Introduction
An overview of the volume

This is a book about current problems affecting the law and institutions of the World Trade Organization (WTO). The particular problems treated in this book have recently risen to particular prominence due to the WTO's decision, at its November 2001 Ministerial Meeting in Doha, Qatar, to launch a new round of trade negotiations. The need to deal with these issues was a key reason for launching the new negotiations, while the problems themselves, if not resolved, will stand as obstacles to the success of those negotiations.

In recognition of Professor Robert E. Hudec's scholarly contributions to international trade law, participants at the conference in his honor were invited to employ, in their treatment of the WTO problems they had chosen to discuss, a particular analytical approach for which Hudec's scholarship is known. Known to conference participants as "Transcending the Ostensible,"[1] the approach directs particular attention to the possibility that WTO legal institutions, like other international legal institutions, will function in unexpected ways due to the political and economic conditions of the international environment in which they have been created, and in which they operate. Like all international legal institutions, WTO legal institutions are designed to affect the behavior of *governments*, rather than private persons and institutions. Government behavior is determined by the domestic political forces engaged on the issue in question. International legal institutions must therefore be viewed as institutions designed to influence domestic political forces, and thus both their design and operation must be understood in light of the political and economic conditions that shape outcomes in this political arena.

The functions of WTO legal institutions are particularly influenced by the unruly nature of the environment in which international trade relations take place. The WTO's trade liberalization objectives often enjoy only very tenuous political support in home capitals, with the result that the legal commitments made by governments are often less dependable than their binding legal form would suggest.

1 The term is taken from David Riesman's advice concerning the analytic approach to be taken toward legal systems in primitive societies: "The anthropologist is not likely to harbor the naive assumption that the law, or any other institution, serves only a single function – say that of social control . . . The concept of ambivalence is part of his equipment; he tends to search for latent functions, transcending the ostensible." DAVID RIESMAN, INDIVIDUALISM RECONSIDERED AND OTHER ESSAYS 445 (1954), quoted in Robert E. Hudec, "*Transcending the Ostensible*": *Some Reflections on the Nature of Litigation between Governments*, 72 MINNESOTA L. REV. 211 (1987).

Legal institutions that operate in such a hostile environment must often behave in unusual ways in order to achieve government decisions to comply with the commitments they have made.

In sum, the analytic approach counseled by these perceptions is one that, first and foremost, cautions that WTO legal institutions may not be what they seem to be on the surface. It counsels an initial skepticism toward the conventional appearances of such institutions, and calls for an effort to look behind the scenes for a more sophisticated appreciation of what they do and how they operate – an effort to "transcend the ostensible." We borrow the term "political economy" to describe the principal focus of this approach.

This overview first discusses briefly the substantive themes developed by the main essays in this volume, and then returns to the ways in which the essays develop and apply the analytic approach described in the title.

I

The WTO problems dealt with in this volume range from long-term problems of the WTO's "constitutional" structure to more immediate problems that affect the WTO's day-to-day operations. At the constitutional end of the spectrum, Jackson offers a conceptual framework for defining and dealing with the fundamental constitutional tension between the increasing scope of WTO legal disciplines, on the one hand, and, on the other, the increasing concern of national governments to protect their "sovereignty" against encroachment by the WTO. Cass and Haring present a critical view of the similar tension between the increased foreign competition generated by WTO trade liberalization and the concerns of governments to protect the autonomy of their national regulatory structures from being undermined by such competition. Petersmann looks beyond the WTO's constraining effect upon national regulation, and argues that international trade law should occupy an even larger scope, as part of an emerging world system of national and international constitutional protection for democratic values and human rights. Weiss examines a set of constitutional reforms ranging from proposals to improve WTO decision-making procedures to proposals for enhancing the WTO's role in promoting human rights. Kuijper examines the internal legal structure of the new WTO to expose a significant number of unanswered questions about the distribution of decision-making authority between its various organs.

A more immediate "constitutional" problem confronting the WTO at present is the question whether to extend WTO legal disciplines to new subject areas such as competition law, investment rights, core labor standards, or environmental policy. Hindley presents a skeptical approach toward the justifications usually given adopting agreements on new subject areas. Abbott and Snidal take a different angle by examining various negotiating methods for creating new agreements, comparing and contrasting the WTO's bargaining approach with the Organization for

Economic Cooperation and Development (OECD)'s "softer" approach on the same subject of anti-bribery conventions. With regard to specific subject areas, Shaffer assesses the underlying reasons for the political impasse in the WTO's Committee on Trade and Environment over efforts to reconcile environmental norms with WTO legal disciplines. Gifford and Kudrle offer a detailed exploration of the prospects for international harmonization of just one element of national competition laws – merger and acquisition policy. And finally, with regard to efforts to impose effective legal discipline on agricultural trade, Tangermann examines the prospects for making the highly tentative Uruguay Round agreement on agricultural trade into a meaningful set of commitments.

In the day-to-day operations of the WTO, the most pressing general concern is the growing friction between the developed and developing country members of the WTO. Ostry presents an overview of the "Grand Bargain" between the developed and developing countries in the Uruguay Round, identifying the elements of the bargain which developing countries now find unsatisfactory, and the ways in which developing countries have given effect to their dissatisfaction in the WTO decision-making process. Other essays explore individual elements of that friction. Frederick Abbott traces the bargaining process that led to developing-country acceptance of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and then examines some of the issues, particularly those involving pharmaceutical patents, that have generated impasse over implementation of that agreement. Shaffer's study of the current impasse over environmental policy assesses the roles played by the various participants, public and private, in this aspect of the North–South divide. Schuh examines the place of agricultural trade in current developed–developing country relations, pointing to the distortive policies on both sides of the North–South divide. Odell examines the most visible example of North–South impasse in the well-publicized failure of the WTO's Seattle ministerial meeting of November–December 1999, tracing the relationship between the North–South issues and the many other policy conflicts and negotiating mistakes that contributed to the failure.

Finally, the volume presents a number of essays on current problems in the WTO adjudication, or "dispute settlement" procedure. Busch and Reinhardt set the stage by presenting a survey of an interesting new field of WTO scholarship that employs statistical analysis to interpret the considerable data now available on the operation of the dispute settlement system; in addition to giving an overview of current dispute settlement activity, these studies suggest a number of interesting, albeit sometimes highly controversial, hypotheses about the factors that influence how the dispute settlement process operates. Seven other essays deal with three distinct aspects of the current WTO dispute settlement process. First, Steger and Davey discuss the current state of practice and procedure in the Appellate Body and in the panel process. Steger traces the generally successful development of the new Appellate Body from its inception in 1995, and describes some of the proposals for improvement currently being considered. Davey describes the most important

problems generated by the *ad hoc* character of the current panel procedure, and presents a detailed evaluation of a proposal to solve many of these problems by staffing the panel procedure with professional judges. Second, essays by Trebilcock and Soloway and by Mavroidis deal with the type of substantive legal issues generated by the expansion of WTO adjudication into sensitive new areas. Trebilcock and Soloway argue for doctrinal limitations in WTO adjudication of claims concerning national health, safety, and environmental measures under the Agreement on Sanitary and Phytosanitary Measures (SPS). Mavroidis analyzes the consequences for the internal governance of the WTO of giving dispute settlement tribunals the power to rule on whether regional trade agreements comply with GATT Article XXIV. And third, Charnovitz, Horlick, and Palmeter and Alexandrov examine the growing concern about the adequacy of WTO legal remedies for violation of the agreement, focusing particularly on the purpose, effectiveness, and policy consistency of trade retaliation.

Most of the essays mentioned in this overview are further elaborated by brief comments written by other distinguished scholars of international trade. Time does not permit describing each of them.

Notwithstanding their diversity, the various problems addressed by the essays in this volume have common roots in a major systemic problem that is confronting the WTO today. Almost without exception, all these various problems can be traced to the expansion and enlargement of the GATT/WTO legal system brought about by the Uruguay Round negotiations of 1986 to 1994. The Uruguay Round expanded WTO legal disciplines to cover a significantly greater area of national regulatory activity, strengthened the effectiveness of those legal disciplines, expanded the number of developing countries to which those more rigorous disciplines would apply, and then wrapped up its accomplishments by transforming the obscure and ill-defined General Agreement on Tariffs and Trade into a properly constituted, and highly visible, World Trade Organization. The expansionist momentum of the Uruguay Round has carried over to the agenda of the new WTO. The Uruguay Round agreements contained specific commitments to conduct further negotiations in services and agriculture, and since then proposals for even more ambitious new agreements have been tabled.

The controversy over proposals to expand the WTO's jurisdiction to even more "new subjects" is, of course, a direct consequence of the expansionist agenda set in motion in the Uruguay Round. The greater demands being made upon governments by these expanded WTO legal disciplines can also be found at the root of the heightened concerns about threats to the sovereignty and regulatory autonomy of national governments. And the Uruguay Round expansion has certainly been at the heart of the current frictions between developed and developing countries – the increase in the number of legal commitments developing countries were required to make, the broader subject-matter scope of those new commitments, the increased rigor with which such commitments are to be enforced and, finally, the new demands for still further commitments on matters such as environmental

policy and labor policy. Finally, of course, most of the current problems being experienced by the WTO's dispute settlement process can be traced to the fact that this adjudication procedure must now implement a number of new and more controversial agreements, and must, in all its work, meet the increased demands imposed by its stronger and more complex legal structure created in the Uruguay Round. In sum, the problems these essays are describing are all related to the WTO's difficulty in digesting the substantial expansion of the WTO's business and the enlargement of its active membership.

Odell's analysis of the failed Seattle ministerial meeting lists three aspects of the WTO's expansion as contributing conditions to the difficulties experienced there: (1) the expanded substantive scope of the new WTO legal disciplines, (2) the more rigorous enforcement of those legal disciplines, and (3) the breakdown of the WTO's internal decision-making process caused by the more active participation of a larger and more diverse membership. Not surprisingly, the same three aspects can be found as prominent themes of the more general difficulties treated by the essays in this volume.

(1) The main problem found in the expanded substantive scope of WTO disciplines is the fact that the new subjects added to WTO agenda tend to involve WTO supervision of a somewhat different kind of government regulatory conduct than before. Several essays note that the traditional subject matter of the GATT was primarily confined to the reduction of conventional trade barriers such as tariffs, quotas, discriminatory internal taxes and regulations, and trade remedy laws. For the most part, these measures involved a simple choice between trade liberalization and protection, and the GATT/WTO mandate to move toward greater liberalization was fairly clear. The new WTO agenda, these essays observe, undertakes to police for trade-restricting measures in other kinds of govenment regulatory measures that involve other quite important social policies. The one WTO agreement that usually heads the list of non-traditional subjects is TRIPS, an agreement that most observers agree has very little to do with conventional trade measures. Other examples of agreements covering non-traditional subjects include the new Agreement on Sanitary and Phytosanitary Measures (SPS) and the revised and expanded Agreement on Technical Barriers to Trade (TBT). The question raised by WTO policing of these new areas is whether, at present, the WTO has the capacity to deal with these more complex policy areas.

The problem of capacity has both a political dimension and an economic dimension. The political problem usually emerges as a problem of the WTO's "legitimacy" as a decision-making institution. The more its obligations intrude upon national social policy, the more opponents of that intrusion will challenge the WTO's fitness to "govern" on such matters, by challenging the protrade bias of its decision-makers, the lack of transparency in its decision-making processes and the lack of opportunity for all stakeholder voices to be heard. Jackson cites a number of these legitimacy issues, along with other organizational flaws, in explaining how distrust of the WTO decision-making process can contribute to "sovereignty"

objections against the WTO's various regulatory powers. Petersmann presents a much stronger indictment of the democratic deficits in the WTO's present structure, in the course of his argument calling for the WTO to play a significantly greater "constitutional" role.

Trebilcock and Soloway present one short-run response to such legitimacy concerns. With regard to SPS obligations pertaining to science-based health, safety, or environmental regulations, they counsel the adoption of doctrinal guidelines that defer to the policy judgments of national governments in such cases. Jackson, Petersmann, and Weiss identify some long-term reforms that could be considered in seeking to redress the perceived political inadequacies of the WTO in this regard. Howse's comment to Odell's essay suggests that recent events such as the Seattle protests could be the start of changes in this direction.

Finger's comment to Ostry's essay stresses a different type of economic policy issue that can be raised by new WTO obligations in these non-traditional areas. He points out that rules going beyond the elimination of traditional trade restrictions may not be supported by the relatively unquestioned economic benefits that came with traditional GATT trade commitments – the general perception that reducing conventional trade barriers produces an economic gain for all participants, regardless of whether the "bargain" was balanced in mercantilist terms. The more that newer WTO obligations seek to constrain government measures representing regulatory objectives beyond conventional trade protection, Finger argues, the greater the possibility that interference with these other non-trade objectives may serve as a basis to challenge the policy justification for such newer obligations.

Several essays devote considerable attention to the TRIPS Agreement in this regard. Frederick Abbott and Srinivasan call attention to the widespread view that TRIPS is not beneficial to developing countries, and, in the opinion of many, is actually harmful to economic development. The counter-argument, presented here by Trachtman, has been that TRIPS cannot be viewed in isolation – that the Uruguay Round, like most international agreements, involved trade-offs, and that governments who accept such package agreements must be presumed to be aware of the balance of benefits they are agreeing to. Hindley argues that the "single undertaking" strategy followed in the Uruguay Round, which offered smaller countries the choice of the entire WTO package or nothing at all, left smaller countries no realistic option but to accede to the package. Ostry adds the observation that, inside the negotiations, neither developed nor developing country delegations really understood the consequences of their decision to undertake regulation of these non-traditional new areas.

(2) The presence of stronger legal enforcement quite naturally amplifies all of the concerns just discussed about the scope of the WTO's expanded regulatory agenda. The greater the legal power behind WTO commitments in these new areas, the greater the resistance of those who oppose such supervision in the first place. The Abbott and Snidal essay points out that this phenomenon also affects the

negotiation of new agreements, and suggests that the WTO could advance further in some of the more controversial areas by relaxing its insistence on binding obligations and adopting a more "soft law" approach toward them. Howse proposes that an answer to developing-country resistance in some controversial areas might be found in greater use of plurilateral agreements, where countries unwilling to submit to binding legal disciplines would be allowed to opt out.

Quite naturally, the demand for stronger legal enforcement has also caused most of the current problems within the operation of the dispute settlement procedure itself. Porges describes the way that progressively increasing ambitions for the dispute settlement procedure have led to the proposal for professional panelists discussed by Davey. The promise of stronger legal enforcement has also generated the concern about the mechanism of enforcement dealt with in the essays by Charnovitz, Horlick, and Palmeter and Alexandrov, a concern that has become particularly acute as the promise of stronger enforcement has not yet been achieved in a few important cases.

(3) The expanded agenda set out in the Uruguay Round has obviously placed new stresses on the WTO's internal decision-making process. The breakdown of the Seattle ministerial meeting was not the only policy impasse to seize the WTO in recent years. The expanded agenda of the WTO has generated a large number of other policy conflicts within the WTO's day-to-day operations as well. And, while the most visible area of discord is the divide between developed and developing countries, there has also been a disconcerting number of North–North deadlocks as well. To be sure, policy disagreements are always part of international trade diplomacy, but the intensity and rigidity of these recent deadlocks have raised questions about whether the WTO's internal decision-making process – in particular its long-standing practice of consensus decision-making – can any longer function well enough to permit the WTO to operate effectively in the new and enlarged setting created by the Uruguay Round.

A number of the essays in this volume make suggestions about improving the decision-making process. Odell suggests a number of lessons that might be drawn from the Seattle impasse in order to improve the WTO's internal negotiating process. Shaffer considers whether, in light of government conduct within the WTO Committee on Trade and Environment, the chances of arriving at agreed policies might be improved, as many have suggested, by assigning subjects like environmental policy to another international organization. Ostry considers whether a better-designed executive committee similar to the GATT's former CG-18 might not facilitate the kind of North–South discussions needed to develop consensus. Weiss considers a similar suggestion for an executive committee based on World Bank or IMF models. Jackson and Petersmann look further ahead to more basic changes in WTO decision-making, including the possibility of at least some departures from the current rule of consensus decision-making. Although the recommendations found in these essays, true to the GATT/WTO tradition, offer no

systematic solutions to the present condition of policy impasse, their collective weight indicates a growing view that the old internal decision-making processes inherited from the GATT will need to be re-thought if the WTO is to function effectively under its new and broader Uruguay Round agenda.

The various recommendations on this final point are typical of the recommendations made with regard to all the other WTO problems discussed in this volume. The Uruguay Round has left the WTO with a large number of different problems, each the product of a different set of new circumstances. In the GATT tradition, each of the essays tries to make some contribution to understanding, and hopefully resolving, the problem it deals with. None offers a silver bullet that will resolve all the problems in a particular area. For example, each of the essays by Tangermann, Schuh and Roe on WTO policy toward agriculture after the Uruguay Round stresses the complex relationship between the large number of restrictions around the world, and the number of large small changes that will be needed to move forward. It took almost fifty years for the GATT to evolve, bit by bit, into an institution capable of pulling off something as imposing as the Uruguay Round. It will probably take the WTO a proportional amount of time – step-by-step, problem-by-problem – to accommodate itself to its new mission, or, perhaps, to accommodate its mission to its actual capabilities. With good fortune, the Doha negotiations will take some constructive steps towards this goal.

II

The analytic approach referred to as "Transcending the Ostensible" is ultimately a state of mind looking for explanations of how international legal institutions work and why they are as they are. The search is normally fueled by a persistent skepticism toward explanations derived from conventional understandings of how analogous legal institutions operate in other settings. The skepticism is rooted in the perception that international legal institutions must function in distinctive and highly political ways in order to influence government behavior, and most especially so when they operate on very fragile political support. As such, this analytic approach invites application to almost any aspect of a legal institution like the WTO, from the actual operation of its legal system to the more political "legislative" and "constitutional" choices it confronts from time to time. A few of the essays and comments in this volume refer explicitly to this approach, but almost all employ it in one way or another. The only way to appreciate the analytic approach of any particular essay or comment is to read it in full. The following is simply a sketch of some of the larger analytic themes that can be found in the essays and comments found in this volume.

Perhaps the clearest examples of this analytic approach are the three essays by Charnovitz, Horlick, and Palmeter and Alexandrov, addressing the use of trade retaliation as a sanction to enforce WTO legal rulings. The essays point out that

the GATT took a quite limited view of the use of such trade measures as sanctions, but that the Uruguay Round reforms went to some lengths to permit greater use of trade retaliation as a means of strengthening enforcement. Each essay takes a skeptical view, in this context, of the conventionl expectation that stronger sanctions make for stronger enforcement. Though considering the issue from different perspectives, each essay undertakes a closer look at how trade retaliation actually influences the political decision-making processes of governments in this situation. Based on their understanding of how the compliance process actually works, each concludes that the WTO would do better to place less emphasis on retaliation as a sanction, and to give more attention to procedures designed to improve the internal political conditions for compliance.

Several other essays set out to explain in some detail the actual political and economic conditions underlying a current issue facing the WTO. Each devotes considerable attention to finding out how governments have actually behaved to date, and then seeks to understand why they did so, using the author's own experience, interviews with participants, and other behind-the-scenes sources to gain the necessary information. For example, in his analysis of the current WTO panel procedure, Davey goes beyond the conventional understandings of that procedure by showing how various aspects of the *ad hoc* selection process fit into the delicate political balance that governments seek to achieve when they participate in this process. Abbott and Snidal achieve a similar level of understanding by their detailed comparison of OECD and WTO negotiations on essentially the same subject, comparing the impact of the different negotiating methods, the different individuals and government ministries involved, and the two organizations' different ways of doing business. Most of the essays on the current North–South frictions likewise dig into the underlying conditions that explain the present situation. Ostry and Frederick Abbott focus on an in-depth analysis of the bargaining process of the Uruguay Round, and on the patterns of behavior that followed after it. On the impasse over environmental issues, Shaffer uses a detailed analysis of the positions taken on a long series of issues by governments, by participating NGOs, and by the WTO Secretariat to arrive at a more accurate understanding of the determining factors in that impasse. Odell achieves a similar clarification of the traumatic failure of the Seattle ministerial meeting, by carefully investigating all of the underlying policy conflicts, the negotiating strategies of the principal governments, the conditions affecting the year-long preparatory negotiations, and the actual management of the meeting itself.

A somewhat sharper form of skepticism can be found in efforts to look behind the policy justifications for certain proposed actions. Hindley's critical examination of the conventional justifications for adding new agreements to the WTO is a good example, questioning both the values that such agreements claim to serve, and also the actual reasons why governments agree to them. Cass and Haring present an equally skeptical look at the value of the regulatory activities that governments want to protect from being undermined by foreign competition, setting

forth a "public choice" analysis of the rent-seeking purposes often found in such regulation.

On a broader scale, Jackson's essay employs a particularly useful version of this method in looking for the real meaning behind the much-maligned expressions of concern about loss of "sovereignty." As is true of many of the seemingly empty political slogans in the trade policy area, the considerable public resonance of the "sovereignty" slogan indicates that there are politically meaningful concerns behind it, and thus it obviously pays to try to decipher them in order to deal with them. Jackson's analysis of the "sovereignty" issue in terms of "allocation of power" clearly helps to move these concerns a step closer to constructive analysis and resolution.

For the most part the analytic approach being discussed here is directed to understanding things as they are, the goal being to identify the reality behind the appearance. The danger of exclusive dedication to such inquiries, however, is that one may come to accept the what-is as the what-ought-to-be, or at least as the limit of the what-can-be. Clearly, one of the further roles of scholarship is to bring a similar skepticism to bear on the what-is, in order to "transcend" the apparent inevitability of the what-is, so that we may also investigate the what-can-be, and the what-ought-to-be. It is not important to decide whether such further inquiries fall within, or just alongside, the type of analytic approach discussed here. It is enough to say that any collection of essays on current WTO problems would be incomplete without forward-looking visions of what the WTO can be, such as those provided here by, *inter alia*, Petersmann, Weiss, Dillon, and Howse.