiary has met certain conditions. The UCP provides a set of definitions and terms that banks and their customers may incorporate into a credit. In practice the UCP has become the international standard for most letters of credit, and in particular for credits supporting international commercial transactions. Specialists report that most banks would entertain dickerings over the applicability of the UCP only with the greatest reluctance.⁶⁰

Issuing banks have a strong interest in fixing their obligation to honor credits in a way that precludes the exercise of discretion on the part of their personnel. They wish both to minimize legal risk and to constrain the lower level employees that normally process credits. In short, they want payment to proceed as automatically as possible given the conditional nature of the instrument.

Accordingly, the UCP lays down a series of clear and precise rules that facilitate the payments process. To a greater extent than Article 5 of the UCC (the local law for letters of credit in most of the United States), the UCP emphasizes the separation of the credit from the underlying transaction for which the credit serves as payment. The bank pays only against the delivery of documents, and the customer may not specify a nondocumentary condition.⁶¹ Presentation of the documents will trigger the bank's obligation only if made to that bank or its nominee, even if the issuing bank is acting as a confirming bank for another issuer.⁶² Time limits for examination of the documents are fixed, rather than left to an amorphous reasonableness standard.⁶³ Where a bank attempts to amend a credit, the UCP treats this step as creating an option exercisable by the beneficiary: the bank must honor the amendment whether the beneficiary received adequate notice or not, but the beneficiary must comply only with amend-

⁵⁹ Buckley, *supra* note 35, at 267.

⁶⁰ *See id.* at 267-68.

⁶¹ UCP, *supra* note 35, at art. 13(c).

⁶² *Id.* at art. 9(b).

⁶³ To be precise, article 13(b) gives the issuing bank "a reasonable time, not to exceed seven banking days following the day of receipt of the documents," to reject nonconforming documents. *Id.* at art. 13(b).

ments for which it gives express consent or with which it makes a conforming tender of documents.⁶⁴ Each of these rules diminishes uncertainty about the bank's responsibility and provides reasonably clear guidance to bank employees.

D. The European Court of Justice

Perhaps the most vivid example of how institutional interest may affect the outcome of international adjudication comes from the EU. Earlier in this paper I noted briefly that the European Court of Justice, the judicial branch of the EU, has acted in a fashion that parallels how the Marshall Court behaved during the formative years of the U.S. judicial system. In particular, I suggested that the Court of Justice has both displayed a tendency toward self-aggrandizement and has supported an expansion of the authority of the EU organs at the expense of national lawmaking authority. I will expand on those observations here.

The self-aggrandizement of the Court of Justice comes from three claims of authority it has made. First, it has asserted the power to review the legislation and practice of the EU organs for consistency with the various treaties and to invalidate EU laws that conflict with those treaties.⁶⁵ The parallel with *Marbury v. Madison* seems obvious, although the form of the Court's review more closely resembles that of the constitutional courts one finds in many continental European legal systems. Second, it has maintained that EU law, whether the articles of the treaties themselves or the lawful commands of the EU organs, applies directly to the legal systems of the member states.⁶⁶ Because it occupies the role of ultimate authority on the interpretation of EU law, this claim in turn means that the national courts not only must follow EU law in deciding the cases before them, but must defer to the Court of Justice when doing so. Here an analogy with *Martin v. Hunter's Lessee* seems evident. Finally, the Court has extended the logical implications of these assertions by claiming the right to ascertain the scope of the EU's authority, and hence of its own jurisdiction. This assertion of *Kompetenz-Kompetenz*, as the Europeans call it, closely follows what the Supreme Court did in *McCulloch v. Maryland*.

⁶⁴ *Id.* at art. 9(d).

⁶⁵ See, e.g., *Commission v. Council (Generalized Tariff Preferences)*, 1987 E.C.R. 1493.

⁶⁶ *Van Gend En Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; *Defrenne v. Sabena*, 1976 E.C.R. 455.

These successful assertions of power have created for the Court the role of supreme arbiter of all questions that may plausibly be framed as legal and involving the EU. Because the Court itself gets to decide what is a legal question and what is EU law, the extent of its powers is limited only by exceedingly vague political and cultural considerations. The jealousy with which the Court guards these prerogatives was exposed during the negotiations leading up to the 1993 treaty between the European Communities, as they then were, and the European Free Trade Association (EFTA), which then comprised Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland. The first iteration of that treaty would have created a tribunal consisting of the members of the Court of Justice plus justices from the EFTA countries to resolve disputes over that treaty's interpretation and application. The Court of Justice ruled that the establishment of such a body would violate the Treaty of Rome by derogating from its exclusive and supreme authority to interpret the Communities' law.⁶⁷ The parties acceded to this claim, with the final version creating a joint committee for interpretation that, as to all questions of Community law, would be inferior to the Court.⁶⁸

Armed with the authority of *Kompetenz-Kompetenz*, the Court of Justice has interpreted the various treaties liberally so as to permit a significant expansion of EU power. As with the Commerce Clause jurisprudence of the Supreme Court, the Court's decisions have both a positive and negative aspect. On the one hand, they have read implied powers into the treaties so as to give the EU organs free reign to legislate in areas of interest to them.⁶⁹ On the other hand, they have identified areas where, in the absence of explicit authorization from EU organs, any lawmaking by the member states would, in the view of the Court, impermissibly interfere with EU power.⁷⁰ Analogies to the necessary-and-proper doctrine of *McCulloch v. Maryland* and the negative commerce clause principles of *McCulloch* and *Gibbons v. Ogden* have seemed obvious to observers. Taken together, these decisions create the legal foundations for a dominant EU regulatory power that, over time, may relegate the member nations to the kind of subordination now associated with the States of the United States.

⁶⁷ *In re Draft Treaty on a European Economic Area*, 1991 E.C.R. 6079.

⁶⁸ *See In re Draft Treaty on a European Economic Area*, 1992 E.C.R. 2821.

⁶⁹ *See, e.g., Commission of the European Communities v. Council of the European Communities (ERTA)*, 1971 E.C.R. 263.

⁷⁰ *See, e.g., Procureur du Roi v. Dassonville*, 1974 E.C.R. 837; *Commission of the European Communities v. Council of the European Communities (In re Draft International Agreement on Natural Rubber)*, 1979 E.C.R. 2871.

None of these claims of the Court of Justice rested on stunningly bizarre interpretations of the Treaty of Rome or other authorities. The very similarity to U.S. experience may suggest a certain inevitability in the way the Court resolved these questions. Yet other choices were open to the Justices. If nothing else, the tradition of a limited role for the judiciary that existed in most continental legal systems might have led the Court to take a more modest position. In particular, it did not have to insist on direct applicability of Communities law in national legal systems.

Students of international law, as all the members of the Court have been, are well acquainted with the dualist notion. This concept holds that international law binds only states in their dealings with each other and not the relationship between sovereign and subject. As members of an international body, the justices might have concluded that they had the power to expound on the meaning of the law of the Communities, but that each member state reserved the right to observe its obligations in the manner it chose, subject only to protests and pressure from the other members. That they assumed the mantle of monists at a time when most legal systems had only limited experience with the direct application of international law to private transactions suggests a certain willingness to build institutional prestige at the expense of limited government. The judges chose to become lawgivers in a great multinational enterprise, when they could have remained legal consultants to an international committee of narrow competence.

E. IMF Interpretations of Its Articles of Agreement

The IMF is one of the most important international organizations, if only because it handles so much money and is so intimately involved in the management of so many national economies. Much of its activity might be considered administrative rather than lawmaking. Mostly it loans money under its control to governments, and states conditions under which it would be prepared to loan them additional sums. But on occasion its decisions have consequences that extend to private parties. The most common situation involves a government caught up in a financial crisis that imposes some sort of currency control on preexisting debtor-creditor relationships. Normally the currency control has the effect of barring the debtor from repaying the loan and thus destroys or greatly reduces the value of the creditor's rights. The legal issue becomes whether the creditor may challenge the imposition of such controls as an illegal confiscation of its prop-

erty. For many countries where creditors may bring such challenges, that issue will depend on whether the country blocking the payment violated international law. And that question in turn depends at least in part on whether the blocking country acted in conformity with the IMF Articles of Agreement, an international treaty that, *inter alia*, deals with currency controls.⁷¹

Lawyers associated with the IMF have taken the position that only the IMF has the authority to issue definitive interpretations of its Articles and to determine whether governments have acted in conformity with them.⁷² In practice the IMF has used this power to take a generous view of what kinds of currency controls the Articles permit. When working with a debtor government to come up with a plan for rescheduling its obligations, the IMF will insist on its right to approve the government's currency control, but typically the results of this preclearance are favorable.⁷³ In effect the IMF staff uses its capacity to interpret the Articles as a means of expanding their control over the budgets of debtor countries. Governments that share control over their finances with the staff obtain a valuable privilege that can be used to avoid liability in other countries' courts. Those that prove recalcitrant face not only a denial of access to IMF funds, but also an increased risk of legal liability outside of its borders.

IV. NORMATIVE IMPLICATIONS

What should we make of all this? Suppose one becomes convinced that a significant portion of international law constitutes the product of successful rentseeking on the part of either interest groups or the institutions themselves. Should we then pursue prophylaxis by erecting broad barriers against the recognition of internationally generated rules? Should we make it more difficult for executive branches to craft multilateral agreements and for parliaments to implement them? Should we regard the rules generated by private international legislatures, international adjudicators and international administrative interpreters as suspect and presumptively invalid?

⁷¹ See Articles of Agreement of the International Monetary Fund, *supra* note 6, at arts. VIII, XIV.

⁷² See, e.g., JOSEPH GOLD, *THE FUND'S CONCEPTS OF CONVERTIBILITY* (1971); 1&2 *LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM - SELECTED ESSAYS* (1979).

⁷³ For examples of the IMF's behavior in such circumstances, see *West v. Multibanco Comermex*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987); *Callejo v. Bancomer*, 764 F.2d 1101 (5th Cir. 1985).

At this point, any response to these questions must be in the form of a thought experiment only. I have taken pains to set boundaries on what this paper purports to establish, and in particular have insisted that the argument that some kinds of international lawmaking may reduce welfare is speculative and not proved by the anecdotal evidence produced here. No policymaker should implement any comprehensive strategy to cope with the costs of international lawmaking until it has independently come to the conclusion that such steps are justified. One should proceed with this thought experiment, if at all, only because the possibility is greater than nil that further research may justify some restraints on international law making. Common sense and experience may bolster the suspicion that this research will bear fruit, but I make no stronger claim than that.

Furthermore, a decisionmaker could conclude that none of these questions is relevant. Rather than developing a general critique of international rules, the decisionmaker might seek simply to implement predetermined substantive preferences, whatever they may be and whatever the context in which they appear. Thus an economic liberal might support and strengthen any international rule that augments free trade and invalidate or interpret into meaningless any rule that smells of protection. But such a decisionmaker would not be interested in accountability or legitimacy as such. Free trade, or environmental protection, or celebration of aboriginal cultures, or empowerment of women, or advancement of human rights would be the ends, and the means would be whatever works. For such a person, a lawyer concerned about legitimacy and the disadvantages of law-making processes that lack accountability would have nothing helpful to say.

I am not so naive as to believe that choices about lawmaking process lack substantive consequences. All the same, issues of legality and legitimacy in lawmaking still matter. If certain ends are good, then over time an enlightened democracy might be persuaded to embrace them. We need to worry about obstacles to democratic decisionmaking that might prevent a good society from pursuing its just goals. And if international lawmaking is disproportionately encumbered with such obstacles, we would have to ask whether international rules prevent visions of the good, whatever they may be, from coming into being. I accordingly will limit my normative discussion to the procedural aspects of the creation of international norms, even though the desired end is substantively better rules.

A. Strategies for Subversion

A decisionmaker, whether legislator, judge, administrator, or jurist, might try to thwart rent seeking by making it more difficult to enact international rules into law. To be sure, the decision to embark on this course is problematic. Even if one were to conclude that a majority of international rules reflect interest-group rentseeking, it does not follow that international rules as a whole decrease overall welfare. It may be that most international rules reflect institutional or bureaucratic interests but are not sufficiently concrete and constraining to do much harm, and that an important minority increase welfare through the solution of important collective action problems. Our concern should not be how many bad rules are produced, but rather how bad are the rules produced, in comparison to the domestic regimes that otherwise would exist. The latter question is much harder to answer, and its difficulty should discourage decisionmakers from blanket attacks on international lawmaking.

Nonetheless, there is a case to be made for mechanisms that make the adoption of international rules more difficult. A decisionmaker reasonably might hope that drawing out the lawmaking process might enable opponents to call attention to unwise or welfare-diminishing proposals. In other words, the advantage of more rigorous procedural requirements for international rules would be to induce both proponents and opponents to supply more information about the proposal. I will characterize the various requirements that might be imposed and the methods for imposing them as strategies for subversion of international lawmaking.⁷⁴

I would like first to consider briefly and to reject an approach offered by Laurence Tribe. He would treat at least one aspect of international lawmaking, namely U.S. legislative approval of international agreements, as bound by substantial constitutional constraints. He finds his constitutional hook in Article II, Section 2, which specifies that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." At least some class of international agreements, the argument goes, as a matter of constitutional law must be

⁷⁴ For comparable attempts to develop legal rules that will reduce rent-seeking domestic legislation, see Peter H. Aranson et. al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Jonathon R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787 (1992).

considered treaties and thus may become the law of the United States only if a supermajority of the Senate approves of them.⁷⁵ This constraint is stronger than may first appear, because many international agreements in the economic sphere also raise or lower tariffs and thus may be characterized as revenue bills subjected by the Constitution to House approval.⁷⁶ NAFTA and the Uruguay Round Agreements, it appears, could become the law of the United States only if a majority of the House and two-thirds of the Senate approved them.

If one wishes only to obstruct the adoption of international agreements, this strategy succeeds admirably.⁷⁷ But that success comes at a price to constitutional law. First and probably least important, the argument flies in the face of settled understanding. For at least a century Congress has not adhered to the rule Tribe purports to find in the Constitution.⁷⁸ Were one to disregard the crystallization of practice and go back to the framers, the case is deeply ambiguous. The framers' primary motivation for including the treaty language in Article II almost certainly was not incorporation of the terminology of international law into the Constitution, but rather giving the federal government the power to regulate through the treaty-making process subjects outside the scope of its Article I powers, whatever those may be.⁷⁹

⁷⁵ See Laurence H. Tribe, *supra* note 1. The argument is an old one, although it fell out of circulation after World War II. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 Rep. Note 8 (1987).

⁷⁶ To be sure, some lower court authority points the other way, but the Supreme Court has not resolved the matter. See *Goldwater v. Carter*, 444 U.S. 996, 997-998 (1979).

⁷⁷ I do not mean to impute this intention to Tribe. His argument, it seems to me, leads one to a position where some international agreements require the treaty process and others do not, with the sorting being done by a political theory (or, a critic might assert, a collage of preferences) largely left out of the discussion.

⁷⁸ Bruce Ackerman and David Golove argue that Congress has adhered to this practice for only a half century, and that before 1945 it seemed to accept the position Tribe has propounded. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). But they rest this claim on the assumption that Congressional legislation authorizing international agreements in advance of their conclusion, of which there are examples as early as the nineteenth century, somehow does not count. *Id.* at 820-27. Their attempt to distinguish legislative preauthorization of international agreements from agreements that are implemented through legislation rests on the demonstrably false assertion that Congress has the power to repudiate the former but not the latter. For authority to the contrary, see, e.g., *United States v. Dion*, 476 U.S. 734 (1986); *Chinese Exclusion Case*, 130 U.S. 581 (1889); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Cherokee Tobacco Case*, 78 U.S. 616 (1871).

⁷⁹ Cf. *Missouri v. Holland*, 252 U.S. 416 (1920) (Migratory Bird Treaty upheld under Treaty Clause even though similar legislation had been held unconstitutional as outside the scope of Article I). The review of the evidence as to the framers' intent by Ackerman, Golove and Tribe is, to my mind, good law office history but not persuasive.

More importantly, at least for us functionalists who find historical arguments over the Constitution interesting but too often unhelpful, there are no satisfactory candidates for a constitutional definition of a treaty. That is to say, to which international agreements and norms does the Senate-only rule apply? To be sure, the formal aspects of a treaty are clear enough.⁸⁰ But adopting an innovative constitutional interpretation only to impose a formal requirement seems pointless.

Yet because treaties are defined by form rather than content, any substantive definition would have to reflect values not suggested by the Treaty Clause itself. Informed by a belief that international cooperation largely reflects rent-seeking rather than welfare maximization, a would-be constitutional interpreter might take, for example, the extreme position that all international agreements, tacit as well as express, constitute treaties in the Article II sense. But then great difficulties would arise. To cite only one problem among many, U.S. courts on occasion have crafted particular common-law rules in the express belief that they satisfied the demands of reciprocal international comity. Did Chief Justice Marshall violate the Treaty Clause when he recognized foreign sovereign immunity to meet what he deemed the reasonable expectations of other civilized nations?⁸¹

Rather than constructing a constitutional rule of dubious provenance and uncertain operation, I would rather locate the issue in the realm of statutory interpretation. Skeptics of rentseeking international cooperation could insist that the legislature give express approval of each specific rule embodied in an agreement. The decisionmaker would not ask by what procedure did the legislature give its approval, but rather whether the action taken constituted approval of the rule under consideration. Executive support would not substitute for clear legislative action.

This approach has both a procedural and interpretive dimension. It requires compliance with certain procedures – legislative authorization – as a precondition for a rule to take effect. But it also forces the decisionmaker to interpret the authorization to decide whether it

⁸⁰ The Vienna Convention treats all formal international agreements intended to create legal obligations as treaties. See Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 2(1)(a), U.N. Doc. A/Conf.39/27 (1969), reprinted in 155 U.N.T.S. 331, 333 (1969); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III, introductory note (1987). But agreements that are not memorialized in written instruments or otherwise are not formalized presumably fall outside the scope of the Convention, no matter how strong and clear may be the parties' intention to constrain their future behavior.

⁸¹ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); see also Stephan, *supra* note 26, at 150-54.

clearly and specifically covers the rule at issue. The U.S. law of international relations, at least, includes dozens of vaguely worded statutes that might be generously read as giving congressional approval for almost any action by the executive. The subversive strategy would require a much more focused statement of legislative approbation.

The position taken by Justice Scalia in his *Barclays Bank* concurrence typifies the procedural dimension of this strategy.⁸² Under pressure from our trading partners, the executive (until 1993) had consistently attacked the California corporate income tax as applied to foreign corporations, arguing that the tax undermined federal policy and prevented the nation from speaking "with one voice" when dealing with foreign commerce. The executive even had signed a treaty with Great Britain that would have outlawed California's tax, although the Senate had refused to go along. The majority opinion determined that these various executive actions were insufficient to invalidate California's tax and left open the question of whether the executive alone could preempt a state rule of taxation. Concurring in the judgment, Scalia urged that the President acting alone had no power to determine the constitutionality of a state law.⁸³

My intention here is not to debate the general merits of literalism, originalism, strict construction or any other interpretive strategy intended to minimize the influence of nonlegislative actors on the application of statutes. The point is merely that this approach, as applied to international law, has two likely effects, each of which could be salutary. First, a norm that refused to recognize an international rule unless the legislature had expressly and specifically endorsed it would result in recognition of fewer rules. Second, conditioning recognition on express and specific endorsement might induce the executive to be more selective in what international rules it bargained for, and the legislature to take up its deliberative responsibility more assiduously.

Of course, terms such as "express" and "specific" may seem more hortatory than constraining. Committed deconstructionists are prepared to find ambiguity anywhere.⁸⁴ Even a more conventional decisionmaker could turn up many hard cases in the faithful pursuit of this strategy. What should we make, for example, of rather clear *ex ante*

⁸² *Barclays Bank v. Franchise Tax Board*, 114 S. Ct. 2268 (1994).

⁸³ *Id.* at 2287. For a comparable statement of the relative authority of the EU's Commission and Council in the sphere of international lawmaking, see *French Republic v. Commission (In re the E.C.-USA Competition Laws Agreement)*, 1994 E.C.R. 3641.

⁸⁴ See, e.g., Anthony D'Amato, *Legal Theory: Deconstruction: The "Easy Case" of the Under-Aged President*, 85 Nw. U. L. Rev. 250 (1990).

authorization by Congress of executive agreements? Since 1934, for example, the President intermittently has possessed legislative permission to negotiate reciprocal tariff reductions, with agreements that do not cut preexisting tariffs by more than half authorized to take effect without further legislative action.⁸⁵ Should we take Congress at its word that the President may implement such agreements, or should express legislative approval be limited to ex post consent? Good arguments can be made either way. On the one hand, all legislative actions involve guesses about the future, and specific ex ante constraints on executive lawmaking (no reduction by more than half without additional approval) may serve as well as would the endorsement of a realized agreement. On the other hand, by authorizing agreements in advance of their consummation, the legislature surrenders the power to weigh international rules in light of the circumstances of their formation. A fifty percent tariff reduction might seem insignificant at one moment, and quite meaningful at some later date.

My point is simply that strategies for constraining the production of international rules exist, and indeed currently are employed by significant decisionmakers. I do not make the stronger claim that decisionmakers generally appreciate the normative argument for increasing accountability in international lawmaking and therefore widely use interpretive techniques that hinder the adoption of international rules. To confirm this point, contrast the approach of Justice Scalia in *Barclays Bank* with that of the Court in *Dames & Moore v. Regan*.⁸⁶

Dames & Moore involved the validity of Treasury regulations implementing the Algiers Accords, an executive agreement that sought to settle the Iranian hostage crisis by, *inter alia*, negating certain state law contractual and tort rights held by private parties. In accordance with the interpretive dimension of the subversive strategy, the majority determined that no act of Congress authorized every aspect of the agreement. This part of the decision was not inevitable, as Congress had enacted several broad statutes concerning sanctions against foreign states. But the majority then disregarded the strategy's procedural dimension. Noting a long history of settlement of foreign claims, it held that the executive had the power to implement the Ac-

⁸⁵ For the original authority, see Trade Agreements Act of 1934, § 1, Pub. L. No. 316, 48 Stat. 943 (1934) (codified at 19 U.S.C. § 1351 (1994)).

⁸⁶ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

cords without legislative authorization.⁸⁷ It seemed to argue that tradition could substitute for congressional approval. Those seeking an interpretive strategy to frustrate rent-seeking international agreements should deplore this argument, regardless of the underlying merits of the Accords.

These illustrations involve cases and may seem to imply that judges should be the primary agents for implementing the subversive strategy. But other decisionmakers also may challenge international rules without going to the courts for support. A member of Congress, for example, might question the validity of an executive action when considering whether to approve appropriations. A state official might refuse to comply with an international rule that lacks what might be deemed sufficient legislative authority. Perhaps most importantly, the academic community, and particularly jurists specializing in international law, might rely explicitly on the strategy when analyzing particular rules. By shifting the focus of debate, the strategy may change the underlying legal culture.

B. Transparency

Subversion has its attractions but, as an *ex post* device for determining the legitimacy of international rules that already have taken shape and attracted support, it has several drawbacks. First and most obvious, it operates with respect to rent-seeking and welfare-increasing rules alike. Some good rules will be undermined along with the bad ones. Second, the decisionmaker with the power to subvert the rule will know what the rule proposes and may have difficulty disentangling the strategic issue from whatever substantive preferences the rule may implicate. Third, the decisionmaker may find itself caught up in a game of chicken. That is to say, support for the substantive consequences of a rule may be so powerful as to discourage the decisionmaker from employing the interpretive moves it normally would use to make adoption of the rule more challenging. Arguably *Dames & Moore* arose in exactly this posture.

An alternative approach might focus less on the exact procedures through which an international rule is adopted and instead ask whether domestic lawmakers received significant amounts of information about the proposal. The issue would become transparency in the lawmaking process, rather than the specific content of authorizing legislation. The greater the quantity and quality of information generated

⁸⁷ Earlier case law took a similar approach. *See, e.g.*, *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

during the formation of the rule, the more willing would be the decisionmaker to respect the international norm.

As compared to subversive interpretive strategies, transparency-promoting procedures have a virtue that some might see as vice. An interpretive strategy necessarily gives substantial discretion to the interpreter, normally a judge or bureaucrat. The decisionmaker must decide whether a particular authorization is sufficiently clear and specific to extend to the rule in question, and that inquiry cannot easily be reduced to bright line considerations. A transparency rule is easier to make concrete, reducing the decisionmaker's discretion to determine whether compliance has occurred. The President either gives Congress ninety days notice of an intention to enter into an agreement or he does not: one may quibble over the content of the notice and the specificity of the intention, but the room for legitimate dispute is smaller.

A model for transparency-promoting rules can be found in the procedures the U.S. government must follow when pursuing a trade agreement. Since 1974, the executive has had to comply with several specific requirements before submitting trade legislation to Congress. To gain access to the "fast-track" process under which Congress promises to give a straight up-or-down vote within a specific time period, the executive must first obtain permission from the legislature to enter into the negotiations. It then must permit Congress to send observers to trade negotiations, give key committees sixty days advance notice of an intention to enter into an agreement, wait a further ninety days after announcing that intention before entering into that agreement, and after signing, submit to Congress draft implementing legislation, a list of proposed administrative actions and various supporting statements. At each point where the executive must notify the Congress of its intentions, either branch (or, for that matter, either of the key committees) may terminate the fast track authority by a simple majority vote.⁸⁸ Congress remains free either to reject the trade agreement or to refuse to stick to its fast-track rules, no matter how strict the executive's adherence to these requirements.

Several scholars have attacked the fast track mechanism because of what they see as a default by Congress of its duty to engage in rigorous legislative deliberation. They seem to attach little impor-

⁸⁸ See Trade Act of 1974, §§ 151-153, 161, Pub. L. No. 93-618, 88 Stat. 2290, 2317-26 (1975), (codified at 19 U.S.C. §§ 2191-93, 2211 (1994)); Omnibus Trade and Competitiveness Act of 1988, §§ 1102-03, Pub. L. No. 100-418, 102 Stat. 1107, 1126-32 (1988), (codified at 19 U.S.C. §§ 2902-03 (1992)).

tance to the obligations the executive faces under the procedure, perhaps on the grounds that Congress always has the power to insist on prior consultations in advance of the submission of a bill.⁸⁹ I would flip both points: the fast track procedure demands that the executive seek legislative approval in advance of closing any international agreement and otherwise thrusts Congress well into the negotiations process. To the extent any procedure can, it puts extraordinary pressure on the executive to specify what it will want from the legislature before obtaining the consent of its negotiating partners to what would become a take-it-or-leave-it deal. And the argument that the fast track substantially reduces legislative review of the final product strikes me as silly. The up-or-down component of the procedure is built into any process that would approve an international agreement. The Congress understands that it either must approve the deal as negotiated or force the executive to go back to the bargaining table: the one option not available to the legislature is unilaterally to modify the agreement. The fast-track procedure's one substantial concession to the executive, namely the Senate's promise not to engage in unlimited debate, is important but hardly fundamental. I am not persuaded that the filibuster is a constitutionally necessary part of the deliberative process.

The prior consultation components of the fast-track process are illustrative of how an information-forcing procedure may work. With sufficient ingenuity, other mechanisms may be devised that would have the same effect, namely forcing international lawmakers to expose their processes to analysis and criticism in advance of formation of any rule. A recent announcement of the WTO, for example, hints that that body will publish more of the materials involved in the dispute resolution process than it has in the past.⁹⁰ One might applaud that step and still insist that before U.S. decisionmakers treat WTO rulings as a form of law, the WTO organs must emulate the U.S. courts in treating all submissions of the parties to a dispute as presumptively a matter of public record at the time of submission.

⁸⁹ See, e.g., Koh, *supra* note 12; Edmund W. Sim, *Derailing the Fast Track for International Trade Agreements*, 5 FLA. J. INT'L L. 471, 476-479 (1992).

⁹⁰ Decision of the WTO General Council, Procedures for the Circulation and Derestriction of WTO Documents, WT/L/160 (July 22, 1996); see also General Council takes steps to increase public access to WTO information <<http://www.wto.org/Pressrel/ngo.utm>>. Although that decision generally excepts most dispute-resolution materials from its presumption of disclosure, it implies that the panel decisions, which normally will be disclosed, will contain comprehensive accounts of the parties' arguments.

I would not contend that transparency-promoting rules are free of the shortcomings associated with subversive interpretive strategies. Even though, I have argued, these rules tend to give decisionmakers less discretion than do interpretive strategies, one never can eliminate all indeterminacy in any rule. And any residual uncertainty of application will allow decisionmakers to substitute their substantive preferences for rigorous and consistent application of the rule, and in extreme cases to give in to chicken games. Moreover, identifying the optimal level of transparency and the best mechanism for obtaining that level remain daunting tasks. But even so, there seems a reasonable basis for believing that the promotion of transparency in international lawmaking, either in tandem with or in substitution for subversive interpretation, might discourage the implementation of rent-seeking rules.

C. Skepticism

Beyond subversion and transparency, a decisionmaker may rely on a general skepticism when confronted with internationally produced laws. Skepticism is not the same as hostility or even the functional equivalent of a presumption against the validity of an international rule. Rather, the decisionmaker might undertake an independent inquiry into the possible wellsprings of the claim. To what extent, the decisionmaker might ask, does the rule at issue reflect the institutional agenda of the organization that issued it or the desires of private interest groups, and to what extent does domestic law command the decisionmaker to respect that agenda or those interests?

This skepticism is similar to but distinguishable from subversive interpretation. Subversive interpretation as I have used the term involves the issue of validity: it asks whether a particular domestic legislative act authorizes the international rule in dispute. Skepticism enters the picture when international materials are employed to interpret a valid but ambiguous domestic law. On the one hand, the United States long has invoked the rhetoric of resolving ambiguities in favor of complying with international law.⁹¹ On the other hand, that formula says nothing about how decisionmakers should determine the content of international law in the absence of an unambiguous commitment. A skeptical decisionmaker would not defer to international bodies in deciding what international law is and what it requires of domestic law.

⁹¹ See, e.g., *Cook v. United States*, 288 U.S. 102 (1933); *Whitney v. Robertson*, 124 U.S. 190 (1888); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Illustrations of how this skepticism might work in practice come mostly from trade law. The welter of statutes governing U.S. tariffs, and especially those involving countervailing and antidumping duties, raise many significant interpretive problems. The International Trade Administration of the Department of Commerce (hereafter ITA) has evolved its own jurisprudence as to the meaning of these provisions, which it expounds and applies in particular countervailing and antidumping duty cases. Sometimes these agency interpretations conflict with what GATT dispute resolution bodies have concluded are the United States's obligations under the various multilateral trade agreements. On occasion the parties obtain through their governments a GATT dispute resolution panel interpretation that requires exactly the opposite outcome from that sought by ITA.⁹² These cases present a reviewing court with three possible approaches: (1) undertake an independent determination of what the statutes require; (2) defer to the administrative agency in cases of genuine statutory ambiguity; or (3) within the range of plausible outcomes, choose the one that accords with the multilateral trade agreements as interpreted by GATT dispute resolution bodies.

Consider the issue in *Federal Mogul Corporation v. United States*.⁹³ For purposes of determining whether importers have "dumped" their goods within the meaning of U.S. trade law, ITA must decide only whether U.S. prices are lower than home market prices, not that U.S. prices are unprofitable; the difference between the U.S. and home market price is called the margin of dumping. In making this comparison, ITA must take account of value added taxes, which are levied by many countries of production on domestic sales but are refunded when goods are exported. United States legislation does not allow ITA to subtract domestic VAT taxes when calculating the home market price, but arguably permits ITA to increase U.S. prices to reflect the amount of taxes that could have been levied but were not. In *Federal Mogul*, ITA made this adjustment by adding to the U.S. price the absolute amount of value added tax that would have been collected if the goods had been sold in the country of production at the home market price. The Court of International Trade instead ordered that ITA determine the adjustment by applying the domestic tax rate to the U.S. price, a calculation that normally produces a smaller in-

⁹² See, e.g., *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078 (Ct. Int'l Trade 1994) (court deferred case while parties pursued GATT dispute resolution, and then upheld Commerce position); *Avesta AB v. United States*, 689 F. Supp. 1173 (Ct. Int'l Trade 1988), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990).

⁹³ *Federal Mogul Corp. v. United States*, 63 F.3d 1572 (Fed Cir. 1995).

crease in the U.S. price and a correspondingly larger margin of dumping.⁹⁴ On appeal, the Federal Circuit reversed. It noted that both the 1979 GATT and 1994 Uruguay Round Antidumping Codes require tax-neutral adjustments to make the home and import prices truly comparable, and that the Court of International Trade's methodology accounted for the tax in a way that would make the margin of dumping depend on the tax rate. Judge Mayer dissented, arguing that the majority's GATT-consistent interpretation departed unacceptably from the clear meaning of the statute.⁹⁵

Superficially, the *Federal Mogul* opinion seems most consistent with approach (3), which exhorts the decisionmaker to find the interpretation that most accords with the requirements of international law. But in *Saarstahl AG v. United States*, a recent countervailing duty case, the Federal Circuit seemed to indicate that approach (2) better explains its stance. The dispute involved the question whether the purchaser of a privatized business should be treated as enjoying the subsidies showered upon the business while it belonged to the state. If the answer is yes, U.S. law requires the imposition of a countervailing duty reflecting the amount of the subsidy. ITA has taken the position that the new owners may pay less for a privatized business because of the prior subsidies and that the difference between what they did pay and what they would have paid for an unsubsidized business constitutes a countervailable subsidy. The Court of International Trade found this reasoning unconvincing, if not absurd, and ruled that an open and competitive auction of a state firm would purge the privatized business of any prior subsidies. Judge Mayer, writing this time for the court, ruled that the Court of International Trade had shown

⁹⁴ Where the U.S. price is lower than the home market price for reasons not attributable to the difference in value added taxes, using the home market tax rate to make an adjustment will exaggerate the difference between the two prices. For example, assume that the tax-exclusive price of a good is \$80 in the U.S. market and \$100 in the home market, and that a 10% value added tax applies at home. The real difference in price is \$20 and the preadjustment difference is \$30. Using the Commerce methodology, the U.S. price becomes \$90, reflecting the \$10 tax levied on comparable goods at home, and the margin of dumping will be \$20. Using the Court of International Trade's methodology, the U.S. price becomes \$88, reflecting a 10% tax on the U.S. price of \$80, and the margin of dumping increases to \$22.

⁹⁵ No GATT dispute resolution panel had squarely mandated this result, but another international body, namely a binational panel established by the U.S.-Canada Free Trade Agreement, had. In the Matter of: Certain Corrosion-Resistant Carbon Steel Flat Products From Canada (AD), No. USA-93-1904-3, 195 DTAPD LEXIS 5, at 7 (U.S. — Canada FTA Panel 1994). The *Stelco* panel recognized that it had to apply U.S. law in determining how to adjust U.S. prices, but argued that a U.S. decisionmaker would not want to reach a result inconsistent with the GATT and that the various multilateral trade agreements required an absolute rather than a proportional adjustment.

insufficient deference to the appropriate administrative agency's interpretation of what constituted the "receipt" of a subsidy.⁹⁶

What emerges from this and other trade law cases is a hierarchy; when statutory ambiguity exists, international law trumps a court's independent guess as to what domestic law requires but not the administrative agency's.⁹⁷ Where the executive accepts the international organ's position, the court will support the agency's choice unless the plain language of the statute clearly requires otherwise. But where the responsible agency disagrees with the international body, the court will side with the domestic decisionmaker.

At least two arguments support what these courts appear to be doing. The domestic decisionmaker, even if a bureaucrat, still bears some political accountability for its choices; the international lawmaker does not. What underlies the skeptical position is a belief that the more accountable decisionmaker should receive the benefit of the doubt. Second, as discussed above, an administrative agency that participates in the international lawmaking process has many incentives to inflate the importance of what that process produces. Even though the Trade Representative and not ITA serves as the negotiator of trade agreements, ITA has an ancillary role in the formation of these agreements. Where an agency such as ITA chooses to deprecate an international rule, a decisionmaker should give careful consideration to its position. To be sure, ITA may be the puppet of opposing rentseekers, and in particular of domestic producers seeking protection from foreign competition. But it seems improbable that ITA is any more subject to capture by such groups than is the Congress that set the statutory constraints on what ITA does.

Skepticism may also manifest itself in the reaction of the broader legal culture to the ambitions of international organs such as adjudicators or bureaucrats. To take a concrete example, the claim of the European Court of Justice that it possesses *Kompetenz-Kompetenz* seems at least as plausible as is the long-accepted authority of the Supreme Court of the United States. Once one accepts that the European

⁹⁶ *Saarstahl AG v. United States*, 78 F.3d 1539, 1542 (Fed. Cir. 1996).

⁹⁷ This hierarchy is especially clear in *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078 (Ct. Int'l Trade), *appeal dismissed*, 43 F.3d 1486 (Fed. Cir. 1994). The court originally deferred the U.S. proceeding while two different GATT dispute resolution panels took up the issue of when U.S. obligations under the 1979 Subsidies Code went into effect. After one panel ruled that the U.S. position did not violate the Subsidies Code but a second panel determined that it did contravene the most-favored-nation obligation of the GATT, the court concluded that the delay was unnecessary. While the court believe a genuine ambiguity existed in the statutory language, it considered itself obligated to treat the administrative agency, and not the GATT panels, as the tiebreaker.

Communities were meant to build a new form of international cooperation and that legality mattered to their architects, it does not seem such a great leap to concede that the European Court of Justice should behave in the manner of a domestic constitutional court. If the architects of the Communities expected the Court to make law as a necessary part of the construction of a new law-based international economic space, then the Court's lawmaking power should encompass the authority to interpret the international agreements on which its competence rests. It does not follow, however, that the possession of *Kompetenz-Kompetenz* implies a need for judicial *lebensraum*. The Court could use its powers to constrain the authority of the EU generally, just as the Supreme Court, belatedly and many would argue ineffectively, has attempted to bring new life to the doctrine of dual federalism. To a greater extent than is true of the U.S. federal government, the organs of the EU lack the legitimacy that comes from accountability, and the Court could compensate for this difference by holding the organs to a more demanding standard of authority. Where such forbearance has not been forthcoming, the scholarly community might use these arguments to admonish the Court.⁹⁸

Again, these examples are illustrative only and not meant to suggest that courts are the only desirable audience for skeptical arguments. The reception of international rules and the success of international lawmaking depends ultimately on the legal culture of the societies that engage in this process. Here scholars and teachers can make their greatest contribution to the evolution of international lawmaking. Skeptical arguments enrich the legal culture of the internationalists by exposing their doctrinal tools and underlying normative positions to sustained critical analysis. Some rules and rulemakers may not survive the analysis, but the legal culture as a whole becomes stronger.

In other fields, we accept it as given that mature discourse means that all issues, including the worth of the project itself, are on the table. Modern legal scholarship in most areas tends to devote, if anything, too much attention to the big questions. In constitutional law, for example, the absence of any broad consensus about the purposes or methods of the subject marks the starting point for serious discussion. Yet among international law specialists we find a widespread, although by no means pervasive, conviction that more international law is better, that human progress marches in step with gains in the

⁹⁸ Cf. J.H.H. Weiler & Ulrich R. Haltern, *Response: The Autonomy of the Community Legal Order – Through the Looking Glass*, 37 HARV. INT'L L. J. 411, 442-47 (1996).

extent and significance of settled international rules. Scholars debate whether the particular international rules that we find are good or not, but few question the assumption that more rules would be better.

Skepticism may offer an antidote to this unhealthy complacency and hermeticism. By exposing rent-seeking rules and the shortfalls that a lack of accountability may produce, we may sow seeds of doubt about international lawmaking generally. These doubts need not be destructive. Rather, the skepticism that breeds them may nurture habits of mind that yet might encourage the development of better, if not more, international rules.

D. Lawmaking Versus Administration

Up until this point, the normative portion of this essay has focused on devices that may constrain the production or application of international rules. My underlying premise has been that insufficient accountability in the lawmaking process may lead lawmakers to reach too many results that serve parochial institutional or sectoral interests at the expense of, or at least not to the benefit of, the general welfare. In response to this concern, I have identified several means by which international lawmakers may be constrained in such a way as to make their actions more difficult, and arguably more accountable.

It would not be too hard to take the next logical step and deplore all international activity by governments, whether lawmaking or not. There is a deeply isolationist streak in U.S. culture, and my critics might fairly accuse me of playing to that particular tendency. In this final section I would like to offer a plausible, although by no means compelling, distinction between international lawmaking and other kinds of international activity, and suggest reasons why one might worry more about the former. In other words, I would like to sketch an argument as to why one might remain an internationalist while expounding a critique of international lawmaking.

What I would like to do is return to the distinction drawn at the beginning of this essay between, on the one hand, state activity that constrains private actors and, on the other hand, state administration of assets, physical and human, that by some consensus are seen as legitimately the state's. I realize that many will find this distinction difficult if not untenable. To begin with, one has difficulty conceiving of private activity without the existence of state institutions to support and legitimate it. Second, the alternating waves of nationalization and privatization that we have seen this century suggest how arbitrary is the boundary between the regulation of private activity and the ad-

ministration of state assets. Third, the administration of state assets often can have profound consequences for private activity, as when a government debases its currency or goes to war.

But notwithstanding these points, I still perceive, with respect to democratically accountable governments, an important difference between the disposition of the things given to the government to administer and the imposition of rules on the affairs of private persons. In the first case, the government is perceived as responsible for its stewardship of state property. In the second case, a government can deflect a certain portion of its accountability for bad rules by hiding behind its international obligations. Rules are more abstract than things, making responsibility for their consequences easier to avoid.

If we define international lawmaking to mean the generation of rules that largely govern private behavior, then the outlines of an argument for treating lawmaking differently from administering becomes clear. One could believe that governments should not impose rules on private persons without going through procedures that illuminate which governmental actors have taken responsibility for those rules, and still wish governments to have considerable flexibility in conducting the affairs entrusted to them. One might distinguish, for example, between a military base agreement under which two or more governments decide how to use one government's property, and an exchange of tariffs or quotas that necessarily affects the rights and privileges of private persons. In the former case an electorate may find it easier to tell whether a government has squandered the assets entrusted to it, as by allowing foreign troops to occupy the country's soil without offsetting compensations. In the latter case, the parties may find it easier to hide behind the mysteries of the bargain.

In practical terms, this argument means that my main thesis, namely that international lawmaking raises distinctive problems of accountability that affect international law's legitimacy, does little to illuminate many debates over the relative responsibility of the executive and the legislature in foreign affairs. When the issue is, for example, the constitutionality of the War Powers Resolution or the propriety of legislation barring covert action in Nicaragua, one might argue that both the President and the Congress must answer to the electorate for the choices they make, so that the actions of the one are not inherently more or less legitimate than those of the other. Once accountability drops out of the picture, one then may look to other considerations, such as institutional efficiency or informational advantages, to determine who should decide what.