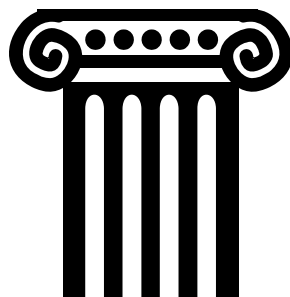


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## **Interpretation and Institutional Choice at the WTO**

**Gregory Shaffer  
Joel Trachtman**

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Article

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*Gregory Shaffer & Joel Trachtman*

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# Interpretation and Institutional Choice at the WTO

GREGORY SHAFFER & JOEL TRACHTMAN\*

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*This Article develops the framework of comparative institutional analysis for assessing the implications of judicial interpretation in the World Trade Organization (WTO). The analytical framework offers an improved means to describe and assess the consequences of choices made in treaty drafting and interpretation in terms of social welfare and participation in social decision-making. The analysis builds on specific examples from WTO case law. Our framework approaches treaty drafting and judicial interpretive choices through a comparative institutional lens — that is, in comparison with the implications of alternative drafting and interpretive choices for social welfare and participation in social decision-making processes. By deciding among alternative interpretations, the judicial bodies of the WTO effectively determine which social decision-making process decides a particular policy issue. That decision, in turn, can have profound domestic and international implications. While this Article focuses on the WTO, the framework developed here has general relevance for understanding the interpretation of international and domestic legal texts from “law and economics” and “law and society” perspectives.*

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“[A] choice there has been.”

Justice Benjamin N. Cardozo, *The Nature of the Judicial Process*<sup>1</sup>

“Human relations are too numerous, too complex, and too dynamic to be susceptible to sufficient regulation by means of several verbal formulae, issued at a fixed time and with regard to a situation, impossible to grasp with a single glance . . . .”

François Gény, *Method of Interpretation and Sources of Private Positive Law*<sup>2</sup>

1. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 11 (1921).

2. FRANÇOIS GÉNY, *MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* 404 (2d ed. 1954) (“Les rapports humains sont trop nombreux, trop complexes, trop changeants, pour trouver un règlement suffisant, en quelques formules verbales, édictées à un moment fixe et en présence d’une situation impossible à embrasser d’un seul coup d’œil . . .”).

## INTRODUCTION

This Article will develop a new framework for understanding the drafting and interpretation of World Trade Organization (WTO) agreements — that of comparative institutional analysis. Our aim is to provide a framework that offers a better means for describing and assessing the consequences of choices in treaty drafting and interpretation. We will draw on specific examples from WTO case law to make our case. Both treaty drafting and judicial interpretation implicate a range of interacting social decision-making processes, including domestic, regional, international, political, administrative, judicial, and market processes, that we will collectively refer to as *institutions*. Our definition of institutions has a different focus from those definitions conventionally used in institutional economics, which views institutions as constraints on future decision-making that are established to increase welfare.<sup>3</sup> Our framework focuses attention on the ways in which institutions determine *social decision-making processes*, thereby affecting participation and welfare. While this Article will focus on the WTO, the framework developed here has general relevance for understanding the interpretation of international and domestic legal texts from “law and economics” and “law and society” perspectives.<sup>4</sup>

Choices over alternatives in treaty drafting and subsequent judicial interpretation can both be viewed in terms of institutional choices — that is, in terms of their implications for different social decision-making processes. These drafting and interpretive choices affect the articulation and institutional mediation of individual preferences. By affecting which institution decides a policy issue, these choices ultimately affect social welfare. Our framework shows how these choices can be viewed through a

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3. Cf. AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 30 (2006) (defining an institution as “a system of rules, beliefs, norms, and organizations”); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990) (defining institutions as “rules of the game”); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 1 (1985) (“[T]he transaction cost approach maintains that these institutions have the main purpose and effect of economizing on transaction costs”).

4. In particular, this Article will build on the important work of Neil Komesar, who has applied comparative institutional analysis to the interpretation of U.S. public and private law. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1996); NEIL K. KOMESAR, LAW’S LIMITS (2001); see also ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991). For earlier applications of comparative institutional choice in WTO law, see, for example, Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT’L L. & POL. 1 (2008); Joel 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).

comparative institutional lens — that is, in comparison to the implications of alternative drafting and interpretive choices for different institutions.

In the case of the WTO, drafting and interpretive choices implicate the interaction of institutions for domestic, regional, and global governance. WTO judicial interpretive choice is constrained by treaty design, text, and prescribed interpretive approaches. We thus first address important design choices faced by treaty drafters from the perspective of comparative institutional choice, including the interpretive methodologies that WTO texts formally prescribe and to which panel and Appellate Body decisions refer.

We then explain why these formal design and methodological choices are radically insufficient for understanding WTO law. Like any dispute settlement body confronting a legal text, WTO panels and the Appellate Body have choices in applying the text to particular factual scenarios that are not specifically addressed by the text. More than one WTO provision or WTO agreement may apply to a factual situation, whether the provisions are drafted as fairly precise rules, more open-ended standards, or exceptions. Interpretive claims are made before panels, and the resolution of these interpretive arguments has important consequences not only regarding who wins or loses a particular case, but also regarding broader systemic issues of domestic and international policy.

These consequences of treaty interpretation can be viewed in *welfare terms* (regarding the efficiency and distributive consequences of a particular interpretation) and in *participatory terms* (regarding the quality and extent of participation in the decision-making processes at issue). In terms of participation, we refer to the effect of a WTO interpretive choice on the allocation of authority over a particular issue to different social decision-making processes, such as domestic political and administrative processes, international political and administrative processes, markets, and judicial bodies. In each of these social decision-making processes, individuals' perspectives are directly or indirectly represented and mediated in different ways. Regardless of how imperfect participation may be in each alternative social decision-making process implicated by WTO texts and their interpretation, the imperfections will not be the same, as we demonstrate with numerous examples. The goal, of course, is to choose the best among imperfect alternatives.

Our single analytic framework captures these two approaches to analysis (welfare-based and participation-based). In our framework, participation-based criteria may be understood in welfarist terms, and vice versa. In situations where welfare consequences are difficult to calculate, the quality and extent of participation can serve as a proxy for both efficiency and distributive consequences. The different dynamics of participation characterizing different institutional fora will determine the

pursuit of a particular social goal, whether it be resource allocation efficiency, justice as fairness, human rights, sustainable development, or some other goal.<sup>5</sup> All of these goals are susceptible to inclusion in a welfarist analysis and all are captured within our framework.

The remainder of this Article is divided into three parts. Part I will present an analytical template for comparative institutional analysis of treaty design and interpretive choice regarding dispute settlement. Part II will describe the underlying structure of institutional choice for dispute settlement at the WTO made by the treaty drafters. These institutional choices shape, but do not determine, judicial interpretation, in particular because abstract language frequently contains compromises between conflicting positions, may be ambiguous, and, in any case, inevitably needs to be applied to particular contexts that vary over time. Part III will then assess the implications for social decision-making processes of the interpretive choices made within WTO dispute settlement. It will evaluate each of these choices in comparative welfare and participatory terms, and provide examples from WTO case law. The Article will conclude by explaining how this analytical framework enables greater understanding and precision in the choice among alternative institutional processes.

#### I. THE PARAMETERS OF INSTITUTIONAL CHOICE IN DISPUTE SETTLEMENT AND INTERPRETATION

New institutional economics proposes that individuals, firms, and states select institutional devices in order to maximize welfare benefits and minimize transaction costs and strategic costs.<sup>6</sup> We may understand not only private ordering decisions, but also mechanisms for majority voting, administrative delegation, and dispute settlement, in institutional terms. We may also understand and compare different interpretive approaches in these terms, although there has been much less work in this area. The designers of international dispute settlement do not exercise extensive control over the second-order decision-making of judicial bodies, which is likely why new institutional economics has attended less to this

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5. See Neil Komesar, *The Essence of Economics: Law, Participation and Institutional Choice (Two Ways)*, in ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT 165, 170 (Sandra S. Batic & Nicholas Mercuro eds., 2008) (“[P]articipation is the heart of key economics concepts such as transaction costs, externalities and resource allocation efficiency. Transaction costs are the costs of market participation. Externalities are failures of market participation where missing transactions give rise to allocative decisions that do not reflect all costs and benefits. Resource allocation efficiency is defined by transaction costs and violated by externalities and is, therefore, a participation-based notion.”).

6. See, e.g., MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS (2001); GREIF, *supra* note 3; NORTH, *supra* note 3; WILLIAMSON, *supra* note 3, at 3–22.

phenomenon.<sup>7</sup> Yet, general interpretive approaches and particular interpretive choices can be examined in terms of their costs and benefits in social welfare terms. In a related way, they can be understood in terms of their effect on the form and level of participation in decision-making, which can serve as a proxy for assessing social welfare.

Our discussion of welfare effects will be relatively straightforward. While we are normatively interested in public interest-type economic welfare, we also recognize, descriptively, that in the international relations context, institutions may be chosen to promote public choice-type welfare: the welfare of government officials.<sup>8</sup> To the extent that the domestic political system successfully aligns public choice-type welfare with public interest-type welfare — that is, to the extent that the domestic political system is responsive — these measures of welfare are congruent. We also recognize that in the trade context, the fundamental theorem of welfare economics will often (but not always) align national and global public interest welfare with liberalized trade. A particular challenge arises when trade liberalization goals interact with other social policy preferences. In addition to considering the welfare and public choice efficiency of interpretive choices, we must also consider the distributive effects of interpretive choices.

While we examine welfare and public choice efficiency separately from participation, we believe that participation can be understood in welfarist terms, and so this separation is in important respects artificial. Welfare analysis is based on methodological and normative individualism: Welfare only exists in terms of the preferences of individuals. If we are to analyze welfare from outside the mind of an individual, we must refer to revealed preferences. In the economics of market behavior, these revealed preferences are analyzed through purchases and sales, and equilibrium pricing. But preferences can be inferred from other behaviors as well. One such behavior that affects and interacts with market activity is political participation, which involves both individuals and interest groups. In this sense, participation is not an alternative to welfare, but rather a method of gauging welfare through revealed preferences. In each case, individual preferences are only imperfectly revealed in the real world because all institutions suffer from biases and distortions, which is why comparative institutional analysis becomes essential.

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7. We review the mechanisms of control available to the designers of international dispute settlement in Part II. By second-order decision-making, we mean judicial interpretation of a rule or standard created by the negotiator-signatories of an agreement (i.e., the first-order decision-makers).

8. Public-interest and public-choice welfare are terms-of-art used in law and economics. See, e.g., Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 116 (1990).



Turning to judicial interpretation, different interpretive choices with respect to a legal text can be viewed as affecting participation by allocating authority over an issue to different social decision-making processes, in which individuals are able to participate to different degrees. This variation affects the articulation, mediation, and attainment of their preferences, and thus of social welfare.

In addition, participation may be understood intrinsically as a preference: Individuals may value the possibility for participation separately from their ability to affect decisions that participation provides them. We do not have an empirical method by which to separate this second welfare role for participation, but we recognize that it may be significant in many contexts. Our discussion of participation generally recognizes that greater accountability, transparency, and opportunities for input in different social decision-making processes will often be valued in themselves, as well as for articulating and furthering other individual preferences.

Within the overall category of participation, we examine the relative degree of transparency, accountability, and legitimacy that a particular interpretive choice entails. By *transparency*, we mean the extent to which the decision-making is observable by citizens. By *accountability*, we mean the extent to which decision-making can be influenced by citizens. By *legitimacy*, we mean the overall extent to which citizens believe that the interpretive choice has been structured so as to provide a fair and accurate method by which to reflect citizen preferences.

Finally, we stress that institutions interact. Judicial interpretation is part of this dynamic process of institutional interaction, horizontally and vertically, across different levels of social organization.<sup>9</sup> In this Article, we offer an improved means for understanding and assessing the choices made in connection with WTO treaty drafting and judicial interpretation. We focus attention on the importance of understanding and weighing the relative benefits and detriments of allocating authority to alternative social decision-making processes, ultimately affecting *who decides* a policy issue, thereby affecting social welfare.

## II. INSTITUTIONAL CHOICES IN TREATY DRAFTING: RULES, STANDARDS, INTERPRETIVE GUIDELINES, AND EX POST SUPERVISION

WTO Members make institutional choices in writing WTO treaties. Formally, Members have delegated the task of “clarifying” the meaning of

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9. See, e.g., WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, 48–80 (1994); WILLIAM ESKRIDGE & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTIONALISM 266–76 (2010).

the provisions of the WTO agreements to the WTO Appellate Body and panels, with the instruction that such clarification be done “in accordance with customary rules of interpretation of public international law.”<sup>10</sup> Treaty drafters also can circumscribe judicial authority, both formally and informally, through the precision of the text drafted, by providing rules for the interpretive process, and by challenging, obstructing, refusing to recognize, and potentially overruling by treaty amendment the interpretive choices that judges make. These latter capacities can be exercised *ex post* in response to interpretive choices, but they can also induce judges to shape their interpretive choices *ex ante* in anticipation of Member reactions. There may also be circumstances where judges are reluctant to fill in what they feel are gaps in the law’s coverage, possibly in anticipation of Members’ responses.

*A. Rules versus Standards*

First, in drafting the substantive WTO agreements, Members can circumscribe *ex ante* the interpretive function through the precision of the agreed-upon text. This drafting choice is encapsulated in the distinction between specific rules and general standards.<sup>11</sup> The more precisely the parties draft the text of an agreement—i.e., the more that the text constitutes a specific rule—the less discretion is available to a WTO panel. The more open-ended the drafting—i.e., the more that it constitutes a general standard—the more discretion is accorded to a panel. For example, Annex I to the Agreement on Subsidies and Countervailing Duties provides a detailed illustrative list of twelve prohibited export subsidies, which in turn refers to guidelines for determination of particular export subsidies set forth in Annexes II and III.<sup>12</sup> In contrast, Article XX of the GATT, which provides exceptions for WTO obligations, uses more open-ended language, such as the concept of “unjustifiable discrimination.”<sup>13</sup>

Why would negotiators choose a broader standard, implicitly delegating more authority to dispute settlement over the text’s meaning? In some cases, parties may choose compromise language to paper over their differences, resulting in more open-ended text to interpret. Parties may

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10. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

11. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 350 (1999).

12. Agreement on Subsidies and Countervailing Measures, Annex I, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

13. General Agreement on Tariffs and Trade art. XX, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

deem it too costly to attempt to anticipate every context in which a text might be applied, and so draft more general language for the delegated interpreter to apply subsequently to particular situations. Where an agreement involves multiple parties, such as the WTO agreements, the parties are likely to resort more frequently to general standards, as opposed to specific rules, in order to reduce the transaction costs of reaching agreement.<sup>14</sup>

Thus, the relative degree of specificity of treaty obligations — between the most specific rules and the most general standards — is inversely proportional to the extent of delegation to judges. Specificity is thus indicative of institutional choice by treaty drafters, as between legislative determination through rules and judicial determination based on standards. Wherever room has been left for interpretation, we can infer that either an explicit or an implicit institutional choice has been made: to delegate more or less responsibility to judges.

To the extent that the WTO treaty is understood as a contract freely entered into, we can assume that specific rules agreed among the parties are designed to maximize welfare. Whether negotiators are maximizing economic welfare or public choice welfare depends on the accountability of the negotiators to their own citizens. We also can assume that a freely concluded treaty has reasonable distributive consequences, if we ignore strategic problems and asymmetric allocation of power. In terms of transparency, accountability, and legitimacy, these specific rules draw a great deal from the domestic processes of negotiation and ratification: If domestic politics are transparent, accountable, and legitimate, the rules produced are more likely to be so as well.

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14. Some law and economics scholars, writing from an economic welfare perspective, view international agreements as “incomplete contracts” and states as delegating the interpretation of these contracts to international tribunals because it is less costly to them than to negotiate more explicit terms up front. See Henrik Horn et al., *Trade Agreements as Endogenously Incomplete Contracts*, 100 AM. ECON. REV. 394, 394 (2010) (“We propose a model of trade agreements in which contracting is costly, and as a consequence the optimal agreement may be incomplete. . . . We argue that taking contracting costs explicitly into account can help explain . . . key features of real trade agreements.”); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S180–81 (2002) (“The point of departure is the proposition that the WTO agreements are, in effect, contracts among the political actors who negotiated and signed them. As with all contracts, it is in the interest of the signatories to maximize the joint gains from trade, that is, to enable the signatories to attain their Pareto frontier. . . . [W]e will argue that the WTO provisions respecting renegotiation and the settlement of disputes over breach of obligations are carefully designed to facilitate efficient adjustments to unanticipated circumstances.”); Wilfred J. Ethier, *Punishments and Dispute Settlement in Trade Agreements* (Penn Inst. for Econ. Research, Working Paper No. 01-021, 2001), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=273212](http://papers.ssrn.com/paper.taf?abstract_id=273212) (“This paper interprets dispute settlement procedures and punishments as responses to the fact that trade agreements are incomplete contracts.”).

Broader standards, on the other hand, raise greater issues. We assume that, given the costs of specification, it was more efficient (either from a welfare or from a public choice perspective, or both) to establish standards, but it is less clear that the actual application of the standard by a judge will meet these efficiency criteria.<sup>15</sup> Further, the application of standards may seem lacking in transparency, accountability, and legitimacy because unelected judges are making the ultimate decision. It seems easy for critics to forget that the allocation of authority to judges under standards derives from the same type of political processes that produce specific rules. The delegation of authority to less participatory judicial processes nonetheless can be vulnerable to criticism, even where the initial delegation itself seems satisfactory from a participatory standpoint, and even where the delegation may be justifiable in welfare terms.

*B. Delegation to Other International Organizations or Processes*

Second, while (as discussed below) the WTO dispute settlement process generally declines to apply or to determine rights and duties under non-WTO substantive international law, in certain cases, the drafters of WTO texts have specifically incorporated non-WTO international law by reference. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), for example, incorporates by reference portions of the following treaties: the Paris Convention (on industrial property), the Berne Convention (on copyrights), the Rome Convention (on performers, phonogram producers, and broadcasters), and the Washington Treaty (on integrated circuits).<sup>16</sup>

The drafters have also partially incorporated into WTO texts the decisions of other international bodies, even when those decisions are made subsequently and are voluntary under the rules of those other bodies, and thus do not necessarily achieve the status of international law. Certain provisions of the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Sanitary and Phytosanitary Standards (SPS Agreement) are examples of the latter alternative, as they refer to

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15. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 19.2, at 532–33 (6th ed. 2003).

16. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1.3, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 (“Members shall accord the treatment provided for in this Agreement to the nationals of other Members. (1) In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions. (2) Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights.”).

international standards adopted through particular international standard-setting bodies.<sup>17</sup> Members are required to base their domestic standards on these international ones, subject to certain exceptions.

There are three international organizations expressly recognized by the SPS Agreement for the adoption of harmonized international food, plant, and animal health protection standards: the Codex Alimentarius Commission, the International Plant Protection Committee (IPPC), and the International Office of Epizootics (OIE).<sup>18</sup> The organizational rules of these three bodies provide for the adoption of standards by either a simple majority vote (for food and animal health standards under the Codex Alimentarius Commission and OIE) or a two-thirds majority vote (for plant protection standards under the IPPC).<sup>19</sup> WTO Member regulations that implement these international standards are presumed to be legal under the SPS Agreement.<sup>20</sup> Although the TBT Agreement does not expressly reference particular bodies as international standard-setting bodies, Article 2.4 of the TBT Agreement requires that Members use “relevant international standards” “as a basis for” their technical regulations, subject to certain exceptions.<sup>21</sup> These standards are often adopted by hybrid public-private bodies, such as the International Organization for Standardization (ISO).<sup>22</sup>

The fact that a “legislative” act, in connection with sanitary and phytosanitary standards, and to a lesser extent other product standards, takes place *outside* the WTO imparts some interesting features. First, it can provide the WTO a degree of insulation from criticism with respect to legitimacy, since the decision regarding the appropriate standard is made through another political process. Second, it provides a legislative device that may evade the need for consensus within the WTO. This avoidance of consensus may raise legitimacy challenges.<sup>23</sup> Codex Alimentarius and other

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17. See Tim Büthe, *The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization*, 71 LAW & CONTEMP. PROBS. 219 (2008).

18. Agreement on the Application of Sanitary and Phytosanitary Measures art. 12(3), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

19. See MARK A. POLLACK & GREGORY C. SHAFFER, WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS 214 (2009).

20. SPS Agreement, *supra* note 18, art. 3.2 (“Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.”).

21. Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1868 U.N.T.S. 120.

22. See Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1 (2003) (describing and analyzing the International Organization for Standardization and the International Electrotechnical Commission).

23. Similarly, Annex 1 of the Agreement on Subsidies and Countervailing Measures (SCM

standard-setters can provide opportunities for less rigorous voting requirements for adoption of international rules.<sup>24</sup> Third, this structure provides an opportunity for subject-matter specialists, as opposed to trade officials, to take the lead role in formulating the relevant standards.

From the perspective of economic welfare, this type of delegation to international standard-setting bodies may reduce the possibility for protectionist formulation of national standards, and may thereby promote economic efficiency. Efficiency also may be enhanced by the expertise deployed by these bodies. Nonetheless, these decision-making processes are also subject to capture by certain interests, such as large industrial interests, which has prompted criticism.<sup>25</sup> Because of the imperfections in transparency and accountability that may characterize these standard-setting bodies, granting significant authority to the standards adopted by them can raise legitimacy concerns.

Reference by WTO bodies to these externally produced standards often displaces the type of judicial scrutiny that might otherwise be applied to national standards regarding, for instance, their scientific or non-discriminatory basis. So it is useful to examine the efficiency and participation characteristics of these references to international bodies in comparison to other institutional alternatives, such as judicial determination. In Part III below, we discuss the interpretation by panels and the Appellate Body of references to rules established by international standard-setting bodies, while in this subsection we have discussed the initial institutional choice by treaty authors to specify these references.

### C. *Specifying Interpretive Rules*

Third, states may choose to instruct judges on how to exercise their authority, or they may leave the choice over interpretive rules to the judges. WTO Members provided instructions regarding interpretation. Formally, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, or

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Agreement) grants to a subset of WTO Members the ability to decide which export credit practices will not be considered export subsidies, and thus will be permitted by the agreement. Controversially, this subset of Members consists solely of OECD Members. Item K of Annex 1 provides that “if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.” SCM Agreement, *supra* note 12, Annex 1. Such delegation raises legitimacy issues because a subset of Members can create rules, albeit of limited scope, affecting the entire WTO membership.

24. See Shaffer, *supra* note 4, at 34.

25. *Id.* at 3.

DSU) instructs panels to interpret texts “in accordance with the customary rules of interpretation of public international law.”<sup>26</sup>

The customary rules of interpretation have been codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),<sup>27</sup> and the Appellate Body referenced the VCLT in sixty-two of its first ninety-six decisions (65%), starting with its first decision in *United States—Standards for Reformulated and Conventional Gasoline* in April 1996.<sup>28</sup> Article 31.1 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>29</sup> Not surprisingly, panels and the Appellate Body frequently commence their interpretations by examining the “ordinary meaning” of the text, often citing dictionaries regarding that meaning. A search of the first ninety-six rulings of the Appellate Body found that a dictionary was cited in sixty-seven decisions regarding the “ordinary meaning” of a term (constituting 70% of these Appellate Body rulings). While the VCLT is by no means a detailed guide to interpretation, it provides at least some circumscription of the interpretative process.

Article 31.2 delineates the “context” to be referenced in interpreting a treaty provision. It defines “context” to include, first, the text of the agreement, including its preamble and annexes; second, “any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty”; and third, “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”<sup>30</sup> In other words, the VCLT circumscribes the meaning of “context,” which does not, by its terms, encompass factual, social, or historical context. The Appellate Body nonetheless has stated that interpretation under Article 31 is “a holistic exercise that should not be mechanically subdivided into rigid components,” such that a panel may consider particular surrounding factual circumstances, whether “under the rubric of ‘ordinary meaning’ or ‘in the light of its context.’”<sup>31</sup>

Articles 31(3) and 32, moreover, further broaden the interpretive enterprise to take into account other sources. Article 31(3) requires interpreters to consider:

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26. DSU, *supra* note 10, art. 3.2.

27. Vienna Convention on the Law of Treaties, art. 31, 32, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

28. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

29. VCLT, *supra* note 27, art. 31.1.

30. *Id.* art. 31.2.

31. Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, ¶ 176, WT/DS269/AB/R (Sept. 12, 2005).

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.<sup>32</sup>

This last provision raises the question of the role of non-WTO international law in interpretation, including customary international law and other international treaties. Finally, Article 32 provides that a dispute settlement panel may refer to

supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.<sup>33</sup>

The guidance that Articles 31 and 32 of the VCLT provide to treaty interpreters, and the specific reference to “customary rules of interpretation of public international law” in Article 3.2 of the DSU, constitute an institutional choice by the treaty drafters. The negotiators of the DSU chose to avoid immediate reference to the *travaux préparatoires* (preparatory work) of WTO treaties, but rather to require interpreters to focus first on text. This focus on text may be understood from a welfare perspective, and from a participation perspective in light of the fact that all treaties, like all contracts, are incomplete.

From a welfare perspective, we assume (as with private contracts) that freely agreed treaty provisions are designed by the parties to maximize their joint welfare. If so, then an interpretive rule that focuses on text can be viewed as enhancing Member welfare by empowering the choices of WTO Members and constraining the discretion of judges. Of course, there are important limits to the assumption underlying this analysis, especially in the WTO context, because strategic problems and power asymmetries may affect the parties’ ability to formulate welfare-maximizing treaty provisions. Second, the parties to the treaty may be maximizing political welfare, in a public choice sense, as opposed to public interest welfare. In that case, the social welfare arising from the drafting choice will depend on

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32. VCLT, *supra* note 27, art. 31(3).

33. *Id.* art. 32.



the relative congruence between the political welfare of government officials and national and global social welfare.

From a participation perspective, the focus on text can be viewed as an instruction to give primacy to the political branches that formulated the treaty, rather than to the judicial process. The focus on text, from this perspective, constitutes a decision to attempt to retain relative authority within the legislative process, as opposed to transferring greater authority to the judiciary. Nonetheless, by limiting the use of *travaux préparatoires*, treaty negotiators are also reducing their ability to have their intent, as opposed to their words, be the primary reference point in interpretation. Alternatively, this choice of interpretive methodology might be understood in terms of allocating relative authority between legislatures and executives in national political processes. By focusing on text, parliaments or other bodies that approve international agreements have greater certainty regarding the meaning of the treaty terms that they have approved. It is the text that they approved that has primacy, not the intent of negotiators reflected in the *travaux préparatoires*, which may or may not reflect the legislature's intent. The focus on text, and not *travaux préparatoires*, in interpreting WTO agreements, in other words, can be viewed in terms of its indirect impact on participation, raising the issues of relative transparency, accountability, and legitimacy, as this textual focus can empower national legislatures in relation to both national negotiators and international adjudicators, compared to other alternatives.

WTO Members have also attempted to constrain treaty interpretation of particular provisions by assigning particular interpretive rules to them. For instance, Article 17.6 of the WTO Anti-Dumping Agreement provides for a degree of deference to national interpretation of law in WTO challenges to anti-dumping decisions made by domestic authorities.<sup>34</sup> Article 17.6 (ii) provides that “[w]here the panel finds that a relevant provision of the [Anti-Dumping] Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”<sup>35</sup> The United States pushed for this rule in order to retain greater discretion in applying U.S. anti-dumping regulations under WTO rules.<sup>36</sup> In practice, however, many commentators believe that

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34. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 17.6, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1868 U.N.T.S. 201.

35. *Id.*

36. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 199–200 (1996) (describing negotiations over Art. 17.6); Terence P. Stewart & Mara M. Burr, *The WTO’s First Two and a Half Years of Dispute Resolution*, 23 N.C. J. INT’L L. & COM. REG. 481, 636 (1998) (“The United States also insisted on an arguably different standard of review of legal interpretations in the anti-dumping and countervailing

the Appellate Body has been unconstrained by this interpretive rule, paying it no more than lip service when interpreting the meaning of the provisions of the Anti-Dumping Agreement.<sup>37</sup>

#### D. *Retaining a Veto*

Fourth, even after they have delegated interpretive authority, WTO Members can exercise some formal ex post oversight of the interpretation of WTO texts. However, they retain fewer checks on the judicial interpreter than under the predecessor regime, the General Agreement on Tariffs and Trade (GATT). Under the GATT, to form a panel required a consensus decision of all GATT Contracting Parties.<sup>38</sup> Thus, any party, including the respondent, could block the panel's formation. Likewise, adoption of the panel ruling required consensus, so that any GATT Contracting Party, including the losing party, could block the ruling and thus its interpretive implications.<sup>39</sup>

The DSU, however, created a "reverse consensus" rule so that the formation of a panel or the adoption of a panel ruling can only be blocked if no WTO Member objects to blocking such formation or adoption, including, respectively, the respondent and winning party.<sup>40</sup> This rule effectively makes WTO dispute settlement automatic and delegates greater powers of interpretation to WTO panels and the Appellate Body. The formal adoption of an Appellate Body or panel ruling by the WTO Dispute Settlement Body is, as a result, *pro forma*.

WTO Members still can amend the texts where they disagree with the interpretation made by a WTO panel or the Appellate Body, constituting a kind of "legislative veto." Amending texts, however, can be quite difficult, even in domestic legal systems with legislatures where approval is by

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duty area.").

37. See, e.g., Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POLY INT'L BUS. 109, 112–13 (2002) (stating that "the special standard of review has had virtually no impact on the review of national anti-dumping measures by the WTO"); Isabelle Van Damme, *Ninth Annual WTO Conference: An Overview*, 13 J. INT'L ECON. L. 497, 508–09 (2010) (describing ineffectiveness of Article 17.6).

38. JOHN H. JACKSON, *THE JURISPRUDENCE OF THE GATT & THE WTO* 123 (2000); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 650 (2005) (noting that formation of panels under GATT required consensus).

39. For example, shortly before the WTO's formation, the United States blocked the adoption of controversial GATT decisions regarding the relationship of environmental protection measures and trade commitments in the two tuna-dolphin cases. Report of the Panel, *United States—Restrictions on Imports of Tuna* (June 16, 1994), GATT/DS29/R (unadopted); Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 155 (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) (unadopted) [hereinafter *Tuna-Dolphin I* Panel Report].

40. John H. Jackson, Editorial Comment, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply Or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 114 (2004) (describing "reverse consensus" mechanism).

simple majority.<sup>41</sup> In the WTO context, it is particularly difficult given that the agreements are changed only with the consensus of the WTO membership, which included 153 Members as of June 2011.<sup>42</sup> Although the formal WTO rules provide for amendment or formal interpretation by Members with less than a consensus vote, these voting rules have not been used in practice.<sup>43</sup> The result, from an institutional perspective, is again considerable delegation of interpretive authority to WTO panels and the Appellate Body. Because of the prevailing norm of decision-making by consensus, the WTO political/legislative system, in contrast to its judicial system, is relatively inflexible and weak.<sup>44</sup>

The possibility of legislative reversal, if it were practically effective, would derivatively display some of the same efficiency and participation characteristics as the original treaty-making. It would involve direct action by negotiators, with whatever efficiency, transparency, accountability, and legitimacy characteristics appertain to such action.

#### *E. Interpretive Communities and Member Defiance*

Fifth, the WTO Appellate Body and panels also face non-formal constraints that inform their interpretive choices regarding WTO texts. Most importantly, the discretion of the Appellate Body and panels is cabined in terms of the accepted meaning of the text within a larger interpretive community that includes (first) the Members themselves, and in particular the most active users of the DSU, which tend to be the largest traders, and (second and more broadly) business and civil society

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41. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 7 (1982) (noting that it is generally harder to amend statutes than to enact them initially); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response*, 93 MICH. L. REV. 1, 21–26 (1994) (discussing obstacles to moving legislation through Congress).

42. WORLD TRADE ORG., *THE WTO*, [http://www.wto.org/english/thewto\\_e/thewto\\_e.htm](http://www.wto.org/english/thewto_e/thewto_e.htm) (stating that WTO has 153 members) (last visited June 1, 2011).

43. Article IX:1 of the Marrakesh Agreement Establishing the WTO provides for a general rule on WTO decision-making that “except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting,” and, in such a case, by a simple majority of the votes cast. Article X provides for a specific rule on amendments, providing for a two-thirds majority vote, subject to some complications depending on whether an amendment would alter substantive rights and obligations. Articles IX:2 and IX:3 provide respectively for a three-fourths majority vote for authoritative interpretations of the texts and for the waiver of any obligations of a member. Marrakesh Agreement Establishing the World Trade Organization arts. IX & X, Apr. 15, 1994, 1867 U.N.T.S. 154; *see also* Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT’L L.J. 481, 504–05 (2000).

44. *See, e.g.*, Claus-Dieter Ehlermann & Lothar Ehring, *Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and ‘Plurilateral’ Rules?*, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 498, 516–19 (Ernst-Ulrich Petersmann ed., 2005).

organizations, social movements, academics, and so forth.<sup>45</sup> In addition, a panel can anticipate the likely WTO Member reactions to its interpretive choice. In fact, Article 3.4 of the DSU arguably instructs a panel to consider Member responses by requiring that a panel's rulings "shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements."<sup>46</sup> WTO law is a social ordering and transaction-facilitating mechanism and, in particular, a mechanism for managing ongoing trade relations of Members over time. WTO panelists and Appellate Body members enhance their authority and legitimacy, and thus their status, if they promote this basic function.<sup>47</sup>

If a Member refuses to comply with a decision, and if such defiance becomes relatively systematic, the authority of the Appellate Body and WTO panels can be undermined. A Member's defiance is strengthened if its arguments regarding interpretation are supported by a broader community of interpreters. WTO panels and the Appellate Body can anticipate these responses, recursively affecting their interpretive choices. In this way, WTO judicial decision-making can be viewed as "interdependent" with other decision-making processes, such as political processes, as well as with broader social processes involving interpretive communities.<sup>48</sup>

### III. JUDICIAL INTERPRETIVE CHOICE WITHIN WTO DISPUTE SETTLEMENT AS INSTITUTIONAL CHOICE

Legal texts are always indeterminate at some level, which is why their meaning is intensely debated and reasonable interpreters often disagree. Under all interpretive theories and methodologies, there are inevitably

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45. See, e.g., Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004) (arguing that evaluation of the WTO dispute settlement system should take into account the extent to which the Appellate Body is constrained by international legal discourse, politics, and constitutional structure). See generally STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) (providing a constructivist approach to interpretation and interpretive communities); Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 443–44 (2003) (discussing the concept of interpretive communities in international law).

46. DSU, *supra* note 10, art. 3.4.

47. See, e.g., Steinberg, *supra* note 45. See generally Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (presenting an economic theory of the behavior of appellate judges).

48. For a related perspective, see Ginsburg, *supra* note 38, at 633; see also LON L. FULLER, *ANATOMY OF THE LAW* 59 (1968) ("The interpretation of statutes is, then, not simply a process of drawing out of the statute what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied.").

disagreements regarding a WTO text's meaning. What, for example, is the meaning of "like product" in the various agreements? The Appellate Body has found that it varies depending on the context, writing in the *Japan-Alcoholic Beverages* case that:

[t]he concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied . . . [in relation to] the context and the circumstances that prevail in any given case . . . .<sup>49</sup>

Similarly, what is the meaning of "exhaustible natural resources" in Article XX of the GATT? The Appellate Body said that the meaning of the term "natural resources" is "not 'static' . . . but is rather 'by definition, evolutionary.'"<sup>50</sup> What if two provisions could apply, potentially leading to different results, with one setting forth a more general standard and the other a more specific rule? In the WTO anti-dumping zeroing cases against the United States, for example, a series of dispute settlement panels agreed with the United States that the practice of zeroing was permitted in certain circumstances by the detailed wording of subsections of Article 2 of the Anti-Dumping Agreement.<sup>51</sup> Nonetheless, the Appellate Body has maintained that the general provision of Article 2.4 of that agreement, which provides that "[a] fair comparison shall be made between the export price and the normal value," effectively prohibits the use of zeroing.<sup>52</sup>

49. Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, at 21 (Oct. 4, 1996) [hereinafter *Japan-Alcoholic Beverages* Appellate Body Report].

50. Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 130, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *United States-Shrimp I* Appellate Body Report] (emphasis added). The Appellate Body has also held that the words "must be read . . . in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." *Id.* ¶ 129. See also Panel Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) ("[T]he content of these concepts [of public morals and public order] can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.").

51. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 14 [hereinafter GATT]. The United States argued that the dumping margin permitted by Article 2 of the Anti-Dumping Agreement "can be interpreted as applying on a transaction-specific basis." Appellate Body Report, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 128, WT/DS294/AB/R (Apr. 18, 2006); see also Panel Report, *United States-Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.70, WT/DS344/R (Dec. 20, 2007) ("[T]he United States argues that the Anti-Dumping Agreement cannot be interpreted to include a general prohibition on zeroing in all contexts."). "Zeroing" is a method of determining the margin of dumping that compares the prices of individual export transactions against weighted average normal values and treats as zero the results of comparisons where the export price exceeds the weighted average normal value, instead of using the resulting negative dumping margin to reduce the margin of dumping.

52. See, e.g., Appellate Body Report, *United States-Final Dumping Determination on Softwood Lumber from Canada*, ¶ 138, WT/DS264/AB/RW (Aug. 15, 2006) ("The term 'fair' is generally understood to

In short, the analysis of a text's "ordinary meaning" can only get an interpreter so far. In some cases, that meaning is generally settled among all affected parties, which makes that case "easy." In many cases, however, the meaning of a particular provision, at times in light of other provisions in the WTO texts and other international law, may be highly contested as applied to different factual contexts. What does a panel do in such cases? Although constrained in the interpretation of WTO texts, the Appellate Body and panels retain important interpretive choices, and these choices implicate the operation of other social decision-making processes, and ultimately affect social welfare.

This section examines how WTO panels and the Appellate Body make interpretive decisions that can effectively delegate responsibility to different social decision-making processes, including to national political and administrative processes; WTO political bodies; other international organizations with specific functional mandates, such as standard-setting organizations; international market processes (by stringently reviewing and ruling against national decisions that adversely affect imports); and the dispute settlement panels themselves, which are supported by the WTO secretariat (by engaging in judicial balancing and process-based review). In making these institutional choices, the Appellate Body and panels can re-allocate decision-making authority over the issues at stake, including by delegating the determination of some underlying factual issues in disputes to experts having technical expertise, such as scientists and economists. These "delegations" and "allocations" of authority are, of course, not static. Rather, they should be viewed as part of ongoing processes of institutional interaction taking place over time regarding the meaning and application of the text.<sup>53</sup>

Each of these interpretive choices, with its institutional implications, has different effects on welfare and participation. We look at each choice individually and comparatively in terms of its welfare, distributive, and participation implications, giving examples in each case from WTO case law. None of these institutional choices is perfect from the perspectives of social welfare maximization, distributive fairness, or the direct or indirect participation in decision-making of affected stakeholders. Under each alternative, stakeholder positions will be reflected and affected in different ways. Different interpretive choices can thus be analyzed using a

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connote impartiality, even-handedness, or lack of bias. For the reasons stated below, we consider that the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the 'fair comparison' requirement in Article 2.4.').

53. Cf. ESKRIDGE, *supra* note 9; and ESKRIDGE & FEREJOHN, *supra* note 9, at 272 (discussing institutional dynamism and the hydraulics of institutional interactions).

comparative institutional analytic method that focuses on the relative implications of interpretive choices for welfare and participation.

*A. Allocation of Decision-Making to WTO Political Processes, or to Subsets of WTO Members*

The allocation of authority within the WTO can be evaluated in terms of horizontal and vertical allocations of powers, including the relationships among legislative, executive, and adjudicative institutions over time. While the WTO's executive function is handled largely by the WTO secretariat and is relatively limited,<sup>54</sup> the relationship between adjudication and legislation — between the judicial branch and the legislative branch — is of particular interest. The legislative branch, understood here as the Members in their treaty-making and treaty-oversight capacity, is theoretically omnipotent, but it only exercises its power after long rounds of negotiations, or in very limited and infrequent amendments and interpretive understandings. Thus, the interpretive choices of the Appellate Body and panels in the WTO dispute settlement system can easily affect the allocation of powers among decision-making processes.

As we showed in Part II, the practice of voting by consensus makes it effectively impossible for Members to override an Appellate Body or panel decision. This difficulty affects the horizontal allocation of powers set up by the WTO agreements. These agreements provide for specific types of decision-making by the parties and delegate this authority to certain committees within the WTO, such as the Committee on Balance of Payments and the Committee on Regional Trade Agreements.<sup>55</sup> Although still subject to the constraint of voting by consensus, the extensive WTO committee system represents a form of political decision-making that can be used to elaborate upon and guide the meaning of texts, and help

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54. See Gregory Shaffer, *The Role of the WTO Director-General and Secretariat*, 4 *WORLD TRADE REV.* 429 (2005).

55. Regarding balance of payments, see Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 *ILL.M.* 1125, 1538 (supplementing the GATT and revising procedures for Committee action regarding measures taken for balance-of-payments purposes); *Declaration on Trade Measures Taken for Balance-of-Payments Purposes* (Nov. 28, 1979), GATT *B.I.S.D.* (26th Supp.) at 205–09 (1980) (describing procedures for Committee action regarding measures taken for balance-of-payments purposes); General Agreement on Tariffs and Trade arts. XII and XVIII, Oct. 30, 1947, 55 *U.N.T.S.* 188, 194–254 (describing control of measures taken for balance of payments purposes). Regarding regional trade agreements, see World Trade Organization, General Council, Decision of 6 February 1996, WT/L/127 (1996), <http://tinyurl.com/4x8emfk> (creating the Committee on Regional Trade Agreements); Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 *ILL.M.* 1125, 1161 (1994) (modifying GATT art. XXIV); GATT, *supra* note 51, at 268–72 (relating to control of customs agreements and free trade agreements among GATT members).

mediate disputes before they lead to full litigation.<sup>56</sup> In one anti-dumping case, for example, a dispute settlement panel referenced a recommendation of the Committee on Anti-Dumping Practices in 2000 as providing the applicable norm to guide interpretation.<sup>57</sup> Moreover, approximately seventy-five other international organizations hold observer status within the WTO, and WTO secretariat members attend the meetings of many of these international organizations on a reciprocal basis.<sup>58</sup> These arrangements enable the secretariat and the trade representatives of the Members to be aware of developments in other areas of international law, and permit the secretariats and state representatives of other international organizations to be aware of the implications of WTO law for their respective areas.

These political processes within WTO committees, however, have yet to prevent the dispute settlement system from exercising jurisdiction in matters falling within the committee's areas of concern. For example, the Appellate Body has found that specific WTO treaty provisions confirm the availability of dispute settlement regarding the issues of whether a balance of payments exception or customs union exists, and it thus has interpreted and enforced these provisions.<sup>59</sup> The specific assignment of decision-making authority to these political bodies has therefore not stopped the Appellate Body from issuing rulings over claims in these areas. Thus far, the Appellate Body has generally declined to recognize a form of "political question" doctrine pursuant to which it will defer questions to the WTO's political branches and refrain from ruling on particular WTO claims, at least in cases where it finds that the agreement at issue specifically

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56. Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUR. J. INT'L L. 575, 586 (2009) (stating the ways in which WTO committees are "involved in the gradual development of shared norms"); *id.* at 587–88 (describing how committee work can lead to the avoidance of formal dispute mechanisms).

57. See Panel Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R (Mar. 7, 2003) ¶ 7.321 & n.272; see also Richard Stewart & Michelle Raton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, in CHRISTIAN JOERGES & ERNST-ULRICH PETERSMANN, CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE, AND SOCIAL REGULATION 457–94 (2d ed. 2011).

58. See *International Intergovernmental Organizations Granted Observer Status to WTO Bodies*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm) (last visited June 1, 2011); see also Steve Charnovitz, *International Standards and the WTO* (The George Washington University Law School Public Law & Legal Theory, Working Paper No. 133, 2005), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=694346](http://papers.ssrn.com/so13/papers.cfm?abstract_id=694346).

59. Appellate Body Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 87, WT/DS90/AB/R (Aug. 23, 1999) ("Any doubts that may have existed in the past as to whether the dispute settlement procedures under Article XXIII were available for disputes relating to balance-of-payments restrictions have been removed by the second sentence of footnote 1 to the BOP Understanding . . ."); see also Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 9.50–51, WT/DS34/AB/R, (May 31, 1999) ("We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine 'any matters 'arising from' the application of those provisions of Article XXIV.'").



confirms the availability of dispute settlement.<sup>60</sup> Nor has it recognized a concept of *non liquet*, pursuant to which it would refuse to issue a ruling where it finds that existing WTO law does not cover an issue.<sup>61</sup> As a result, WTO dispute settlement is available to interpret and enforce WTO provisions even where the application of these provisions is also expressly assigned to political decision-making or there is an alleged “gap” in the law. Importantly, the practice of voting by consensus has prevented political decision-making in these cases, so that the judicial process can be viewed as deciding them by default.

Through interpretation, the Appellate Body and panels can implicitly allocate decision-making to other political processes by signaling that they will take into account other agreements between the parties to a dispute. This issue arose, for instance, in the *United States–Shrimp* case. There, the Appellate Body’s report noted that the United States had successfully negotiated an Inter-American Convention for the Protection and Conservation of Sea Turtles, which demonstrated that “multilateral procedures [were] available and feasible.”<sup>62</sup> The Appellate Body found that the United States never seriously attempted to negotiate a similar agreement with the four Asian complainants. In this way, in the particular context of the *chapeau* (introductory paragraph) of Article XX of the GATT, the Appellate Body tried to foster an ad hoc political approach by requiring the United States to attempt to negotiate harmonized substantive rules before implementing a ban that could trigger a dispute before the WTO judicial process. When Malaysia subsequently challenged the United States for failing to reach a negotiated settlement through a multilateral process, the Appellate Body held that the United States only needed to engage in good-faith negotiations, but was not required to conclude an agreement.<sup>63</sup>

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60. Cf. Jeffrey Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733, 757–58 (1999) (calling for use of a political question doctrine).

61. See, e.g., Steinberg, *supra* note 45, at 258 (“Also at the restrained end of the continuum, various customary doctrines counsel abstention in dealing with a gap in the law. Some would invoke the doctrine of *non liquet* (which means ‘it is not clear’) if the law does not permit deciding a case one way or the other. According to that view, there are gaps in international law and it is not the place of courts to fill those gaps as they are not legislative organs; thus, in such cases courts should declare *non liquet*.”); see also Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism*, 53 INT’L & COMP. L.Q. 861, 874–75 (2004) (describing the potential use of *non liquet* in WTO dispute settlement proceedings); Jacques H.J. Bourgeois, *WTO Dispute Settlement in the Field of Anti-Dumping Law*, 1 J. INT’L ECON. L. 259, 271 (1998) (noting an argument that unregulated areas could be considered *non liquet*, allowing panels and the Appellate Body to refuse jurisdiction).

62. *United States–Shrimp I* Appellate Body Report, *supra* note 50, ¶¶ 166–70.

63. Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 122–23, WT/DS58/AB/RW (Oct. 22, 2001) (“Requiring that a multilateral agreement be concluded by the United States in order to avoid ‘arbitrary or unjustifiable discrimination’ in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto

In other words, in the *United States–Shrimp* case, the Appellate Body implicitly accepted the possibility that a subset of Members themselves might define, in its words, the “line of equilibrium” between regulatory restrictions and liberalized trade under the *chapeau* of Article XX.<sup>64</sup> This decision can be viewed as setting a factual standard as to what types of national efforts will satisfy the requirements of the *chapeau*, while also re-delegating to subsets of Members implicated in a dispute the authority to decide on an arrangement pursuant to which the national trade restrictive measure would be able to meet Article XX requirements. Similarly, on the issue of opening hearings to the public (which have traditionally been closed), panels and the Appellate Body have chosen to defer to the decision of the litigating states.<sup>65</sup> This allocation of authority is, nonetheless, significantly more circumscribed, and more provision-specific, than allowing subsets of Members to vary their obligations *inter se*, which does not appear to be formally permitted by the WTO charter.

It is impossible to evaluate this institutional choice of allocating authority to a subset of Members from the standpoint of economic welfare without addressing the competing priorities held by the affected parties, because this type of decision involves commensuration between diverse values. From the standpoint of political efficiency, in a public choice sense, such sub-multilateral arrangements are likely to be efficient, so long as they do not give rise to negative externalities upon the governments of other states. Similarly, if the arrangements do not result in negative externalities for other constituencies, then the arrangements can be viewed as more appropriate from a participatory perspective, again depending on the transparency, accountability, and legitimacy of the domestic politics of the subset of Members. By virtue of the political consensus among the contending states, concerns regarding both efficiency and participation are to some extent addressed. A number of commentators have thus contended that such international political processes should be

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over whether the United States could fulfill its WTO obligations.”)

64. *United States–Shrimp I* Appellate Body Report, *supra* note 50, ¶ 170 (“[T]he parties to the Inter-American Convention together marked out the equilibrium line”). *See also id.* ¶ 159. The obligation to negotiate was rejected by the Appellate Body in the *Gambling* case, in the context of the subheadings of Article XIV of GATS — in a provision equivalent to the necessity requirement of Article XX(b) of GATT. *See* Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *United States–Gambling* Appellate Body Report].

65. *See* Panel Report, *Canada–Continued Suspension of Obligations in the EC–Hormones Dispute*, ¶¶ 7.41–7.51, WT/DS321/R (Mar. 31, 2008). This decision was subsequently modified by the Appellate Body. *See* Appellate Body Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, Annex IV–Procedural Ruling of July 10 to Allow Public Observation of the Oral Hearing, ¶ 11, WT/DS320/AB/R (Oct. 16, 2008) (“For these reasons, the Division authorizes the public observation of the oral hearing in these proceedings on the terms set out below.”) [hereinafter *United States–Continued Suspension* Appellate Body Report].

institutionalized within the WTO,<sup>66</sup> or outside of and in collaboration with it.<sup>67</sup> However, it is likely that a rule of consensus or unanimity could often result in a minority blocking what might otherwise be a more efficient outcome, or an outcome that would enhance stakeholder participation.

Overall, delegation of decision-making authority to an international political process is, like other institutional alternatives, subject to trade-offs from the standpoints of welfare and participation. Even if international political processes were made more robust, they would still be subject to biases arising from resource and power imbalances, collective action problems, and general citizen apathy toward distant fora. The bureaucracies of large, wealthy countries have greater resources, and larger, more experienced staffs. Interest groups from these countries are more likely than interest groups from developing countries to have the funding needed to represent their views at the international level. The development of international political governance mechanisms can nonetheless provide a focal point for political negotiations that can make the conflicting norms, priorities, and interests at stake in trade-social policy conflicts more transparent, potentially enhancing global welfare.<sup>68</sup> By bringing developing country perspectives that might otherwise be suppressed in a litigation context to the fore, political bargaining might facilitate targeted financial transfers that would be more equitable and efficient in addressing environmental and development goals.<sup>69</sup> Yet, political bargaining also intensifies the role of political leverage, and can provide better opportunities for strong states to prevail over the interests of weaker ones in the resolution of disputes.

B. *Recognition of Other International Political Processes through Taking Account of Other International Law*

One way for the judicial process to allocate authority to other political processes is through its treatment of other (non-WTO) international law. The question of what law is to be applied and interpreted in WTO dispute settlement raises treaty design and interpretive questions that have significant institutional implications. Application of, or reference to, non-WTO international law can be viewed as a way of effectively delegating decision-making authority to the non-WTO source institution, which may operate under a different framework of norms (such as environmental,

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66. Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 305 (2004).

67. See DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 239–41 (1994) (advocating creation of a Global Environmental Organization); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1 (2001).

68. Shaffer, *supra* note 67, at 13.

69. *Id.* at 89–92.

human rights, or labor protection), and involve the participation of different actors. The drafters of the WTO agreements made certain choices clear, but left others open. Some of these have been raised in WTO disputes and have also been the subject of considerable academic commentary.<sup>70</sup>

It is clear and undisputed that when states agreed in the Uruguay Round to the DSU, they did not create a court of general jurisdiction. As a result, only claims based on WTO law may be adjudicated under the DSU.<sup>71</sup> This choice of international treaty design is certainly an important institutional one: The creation of a court capable of interpreting and applying claims under WTO law, but not authorized to entertain claims under other international law, empowers certain institutions, laws, and values in relation to others.

Yet, there may be circumstances in which non-WTO law is relevant to a claim based on WTO law, raising questions of interpretive choice having institutional implications. For example, it may be that a multilateral environmental treaty or a customary rule of human rights law could be invoked as a defense to a WTO obligation. Under certain circumstances, a norm of customary international law (including but not limited to *jus cogens*) or another international treaty provision could trump a claim under WTO law, should the two conflict, and should the other norm (such as a *jus cogens* norm) occupy a superior hierarchical position. Non-WTO rules of international law obviously may apply to state conduct. It is less clear whether, when states agreed to the DSU, they intended for panels and the Appellate Body to apply non-WTO international law. Panels and the Appellate Body are not courts of general jurisdiction, but what is the law that they are assigned to interpret and apply?

The DSU does not explicitly specify the body of applicable law that WTO adjudicators are assigned to interpret and apply, although it does provide that the mandate to panels and the Appellate Body is “to clarify the existing provisions of the [WTO covered agreements],” which are listed in Appendix 1 to the DSU.<sup>72</sup> The Appellate Body has said clearly that WTO adjudicators are not empowered to interpret non-WTO international law for purposes of applying non-WTO international law. In the *Mexico–Soft Drinks* case, the Appellate Body stated that it would be inappropriate for a panel to make a determination as to whether the United States had acted inconsistently with its NAFTA obligations.<sup>73</sup> It

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70. See, e.g., Joel P. Trachtman, *Jurisdiction in WTO Dispute Settlement*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT (Rufus Yerxa & Bruce Wilson eds., 2005).

71. *Id.*

72. DSU, *supra* note 10, art. 3.2.

73. Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, ¶ 56, WT/DS308/AB/R (Mar. 6, 2006).

declined to accept “Mexico’s interpretation[, which] would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements.”<sup>74</sup> While the Appellate Body determined that it could not “determine rights and duties outside the covered agreements,” it did not explicitly state that it could not give effect to rights and duties outside the covered agreements in assessing claims based on WTO law.

Article 31(3)(c) of the VCLT specifically instructs that interpreters shall consider “any relevant rules of international law applicable in the relations between the parties.” In the *EC–Biotech* case, the panel found it sensible “to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted.”<sup>75</sup> Therefore, only those international legal rules to which all Members are party, such as general customary international law or treaties that include all Members, would be *required* to be taken into account. The panel observed that “[r]equiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.”<sup>76</sup> The panel thus made an institutional choice to limit the authority of other international political processes, a decision that was later criticized in an International Law Commission report.<sup>77</sup> In the *EC–Biotech* case, since the complainants (as well as many other Members) had not ratified the Biosafety Protocol, the panel found that VCLT Article 31(3)(c) did not require it to take into account the Biosafety Protocol when interpreting the WTO treaty.<sup>78</sup>

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74. *Id.*

75. Panel Report, *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 7.70, WT/DS291/R, (Nov. 21, 2006) [hereinafter *EC–Biotech* Panel Report].

76. *Id.*

77. See Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 450, 472, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (“The panel buys what it calls the ‘consistency’ of its interpretation of the WTO Treaty at the cost of the consistency of the multilateral treaty system as a whole. It aims to mitigate this consequence by accepting that other treaties may nevertheless be taken into account as facts elucidating the ordinary meaning of certain terms in the relevant WTO treaty. This is of course always possible and, as pointed out above, has been done in the past as well. However, taking ‘other treaties’ into account as evidence of ‘ordinary meaning’ appears a rather contrived way of preventing the ‘clinical isolation’ as emphasized by the Appellate Body. . . . A better solution is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty. . . . In addition, it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been ‘implicitly’ accepted or at least tolerated by the other parties ‘in the sense that it can reasonably be considered to express the common intentions or understanding of all members as to the meaning of the . . . term concerned.’”).

78. Argentina and Canada had signed the Biosafety Protocol but not ratified it, while the United States had not signed it. Argentina and Canada had signed and ratified the underlying Convention on

The Panel in the *EC–Biotech* case nonetheless left open the possibility that a panel would have *discretion* to take into account another international treaty where the parties to the dispute had each ratified that other treaty.<sup>79</sup> In addition, it recognized that other rules of international law might inform the interpretation of the meaning of the WTO text as applied to a particular factual context, rather than as independent rules of applicable law. The Appellate Body in the early *United States–Gasoline* report memorably wrote that the GATT “is not to be read in clinical isolation from public international law.”<sup>80</sup> Similarly, in the *United States–Shrimp* case, the Appellate Body referred to “modern . . . conventions and declarations” in order to interpret the terms “exhaustible” and “natural resources” in Article XX(g) of GATT.<sup>81</sup> The Appellate Body did not mention that it was doing so pursuant to Article 31(3)(c) of the VCLT, but its decision clearly took into account other international law. The *EC–Biotech* panel also maintained, although in a more circumscribed manner, that:

[O]ther relevant rules of international law may in some cases aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used. Such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do.<sup>82</sup>

This limited use of other international law in interpretation constitutes (once more) an implicit institutional choice: a decision to focus WTO dispute settlement, at least formally, on interpretation of the covered agreements in light of their context, object, and purpose, while limiting the scope for taking into account other international law. This decision not to take into account other international law in judicial interpretation on a general basis constitutes an institutional choice to assign to the political processes the job of reconciliation of diverse rules of international law.

From a legal realist (non-formalist) perspective, nonetheless, a panel could take account of other international law without acknowledging it. The core legal realist claim is that, in practice, judges decide cases in response to factual context and not simply in response to formal rules and

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Biodiversity, while the United States had signed it but not ratified it.

79. *EC–Biotech* Panel Report, *supra* note 75, ¶ 7.72. (“[I]t is important to note that the present case is not one in which relevant rules of international law are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law. Therefore, we need not, and do not, take a position on whether in such a situation we would be entitled to take the relevant other rules of international law into account.”).

80. Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, at 17 WT/DS2/AB/R (Apr. 29, 1996).

81. *United States–Shrimp I* Appellate Body Report, *supra* note 50, ¶¶ 130–32.

82. *EC–Biotech* Panel Report, *supra* note 75, ¶ 7.92.

legal doctrine. Judges are viewed as situated decision-makers who respond to disputes in light of particular social, political, and historical contexts that shape their views of the facts of a particular case.<sup>83</sup> The texts of agreements are seen as having a degree of malleability (or incompleteness) that can be adapted (or filled out) in light of these contexts.<sup>84</sup>

This legal realist perspective on judicial interpretation has both rationalist and constructivist dimensions. From a rationalist perspective, an international judicial body wishes to avoid conflict with other international bodies that could spur challenges to its legitimacy and authority. It thus has incentives to interpret and apply legal provisions in a way that accommodates conflicting provisions in another regime when it can, even while it explicitly writes that it is not doing so, especially in high-stakes disputes that generate significant publicity and possibly mass protests. In this way, the Appellate Body can limit the tension between the WTO and other international regimes in a fragmented international law system and seek to limit political backlash against its decisions that touch on environmental, social, or other political issues, the potential of which is reinforced and signaled by such other regimes. From a constructivist perspective, a judicial body's interpretation and application of a text will be informed by historical, political, and social context. The judicial body will be part of a "community of interpreters" of that text as applied within such a context.<sup>85</sup> From this perspective, WTO jurists may be persuaded by and internalize principles and norms from neighboring international law regimes, and incorporate those principles and norms into their reading and application of WTO texts. One reason states negotiate some international agreements is to attempt to loosen the constraints of WTO rules.<sup>86</sup> Through these other agreements, they seek to provide signals to WTO judicial decision-makers.<sup>87</sup>

From a welfare perspective, is this current arrangement for dispute settlement of WTO and other international law efficient? Its efficiency

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83. See, e.g., Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1728–31 (1990). Also of note is William Eskridge and Philip Frickey's concept of "practical reasoning" in statutory interpretation, "eschew[ing] objectivist theories in favor of a mixture of inductive and deductive reasoning . . . seeking contextual justification . . ." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 n.3 (1990).

84. See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009); Shaffer, *supra* note 4, at 70; Trachtman, *supra* note 11.

85. See, e.g., FISH, *supra* note 45; Johnstone, *supra* note 45; Steinberg, *supra* note 45.

86. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010) (discussing the Biosafety Protocol and UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as examples).

87. *Id.*; see also Ginsburg, *supra* note 38, at 634 (discussing legislative signaling in the international context).

depends in part on the relative efficiency of the substance of WTO law compared to other international law. In economics, trade liberalization is viewed as economically efficient for all states, enhancing both national and global welfare, subject to the caveat that some powerful states can, in some circumstances, enhance their economic welfare through trade restrictions at other states' expense.<sup>88</sup>

Further, from a welfare perspective, if we assume states are acting rationally, and if we assume that international law is not biased due to the exercise of asymmetric power or subject to other strategic problems (two large assumptions), then we can infer that states have determined that it would increase efficiency to provide for stronger enforcement of WTO law, while implicitly determining that it would not be as valuable to provide for equally strong enforcement of other international law. Given the need to make strong assumptions here, such an inference of efficiency in a welfare sense rests on shaky ground. Stronger reasons exist to infer efficiency from the standpoint of maximizing the political welfare of government officials, in a public choice sense.<sup>89</sup> From the perspective of political welfare, constituencies interested in WTO rules have been able to elevate the importance of WTO rules among government priorities.

While it is clear that a limited mandate for the Appellate Body and panels' jurisdiction accentuates the phenomenon of "fragmentation" of international law, pursuant to which different types of international law are separated both at the stages of negotiation and judicial application, it is also possible that states would prefer different types of dispute settlement mechanisms for different types of international law (such as trade, environmental, and human rights law). Thus, the acceptance by states of this type of fragmentation could be viewed as an acceptance of an institutional choice to differentiate among types of international law in terms of the available institutional infrastructure. States may, for example, only agree to the terms of certain international agreements because judicial enforcement is weak, thus leaving interpretation of the meaning of such terms to non-judicial processes.

There are nonetheless welfare-oriented arguments for recognizing other international law in WTO dispute settlement in order to constrain trade

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88. See generally PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* (5th ed. 2000) (noting that states with terms of trade power are able to increase their own welfare by imposing tariffs on imports). Of course, not all WTO law embodies trade liberalization; some WTO law authorizes states to act illiberally.

89. See Warren F. Schwartz & Alan O. Sykes, *Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System*, 16 *INT'L REV. L. & ECON.* 27 (1996) (using public choice theory to explain aspects of WTO system); Alan O. Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, 16 *INT'L REV. L. & ECON.* 5 (1996); Alan O. Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 *U. CHI. L. REV.* 255 (1991).



liberalization. This choice can be understood from an “embedded liberalism” perspective that recognizes that in order to establish the political conditions for liberalism, it is necessary to engage in some measure of redistributive and other social regulation.<sup>90</sup> The embedded liberalism concept links considerations of welfare economics with other political considerations. Redistributive regulation is viewed as necessary to induce those who would otherwise be hurt by liberalization to accept liberalization that will increase aggregate social welfare, and thus legitimize the regime.

Finally, if WTO law always trumps other international law in WTO dispute settlement, this scenario raises issues of institutional choice from the perspective of participation. Those states and other actors participating in other international law regimes that do not benefit from automatic and binding dispute settlement are disfavored. Therefore, the de facto supremacy of WTO law would again call into question the legitimacy of establishing a de facto structural hierarchy through negotiations among trade officials, without extensive participation of officials responsible for other substantive areas.

In sum, the exclusion of the determination of rights and duties under other international law from the mandate of WTO dispute settlement can be understood as an implicit institutional decision (whether made by treaty design or through interpretive choice): a decision to leave other international law to the general institutional mechanism for application and enforcement of international law (or to other discrete mechanisms), while providing a special mechanism for application and enforcement of WTO law. This move may be viewed as an implicit elevation of WTO law above other international law — a type of “structural supremacy” — and it therefore raises questions regarding the legitimacy of establishing a de facto structural hierarchy of international law through negotiations among trade officials. It can thus be argued that if the WTO dispute settlement process declines to give effect to broadly accepted values embodied in other international law, the WTO itself will lose legitimacy.<sup>91</sup>

### C. *Textual Incorporation of Other International Law; Delegation to International Standard-Setting Bodies*

As discussed in Part II.B, the authors of the WTO treaties decided to delegate certain decision-making authority to external standard-setting bodies. However, the terms of this delegation allowed considerable room

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90. John Gerard Ruggie, *Embedded Liberalism and the Postwar Economic Regimes*, in CONSTRUCTING THE WORLD POLITY 62, 73 (1998) (stating that the essence of the embedded liberalism compromise is that “multilateralism [is] predicated upon domestic interventionism”).

91. See Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 386 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

for interpretation by panels and the Appellate Body. In the *EC–Sardines* case, the Appellate Body examined the effect within the WTO legal system of an international standard for labeling in connection with sardines.<sup>92</sup> The European Communities (EC) argued that the EC regulation was “based on” Codex Standard 94, as required by Article 2.4 of the TBT Agreement, because it adopted the portion of Codex Standard 94 that reserves the term “sardines” exclusively for *sardina pilchardus*.<sup>93</sup> It argued that this relationship satisfies the requirement for a “rational relationship” between the international standard and the technical regulation, as required by Article 2.4. The Appellate Body ruled against the EC, finding that the Codex standard could not be the “basis” for the EC regulation since the EC regulation and the Codex standard were contradictory.<sup>94</sup> This interpretation of the meaning of “basis” delineates the institutional relationship between the WTO and Codex Alimentarius. The Appellate Body agreed with the panel’s use of the earlier *EC–Hormones* decision, which had applied an analogous provision under the SPS Agreement.<sup>95</sup> In the *EC–Hormones* case, the Appellate Body found that, in order for an international standard to be “used ‘as a basis for’ a technical regulation” under Article 3.1 of the SPS Agreement, that standard must be “used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation.”<sup>96</sup> Incorporation by reference of other international treaties generally entails interesting interpretive problems regarding the meaning of these treaty provisions. Appellate Body interpretations of the Paris Convention and the Berne Convention have been subject to academic scrutiny and critique.<sup>97</sup>

These interpretive choices can be assessed according to whether they have been faithful to the intent of the drafters of these provisions

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92. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC–Hormones* Appellate Body Report]; Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 214, 243 WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC–Sardines* Appellate Body Report].

93. *EC–Sardines* Appellate Body Report, *supra* note 92, ¶ 241.

94. *Id.* ¶ 248.

95. *Id.* ¶ 242 (citing *EC–Hormones* Appellate Body Report, *supra* note 92, ¶ 166).

96. *EC–Sardines* Appellate Body Report, *supra* note 92, ¶ 243.

97. See, e.g., Graeme B. Dinwoodie & Rochelle C. Dreyfuss, *Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond*, 46 HOUS. L. REV. 1187, 1207–09 (2009) (criticizing WTO panel’s interpretation of the Berne Convention in Panel Report, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000)); Gail E. Evans, *Recent Developments in the Protection of Trademarks and Trade Names in the European Union: From Conflict to Coexistence?*, 97 TRADEMARK REP. 1008, 1021–22 (2007) (describing how the Appellate Body interpreted the Paris Convention in Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002)); Daniel Gervais, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 AM. J. INT’L L. 549, 549–50 (2009) (describing WTO panel’s interpretation of the Berne Convention in Panel Decision, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009)).

regarding the applications of rules produced outside the WTO. The use of these rules may be understood as adding to the welfare efficiency of these provisions, to the extent that the expertise brought to bear in the formulation of these rules helps to safeguard against the use of regulation for discriminatory, protectionist purposes. We discuss the role of expertise in more detail in Subpart D below. The Appellate Body also seems to have been careful to ensure that Members are not able to depart from these rules too widely, in keeping with the goal of minimizing protectionist use of technical standards. This seems to promote both welfare efficiency and political efficiency. To the extent that these rules are produced under circumstances of limited transparency, accountability, and legitimacy, however, the Appellate Body's applications of these provisions may raise issues of participation. Indeed, in the *EC–Sardines* case, the Appellate Body accepted that international product standards may include not only those adopted by consensus, but also those that are adopted based on majority voting.<sup>98</sup>

#### D. *Delegation to Experts Regarding Factual Issues*

In determining how to interpret textual language as applied to a specific factual setting, judicial bodies often seek expert advice. In the WTO context, they do so when deciding whether to defer broadly to national regulatory decisions or to subject them to stricter scrutiny, whether in terms of the substance of the claims or in terms of the domestic procedures used.

This form of delegation of institutional authority can be viewed as technocratic, or expert-based. In requesting experts' views and taking them into account, panels are engaging in a form of delegation, although this delegation is only a partial one, as the panels retain authority to determine how to make use of the experts' views. Nonetheless, to the extent that the experts shape the perspectives of the panels regarding factual contexts, they may wield considerable authority.<sup>99</sup>

In cases that raise environmental and health-related issues, WTO panels have typically called on experts to testify about these issues in order for the panels to weigh the factual evidence. Under Article 13.2 of the DSU, panels are permitted to establish "expert review groups."<sup>100</sup> This authority has not yet been used to create "expert review groups" per se,<sup>101</sup> but it has

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98. *EC–Sardines* Appellate Body Report, *supra* note 92, ¶¶ 222–27.

99. See, e.g., ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (forthcoming 2011) (manuscript at ch. 9) (on file with the Virginia Journal of International Law Association); Damian Chalmers, 'Food for Thought': *Reconciling European Risks and Traditional Ways of Life*, 66 *MOD. L. REV.* 532 (2003).

100. DSU, *supra* note 10.

101. See Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 *INT'L & COMP. L.Q.* 325

been used by panels to receive testimony from experts on an individual basis regarding complex scientific and other determinations. Panels have done so in eight cases involving environmental, food safety, and phytosanitary questions: *Australia–Salmon*, *EC–Asbestos* (initial panel and Article 21.5 panel), *Japan–Agricultural Products*, *Japan–Apples*, *EC–Biotech*, *EC–Hormones*, *United States–Continued Suspension* (a follow-up case to *EC–Hormones*), and *United States–Shrimp*. They have cited these experts' views in support of their decisions.<sup>102</sup>

For example, in *EC–Biotech*, the panel called on six scientific experts to testify, asking them detailed questions regarding the risks posed by particular genetically-modified agricultural products and whether the EU member state bans on such products were supported by risk assessments.<sup>103</sup> Similarly, the panel in *United States–Shrimp* used experts to examine environmental questions on which key legal issues turned.<sup>104</sup> The panel asked the parties for a list of individuals having expertise on matters of sea turtle conservation, and then selected five marine biologists from this list to report to it as individual experts.<sup>105</sup> The panel asked the experts detailed questions concerning the status of sea turtles in the complainants' waters, their migratory patterns, the relative effectiveness of the complainants' sea turtle conservation measures, the relation of shrimp trawling to sea turtle conservation, and the socio-economic conditions of

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(2002).

102. *United States–Continued Suspension* Appellate Body Report, *supra* note 65; *EC–Biotech* Panel Report, *supra* note 75; Panel Report, *Japan–Measures Affecting the Importation of Apples*, WT/DS245/R (July 15, 2003); Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC–Asbestos* Appellate Body Report]; Panel Report, *European Community–Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R (Sept. 18, 2000); Panel Report, *Japan–Measures Affecting Agricultural Products*, WT/DS76/R (Oct. 27, 1998); *United States–Shrimp I* Appellate Body Report, *supra* note 50; Panel Report, *Australia–Measures Affecting the Importation of Salmon*, WT/DS18/R (June 12, 1998); *EC–Hormones* Appellate Body Report, *supra* note 92; *see also* Sungjoon Cho, *Of the World Trade Court's Burden*, 20 EUR. J. INT'L L. 675, 680 (2009) (noting panel's reliance on experts in *EC–Hormones* decision); James Harrison, *Significant International Environmental Law Cases*, 19 J. ENVTL. L. 409, 413–14 (2007) (discussing panel's use of individual experts in *EC–Biotech* decision); David Winickoff et al., *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 YALE J. INT'L L. 81, 111 (2005) (“In prior cases under the SPS Agreement, the panels sought advice from experts in relevant sciences and risk-assessment fields to help guide their decisions.”).

103. Antonia Eliason, *Science Versus Law in WTO Jurisprudence: The (Mis)Interpretation of the Scientific Process and the (In)Sufficiency of Scientific Evidence in EC–Biotech*, 41 N.Y.U. J. INT'L L. & POL. 341, 382–84 (2009) (describing questions and answers of experts in *EC–Biotech*).

104. Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter *United States–Shrimp* Panel Report].

105. The expert group was created pursuant to Article 13.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, which authorizes panels to seek information from any relevant source, including by requesting an advisory report in writing from an expert review group. All five members were marine biologists and three of them (Scott Eckert and Jack Frazier from the United States and Hock Chark Lieu of Malaysia) were members of the Marine Turtle Specialist Network of the IUCN (International Union for the Conservation of Nature).

the shrimping industry.<sup>106</sup> In this way, WTO judicial bodies can try to take account of the trade, environmental, developmental, and other social interests and concerns at stake.

The use of such expertise in decision-making can be controversial. On the one hand, WTO panels can better check the reasoning of the regulating Member against expert opinion to assess whether its regulatory rationales pass muster. Yet, as shown in debates over risk regulation between rationalists (such as Cass Sunstein) and culturalists (such as Dan Kahan), expertise-based accountability mechanisms (focused on effectiveness) are in tension with those of democratic politics (focused on responsiveness).<sup>107</sup> In the context of multi-level governance, internal accountability mechanisms within national democracies are in tension with the external accountability mechanisms of WTO technocratic review through partial delegation of fact-finding to experts.<sup>108</sup>

WTO law broadly, and adjudication in particular, maintains a complex relationship with neo-classical economics. Some of the concepts used in WTO law, such as “market,” “like products,” “subsidization,” “injury,” and “price suppression,” have cognates in economics. However, these cognates may, at times, be false if the economic concept is not what was intended by the treaty language. Applying these terms thus raises delicate issues of interpretation. To the extent that it is accepted that the intent was to ascribe the meaning to a particular term as used in economics, and economists are requested to provide their analyses in this light, this choice again involves a partial delegation of decision-making to technical experts.

Parties to WTO disputes increasingly turn to economists for support in making the factual case for a WTO violation, and WTO panels increasingly cite the economists’ views in support of their decisions. For example, in cases assessing the existence of tax discrimination between competitive products, parties have supplied econometric data regarding

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106. Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, in *POWER IN GLOBAL GOVERNANCE* 130, 152 (Michael Barnett & Bud Duvall eds., 2005); see also John H. Knox, *The Judicial Resolution of Conflicts between Trade and the Environment*, 28 *HARV. ENVTL. L. REV.* 1, 45 & n.185 (2004).

107. Compare CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE*, 149–74 (2005) (advocating cost-benefit analysis), with Dan Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 *HARV. L. REV.* 1071, 1073 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR* (2005)) (“[T]he complexity of reconciling rational risk regulation with democratic decisionmaking”). See also ELIZABETH FISHER, *RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM* 26–34 (2006) (contrasting what she terms “rational-instrumental” and “deliberative-constitutive” administrative approaches to risk regulation).

108. Cf. Robert O. Keohane, *Global Governance and Democratic Accountability*, in *TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE* 130, 149 (David Held & Mathias Koenig-Archibugi eds., 2003) (describing how internal democracy does not assure external accountability). Grant and Keohane have categorized accountability mechanisms into seven types, which they term hierarchical, legal, market, public reputational, fiscal, supervisory, and peer. See Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 *AM. POL. SCI. REV.* 29, 35–36 (2005).

the cross-elasticity of demand of such products, which panels have cited in support of their findings.<sup>109</sup> Similarly, in the *United States–Cotton* case, the Appellate Body was required to review, among other matters, a finding by the Panel that U.S. cotton subsidies had caused “significant price suppression.”<sup>110</sup> The interpretation and application of the requirement that the U.S. subsidy “cause” “significant price suppression” required reliance on at least some economic analysis, as well as legal analysis. The question of whether “significant price suppression” exists is partially one of legal interpretation to determine the applicable measure that is challenged, as well as the meaning of the treaty provision, and partially one of assessment of facts regarding suppression of world prices, for which economic data is needed. The question of causation also requires both a legal standard of causation and the use of economic theory and methodology in the factual analysis. The panel did not engage in its own economic analysis in this case, nor did it state that it fully relied on economic analyses performed by the complainant’s experts, yet it did cite their economic evidence in support of its findings.<sup>111</sup>

Just as the hard sciences provide tools to determine whether there is a scientific basis for a sanitary measure, economics provides tools to determine the effects of subsidies on prices. Thus, where the Agreement on Subsidies and Countervailing Measures (SCM Agreement) calls for a determination by a panel of whether a subsidy has caused significant price suppression, a panel can use the information provided by economists, including expert testimony or reports, just as it has done with scientific expertise in disputes involving SPS and environmental issues.

Panels have sought and obtained economic information from the International Monetary Fund (IMF) regarding balance of payment issues, as specifically contemplated in the GATT.<sup>112</sup> The panels in *Dominican*

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109. See, e.g., Panel Report, *Chile–Taxes on Alcoholic Beverages*, ¶ 7.71, WT/DS87/R, (Feb. 15, 1999); Panel Report, *Korea–Taxes on Alcoholic Beverages*, ¶ 10.43, WT/DS75/R, WT/DS84/R (June 26, 1998); Panel Report, *Japan–Taxes on Alcoholic Beverages*, ¶ 6.32, WT/DS8/R, WT/DS10/R, WT/DS11/R (May 20, 1996).

110. Appellate Body Report, *United States–Subsidies on Upland Cotton*, WT/DS267/AB/R at 290 (Mar. 3, 2005); see also André Sapir & Joel P. Trachtman, *Subsidization, Price Suppression and Expertise: Causation and Precision in Upland Cotton*, 7 WORLD TRADE REV. 183 (2008).

111. Panel Report, *United States–Subsidies on Upland Cotton*, ¶¶ 7.1207–1209, WT/DS267/R (Sept. 8, 2004) (“[W]e observe that the simulations were prepared by experts, and explained to the Panel by experts. The outcomes of the simulations are consistent with the general proposition that subsidies bestowed by Member governments have the potential to distort production and trade and the elimination of subsidies would tend to reduce ‘artificial’ incentives for production in the subsidizing Member. This is one of the underlying rationales for the establishment of the subsidy disciplines in the *SCM Agreement*. . . . [W]e have taken the analyses in question into account where relevant to our analysis of the existence and nature of the subsidies in question, and their effects, under the relevant provisions of the *SCM Agreement*, and have attributed to them the evidentiary weight we deemed appropriate.”).

112. GATT, *supra* note 13, art. XV (“In all cases in which the CONTRACTING PARTIES are

*Republic–Cigarettes* and *India–Quantitative Restrictions*, for instance, used such information. In each case, the panels used the respective IMF position to support their decisions against the respondents.<sup>113</sup>

Panels have not (formally) consulted individual experts on economic issues, in contrast to their consultation of scientific experts on environmental and food safety issues. Economists are, however, part of the WTO secretariat and can assist panels informally (which in turn can raise concerns about the transparency of the judicial decision-making process). The determination of evidence invoking economic concepts, such as the causation of significant price suppression by competitive products, would seem amenable to a report from an expert review group comprised of economists with expertise in trade economics and econometrics. Article 13 of the DSU has been found to provide panels with broad flexibility to utilize experts, so it is notable that economic experts have not (formally) been used.<sup>114</sup> Article 24 of the SCM Agreement calls for the establishment of a “Permanent Group of Experts” to perform certain functions under that agreement, such as assisting panels with issues relating to prohibited subsidies.<sup>115</sup> However, given the limited mandate under the SCM Agreement for its permanent group of experts, one alternative is to utilize expert review groups under Article 13 of the DSU. Instead of choosing this option, panels have so far relied on the litigants to bring their own experts (or informally, on internal WTO secretariat members who are economists or have training in economics), and then determined which parties presented the better argument.<sup>116</sup> Yet, as Scott Brewer maintains, “A non[-]expert cannot independently and directly check complex theoretical propositions that do not have simple observational consequences . . . . Whatever checking the non[-]expert can

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called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund.”)

113. Panel Report, *Dominican Republic–Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 7.138, WT/DS302/R (Nov. 26, 2004) [hereinafter *Dominican Republic–Cigarettes* Panel Report]; Panel Report, *India–Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, ¶ 5.12, WT/DS90/R (Apr. 6, 1999).

114. See, e.g., Chad P. Bown, *The WTO Secretariat and the Role of Economics in Panels and Arbitrations*, in *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 391, 417–18 (Chad P. Bown & Joost Pauwelyn eds., 2010).

115. Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body’s Experience*, 26 *FORDHAM INT’L L.J.* 1505, 1532 & n.63 (2003); Pauwelyn, *supra* note 101, at 331 (“In cases involving complex economic matters, panels should, however, overcome their professional pride . . . and appoint economic experts.”). Economists do provide ex post analysis of all Appellate Body decisions, jointly authored with legal scholars. See *THE AMERICAN LAW INSTITUTE REPORTERS’ STUDIES ON WTO CASE LAW: LEGAL AND ECONOMIC ANALYSIS* (Henrik Horn & Petros C. Mavroidis eds., 2007).

116. See, e.g., Panel Report, *United States–Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1–3, Mar. 21, 2005 (as modified by Appellate Body Report, WT/DS267/AB/R, Mar. 3, 2005).

manage must rely on indirect devices like demeanor, credentials, and reputation.”<sup>117</sup>

Economists have sometimes assessed how WTO texts incorporate economic concepts that are congruent with economic welfare analysis.<sup>118</sup> Where such congruence exists, greater precision in the application of these concepts would improve economic welfare. The use of experts also could be viewed as enhancing overall political welfare if the economic concepts are consistently applied without favoring some Members over others. It can be argued that where the treaty framers expressed rights and obligations in terms of economic concepts, they implicitly called for an accurate use of those economic concepts. From the perspective of participation, since panels may take into account expert opinion either expressly or less transparently, the creation of expert review groups could increase the transparency of this process.

Yet, expertise is no guarantee against bias or ideology, and affected stakeholders will be concerned, in particular, if questions raising value judgments (such as economic development policy) are being delegated to unaccountable economic experts who help to justify in technocratic terms judicial decisions with political implications. There are, in short, important limits to the usefulness of expert methods. In particular, when diverse values must be balanced, economics cannot assist in the commensuration among them. Panels may use experts to justify their decisions from a technical perspective, but such deference to technical judgment will not necessarily avoid legitimacy challenges where particular social priorities are at stake. Stakeholders will raise questions about the participation characteristics or the legitimacy of assigning even partial decision-making to expert groups of economists and scientists. Experts' assessments of the underlying facts can nonetheless assist panels in making the ultimate institutional choices at stake, such as whether to defer to a national measure, engage in judicial balancing, turn to process-based review, or issue a clear bright-line rule against categories of measures, thus leaving ultimate outcomes to market processes.

#### *E. The Institutional Choice of Judicial Balancing*

WTO panels and the Appellate Body face particularly difficult institutional choices where WTO disputes raise conflicts between diverse values and social priorities. This situation is evident in cases involving Article XX of the GATT and its analogue for trade in services, Article

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117. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1604 (1998).

118. See the analyses prepared in connection with the American Law Institute project on Legal and Economic Principles of World Trade Law (2001–09) available at <http://tinyurl.com/3wpyfkh>.



XIV of the General Agreement on Trade and Services (GATS). In some cases, the Appellate Body has explicitly interpreted certain of these provisions as requiring a balancing approach. In others, it has appeared to back off of a full balancing approach by permitting the Member to choose its “level of protection” (such as a zero tolerance) and then asking if this level can be reached through a less trade-restrictive means of regulation (finding that nothing is as effective as an import ban to achieve it).

The Appellate Body most notably formulated and applied a judicial balancing approach in a case involving a requirement of the Republic of Korea that retailers make a choice of only selling Korean or foreign beef.<sup>119</sup> Korea’s alleged regulatory rationale was to ease monitoring of the labeling of the origin of beef sold in Korea to ensure compliance with regulations against deceptive marketing practices, as there was evidence that Korean retailers were selling lower-priced U.S. beef as Korean beef. The Appellate Body responded by applying a judicial balancing test involving (at least) three variables in determining whether the Korean measure was “necessary” to secure compliance with Korea’s anti-fraud regulations under its Unfair Competition Act for purpose of Article XX(d) of the GATT. The Appellate Body concluded:

In sum, determination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of *weighing and balancing* a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.<sup>120</sup>

It explicated each of these three listed variables with respect to the question of whether a Member’s regulatory measure is “necessary” for purposes of GATT Article XX, maintaining:

- “The more vital or important those common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed as an enforcement instrument”;<sup>121</sup>

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119. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea—Beef* Appellate Body Report]. See also *Dominican Republic—Cigarettes* Panel Report, *supra* note 113, ¶ 7.0 (affirming the “weighing and balancing” by the judicial body of these factors).

120. See *Korea—Beef* Appellate Body Report, *supra* note 119, ¶ 164 (emphasis added).

121. *Id.* ¶ 162.

- “The greater the contribution [to the realization of the end pursued], the more easily a measure might be considered to be ‘necessary’;<sup>122</sup> and
- “A measure with a relatively slight impact upon imported products might more easily be considered as ‘necessary’ than a measure with intense or broader restrictive effects.”<sup>123</sup>

After reiterating that Members have the right to determine for themselves the level of enforcement of their domestic laws, the Appellate Body “assume[d] that in effect Korea intended to *reduce considerably* the number of cases of fraud,” and not “*totally eliminate*[] fraud with respect to the origin of beef,” as it had contended.<sup>124</sup> It then found that Korea’s measure was not necessary because a less trade-restrictive alternative was reasonably available to achieve this aim, such as “devot[ing] more resources to its enforcement efforts.”<sup>125</sup>

Yet, the Appellate Body did not fully articulate how to conduct the balancing test, and, in particular, did not prescribe explicit cost-benefit analysis from a law-and-economics perspective. It appears that the balancing test prescribed is to proceed by a kind of gestalt, rather than by aggregating the value of costs and benefits. It was also unclear in *Korea–Beef* how this balancing test related to the traditional test, which asks whether an alternative measure that is less restrictive of trade is reasonably available to meet the Member’s policy goal.

In other cases, the Appellate Body, while consistently referring to the *Korea–Beef* balancing test, has avoided engaging in explicit judicial balancing by applying the least trade-restrictive alternative test after finding that the purpose of the regulatory measure was to reduce a given risk as much as possible. For example, in *EC–Asbestos*, the Appellate Body found that the level of protection chosen by France was “a ‘halt’ to the spread of *asbestos*-related health risks.”<sup>126</sup> The less trade-restrictive alternative proposed by Canada of “controlled use” of asbestos would not contribute to the realization of this goal to the same extent as would a “prohibition.”<sup>127</sup> In *United States–Gambling*, the Appellate Body confirmed that a “‘reasonably available’ alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.”<sup>128</sup> Likewise, in *Brazil–Tyres*, the

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122. *Id.* ¶ 163.

123. *Id.*

124. *Id.* ¶ 178.

125. *Id.* ¶ 180.

126. *EC–Asbestos* Appellate Body Report, *supra* note 102, ¶ 168.

127. *Id.* ¶¶ 174–75.

128. *United States–Gambling* Appellate Body Report, *supra* note 64, ¶ 308.

Appellate Body upheld the panel's finding that "Brazil's chosen level of protection is the reduction of the risks of waste tyre accumulation to the maximum extent possible," and found that other measures could not contribute to the achievement of this objective in an equivalent manner.<sup>129</sup>

It is not clear how the Appellate Body will reconcile the right of a Member to determine its chosen level of protection with the criterion in a balancing test of evaluating the importance of the value protected.<sup>130</sup> The Appellate Body attempted to do so partially in the *EC–Asbestos* case, where it referred to its decision in *Korea–Beef*.<sup>131</sup> There, the Appellate Body pointed out that the protection of human life from the risk of asbestos "is both vital and important in the highest degree," suggesting that, per the *Korea–Beef* balancing criteria, the more important the common interests or values pursued, the easier it would be to accept the national measure as necessary.<sup>132</sup> Moreover, the Appellate Body noted that, in determining whether another alternative method is reasonably available, it is appropriate to consider the extent to which the alternative measure "contributes to the realization of the end pursued."<sup>133</sup> This language suggests that there may be some cases in which it is appropriate to restrict the degree to which a state may expect to achieve its appropriate level of protection. If so, it arguably represents a significant departure from the conventional understanding of "reasonably available," which would consider the costs of the alternative regulation, but not the degree of its contribution to the end pursued.

In this line of cases, the Appellate Body can be viewed as arrogating to itself a great deal of authority to balance substantive concerns implicated by a trade restriction. In the cases that hold a Member's policy goals inviolate, in contrast, it can be viewed as deferring to a greater extent to the importing Member's policy goals and measures to achieve them. From an economic welfare perspective, insights from a full cost-benefit analysis may improve economic efficiency, leading to increased economic welfare. However, there are important arguments for a retreat from cost-benefit analysis and even from an imprecise balancing test, based on the difficulty

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129. Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶¶ 144, 156, WT/DS332/AB/R, (Dec. 3, 2007) [hereinafter *Brazil–Tyres* Appellate Body Report]. See also Chad P. Bown & Joel P. Trachtman, *Brazil–Measures Affecting Imports of Retreaded Tyres: A Balancing Act*, 8 *WORLD TRADE REV.* 85, 124 (2009).

130. See Gabrielle Marceau & Joel P. Trachtman, *TBT, SPS, and GATT: A Map of the WTO Law of Domestic Regulation*, 36 *J. WORLD TRADE* 811 (2002). Cf. Donald H. Regan, *The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 *WORLD TRADE REV.* 347 (2007) (arguing that the Appellate Body decided *EC–Asbestos*, *United States–Gambling*, and *Dominican Republic–Cigarettes* on the principle that Members get to choose their own level of protection).

131. *EC–Asbestos* Appellate Body Report, *supra* note 102, ¶ 172.

132. *Id.*

133. *Id.*

of commensuration between diverse values and concerns, as well as on the expertise of WTO tribunals for such a task.<sup>134</sup> To the extent that the legitimacy of the WTO Appellate Body would be challenged were it to engage in explicit balancing in such cases, this approach is not desirable from the perspective of the political welfare of the overall WTO system, and thus of the political welfare of the officials of individual Members.

From the perspective of participation, open-ended judicial balancing tests privilege the judicial process compared to determinations made by a political process. In contrast to either deference to national decision-making or to a bright line rule as applied in the GATT *United States–Tuna* case discussed next, judicial balancing creates greater uncertainty. This approach can thus be viewed as favoring those states that are best able to engage in full-scale litigation on a case-by-case basis. Large and wealthy states who are repeat players in WTO litigation are able to mobilize legal resources more cost-effectively than smaller and poorer ones. The dynamics of full-scale litigation can thus favor large and wealthy states and, indirectly, the constituents that they represent in these disputes.

Yet, in creating uncertainty, the Appellate Body may also open space for multilateral political negotiations in other fora, fostering the political institutional alternative discussed above. Through an in-depth examination of rival policy claims and their impacts, the Appellate Body and panel can help frame subsequent bilateral and multilateral negotiations between disputing parties. In other words, institutional choices should not be viewed as static, because institutional processes can dynamically interact.

#### F. *Delegation to Markets*

In a number of contexts, the meaning of critical WTO legal terms can be determined in light of market practice. In other cases, judicial interpreters can apply interpretive choices that directly allocate decisions to market processes. For example, in evaluating national measures under GATT Articles I, III, and XI, together with the exceptions of Article XX, we have seen how panels and the Appellate Body often review them in relation to alternative measures that are less restrictive of trade. Import bans can be particularly scrutinized because of the frequent availability of more market-friendly means to inform consumers of foreign environmental and other social impacts, such as product labeling. Product labeling, in particular, can inform consumption decisions (and, indirectly, foreign production decisions) in a less draconian manner. Taking such a labeling approach effectively shifts decision-making over the appropriate balance among trade, environmental, development, and other social goals

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

from a national political process to the market. The GATT *United States–Tuna* case took this route, accepting environmental labeling regimes as not in violation of the Article I MFN obligation of GATT.<sup>135</sup>

WTO judicial decision-makers can apply interpretive choices that delegate decision-making away from national political processes to markets. Arguably, the most famous example of this situation is WTO panels' handling of domestic regulatory measures based on production and process methods (PPMs) in the absence of multilaterally-agreed rules. The (in)famous *United States–Tuna* case and the initial WTO panel in the *United States–Shrimp* case took both involved U.S. regulatory restrictions based on fishing methods, a type of PPM.<sup>136</sup> These cases addressed U.S. regulatory bans on the import of products from countries that did not have a marine species conservation program comparable in effectiveness to the relevant U.S. regulatory program. Neither panel deferred to the U.S. national regulation that restricted the marketing of foreign products in the United States on account of the alleged lack of adequate regulation of the PPMs abroad.<sup>137</sup> The panel in *United States–Tuna* stated:

[I]f the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.<sup>138</sup>

Similarly, the initial WTO panel in *United States–Shrimp* found that, although the U.S. regulation was not discriminatory on its face, by “conditioning access to the U.S. market” on a change in a foreign government’s environmental regulatory policy, the U.S. measure “threatens the multilateral trading system.”<sup>139</sup> The panel’s broad ruling was based on

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135. *Tuna–Dolphin I* Panel Report, *supra* note 39, § 5.44.

136. Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 7.24–26, WT/DS58/R (May 15, 1998) (describing U.S. justification for restrictions); Panel Report, *United States–Restrictions on Imports of Tuna*, ¶ 5.24, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) (describing U.S. justification for restrictions).

137. Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 8.1, WT/DS58/R (May 15, 1998) (finding U.S. restrictions unjustified); Panel Report, *United States–Restrictions on Imports of Tuna*, ¶ 5.34, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) (finding U.S. restrictions unjustified).

138. *Id.* § 5.27.

139. *United States–Shrimp* Panel Report, *supra* note 104, ¶¶ 7.48, 7.51; *see id.* ¶¶ 7.44, 7.45, 7.51, 7.55, 7.60, 7.61 (repeating the assertion of a threat to the system nine times); *see also* Shaffer, *supra* note 106, 130–60.

the type of measure affecting trade, a PPM, and not on the measure's social purpose or the details of its implementation. The two panel decisions effectively maintained that PPM-based measures that did not affect products (as such) were in violation of GATT rules, so that foreign products using different PPMs could not be restricted. As a result, these products would effectively be in competition with each other, and consumers would decide between them based on advertising and (potentially) labeling regimes regarding the PPM.

This type of market-based model has many benefits from the perspective of participation in the decision-making process. A market-based decision-making mechanism can permit more individualized participation in determining the proper balance between trade, environmental, and other social goals. In this manner, markets can enhance democratic voice. Marketers can label their products in terms of social preferences. Consumers, informed through advertising campaigns, can choose which products to buy on the basis of how they are produced, such as "dolphin-safe" tuna or "GMO-free" foods. In choosing between products, consumers implicitly choose among alternative regulatory regimes for the production of particular products. Such a WTO approach could stimulate not only product competition, but also regulatory competition.<sup>140</sup> Different regulatory approaches would be in competition when consumers select which product to buy. In purchasing a product, one would effectively be voting for one regulatory system over another.

From a welfare perspective, such an interpretive approach to the handling of regulatory measures based on PPMs in the absence of multilateral agreements can foster greater commercial certainty, thereby facilitating cross-border trade, promoting development, and protecting a liberal international trading system. The market decision-making mechanism, however, is also subject to bias, resulting in skewed participation in the determination of the appropriate balance of the policy concerns. Markets are subject to information asymmetries, externalities, and collective action problems. Information costs would be high. The labels could be misleading, and even if the labels were accurate, many consumers would not take the time to review them. Some consumers, even if informed, might decide to buy the cheaper product and "free ride" on more socially-concerned purchasers. Other purchasers might refrain from buying a product that is produced in a particular way because they doubt that their purchasing decisions would be effective in light of other consumers' actions. The views of consumers who do not plan on consuming a particular product (however it is produced) would not be

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140. See INTERNATIONAL REGULATORY COMPETITION AND COORDINATION (William Bratton, Joseph McCahery, Sol Picciotto & Colin Scott eds., 1996); REGULATORY COMPETITION AND ECONOMIC INTEGRATION (Daniel Esty & Damien Geradin eds., 2000).

represented in the market process. Social activists thus fear that competition between socially-protective regulations and non-socially protective regulations would result in a “race to the bottom” toward less protective regulations.<sup>141</sup>

Other types of cases in which market or consumer preferences are critical are those that refer to market competition for a determination of the “likeness” of products.<sup>142</sup> The reference to competition as the determinant of “likeness” leaves little room for considering the types of regulatory distinctions that might not be made by the market. Indeed, the economic theory of regulation suggests that regulation would often be necessary precisely where the market fails to make important distinctions.<sup>143</sup> In these cases, reference to markets might suffer from deficiencies in welfare and political efficiency. While consumer preferences are incorporated in market decision-making, regulatory preferences might be seriously underweighted, diminishing political participation as well.

#### G. *Vertical (Re-)Allocation: Deference to States*

One interpretive choice that some commentators favor is for the WTO judicial body to show deference to a country implementing a trade restriction on social policy grounds in reflection of local values, thereby effectively allocating decision-making authority to a national political process. Some scholars contend that WTO rules should be interpreted in deference to the “societal values” of the country imposing the trade restriction.<sup>144</sup> Environmental activists and many legal scholars further maintain that WTO rules (and, in particular, GATT Articles III.4 and XX) should be interpreted to permit trade restrictions imposed on account of foreign production processes that are environmentally harmful, so long as the same ban is applied domestically.<sup>145</sup> For example, a WTO panel could hold that so long as a national regulatory purpose is facially valid, then the panel will look no further at the regulatory measure chosen, whether in terms of its impact on trade, its effectiveness, its proportionality, or

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141. See, e.g., Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961, 1965 (2007) (noting likelihood of “race to the bottom” in climate change regulation).

142. See *EC–Asbestos* Appellate Body Report, *supra* note 102; *Japan–Alcoholic Beverages* Appellate Body Report, *supra* note 49.

143. See Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491 (1981).

144. Philip Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658 (1996).

145. Daniel Bodansky, *What’s So Bad About Unilateral Actions to Protect the Environment?*, 11 EUR. J. INT’L L. 339 (2000); Robert Howse & Donald Regan, *The Product/Process Distinction — An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249 (2000).

otherwise. This choice was implicitly made by the Appellate Body in *Brazil–Tyres*.<sup>146</sup>

The issue of deference is intricately linked to the standard of review applied by panels. In general, the Appellate Body's approach to standards of review has eschewed special deference to states. Rather, in the *EC–Hormones* decision, the Appellate Body explained that the appropriate standard of review is that expressed in Article 11 of the DSU: an objective assessment of the facts.<sup>147</sup> Even where the drafters of the WTO treaty seem to have intended an especially deferential standard of review, under Article 17.6(ii) of the Anti-Dumping Agreement, the Appellate Body has not so far accorded extensive deference, as noted earlier. Nonetheless, in some cases, such as *United States–Continued Suspension of Obligations* in the *EC–Hormones* dispute, the Appellate Body has appeared to scold panels for being too intrusive in their review.<sup>148</sup> As the Appellate Body stated in that case, concerning an SPS measure, “the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.”<sup>149</sup>

The institutional choice of deference would entail particular institutional consequences in terms of social and political welfare, and the participation of affected stakeholders. Strong policy grounds sometimes exist for deferring to domestic regulatory choices given the remoteness of international institutional processes. Participation in democratic decision-making at the national level is of a higher quality than at the international level because of the closer relation between the citizen and the state, the consequent reduced costs of organization and participation, and the existence of a sense of a common identity and of communal cohesiveness — that is, of a *demos*. National and sub-national processes are better able to tailor regulatory measures to the demands and needs of local social and environmental contexts. They are also more likely to respond rapidly and

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146. *Brazil–Tyres* Appellate Body Report, *supra* note 129.

147. *EC–Hormones* Appellate Body Report, *supra* note 92, ¶¶ 115–17.

148. *United States–Continued Suspension* Appellate Body Report, *supra* note 65.

149. *Id.* ¶ 590; *see also* Appellate Body Report, *United States–Countervailing Duties on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, ¶¶ 182–90, WT/DS296/AB/R (June 27, 2005). In the *United States–DRAMs* case, the Appellate Body maintained, “[W]e are of the view that the ‘objective assessment’ to be made by a panel reviewing an investigating authority’s subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.” *Id.* ¶ 186. It concluded that “the Panel failed to apply the proper standard of review and, therefore, failed to comply with its obligations under Article 11 of the DSU,” because “the Panel went beyond its role as the reviewer of the investigating authority’s decision and, instead, conducted its own assessment, relying on its own judgment, of much of the evidence before the USDOC.” *Id.* ¶ 190.



flexibly to new developments. This approach applies a principle espoused in a variety of disciplines, from law to political science to institutional economics.<sup>150</sup>

Yet, national and sub-national political decision-making processes can be highly problematic from the perspectives of participation, accountability, and global social and political welfare. First, producer interests may be better represented than consumer interests on account of their higher per capita stakes in regulatory outcomes, which can give rise to economic protectionist legislation, reducing national as well as global social welfare.<sup>151</sup> Second, even where national and local procedures are relatively pluralistic — involving broad participation before administrative and political processes that are subjected to judicial review — they often do not take account of adverse impacts on foreigners. International law comes into play precisely where other states have concerns about how these domestic political choices affect them. If the WTO judicial process showed complete deference to national political processes, permitting them to ignore significant effects on foreign interests in a manner contrary to the obligations set forth in the WTO treaty, then accountability would suffer in a reciprocal sense: The affected foreign states' political processes, and the political process of international law, would be prevented from inducing states to take into account the foreign effects of their actions.

Members with large markets, such as the United States and European Union, are often favored by such a deferential approach, which is why developing countries tend to be wary of deference on social policy grounds.<sup>152</sup> This institutional choice can permit countries with large markets to use their market leverage to compel foreign regulatory change aligned with the large country's particular preferences. Were the Appellate Body to defer to national legislation and its administrative application, then it would effectively allocate decision-making over the appropriate balance of the trade and other regulatory concerns at stake to national political and administrative processes.

#### *H. Process-Based Review*

As a result, instead of simply deferring to a Member's policy goals or engaging in judicial balancing of substantive concerns, the Appellate Body

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150. See, e.g., Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (1969) (discussing the effectiveness of small-sized governmental units based on a number of factors, including the internalization of externalities); Oliver Williamson, *Hierarchical Control and Optimum Firm Size*, 75 J. POL. ECON. 123 (1967) (arguing that large organizations encounter the problem of "control loss" and that this loss may be a reason to reduce the scale of large organizations).

151. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141–48 (1965).

152. See Shaffer, *supra* note 67.

has sometimes reviewed national decision-making processes to attempt to ensure that they take into account the views of affected foreign parties. Since the creation of the GATT in 1949, Article X has provided for certain transparency requirements for the administration of trade regulations.<sup>153</sup> While this article was considered to be “subsidiary” to the substantive provisions of the GATT prior to the WTO, it has been increasingly enforced by WTO panels and the Appellate Body in recent years, as have its more detailed analogues in the GATS, TRIPS, SPS, and TBT agreements.<sup>154</sup>

The WTO Appellate Body has applied this process-based approach in a number of cases involving defenses based on social concerns. For example, in the *United States–Shrimp* case, “the Appellate Body returned the substantive issue to a lower vertical level of decision-making — that is, back to the U.S. Department of State, which was responsible for implementing the U.S. legislation — subject to certain procedural conditions.”<sup>155</sup> By reviewing the due process and transparency of the State Department’s implementing procedures, the Appellate Body attempted to enhance the representation of affected foreign parties and thereby counter the national biases of domestic legislative and administrative bodies.<sup>156</sup>

In this case, the Appellate Body faulted the United States for the national biases in its procedures, and effectively required the United States to create an administrative procedure pursuant to which foreign governments or traders have an opportunity to comment on U.S. regulatory decisions that affect them. The Appellate Body held that the application of the U.S. measure was “arbitrary” in that the certification process was not “transparent” or “predictable,” and did not provide any “formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it.”<sup>157</sup> The Appellate Body admonished the United States for failing to take “into consideration different conditions which may occur in the territories of . . . other Members,” and recommended that the Dispute Settlement Body request

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153. Padideh Ala'i, *From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance*, 11 J. INT'L ECON. L. 779, 779 (2008) (“The oldest transparency and good governance obligation of the WTO is Article X of [the] General Agreement on Tariffs and Trade (GATT).”); Debra P. Steger, *Introduction to the Mini-Symposium on Transparency in the WTO*, 11 J. INT'L ECON. L. 705, 710 (2008) (noting that art. X of the GATT, requiring transparency, has existed since 1947).

154. See Stewart & Sanchez, *supra* note 57, at 457–94 (citing *Argentina–Hides and Leather*; *Dominican Republic–Import and Sale of Cigarettes*; *United States–Customs Bond Directive*; *EC–Selected Customs Matters*; *Japan–Agricultural Products II*; *Argentina–Poultry Anti-Dumping Duties*; *Guatemala–Cement II*).

155. See Shaffer, *supra* note 106, at 153.

156. *Id.*

157. *United States–Shrimp I* Appellate Body Report, *supra* note 50, ¶¶ 180, 186.

that the United States ensure that its policies were appropriate for the local “conditions prevailing” within the complainant developing countries.<sup>158</sup>

Similarly, in the *EC–Preferences* case, the European Community’s lack of procedural transparency was the primary ground for the Appellate Body’s finding against the EC’s scheme.<sup>159</sup> The EC granted special tariff preferences to a list of twelve countries on the grounds that they undertook effective programs to combat illicit drug production and trafficking (the Drug Arrangements). In this case, however, the country beneficiaries were simply designated up front by the EC, subject to no defined review criteria. The Appellate Body faulted the EC’s Drug Arrangements for a series of procedural reasons, including (1) because they “provide[d] no mechanism under which additional beneficiaries may be added to the list of beneficiaries”; (2) because they did not “set out any clear prerequisites — or ‘objective criteria’ — that if met, would allow for other developing countries ‘that are similarly affected by the drug problem’ to be *included* as beneficiaries”; and (3) because they did not give any “indication as to how the beneficiaries . . . were chosen or what kind of considerations would or could be used to determine the effect of the ‘drug problem’ on a particular country.”<sup>160</sup>

In cases involving Members’ use of trade remedies against dumping and subsidies, panels and the Appellate Body likewise have sought refuge in procedural criticisms of national economic analyses, rather than engaging with the substantive determinations.<sup>161</sup> Panels, for example, have examined whether national authorities have created a record evidencing that they considered the required factors.<sup>162</sup> Were panels to use the institutional alternative of expert review groups, discussed above, they might feel more comfortable engaging in a full substantive review, but instead they often have turned to this process-based form of review.

Process-based review may seem desirable, because it is relatively less intrusive than substantive review and focuses directly on the issue of

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158. *Id.* ¶¶ 164–65, 177, 186–88.

159. See Gregory Shaffer & Yvonne Apea, *Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences: The Law and Politics of Rights*, 39 J. WORLD TRADE 977, 977 (2005).

160. Appellate Body Report, *European Communities–Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 182–89, WT/DS246/AB/R (Apr. 7, 2004).

161. See, e.g., Appellate Body Report, *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, (Nov. 10, 2003).

162. See, e.g., Panel Report, *Egypt–Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, ¶ 7.34, WT/DS211/R (Oct. 1, 2002); Appellate Body Report, *Thailand–Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R (Mar. 12, 2001); Appellate Body Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001); Panel Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (Oct. 30, 2000); Panel Report, *Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Jan. 28, 2000).

participation of domestic and foreign parties. However, process-based review also raises serious concerns, in particular, because processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome. Even if international case-by-case review were possible (which it is not), it would be difficult, if not impossible, for an international body to determine the extent to which a national agency actually takes account of foreign interests. The challenge remains that Members, particularly powerful ones, can thus go through the formal steps of due process without meaningfully considering the views of other affected parties. As a result, WTO panels and the Appellate Body may retain the interpretive alternatives of judicial balancing and the application of bright line rules.

#### CONCLUSION

This Article has provided a new framework for understanding and evaluating the treaty drafting and interpretive choices confronting WTO Members and judicial bodies, as part of dynamic processes of institutional interaction over time regarding the meaning and application of WTO texts. When Members define rules and standards, and WTO panels and the Appellate Body interpret them, they make institutional choices that structure and facilitate social decision-making. These choices are fruitfully evaluated in terms of which social decision-making process decides a policy issue, affecting the participation of stakeholders. This form of institutional analysis provides a proxy that helps us to evaluate the comparative distributive and efficiency consequences of treaty drafting and interpretive choices, both in social welfare and public choice terms, because institutional processes mediate the articulation of individual preferences.

The analytic framework of this Article permits us to assess the consequences of alternative treaty drafting and interpretive choices in comparative institutional choice terms. We have shown how these choices allocate authority among different social decision-making processes, which, in turn, interact over time. We have evaluated the consequences of these allocations both in participatory terms and in terms of the efficiency and distribution of economic and political welfare. First, these choices affect the degree of transparency, accountability, and legitimacy of social decision-making. Second, by deciding among such institutional alternatives as incorporation of international standards, judicial balancing, delegation to markets, national deference, and process-based review, these choices help determine which social decision-making process decides a particular policy issue in particular cases, thereby affecting the institutional mediation of individual preferences. Our framework affords a better understanding of

how WTO panels and the Appellate Body, in practice, have made alternative institutional choices. It also helps us to more effectively evaluate the comparative welfare and participatory implications at stake in these choices. Although we apply this framework to WTO treaty drafting and judicial interpretation, the framework can be usefully applied in describing and evaluating choices inherent in the creation and interpretation of any domestic or international legal text.