THE DEVELOPMENT OF WTO LAW IN LIGHT OF TRANSNATIONAL INFLUENCES: THE MERITS OF A CAUSAL APPROACH

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ABSTRACT

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The WTO is one piece in a complex network of international, regional and domestic legal systems and regulatory frameworks. The influences on the development of WTO law extend far beyond its own Members and institutions: domestic legal instruments have provided the inspiration for numerous WTO obligations while the rights and obligations under the covered agreements are frequently incorporated into the legal systems of the Membership. The WTO is home to numerous committees and working groups that also engage with other international bodies and their domestic counterparts. Transnational actors seek to take advantage of these networks, encouraging WTO law to develop in their favour. The interactions involved, however, are highly complex and unpredictable. By drawing on different models of causal explanation, it is possible to offer a perspective on the development of WTO law that accepts its role as part of a larger globalized process. Three different causal influences are identified: instrumental, systemic and constitutive. Together, they offer a prism through which to examine the development of WTO law as it responds to the behaviour of transnational actors, bridging gaps between international relations and law and, it is hoped, offering a convincing explanatory rationale for the way in which WTO law develops.

Word count: 96,060

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Table of Abbreviations

AD – Anti-dumping
ASR – Articles on State Responsibility
CGBA – Central Bank Gold Agreement
CVD – Countervailing duties
DARIO – Draft Articles on the Responsibility of International Organizations
DG – Directorate General
DoC – Department of Commerce
DSS – Dispute settlement system
DSU – Dispute Settlement Understanding
EC – European Communities
ECJ – European Court of Justice
EFSA – European Food Safety Authority
EU – European Union
GATS – General Agreement on Trade in Services
GATT – General Agreement on Tariffs and Trade
GMO – Genetically modified organism
ILC – International Law Commission
MFN – Most favoured nation
OMA – Orderly marketing arrangement
PTA – Preferential trade agreement
RTA – Regional trade agreement
SCM – Subsidies and countervailing measures
SPS – Sanitary and phytosanitary
TBT – Technical barriers to trade
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
TPA – Trade Promotion Authority
UN – United Nations
UNCTAD – United Nations Conference on Trade and Development
UNESCO – United Nations Educations, Scientific and Cultural Organization
UNGA – United Nations General Assembly
US – United States
USC – United States Code
USITC – United States International Trade Court
VCLT – Vienna Convention on the Law of Treaties
VER – Voluntary export restraint
WTO – World Trade Organization

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Introduction

WTO law has a fertile relationship with domestic and regional trade law: domestic legal instruments have provided the inspiration for numerous WTO obligations while the rights and obligations under the covered agreements[1] are frequently incorporated into the legal systems of the membership. The WTO and its Members attempt to regulate international trade through a range of institutions with legislative, judicial and executive characteristics at domestic, regional and international levels. As a consequence, WTO law is at the intersection between multiple jurisdictions and regulatory techniques. This thesis aims to understand how this nexus of interactions influences the development of WTO law and, in doing so, offer an explanation of why WTO law develops in the way that it does.

In approaching this task, this thesis makes two claims. As regards the first: it is no longer accurate to discuss the development of WTO law outside of other non-WTO legal influences. The WTO is part of a broad transnational network of international trade regulation and it cannot be studied in isolation. Such a claim is not particularly novel in of itself. It does, however, present a serious challenge: how to accept the complexity of the international trade regulation without losing the ability to provide convincing explanations of its development? The answer to this challenge is the basis of the second claim of this thesis: that a concept of causation provides a useful analytical framework to (i) understand and evaluate the range of different sources and influences involved in

[1] The 'covered agreements' are those agreements included in Appendix 1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994) LT/UR/A-2/DS/U/1 <http://docsonline.wto.org> (hereafter 'DSU')

international trade regulation, and (ii) provide a convincing narrative explanation for the way in which WTO law develops.

A. The First Claim: WTO Law as Part of a Global Process

If there is a single word that encapsulates the public perception of the WTO it is *globalization*.[2] Whether viewed in positive or negative terms, the increasing interdependence and interactions between peoples and States of the world is a hallmark of the end of the 20th and beginning of the 21st centuries.[3] The ease with which ideas, people and capital spread across the globe is one of the identifying features of globalization: the interconnectedness of social interactions, whether they be financial, political or personal.

Globalization not only refers to the ease with which people, capital, culture and ideas can interact across nations; but the legal systems that societies create can now also spread more easily across the globe.[4] The previously sharp distinction drawn between domestic law regulating one type of behaviour and international law regulating another is no longer accurate in many areas of the law.[5] Regional arrangements have broken down

[2] For two polemic outlines of the merits and disadvantages of globalization: J Bhagwati, *In Defense of Globalization* (OUP 2007), J Stiglitz, *Making Globalization Work* (Penguin 2007)

[3] Processes of increased global interaction and interdependence are not unique to this period though the technological advances (in telecommunications in particular) have extended its scope and depth beyond what was previously foreseeable. S Strange, *The Retreat of the State* (CUP 1996) 7

[4] D Rafael, *The New Global Law* (CUP 2010) 55ff

[5] Drawing a distinction between two separate spheres of behaviour and regulation (one domestic and the other international) was Sir Gerald Fitzmaurice's contribution to resolving the monism/dualism debate (known as the 'Fitzmaurice compromise'). G Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *Recueils des Cours* 92 (1957) 70-80

the hermetic seals between differing domestic legal systems.[6] Policymakers look to a network of interlocking rights and duties as they seek to prohibit some practices or to encourage certain types of behaviour over others.[7] Litigants cast their net wide, not stopping at the highest courts within a State but looking to the courts of other States[8] as well as regional and international courts and tribunals.

Academic literature has of course engaged with the developments in international law or international relations more generally and there exists a range of different approaches to the changing nature of international regulation. Chapter 1 takes one of these approaches, transnational legal process, and identifies the advantages that it offers to an examination of WTO law as part of a globalized process. These are four fold: the descriptive nature of the claim made by transnational legal process scholars avoids the potentially distracting normative claims made by others;[9] transnational legal process accepts that a wide range of transnational actors can influence the development of law; that these actors engage on multiple levels of regulation, often simultaneously; and transnational legal process can incorporate both the influence of law as a system on actors as well as the influence of law as a tool used by those actors. By accepting the influence of numerous actors, acting at numerous levels of governance in numerous

[6] The EU is a notable example of a regional agreement that has sought to minimize the barriers between legal systems of the Member States where they might restrict trade: e.g. the European Qualifications Framework that seeks to minimize restrictions to European employment policy by virtue of recognition of qualifications: Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning [2008] OJ C111/1.

[7] The principle of 'complementarity' under the Statute of Rome, for example, sets out a framework that encompasses domestic legal procedures in the first instance with an international criminal process in the second: Art 17 Rome Statute of the International Criminal Court (concluded 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[8] For example, *Sosa v Alvarez-Machain* 542 US 692 (2004). For more detail on such claims: n111 and accompanying text.

[9] That is, arguments that would seek to assert a claim over the relative merits of one normative system over another.

jurisdictions, we are, however, left with a complex web of interactions to try and understand.

B. The Second Claim: The Explanatory Merits of Causal Language

In order to resolve the difficulties with opening up the analysis of WTO law by considering a range of actors and legal influences, it is suggested that causal language offers a method for clarifying and explaining these interactions. The second half of Chapter 1 introduces the use of causal language as an explanatory tool, arguing that the principal role of causal language has always been explanatory: a way to make better sense of complex events around us.

Chapter 1 builds on models of causation in an Aristotelian tradition that rejects the application of a scientific method to examining the development of WTO law. The key insight taken from the Aristotelian tradition is the way in which causes can influence things in different ways. Thus, there are constraining causes that limit our actions (a legal prohibition, for example), pushing or pulling causes that function in a more direct fashion instructing certain types of behaviour (such as the conclusion of a treaty). Separately, there are causes that have constitutive influences without which the thing could not exist (the grant of legal personality to a corporation under domestic law could be one such example).

By accepting different types of causal influence, chapter 1 suggests a different approach to examining the development of WTO law. Rather than attempting to apply empirical methods to a social phenomenon in a positivist vein, the model suggested

accepts a wider range of causes that serve to divide legal influences into three categories: (1) the use of law as an instrument by transnational actors; (2) the influence of law as a system constraining or enabling the behaviour of actors; and (3) the constitutive role of law influencing the identities and interests of actors. These three types of causal influence draw together insights from different schools of thought within international relations and law: the benefit of the causal framework in this case is that it brings them together to provide a more comprehensive explanation.

C. The Consequences of these Claims: Processes of Value Contestation and Norm Export

Chapter 2 takes the insights from chapter 1 and applies them to the specifics of the WTO. What consequences does this causal approach have when used to examine the development of WTO law? How do these causal influences function and how can they be applied to the specific dynamic of international trade regulation?

In applying the three types of causal influence to the regulation of international trade, chapter 2 identifies two key processes that underpin the development of WTO law: value contestation and norm export. When investigating the constitutive influence of law on actors involved with the WTO, the importance of the values underpinning trade regulation and the debates over them become clear. These value contestations, in turn, encourage transnational actors to project their own value preferences onto others – the process of norm export – as they seek to use the law of the WTO and its institutions to ensure that others accept their own understanding of the values in question.

Transnational actors engage in a process of norm export, seeking to use the network of rights and duties regulating international trade to encourage others to accept their own understanding of values that underpin key issues in trade. They do this through a range of means, either by embedding norms within legal or institutional frameworks or by stimulating challenges between differing conceptions of the regulation in question. The remainder of Chapter 2 identifies where and how these acts might take place. The institutions of the WTO are examined, as are models of domestic systems that might shed light on the role of domestic and regional institutions in this regard.

D. The Case Studies and their Conclusions

Having set out the processes and motivations of transnational actors that guide the development of WTO law, two separate case studies are examined in chapters 3 and 4. In chapter 3, the development of safeguard measures is studied with a selection of disputes surrounding their use and proper interpretation being considered. The development of the regulation of safeguard measures is an interesting example as it offers perhaps the most obvious example of norm export available: the verbatim use of a statutory provision transposed onto a treaty. The consequences of this transposition have been unpredictable and varied, with parties frequently losing disputes over what they perceive as unfair or burdensome interpretations by the Appellate Body.

Chapter 4 examines certain issues in the development of the regulation of SPS measures at the WTO. SPS measures are highly contentious, not least because they go to the heart of the State's responsibility to its citizens: their protection. They provide an

interesting case study as the regulation of SPS measures develops not only in the more traditional forms (i.e. through legislative or treaty-based processes and judicial interpretation) but also through standard setting bodies within the WTO and without.

Both case studies offer an interpretation of the development of WTO law that revolves around the importance of processes of value contestation and norm export. The way in which the law has developed in SPS and safeguard measures, though different, shares some interesting characteristics. Of particular importance is the way in which debates over values inform the identities of the actors involved, and in turn influence the development of law.

The conclusion then brings out the principal insights, suggesting trends in the development of WTO law and possible avenues for further investigation. Four principal points of interest are outlined: (1) the inconsistent consequences of processes of norm export; (2) the importance of institutions that, once constituted, pursue their own objectives as well as those of their members; (3) the apparent trend that matches increased scrutiny of behaviour to a movement from the public to private spheres in international trade; and (4) the utility of multi-causal examinations of WTO law in the face of the increasing importance of the emerging economies.

Chapter 1: Approaching the Development of World Trade Organization Law in Light of Transnational Influences

Introduction

This chapter sets out the theoretical foundations of the thesis. In doing so, two claims are made: first, that the development of WTO law can only be understood by examining a range of legal influences from other relevant jurisdictions;[10] and second, that such an exercise is only possible with a clear causal framework that can make sense of such a bewildering area of influences.

Instead of attempting to create a detailed model of exactly how transnational actors[11] and legal influences from different jurisdictions interact in each possible instance, a conceptual framework is created from which the development of legal regimes in WTO law can be examined. A legal regime is defined as *a group of norms, rules and principles that are thematically or ideologically connected*. A regime can be understood broadly (e.g. international trade law) or narrowly (e.g. the regulation of anti-dumping measures). This has the advantage of taking thematic areas of law as the object of examination rather than discrete sets of obligations within a specific jurisdiction. While such divisions are important as a matter of positive law they can obscure analysis of WTO law in the context of globalized legal processes.

[10] The term 'jurisdiction' in this thesis is used to describe the totality of a body of law including the institutions involved in its creation, interpretation and enforcement.

[11] The term 'transnational actor' is a functional definition: an actor whose behaviour crosses national boundaries. These include: States, International Organizations, multinational enterprises, non-governmental organizations, and private individuals.

With regard to the second claim, that casual language is the most effective way to simplify this complex network of interactions between jurisdictions and provide a convincing explanation for the development of a legal regime, an approach is synthesized that builds on causal models used in philosophy and international relations. This causal framework marries three approaches to the way that law functions: as a result of processes within a legal system such as law-making or law-interpreting (the systemic approach[12]), as a result of its use by actors as an instrument for their own ends (the instrumental approach[13]), and as part of a constitutive relationship creating identities and interests amongst actors (the constitutive approach[14]).

The purpose of such a framework is to provide a convincing narrative explanation the development of WTO law. The next chapter applies this causal framework to the specifics of the legal institutions of the WTO, identifying key points of interest. The following two chapters then apply this framework to two different legal regimes based around the obligations under the covered agreements. In each instance it is argued that this causal approach offers a more convincing explanation for the development of the law in that area than the approaches taken so far.

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[12] This is a categorization common amongst international lawyers and critiqued by Andrew Lang and Joanne Scott in an exchange with Richard Steinberg: A Lang & J Scott 'The Hidden World of WTO Governance', 20 European Journal of International Law (2009) 575; R Steinberg 'The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott', 20 European Journal of International Law (2010) 1063; A Lang & J Scott 'The Hidden World of WTO Governance: A Rejoinder to Richard H. Steinberg', 20 European Journal of International Law (2010) 1073

[13] This is a common depiction of the nature of public international law particularly amongst realists and neo-realists within international relations scholarship. For seminal texts in this vein: H Morgenthau *Politics Among Nations* (5th ed., Knopf 1973), K Waltz *Theory of International Politics* (1st ed., McGraw-Hill 1979) and more recently, J Goldsmith & E Posner *The Limits of International Law* (OUP 2005)

[14] Most commonly depicted within constructivist literature. In the context of international trade, most notably applied by John G. Ruggie. For example, J Ruggie 'International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order,' 36 International Organization 2 (1982) 379

A. Expanding the Scope of Analysis: Examining WTO Law in a Transnational Context

This thesis offers an approach to examine the development of WTO law in light of transnational influences. It does this by focussing not only on the regulation of a specific topic at the WTO but rather by examining the legal regime[15] more broadly. The aim is to understand how the law in a certain area develops over time and in response to different legal influences. It is concerned, therefore, not with determining what the law *is* but instead, identifying how the law developed in the way that it did and why. The change in the law can be in its content, the way it is applied or the manner in which it is interpreted. This approach avoids focussing too narrowly on certain types of influence such as judicial decisions or treaty provisions alone. The aim of this thesis is to provide a conceptual framework that can be applied to an area of law to understand how it develops more clearly and to offer a convincing narrative of the law's development in that area.

In this section it is argued that instead of examining one jurisdiction alone, by expanding the analysis to view WTO law as part of a legal regime, the door is open to examine public international law and domestic law as well as the range of institutions that regulate them.

(i) Examining WTO Law in the Context of Legal Regimes: In Favour of a Multi-Jurisdictional Analysis of WTO Law

[15] 'A group of norms, rules and principles that are thematically or ideologically connected' above, p28

To understand the development of WTO law it is necessary to factor in the relevant regional and domestic legal influences in the legal regime being analysed. The primary concern here with legal regimes in international trade (although the potential application of this approach to other legal regimes is not ruled out). This section sets out why a multi-jurisdictional analysis is necessary to understand the development of WTO law.

In the area of international trade, the primary concern of trade agreements was once the reduction of tariffs and other border measures.[16] Today, the international trade regime encapsulated at the World Trade Organization is concerned with both tariff and non-tariff barriers to trade in goods and services as well as aspects of the regulation of intellectual property rights.[17] At the regional level, the number of trade agreements has increased dramatically over the past two decades, [18] deepening the level of trade liberalization between the Member States further than their obligations at the WTO.[19] For some States, their commitments at both the international and regional levels in the regulation of international trade have led to the creation of domestic mechanisms for the enforcement of international and regional trade-related rights and obligations.[20] States

[16] P Mavroidis *The General Agreement on Tariffs and Trade: A Commentary* (OUP 2009) 7-8

[17] General Agreement on Tariffs and Trade 1994 (15th April 1994) LT/UR/A-1A/1/GATT/1 <http://docsonline.wto.org> (incorporating the General Agreement on Tariffs and Trade 1947) hereafter 'GATT', General Agreement on Trade in Services (15th April 1994) LT/UR/A-1B/S/1 <http://docsonline.wto.org> hereafter 'GATS', Agreement on Trade-Related Aspects of Intellectual Property Rights (15th April 1994) LT/UR/A-1C/IP/1 <http://docsonline.wto.org> hereafter 'TRIPS Agreement', Agreement on Technical Barriers to Trade (15th April 1994) LT/UR/A-1A/10 <http://docsonline.wto.org> hereafter 'TBT Agreement', Agreement on the Application of Sanitary and Phytosanitary Measures (15th April 1994) LT/UR/A-1A/12 <http://docsonline.wto.org> hereafter 'SPS Agreement' *inter alia*.

[18] On the motivations behind concluding Regional Trade Agreements and their recent proliferation: L Bartels & F Ortino (eds.) *Regional Trade Agreements and the WTO Legal System* (OUP 2006)

[19] Provided for as an exception to the Most Favoured Nation principle under Art I(1) GATT and Art II(1) GATS: Art XXIV GATT, Art V and Art V *bis* GATS.

[20] For example: in the United States of America, the Uruguay Round Agreements Act of 1994 [Pub. L. 103-465, 108 Stat. 4809] hereafter 'URAA' and Uruguay Round Agreements Act Statement of Administrative Action, [H.Doc 103-316 (I), at 1032-33] hereafter 'SAA', set out the framework for the incorporation of obligations under the WTO covered agreements into US law; while in the European Union, Council

that do not have comparable domestic regimes are still required to maintain conformity of their domestic laws, regulations and administrative procedures with their obligations under the covered agreements,[21] as are International Organizations that are also members of the WTO such as the EU.

The regulation of international trade is particularly susceptible to a multi-jurisdictional analysis as the norms from which obligations stem at the international, regional and domestic levels are incorporated and transferred from one level to another.[22] Increasing numbers of obligations under WTO law require members to enact specific internal mechanisms to comply with those obligations.[23] The public international law obligations under the covered agreements are internalized as Members introduce new legislation or administrative procedures to comply with their WTO commitments. While the internal obligations are not international in nature (the distinction between public international law and domestic law remains), they are coterminous[24] with the WTO obligation. Conversely, the use of internal provisions in new WTO provisions has a

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Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports [2009] OJ L84/1 sets out the generally applicable rules in line with obligations under the WTO covered agreements. Both US and EU law is supplemented with further specific provisions for other aspects of obligations under the WTO (e.g. calculating anti-dumping margins etc.)

[21] Art XVI(4) Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) LT/UR/A/2 <http://docsonline.wto.org> hereafter 'WTO Agreement', Art 26 Vienna Convention on Consular Relations (concluded 24 April 1963, entered into force 19 March 1967) 596 UNTS 261, hereafter 'VCLT'

[22] The phenomenon of multi-sourced equivalent norms: T Broude & Y Shany (eds.) *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011)

[23] E.g., Art X GATT, Art III GATS and Art 63 TRIPS all require the publication of laws and regulations that may impact the trade in those areas, while under the SPS Agreement (Annex B, 3) and TBT Agreement (Art 10), members are also required to set up 'enquiry points' for traders.

[24] 'Coterminous' is used to describe those rights and duties that Members have incorporated into their own legal systems to comply with the covered agreements. These may be incorporations by reference to the covered agreements themselves, verbatim repetition of the relevant provisions of the covered agreements in a domestic legal instrument or alternatively may be worded differently but held to be compliant (by the Member) with their obligations under the covered agreements. While they constitute separate legal obligations (domestic and not international), their substance is such that they *necessarily* imply consequences for the Member at the WTO level where they are not WTO compliant. Parallels can be drawn with the concept of 'Multi-Sourced Equivalent Norms' developed in T Broude & Y Shany (eds.) *Multi-Sourced Equivalent Norms in International Law* (Hart 2011)

similar effect, blurring the usefulness of maintaining the distinction between WTO law and other relevant systems of law in the final analysis. There are areas of activity that will be subject to numerous overlapping jurisdictions; health regulations enacting by member States of the European Union is a clear example where domestic law, EU law and WTO law are all relevant.[25] Though as a matter of positive law the obligations can be separated (and are by judicial or quasi-judicial bodies) the process of 'judicial dialogue'[26] whereby the judiciaries of different jurisdictions engage with each other's decisions or acts is well documented, even where the judicial bodies do not explicitly make reference to the other jurisdiction in question.[27]

The nature of trade regulation in the global economy requires a broader approach to understand its development. Rather than examining only legal rules and principles under the covered agreements or the domestic law of States as a matter of their own law, we must examine the different levels of *interactions* between different jurisdictions. Gregory Shaffer explains this clearly in the context of privacy standards in the EU and US. He states:

> [S]ingle jurisdictional analysis fails to account for the dynamics of regulatory change in a globalizing economy. What happens in one jurisdiction can affect not only the playing field in other jurisdictions, but also the players' perceptions of their stakes… We live in a world where it is

[25] Though the relationship between potential overlapping domestic and EU obligations is in theory settled from Case 6/64 *Costa v ENEL* [1964] ECR 585 through to Declaration No 17 concerning primacy, annexed to the Lisbon Treaty [2010] OJ C83/344, in practice the situation is potentially more complicated (c.f., s18 European Union Act 2011 and *Brunner v The European Union Treaty*, Case 2134/92, 1 *Common Market Law Review* 57 (1994))

[26] For example, A Tzanakopoulos 'Judicial Dialogue in Multi-level Governance: The Impact of the Solange Argument' in O Fauchald & A Nollkaemper (eds.) *The Practice of International and National Courts and the (De-)fragmentation of International Law* (Hart Publishing 2012)

[27] M Bronckers 'From 'Direct Effect' to 'Muted Dialogue': Recent Developments in the European Courts' Case Law on the WTO and Beyond', 11 Journal of International Economic Law 4 (2008) 885

> less and less accurate to think solely in terms of national regulation and national institutions. In one sense, the EU Directive is an exogenous force in internal U.S. conflicts over the regulation of privacy protection, shifting the stakes of U.S. political and economic actors. On the other hand, it is misleading simply to segregate the foreign from the domestic, the external from the internal. In importing and exporting goods and services, countries can also import standards and procedures. In a globalizing economy characterized by high numbers of transactions, widely dispersed stakes, and competing national, regional, and transnational jurisdictional authorities, the allocation of decision-making among alternative institutions (be they markets, legislatures, or courts) at alternative levels of social organization (be they sub-states, states, regions, or international regimes) becomes even more complex.[28]

The complexity Shaffer refers to is the focus of the second claim made in this chapter: causal language offers the best explanatory tool to make sense of the complex web of interactions between domestic, regional and international levels of regulation in the international trade system and understand how the law develops in a specific legal regime. It will be shown how causal language is concerned primarily with 'explanation', a focus that is eminently useful in understanding this complex relationship.[29]

The remainder of this section supports the claim that we should examine public international law and domestic law in tandem when trying to understand the development

[28] G Shaffer 'Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards', 25 Yale Journal of International Law (2000) 1, 38
[29] p47ff

of a legal regime.[30] This thesis does not aim to set out a fully functioning model of how domestic law and public international law at the WTO relate to each other at a *formal* level (i.e. as a matter of positive law): it does not make a normative case for the primacy of one system over another nor does it suggest rules for conflict avoidance or resolution where an inconsistency appears (if we accept that such an inconsistency can exist).[31] Instead some of the key approaches to examining domestic and international law simultaneously are reviewed in an attempt to conceptualize the development of law in thematic rather than systemic terms. It will be argued that transnational legal process is the most useful analytical approach as it focuses on how law develops across different levels of regulation as a descriptive statement avoiding normative claims.

(ii) The Key Characteristics of Transnational Legal Process

The desire to break down the barriers between domestic legal systems and public international law is not new. Phillip Jessup coined the term 'transnational law' in 1956[32]

[30] The obligations under regional agreements a form of public international law as they are concluded in accordance with public international law and derive their legitimacy from that system. See, ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN4/L682, paras. 46-222. See also, *Ahmadou Sadio Diallo* (*Republic Of Guinea v Democratic Republic Of The Congo*) *(Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* (Judgment) [2012], Declaration of Judge Greenwood: 'International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law and each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.' At para. 8.

[31] Important though these issues are: the vast body of literature arising from decisions concerning conflicting supremacy claims in public international law is a testament to this. For example: Case C-402/05 P *Kadi & Al Barakaat International Foundation v Council, Commission & United Kingdom* (2008) ECR I-6351; *Behrami and Behrami v France, Saramati v France, Germany and Norway*, App Nos 71412/01 & 78166/01, Grand Chamber, Decision, 2 May 2007; *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31, 12 December 2007

[32] P Jessup *Transnational Law* (Yale University Press 1956) 2: 'I shall use, instead of "international law", the term "transnational law" to include all law which regulates actions or events that transcend national

while Myers McDougal proposed understanding law as a global social process, founding the 'New Haven School' in the 1960s.[33] Recently, a number of approaches have become particularly influential: the 'Transnational Legal Process' work of the '"New" New Haven School' (in particular, Harold Koh),[34] and the 'Global Administrative Law' project at New York University under Benedict Kingsbury and others are two examples.[35] Others still approach the shifts in governance and law in the international community through a lens of 'constitutionalism.'[36] The literature in these different approaches is vast and the views posited divergent. Some tend toward a unifying theory of the 'fragmented' international legal order while others encourage the continuing development of a 'heterarchical' relationship between discrete legal orders or systems.[37] Where these theories or schools coincide is their desire to describe (and in some cases argue for) a world-view that accepts the interdependence and globalization of politics, trade and law as its starting point.

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frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.'

[33] M McDougal & Associates, *Studies in World Public Order* (Yale University Press 1960) 10-11: 'Systems of public order are embedded in a larger context of world events which is the entire process of the globe. We speak of "process" because there is an interaction, or "social" because living beings are the active participants, of "world" because the expanding circles of interaction among men ultimately reach the remotest inhabitants of the globe.'

[34] H Koh 'Transnational Legal Process', 75 Nebraska Law Review (1996) 181. See also, Symposium in Yale Journal of International Law (2007). Other notable work in the 'law as process' approach is: R Higgins *Problems and Process: International Law and How We Use It* (Clarendon Press 1996), R Higgins 'Policy Considerations and the International Judicial Process', 17 International and Comparative Law Quarterly (1968) 58

[35] B Kingsbury et al, 'The Emergence of Global Administrative Law', 68 Law and Contemporary Problems (2005), B Kingsbury 'The Concept of "Law" in Global Administrative Law', 20 European Journal of International Law 1 (2009) 23

[36] M Kumm 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 European Journal of International Law (2004) 907; E.U., Petersmann 'The WTO Constitution and Human Rights', 3 Journal of International Economic Law 1 (2000) 19; P Allott 'The Concept of International Law', 10 European Journal of International Law (1999) 31; D Cass 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as an Engine of Constitutional Development in International Trade', 12 European Journal of International Law (2001) 1, 39

[37] N Krisch *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010)

What is transnational law and what do we mean by transnational legal process? More importantly, what advantage does transnational legal process offer to understanding the development of areas of legal regulation in international trade? There is no settled theory of transnational legal process or an accepted list of definitions for the terminology used.[38] Instead, it is an approach to understand the way law functions and develops in a globalized world. The broad ideas and arguments from transnational law and transnational legal process will be developed, separating them from other conclusions that are sometimes drawn in this area about the nature of transnational law (for example, the creation of a new type of 'transnational law'[39]).

Jessup's original definition of transnational law was simply any law that regulated cross-border activity.[40] Essentially an amalgam of public and private law, domestic and international law: transnational law is whatever law might apply to a cross-border situation or activity regardless of its source. Harold Koh expands on Jessup's definition. He argues:

> Perhaps the best operational definition of transnational law, using computer-age imagery, is: (1) law that is "downloaded" from international to domestic law: for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm

[38] For an examination of different approaches to transnational law: C Scott '"Transnational Law" as a Proto-Concept: Three Conceptions', 10 German Law Journal 7 (2009) 859

[39] It should be noted that not all of Koh's conclusions are accepted, most notably that a new type of law, *transnational law,* has come into existence (also called 'transnational legal substance' – H Koh 'The Globalization of Freedom', 26 Yale Journal of International Law (2001) 305, H Koh 'Why Transnational Law Matters', 24 Pennsylvania State International Law Review (2005-2006) 745). The current divisions between jurisdictions and the legal rights and duties therein are maintained as a useful and accurate depiction of the *legal* realities of the international trading regime. Indeed, maintaining a legal pluralist view of the international system supports the core tenets of a transnational view: that actors are not limited to the systems in which they are subjects but rather engage in different levels of governance and regulation in order to pursue their objectives.

[40] P Jessup *Transnational Law* supra n32

> against disappearance, now recognized as domestic law in most municipal systems; (2) law that is "uploaded, then downloaded": for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process of law in Western legal systems, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world; and (3) law that is borrowed or "horizontally transplanted" from one national system to another: for example, the "unclean hands" doctrine, which migrated from the British law of equity to many other legal systems.

This description of transnational law resonates with the development of international trade law. Some members of the WTO 'download' their obligations under the covered agreements into their own law by virtue of incorporation.[41] In the case of some States this follows from having 'uploaded' their own domestic law into certain covered agreements in the first place.[42] This is particularly the case with the US and the GATT but also to a lesser extent certain EU Member States, Canada and Australia.[43] There are also incidents

[41] For example, Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports [2009] OJ L84/1

[42] For example, provisions of the Agreement on Safeguards (15th April 1994) LT/UR/A-1A/8 <http://docsonline.wto.org>, hereafter 'Agreement on Safeguards', which are based on US legislation (s201-202 of the Trade Act 1974 Trade Act 1974 [Pub L 93-618, 88 Stat 1978]). See chapter 3 (p167ff) for a fuller discussion.

[43] The prevalence of developed 'Western' States is not an accident. With the exception of Japan, the GATT and later the WTO has, until the 21st century been disproportionally influenced by Western States. This does not necessitate a connection between 'transnational' and 'Western', however, as it is possible to factor the influence of emerging economies into a transnational model as suggested by Onuma in his 2010 Hague Lecture: 'This transcivilizational perspective can supplement and rectify the two prevalent perspectives in the twentieth century [international and transnational] by paying more attention to non-State-centric, non-modernistic or non-West-centric aspects of human ideas and activities which could

of 'horizontal transplants' as certain practices are either implicitly or explicitly incorporated into the legal systems of the Member States bypassing the WTO. An example of this is the practice of states in relation to the conclusion of preferential trade agreements that may or may not be in compliance with Art XXIV GATT.[44]

Koh's operational account of transnational law provides a conceptual tool to consider the interactions between ideologically or thematically connected legal norms, irrespective of whether their source is domestic or international. The focus on the movement of legal norms across jurisdictions rather than an examination of a broader 'global' legal regime is of particular use. Without making supremacy claims, it focuses on the fluid and dynamic processes of legal creation and development across different jurisdictions. This is one of the key advantages of transnational legal process: notably its acceptance of a web of interacting rights, duties and principles at the domestic and international levels that can be manipulated by interested actors. It is argued here that the actors involved in transnational legal process offers another advantage when examining the development of WTO law. The next section argues that while States are still the primary actors in public international law and the WTO, they are not the only actors and a genuinely convincing account of the development of WTO law must accept the roles played by others.

(iii) The Actors Engaged in Transnational Legal Processes

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have an important bearing on international law.' Y Onuma 'A Transcivilizational Perspective on International Law', *Recueil des Cours* 342 (2010) 95

[44] See discussions in L Bartels & F Ortino (eds.) *Regional Trade Agreements and the WTO Legal System* (OUP 2006)

States are not the only relevant actors within the development of a legal regime. The role of transnational actors other than States engaging in networks within International Organizations such as the WTO is central to this thesis.[45] At the domestic or regional level, non-State transnational actors can have a key role and engage directly with the development of areas of law. However, as a matter of public international law, certain key activities such as the conclusion of treaties or raising claims in international dispute settlement systems are still the primary domain of States or, increasingly, International Organizations.[46] As a matter of law, the State enjoys full legal personality[47] though as a matter of fact, the State can be understood as 'a representative institution constantly subject to capture and recapture, construction and reconstruction by coalitions of social actors.'[48]

The distinction between the normative claim and the descriptive claim is relevant: while it is important to examine the role of non-State actors, at the international level, this is often at its most pertinent where they act through the legal personality of the State.[49] This is not State-centrism but rather an acceptance of the legal realities of current public international law. Transnational legal process as used here is a descriptive and analytical tool, not a normative claim. Alexander Wendt supports such an approach, stating:

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[45] Discussed in further detail in chapter 2 (p81ff)

[46] In the case of the International Court of Justice, exclusively that of states: Art 34, Statute of the International Court of Justice (concluded 26 June 1945, entered into force 24 October 1945) 39 AJIL Supp. 215, hereafter 'Statute of the ICJ'

[47] I Brownlie *Principles of Public International Law* (7th ed. OUP 2008) 69

[48] A Moravcsik 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 International Organization 4 (1997) 513, 518

[49] International investment law is an unusual exception to this where many bilateral investment treaties provide for investor-State arbitration. See, R Dolzer & C Schreuer *Principles of International Investment Law* (OUP 2008) 214ff

> It should be emphasized that "state-centrism" in this sense does not preclude the possibility that non-state actors, whether domestic or transnational, have important even decisive, effects on the frequency and/or manner in which states engage in organized violence. "State-centrism" does not mean that the causal chain… stops with states, or even that states are the "most important" links in that chain, whatever that might mean. Particularly with the spread of liberalism in the twentieth century this is clearly not the case, since liberal states are heavily constrained by non-state actors in both civil society and the economy. The point is merely that states are still the primary medium through which the effects of other actors on the regulation of violence are channelled into the world system. It may be that non-state actors are becoming more important than states as initiators of change, but system change ultimately happens *through* states. In that sense states still are at the center of the international system, and as such it makes no more sense to criticize a theory or international politics as "state-centric" than it does to criticize a theory of forests for being "tree-centric."[50]

The role of non-State transnational actors is particularly important in the WTO context as the institutional structures of the WTO serve as a nexus for actors to stimulate developments in the WTO system as well as the legal systems of the WTO's membership (for example, the committees or technical assistance programmes). It has been pointed out that it is an unfortunate side-effect of early economic theories is that people view States as 'traders' at all, when with few exceptions private economic actors trade, not

[50] A Wendt, *Social Theory of International Politics* (CUP 1999) 9

their States.[51] However, the behaviour of individuals is still often under the aegis of the State, at times acting through its legal personality or where not, such as in the case of lobby groups, acting through some form of legal framework (weak though it may be).[52]

Besides private actors, the institutions of the WTO itself constitute separate actors as well as forums. Just as the State is both actor and forum, the dispute settlement system (for example) offers a space for transnational actors to engage with each other but is also home to panels and the Appellate Body, themselves important actors in their own right. In privileging the State and International Organizations as principal actors, the structure of public international law encourages transnational actors to create and work through the bodies of States and International Organizations. In this way, while transnational actors come in a wide range of forms, at the international level they often act 'as' or 'through' the institutions they engage with.

The ability of transnational actors to act through different institutions can create confusion: when does the institution the actor engages through (such as a State) constitute a separate transnational actor? The most single defining feature of transnational actors examined here is that they identify as that actor. Actors commonly hold numerous separate identities (individual and collective): an individual person can be that person but also a member of a family, region, nation, religious denomination and

[51] M Trebilcock & R Howse *The Regulation of International Trade* (3rd ed. Routledge 2007) 3-4: 'An unfortunate semantic legacy of Ricardo's demonstration of the gains from international trade, perpetuated in the terminology of much subsequent trade literature and debate is that in international trade countries are trading with each other. This, of course, is rarely the case. As in purely domestic exchanges, private economic actors (albeit located in different countries) are trading with each other.'

[52] For example, in the US, the Lobbying Disclosure Act 1995 [Pub L 104-65, 109 Stat. 691], as amended by the Honest Leadership and Open Governance Act 2007 [Pub L 110-81, 121 Stat. 735], which requires lobbyists to register with the Clerk of the House of Representatives and Secretary of the Senate. See also the EU's largely voluntary (at this stage) European Transparency Initiative: Communication from the Commission 'A Framework for Relations with Interest Representatives (Register and Code of Conduct)', Brussels 27/5/2008, COM (2008) 323 Final

political affiliation.[53] Transnational actors engage across these groups, some times as a part of an interest group, at others as part of an institution. While the State is preeminent in public international law and is given considerable focus, accepting the influence of other transnational actors requires them to be factored into the analysis of how law develops at the WTO.[54]

(iv) The Advantages and Limitations of a Transnational Approach

Given the wide range of choices available, why use transnational legal process as a model? There are three advantages to such an approach. Transnational legal process accepts: different levels of legal rights, duties and principles in an examination of the development of a legal regime; the role of actors in stimulating the development of a legal regime; and the systemic influences of legal rights, duties and principles on the behaviour of actors.

The first advantage of transnational legal process has been discussed above: the acceptance of different levels of legal regulation in a globalized economic system as necessary to understanding the process of creating, applying and interpreting law at the WTO. This does not put forward a model for the *structure* of the international legal system; while the structure of the international legal system is important, this thesis is primarily concerned with the dynamic process of change in the law. In that regard, transnational legal process provides a better fit as it too focuses on themes in regulation

[53] It will be argued below that the identity of an actor is, in part, constituted through the legal environment in which they exist: Chapter 1(C)(iii) (p70ff)

[54] This adds to the complexity of such an analysis, the resolution for which is the use of causal language. This is examined below: Chapter 1(B) (p47ff)

(such as measures to protect human health or regulate the appropriate use of subsidies) rather than looking at a single jurisdiction as the source of the regulation itself.

The second advantage of transnational legal process is the central role that transnational actors play in the development of a legal regime. Transnational legal process examines the process of change in law-making, law-applying and law-interpreting at international and domestic levels by focussing on the role of transnational actors as they stimulate interactions across jurisdictions. They may initiate proceedings before domestic and international courts, or lobby for legislative or administrative outcomes at the domestic and international levels. For Koh, how transnational law is used and by whom is central to his understanding of transnational legal process:

> Transnational legal process describes the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize rules of transnational law.[55]

The behaviour of transnational actors is what defines the process of creating, interpreting and applying transnational law. This is an image that some, particularly in the realist tradition, find compelling: actors use the law to get what they want.[56]

While actors may use the law to encourage certain outcomes this does not always work: the law itself has an influence. The internal conflicts between the values, norms,

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[55] H Koh 'Transnational Legal Process' n34, 183-184

[56] Koh's work on 'internalization' and his connections with compliance of international obligations falls outside of this thesis. It is possible to separate his theories on the development of transnational law and his arguments connecting this process with a theory explaining compliance with international obligations by States and agents of the State.

rules and principles within a legal regime can produce results that some actors might not anticipate. The objective of those that apply or interpret the law may influence the outcomes expected,[57] as may the structural biases of the regime.[58] Gregory Shaffer and others have expressed this circularity of influences through the concept of 'recursivity.' Recursivity refers to the circular influence of law on actors and actors on law.[59] This is a model that is not fixed at a single point in time but describes continual cycles of change and influence from one jurisdiction to another. It depicts cycles of legal influence and change that are continually active at domestic and international levels between two poles: 'law in practice' on the one side and 'law on the books' on the other.[60]

Recursivity encourages viewing legal change as a 'two-way street' rather than the influence of one legal instrument or legal system on another. The advantage of recursivity is its inclusiveness in determining what the triggers or influences of change may be. Rather than focussing solely on actors (though they play a key role), recursivity also takes into account the constituting role of legal concepts, structural biases and the importance of power relationships, as well as the form of the legal obligation *per se* (whether it is a soft law instrument, treaty provision or custom) and the attendant consequences of that form.[61] This is particularly important at the WTO where increasing attention is being given to the influence of committees, working groups and trade policy

[57] Examples of this can be found in the legal regulation of both safeguard measures (chapter 3, p167ff) and SPS measures (chapter 4, p242ff)

[58] M Koskenniemi 'The Politics of International Law – 20 Years Later', 20 European Journal of International Law 1 (2009) 7, 9ff

[59] 'a multidirectional, diachronic process of legal change.' G Shaffer 'Transnational Legal Process and State Change: Opportunities and Constraints', University of Minnesota Law School Legal Studies Research Paper Series, Research Paper No. 10-28 <http://ssrn.com/abstract=1612401> (accessed 1 October 2012) 16

[60] T Halliday & B Carruthers 'The Recursivity of Law: Global Norm Making and National Law Making in the Globalization of Corporate Insolvency Regimes', 112 American Journal of Sociology 4 (2007) 1135, 1146

[61] Ibid 1142-3

review mechanisms on the development of law at the WTO, expanding the scope of analysis from the covered agreements and the reports of the DSB alone.[62]

The key benefits of transnational legal process as a conceptual approach to understand the development of legal regimes have been briefly examined here. While there is no single definition of transnational legal process, certain qualities that provide a useful starting point for a conceptual model have been identified: transnational legal process is open to both domestic and international influences on the development of a legal regime; it is a fluid and dynamic model that views the development of law as influenced by actors using the law for their benefit; and understands the recursive process of law as a system and the constituting influence of legal concepts.

There are still problems with transnational legal process as understood or interpreted here, however. The first is that it is a deeply complicated and complex model. Not only are we incorporating domestic and international legal influences but are also accepting that these influences are both actor-driven and systemically influenced. The most common attempts to resolve these difficulties have been to apply social-scientific methods and positivist models.[63] However, as discussed below the scientific inclination is counter-productive: examining and explaining the development of law is not a scientific

[62] Examined in more detail in chapter 2 (p81ff)

[63] For example: A Guzman *How International Law Works: A Rational Choice Theory* (OUP 2008); M Pollack & G Shaffer *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (OUP 2009); W Schwartz & A Sykes 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 Journal of Legal Studies (2002) 179. N.B, positivism here is used to refer not to legal positivism (a theory of determining the validity of legal rules) but to positivism in the philosophy of science: broadly speaking, 'those approaches that (1) believe in a "scientific method" that is applicable across sciences, (2) assume naturalism, (3) assume empiricism, (4) believe in value-neutrality of scientific method and (5) emphasise the importance of instrumental (predictive) knowledge', M Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (CUP 2008) 61-62

process but a discursive one. There are profound limitations with transposing the methodology of science to the examination of legal developments.[64]

To resolve this, the transnational legal process is interpreted with causal language. In section B it is argued that the purpose of causal language is to make sense of the complexities of the world and the situations that arise within it, a purpose eminently suited to a model that uses transnational legal process.

B. Using Causal Language to Understand the Development of a Legal Regime

The previous section argued that transnational legal process offered a useful starting point for examining how legal regimes develop (particularly in the context of international trade at the WTO). A consequence of such an approach, however, is that it presents a bewildering array of interlocking and interweaving legal rights and duties, as well as the objectives of a series of transnational actors. This is where causal language helps the most. The first advantage is that causal language is concerned with giving explanations of the world. To talk of causes is intrinsically linked to talk of why something happened and how it happened. In systems characterized by interdependence and high complexity, causal language is indispensible in attempting to make sense of the world.[65]

[64] Notes 75-77 and accompanying text.
[65] See Susan Marks' examination of the use of 'root causes' in analyzing human rights abuses: S Marks, 'Human Rights and Root Causes', 74 Modern Law Review 1 (2011) 57

The second advantage is that the approach to causation that will be used in this thesis is a holistic approach that accepts a variety of different types of cause that cause things in different ways. By accepting different types of cause that can cause things in different ways, we can distinguish the different types of influences from a range of sources thereby making an explanation of the development of a legal regime clearer. Specifically developed in section C, a causal framework can marry the role of law as a system, the role of law as an instrument to further actors' ends and the role of law as a constitutive force that creates and influences identities and objectives.

(i) The Use of Causal Language as an Explanatory Tool

Causal language is concerned with making sense of the world. More specifically, it is concerned with helping us make sense of a complex world and events that, at first sight, may appear beyond our comprehension. When we say that X happens because of Y, we are telling a story: it is a narrative explanation that connects a cause with an effect.

In the Aristotelian tradition, a causal discussion is routed in an attempt to understand the world. Aristotle argued:

> 'men do not think they know a thing till they have grasped the "why" of it (*which is to grasp its primary cause*).'[66]

From an Aristotelian perspective, to understand the development of a legal regime requires having a clear approach to the causes involved in such a development. Why does a State alter its domestic law on the marketing of certain goods in the face of a panel or

[66] Aristotle, *Physics II (3)* in J Barnes (ed.) *Complete Works of Aristotle Volume 1: Revised Oxford Translation* (Princeton University Press 1984) 332. Emphasis added.

Appellate Body decision?[67] Why do committees at the WTO alter their behaviour, at times in unexpected ways?[68] These sorts of questions cannot be tackled unless we have a clear idea of what caused these situations. By looking at the world in causal terms we can make better sense of it.

More recently, Hidemi Suganami has championed the importance of causal language in creating convincing narratives of social, legal and historical events.[69] While there are a host of approaches to the examination of causal relationships in the social sciences,[70] the work of Hidemi Suganami is particularly helpful in focussing on examining causal relationships as a tool to render a situation or event intelligible.[71] Just as Aristotle stated that the purpose of understanding causes was a method for understanding 'why,' so Suganami examines causation as a narrative tool: one which helps us understand the world by explaining the connections between events and results.[72]

Where Suganami digresses from an Aristotelian approach is his refusal to engage with the 'real' cause of something. Suganami's approach is ontologically flat, accepting the premise that it is not possible to understand the genuine cause of something. Instead,

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[67] For example, the sale of certain beef products in Korea: *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body (10 January 2001) WT/DS161/AB/R and WT/DS169/AB/R, 5

[68] For example, the inability of the Committee on Regional Trade Agreements ('CRTA') to produce a report on the Art XXIV consistency of any RTA since its creation in February 1996

[69] Though he is certainly not the first: for a comprehensive account of historical explanation as a narrative exercise see, W.B Gallie, *Philosophy and the Historical Understanding* (Chatto & Windus 1964)

[70] M Kurki *Causation in International Relations* (CUP 2008) outlining the general strands of theory that conceptualise cause and effect within the social sciences (and indeed before their conception). International law scholarship has avoided many of these debates, largely by asking different questions and removing itself from areas that it perceives to be 'political.' See, for example, M Koskenniemi 'The Fate of Public International Law: Between Technique and Politics', Modern Law Review (2007) 1: 'Compared with the sophisticated techniques of domestic law, international law seemed primitive, abstract and above all political, too political.'

[71] H Suganami 'Agents, Structures, Narratives', European Journal of International Relations (1999) 365, 372

[72] In doing so, rejecting empirical models of causation: M Kurki, *Causation in International Relations* n70, 168-170

he views causes as a way to make sense of a result. Thus, for Suganami there are no 'true' causes but instead only those that offer convincing narratives.[73] While his scepticism of 'true' causes is not accepted here, the motivations behind his push for a narrative perspective are: Suganami's position on the narrative purpose of causal language can be seen as part of his rejection of more 'scientific' methodologies used in the social sciences that are increasingly encompassing law as part of the discipline.[74]

The narrative approach seeded in Aristotle's work and cultivated by Suganami, serves to avoid the overly restrictive empirical approach followed in much of the social sciences, influenced, in particular, by the writings of David Hume.[75] The tradition of empiricism flowing from Hume's work is ill suited to dealing with the complexities of the development of legal regimes that straddle the international, regional and national.[76] While Hume's approach has had a profound influence on the understanding of cause and there are considerable advantages to an empirical approach in the sciences, it is less suited to the interactions that take place both in the international legal system and under its influence at the national level. This is because the Humean approach to causation focuses on the importance of examining 'observables' (those things which can be viewed, studied and, most importantly, measured) and the requirement of 'regularity determinism.'[77] The regularity requirement demands the possibility of a repetition of

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[73] H Suganami, *On the Causes of War* (OUP 1996) and H Suganami 'Agents, Structures, Narratives' n71, 370, M Kurki, *Causation in International Relations* n70, 159

[74] See n63 and accompanying text

[75] In this context, most importantly: D Hume *An Inquiry Concerning Human Understanding*, (C Hendel, ed. Liberal Arts Press 1955) and D Hume, *A Treatise of Human Nature* (L Selby-Bigg, ed. Clarendon Press 1975)

[76] The term 'Humean tradition' is used as elements of Hume's work indicate that he was a causal sceptic, accepting that the connection between cause and effect was psychological rather than actual. D Hume *A Treatise of Human Nature* n75, 170-173. For a detailed examination, M Kurki, *Causation in International Relations* n70, 37

[77] D Hume *A Treatise of Human Nature* n75, 130 & M Kurk, *Causation in International Relations* n70, 58

conditions producing the same result. In a scientific context with quantifiable and excludable variables this is the *sine qua non* of the scientific method. However, within the context of the development of legal regimes, this is particularly inappropriate; legal regimes are part of a complex system within which observables are not clear or empirically quantifiable and where 'regularity' is difficult to conceptualize (and more difficult to provide) given changing facts and circumstances to each incident of legal interaction or change.[78]

Further, the types of facts that relate to the functioning of legal processes, such as interpretative approaches, differ to the types of facts found in scientific enquiry: legal interpretation can be influenced by observation (e.g. theories or opinions of the interpreter) whereas the nature of objectively knowable facts within science cannot. In short, types of legal process prioritize epistemology over ontology. This presents serious problems for the application of a scientific method in the context of legal decision-making.

Instead, the narrative approach allows this thesis to use a more appropriate method: an interpretative methodology that accepts the importance of socio-historical and legal influences on the relationship between jurisdictions and the behaviour of States and other transnational actors. In rejecting scientific approaches to understanding international phenomena, Hedley Bull supported such a mode of analysis, describing it as:

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[78] Quentin Skinner shares similar concerns within the philosophy of history, as a positivist social-scientific approach 'assumes a necessary uniformity of relationship between antecedents and event, and so ignores the conditional form of many of the explanations given even in the natural sciences.' Q Skinner, 'The Limits of Historical Explanations', XLI The Journal of the Royal Institute of Philosophy 157 (1966) 199, 200

> the approach to theorizing that derives from philosophy, history, and law, and that is characterized above all by explicit reliance upon the exercise of judgment and by the assumptions that if we confine our-selves to strict standards of verification and proof there is very little of significance that can be said about international relations[79]

In the context of legal discourse where subjective textual analysis is commonplace, this broad methodological approach to causation is more helpful than a strict scientific approach to causal models.

The next section questions how we can conceptualize law as a cause and how we can distinguish between different types of causes and effects within the development of a legal regime. This is done by synthesising elements of the Aristotelian approach to causation and the more recent work by Milja Kurki. While Kurki's focus is in the field of international relations, it is suggested that the innovative elements she introduces can be adapted to create a causal framework for examining the development of legal regimes.

(ii) Understanding the Role of Law in Causal Terms

What does it mean to say that law is the cause of something? Can law be an autonomous cause of anything, or must it be contingent upon another influence? These questions go to the heart of how we understand the development of a legal regime. To say, for example, that a relationship exists between the law within two separate jurisdictions implies that there are effects felt in one area of law which originate in another (i.e. the result of a

[79] H Bull, 'International Theory: The Case for a Classical Approach', 18 World Politics 3 (1966) 361-377

cause). The concept of cause underpins much legal analysis and yet there has been little engagement in understanding the concept of cause within the relationship between bodies of law.[80] While we do not necessarily refer to the terms 'cause' or 'effect' they are at the heart of the examination of law.[81]

In the case of the law of different jurisdictions influencing each other, certain conceptual issues must be overcome. It is common to visualize the influence of one legal, obligation or principle on another in terms of the interaction of two rule-sets.[82] To say that legal obligations at the WTO law influence domestic law creates a broad selection of potential causes. This can be problematic as for each effect there are many different causes, each causing the effect in a different way.[83] Put another way, *how* does law cause something and what is its consequence?

For example, in the case of a legal obligation at the WTO influencing domestic law (which is to say causing an effect on domestic law) there are numerous causes, each different in its effect. The binding nature of the WTO Agreement is a cause of the influence on domestic law as States adapt their internal law to bring it into conformity with their international obligation. However, more specifically, is it the wording of Art

[80] It should be noted that this chapter is concerned with causes and effects within the world of social facts ('factual causation') and not causation as a way of determining legal responsibility ('legal causation') or issues related to supremacy claims made by all legal systems i.e. 'a claimed authority to regulate the operation of other normative systems applying to the same subject-community, and the inability to accept any claim to supremacy over the same community made by another legal system', J Dickson, 'How Many Legal Systems?: Some Puzzles Regarding the Identity Conditions of, and Relations Between, Legal Systems in the European Union', Oxford Legal Studies Research Paper No.40/2008, 18 citing: J Raz, *Practical Reason and Norms* (2nd ed. Princeton University Press 1990) 151-2; J Raz *The Authority of Law* (Clarendon Press 1979) 118-119; and J Finnis *Natural Law and Natural Rights* (Clarendon Press 1980) 148-9 & 267

[81] Some studies do engage with the language of causation though fail to identify what is meant by 'cause' in the context used, for example, S Marks, 'Human Rights and Root Causes', 74 Modern Law Review 1 (2011) 57.

[82] The concerns of the case-law referred to above, n31

[83] Aristotle, *Metaphysics* (J Warrington, trans. & ed. Everyman's Library 1966) 4

XVI:4 WTO Agreement,[84] the general obligation of *pacta sunt servanda* as codified by Art 26 VCLT, or rather the original accession to the WTO by a State which caused the change in its domestic law?[85] Perhaps the influence of the dispute settlement system within the WTO system is an element, or a number of these influences at the same time. We might equally say that the transfer of information between representatives at the WTO level influences the development of the domestic law as representatives return to their home States and develop or apply WTO related legal provisions.[86] Creating a framework for distinguishing causes and how these causes effect the law is necessary to clarify this complex range of possible causes and their effects. We need to be able to distinguish between types of cause and what their influences are. The Aristotelian approach to causation is useful in this context as it permits a range of causes with different sources and effects.

The causal approach used in this thesis has two core elements: the first, as discussed above, is its focus on the explanatory uses of narratives created by causal language which is of particular use where there are a range of complex interactions between jurisdictions and amongst transnational actors. The second element of this causal approach is its creation of a typology of different types of causes with different types of influence (effect). This builds on Aristotle's key insight in the examination of causation: the acceptance of a range of different types of cause that cause things in different ways. This is different to approaches that explicitly or implicitly are empirical in nature, rooted

[84] 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'

[85] Accessions are governed by Art XII WTO Agreement and the specific accession agreement between the candidate member and the WTO

[86] The role of committees in the WTO institutional structure is examined in chapter 2 (p81ff)

in the Humean tradition of observables and a 'mechanistic'[87] view of causes and effects where causes are understood in terms of 'pushing and/or pulling.' Furthermore, Aristotle's causes not only cause things in different ways but also influence each other: for example, the man that walks to be healthy is healthy because he walks. His desire to cause good health makes him walk, while his good health is a cause of his ability to walk when he wishes.[88]

Aristotle's own example is that of a bronze statue is illustrative. First, the bronze is a cause of the statue, as it is an 'intrinsic feature from which something is produced.' Second, the idea of what the statue is to be is a cause of it (the idea of it which exists defining its nature). Third, the sculptor who creates the statue from the bronze is a cause of it as the 'primary principle of change or stasis.' The last type of cause is the 'cause as end', which is the purpose of the thing; in the case of the statue this might be the desire to place it in a church or its role as an ornament in the market place.[89]

It has been said that the four types of cause are too broad for the term 'cause' in English; a cause for Aristotle must be necessary though it need not be sufficient, whereas in English for something to be a cause of something else it must be both necessary and sufficient.[90] Sir David Ross cautions against translating the Greek term *αἴτιον* as cause 'for the several *αἴτια* are not causes in the sense of furnishing complete explanations of natural processes. It is only the union of them all that furnishes a complete explanation, and severally they are merely necessary conditions of natural processes.'[91]

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[87] Also called a 'billiard balls' or 'Newtonian' approach to causation.
[88] Aristotle, *Metaphysics* (J Warrington, trans. & ed. Everyman's Library 1966) 4
[89] In Aristotelian terminology these are the material, formal, efficient and final causes respectively (Aristotle, *Metaphysics* ibid)
[90] D Ross, *Aristotle* (6th ed. Routledge 1995) 75
[91] D Ross, *Aristotle Physics* (OUP 1936) 35-36

This critique could serve to pair down Aristotle's categories that may be too broad for any useful application in legal analysis. However, the debates within legal philosophy on the definition of legal causation have rested on either sufficiency *or* necessity.[92] The idea that a cause must be both necessary and sufficient for a resulting effect to occur cannot be correct. This is particularly the case when the subject of the study (as in the case of influences between jurisdictions) is a fluid and complex system with a vast number of variables and no meaningful baseline from which to work from as a control. Such a strict interpretation of 'cause' would undermine any meaningful examination of the development of legal regimes in international trade by restricting those influences or events that we might call a cause. Most importantly, Ross' critique has weight when we seek to determine *the* cause of something, not *a* cause. In light of the narrative importance attributed to the approach taken in this thesis the greater the number of causes that can be attributed to an event the more convincing the explanation will be. In strict terms, however, such a narrow interpretation would undermine the advantages offered by an Aristotelian framework.

A related though separate problem with an Aristotelian approach in the way suggested is the potential multiplicity of causes. An examination what Aristotle views as causes can lead to an important question; for Aristotle, what does not qualify as a cause? One way to resolve the problem with such a broad definition of cause has been to create a hierarchy within Aristotle's four causes. For Thomas Aquinas, the purpose of something is promoted as the most important cause, thus placing the role of God at the apex of all

[92] The NESS approach ('necessary element of a set of conditions jointly sufficient for the result') does not require the cause to be both fully necessary and sufficient but that instead it is necessary and contributes toward sufficiency with other factors. See, H.L.A Hart & T Honoré, *Causation in the Law* (2nd ed. Clarendon Press 1985)

manner of understanding cause.[93] Another option is the approach of the early empiricists, stressing the role of an act or action (the sculptor himself, or act of sculpting) as the preeminent cause.[94] The prioritization of types of cause is one way of narrowing Aristotle's casual categories, however, it is not the only one. Once again, when we return to the role of narratives and the purpose of causal language as creating convincing stories, this permits a range of factors to be considered always with the limitation that they still contribute to a believable narrative. Focussing on a narrative approach does not mean that 'anything goes.' Indeed, Suganami argues:

> This [a narrative approach], however, does not mean that any representation is just as acceptable as any other. While there is nothing in the objective world that tells us to represent it in any particular way, there is still room for intersubjective agreement as to the relative merits of one type of (normatively embedded) depiction compared to another.[95]

If we accept this non-empirical, narrative understanding of causation, we still have to understand how to place law within it. Might we consider law a 'mechanistic process' (to use Suganami's terminology) or the instrument of specific actors? This question can be reformulated: is law a cause (i.e. part of the mechanistic process of the functioning of the international legal order), or is law an instrument used by specific actors? The role of law does not appear to conveniently fit into either of these categories. Legal systems do not function like clockwork, mechanistically progressing and producing results irrespective

[93] T Aquinas, *Summa Theologiae* (B Davies & B Leftow eds. CUP 2006) 24-27. More traditionally, Aquinas also built on Aristotle's position that the first efficient cause must always be the divine.
[94] Most notably Hume but also Descartes who viewed this as preferable to viewing objects as having 'little souls', in D Clarke, *Descartes: A Biography* (CUP 2006) 246
[95] H Suganami 'Agents, Structures, Narratives', European Journal of International Relations (1999) 365, 380

of any other form of influence. Nor is the law a simple instrument, to be used by an actor without any other variable influencing its development. The tension between these two approaches to the causal nature of law is an important one as each approach has its uses.[96] Furthermore, as discussed above,[97] one of the advantages of transnational legal process is its desire to reconcile the influence of both transnational actors on the development of a legal regime and the role of law itself as a systemic influence.

In determining how to understand law as a 'cause' in the development of a legal regime, the first conceptual exercise is to view law as being part of, broadly speaking, two different approaches. The first is to examine the role of law as an autonomous cause in the development of a legal regime, while the second is to use an actor as the cause who uses law to create some sort of effect within a specific body of law. The first approach ('law as cause') is the more common within legal writing for a multitude of reasons, not least the desire not to stray into areas that are more commonly dealt with in International Relations scholarship (i.e. individuals' or groups of individuals' behaviour within a State determining or influencing that State's behaviour).[98] Furthermore, legal theory on causation has been focussed more keenly on the concept of cause as a way to attribute responsibility for harm, a distinct and more specific approach to cause than that sought for here.[99]

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[96] The tension between 'actor/action' and 'structure/system' as a cause is, in many ways, a reformulation of Koskenniemi's power-based v rule-based understandings of legal argumentation: is international law a body of rules or the behaviour of powerful actors? See generally M Koskenniemi, *From Apology to Utopia* (CUP 2005)

[97] n60 and accompanying text

[98] The distaste for engaging with the 'political', M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' n.70

[99] For example, H.L.A Hart & T Honoré *Causation in the Law* n92, L Green 'The Causal Relation Issue in Negligence Law' Michigan Law Review, 60 (1962) 543, G Calabresi 'Concerning Cause and the Law of Torts' University of Chicago Law Review 43 (1975) 69

While the 'law as cause' approach is valuable, it also limited. It is only one half of the picture, excluding the important role of human action (whether through individuals or groups) on the development of law. It is necessary to include within the analysis an examination of the actors that may use the law to effect change in a legal regime. In this sense, the different approaches are not separate but instead complimentary.[100]

It is necessary to focus on the role of transnational actors such as States and International Organizations as a key factor in the causal relationship alongside the recognized role of law. This approach both helps to identify types of cause of change in a legal regime but also the type of influence the cause has. Suganami's approach to causation does not permit us to examine causes in a complimentary manner but instead as distinct categories. Furthermore, his approach still suffers from dependence on making no 'real' claim about the world or how it functions. Instead, it is the work of Milja Kurki that allows a synthesis of 'law as cause' and 'actor as cause' approaches while at the same time keeping Aristotle's broad categories for understanding causation that is so useful in the context of the complex relationship between WTO law and transnational influences from a range of jurisdictions and actors.

The division into the different types of cause is useful as this typology of causes serves to distinguish between different types of cause and how they cause things. We can thus marry the advantages of transnational legal process with the explanatory merits of causal language. The result is the typology presented in the following sections. Here the three types of causes in the development of a legal regime are set out: the role of law as a

[100] This approach is closer to the Aristotelian understanding of causation, where a single event has multiple causes which vary in their intensity and moment of influence

system, the use of law as an instrument, and the place of law as a creator of identities and interests.

C. Causes of Change in a Legal Regime: A Typology of Causes and their Interactions

Each of the three types of influence set out below ('instrumental', 'systemic' and 'constitutive') offer a perspective on how WTO law develops. To gain a complete picture, however, and a convincing explanation for the way in which WTO develops, the three need to be considered together. What follows is a reworking of these approaches into a single causal framework accepting all three types of influence.

In attempting to create such a framework the work of Milja Kurki is invaluable. Kurki reworks the Aristotelian causal model to permit an analysis of both actors and structural influences on a series of events. This is an attempt to 'broaden' and 'deepen' the understanding of cause, in order to create a more convincing model. While Kurki applies this to international relations more generally, here the model is altered to address the concept of causation in the development of legal regimes.[101]

What does a broader and deeper understanding of cause add to an examination of the development of a legal regime? It is because so long as we accept that the purpose of causal language is to understand why something happens, we need to be able to explain not only that an action took place but also *why* it took place. Take the example of a judge delivering an opinion that alters the development of law in a certain area. The cause of

[101] M Kurki, *Causation in International Relations* n70, 189ff

the change in the law is not only the judge that interprets a provision in front of him or her. A causal explanation questions not only *who* or *what* changed the law but *how* and *why*. We must know why the judge delivered that opinion: what restricted or encouraged his or her behaviour in that manner? What rules guided his or her decision-making? What conceptual framework did he or she use to come to that decision? To provide a convincing narrative explanation of the development of WTO law, we have to examine all types of cause that influence the changes in law. These are the three types of cause that each must be examined to explain the development of a legal regime: the use of law as an instrument, the constraining or enabling influence of law as a system, and the constitutive force of law influencing the identities and interests of actors. These three categories can be recast as representing three caricatures of how law works: the instrumental approach, the systemic approach, and the constitutive approach.[102]

(i) The 'Instrumental' Approach: The Use of Law as a Tool

When discussing Aristotle's categories of cause they were held to have the advantage of being broad and permitting a dynamic model which accepts different types of cause and their different types of influence or effect. These categories, however, were considered overly broad and the role of law in this approach was unclear. Suganami built on Aristotle's core understanding of causation as an explanatory tool (the way in which we understand the world is explained through causal language). Suganami's approach, however, is flawed when we attempt to apply it to the development of a legal regime: his

[102] The term 'caricature' is used advisedly as there are clearly a range of nuances and variations within each approach.

categories of cause do not fit clearly with the nature of legal influences and he avoids making any 'true' claim of the world or how it functions. Milja Kurki, however, helps to resolve these issues by re-working Aristotle's categories and applying them in such a way that convincing narratives can be drawn from a series of events in international affairs.

Kurki re-interprets Aristotle's types of cause in line with the complexities of the international system. For Kurki types of cause are divided into two groups: the "intrinsic" causes that are expressed as social structures and the "extrinsic" causes that are expressed by the motivations and behaviour of actors.

For Kurki, one of the key advantages to the Aristotelian categories is the ability to have different types of cause which function in different ways. Thus she states:

> These four Aristotelian causes cause in different ways. Crucially, they do not just "move" things: they also "constitute" or "condition" things… An intrinsic cause is that which is within the thing being caused, that which continues to be present in a thing through constituting it. An extrinsic cause is that which is not within the being, but which lends and influence or activity to the producing of something.[103]

Kurki understands the role of the actor and its objectives as being extrinsic causes: the actor and its acts are the causes 'by which' something happens, while its objective is the motivation of the actor ('for the sake of').

[103] M Kurki, *Causation in International Relations* n70, 220

This is an instrumentalist view of law,[104] understanding law as something we use to advance our own individual or collective interest. [105] Transnational actors use the law to cause a change in the legal regime (and thus stimulate its development). The actors involved can range widely from governments introducing legislation, corporations initiating litigation or judges delivering opinions. As a legal regime includes both domestic law and public international law, these actors operate across jurisdictions as they pursue their objectives. While the behaviour of transnational actors in each jurisdiction is examined separately (so as not to conflate them as a matter of law), their objectives take into account the legal regime as a whole.

By using the law as an instrument, actors can change the rules and principles that govern the legal regime ('law on the books') or the behaviour of actors within the legal regime that form a constitutive part of it ('law in practice').[106] Within international law we can argue that the dividing line between these two categories is not quite so clear in the context of rules of customary international law where State practice is a requisite element.[107] Another example is the use of subsequent practice by States in interpreting a treaty.[108] Once again, the interconnectedness of Aristotelian causes help overcome this blurring of categories as they can be reconciled as causing things in different ways: here

[104] Also called 'functionalist': M Loughlin, 'The Functionalist Style of Public Law', 55 University of Toronto Law Journal (2005) 361, 363; N.D. White *The Law of International Organisations* (Manchester University Press 1996) 2-7; and 'instrumentalist' R Keohane 'International Relations and International Law: Two Optics', 38 Harvard International Law Journal 487 (1997)

[105] On the relative newness of this depiction see: B Tamahana, 'The Perils of Pervasive Legal Instrumentalism', Montesquieu Lecture Series, Tilburg University, Vol. 1, 2005 <http://ssrn.com/abstract=725582> (accessed 1 October 2012)

[106] See n60 and accompanying text

[107] Art 38(1)(b) Statute of the ICJ, listing sources of international law includes 'international custom, as evidence of a general practice accepted as law'. See also, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 4

[108] Art 31(3)(b) VCLT 1969

instrumentally, in the context of custom, as a constraining or enabling influence. While looking at the role of law as an instrument in this section, the key focus is on *who* or *what* changes the law.

An instrumental use of the law can take many forms. An individual may initiate legal proceedings within a national or regional court on the basis of rights or duties under international law in the hope that such rights or duties will be 'internalized' into his or her own domestic legal system.[109] This could be the case with obligations under treaties[110] or rules of customary international law.[111] Conversely, a State or International Organization may challenge a provision of domestic law of another State at an international tribunal where its success under domestic or regional courts would be in doubt.[112] States can encourage the creation of a new treaty obligation[113] or contribute to the creation of a new rule of customary international law in order to pursue certain objectives.[114] The underlying rationale is that an actor is using the law as a tool to realise

[109] H Koh, 'Transnational Legal Process After September 11th', 22 Berkley Journal of International Law (2004) 337, 339

[110] For example, *Medellín v. Texas*, 552 US 491 (2008) as an attempt to enforce the treaty based obligations of the US under the Vienna Convention on Consular Relations (concluded 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 in domestic courts following a determination by the ICJ of the US' breach of said convention in *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12

[111] For example, *Filártiga v Peña-Irala* 630 F 2d 876 (2nd Cir 1980) and *Sosa v Alvarez-Machain* 542 US 692 (2004) where claims under customary international law were raised in US courts though with considerable limitations. It is expected that the pending appeal from *Kiobel v Royal Dutch Petroleum* 621 F 3d 111 (2nd Cir 2010) to the US Supreme Court will clarify the scope of such claims.

[112] For example, *United States – Anti-Dumping Act of 1916,* Report of the Appellate Body (28 August 2000) WT/DS/136/AB/R, 16-29

[113] Whether by amendment procedures under existing treaties or by the conclusion of a new treaty

[114] For example, Chile, Peru and Ecuador's *Declaration on the Maritime Zone* (Chile/Peru/Ecuador) (signed 18 August 1952) UNTS (1976) 326 which contributed to the development of an exclusive economic zone of 200 nautical miles, confirmed as a rule of customary international law for States other than Chile, Peru and Ecuador such as Libya and Malta (*Case Concerning the Continental Shelf (Libyan Arab Jamahirya v Malta)* (Judgment) [1985] ICJ Rep 13, 35-6) and now codified in Arts 55-75 United Nations Convention on the Law of the Sea (concluded 10 October 1982, entered into force 16 November 1994) 1833 UNTS 3

their own objectives whether it is initiating litigation, creating new rules, or encouraging favourable interpretations.

While we are familiar with the idea of using the law to produce outcomes (whether personal or societal), it is also clear that the objectives of the actors are not always realised. Governments that pass legislation to encourage liberalization may not always achieve their objectives, individuals who litigate may not receive the decision that they were hoping for. Actors and what they do are not the only influence on the development of law: law works as a system, constraining and enabling the behaviour of those that operate within it. This is the second cause that is examined here, the role of law as a system. This is the *how* of a change in the law: it influences the way in which actors try to use the law to pursue their objectives (at times helping, at times hindering).

(ii) The 'Systemic' Approach: The Role of Law as a System

Law is not merely an expression of the will of interested actors; it is clear that the creation of new rules do not always fix the problems they may have sought to resolve. Law also functions as a constraining or enabling influence on those within its system. This is the systemic influence of law, the role of law as a body of rules and norms. If we want to understand the development of a legal regime it is not enough to say that the law changed because a State garnered enough support for a new treaty in a certain regulatory field. To understand *why* the legal regime changed we need to know what rules applied to the State as it concluded the treaty, was it limited or enabled to act in the way that it did because of the rules applying to it under public international law or under its own legal

system? The *how* and *why* of the behaviour of actors is, in a legal world, connected to the system of rules in which they exist and act.

When Kurki divided causes into two categories, she separated them by causes that were 'extrinsic' such as actors and their objectives, and 'intrinsic' causes. Intrinsic causes are explained as both, 'a wide range of material substances, things and resources' and the causal power of 'ideas, rules, norms and discourses.'[115] From a legal perspective it is primarily the causal influence of 'ideas, rules, norms and discourses' that interest us in this and the following section.[116]

The 'material substances, things and resources' in an international society are the 'things from which' something arise. An example of this would be the distribution within international society of resources or power. While in International Relations scholarship, literature has been dedicated to the importance of resource asymmetries and their consequence on relations between States,[117] from an international law perspective they are less important (particularly in the context of interrelating or interlocking jurisdictions). This is largely due to the importance of sovereign equality as a founding principle of the current international legal system.[118] Where properly constituted States are equal as a matter of public international law, the relative power of one compared to another is not important in the way that it might be from a political perspective concerned with factual realities rather than legal realities. Insofar as power asymmetries affect the

[115] M Kurki, *Causation in International Relations* n70, 223-226
[116] Ibid
[117] For example, K Knorr, *Power and Wealth – The Political Economy of International Power* (Basic Books 1973), S Krasner, 'State Power and the Structure of International Trade' 28 World Politics 3 (1976) 317, R Keohane & J Nye, *Power and Interdependence* (Longman 2000)
[118] For example, Art 2(1) UN Charter: 'The Organization is based on the principle of the sovereign equality of all its Members' (concluded 26 June 1945, entered into force 24 October 1945, 59 Stat 1031). See also, H Kelsen 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 Yale Law Journal 2 (1944) 207

examination of legal influences, they serve as a background for all causes rather than constituting a discrete category: the ability to use law instrumentally, the ability to resist the constraints of law, and (examined below) the relative influence on constituting interests and identities are all related to power, not as a separate cause but contributed to the strength of the causal influence.

The causal power of 'ideas, rules, norms and discourses,' on the other hand, is key to understanding the influence of law on the development of a legal regime. By approaching the causal power of rules and norms, in particular, we can examine the role of law outside of the behaviour of specific actors within these jurisdictions.[119] This means that we can look not only at the influence of a specific State or other transnational actor but also at the influence of the law itself. As a different type of cause, its effect is distinct: rules and norms are constraining or enabling causes.

An advantage of this categorization is the focus on the *strength* of the constraining or enabling influence rather than a simple choice between whether an obligation is binding or not. Instead, as constraining or enabling causes, the importance of rules and norms in any given situation will depend on the 'bindingness' of the obligation as part of a scale.[120] Where the obligations are more likely to illicit compliance by those bound by them, we can expect stronger constraining or enabling forces to be at work.

[119] Ideas and discourses are dealt with in the following section C (iii) (p70ff)
[120] J Goldstein & L Martin, 'Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note', 54 International Organization 3 (2000) 603, 620

It is true that the level of compliance may help determine how effective international law is but cannot determine, by itself, the 'bindingness' of the obligation.[121] Whether we believe that the law gains its normativity from consistency with a *Grundnorm* backed by threat of sanction[122] or as a reflection of the common good,[123] the question of uniform compliance by a population is not the entirety of the debate. Even Hart, who considers a general acceptance of primary rules by the population and secondary rules by officials as necessary elements of a legal system, insists on acceptance of the rule by those officials from an internal point of view.[124] This is what distinguishes law from other types of rule: 'if laws are imperfectly obeyed they do not necessarily suffer diminished legality… Even if a law is disobeyed, that does not terminate its ability to obligate and does not license disobedience…[T]he failure of states to obey an international rule, however, does affect its "rule-ness."'[125]

To consider the influence of rights, duties or principles under international law or domestic law on the development of a legal regime does not make a descriptive claim of the perfect functioning of the international system. A State may be bound by an obligation and breach it: the issue when understanding this obligation as a 'constraining' cause is that if the State breaches its obligation it incurs a cost (whether political or reputational etc.).

The strength of the constraining or enabling influence of the legal regime on those within it can be viewed as dependent on *both* the normative nature of the rule (i.e. a

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[121] R Howse & R Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', Public Law and Legal Theory Research Paper Series, NYU School of Law, Working Paper No.10-08 <http://ssrn.com/abstract=1551923> (accessed 1 October 2012)
[122] H Kelsen, *Pure Theory of Law* (M Knight tr. University of California Press 1967)
[123] J Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980)
[124] H.L.A Hart, *The Concept of Law* (2nd ed., Clarendon Press 1997)
[125] T Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 43-44

binary choice: is it law or not) and a sliding scale dependent on the legitimacy of the rule.[126] Franck's definition of legitimacy is appropriate. He defines legitimacy as:

> a property of a rule or rule-making institution which itself *exerts a pull* toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.[127]

As the conditions for legitimacy and law-making (as opposed to other forms of rule-making) are often similar,[128] we might expect laws to incline toward greater instinctive legitimacy than other types of rule. In the WTO, for example, Director-General Lamy claims 'non-discrimination, transparency and procedural fairness' as 'fundamental principles' of the WTO.[129]

While normativity and legitimacy together would incline the law to constrain and enable the behaviour of actors involved in the development of a legal regime to a greater extent, the law also works in a third way. The two types of cause of change in a legal regime discussed so far (law as an instrument and law as a system) are, in many ways, traditional categories: law as an expression of the wishes of actors versus law as a body

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[126] Ibid, 41ff

[127] Ibid, 24 (emphasis added)

[128] If one accepts Myres McDougal's case that law is not a body of rules but instead as a form of decision-making that is both authoritative and controlling then the relationship between legitimacy and normative strength is even greater. For McDougal, decision-making that is authoritative but has no power to control is 'sheer illusion', whilst decision-making that has the power to control but no authority to do so is the exercise of 'naked power.' The locus connecting the two is, for McDougal, the site of law. For law to be law, those wielding it must make a claim of authority (so as not to be seen as coercive). Any claim of authority must be legitimate – i.e., consistent with society's view of itself and connect with values the society accepts. The law must reflect society's values so that it does not lack legitimacy and can be used to control successfully. M McDougal & Associates, *Studies in World Public Order* (Yale University Press 1960), 10-11 & 170-172

[129] P Lamy, 'Developmental and Trade Significance, Changing Context and Future Prospects', speech given 11th February 2010 in Geneva <http://www.wto.org/english/news_e/sppl_e/sppl147_e.htm> (accessed 1 October 2012) The veracity of such a claim is clearly subject to considerable debate: M Elsig, 'The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?' 41 Journal of World Trade 1 (2007)

or system of rules that controls and directs behaviour. The third type of cause is less commonly discussed: the role of law as it creates identities and interests. This is a different type of cause than the more traditionally conceptualized 'pushing/pulling/actualising' type of cause centred on actors, or the 'constraining/enabling' influence of law as a body of rules or norms. Instead this is the cause that attempts to explains *why* the actor behaved as it did, as law plays a constitutive role in how actors think of the law and what they want to do with it.[130]

(iii) The 'Constitutive' Approach: The Place of Law as a Creator of Identities and Interests

Transnational actors use law to pursue their objectives at domestic, regional and international levels[131] while law constrains and enables their behaviour as they do this.[132] Tied to these two causes of change in a legal regime, there is a third cause: the role of law as it creates and conditions the identities and interests of those actors. These actors might be states, transnational corporations, NGOs or members of judicial bodies: their identities and interests are in some way constituted by ideas and discourses that 'travel' through the law. [133]

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[130] 'It is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness.' K Marx, Preface to *A Contribution to the Critique of Political Economy* (M Dobb ed. Lawrence and Wishart 1971)

[131] Section C (i) above (p61ff)

[132] Section C (ii) above (p65ff)

[133] This position is deeply influenced by constructivism, 'the view that *the manner in which the material world shapes and is shaped by human action and interaction depends on dynamic normative and epistemic interpretations of the material world*.' (E Adler, 'Seizing the Middle Ground: Constructivism in World Politics', 3 European Journal of International Relations (1997) 319, 322, emphasis in original) While constructivism would traditionally encourage understanding law as socially constituted, it is

It is argued here that the creation of societies or associations on any level necessities some form of law as the ties that bind the individual to society.[134] Law is not value-neutral, however, and part of its social function is to create and encourage identities and shared meanings for society.[135] The result is the contribution of law in influencing the interests of transnational actors. It is proposed that the focus on the role of law as a constituting force offers more powerful alternatives to realist or liberal attempts to explain the motivations of transnational actors alone.[136]

The desire to form associations, whether they are States, an international society of States or sub-State groupings, is an inherent part of human nature.[137] The link between individuals and the societies they choose to form is law. Philip Bobbitt states:

> Nowadays we might say that human beings only become complete in association with one another, that every associational society has a constitution, and thus the nature of man gives rise to law. Men seek law naturally, as roses turn themselves to the sun, because law permits and enhances their development.[138]

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proposed here that part of law's social construction is its role in creating the identities and interests of actors within the legal system.

[134] For example, Hume denied the conception of any 'pre-social' state for mankind as he is inherently social: D Hume, *A Treatise of Human Nature* (L Selby-Bigg, ed. Clarendon Press 1975) 493ff

[135] In Philip Allott's words: '(1) Law carries the structures and systems of society through time. (2) Law inserts the common interest of society into the behaviour of society-members. (3) Law establishes possible futures for society, in accordance with society's theories, values and purposes.' P Allott, 'The Concept of International Law', 10 European Journal of International Law (1999) 31. See also, P Allott, *Eunomia: A New World Order For a New World* (OUP 1990), 3-8

[136] On the benefits of combining insights from constructivism with other theoretical approaches: C.O. Meyer & E Strickmann, 'Solidifying Constructivism: How Material and Ideational Factors Interact in European Defence', 49 Journal of Common Market Studies 1 (2011) 61

[137] More recently, suggesting that human's are sociable at a genetic level and examining the consequences of isolation: J.T Cacioppo & W Patrick, *Loneliness: Human Nature and the Need for Social Connection* (W.W. Norton & Co. 2009)

[138] P Bobbitt, *The Shield of Achilles: War, Peace and the Course of History* (Penguin Books 2002) 518

As groups of individuals (people or States) coalesce to form such societies they form rules with which to govern those societies. Law and society are prerequisites of each other: without law there is no society and outwith society there is no law. As Fitzmaurice argued, the maxim '*ubi societas ibi ius*' goes beyond a descriptive statement: it is a rule. He stated that the maxim:

> is more than a mere statement of a fact. The case is one not merely *of post* but of *propter hoc*. It is not simply that where society is found, law is found, but that it must be so found—that law is a necessary condition of the existence of a society as such— which is to say a necessary condition of any systematized form of inter-relationships.[139]

The social process of determining what laws a society uses and for what ends is a continual one: rules are developed and adapted to the changing circumstances of the society as well as the changing expectations and desires of individuals within that society; there are penumbral cases where the meaning of the rule may not be clear and requires interpretation;[140] the values that underpin these rules often have an indeterminate core where there is a continual process of contestation by actors either maintaining the current interpretation of the rule and those who wish to change it.[141] This leads to a continual process of contestation not only at the law-making stage but also at the law-applying stage.[142]

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[139] G Fitzmaurice, 'The General Principles of International Law Considered From the Standpoint of the Rule of Law', *Recueils des Cours* 92 (1957) 38 (emphasis in original). Cf., G Tunkin, *Theory of International Law* (Harvard University Press 1974), positing the 'unfoundedness of the bourgeois concept of ubi societas ibi jus' at 237

[140] A consequence of the 'open texture of law': H.L.A Hart, *The Concept of Law* n124, 124-136

[141] The reference here is to linguistic indeterminacy rather than legal indeterminacy. For a dissection of the different types of indeterminacy and their consequences: T Endicott, *Vagueness in Law* (OUP 2000) 7ff

[142] On the contestation of values within both States as well as International Organizations see: D Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2007) ch1 & D Sarooshi,

The process of value contestation and the determination of what to subject to legal regulation and how, takes place at the domestic level but also at the international level. One outcome of these processes is the creation of domestic and international institutions. The simple act of creating these institutions is the result of a value contest and determination of the content of the law by actors. When we look at values, the institutions which result from exercises in value contestation provide a forum for future debates about what the values are, how they should be understood and what legal framework (if any) should result from them.

The arguments used in this section so far have been premised on the existence of some sort of international society. It may be a very 'loose' society (particularly when compared to domestic institutions such as the State) but it is a society nonetheless. It is suggested that the distinction often drawn in sociology between a community (*Gemeinschaft*) and a looser association (*Gesselschaft*) is merely one of degrees with the *Gemeinschaft* offering a greater degree of closeness and potential for decisions based on the common good rather than individual short term interests commonly ascribed to participants in a *Gesselschaft*.[143]

What of a society that appears to have no legal framework or at least exhibits the signs of having no legal system? Would this not disprove such a necessary connection between law and society? For example, the 'natural state' of the international society is frequently depicted as anarchy: a model where self-interest, power and self-help are the

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'Sovereignty, Economic Autonomy, the United States, and the International Trading System' 15 European Journal of International Law 4 (2004) 651

[143] F Tönnies, *Community and Civil Society* (J Harris ed. & M Hollis tr. CUP 2001)

key elements.[144] We might accept this as the default status of an international society that requires cooperation to develop (the liberal approach), or argue that there is no international society; only a community of States with no rule-set to apply between them (the realist approach).[145] Each of these approaches threatens to undermine the proposition that law and society are mutual requisites. Before we accept either of these interpretations of the starting conditions of the international system, we must be clear on what this starting point is. Contrary to realist or liberal interpretations of the international society's starting conditions, this power-based state of affairs can be understood as the construction of the international society. Alexander Wendt argues:

> Self-help and power politics are institutions, not essential features of anarchy. *Anarchy is what states make of it*… self-help and power politics are socially constructed under anarchy[146]

When Wendt refers to 'institutions' he does not only mean specific forms of practice but also the whole range of laws, rules and norms that public international law is concerned with. That State X is entitled to attack a weaker State is not a sign that there is no law but instead that in this specific society, State X is not prohibited to attack other States it perceives as weak. Given the relative recentness of the prohibition of the use of force in international affairs,[147] it is not difficult to imagine a society where the law permits such

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[144] The seminal source for such an approach is T Hobbes, *Leviathan*, Part I Chapter 13 (C Macpherson ed. Penguin Classics 1985) 183-188

[145] For an overview of realism and liberalism in international law: A-M Slaughter, 'International Law and International Relations Theory', 285 *Recueil des Cours* (2000) 21-54

[146] A Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics', 46 International Organization 2 (1992) 391, 395

[147] The current prohibition on the use of force between States is commonly traced from the General Treaty for the Renunciation of War (1928) 94 LNTS 57 ('Kellog-Briand Pact'), and more recently embodied under Art 2(4) UN Charter and UNGA Res 2625 (XXV) (1970), as well as being an accepted rule of customary international law and *ius cogens*: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 99-100

behaviour. Further, even if one were to accept that there was once an 'empty space' in which States interacted devoid of compulsory legal obligations[148] it is surely no longer representative given subsequent developments to the international legal system[149] such as obligation *erga omnes*[150] or peremptory norms of international law.[151]

If we accept that there exists a necessary bond between law and society the constitutive nature of law is clearer. In Koskenniemi's words, law 'reflects the social context' but also the 'normative views about that context. In other words, law implies an interpretation of what society is like now and what should be done in order to make it better.'[152] To interpret the current and ideal state of society through its law is to create or encourage the objectives or interests or the society's members. An example can be drawn from Alexander Wendt's work on the State as an actor in international affairs, where the importance of shared understandings conditions the identity of the State (though many of the insights can also be applied to International Organizations and other institutions of interest in this thesis).

Let us claim that the State is an actor in its own right. Not that the 'State' is a useful fiction, that it is really the interests of others manifested through the actions of government bodies or agents. Instead, in the constructivist tradition largely developed by

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[148] A strict reading of *S.S Lotus (France v Turkey)* (Judgment) [1927] PCIJ Rep Series A No 10, would encourage such a view, proposing that only those things specifically consented to by States provide a limitation on the freedom State action under international law. However, note contemporary criticism in J Brierly, 'The " Lotus" Case' 174 Law Quarterly Review (1928) 154

[149] Supporting this position: Join Separate Opinion of Judges Higgins, Koojimans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para. 51

[150] Most famously set out in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3 at para.33

[151] Art 53 VCLT: 'a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

[152] M Koskenniemi, *From Apology to Utopia* (CUP 2005) 474

Wendt and others,[153] the State is understood as a separate entity with its own objectives and values.[154]

A disclaimer is required: the concept of the State's legal personality is not being contested. Wendt himself distinguishes between different types of person with one being legal.[155] International legal personality may be viewed as a legal fiction (though with important legal consequences) much like corporate personality but this does not speak to the *actual* personality of the State. Individuals in the past have been routinely denied legal personality by a national legal system under various grounds; this is does not influence their status as an autonomous human being, however.[156] Similarly, the Republic of Somaliland views itself as an independent State. [157] It is not recognised as such by the international community though this does not alter its opinion of itself as a State.[158] Instead the purpose of this section is to show how law can influence the identity and interests of actors, including States.

In Wendt's conception of the State, it has its own interests and intentions. These are tied to those who help constitute the State (social actors) though they are not identical objectives or beliefs. He states:

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[153] See for example, P.T Jackson, 'Hegel's House, or "People are states too"', 30 Review of International Studies (2004) 281 and C Wight, 'State Agency: Social Action Without Human Activity?' 30 Review of International Studies (2004) 269

[154] In Wendt's words, 'States are people too' (A Wendt, *Social Theory of International Politics* n50, 215)

[155] The others being psychological and moral, A Wendt, 'The State as Person in International Theory' 30 Review of International Studies (2004) 289, 294

[156] Ibid 293-294

[157] See, the Constitution of the Republic of Somaliland Art I(i), establishing an independent and sovereign Republic of Somaliland <http://www.somalilandlaw.com/somaliland_constitution.htm> (accessed 1 October 2012)

[158] Though recognition may well affect the extent of its legal powers in international affairs. See below, n226 and accompanying text.

> individual intentions are constituted by the shared meanings in which they are embedded, making the relationship between individual and group intentions mutually constitutive rather than asymmetric.[159]

Shared beliefs and collective knowledge are important in understanding Wendt's approach to the State as an actor. First, it is his way of answering a question put to realists: how do you distinguish between the State and government? If we approach the State as a vessel for those in power, it is difficult to draw the line between the two. It is equally problematic to explain how it is that when a new Presidential candidate wins a US election; there is a change in government though the State remains the same.[160] Wendt answers that these 'temporal and existential continuities are explained by structures of *collective* knowledge to which individuals are socialized, and which they, through their actions, in turn reproduce.'[161] From a legal perspective the most important structure is the constitutional law of the State: this provides the rule-set for individuals (citizens and officials) to behave with regard to the continuity of the State.[162]

Here, the State is consciously anthropomorphized as a key element to understanding how it functions: 'anthropomorphizing it [the State] is not merely an analytical convenience, but essential to predicting and explaining its behaviour'.[163] The State is a distinct personality, functioning in concert with its constituent parts though not limited by them. While the behaviour of social actors is important, there is behaviour which cannot be attributed to them but instead the separate identity of the State. For

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[159] A Wendt, 'The State as Person in International Theory' n155, 305

[160] As a matter of fact rather than law: the mirror issues within law and the problem of continuing authority of a succession of legislators raised by Austin's command theory is convincingly resolved by H.L.A Hart, *The Concept of Law* n124, ch4

[161] A Wendt, *Social Theory of International Politics* n50, 217

[162] We can see how such an analysis might also apply to International Organizations with their own cultures and identities through their constitutive treaties such as, in the case of the WTO, the WTO Agreement.

[163] A Wendt, *Social Theory of International Politics* n50, 217

Wendt, the identity of the State is constructed by the social structures that form part of it, understood in the context of shared beliefs and ideas.[164] It is an important element of this approach that the identity of the State is routed in how it views itself, the collective understanding of it, and that these understandings are culturally rooted and socially determined. Law serves as a medium through which understandings are shared and conflicting values resolved or managed. This is equally true at the international level. We might expect a looser bond between the participants given the weaker institutional pull, however, the constituting role of the institutions (and thus law) on the actors still holds.

Concluding Remarks

Examining the constitutive role of law on the identities and interests of actors helps explain the development of a legal regime insofar as it helps answer deeper questions of the behaviour of those catalysing legal change. If we look at all three causes of change in a legal regime we can see how they each answer a different question about why the law has changed in the way that it has. *Who* or *what* changes the law? Actors stimulate changes but *how* do they change the law? Their method is constrained and enabled by the rules and norms of the system in which they are acting. *Why* do they behave in this way? The law that mediates their relationship to society and others constitutes their conception of themselves and their objectives.

This constitutive approach rejects attempts to explain the behaviour of transnational actors through positivist means. Positivism creates explanations based on

[164] Ibid 193

hypothetical actors that function in a rational fashion.[165] This presents three problems: first, it offers no true account of the world (based as it is, on a fiction);[166] second, this fiction fails to take into account the role of social practices within institutions or the role of ideas and discourse in constituting the identities of actors;[167] finally, quasi-scientific models are not appropriate for examining the development of WTO law for the reasons given above[168] – namely, the complexity of the system, a lack of quantifiable observables and the difficulties in repeating conditions.

What are the consequences of this causal approach? As an analytical tool, we can apply this framework to examine how WTO law develops by reference to the behaviour of transnational actors as they pursue their objectives, constrained and conditioned as they are in the way described above. In accepting the three different types of cause that cause things *in different ways* many of the ideological divisions that separate the literature are no longer relevant.[169] It is not that a realist account of the instrumental use of law is inaccurate or that a sociological-constructivist account of the role of ideas is sufficient. Rather, that each cause is part of the analysis and that each type of influence corresponds to a different *way* in which law develops.

In the next chapter, this framework is used to examine and identify key mechanisms for change in institutions and structures in international trade. In doing so, it

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[165] For example: A Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations', 58 University of Chicago Law Review (1991) 255; G Shaffer & J Trachtman, 'Interpretation and Institutional Choice at the WTO', 52 Virginia Journal of International Law 1, 103

[166] One of the principal reasons that Suganami's work was not accepted in whole: n73 above and accompanying text

[167] S Cho, 'Beyond Rationality: A Sociological Construction of the World Trade Organization', 52 Virginia Journal of International Law 2, 321

[168] Section B (i) (p48ff)

[169] The divisions in International Relations scholarship, commonly known as the 'Great Debates.' For an overview: R Baumann, P Mayer & B Zangl (eds.), *International Relations: The Great Debates* (Edward Elgar 2011)

is argued that within the WTO and the accompanying domestic legal systems of its members, transnational actors are engaged in a process of norm export and norm import in an attempt to define or guide the process of value contestation within the rules and principles at the heart of the legal regime. The causal framework developed in this chapter offers a way to clarify and examine these potentially overwhelming complex interactions.

Examining the development of WTO law in light of a broader range of transnational legal influences offers new insights and explanations for the development of WTO law in certain highly contentious areas. In chapter 3, the regulation of safeguard measures is reviewed highlighting the tensions between the expectations of transnational actors that seek to incorporate specific legal provisions in the covered agreements while contending with the consequences of having set up new autonomous institutions under the Dispute Settlement Body. In chapter 4, the regulation of sanitary and phytosanitary measures is examined as an example of the role that domestic and international quasi-administrative bodies play in altering the behaviour of transnational actors and the outcomes that they might expect in international trade regulation.

Chapter 2: The World Trade Organization as a Site of Transnational Legal Development

Introduction

In a world characterized by globalized legal processes, institutions such as the WTO provide a focal point for interested transnational actors. In the previous chapter it was argued that international trade law developed in light of three influences: the influence of law *as a system* constraining and enabling transnational actors as they use law *instrumentally* to further their objectives that are *constituted and conditioned* by legal frameworks.

In this chapter the causal categories developed earlier are used to identify processes of legal change at the WTO. It is argued that the WTO provides a focal point for the development of international trade law. Section A examines the constitutive influence of law on transnational actors engaged in trade regulation where it is argued that transnational actors are engaged in a process of 'norm export,' projecting their own preferences onto the WTO. Section B analyses the constraining and enabling legal influences on transnational actors as they pursue this objective of norm export. Finally, section C investigates the ways in which these actors use the law instrumentally, either embedding norms in legal systems or stimulating challenges between jurisdictions.

A. The Constitutive Effect of Law in International Trade: Value Contestations and Norm Export

Transnational actors attempt to project their own understanding of trade-related values onto the WTO system so that others might accept them. Rather than viewing International Organizations as sites of cooperation,[170] they instead function as battlegrounds for continual and profound conflicts over the appropriate scope of international trade regulation and, consequently, the nature and role of the State.

The argument in this section is as follows: the constitutive influence of law encourages transnational actors to project their trade-related value preferences onto others by a process of 'norm export.' This objective is motivated by the constitutive effect of law on individuals,[171] the structure of societies[172] and on States themselves.[173] The interests of these actors in pursuing norm export is not determined by their material circumstances but are instead constituted by the normative (including legal) frameworks in which they exist. The desire to project values via norm export is the result of the constitutive influence of law at each level of trade regulation: the individual, the national and the international.

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[170] For example, K Abbott & D Snidal, 'Why States Act through Formal Organizations', 42 Journal of Conflict Resolution 1 (1998) 3, S Krasner, *International Regimes* (Cornell University Press, 1983)
[171] Section (ii), p87ff
[172] Section (iii), p90ff
[173] Section (iv), p99ff. The State is the primary focus of investigation given the tradition of analysis in the State and its behaviour as well as its predominance in international law. However, many of the insights drawn from this section can equally be applied to other institutions that share certain features such as International Organizations.

(i) Introducing Processes of Norm Export and Import

While economic globalization has encouraged a broad consensus on the merits of liberalization and the role of the market within States,[174] there still exist a wide range of varied and contradictory approaches to this paradigm. Different States structure their relationship between market and government[175] differently. One of the principal tools in structuring the relationship between the market and government is law. It is argued that there is an implicit connection between the values that underpin the relationship between government and market, and the legal structures put into place to regulate this relationship.[176]

A consequence of the relationship between law and values is that International Organizations such as the WTO offer transnational actors the opportunity to project their values by exporting norms. By providing a space for Members to negotiate, create rules and resolve disputes at the international level, the WTO offers a target for actors who want to ensure that their own value preferences are established as the international standard via encouraging the acceptance of certain norms.

Norms, in this context, are defined as a 'prescription for action in situations of choice.'[177] They 'give rise to feelings of obligation and when violated engender regret or

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[174] It is notable that in spite of the traumatic events of the global financial crisis beginning in 2007/2008 there has been no substantial shift toward rejecting the fundamentals of a market economy by policy makers.

[175] For the purposes of this thesis, 'government' refers to the aggregate of public authority within the State. This is broader than its traditional usage that would, for example, exclude judicial bodies that are nonetheless included here. The dichotomy of 'market' and 'government' is taken from C Molyneux, *Domestic Structures and International Trade* (Hart 2001) 7. For more on this see below at p209 and accompanying text.

[176] On the relationship between values and law: Chapter 1(C)(iii) above (p70ff)

[177] A Chayes & A.H Chayes, *The New Sovereignty: Compliance with New Regulatory Agreements*, (Harvard University Press 1995) 113

a feeling that the deviation or violation requires justification.'[178] Norms encourage actors to understand and interpret their obligations in a determined way, taking into account the underlying values within a legal agreement. 'Norm export'[179] is the process whereby actors export norms with the aim that their preferences for certain types of behaviour in instances of choice take preference over others.

For example, one can take 'fairness' as a starting point, a socially determined value that has multiple facets. One actor may view fairness in terms that prioritize intergenerational equity: this is to say that current generations ought to consider the consequences to future generations in their decision-making processes.[180] The proceeding norm within the context of the WTO system, which focuses on the role of development as a tool for peace and prosperity,[181] might be that States should not use the overarching aims of the covered agreements to ignore their environmental obligations to future generations. The specific resultant rule can be found within the exceptions of Art XX GATT, specifically Art XX(b)[182] and Art XX(g).[183] Thus a value suggests a norm that, in turn, crystallizes into a specific legal obligation under the GATT.

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[178] A Cortell & J Davis, 'When Norms Clash: International Norms, Domestic Practices, and Japan's Internalisation of the GATT/WTO', 31 Review of International Studies (2005) 3, 4

[179] The term itself is not new, though its use here is different from prior uses: cf. A Björkdahl, 'Normative influence in world politics: Towards a theoretical framework of norm export and import', Paper prepared for the ECPR Joint Sessions, University of Uppsala, April 13-18 2004; A Björkdahl, 'Norm-maker and Norm-taker: Exploring the normative influence of the EU in Macedonia', 10 European Foreign Affairs Review 2 (2005) 257

[180] For example, Rio Declaration on Environment and Development (3-14 June 1992) A/Conf.151/26 (Vol. I), Principle 3: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.' Principle 21: 'The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.'

[181] Preamble to the GATT 1947, second paragraph: 'Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.'

[182] Relating to the protection of human, animal or plant life or health

[183] Relating to the conservation of exhaustible natural resources

John Ruggie has discussed the embedding of norms as a result of a process of value contestation. For Ruggie, the international trade regime can be understood as a self-constituted society, the result of a compromise between *laissez-faire* external capitalism and a more interventionist desire for domestic stability, what Ruggie called 'embedded liberalism.'[184] This does not mean that the nature of the international trade regime is settled, as transnational actors continue to alter the meaning of key terms within the trading system both consciously and unconsciously. Building on Ruggie's work, Andrew Lang has shown how the definition of what constitutes a 'trade barrier' has developed dramatically since the conclusion of the GATT in 1947, particularly in the period from the Tokyo Round to the Uruguay Round, where the focus moved from traditional border measures to a more inclusive array of potential obstacles to trade.[185] He has also demonstrated how we might understand the concept of 'free trade' as a social construction, altering over the years as a consequence of cognitive changes.[186]

The WTO provides a particularly attractive target for norm export with the legal obligations at the WTO binding 157 members, with a further 27 undergoing the accession process[187] and covering over 97% of world trade.[188] Norm export by transnational actors

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[184] J Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order,' 36 International Organization 2 (1982) 379. For an examination of the legacy and impact of Ruggie's concepts within international trade law: A Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime', 9 Journal of International Economic Law 1 (2006) 81

[185] A Lang, 'Some Sociological Perspectives of International Institutions and the Trading System', in C Picker, I Bunn & D Arner (eds.) *International Economic Law: The State and Future of the Discipline* (Hart 2008) 73, at 81-83

[186] A Lang, 'Reflecting on "Linkage": Cognitive and Institutional Change in The International Trading System', 70 Modern Law Review 4 (2007) 523, at 525-530

[187] WTO Official Site: <http://www.wto.org/english/thewto_e/acc_e/status_e.htm> (accessed 1 October 2012)

[188] WTO Official Site: <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm> (accessed 1 October 2012)

may take place at the point of creating new obligations[189] (for example, negotiations of new agreements or ministerial conferences) or during the judicial processes of interpretation,[190] or during quasi-administrative process at the committees of the WTO and elsewhere.[191] In each instance, transnational actors compete to project their conception of the correct balance between market and government with the expectation that the 'correct' interpretation filters down through the WTO membership via their obligations under the covered agreements ('norm import').

In order to encourage the process of norm export, transnational actors stimulate interactions between the rules and principles at the WTO and at the domestic level. The expectation is that, where successful, there will be an instance of norm import[192] into the legal systems of the Membership.[193] This is part of the norm export process in the sense that it allows the actor (should the interaction be successful) to have their preference

[189] Section C (i) (p131ff)
[190] Section C (iii) (p140ff)
[191] Sections C (ii) & (iv) (p137ff & p148ff respectively)
[192] Harold Koh uses the term 'internalization' to describe a similar process. While Koh's work is used above (p.140ff), the approach here differs for two reasons: first, Koh's primary concern is explaining compliance of States with international law rather than the development of a legal regime *per se*. While his views on the 'process' (i.e. how this pattern of behaviour takes place) are accepted, the *necessary* relationship to greater compliance of States to their International obligations is not (see, A Guzman, 'A Compliance-Based Theory of International Law', 90 California Law Review (2002) 1823, at 1835-1836). Second, using the terminology adopted in this thesis, Koh's work examines the internalization of rules rather than norms. It is maintained that there is a valid distinction to be made between norms (prescription for action in situations of choice) that are more general in application and do not have a legal character from legal rules. In this conception, values inform the desire for certain outcomes. A norm is the first stage in how that outcome is affected (encouraging certain types of behaviour over other). This norm may then (depending on the inclination and resources of the actor) be embedded in a legal rule *requiring* certain types of behaviour. It is both the increased normativity of the rule that distinguishes as well as its more specific application in the instance (which may or may not satisfy the outcomes originally desired hoped for).
[193] One consequence of norm export and import, outside the scope of this thesis for reasons of space, is the following: as transnational actors accept the proliferation of International Organizations and transnational networks, they become aware of the potential for norm export via the legal regimes at these International Organizations. As a consequence, transnational actors seek to 'shield' themselves from the successful norm export of others; they alter their legal systems to restrict and channel international influences. They can do this in the following ways: limiting the scope of applying international obligations in domestic courts, channelling the use of international obligations as interpretive tools by domestic courts and agencies, and encouraging the application of international rights and obligations by different branches of government depending on their capacity to influence outcomes.

accepted by the 'importing' side.

Viewing the development of the WTO through a lens of norm export helps us to understand the nature of institutions, viewing them in light of the desire of transnational actors to create institutions that will cement their normative outlook in the international trade system at the WTO.

The following sections outline the motivation for norm export at the individual, national and international levels. The first relates to the role that law plays in creating a space for value contestations at the domestic level (section ii). The second outlines the role of law in determining the scope of the market and its relationship to institutions of public authority at the national level (section iii). The third constitutive influence of law (section iv), highlights the role of law in constituting the meaning of key shared concepts in trade for constituted international actors.

(ii) The Constitutive Influence of Law on Individuals in International Trade

The idea that transnational actors might use the institutions of the State to pursue their objectives is well documented. In one approach, the State is understood as a forum for the pursuit of interests; in his seminal article setting out the core propositions of international liberalism, Andrew Moravcsik describes the State in this manner when he claims:

> The State is not an actor but a representative institution constantly subject to capture and recapture, construction and reconstruction by coalitions of social actors.[194]

While Moravcsik's approach is centred on the *interests* of actors, his description could equally account for the State, or indeed an International Organization, as a forum for the contestation of values.

Legal processes are social ones: at all points, values play their role as law is made, applied and interpreted. The values of a society help determine the objectives of the legislators, the frame of reference of administrative agents or the imperatives of judges.[195] The prioritization of certain values will influence not only what is to be the subject of legal regulation or deregulation but also the way in which these topics are to be approached. In trade policy we can see the influence of values as it is formulated, developed and applied. The introduction of new legislation, the application of that legislation by administrative bodies, the review of the legislation by judicial bodies – at each of these points the influence of society's values, and the view of what shape society ought to take, is brought to bear.[196]

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[194] A Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 International Organization 4 (1997) 513, 518

[195] Decision-making is not conducted by purely rational individuals as a range of cognitive biases influence judicial decision-makers: C Guthrie, J Rachlinski & A Wistrich, '*Inside the Judicial Mind*', 86 Cornell Law Review (2001) 4. The division between actors pursuing interests and actors motivated by their values proposed by Abbott & Snidal is explicitly rejected: interests are determined in the context of values. Concepts of cost and benefit depend upon prior value judgements; to take an extreme example, in determining costs and benefits, an individual with a belief in the afterlife will approach a problem differently to one that does not. Their understanding of cost and benefit is dependent on their values. On the distinction between 'value actors' and 'interest actors', K Abbott & D Snidal, 'Values and Interests: International Legalization in the Fight Against Coruption', XXXI Journal of Legal Studies (2002) 141, 145-150

[196] See, chapter 1 (C) (iii), p70ff

The identity of actors can be entirely constituted by the legal framework in trade-issues. For example, a shoe manufacturer who wishes to export to a neighbouring State is dependent on being able to claim a right over the shoes that he manufactures. Not only that, he must also be able to rely on an entire legal edifice that identifies him as an 'owner' competent to sell the shoes made in his factory while those that were the proximate creators of the shoes are identified as 'workers' and as such do not enjoy property rights. It is an obvious case though demonstrates how the shoe manufacturer's very identity as a 'trader' is dependent on a set of legal institutions that permit him to act as he does and pursue that which he wishes (in this case, profits), as well as coerce those that do not share this understanding of property rights.[197]

By examining the role of actors in this way, the role of the State becomes one of 'ultimate prize'. Utilising the personality of the State at the international level to pursue their objectives rewards those actors that 'win.' The State is a forum for the development of values but also the prize for those competing to get their approach considered as the dominant or nationally accepted one.[198] The individualized concern of the actor within a broader society encourages him to engage in a process of norm export.

For these actors to maintain the dominance of their values, it becomes necessary not only to maintain control but also embed such values where possible.[199] Having

[197] For a comprehensive analysis of the coercive role of the State in the maintenance of property rights: R Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', 38 Political Science Quarterly 3 (1923) 470

[198] Similar insights can be drawn from public choice theory where policymakers compete in a policy marketplace, attempting to 'sell' their policies for political capital. For an overview in the context of international trade: A Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations', 58 University of Chicago Law Review (1991), 255-305

[199] Embedding values can be understood as encouraging a form of structural bias, the influence of which is well documented: J Goldstein, 'Ideas, Institutions, and American Trade Policy', in , in G.J Ikenberry, D Lake & M Mastanduno (eds.) *The State and American Foreign Economic Policy* (Cornell University

captured certain institutions, there is an interest in ensuring that the values of the actors are entrenched as much as possible. By prescribing certain forms of behaviour within these institutions, actors protect their own value preferences.[200] This applies within the State but also, importantly, within institutions that claim authority over the State such as the WTO. Actors need to be able to engage internationally to protect their preferences from threats both within the State and without.[201]

(iii) The Constitutive Influence of Law on the Structures of Trade Regulation in States

As actors engage in processes of norm export to project their values, their identities and understandings are affected by the constitutive influence of law. The previous section used individuals within a State as the focus of analysis. This section first, examines how law constructs identities and interests through the domestic structures of the State and, second, traces the impulse to engage in a process of norm export as a result of this constitutive influence.

Law's Role in Constituting the Relationship between Market and Government

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Press 1988), M Koskenniemi, 'The Politics of International Law – 20 Years Later', 20 European Journal of International Law 1 (2009)

[200] In support of this, J Nye, *Soft Power: The Means to Success in World Politics* (PublicAffairs 2004) 10

[201] On the analysis of the balancing act that actors must engage in: R Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 International Organization 3 (1998) 427

The 'structures of governance and rule in society'[202] influence the development of values within the State; the domestic structures of the State inform and influence the priorities of actors and help define how they perceive certain issues (i.e. whether they matter for government or the market, private or public). The legal structures that influence this relationship help to constitute the ideas and interests of the actors involved. It is argued here that the way in which States choose to configure the relationship between government and market through law encourages a process of norm export beyond the individualized concerns highlighted in the previous section.

The 'domestic structures' paradigm is one of the most prominent approaches in understanding the internal arrangements of States in economic policy.[203] Katzenstein defines domestic structures as the 'domestic policy networks which link state and society.'[204] This definition is somewhat vague and the literature on domestic structures rarely expands on a specific definition.[205] Instead, the domestic structures approach is to focus on specific social structures and examine their influence on policy making. These domestic structures have a variety of facets; they include the political arrangements of the State, the structure of its economy and the mechanisms for social groups to engage with organs of the State. These are broad categories and include the level of centralization of government administration, plurality within the market place, and the strength of different interest groups.

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[202] R Benjamin & R Duvall, 'The Capitalist State in Context' (1985) cited by A Wendt, *Social Theory of International Politics* (CUP 1999) at 200

[203] P Katzenstein, 'International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States', 30 International Organization 1 (1976) 2

[204] Ibid, 4

[205] On the need to distinguish between types of structure: G.J Ikenberry, 'Conclusion: An Institutional Approach to Foreign Economic Policy', in G.J Ikenberry, D Lake & M Mastanduno (eds.) *The State and American Foreign Economic Policy* (Cornell University Press 1988) 226

Domestic structures can play an important role between values and law within a State. Structures are historically conditioned and reflect the biases of those who were involved with their creation.[206] They provide a space for the determination of the 'correct' balancing of trade and non-trade values, understanding the role of trade law and determining who may speak for the State and influence trade policy. In this way, domestic structures reflect prior value judgments.

The contestation of values does not end with the creation or settlement of structures: domestic structures may change to reflect a new settlement. Values thus change the structures within the State by altering their use. This fluid interaction between values and domestic structures is a further incentive for norm export, encouraging certain types of behaviour in light of these values by other States. Where a society has come to a conclusion (though it may change) over the 'correct' way to regulate an area of trade, for example, or how to choose those who ought to oversee the trade regime, the goal will be for any alteration to have originated within the State. The desire to project values onto other States includes within it a tacit acceptance of the potential of being projecting onto by another.

In trade policy the focus has traditionally been on examining how the market and society within the State interact and on what terms.[207] Thus, States are distinguished by their constitutional settlement relating to their approach to the market. The State may be highly centralized or not, while the society within that State may be highly centralized or

[206] J Goldstein, 'Ideas, Institutions, and American Trade Policy', in G.J Ikenberry, D Lake & M Mastanduno (eds.) *The State and American Foreign Economic Policy* n205, at p180

[207] P Katzenstein, 'Conclusion', in P Katzenstein (ed.) *Between Power and Plenty: Foreign Economic Policies of Advanced Industrial States* (University of Wisconsin Press 1978) 324

not.[208] Molyneux has adapted this model by interpreting 'State' as 'Government' and 'Society' as 'Market'.[209] The domestic structures approach, as modified by Molyneux, leads to the typology of States as either having strong governments or weak governments, and organized markets or plural markets. This characterization is then used to help determine the State's foreign policy by virtue of the domestic structures in place. These structures are distinct from policy, instead of determining the State's policy *per se*, they constrain and encourage its development. This approach helps to explain why States react differently to a single international event or situation; for example, how the oil shocks of the 1970s led to a wide range of responses from developed nations in the face of a single crisis.[210]

The domestic structures theory is of particular help in drawing a more nuanced picture of market states. These distinctions are of great importance in light of the increasing breadth and depth of global liberalization.[211] Indeed, whilst globalization encourages a thin Anglo-Saxon conception of the market it provides space for differing domestic structures.[212] The increasing scope of economic globalization does not, therefore, lead to diminishing variations in the constitutive influence of law: though many States will share certain general propositions, this is not to say that the constitutive effect of law will be the same in all.

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[208] Ibid
[209] C Molyneux, *Domestic Structures and International Trade* (Hart Publishing, 2001) 7
[210] P Katzenstein, 'Conclusion' n207, 295-296
[211] Membership of the WTO now totals 157 (including customs unions). By comparison the (nearly) universal membership of the UN totals 193.
[212] C Molyneux, *Domestic Structures and International Trade* n209, p9. In this sense, globalization can be viewed as a framework for differing structures rather than simply a mechanism for Anglo-Saxon market dominance.

Domestic Structures and the Process of Norm Export

Domestic structures theory also serves to explain the motivation for States to project their own conception of the legal regulation of certain trade matters. This is routed in the connection between the State's trade policy and the concept of policy legitimacy.[213] For an act to be legitimate, it must be both legally valid and justifiable.[214] The question of justifiability is of importance in an examination that includes both international and domestic law. An act may be legal as a matter of domestic law but not specifically regulated by international law. Such an act may be valid, but for it to be justifiable also, it has to reflect the State's own values. As the changes brought about by progressive global liberalization to society are profound and potentially sudden, the actions of the State in response to these changes must be legitimate on its own terms. These terms are defined by the legal arrangements that constitute the domestic structures of the State that, in turn, representing value judgments made on the proper relationship between market and government.

Molyneux's work is primarily concerned with 'fairness' in trade as an expression of legitimacy. There is a broader application, however; any act, whether couched in terms of fairness or not must be internally consistent for it to be credible on the international scene. If fairness is an aspect of legitimacy then here we must stress consistency as another. Consistency of approach is one of the subliminal motivators for projecting certain conceptions of the State's approach to trade as, in order to be consistent, a State will avoid acting one way internationally and another domestically. One way of

[213] Ibid 10-11. As distinct to legitimacy in rule-making, chapter 1 (C) (ii), p65ff

[214] Oxford English Dictionary, 2nd Edition (1989), Additions Series (1997), '[2.]e. In extended use: valid or acceptable; justifiable, reasonable.'

achieving this is to ensure that other States share the same approach to trade by projecting their values internationally. The consistence of domestic policy and international behaviour is particular important in the context of exercising soft power. As Nye states:

> The soft power of a country rests primarily on three resources: its culture (in places where it is attractive to others), its political values (when it lives up to them *at home and abroad*), and its foreign policies (when they are seen as *legitimate and having moral authority*).[215] (Emphasis added)

This approach not only implies a constraint on the economic policy of the State (as the government incurs a political cost where it behaves contrary to its values) but also provides a motivation for certain systems to project themselves externally. This results from having a series of distinct ways for States to interact with their markets, leading to potential conflicts over divergent methods. For example, the United States can be characterized as engaging in an approach closer to *laissez-faire* governance than market regulation for the actions of its companies, helping or hindering only so far as is necessary and suffering a domestic political cost when it does. This prioritization of 'corporate economic autonomy'[216] functions so long as competition in the market place is not disrupted or there is no significant actual or impending market failure. However, where another State subsidizes a domestic industry which is in competition with the US non-subsidized industry, the principle of corporate economic autonomy limits the actions of the US in aiding its unfairly challenged industry. This explains the need to project such

[215] J Nye, *Soft Power* n200,.p11
[216] D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System', 15 European Journal of International Law 4 (2004) 651, 656

a value onto the international level in order to minimize potential conflict with those who would not otherwise enforce it and in doing so, maximising domestic benefits.[217]

Instead of coercing or co-opting other States (so called 'carrots and sticks'), in this example, the US might instead attempt to influence the structure and activity of the WTO. Again, Nye discusses the advantages to influencing International Organizations or institutions:

> Institutions can enhance a country's soft power. For example, Britain in the nineteenth century and the United States in the second half of the twentieth century advanced their values by creating a structure of international rules and institutions that were consistent with the liberal and democratic nature of the British and American economic systems: free trade and the gold standard in the case of Britain; the International Monetary Fund, the World Trade Organization and the United Nations in the case of the United States.[218]

Explaining the benefits of moulding these institutions in the State's own interests, Nye goes onto to say:

> If a country can shape international rules that are consistent with its interests and values, its actions will more likely appear legitimate in the eyes of others. If it uses institutions and follows rules that encourage countries to channel or limit their activities in ways it prefers, it will not need as many costly carrots and sticks.[219]

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[217] Ibid 659
[218] J Nye, *Soft Power* n200, p10
[219] Ibid 10-11

In the case of subsidies at the WTO, the US attempted this method of norm export by encouraging the development of a specific Agreement on Subsidies and Countervailing Measures[220] and then its subsequent interpretation by panels in light of the US' own approach to subsidies in the marketplace.[221]

Policy-makers openly use the potential success of norm export through international legal structures as a justification for policies. For example, President Clinton did so writing in January 2000 on China's accession to the WTO. While he made the traditional arguments about the benefits to US traders and farmers from the reduction of tariffs and inclusion of China into the WTO's dispute settlement system, the President also placed considerable focus on the importance of projecting US values through the trading system. He wrote:

> This deal [China's accession to the WTO] not only expands trade, it also projects our values and enhances our security. To understand why, we need to see China clearly -- its progress and problems, its policies and perceptions of us, of itself, and the world…
>
> The agreement obligates China to deepen its market reforms, empowering leaders who want their country to move further and faster toward economic freedom. It will give Chinese as well as foreign businesses freedom to import and export on their own, and to sell their products without going through government middlemen. It will open China's telecommunications

[220] Agreement on Subsidies and Countervailing Measures (15 April 1994) LT/UR/A-1A/9 <http://docsonline.wto.org>, hereafter 'SCM Agreement'

[221] See D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System', n216 for an account of the US-UK steel dispute in light of a debate over competing values.

> markets, giving its people greater access to uncensored information through satellites and the Internet.
>
> In the past, the Chinese state was employer, landlord, shopkeeper, and news provider all rolled into one. This agreement will accelerate a process that is removing the government from vast areas of China's economic life. China's people will have greater scope to live their lives as they see fit. And as they become more mobile, more prosperous, more aware of alternative ways of life, they will seek greater say in the decisions that affect their lives.[222]

The expectation was that China would alter its behaviour in a way amenable to the US by following the rules of the WTO and allowing the US to use the institutions of the WTO where it did not. This expectation is based on the premise that China would be bound by its commitments under the WTO covered agreements as a matter of international law but also altering its domestic law in time.

States use law to set the terms of engagement between market and government, embedding their preferences for the 'correct' balance. In this way, law constitutes the most fundamental terms of reference for trade policy: the appropriate role of the market in a State. As Katzenstein and Molyneux's work has suggested, this then influences the identities and objectives of actors within that State. We can further draw on the State's relationship with international legal frameworks such as the WTO to explain the inclination toward ensuring that the State's determinations in this field are maintained as the international level. It is in this manner that law constitutes the interests and identities of actors within market States. In the remainder of this section, the law's role in

[222] President Clinton, 'Expanding Trade, Projecting Values', The New Democrat, 1st January 2000 <http://www.ndol.org/ndol_ci.cfm?kaid=108&subid=127&contentid=965> (accessed 1 October 2012)

constituting the identity and interests of the State itself will be proposed, suggesting that norm export is pursued by the State itself as well as other transnational actors.

(iv) The Role of Law in Constituting the Interests and Identities of the State and International Organizations

Law not only influences what an actor does and how, but also its identity and interests.[223] As proposed in chapter 1, the importance of shared understandings and meanings has specific consequences at the international level: the personality of the State as an entirely distinct and 'real' entity that has interests that go beyond that of its component institutions or actors. Law can play a constitutive role in determining that State's identity (by legitimating its existence in the eyes of other members of the international community) and by influencing the way in which the State understands its own national interest. It is also argued that by extension, this approach can be applied to other associations such as International Organizations and the institutions within. Given the priority given to the State in the literature, however, the State will be examined first.

The existence of the State as a 'real' entity is not dependent on its international legal personality;[224] however, the legitimacy that legal personality grants States is considerable. The recent efforts of the Palestinian Authority to have Palestine accepted as a member of UNESCO[225] and its on-going efforts toward international recognition are well documented. Indeed, the recognition of States is a highly contentious area of

[223] Chapter 1 C (iii), p70ff
[224] See above, n153 and corresponding text
[225] General Resolution of the General Conference: 'Admission of Palestine as a Member of UNESCO', 36 C/Resolutions Vol. 1, Resolution adopted at the 11th plenary meeting, on 31 October 2011

international law precisely because of the strength of legitimacy that such an act entails, permitting recognized States to engage with the international community as sovereign equals.[226]

The law's strength in legitimating States is so great that it can do so in situations that would not normally give rise to such recognition.[227] The constitutive role of the Fourth Geneva Convention in the 'reconstruction' of Iraq is one notable example[228] where the Iraqi State was restructured beyond what would traditionally be considered permissible under the authority claimed by occupying powers.[229] The current use of IMF conditionality and Letters of Intent to conduct fundamental changes to the structures of States in the face of the 2008 financial crisis is another.[230] Foreign intervention on such a scale would normally raise serious alarm yet the role of international law in legitimising this process has served to soften some of the criticism.[231]

Law serves a constitutive influence not only on the identity of the State as discussed above but also on its interests. The influence of a State, specifically 'national interest', is different to the interests of the most powerful or adept at social bargaining

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[226] On the competing approaches to recognition: S Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: Tertium Non Datur?' 75 British Year Book of International Law (2005) 101

[227] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 310

[228] M Craven, S Marks, G Simpson & R Wilde, 'We Are Teachers of International Law', 17 Leiden Journal of International Law (2004) 363, 372

[229] S Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq', 17 European Journal of International Law 3 (2006) 531, 533

[230] The legal basis for which is commonly attributed to Art V (3) Articles of Agreement of the International Monetary Fund (concluded and entered into force 27 December 1944) 2 UNTS 39

[231] Clearly not all as there is considerable opposition within receiving States to IMF intervention, by popular protest (in Greece, for example, 'Greek crisis: thousands join protests as MPs debate bailout deal', *The Guardian*, Sunday 12 February 2012) and legal action (Judgment of the Constitutional Court of Latvia, 'On the compliance of Article 2, Paragraph One of the Law "On State Pension and State Allowance Disbursement in the Period from 2009 to 2012" with Articles 1 and 109 of the Constitution of the Republic of Latvia and on the compliance of Article 3, Paragraph One of the above Law with Articles 1, 91, 105 and 109 of the Constitution of the Republic of Latvia.' Case No. 2009-43-01)

within the State. This can be seen a motivation of the State when engaging in international affairs.

More specifically, the constituting effect of law influences how the 'national interest' is understood. By regulating the relationship between market and government, law is involved in determining how the national interest is understood by a State. While Wendt argues that ideas and understandings have a constitutive influence on identities, he accepts that all States 'share essential properties in virtue of their corporate identity'.[232] National interest in all States is understood as having four elements: physical survival, autonomy, economic well-being and collective self-esteem.

As the focus of this thesis concerns international trade policy, we can expect both autonomy and economic well-being to be frequent motivators of the State in pursuing its national interest.[233] While we currently view economic well-being in terms of economic growth, this has not always been the case (societies built on feudal structures, for example) nor is it still the case in parts of the world (for example, subsistence economies in least developed countries). One argument would be that those States do not act in their own interest in pursuing non-growth oriented policies. However, against this position Wendt argues that:

> It seems more reasonable to conclude that the interest in economic well-being only becomes a need for growth in particular state *forms*, and as such

[232] Aware of the potential criticism for such a position, A Wendt, *Social Theory of International Politics* n200, 234: 'Since one of my goals in this book is to show that many state interests *are* constructions of the international system, the notion of pre-social interests sits uneasily with my overall argument. I argue that the content even of these pre-social interests is affected by states' type, role, and collective identities, which to varying degrees are constructed by the international system, but these constructions are still constrained by the nature of corporate stateness.'

[233] A Wendt, *Social Theory of International Politics* n200, 236

> is a function of historically contingent type identities rather than of states' corporate identity.[234]

While Wendt argues that a State pursues economic well-being purely by virtue of its personality,[235] what constitutes economic well-being is conditioned by its own historical or cultural 'experiences.' Where the form of the State requires a growth-based economic policy (as would appear to be the case of market States), this objective will be pursued and interpreted in light of the State's embedded values. These values, routed in the cultural and historical experiences of the State, are mediated through law as it regulates the relationship between market and government within the State.

As is the case with other motivators, the pursuit of the national interest in Wendt's model is a continual and *compulsory* one: the pursuit of the four types of national interest is necessary for the State to exist as a corporate entity. Despite various challenges to the dominance of the State in international affairs, its desire to survive as a construction continues:

> No matter how much transnational actors grow in importance, no matter how much state autonomy is undermined by international regimes or economic interdependence, states keep trying — and apart from a few "failed states" mostly successfully — to reproduce themselves. Continued success may depend ultimately on profound adaptations in their form (like internationalization), but their structure gives them a powerful homeostatic disposition which makes it unlikely they will wither away.[236]

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[234] Ibid
[235] A Wendt, *Social Theory of International Politics* n200, 233-234
[236] A Wendt, *Social Theory of International Politics* n200, 238

By regulating the relationship between market and government, law is involved in the process that constitutes how the national interest is understood. The general objectives that a State will pursue to ensure its survival (such as its autonomy) are given meaning by the law's involvement in providing a process of value contestation and regulation.

Just as individuals compete in a process of norm export from within the State, the State itself also engages in a similar process. In this instance, the State pursues its own objectives as distinct from those of its component parts (either individuals or structures). How do these actors all attempt to project their values through processes of norm export? Can the State be both the vehicle for individuals or groups, and an actor in its own right? It is claimed here that it is possible and, further, a common occurrence in day-to-day life. Multiple identities are a common feature of social life. These identities can relate to categories that international law is familiar with, such as nationality, ethnicity, religion, gender or political affiliation;[237] they can also be those less commonly examined in international law such as social roles (care giver, parent, worker, partner or student).[238] It is possible to hold various roles as a single person, even where such roles potentially conflict or 'interfere' with each other.[239] These situations often arise in the context of States where policies are inconsistent or diverge from the generally accepted policy direction of the State. This is symptomatic of numerous actors (including the State itself) engaging in their own processes of value contestation and norm export simultaneously.

Expanding on Wendt's analysis of the State as an actor in its own right, we can extend these insights to other forms of association such as International Organizations

[237] International human rights law is the most obvious area of public international law in this regard.
[238] These categories are taken from P Pietromonaco, J Manis & K Frohardt-Lane, 'Psychological Consequences of Multiple Social Roles', 10 Psychology of Women Quarterly 4 (1986) 373
[239] M Van Sell, A.P Brief & R.S Schuler, 'Role Conflict and Role Ambiguity: Integration of the Literature and Directions for Future Research' 34 Human Relations (1981) 43

and even the institutions within. Just as States pursue their own objectivities, influences by the way in which law has constituted them, so do other forms of association. International Organizations have their own identity, separate to that of their membership: indeed, this is considered a defining feature of International Organizations as separate legal persons.[240] The structure of public international law requires transnational actors to behave through States or International Organizations at the international level, encouraging the creation and use of such bodies. The separate identity of these institutions, engaging in their own process of norm export is an import factor in examining the development of WTO law.[241]

The following section attempts to identify the key constraining and enabling influences on the behaviour of transnational actors (including States and other institutions) as they pursue a process of norm export at the WTO. The aim is to identify the legal influences on actors as they engage in norm export: in this instance, the domestic and international legal rules (understood broadly) applicable to transnational actors in the regulation of international trade.

B. The Systemic Influence of Law on Transnational Actors At the WTO

[240] International Organizations 'must have an autonomous will distinct from that of its members…', P Sands & P Klein, *Bowett's Law of International Institutions* (6th ed. Sweet & Maxwell 2009) 15

[241] The priorities of the institutions of the dispute settlement system at the WTO are considered particularly important in this thesis. See Chapter 3(C)(ii) and Chapter 4(B)(i)-(ii), p204ff and p278ff respectively

Transnational actors do not behave in a normative vacuum: as they engage in a process of norm export, attempting to embed their own value-preferences onto the WTO and its membership, they are *constrained and enabled* by law. In this sense law functions as a system, setting the rules of the game and limiting or increasing actors' scope of action. In this section, the four principal constraining and enabling influences on transnational actors will be examined: the domestic rules that grant actors access to the international level;[242] the rules that allow actors to raise claims based on WTO law under domestic law;[243] and finally the systemic influence of law applicable at the international level under the covered agreements[244] and the dispute settlement system of the WTO.[245]

(i) The Rules Applicable to Granting Transnational Actors Access to the WTO

The domestic legal systems of WTO Members constrain and enable actors as they attempt to influence the international trade policy of the State, engage on the international plane and respond to influences from the WTO. The legal rules that determine which actors are prioritized or privileged in influencing the Member's policy and behaviour at the WTO legitimizes their claims over others.[246] By determining which actors are legitimized, the legal systems of WTO Members influence their policies as they prioritize some actors over others.

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[242] Section (i), p105ff
[243] Section (ii), p116ff
[244] Section (iii), p119ff
[245] Section (iv), p123ff
[246] On the role of legal systems conferring legitimacy on the claims of certain actors over others: J Goldstein, 'Ideas, Institutions, and American Trade Policy', in G.J Ikenberry, D Lake & M Mastanduno (eds.) *The State and American Foreign Economic Policy* (Cornell University Press 1988) 180-181

To illustrate this point the US' legal regime for the negotiation and conclusion of international trade agreements will be briefly examined and compared to the EU's approach. The different systemic influences present in these two different jurisdictions affect who may act internationally for each Member. The different systemic influences that are a result of different internal priorities influence the way that transnational actors within that jurisdiction can pursue norm export at the WTO.

Concluding Trade Agreements under US Law: Balancing Industry and Executive Interests

While the US is home to the distinct legal systems of fifty states,[247] it faces 'the outside world with one foreign policy, one legal system, and one place in the international legal order.'[248] The US laws that apply to international representation, negotiation and conclusion of treaties stem, in the first instance, from the US Constitution. Due to the paucity of explicit references in the Constitution to foreign affairs powers much of their development has been left to judicial interpretation and executive practice (principally via the implied powers doctrine).[249] One of the most important powers for affecting the international trading system is the competence to negotiate and conclude treaties.

[247] Law-making competence resides in the first instance with the States: US Constitution, Tenth Amendment 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

[248] A Lowenfeld, 'Nationalizing International Law: Essay in Honor of Louis Henkin', 36 Columbia Journal of Transnational Law (1997) 121, 141

[249] J Nowak & R Rotunda, *Constitutional Law* (6th ed West Group 2000) 229

The Constitution grants the executive the authority to 'make' treaties with the 'Advice and Consent of the Senate'.[250] This has led to a centralization of foreign affairs competences to the executive with the Supreme Court declaring that the President 'alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates.'[251]

In trade relations, however, Congress enjoys explicit competences to 'regulate Commerce with foreign Nations'.[252] Under the Constitution, Congress is granted the 'Power To lay and collect Taxes, Duties, Imposts and Excises'.[253] In this context, the authority of the executive in international trade relations is reduced, as Congressional involvement is necessary on a far broader scale.[254] One outcome of this shared relationship is the difficulty associated with the executive negotiating a complex agreement internationally and then having Congress demand changes domestically. Not only does this lead to a longer and more complex process, but it also limits the capacity of the US to engage with its trading partners that may not take commitments made at the negotiating table seriously.[255] In order to resolve this problem Congress began a process of controlled delegations to the executive to negotiate trade agreements.[256] These

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[250] US Constitution Art II s.2 cl.2
[251] *United States v Curtiss-Wright Export Corp*. 299 US 304 (1936) 220
[252] US Constitution Art I s.8 cl.3
[253] US Constitution Art I s.8 cl.1
[254] Taking an extreme position, Destler states 'Congress reigns supreme on trade, unless and until it decides otherwise.' I.M Destler, *American Trade Politics* (4th ed. Institute for International Economics 2005) 14
[255] E.g., the negotiation of the Kennedy Round Agreements and the US' subsequent failure to implement them. Commenting on the lack of fast-track authority leading to either the refusal of trading partners to initiate negotiations, or to suspend where they are already underway; R Brewster, 'Domestic Origins or International Agreements', 44 Virginia Journal of International Law 2 (2003) 1, fn 90. Though note the possibility that requiring domestic ratification may strengthen a State's bargaining position (the 'Schelling Conjecture' in, R Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 International Organization 3 (1998) 427)
[256] Delegation of authority from the legislature to the executive is subject to judicial review. See J Jackson, W Davey & A Sykes, *Legal Problems of International Economic Relations* (4th ed West Group 2002) 73-74

delegations began as early as the Tariff Act of 1897, delegating to the President the ability both to negotiate trade agreements and 'proclaim' the subsequent changes to US tariffs. Later, a similar delegation was to take place under the Reciprocal Trade Agreements Act of 1934.[257] This delegation was limited in time and had to be renewed every three years. Over the following years, Congress restricted such delegations as it grew more confident in the trade sphere. The mechanism settled upon, and still used for such agreements today, is the 'fast-track' system (now called the Trade Promotion Authority[258]). The fast-track system was introduced in the Trade Act of 1974[259] and amended by the Omnibus Foreign Trade and Competitiveness Act of 1988[260] for the purposes of negotiating the Uruguay Round Agreements.

The fast-track system 'can be thought of as a *quid pro quo* between Congress and the President.'[261] It provides for consultation with both Congress and the private sector during the negotiation process. The delegation period is limited, with each renewal requiring Presidential petitions to Congress. A period of 120 days is required prior to signing the agreement in which Congress is to examine and comment upon the document, while the President can only proclaim tariff changes if Congress implements the non-tariff barrier provisions.[262] Importantly, the private sector is represented by proxy through

[257] The impetus for such a delegation was the loss of moral authority by Congress following the Smoot-Hawley incident. See generally: I.M Destler, *American Trade Politics* (4th ed. Institute for International Economics 2005) chapter 2
[258] US Trade Promotion Authority Act of 2002 [Pub L 107-210, 116 Stat 993] This authority expired in 2007 and, at time of writing, has yet to be renewed.
[259] Pub L 93-618, 88 Stat 1978
[260] Pub L 100-418, 102 Stat 1107
[261] D Leebron, 'Implementation of the Uruguay Round Results in the United States', in J Jackson & A Sykes (eds.) *Implementing the Uruguay Round* (Clarendon Press 1997) 191
[262] Ibid, 195

Congressional consultation[263] and directly through the Advisory Committee for Trade Policy and Negotiations ('ACTPN').[264] There are also further advisory committees dedicated to specific sectors or policies.[265] These representatives maintain close contact with the United States Trade Representative ('USTR'), giving recommendations and reports to Congress, the President and the USTR.[266] The advantage of such an involved consultation programme is that once agreed internationally, the implementing bill introduced to Congress must be voted on within a short time frame and may not be amended. Another notable difference from traditional implementation procedures is that the fast track procedure turns on the result of negotiations passing as a congressional-executive agreement and not a treaty. This changes the requirements from a two-thirds majority in the Senate to a simple majority in both Houses.[267]

The final trade agreement that results from fast-track negotiations may enjoy broader support than might have been the case otherwise. With increased potential for interest groups to influence negotiations (through both Congress and the ACTPN) there is a wider scope for the influence of industries and private interests. The US treaty negotiation and ratification differs in the field of international trade to other areas of US foreign affairs; it is characterized by the greater participation of interest groups and

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[263] On the relationship between Congress and private interests: I.M Destler, *American Trade Politics* (4th ed. Institute for International Economics 2005) chapter 2

[264] 19 USC s2155 (b) (1)

[265] Approximately 1000 individuals were involved in the committee system; D Leebron, 'Implementation of the Uruguay Round Results in the United States' n261, 197

[266] D Leebron, 'Implementation of the Uruguay Round Results in the United States' n261, 198

[267] Notably, the North American Free Trade Agreement ('NAFTA') implementing legislation, having passed through the House successfully, was passed by a vote of 61 to 38 in the Senate, short of the two-thirds required had it been a 'treaty.' Had this been the case, of course, it would not have had to pass through the House of Representatives; B Ackerman & D Golove, 'Is NAFTA Constitutional?' 108 Harvard Law Review 4 (1995) 799. Most trade agreements are negotiated as congressional-executive agreements. Their constitutionality was challenged in *Made in the USA Foundation v US* 242 F 3d 1300 (11th Cir 2001) where it was held that 'the question of just what constitutes a "treaty" requiring Senate ratification presents a nonjusticiable political question' (Judge Fletcher at 1302)

continual contact between legislators and negotiators. This, in turn, has the potential to project a broad US position externally, not restricted to the aims of the executive but instead a negotiated stance between the legislative and executive branches of government. The involvement of industry representatives stresses the importance of private interest groups in the policy making process. Involving both Congress and the ACTPN reflects a concern for establishing a position that accommodates both government (specifically the executive) and industry (including its principal representative, Congress).

The systemic influence of US law on the conclusion of trade agreements channels and prioritizes some actors over others. The executive (traditionally in favour of liberal trade policies)[268] is constrained first, by needing authorization from Congress to initiate negotiations[269] and second, by the involvement of Congress and the ACTPN. By enabling industry interests to engage with the negotiating process directly, the US system offers more avenues for private involvement than would otherwise be the case.

Concluding Trade Agreements under EU Law: Placating Institutional Competition

Whilst the EU may have traditionally been viewed as an agreement between Member States, regulating behaviour *inter se*, the realities of global trade soon required

[268] S.D Nollen & D.P Quinn, 'Free trade, fair trade, strategic trade, and protectionism in the U.S. Congress, 1987-1988', 48 International Organization 3 (1994) 491, 493

[269] While technically not necessary, US' trading partners view such authority as necessary in most instances (above, n255), in spite of the positive words of some Senators ('I want to reassure all of our trading partners that, with fast track or without fast track, a good trade agreement will win congressional support.' Senator Max Baucus, Opening Statement, Hearings Before The Committee on Finance, United States Senate, June 20 And 21, 2001 S. HRG. 107–171).

coordinated external action by the EU, on behalf of the Member States. The method of the EU's interaction with other international actors is closely intertwined with its own internal relationships with its Member States. In the case of the EU, the examination of how EU law determines who may influence the negotiation and conclusion of trade agreements is linked to the continual tensions between the EU and its Member States and their desire to influence global outcomes. Whereas the US system can be viewed as a compromise between protectionist influences in Congress and liberal influences through the executive, the EU system is focussed instead on reconciling demands for technical knowledge and efficiency (through the Commission), oversight by the Member States (through the Council) and democratic input (through the Parliament).

The external activities of the EU are regulated by the Treaty on European Union ('TEU') and the Treaty on the Function of the European Union ('TFEU').[270] While ostensibly an International Organization, the EU has long been held to have 'its own legal system…an integral part of the legal systems of the Member States…and capacity of representation on the international plane'.[271] The EU is now an active member of the international community. It is a member of International Organizations, an observer in others; it litigates, defends and negotiates. From an external point of view, in certain fields, the EU is analogous to a single State acting (albeit one with complex internal relationships). However, while International Organizations may have rights and duties as actors on the international plane, their competence to act is not assumed as it is with States.[272]

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[270] [2010] OJ C83/15 and [2010] OJ C83/47 respectively
[271] Case 6/64 *Costa v ENEL* [1964] ECR 585, 593
[272] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 226, para 25

The need to determine and delineate its external abilities leads to two questions that underpin the regulation of EU external relations. The first, is the EU competent to act in a particular field? Second, if it is competent to act, may it act alone or must it act in concert with the Member States?[273] These questions determine the constraints on transnational actors within the EU as they attempt to access the international level. The EU's competence in a field directly constrains and enables actors to engage in norm export at the WTO.

The TFEU grants exclusive competence to the EU over the Common Commercial Policy ('CCP').[274] Art 207 TFEU outlines the CCP in the following terms:

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.[275]

The EU's exclusive competence to conclude agreements that fall under the CCP is a change from the previous system that required 'mixed agreements' where the competence was either shared in certain areas or held by the Member States. This was a

[273] These questions are notably different to the US situation where the capacity to act is not in question, the core issue is *who* is to act (i.e. the executive, the legislature or both). In the EU the ECJ has refused to allow the encroachment of 'administrative' agreements to bypass treaty-making requirements; Case C-327-91 *French Republic v Commission* [1994] ECR I-3641

[274] Arts 3(1)(e), 206 & 207 TEU

[275] Art 207(1) TEU

result of the changing nature of international agreements encompassing many areas outside of the traditional conception of trade agreements that were 'based primarily on the operation of customs duties and quantitative restrictions'.[276] 'Mixity' played an important role in the context of the covered agreements following *Opinion 1/94* in which the ECJ confirmed that the EC (as it was then) had exclusive competence over the GATT, but shared competence with the Member States in relation to the GATS and TRIPS.[277] As the ECJ discussed in *Opinion 1*/94, this created potential problems for EC action in the WTO:[278] the DSU permits cross-retaliation (i.e. the suspension of concessions in either a different sector or under a different agreement where 'it is not practicable or effective to suspend concessions or other obligations with respect to the same sector' or under the same agreement[279]). Retaliation, though permitted under WTO law, may not be possible if a Member State enjoyed competence under the GATS but cannot act under the GATT (an area of exclusive EC competence). The Court merely stressed the importance of the duty of loyal cooperation under EC law;[280] it was for the Member States and Union institutions to come to an effective arrangement for acting internationally in the field of trade.

Art 207 TEU expanded scope of exclusive competences of the EU to include all areas falling under the CCP. While this reduces the necessity for mixity in the field of international trade agreements, in practice, such agreements continue as they incorporate broader and broader topics. A recent example is the EU-Korea Free Trade Agreement

[276] Opinion 1/78 (*Natural Rubber*) [1979] ECR 2871, para. 41
[277] Opinion 1/94 (*WTO*) [1994] ECR I-05267 confirming exclusive competence over the GATT (para. 34) but shared with regard to the GATS (para. 98) and TRIPS (para. 105)
[278] Ibid, para.109
[279] Art 22(3) DSU
[280] Ex Art 10 EC, see also Opinion of Advocate General Maduro; Case C-459/03 *Commission v Ireland* [2006] ECR I-4635 stressing the importance of the 'mutual duty of sincere cooperation' (para. 57)

where questions of cultural cooperation necessitated individual Member State involvement.[281]

The internal EU settlement for the negotiation and conclusion of international trade agreements reflects the need for collaboration in the diverse trade-related matters covered by the WTO as well as recognition of US dominance in the field of international trade. The desire of Member States to be part of an effective bloc with a single voice capable of withstanding US pressures is in tension with their desire to maintain control over their affairs and placate domestic lobbies. These special interest groups are more accustomed to influencing the policy determination process in their own States rather than at the EU level where the methods and terms of engagement are distinct.[282]

The current model under the TFEU provides for Council authorization to open negotiations following a Commission recommendation.[283] The Commission then negotiates in consultation with a Council appointed committee, regularly reporting to the special committee and the European Parliament.[284] Finally the Council and Parliament must consent to the agreement.[285] This system is the result of inter-institutional battles within the EU since its inception. The tension between Member States' desire to present a united front in transatlantic negotiations and to maintain control over their own autonomy has been further complicated by the increasing calls for more Parliamentary

[281] Free Trade Agreement between the European Union and its Member States and the Republic of Korea (signed 6 October 2010) OJ L127/6. It is expected that the EU-India, EU-Singapore and EU-Mercosur FTAs will all be mixed agreements.

[282] At the EU level, the provision of expert information to the Commission is considered a key tool. Where such detailed information is not required, it can be argued that there is a reduced potential for lobbying; A Broscheid & D Coen, 'Lobbying Systems in the EU: A Quantative Study', Max Plank Institute for the Study of Societies Working Paper 06/3 (2006)

[283] Art 207(3) para. 2 TFEU

[284] Art 207(3) para. 3 TFEU

[285] The CCP falls under the 'ordinary legislative procedure' as set out in Art 294 TFEU and thus requires the consent of both Council and Parliament.

involvement to add greater 'democratic' legitimacy to the negotiation and conclusion of trade agreements. The resulting compromise allows Member State involvement through the Council and the Trade Policy Committee[286]. Further, while the CCP is now an exclusive EU competence in which the Directorate General for Trade Policy sets the agenda, the expansion of trade agreements into topics outside of the CCP maintains direct Member State involvement. Meanwhile, the Parliament enjoys greater involvement in trade negotiations and their conclusion than before (though, in practice MEPs were part of the EC delegation at Marrakech).[287]

While Parliamentary consent is on a 'take it or leave it' basis as amendments cannot be tabled,[288] the Parliament's involvement is expected to add transparency through debates in the Parliament with the hope that (in the words of the European Commissioner for Trade): 'No-one can now claim that EU-trade policy making is a bureaucrat-to-bureaucrat exercise, devoid of scrutiny and passion.'[289]

Whereas the US system institutionalizes the influence of industry in the ACTPN, the EU system focuses more on the relationship between the Union Institutions. Unlike the US, the EU process does not allow the direct involvement of interest groups (whether industry or NGOs) only informing them of the final result rather than engaging with them

[286] Formerly the 133 Committee

[287] P Kuijper, 'The Conclusion and Implementation of the Uruguay Round Results by the European Community', 6 European Journal of International Law (1995) 222, 231

[288] Such was the case of the Anti-Counterfeiting Trade Agreement, rejecting by the European Parliament on 4th July 2012 thus barring the EU's accession. On the nature of Parliamentary approval for trade agreements more generally: A Pollet-Fort, 'Implications of the Lisbon Treaty on EU External Policy', Background Brief No.2, EU Centre in Singapore, March 2010, 11

[289] K de Gucht, 'The Implications of the Lisbon Treaty for EU Trade Policy', S&D Seminar on EU Trade Policy, Oporto, 8 October 2010 < http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146719.pdf> (accessed 1 October 2012)

throughout the negotiating process.[290] Instead, the priority in the EU system is the relationship between Union institutions; while this was once concerned primarily with the Commission and Council (as representative of the Member States' interests), Parliamentary involvement has moved this toward a trilateral relationship.

As a consequence, different actors are prioritized in accessing the international level in the pursuit of their interests. While the US system creates a body for industry representation in the form of the ACTPN, the EU system (more concerned with internal institutional divisions) is more fragmented with individuals and groups left to lobby the distinct institutions separately. These differing legal arrangements constrain and enable transnational actors in different ways as they seek to access the international level. Alone the systemic influence of law does not determine outcomes but in concert with the other causal influences contributes to a wider explanation of the development of WTO law.

(ii) The Role of Domestic Procedural Requirements in Challenging Incorporated WTO Obligations

Transnational actors stimulate challenges over the appropriate interpretation or use of legal instruments to encourage norm import.[291] One way to do this is through initiating administrative investigations or judicial determinations under domestic law to challenge coterminous WTO obligations.[292]

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[290] H.G Ruse-Khan, T Jaeger and R Kordic, 'The Role of Atypical Acts in EU External Trade and Intellectual Property Policy', 21 European Journal of International Law 4 (2011) 901, 929
[291] n192 and accompanying text
[292] Examined at Section C (IV) below (p148ff)

As they attempt to stimulate such challenges within the domestic legal systems of Members, they are subject to the systemic influence of the rules applicable to such challenges: the rules on how, when and why such claims may be raised within the legal system of a Member. The structure of the domestic rules on international trade regulation constrains and enables actors as they seek to stimulate these interactions. Consequently, the rules will influence the types of actors that can engage in these processes by determining standing and other procedural matters that channel behaviour in one direction or another.

The requirements for transnational actors to petition authorities to investigate a potential breach of WTO obligations or to challenge a measure under domestic courts influence their ability to pursue their objectives. Under EU law, for example, the ability of industry to petition for relief in the face of unexpected import surges differs from relief in the face of subsidies: under Council Regulation (EC) No 260/2009[293] it is for Member States to inform the Commission of changes in import trends.[294] It is the Commission that then initiates a consultation procedure under the Advisory Committee (a body composed of Member State representatives and a Commission representative as chair[295]). Should the Commission feel that there is sufficient evidence it may initiate an investigation.[296] While interested parties can contribute to the investigation, expressing their views and offering information,[297] they do not have a right to petition the Commission directly nor do they have a formal right of attendance during the consultation phase.

[293] Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports [2009] OJ L84/1
[294] Art 2 Council Regulation (EC) No 260/2009 n293
[295] Art 4(1) Council Regulation (EC) No 260/2009 n293
[296] Art 6(1) Council Regulation (EC) No 260/2009 n293
[297] Art 6(1)(b) Council Regulation (EC) No 260/2009 n293

Such limited access by transnational actors to respond to import surges that may affect their interests can be contrasted with other trade defence instruments. In the case of subsidies and countervailing duties, for example, 'any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry'[298] can petition the Commission to initiate an investigation. While the threshold required is still high[299] industry representatives have a right to petition the Commission directly. Further, interested parties are granted a right to be heard during the investigation subject to certain procedural requirements.[300] Mirror provisions exist in the case of investigations into dumping.[301] While all three trade defence instruments (safeguard measures, anti-dumping duties and countervailing duties) are often grouped together and share certain commonalities,[302] their different treatment under EU law directly influences the ability of certain transnational actors such as industry groups to engage in processes of norm export as they are considerably more limited in the case of safeguard measures than AD/CVDs.

By setting out the procedures and requirements for actors to engage within their own legal systems with WTO-based obligations, domestic legal systems constrain and

[298] Art 10(1) Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community [2009] OJ L188/93

[299] Art 10(6) Council Regulation (EC) No 597/2009 n298: 'An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 % of total production of the like product produced by the Community industry.'

[300] Art 11(5) Council Regulation (EC) No 597/2009 n298

[301] Arts 5 & 6 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L343/51

[302] For example, in all three instances, the hearing officer is present during trade proceedings in order to protect the right to good administration of the interested parties. This is limited, however, to the strictures of the relevant Regulation. See, Decision of the President of the European Commission of 29 February 2012 on the Function and Terms of Reference of the Hearing Officer in Certain Trade Proceedings [2012] OJ L107/5

enable transnational actors to pursue their objectives in certain ways. These procedural requirements can have a considerable influence on the way in which these actors then pursue their objectives, not only within their own legal systems but also at the international level, encouraging greater focus on potentially more productive avenues of engagement.

It is not only the domestic rules applicable to transnational actors that have a constraining or enabling influence on them; the rules at the international level also constrain and enable. The following two sections examine the systemic influence of law at the international level as actors seek to engage in processes of norm export.

(iii) Public International Law Obligations under the Covered Agreements: Constraining and Enabling on the International Plane

The obligations under the covered agreements bind WTO Members (and by extension the actors that act through them) in two ways: first, by virtue of the substantive obligations contained in the covered agreements themselves and second, Members are obliged to comply with the recommendations or rulings of the Dispute Settlement Body ('DSB').[303] While the obligation to comply with these reports is based on the Agreements

[303] The possibility of customary rules of international law arising from the GATT and WTO obligations is contentious and not widely accepted. 'The emphasis in International Economic Law is on treaties.' G Schwarzenberger, 'The Principles and Standards of International Economic Law', I *Recueil des Cours* (1966) 12. Rules of customary international law do, however, play a role in the interpretation of the covered agreements (*United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17) and may even have further application (though this is highly contested). See generally, J Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' 95 American Journal of International Law (2001) 595 and L Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 35 Journal of World Trade (2001) 499

(particularly the DSU),[304] the report creates a distinct obligation for the parties in a case. As the report determines the existence of a breach of the covered agreements, this determination binds the parties to the dispute.[305] This section deals with the constraining and enabling influence of the covered agreements themselves, while the following section examines the constraining and enabling influence of the dispute settlement system at the WTO.

Key to the foundations of the international legal system is that obligations under a treaty are binding on the parties to it.[306] Under the covered agreements, Members are subject to a host of obligations and granted rights in trade-related areas. Whilst many of these obligations relate to the external acts of the Members, there are certain requirements that permeate into the legal system of the Member. Art XVI:4 of the WTO Agreement, requires that 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.' Whereas Art 27 VCLT precludes the use of domestic law as an excuse for failure to comply with a treaty obligation, the WTO obligation extends further: Art XVI.4 of the WTO Agreement 'not only precludes pleading conflicting internal law as a

[304] John Jackson cites Articles 3(4), 3(5), 3(7), 11, 19(1), 21(1), 21(6), 22(1), 22(2), 22(8), 26(1)(b) DSU as relevant for the determination of the obligation to comply with an adopted report; J Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings On the Nature of Legal Obligation', 91 American Journal of International Law (1997) 63. Most notable is Art 21(1) DSU: 'Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.'

[305] J Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 27-28

[306] This is embodied in the concept of *pacta sunt servanda*, and codified in Art 26 VCLT. 'The rule that treaty commitments must be observed – *pacta sunt servanda* – is one the most fundamental in international law', V Lowe, *International Law* (OUP 2007) 74

justification for WTO inconsistencies, but requires WTO Members actually to ensure the conformity of internal law with its WTO obligations.'[307]

While there is no obligation to incorporate WTO obligations into domestic law directly,[308] Members are still bound at all times to maintain WTO consistent positions. However, while Members are expected to comply with their obligations at the WTO this is not to say that they always do.

Considering the obligations of Members under the covered agreements as a constraining or enabling causal influence does not make a descriptive claim of the perfect functioning of the WTO system. A Member may be bound by an obligation and breach it: the issue when understanding this obligation as a 'constraining' cause is that if the Member breaches its obligation it incurs a cost (political, reputational etc.). Rather than a binary choice, the obligation is examined for its casual *strength*. The strength of this cause is dependent on other factors: whether the normativity of the obligation is accepted (i.e. the Member views it as law) or where the Member views the rule as a legitimate one.[309]

The public international law obligations under the covered agreements do not only constrain or enable on the basis of substantive rules of international trade law. They also influence Members by determining who may *be* a Member. Under Art XII(1) WTO Agreement, States and customs territories can become Members of the WTO.[310] By

[307] *United States – Sections 301-310 of the Trade Act 1974,* Panel Report (22 December 1999) WT/DS152/R, 314, fn 652. It appears that the aim of the negotiators to maintain a standard higher than that found in public international law more generally; see S Bhuyian, *National Law in the WTO* (CUP 2007) 59-61

[308] *US – Sections 301-310* n307, para. 7.20

[309] See Chapter 1 (C) (ii), p65ff

[310] 'Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade

restricting membership to States and separate customs territories such as the EU or China Hong Kong, transnational actors are encouraged to act through such institutions and bodies in order to pursue their objectives. Use of the WTO dispute settlement system is principally restricted to Members of the organization,[311] which also encourages engagement with the State as a representative institution or other independent customs territories in order to pursue claims or stimulate contestations between differing interpretations of rules at the WTO.

The use by transnational actors of the legal personality of Members to raise claims at the WTO is not uncommon.[312] While the most obvious is the dispute between Japan and the US over photographic film[313] (commonly referred to as Kodak/Fuji after the companies concerned), the Boeing/Airbus dispute is another notable example.[314] There are less obvious instances of such disputes also: the recent involvement of Phillip Morris with the Ukrainian government in raising tobacco claims is one such example.[315]

The use of Members' legal personality by transnational actors to raise claims at the WTO is enabled by the public international law rules within the WTO system. The existence of the treaty obligations setting out the requirements for Membership is one

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Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.'

[311] Inter alia: 3.2, 3.3, 3.7 and 10.2 DSU making reference to Members in raising claims under the DSU

[312] For an account of the influence of private parties on governmental decisions to litigate and the networks between them: G Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (The Brookings Institution Press 2003)

[313] *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report (31 March 1998) WT/DS44/R

[314] *European Communities and Certain Member States - Measures Affecting Trade In Large Civil Aircraft*, Report of the Appellate Body (18 May 2011) WT/DS316/AB/R and *United States - Measures Affecting Trade In Large Civil Aircraft (Second Complaint)*, Report of the Appellate Body (12 March 2012) WT/DS353/AB/R

[315] 'Hidden hand of big tobacco leads to WTO challenge', The Sydney Morning Herald, 20th August 2012, <http://www.smh.com.au/opinion/political-news/hidden-hand-of-big-tobacco-leads-to-wto-challenge-20120819-24gjo.html> (accessed 1 October 2012) See also the discussion below relating to the role of private parties in the *US – Gambling* dispute: n489 and corresponding text.

part of this, while there is also the possible influence of key decisions that have come out of the dispute settlement system, notably the decision of the Appellate Body in *EC – Bananas III*[316] to allow the use of private legal representation in disputes between Members.

There are many more rules, specifically related to the use of the dispute settlement system, that constrain and enable actors at the international level. Indeed, many of the arguments concerning the systemic influence of the rules of the WTO are shared with the constraining and enabling influence of its dispute settlement system. In the next section, the systemic influence of the dispute settlement system is examined, with certain key characteristics and issues highlighted: the legally binding nature of the obligations arising from the dispute settlement system, and the broader normative strength of the reports of the DSB.

(iv) The Systemic Influence of the Dispute Settlement System: Examining Causal Strength

The dispute settlement system of the WTO provides another constraining and enabling influence on actors as they pursue their objectives. The WTO dispute settlement system is widely praised for its effectiveness with James Crawford going so far as to label it: 'on any view, the most successful inter-state system of dispute settlement ever'.[317] This system enables Members of the WTO to litigate against other Members and gives greater

[316] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body (9 September 1997) WT/DS27/AB/R, para. 10

[317] J Crawford, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture', 1 Journal of International Dispute Settlement 1 (2010) 4, 4

weight to the constraining force of the covered agreements by opening the way to public determinations at the WTO that a Member is in breach of its obligations and potentially permitting the use of counter-measures.[318] However, while the obligation to adhere to the covered agreements is largely uncontested, there has been some debate over the binding nature of adopted panel or Appellate Body reports.

The exact extent of the obligation to obey the recommendations of an adopted panel or Appellate Body report was debated most notably in an exchange in the American Journal of International Law between John H. Jackson and Judith H. Bello.[319] Whilst ostensibly looking at WTO obligations in the round, the primary focus was on the relationship between the existence of an obligation and the existence of an effective enforcement mechanism. Bello's argument was as follows:

> WTO rules are simply not "binding" in the traditional sense… there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.[320]

Jackson's response is largely centred on the statement that WTO rules 'are binding in the traditional *international law* sense', i.e., the obligations exist, though they may have weak enforcement mechanisms.[321] In a similar vein, J.H.H. Weiler has argued that the

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[318] Art 22 DSU

[319] J Bello, 'The WTO Dispute Settlement Understanding: Less is More', 90 American Journal of International Law (1996), 416; J Bello, 'Review: *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* by John H. Jackson' 95 American Journal of International Law 4 (2001) 984; and J Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"', 98 American Journal of International Law (2004) 109 and J Jackson 'The WTO Dispute Settlement Understanding – Misunderstandings On the Nature of Legal Obligation' n304, 60

[320] J Bello, 'The WTO Dispute Settlement Understanding: Less is More' n 319, 416-417

[321] J Jackson, 'The WTO Dispute Settlement Understanding – Misunderstandings On the Nature of Legal Obligation' n304, 63

withdrawal of concessions in the WTO dispute settlement system ought properly to be conceived of as sanctions and 'not an indulgence you buy to expiate your wrong doing.'[322]

In this light, the debate becomes more concerned with the potential effectiveness of WTO enforcement and not the existence of an obligation in and of itself.[323] These are two separate issues. The first question is whether WTO obligations bind the Members. The second question is whether the obligation to obey WTO obligations is undermined if there is no effective enforcement. The preceding section has shown how under the terms of the covered agreements, Member are bound to comply with their obligations. The proposition that reports of the DSB are not binding is grounded in questions of compliance under WTO obligations. Non-compliance does not strip WTO rules of their normative force.[324] Widespread non-compliance, however, would limit the strength of the systemic influence of the dispute settlement system on actors at the international level. It is argued here, however, that (with a few notable exceptions), the WTO obligations have a commendable compliance record, indicating a strong constraining causal influence.

Louis Henkin observed, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[325] Studies indicate a high level of compliance with WTO dispute settlement reports with delays in compliance only where legislative action is required as opposed to alteration by

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[322] J.H.H Weiler, 'Written Statement', Testimony to US House of Representatives Committee on the Judiciary, Hearing on Establishing Consistent Enforcement Policies in the Context of Online Wagers, November 15 2007, 10

[323] J Bello, 'Review: *The Jurisprudence of the GATT and the WTO: Insights on Treaty Law and Economic Relations* by John H. Jackson' n319, 987

[324] See, Chapter 1 (C) (ii), p65ff

[325] L Henkin, *How Nations Behave* (2nd ed. Columbia University Press 1979) 47; similarly, Frank commenting that 'most states observe systemic rules much of the time in their relations with other states.' T Frank, 'Legitimacy in the International System', 82 American Journal of International Law (1988) 705

administrative action.[326] While this does not necessarily reduce the level of compliance, it does affect the speed of bringing measures into conformity in the WTO.[327] The evidence would seem to indicate that the WTO system enjoys a high level of compliance (particularly when compared to other areas of international law).

While we may conclude that States are bound by their obligations under the dispute settlement system, it is clear that there are times when they do not comply with them. The practice of the US with regarding to the practice known as 'zeroing' is a useful example. Until recently, the US maintained a method of calculating the value of dumped goods that created a higher figure than the method used by other WTO members (i.e. allowing it to impose higher duties on imports to the US than would otherwise be allowed). Panels and the Appellate Body repeatedly held that zeroing (as then applied by the US) was contrary to the WTO provisions on anti-dumping measures[328] (specifically, Art 2.4.2 Anti-Dumping Agreement).[329] For a long period of time, the US did not change its practice. Indeed, in a dispute with Thailand (*US – Carrier Bags*[330]) it did not contest Thailand's complaint over the use of zeroing and went so far as to recognize that the Appellate Body had found the practice of zeroing incompatible with the Anti-Dumping Agreement in *US – Softwood Lumber V* and that the current case was on all fours with

[326] B Wilson, 'Compliance by WTO Members With Adverse WTO Dispute Settlement Rulings: The Record to Date', 2 Journal of International Economic Law 1 (2007) 398
[327] Ibid, 399
[328] Most importantly, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, Report of the Appellate Body (12 March 2001) WT/DS141/AB/R and *United States – Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body (31 August 2004) WT/DS264/AB/R
[329] Agreement on Implementation of Article VI (Anti-dumping) (15th April 1994) LT/UR/A-1A/3 <http://docsonline.wto.org>
[330] *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags From Thailand*, Panel Report (22 January 2010) WT/DS383/R

it.[331] While it has since come into conformity with its WTO obligations in this regard (at least in part), the long period of non-compliance demonstrated the ability of States to resist their obligations, even where clear.[332]

It is argued here that the obligatory nature of adopted panel and Appellate Body reports is not undermined by a weak or non-existent enforcement mechanism both as a matter of principle and practice. A causal model that seeks to explain the development of a legal regime is concerned with the constraining or enabling influences of the dispute settlement system. The existence of a cost (whether it be reputational, political or financial) for non-compliance with a panel or Appellate Body report is sufficient to constrain or enable. Given the normative nature of the dispute settlement obligations at the WTO, we can expect it to exert a greater constraining influence.

The importance that panels and the Appellate Body have placed on augmenting their own perceived legitimacy has further added to the strength of the systemic influence of the WTO dispute settlement system.

As transnational actors themselves, the practice of panels and the Appellate Body under the DSU has been an attempt to legitimize their role and, in this way, minimize the potential non-compliance of States.[333] Their approach that focuses on the text of the covered agreements is an attempt to maintain their legitimacy in face of criticism that would undermine their ability to constrain or enable actors within the WTO system.

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[331] Ibid, para. 3.3

[332] The altered practice was published in the Federal Register, 'Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification' 77 Fed Reg 8101 (14 Feb 2012)

[333] An example of causes functioning in different ways: instrumental use of law by panels and the Appellate Body to further their own objectives by augmenting their legitimacy, while at the same time constituting a systemic influence on other transnational actors involved by constraining their behaviour.

While we may conclude that adopted reports are binding (at least to the parties to the particular dispute), panels and the Appellate Body are limited in the formulation of a report by virtue of Art 3.2 DSU which states that:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements*.[334]

The two highlighted provisions stress the importance of a textual approach to panels and the Appellate Body. The reference to the 'customary rules of interpretation of public international law' has been held to include Arts 31 and 32 of the VCLT.[335] However, in

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[334] Art 3.2 DSU (emphasis added)

[335] *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17; *Japan – Taxes on Alcoholic Beverages,* Report of the Appellate Body (4 October 1996) WT/DS8,10,11/AB/R, 10. Arts 31 and 32 VCLT state:

Art 31 - General rule of interpretation

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 (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.

Art 32 – Supplementary means of interpretation

the WTO context this has led to a greater emphasis on Art 31 than Art 32 (i.e. less interest in supplementary methods of interpretation) and importantly a strong emphasis on the first part of Art 31(1) which stresses 'the ordinary meaning to be given to the terms of the treaty'.

This 'literal' approach can be contrasted with the European Court of Justice's 'teleological' approach that places more emphasis on the object and purpose of the EU treaties when rendering an interpretation.[336] In the context of the WTO, this has a 'legitimizing effect' that serves as a defence to accusations of judicial activism.[337] This concern is embodied in the need for a provision specifically limiting the ability of DSB rulings to affect the balance of rights and obligations under the text of the covered agreements.[338] This system aims to limit the potential for perceived judicial excesses and where such behaviour does occur, permits both formal and informal corrections. The formal method for the Member to reinforce their primacy is through either authoritative interpretations or by amendments of the covered agreements themselves.[339] The informal corrections may take the form of action resulting from political discourse within the

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Recourse may be had 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 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.

[336] C.D., Ehlermann, 'Six Years on the Bench of the "World Trade Court"', 36 Journal of World Trade 4 (2002) 605, 616

[337] Ibid, 617. Concerning legitimacy, also: R Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence' in J.H.H Weiler (ed.) *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (OUP 2000), J.H.H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Jean Monnet Working Paper No 9/00 (2000) <http://centers.law.nyu.edu/jeanmonnet/papers/00/000901.html> (accessed 1 October 2012)

[338] Art 3.2 DSU

[339] Authoritative interpretations under Art IX(2) WTO Agreement and amendments to the covered agreements under Art X WTO Agreement.

WTO.[340] The desire by panels and the Appellate Body to ensure compliance with their reports further encourages them to take into account the criticism of the Membership.[341]

The WTO dispute settlement system serves as a constraining and enabling cause by constraining the behaviour of certain Members where their behaviour breaches their obligations under the covered agreements. The dispute settlement system also enables actors to influence the development of a legal regime by serving as a forum where they can bring claims, guiding the development of the rules at the WTO and placing pressure on inconsistent domestic provisions to be brought into line.

The systemic influence of the dispute settlement system is not without limitations, however. Even if we accept the normativity of reports of panels or the Appellate Body along with the covered agreements themselves, this is not to say that there is uniform compliance. The advantage of using a broad causal approach is that this is not entirely problematic: unlike more empirical causal models, this approach does not posit a 'if *x* then *y*' scenario. The influence of law as a system is to constrain and enable, not to determine the outcome of a situation without any other influence. The strength of this cause can be examined in light of the other causes at work in a specific given scenario, rather than the sole focus of an investigation. Constrained and enabled by the systemic influence of law, transnational actors use the law instrumentally to engage in norm export: this is the instrumental influence of law examined in the following section.

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[340] D Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP 2005) 79, using an example the change in position of the Appellate Body on the reception of *amicus curiae* briefs. Also, P Mavroidis, 'Amicus Curiae Briefs Before the WTO: Much Ado About Nothing', Jean Monet Working Paper 2/01, 8 for an account of the WTO General Council Meeting following the reception of *amicus curiae* briefs by the Appellate Body in the Shrimp-Turtle dispute.

[341] Suggesting that the Appellate Body balances its role as a legal decision-maker with a desire to encourage compliance with its reports: J McCall Smith, 'WTO Dispute Settlement: The Politics of Appellate Body Rulings', 2 World Trade Review (2003) 65

C. The Instrumental Use of Law in Pursuing Norm Export at the WTO: Embedding Norms and Stimulating Challenges

Transnational actors use law to pursue their objectives.[342] Specifically, the instrumental use of law allows actors export norms in two ways: using law to embed norms within a legal system and using law to stimulate an interaction between competing conceptions of a norm.[343]

A clear way of embedding norms at the WTO is the creation of new legal obligations such as treaty obligations. These are analysed in section (i). Another is to embed norms via the membership's representative institutions, the Ministerial Council and the General Council (and its sub-Committees). This is examined in section (ii). The stimulation of an interaction between competing conceptions of a norm is examined in sections (iii) and (iv) where the raising and intervening in disputes at the WTO is examined, as well initiating and challenging investigations at the domestic level, respectively.

(i) Embedding Norms as Treaty Obligations: The WTO Agreement and other Covered Agreements

The WTO Agreement created a new system for the regulation of international trade built on the back of the old GATT. The WTO introduced an effective dispute settlement

[342] Chapter 1 (C) (i), p61ff
[343] n192 and accompanying text

system with compulsory jurisdiction and a range of new agreements expanding upon existing obligations under the GATT that were vague or imprecise.[344] The new covered agreements also introduced new subjects to the remit of international trade regulation; most notably trade in services but also trade-related intellectual property rights and certain trade-related aspects of investment. Determining what is to be regulated by international agreement at the WTO, and how the related rights and obligations under the covered agreements are defined and developed is key in ensuring that a transnational actor's objectives are met. This both sets the agenda and the rules of the game from then on.

As actors seek to export their normative preferences, one obvious target is the creation of new international obligations in treaties such as the covered agreements. It is argued in this section that while crystallising norms as treaty obligations is an obvious choice for actors it is limited in effect due to numerous systemic influences that constrain and enable their pursuit of this goal. These can include material factors (the need for power asymmetries), temporal factors (the timing must be right to gain agreement for a new treaty or amendment) and unintended consequences as embedded norms may interact with other norms producing unexpected results.

The most obvious way of ensuring that the normative preferences of an actor are embedded within the WTO system is to introduce a provision in the foundational legal texts of the WTO: the covered agreements. The history of international affairs is replete with examples of disagreements over what should be included in a treaty and how each article and paragraph should be worded. It is the legally binding nature of these

[344] Sections B (iii) & (iv) above (p119ff and p123ff respectively)

international obligations that encourages such focus from the negotiating parties. As the members of the WTO are bound by the obligations within the covered agreements as a matter of public international law[345] (and, depending on their domestic systems, as a matter of domestic law), one might expect that inserting a treaty provision that incorporates an actor's preferences would be a logical objective for those actors engaged in a process of norm export.

While norm crystallisation within treaty obligations may be the objective of actors engaged in norm export, they are also constrained and enabled by the systemic influence of law. These restrictions manifest themselves in three limitations: material, temporal, and behavioural. The material limitation is the result of the influence of the principle of sovereign equality[346] and the *pacta tertiis* rule.[347] As the consent of all relevant parties is traditionally required to incorporate a desired treaty obligation wholesale, considerable power asymmetries are needed to be able to achieve this aim. This has occurred previously: of the 26 articles in the GATT 1947, 23 were almost entirely based on the US' proposals.[348] While examples of US and EU influence in the remaining covered agreements exist, the wholesale dictation of a treaty by one party has not repeated itself in the multilateral trading system. This is a consequence, in part, of the relative decline of US dominance in the international trading system. While 'declinism' is a recurring theme in US perceptions of its place in the world,[349] in the context of trade

[345] Section C (ii) below (p137ff)
[346] Art 2(1) UN Charter
[347] 'A treaty does not create either obligations or rights for a third State without its consent.' Art 34 VCLT. This rule is considered fundamental and 'its existence has never been questioned.' M Fitzmaurice, 'Third Parties and the Law of Treaties', 6 Max Planck UN Yearbook (2002) 37, 38
[348] D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System' n216 at fn 74
[349] Noting in 1989 that declinism was a constant in US politics since 1950: S Huntington, 'The US. – Decline or Renewal?' Foreign Affairs (Winter 1988/1989)

its *relative* position to other WTO members has narrowed. Coupled with the representation of the EU as a (largely) single voice in the WTO and the increasing economic strength of certain developing countries, the allocation of power within the international trading system is less concentrated than it was in the 1940s, for example.

The US is not the only Member with less influence within the WTO, the more recent system of negotiating new agreements through the 'Quad' (the US, EU, Japan and Canada) no longer exists in the manner that it did prior to the Ministerial Conference in Cancún September 2003. The common position asserted by Brazil, India and China have led to increased participation from the larger developing countries in any prospective end to the Doha Round.[350] With a larger group of powerful trading States or regional bodies involved in the negotiations on new treaties or agreements at the WTO the scope for forcing one provision on the WTO's membership is diminished.

This is particularly the case with new multilateral agreements, which would constitute treaties, require unanimity.[351] More likely, Members could act through the Ministerial Conference or General Council and attempt to adopt an authoritative interpretation under Art IX(2) WTO Agreement, a waiver under IX(3) WTO Agreement, Decision under Art IX(1) WTO Agreement or amendment by the Ministerial Conference under Article X WTO Agreement. However, these bodies require (*inter alia*) consensus or majority in the case of Decisions, three-fourths majority for an authoritative interpretation or waiver and a two-thirds majority for amendments (though the

[350] No comment is made on the desirability of an increased number of participants in the negotiating process, merely that it has become harder for a single member to dominate the agenda.

[351] So as not to breach Article 34 VCLT. Alternatively, for a new plurilateral agreement to be added to Annex 4, consensus is required: Art X(9) WTO Agreement.

consequences of amendments vary depending on the circumstances).[352] These are not easy hurdles to overcome: with the exception of waivers which have proved less 'exceptional' than the terms of Art IX(3) WTO Agreement would indicate,[353] there has only been one amendment[354] and no authoritative interpretations.[355]

The second limitation is the temporal limitation: the need for the timing to be right to arrive at an agreement. Timing plays a role in whether or not consensus can be reached over new agreements or amendments to the existing ones.[356] Not only do the negotiations at the multilateral level need to be favourable but all the parties involved have to be capable of agreeing to a new agreement: this is a frequent issue for the US executive which requires a Congressional delegation of authority in order to conclude a trade agreement.[357] With the completion of the Uruguay Round, there have been few agreements at the multilateral level,[358] most notably the four protocols to the GATS on financial services,[359] movement of natural persons[360] and basic telecommunications.[361] Where there has been activity, which will be examined in the following section, has been

[352] In practice, Members do not vote in the majority of these instances and consensus is maintained as the underlying rule: Mary E Footer, 'The WTO as a 'Living Instrument', in Thomas Cottier & Manfred Elsig (eds) *Governing the World Trade Organization: Past, present and beyond Doha* (CUP 2011) 223

[353] Though, most waivers have been granted to individual members thus not having the broader systemic impact that an amendment has. Council for Trade-Related Aspects of Intellectual Property Rights - Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: Note by the Secretariat, (24 October 2002) IP/C/W/387 Annex 1

[354] Decision of the General Council, Amendment of the TRIPs Agreement (6 December 2005) WT/L/641

[355] There have only been two requests: Communication from the European Communities, 'Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization' (25 January 1999) WT/GC/W/133 and Communication from the European Communities, 'Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization' (5 February 1999) WT/GC/W/143.

[356] In accordance with Article X WTO Agreement

[357] See above n261 and accompanying text

[358] This is in stark contrast to the exponential growth of regional and preferential trade agreements

[359] Second Protocol to the General Agreement on Trade in Services (24 July 1995) S/L/11 and Fifth Protocol to the General Agreement on Trade in Services (3 December 1997) S/L/45

[360] Third Protocol to the General Agreement on Trade in Services (24 July 1995) S/L/12

[361] Fourth Protocol to the General Agreement on Trade in Services (30 April 1996) S/L/20

in the form of Ministerial Declarations such as the Information Technology Agreement[362] or documents passed by a specific working group such as the Telecommunications Services Reference Paper.[363] Where treaties have come into question it has been to terminate them, as was the case with the Agreement on Textiles and Clothing.[364]

The crystallisation of norms as treaty obligations has a final disadvantage, the behavioural limitations that result from the systemic influence of law on actors engaged in norm export. This is often the unintended consequence of embedding norms within an institutional structure in a different area.[365] Essentially this relates to the systemic influence of a separate exercise of norm export on the actor as they attempt to embed their own normative preference.

Take the prior example of an intergenerational conception of fairness as a societal value.[366] When expressed in environmental matters, the resulting norm proscribing acts prejudicial to the interests of future generations for short-term development crystallizes as a treaty obligation. In the context of the GATT, specifically Art XX (b) and Art XX (g), providing for exceptions to the GATT obligations where in pursuance of the protection of exhaustible natural resources or protection of human, animal or plant life.[367] While an actor may be encouraged by the inclusion of these provisions, this says nothing

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[362] Ministerial Declaration on Trade in Information Technology Products (13 December 1996) WT/MIN(96)/16

[363] Negotiating Group on Basic Telecommunications, 'Telecommunications Services: Reference Paper' (24 April 1996) <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> (accessed 1 October 2012)

[364] Terminated on 1st January 2005

[365] This issue arises in both the regulation of safeguard measures and SPS measures

[366] See, n180 and accompanying text

[367] Subject to the requirements set out in, *inter alia*: *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body (12 March 2001) WT/DS135/AB/R; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) WT/DS58/AB/R; and *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body (10 January 2001) WT/DS161/AB/R and WT/DS169/AB/R

of the method of interpretation conducted by the panel in the particular dispute, nor the institutional procedures for the adoption of the report, nor the method of compliance should a Member be found in violation. At each stage, it is not only the specific rights and obligations under the GATT that matter but rather also the relevant provisions under the DSU, WTO Agreement and others. It is not only the narrow treaty obligation that matters but also the environment in which it exists, an environment which constrains and enables actors as a result of successful norm exports by that same Member or others.

(ii) Embedding Norms Through the Quasi-Legislative[368] Institutions of the WTO: The Role of WTO Councils and Committees

Creating new treaty obligations is not the only method of embedding norms in the WTO system. Members can also use a variety of sites with varying possible outcomes affecting the membership: Ministerial Declarations, decisions and standards at either the principal Councils (the Council for Trade in Goods, Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights)[369] or their sub-Committees, Working Parties and Working Groups.[370] Actors can use these bodies to disseminate a range of instruments to influence the legal regime from within the WTO system. While less dramatic than a new agreement, the mechanisms provided for by these bodies (in

[368] The term 'quasi-legislative' is used in its most spare form possible: institutions engaged in some form of rule making or rule-elaboration. No meaning beyond this is intended (e.g. ascribing legislative powers in the domestic law sense).
[369] Art IV(5) WTO Agreement
[370] Art IV(6) WTO Agreement

which all Members can be represented) offer ample opportunity for the pursuit of actors' objectives in embedding norms within the international trading system.

In their article, 'The Hidden World of WTO Governance'[371] Lang and Scott seek to open a broader discussion on the role of 'non-judicial governance' at the WTO. While they acknowledge a range of sites of non-judicial governance, they concentrate on the GATS committees and the Committee on Sanitary and Phytosanitary Measures[372] ('SPS Committee').[373] They distinguish between three functions which take place at these non-judicial governance sites: the dissemination and exchange of information between representatives; technical assistance and regulatory coordination; and the elaboration and development of norms. They argue that each of these functions influences how the trade regime develops by offering a space for individuals to interact with each other and influence their home-State trade regulations. As sites of norm elaboration and development they are of particular interest to actors attempting to embed their normative preferences within the WTO framework.

Some committees at the WTO provide a clear opportunity to embed norms within the international system. Some of the most notable of these are the SPS Committee, the Working Party on Domestic Regulation[374] and the Committee on Technical Barriers to Trade[375] ('TBT Committee'). These committees offer actors the prospect of influencing the ways in which the committee and the membership conduct themselves in a range of

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[371] A Lang & J Scott, 'The Hidden World of WTO Governance', 20 European Journal of International Law (2009) 3, 575

[372] Ibid, 577-590 and 590-601 respectively

[373] Art 12, Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/UR/A-1A/12 <http://docsonline.wto.org> hereafter 'SPS Agreement'

[374] Replacing the Working Party on Professional Services: Decision on Domestic Regulation adopted by the Council for Trade in Services (26 April 1999) S/L/70

[375] Art 13, Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 <http://docsonline.wto.org> hereafter 'TBT Agreement'

fields. The comprehensive guidance given by the TBT Committee in its decisions and recommendations[376], for example, gives guidance on a wide range of matters for members from notification requirements[377] to the proper running of enquiry points.[378] These decisions can have far reaching consequences. While the broader process of institutional learning is particularly important, there is increasing scope for such documents to become relevant in litigation. The panel in *US - Poultry*[379]referred to a decision of the SPS Committee on equivalence[380] in determining the appropriate interpretation of Art 4 of the SPS Agreement. Acknowledging that the decision is not binding, the panel nonetheless drew on it in this instance:

> The Panel notes, that while this decision is not binding and does not determine the scope of Article 4, we do consider that this Decision expands on the Members' own understanding of how Article 4 relates to the rest of the SPS Agreement and how it is to be implemented[381]

Indeed, even its observation that the decision is not binding is qualified: it goes on to point out that whereas most decisions contain a note stressing their respect not to alter the rights or duties of the membership under the covered agreements, in this case such a provision was missing.[382] It is unclear exactly what the panel meant here. This could be an acknowledgment that without such a provision decisions may have greater weight. Irrespective, the role of such decisions is likely to increase in importance as they increase

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[376] The Secretariat provides these as a single document: Decisions and Recommendations adopted by the WO Committee on Technical Barriers to Trade since 1 January 1995 (9 June 2011) G/TBT/1/Rev.10
[377] Ibid, 18-29
[378] Ibid, 33-36
[379] *United States – Certain Measures Affecting Imports of Poultry from China*, Panel Report, (29 September 2010) WT/DS392/R ('*US – Poultry*')
[380] Decision of the Committee on Sanitary and Phytosanitary Measures, 'Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures' (23 July 2004) G/SPS/19/rev. 2
[381] *US – Poultry* n379, para 7.136
[382] Ibid, fn345

in number and scope.[383]

(iii) Reviewing 'Measures' at the WTO: The Dispute Settlement System and other Mechanisms for Scrutiny

Transnational actors can use law to further their objectives not only by embedding norms *within* structures such as treaty instruments or other legal instruments but also by stimulating interactions between competing conceptions of a norm's content. This section examines the review of Members' measures at the WTO as a method for contesting norms and, in turn, ensuring compliance with the accepted result. The next section evaluates a similar practice at the domestic level.

In his work on transnational legal process, Harlod Koh argues that one reason for compliance with international law is the internalisation of norms from the international sphere.[384] This takes place in three stages:

> Those seeking to embed certain norms into national conduct seek to trigger *interactions* that yield *interpretations* that are then *internalized* into the domestic law of even resistant nation states.[385]

Koh goes on to give a concrete example to illustrate his point:

> First, suppose you were a human rights lawyer in Great Britain, and you were protesting the treatment of immigrants who were being detained by the

[383] Not only from committees within the WTO: Codex standards adopted by majority vote may still apply to Members that did not vote in favour of the standard via Art 2.4 TBT (*European Communities – Trade Description of Sardines*, Report of the Appellate Body (26 September 2002) WT/DS231/AB/R, para. 227)
[384] The others being self-interest and arguments aimed at establishing a shared identity: H Koh, '1994 Roscoe Pound Lecture: Transnational Legal Process', 75 Nebraska Law Review (1996) 181, 194ff
[385] H Koh, 'Jefferson Memorial Lecture: Transnational Legal Process After September 11th', 22 Berkeley Journal of International Law (2004) 337, 339

> British government. What would you do? You would start by challenging the legality of the detention before the British courts. Suppose you lost. Is that the end of the story? Not any more. Today, any British lawyer worth his or her salt would appeal the British court's ruling to the European Court of Human Rights in Strasbourg, an international body, and try to win a judgment invalidating the British government's conduct under European human rights law. To use my terms, you would trigger an interaction in a European court that would promote an interpretation of European law that would lead, you hope, to the internalization of that international rule into British domestic law.[386]

For the actors attempting to encourage the proliferation of their own values through a process of norm export, dispute settlement systems and compliance mechanisms at the international level serve a dual purpose. The first is, as Koh indicates, that they encourage Members to internalize norms that the actor prefers. This is routed in the compliance function of the dispute settlement system and other bodies. It is a key advantage of the WTO that has, by international standards, a very high success rate in compliance and monitoring.[387] This constraining or enabling influence of the dispute settlement system and compliance mechanisms at the WTO has been examined above.[388] It is only one way that these structures can influence the development of a legal regime, however. While the dispute settlement system exercises a systemic influence on actors, it

[386] Ibid, 339-340
[387] M Footer, 'Some Theoretical and Legal Perspectives on WTO Compliance', 38 Netherlands Yearbook of International Law (2007) 61, 100; J Crawford, 'Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture', 1 Journal of International Dispute Settlement 1(2010) 4, 4
[388] Section B (iv), p123ff

also serves (with other mechanisms for scrutiny) as a forum for the contestation of values where actors use law instrumentally to stimulate challenges at the WTO level.

The norms embedded in the covered agreements and other legal instruments are not without flexibility. The inherent indeterminacy at the heart of the values that they seek to encourage means that actors engage in a *continual* process of contestation, a process that can be engaged in by challenging the meaning and application of certain obligations at the WTO through the dispute settlement system or through oversight structures such as the Trade Policy Review Mechanism ('TPRM')[389] and the Committees. This section will examine, first the dispute settlement system as a site for stimulating such challenges and, second, the role of other review mechanisms such as the TPRM as alternative sites for stimulating challenges between conceptions of appropriate legal behaviour.

Stimulating Challenges under the Dispute Settlement System

What can transnational actors question at the WTO level? The scope of the WTO bodies' powers of scrutiny is at the heart of how actors stimulate these challenges. They can only stimulate an interaction by challenging (in the dispute settlement system) or questioning (in the case of the Committees) measures that are within the purview of the WTO system.

Within the dispute settlement system, transnational actors are in the first instance limited by the membership and standing requirements of the WTO: only Members (States

[389] Trade Policy Review Mechanism (15 April 1994) LT/UR/A-3/TPR/1 <http://docsonline.wto.org> hereafter 'TPRM'

or customs unions) may raise claims under the DSU.[390] While they may only act in the WTO system under the aegis of a State or custom union, the dispute settlement system at the WTO still offers many opportunities for transnational actors to engage in challenging the interpretation and the application of norms in the international trade system. So long as they can use the legal personality of a Member, the dispute settlement procedures at the WTO provide plenty of opportunities for norm export (particularly when compared to other areas of public international law).[391] First, Members are given considerable discretion to decide on whether they have an interest in the dispute,[392] either when requesting consultations[393] or as third parties[394] and are under no requirement to show any legal interest.[395] Beyond the ease with which claims may be raised (as a matter of law rather than of resources), dispute settlement at the WTO also permits the examination of a wide range of what it considers 'measures' that may be subject to a complaint.

Panels and Appellate Body have encouraged a broad interpretation of what constitute the 'specific measures at issue'[396] that must be raised to establish a panel. Starting with an expansive interpretation, the Appellate Body has stated: 'In principle, any act or omission attributable to a WTO Member can be a measure of that Member for

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[390] See n309 above and accompanying text

[391] Cf. third party interventions at the International Court of Justice under Article 62 Statute of the ICJ and Article 81(2) Rules of the Court, and their strict interpretation as in, for example, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Application to Intervene* (Judgment) [1981] ICJ Rep 3

[392] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body (9 September 1997) WT/DS27/AB/R, para. 135: '[W]e believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore, that a Member is expected to be largely self-regulating in deciding whether any such action would be "fruitful".'

[393] Art 4.11 DSU

[394] Art 10.2 DSU

[395] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body (9 September 1997) WT/DS27/AB/R, para. 132

[396] Art 6.2 DSU

purposes of dispute settlement proceedings.'[397] Usually, such acts or omissions would be those of an organ of that State (though not necessarily).[398] Furthermore, the measure in question need not be only a legislative instrument: the Appellate Body has acknowledged that were the agreement in question provides a list it is not necessarily exhaustive. This is the case with the SPS Agreement that includes 'laws, decrees or ordinances which are applicable generally'[399] as examples of SPS regulations that are subject to the disciplines on transparency within Annex B. In *Japan – Agricultural Products II*,[400] the Appellate Body made it clear that this was not an exhaustive list and would consider other measures of similar character as included.[401] Notably, it is for the panel or Appellate Body to determine the nature of the instrument in question and whether or not it constitutes a measure by reference to its content and substance, irrespective of its name or form.[402]

The challenge of measures under the dispute settlement system is not only broad in terms of targets (i.e. what constitutes a measure) but also in the effect of that measure. Under the dispute settlement system there is scope for raising a complaint in light of both how a measure is applied as well as (and more far-reaching) the measure 'as such.'[403] These claims are interpreted strictly and the expectation, as set out by the Appellate Body, is that Members will be selective in raising 'as such' claims:

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[397] *United States – Sunset Review of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*, Report of the Appellate Body (15 December 2003) WT/DS244/AB/R, para. 81
[398] Ibid
[399] SPS Agreement, Annex B Art 1, footnote 5
[400] *Japan – Measures Affecting Agricultural Products*, Report of the Appellate Body (22 February 1999) WT/DS76/AB/R
[401] Ibid, para. 105
[402] *United States – Sunset Review of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*, Report of the Appellate Body (15 December 2003) WT/DS244/AB/R, fn 87
[403] Art XXIII.1(a) GATT, confirmed in *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body (28 August 2000) WT/DS/136/AB/R, para. 60-61

> In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct — not only in a particular instance that has occurred, but in future situations as well — will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims…We would therefore urge complaining parties to be *especially diligent* in setting out 'as such' claims in their Panel requests as clearly as possible.[404]

While this may be the assumption (or hope from the DSB's perspective), numerous complainants have challenged certain provisions of domestic legislation of Members including, most notably, key provisions of US law concerned with their commitments under the covered agreements such as the Uruguay Round Agreements Act[405] and provisions of the Trade Act 1974 (as amended).[406]

Limited restrictions on raising claims and a broad interpretation of what constitutes a 'measure' offer transnational actors a range of options to stimulate challenges at the WTO level. Engaging in the dispute settlement procedures under the

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[404] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, Report of the Appellate Body (29 November 2004) WT/DS268/AB/R, para. 172-173

[405] *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, Panel Report (15 July 2002) WT/DS221/R

[406] *United States – Sections 301-310 of the Trade Act 1974*, Panel Report (22 December 1999) WT/DS152/R

DSU is costly and time-consuming, however.[407] The final result also rests with the members of the panel or Appellate Body. Such an approach is potentially a risky one, even with the theoretical 'handbrake' of the Dispute Settlement Body.[408] Instead of viewing dispute settlement as the main weapon in the armoury of the transnational actor, it is more helpful to view it as another arrow in its quiver. To the advantage of transnational actors, there are other methods of stimulating a challenge at the WTO level. Within the WTO institutions, the Committees, Councils and Trade Policy Review Body all provide an offer alternative place for actors to stimulate challenges over the meaning and application of key obligations.

Stimulating Challenges through Non-Judicial Institutions at the WTO

Mary Footer has put forward a convincing alternative approach to understanding compliance mechanisms at the WTO. Rather than viewing compliance mechanisms as a choice between carrots or sticks, instead she uses the concept of a 'management-enforcement ladder'[409] to explain the combination of the coercive techniques used within the dispute settlement system with more persuasive 'managerial' techniques at the

[407] Conservative estimates suggesting anything from $128,500 to $706,000 depending on the complexity of the case. Certain cases have been particularly expensive: fees for the Kodak and Fuji dispute (*Japan – Measures Affecting Consumer Photographic Film and Paper,* Panel Report (31 March 1998) WT/DS44/R) is reputed to have exceeded 10 million dollars: H Nordstrom, 'The Cost of WTO Litigation, Legal Aid and Small Claim Procedures', Paper presented at conference on WTO Dispute Settlement and Developing Countries: Implications, Strategies, Reforms. Center for World Affairs and the Global Economy (WAGE), University of Wisconsin, 20-21 May 2005 <http://wage.wisc.edu/research/resources/?Id=117> (accessed 1 October 2012)

[408] On the political oversight of the dispute settlement system see n340 above and accompanying text

[409] Originally posited by Jonas Tallberg in the context of the European Union. See, J Tallberg, 'Paths to Compliance: Enforcement, Management and the European Union', 56 International Organization 3 (2002) 609-643

WTO.[410] A key element of her argument rests on examining not only the more traditional avenues available to encourage compliance by complaining Members under the DSU but also bodies at the WTO such as certain Committees and Councils.[411]

Many of these bodies provide a forum for Members to discuss the compliance of other Members' domestic procedures and thus encourage a discussion over the 'appropriate' interpretation or application of a measure. This usually arises as a result of the notification requirements under various agreements at the WTO.[412] Following notification of the relevant measure, representatives at the Committee then question the Members on the potential compliance consequences of their domestic instruments. For example, the US questioned the compliance of India's Customs Tariff Rules in light of its obligations under the Agreement on Safeguards at the Committee on Safeguards.[413] However, this was not done in a confrontational manner but rather, it left the door open to the potential future correction of domestic legislation or an alteration in practice were India to respond negatively.[414] This offers an alternative to the more adversarial nature of litigation. In the event, Indian law on this point appeared to comply with the Safeguard Agreement.

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[410] M Footer, 'Some Theoretical and Legal Perspectives on WTO Compliance', 38 Netherlands Yearbook of International Law (2007) 61-112

[411] Ibid, 91-98

[412] Generally, Ministerial Decision on Notification Procedures of the Trade Negotiations Committee (15 April 1994) LT/UR/D-1/5 <http://docsonline.wto.org> and Art X GATT

[413] Committee on Safeguards, 'Replies from India to Questions Posed by the United States and Japan' (16 September 1998) G/SG/Q1/IND/7

[414] The US question read: 'While rule 6 (6) of India's Customs Tariff Rules provides for the Director-General to make available to parties the evidence presented by other interested parties, does India plan to allow interested parties the opportunity to respond to the presentations of other parties as required by Article 3.1 of the WTO Safeguards Agreement?'

The role of these committees is, in part, a process that encourages certain types of behaviour by creating an environment where WTO consistent behaviour is expected.[415] One example is the Trade Policy Review Mechanism under the WTO where the behaviour of members is scrutinized and serves as 'a venue for persuasion and ideological diffusion, for "teaching" members norms of appropriate behaviour.'[416] These bodies provide a forum for Members to challenge the interpretation or application of measures and, in this way, other Members' understanding of the core value judgments underpinning such measures. This can be viewed as a softer alternative to dispute settlement: less confrontational, more cost-effective and, to a degree, less risky as there is no final statement decided by a third party (the panel or Appellate Body).

The WTO provides a forum for actors to stimulate challenges at the international level. As actors look to stimulate interactions in order to export their normative preferences, they can also pursue a similar policy at the domestic level. This takes place within the mechanisms incorporating WTO rights and duties at the national or regional level.

(iv) Initiating Administrative Investigations and Requesting Judicial Determinations under Members' Domestic Legal Systems

Actors can stimulate challenges by initiating administrative investigations or raising matters within judicial bodies at the domestic level. An administrative investigation is the

[415] A Lang, 'Some Sociological Perspectives on International Institutions and the Trading System', in C Picker, I Bunn & D Arner (eds.) *International Economic Law: The State and Future of the Discipline* (Hart 2008) 73-88, 78
[416] Ibid

process whereby an actor requests the governing structures of a Member to investigate a perceived breach of WTO or coterminous domestic rights or duties through internal administrative bodies. Judicial determinations arise where an actor challenges the behaviour of a Member within its own judicial system over a perceived inconsistency with the relevant WTO or coterminous rights or duties. The perception by an actor that others hold a different interpretation to the actor's own is the impetus for raising such claims. Whether or not there is an actual breach of the obligation is not the issue but rather that others are coerced into applying or following a legal provision in a manner that accords with the actor's values.

Administrative Investigations as Sites for Stimulating Challenges within Domestic Law

In the case of administrative investigations, actors request a determination by a governmental agency of whether or not certain conditions constitute either a breach of a WTO-based obligation or meet the criteria for the Member to enforce its rights under the covered agreements.

For example, within the US, the Department of Commerce and/or the United States International Trade Commission (depending on the behaviour in question)[417] can investigate whether or not a Member has breached obligations owed to the US under the covered agreements. The consequences of this breach may be felt within the US (as is the case of dumping) or outside the US, limiting US industries' ability to access that market

[417] In the case of Countervailing and Anti-Dumping duties: 19 U.S.C. §§ 1671-1677, and 19 C.F.R. §§ 202, 205, 207 & 351; Safeguard Measures: ss201, 204 & 421 Trade Act 1974 and 19 C.F.R. § 206

(such as discriminatory regulations). Actors can use this process to encourage certain interpretations or stimulate challenges over matters that have profound consequences to the Membership of the WTO as a whole. The debate over what constitutes a 'public body' under the SCM Agreement is a recent example: is it 'any entity controlled by the government'[418] or rather 'an entity that possesses, exercises or is vested with governmental authority'? [419] While the Department of Commerce's interpretation of this term was later subject to scrutiny at the WTO, it began as part of an investigation by the US' internal institutions.

Obligations at the WTO can have an important influence on the practice of these administrative bodies, making them key targets for those that wish to encourage the type of practice that supports their value preferences.

In the US, interpretation in trade matters is largely in the hands of administrative agencies, either the US International Trade Commission ('USITC') or the Department of Commerce ('DoC'). These bodies (which share executive and judicial characteristics) are charged with conducting investigations into trade remedy petitions, providing reports to both Executive and Legislature, and maintaining the US' Tariff Schedule. In performing their duties, these bodies apply their conception of the standard of WTO law within the US system.[420] Judicial oversight exists in the form of the Court of International Trade

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[418] The view of the Panel in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report (22 October 2010) WT/DS379/R, para. 8.94

[419] *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011) WT/DS379/AB/R, para. 317

[420] For the respective responsibilities and duties of these agencies: Department of Commerce, established under Act To Establish the Department of Commerce and Labor 1903 [32 Stat 825], mission and organization of the DoC (Department Organization Order 1-1 Effective Date 2005-4-4) available at <http://www.commerce.gov/About_Us/index.htm> (accessed 1 October 2012) USITC established in 1916 (originally named the Tariff Commission) Ch.463, 64th Congress, 1st Sess. 796, Pub L 271, aims and objectives (USITC Strategic Plan) available at <http://www.usitc.gov/ext_relations/about_itc/Strategic_Plan2006_2011.pdf> (accessed 1 October 2012)

('CIT') and superior courts but the vast majority of determinations are not appealed. The legislature is effectively excluded from the process, capable of influencing administrative bodies only in a peripheral manner, by Congressional oversight and the control of funding. The concentration of interpretation in the hands of semi-executive administrative bodies has potentially wide-reaching applications.

While the US system is bifurcated, within the EU the Commission undertakes administrative reviews. The EU approach sets out two clear approaches: the 'shield' of trade defence instruments[421] to protect EU industries through safeguard measures, countervailing duties or anti-dumping measures; and the 'sword' of stimulating market access for EU industry, under the Trade Barriers Regulation[422] by challenging measures of trading partners that constitute obstacles to trade[423] for EU industry under international trade rules.[424]

By initiating an administrative investigation, actors encourage an evaluation of how their own Member should apply WTO rules in its own territory and (depending on the standing requirements) can help determine how other Members apply the rules within

[421] Principally regulated by: Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community [2009] OJ L188/93; Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports [2009] OJ L84/1; Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L343/51; and Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters [2001] OJ L201/10

[422] Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization [1994] OJ L349/71

[423] Defined under Art 2.1 Council Regulation (EC) No 3286/94 as 'any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.'

[424] Defined under Art 2.2 Council Regulation (EC) No 3286/94 as 'primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries.'

their territory. In the case of judicial determinations, however, there is less scope for action. The legal systems of the two largest traders, the EU and US, limit the ability of individuals to challenge provisions of law on the basis of a WTO obligation under their judicial systems.

Attempting to Stimulating Challenges through Domestic Judicial Bodies: The Options in the European Union

Under EU law, an international agreement concluded validly[425] is part of the EU legal order, [426] binding both Union institutions and the Member States.[427] In the hierarchy of EU obligations, validly concluded international agreements lie below primary EU law (i.e. the Treaties and Acts of Accession) but above secondary EU law (i.e. Regulations etc.).[428] This is not by virtue of the conclusion of the treaty internationally, however, but via the Council decision authorising conclusion of the agreement.[429] Agreements concluded internationally by the EU are incorporated into the legal system by virtue of this decision.[430] While the covered agreements are part of the EU legal order, their influence varies depending on the approach that actors take as they seek to stimulate challenges. Thus, the ability to invoke WTO rights and duties as a basis for a challenge

[425] As a matter of EU law, fulfilling the requirements of Arts 207 and 218 TFEU
[426] Case 181/73 *Haegeman* [1974] ECR 449, Art 216(2) TFEU
[427] Art 216(2) TFEU
[428] Case C-122/95 [1998] *Germany v Council* ECR I-973 and Case C-61/94 *Commission v Germany* [1996] ECR I-3989 respectively
[429] K Lenaerts & E de Smitjer, 'The European Union as an Actor under International Law', Yearbook of European Law (1999/2000) 95, 104
[430] In this regard, the direct applicability of international agreements in the EU legal order is distinct to that of US congressional-executive agreements where such agreements require domestic legislation to enact them validly. See below, p159ff

within the domestic sphere of the EU turns on how far the covered agreements are received into the EU legal order.

There are three main possibilities for actors attempting to stimulate a challenge within the EU's judicial bodies: the use of rights and duties under the covered agreements to bring a claim against either an individual or institution; the enforcement of panel and Appellate Body reports in EU courts; and the use of the covered agreements and their *acquis* to interpret EU law.

The possibility of an individual bringing a claim based on GATT law in an EU court was first discussed in *International Fruit Company*.[431] The ECJ denied granting the GATT direct effect[432] due to its inherent flexibility and lack of effective dispute settlement system.[433] Despite the creation of the WTO, which includes a distinct institutional structure and compulsory dispute settlement system, the ECJ has not changed its position.[434] It cited the importance of negotiations in the dispute settlement system of the WTO and the importance of reciprocity within the GATT system at large.[435] The ECJ clearly stated in *Portugal v Council* that 'the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.'[436] There has been a wide-ranging call

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[431] Case 21-24/72 *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* [1972] ECR 1219

[432] The terms 'directly applicable' and 'direct effect' are here given a distinct meaning in line with Wyatt & Dashwood, *European Union Law* (4th ed, Sweet and Maxwell, 2000), 60-61. Whilst the ECJ itself has been known to use these terms interchangeably it is helpful to distinguish the two concepts. Therefore, for the purposes of this thesis, legal instruments that are automatically incorporated into a legal system in their entirety are directly applicable, while a legal instrument that grants an enforceable right to an individual in its own legal system is directly effective.

[433] Ibid para. 27

[434] Case C-149/96 *Portugal v Council* [1999] ECR I-8395

[435] Ibid paras. 36-47

[436] Ibid para. 47. This statement implicitly rejected Portugal's attempt to divide issue of direct effect from grounds of judicial review of EC acts (para. 32). This division, were it to have been enforced could have helped to clarify this situation.

for a change in this approach from academics to advocates general[437] yet the closest that the ECJ has come is the acceptance that direct effect may be granted as a matter of national law to a WTO provision which is within the shared competences of both Member States and the EU where the EU has yet to act. Once the EU acts, however, the provision is no longer directly effective, even if the domestic system had given it direct effect.[438]

The refusal to grant direct effect has been motivated largely by the political concerns of the Commission and the Member States that subsidiaries of non-EU trading partners may exercise rights in the national courts of the EU which European businesses will not be able to in the jurisdictions of other Members. These extra-legal concerns are acute when one examines examples of other international norms being received into the European legal order, at times being granted priority over core EU rules. In *Schmidberger*,[439] for example, the court accepted a defence for the breach of one of the fundamental freedoms (the free movement of goods) based on rules from the European Convention on Human Rights.[440] This is not, however, an entirely fair assessment, since like the US Statement of Administrative Action,[441] the authorising Council decision for the conclusion of the covered agreements specifically limited their application by eliminating the possibility of direct effect. As the applicability of the covered agreements in the EU legal order is predicated on this decision, its statement that 'by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is

[437] A Antoniadis, 'The European Union and WTO Law', 6 World Trade Review 1 (2007) 45, fn 31 and 32. Though, questioning the wisdom of granting direct effect to WTO law in the EC system, C.D Ehlermann 'Six Years on the Bench of the "World Trade Court"' n336, 636

[438] Joined Cases C-300/98 & C-392/98 *Parfums Christian Dior SA* [2000] ECR I-11307 para. 48

[439] Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659

[440] Ibid, paras. 75-78

[441] Uruguay Round Agreements Act Statement of Administrative Action, H.Doc 103-316 (I), at 1032-33

not susceptible to being directly invoked in Community or Member State courts'[442] frames the position in legal terms.[443] Whether for this reason, or for the political considerations, or both, the Court has refused to grant rights in the EU that are not present in its principal trading partners' legal systems (most notably the US).

While the provisions of the covered agreements may not have direct effect this is not to say that, in practice, actors cannot rely on provisions of the covered agreements to challenge EU law. In complying with its obligations under the WTO, the EU has enacted a series of regulations giving force to its international commitments. In the *Fediol* and *Nakajima* cases[444] the Court reviewed the legality of an EU measure, examining its compliance with a GATT rule, even though there was not an explicit reference to the GATT. The implied connection was considered sufficient in those cases. In the case of safeguards, for example, sections of Council Regulation 260/2009 are so closely modelled on the Agreement on Safeguards that they repeat the WTO disciplines verbatim.[445] This provides a transnational actor the opportunity to encourage an interpretation in line with the WTO rule, or simply highlight a difference in order to stimulate a challenge within the EU courts.

A separate possibility is to stimulate a challenge by enforcing panel or Appellate Body reports in EU courts. In the case of a report which declares an EU instrument incompatible with the covered agreements, an extension of the logic from *Fediol* and

[442] Preamble, Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations OJ L336/1

[443] For an opposing view of using Council Decision 94/800/EC as the basis for excluding direct effect; P Kuijper, 'The Conclusion and Implementation of the Uruguay Round Results by the European Community', 6 European Journal of International Law (1995) 222, 231-236

[444] Case C-70/87 *FEDIOL v Commission* [1989] ECR 1781 para. 19 and Case C-69/89 *Nakajima All Precision Co. Ltd. v Council* [1991] ECR I-2069 para. 29

[445] Art 16(1) Council Regulation 260/2009 shares the wording of Art 2(1) Agreement on Safeguards with the addition of a 'Community interest' requirement

Nakajima to the WTO's dispute settlement system, could lead to a claim arising where the EU has yet to act in the face of a negative determination.[446] In *Van Parys*,[447] however, the Court refused such reasoning, holding that there was insufficient ground to permit such a review given the inherent flexibility in the WTO dispute settlement system. It argued that by permitting negotiations under Art 22 DSU, the WTO system allows parties to the dispute to arrive at a negotiated settlement, acceptable to both. If the Court were to review EU acts found inconsistent with the covered agreements it would limit the scope of action by the executive and legislative branches. This is the case even where the permitted period for negotiations under the DSU has passed.[448] By stressing the implications of the Court's action on the executive and legislative branches of the EU (not stating exactly what they are), the ECJ put forward a version of the political question doctrine.[449] While common under US constitutional law it has less of a pedigree in the EU system.[450] Such an argument is instead motivated by the political concerns of the Member States and the EU's ability to engage effectively and not be weakened in front of its trading partners. Similarly, the Court states that were it to review EU acts on such grounds it:

> would deprive the Community's legislative or executive bodies of the discretion which the *equivalent bodies of the Community's commercial*

[446] In the case of countervailing duties and anti-dumping measures, where a DSB report finds an EU measure incompatible, the Council may temporarily repeal or amend the instrument in question or adopt other special measures to comply with the DSB report (Council Regulation (EC) No 1515/2001 Art 1(1)). It is still, however, for the Council to act on a proposal of the Commission, conditioning compliance on a determination of the EU institutions.

[447] Case C-377/02 *Léon Van Parys NV v Belgisch Interventie – en Restitutiebureau* [2005] ECR I-1465 para. 44ff

[448] Ibid. para. 51

[449] Discussing the same point in the Opinion of the Advocate General in *Omega,* see F Snyder, 'The Gatekeepers: The European Courts and WTO Law', 40 Common Market Law Review 2 (2003) 313, 331

[450] The political question doctrine stems from a traditional conceptualisation of the separation of the three branches of government, a separation that is not so clear in the case of the EU.

> *partners enjoy*. It is not in dispute that some of the contracting parties, which are *amongst the most important commercial partners of the Community*, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules.[451]

The Court does not explain what these anomalies might be in the application of WTO rules. Instead, the position taken is more concerned with the lack of a similar judicial review system in the legal order of the EU's trading partners. This has been labelled the ECJ's '*realpolitik* approach to the relationship between WTO law and EU law.'[452] While some may view such an approach as undesirable, it is instead the EU courts' awareness of the processes that actors use to further their own objectives: the manipulation of inconsistencies between the EU practice and obligations at the WTO in order to stimulate challenges. The 'political' concerns of the court are, in fact, legal ones as transnational actors seek to use EU legal structures to encourage specific interpretations of WTO rules.

The third possibility of stimulating a challenge within the EU legal system is to encourage EU courts to use the covered agreements and panel or Appellate Body reports to aid in the interpretation of coterminous rights and duties under EU law. Referring to the position of international agreements within the EU legal order, the ECJ has held that 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as possible, be

[451] Case C-377/02 *Léon Van Parys NV v Belgisch Interventie – en Restitutiebureau* [2005] ECR I-1465, para. 53 (emphasis added)
[452] F Snyder, 'The Gatekeepers' n449, 340

interpreted in a manner that is consistent with those agreements.'[453] Drawing on the established principle that national courts are to interpret their law in light of secondary EU legislation,[454] the ECJ has extended this to the provisions of the covered agreements that fall within EU competence as they form an integral part of EU legal order.[455] This co-opts the Member States' judiciaries into helping maintain the unity of EU law, as well as consolidating a 'European' position on trade-related matters.

At first sight, it appears that the EU does not provide an easy route for transnational actors to use judicial processes to stimulate challenges of international trade rules. In the first instance, the EU is resolute in denying direct effect for the covered agreements. However, where there is overlap between the EU and WTO rules, there is scope for the EU courts to examine EU instruments in line with these rules. Likewise, the obligation to interpret EU law in light of WTO obligations offers actors with a broad but potentially influential method to stimulate challenges. The US can be viewed as the mirror to the EU, with the concern of transatlantic competition informing the decisions behind each Member's internal relationship with WTO law. Though it is based in a different constitutional tradition, the US system also limits the role of actors in stimulating judicial challenges while maintain similar interpretative rules as the EU.

Attempting to Stimulate challenges through Domestic Judicial Bodies: The Options within the US

[453] Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para. 52
[454] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 para. 9
[455] Case C-89/99 *Schieving-Nijstaad vof and Others v Groeneveld* [2001] ECR I-5851 para. 55

The US legal system's treatment of WTO law strictly enforces a clear divide between domestic US law on the one hand, and international WTO law on the other. The general rule under US law[456] is that treaties are judicially enforceable by individuals in US courts without the need for extra legislative action so long as they are classified as 'self-executing treaties'.[457] Self-executing treaties are those that do not require Congress to pass subsequent legislation.[458] As a consequence, there can be no judicial enforcement of a non self-executing treaty, as the judiciary is not empowered to instruct Congress to legislate; this is the case even where there has been a breach of a specific obligation under the international agreement.[459] Where a treaty is deemed to be 'self-executing', it is granted the status equivalent to that of federal laws, subject to the rule that the provision that is later in time prevails.[460] In the case of the covered agreements, however, US law does not recognize their direct effect.

The implementing legislation of the covered agreements in the US is the Uruguay Round Agreements Act ('URAA').[461] The URAA implements the covered agreements that are, for the purposes of US constitutional law, a congressional-executive agreement and not a 'treaty'. The distinction between a treaty and a congressional-executive agreement is one more of form than of substance. It is widely considered that they are interchangeable,[462] with the potential exception of an international agreement that

[456] US Constitution, Art VI cl.2
[457] C.M Vazquéz, 'Treaties as Law of the Land: The Supremacy Clause and the Presumption of Self-Execution', 121 Harvard Law Review (2008) 1
[458] *Foster v Neilson* 27 US 253 (1829)
[459] C.M Vazquéz, 'Treaties as Law of the Land: The Supremacy Clause and the Presumption of Self-Execution' n457, 3
[460] J Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis', 86 American Journal of International Law 2 (1992) 310, 320
[461] Uruguay Round Agreements Act of 1994 [Pub L 103-465, 108 Stat 4809]
[462] D Vagts, 'International Agreements, the Senate and the Constitution', 36 Columbia Journal of Transnational Law (1998) 143

changes the balance of powers between the states and the federal structure.[463] A congressional-executive agreement cannot be self-executing as Congress is required to pass implementing legislation (i.e. 'execute' the agreement) in order for it to become law.[464] Another consequence is that the agreement can prescribe the extent of the effect of the covered agreements in the US system. This presents an advantage to Congress that 'may wish to tailor the act of transformation in certain ways'. [465]

In the case of the covered agreements, s102(a) URAA limits the scope of their application by providing that the implementation of WTO law can have no domestic effect where it conflicts with US law.[466] The URAA cannot be used to amend or modify any US law unless it is specifically provided for under the Act.[467] Only the US government may 'have any cause of action' under the covered agreements and it is not possible to challenge any organ of the State for action or lack of action inconsistent with the covered agreements.[468] At the same time, however, the URAA aimed to ensure that domestic US laws and practice were brought into line with its obligations under the covered agreements.[469] What results is a desire to produce an internationally acceptable state of affairs whilst ensuring a domestic limitation on the impact of WTO law. From the perspective of a transnational actor, however, only those within the US governmental structures would be able to rely upon WTO rules to stimulate a challenge directly.

Under the URAA an adopted report that finds a US legal instrument incompatible with the US' obligations under the covered agreements may be responded to in two ways.

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[463] Ibid, 151-152
[464] American Law Institute, *Restatement (Third) of US Foreign Relations Law* (ALI Publishers 1987) 217
[465] J Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' n460, 324
[466] 19 USC § 3512(a)(1)
[467] Ibid, § 3512(a)(2)
[468] Ibid. § 3512(c)(1)
[469] P Reed, 'Relationship of WTO Obligations to US International Trade Law: Internationalist Vision Meets Domestic Reality', 38 Georgetown Journal of International Law (2006) 209, 216

First, in the case of administrative practice or regulations, the URAA permits an alteration of practice if it is possible under existing legislation, following consultation with Congressional committees and the public.[470] Where the legislation does not permit this or the DSB report specifically declared an inconsistency with a US statute then it is for Congress to enact new legislation. This results from the non-self-executing nature of the URAA, thus '[i]f a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.[471]' The consequence is a US system that asserts primacy over WTO law in the domestic system but creates a backlog of pending modifications to regulations and laws, which are necessary to comply with its international obligations.[472] As a consequence, where interactions between the WTO level and the US level take place, the actor's success in having their desired outcome incorporated at the US level will be limited.

Where an actor encourages the interpretation of US law in light of obligations under the covered agreements, the general rule under US law, known as the *Charming Betsy* doctrine, is that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.[473] However, as regards international trade law the *Charming Betsy* doctrine is limited in its application.[474] As discussed above,[475] the URAA creates a 'legislative wall between the United States courts

[470] 19 US.C § 3533 (g)
[471] Statement of Administrative Action n441, 1032-33
[472] J Grimmett, 'WTO Dispute Settlement: Status of US Compliance in Pending Cases', CRS Report for Congress, Order Code RL32014 (last updated 14th August 2007)
[473] *Murray v The Charming Betsy* 6 US 2 Cranch 64 (1804), 118
[474] P Reed, 'Relationship of WTO Obligations to US International Trade Law: Internationalist Vision Meets Domestic Reality' n469, 245
[475] See, n466 and corresponding text

and any actions of the WTO.'[476] It is argued that the URAA has removed the possibility of interpreting legislation to ensure consistency with WTO law as it is for Congress to alter any legislation.[477] When attempting to interpret one legal provision to avoid conflict with another, the requirement is that where ambiguity exists it may be permissible but where there is a clear conflict, US law is to be applied.[478] While in the case of conflict it is necessary to defer to US law, there is no prohibition against courts using WTO law to help interpret, for example, the validity of judicial review claims made against the decisions of federal agencies.[479] However, the URAA sets a low standard for determining the existence of a conflict between WTO law and US law. While one may view a conflict as arising where it is not possible to comply with two separate obligations simultaneously,[480] under the URAA:

> No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is *inconsistent* with any law of the United States shall have effect.[481]

The use of 'inconsistent' extends beyond the inability to comply with two sets of obligation. It requires a lower threshold, defined as 'Not consisting; not agreeing in substance, spirit, or form; not in keeping; not consonant or in accordance; at variance,

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[476] F Davenport, 'The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the *Charming Betsy* Standard with Respect to WTO Agreements', 15 Federal Circuit Bar Journal 2 (2005) 279, 283

[477] Ibid, 313

[478] For example, P Reed, 'Relationship of WTO Obligations to US International Trade Law: Internationalist Vision Meets Domestic Reality' n469, 221

[479] Ibid, 218 integrating WTO law into the *Chevron* analysis for judicial review of federal agencies' interpretations of the statutes which they apply, *Chevron USA Inc. v Natural Resources Defence Council* 467 US 837 (1984)

[480] C.W Jenks, 'The Conflict of Law-Making Treaties', 30 British Yearbook of International Law (1953) 401, 426

[481] URAA n461, § 3312 (a) (1) (emphasis added)

discordant, incompatible, incongruous.'[482] The meaning is not one of conflict per se but of a lack of unity or accord.

The Courts have been resolute in their adherence to the URAA and SAA. For example, in *USA vs. Kaplan et al*[483] the Magistrate Judge refused arguments by the defendants that a WTO-inconsistent law could not be used to bring a criminal prosecution against them. The Appellate Body had previously held that certain US legal instruments prohibiting gambling were in conflict with US commitments under its GATS schedule of concessions.[484] The defendants argued that to be prosecuted under WTO-inconsistent legal provisions was a breach of the US's international obligations. It was also argued that the *Charming Betsy* cannon for statutory interpretation required the Court to prohibit a prosecution in order to avoid a breach of WTO obligations. These arguments were rejected in no uncertain terms. The Court held that the defendants had no standing in an argument based on the GATS,[485] that even if they had US law would be applied[486], and that the *Charming Betsy* cannon had no application in relation to WTO provisions.[487]

While there is scope for actors to stimulate challenges within the US system, it is restricted. The Courts play a far smaller part in its application than the administrative bodies that apply and interpret the US' obligations under the covered agreements in their day-to-day practice. Their practice may be less dramatic than Congressional legislation

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[482] Oxford English Dictionary (2nd ed. OUP 1989)
[483] *United States v Kaplan et al* Case No. SI4:06CR337CEJ(MLM) (18 July 2008) US District Court Eastern District of Missouri, <http://www.worldtradelaw.net/betonsportsmagistratereport.pdf> (accessed 1 October 2012)
[484] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Report of the Appellate Body (7 April 2005) WT/DS285/AB/R, para. 265
[485] *USA v Kaplan et al* n483, 10
[486] Ibid
[487] Ibid, 14

but is far more frequent. These agencies provide an alternative approach for transnational actors as they can respond to public opinion whilst still escaping from the same level of pressure from special interest groups which influences the legislature. The US attempts to limit WTO influences that may undermine the autonomy of the government.[488] This means that transnational actors are limited in how they can pursue this course of action at the US level. However, where administrative agencies are competent rather than judicial bodies, actors can encourage challenges more easily.

Concluding Remarks

This chapter has sought to identify the processes that are involved in the development of WTO law as part of a transnational legal process. It has been argued that WTO law develops in light of actors pursuing a process of norm export, encouraging others to accept their own value preferences through the law. They do this by embedding their normative preferences and stimulating challenges between differing conceptions of the 'correct' interpretation of the norms in question.

In examining the different ways in which the law influences process of norm export, some key issues have been identified. The ability of actors to crystallize norms in treaty form is likely limited and is subject to the interaction of other norm exports. This is expected to create uncertainty in tracing the objectives of some actors and the outcomes as the law develops. The possibility of actors pursuing their objectives across

[488] The requirement of Congressional action where a new WTO ruling cannot be complied with under US law is the key example, n472 and corresponding text

jurisdictional lines is also to be expected, especially in light of the different rules that apply within Members' legal systems. The picture we are left with is a complex one with transnational actors spanning jurisdictions and pursuing their objectives at numerous levels of governance.

A picture of transnational actors engaging across numerous jurisdictions and attempting to manipulate the way in which law develops may seem a complex one though it is far closer to the reality of litigation at the WTO, for example, than a State-centred view. If we take the *US – Gambling*[489] dispute as an example: nominally this is a dispute between the US and Antigua & Barbuda, however, private individuals are key to understanding the dispute. Jay Cohen, a US citizen constituted an online gambling company (World Sports Exchange) in Antigua and was subsequently prosecuted by the US[490] for violations of the Wire Wager Act[491] that prohibits the use of wire communication facilities in betting.[492] Cohen's own involvement, the US government's zealous pursuit of online gambling companies and Antigua's diminishing appeal as a host for such businesses all contributed to the initiation of the WTO dispute.[493] To view it only

[489] Principally (and still on-going): *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Panel Report (10 November 2004) WT/DS285/R; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Report of the Appellate Body (7 April 2005) WT/DS285/AB/R; *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda,* Panel Report (30 March 2007) WT/DS285/RW

[490] *United States v Jay Cohen* 260 F 3d 68 (2nd Cir 2001)

[491] 18 U.S.C § 1084

[492] *Ibid:* 'Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.'

[493] H Pontell, G Geis & G Brown, 'Offshore Internet Gambling and the World Trade Organization: Is it Criminal Behavior or a Commodity?' 1 International Journal of Cyber Criminology 1 (2007) 119, 124

in terms of States (or customs unions) or single jurisdictions misses the wider influences on the way in which the dispute (and, therefore, the law) evolves.[494]

Having built on the causal framework constructed in chapter 1 and used it to identified key sites and methods of how WTO law develops, the following chapters use this approach to examine the development of WTO law in two separate areas: the regulation of safeguard measures and the use of SPS measures.

[494] A partial analogy can be drawn with the *Tokios* arbitration (*Tokios Tokelés v Ukraine* (Jurisdiction) ICSID Arbitration Case No ARB/02/18 (2004)) where a business owned by Ukrainian nationals and conducting business almost exclusively in Ukraine, incorporated in Lithuania so that it might sue the Ukrainian government under the Ukraine – Lithuania Bilateral Investment Treaty (Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, Feb. 8, 1994)

Chapter 3: The Development of Safeguard Measures and their Legal Regulation at the WTO

Introduction

This chapter examines the development of the legal regime of safeguard measures at the WTO. Using a causal approach, it examines how the behaviour of transnational actors embedding their normative preferences within the regulation of safeguard measures has influenced the development of this legal regime. It is suggested that a causal approach gives a more convincing account of how the rules on safeguard measures has developed over other, largely judicial-centred approaches. As is the case with the other legal regimes examined in this thesis, while they are based at the WTO (i.e. it is their central focus on the international plane), domestic legal influences often play a key role in how they develop.[495]

The chapter is divided into four sections. In the first (Section A) the core values at the heart of safeguard measures and the tensions between them are outlined. This sets the ground for the contestations that take place throughout the modern history of safeguard measures regulation. The second section (B) examines how the US has embedded its own conception of the 'correct' interpretation of safeguard measures into the international system by crystallising norms in, first, Article XIX GATT and then, the Agreement on

[495] See, chapter 1 (A) identifying the transnational nature of international trade law (p30ff)

Safeguards. In section C it is argued that key debates over the regulation of safeguard measures can be better understood as a result of the limited success of this norm export and the unforeseen consequence of this failure.[496] Section D highlights the US' attempt to correct this unsuccessful norm export by concluding new agreements to influence other Members' application of safeguard measures.

A. The Contestation of Values in the Regulation of Safeguard Measures

In this section the key values underpinning the development and use of safeguard measures are set out. This identifies a key battleground where competing conceptions of the 'proper' use and interpretation of safeguard measures takes place. It will be argued that neither economic nor political economy arguments offer entirely convincing justifications for the use of safeguards and that, instead, they are based on completing conceptions of fairness: specifically, outcome-based fairness concerned with the consequences of liberalized trade on specific sections of society and rules-of-the-game fairness which is concerned with 'fair play' and avoiding 'cheating' in international trade.

A safeguard measure is the temporary restriction of imports of a product to protect a domestic industry from serious injury (or threat thereof). The increase in imports must have been the result of unforeseen circumstances arising from a commitment made to reduce tariffs under a trade agreement. Such a clause ensures that

[496] See Chapter 2(C)(i) outlining the difficulties of such a process (p131ff)

where a trade agreement grants concessions, and where there is an unexpected increase in imports the importing Member has an 'escape clause' permitting the suspension of the previously granted concessions. One of the most important and frequently cited escape clauses is Article XIX GATT, further supplemented by the Agreement on Safeguards 1994.[497]

While it is common to compare safeguards to other trade defence instruments ('TDIs') found in the covered agreements, safeguard measures are different for two reasons.

First, their application is subject to high legal standards which are often difficult to satisfy and can be undesirable in their result. The determination process requires a finding of 'serious injury' to the domestic industry, unlike the lesser threshold of 'material injury' in respect of dumping and subsidies.[498] The requirements of 'non-attribution' analyses further add to the complexity of these determinations.[499] The introduction of a safeguard measure also requires the negotiation of compensation to the exporting Members affected, unlike the case of Anti-Dumping and Countervailing Duties ('AD/CVDs').[500] Again, unlike AD/CVDs, safeguards must be applied 'to a product being imported irrespective of its source.'[501] Safeguards have the potential of costing more to

[497] There are a number of other 'escape clauses' in a range of issues: for example, *inter alia*, in the GATT, Art XVIII (balance of payments), Art XXI (national security), Art VI (anti-dumping duties), Art XXIV (regional trade agreements)
[498] Art 2.1 Agreement on Safeguards, Art XIX:1 GATT
[499] Art 4.2(b) Agreement on Safeguards. It is necessary to show that the increase in imports is a cause of serious injury and that where there are other factors that may cause injury, they have not been attributed to the increased imports.
[500] Art 8 Agreement on Safeguards
[501] Art 2.2 Agreement on Safeguards. There is a limited form of selectivity in the Agreement on Safeguards though it is restricted, see Art 5.2 Agreement on Safeguards

the enacting Member than AD/CVDs, in both the costs of conducting complex investigations and in compensation to adversely affected Members. [502]

The second key difference is their lack of the moral justification of instruments that respond to 'unfair' trade practices such as dumping or subsidies.[503] Safeguard measures do not deal with 'cheating' in international trade but instead concern themselves with the inability of a State's industries to adapt to changing times and progressive market liberalisation. The protection involved in AD/CVDs is meant to negate the effect of the unfair practice (e.g. negating the benefits of subsidies by increasing tariffs[504]). The motivation behind safeguard measures, however, is not to protect in order to level the playing field but, instead, is intended to be a form of 'time out' from the competitive pressures of certain imports. It is a statement that the domestic industry in the normal course of competition would suffer serious injury (or not survive) and, as such, requires a period of lessened competition to adapt. Clearly, this creates an awkward situation for the State enacting such measures as it signals an inability to adapt to the global market.

In order to understand which values underpin safeguard measures, it is first necessary to understand why they are used. As an exception to a previously agreed commitment, safeguards must be justified not only in their individual use but also at the theoretical level, justifying their inclusion into a trade agreement.

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[502] 82 safeguard measures where imposed during the period 1st January 1995 to 31st October 2007 compared to 1997 anti-dumping measures imposed in the period 1st January 1995 to 30th June 2007 alone; 'WTO Secretariat reports decline in safeguard investigations', WTO News Items, 17th November 2008 <http://www.wto.org/english/news_e/news08_e/safeg_nov08_e.htm> (accessed 1 October 2012)

[503] The fear of being termed a 'wimp'; E Vermulst, M Pernaute & K Lucenti, 'Recent EC Safeguards' Policy: "Kill Them All and Let God Sort Them Out"?', 38 Journal of World Trade 6 (2004), 955

[504] Art VI.3 GATT

(i) The Justification for Safeguard Measures

Justifications for safeguard measures can be divided into two general groups. In the first group are the arguments based on the economic benefits that may accrue from the correct use of safeguards to the Member introducing them. In the second group are the arguments that focus on the need to grant domestic industries temporary protection in the face of unexpected import surges as part of a broader international trade liberalising project.

Economic Arguments for the Use of Safeguard Measures and their Limitations

There are a series of arguments that focus on the economic advantages of safeguard measures. It is argued that safeguards can serve as necessary protection for domestic industry whilst it makes 'a positive adjustment to import competition.'[505] This primarily involves either enhancing competitiveness or providing support for the exit of firms or workers from the domestic industry in question. The evidence supporting this proposition, however, is not convincing. Bown and McCulloch identify the weaknesses with the argument that safeguards could provide 'breathing space' for industries as they adapt. They state:

> [A] basic problem with the "breathing space" approach is that there is no 'pro-adjustment' effect inherent in an import-restricting policy; by itself, temporary protection from imports does nothing to cause an industry to

[505] s201 Trade Act of 1974 [Pub L 93-618, 88 Stat 1978]

> become more internationally competitive. Rather, by allowing the industry to continue production in a protected environment, such a policy ends up having an anti-adjustment bias – it does nothing either to induce the industry to shrink or to transform itself to meet the reality of a new and more competitive economic environment.[506]

Indeed, protection can encourage industry to invest in lobbying rather than restructuring, further reducing the possibility of an end result where industries have become more competitive or contracted sufficiently.[507]

Another argument is that while aggregate economic welfare is traditionally believed to increase as a result of trade liberalisation, the increase in economic welfare need not be uniform. In such cases safeguard measures are seen by some as a tool for the redistribution of wealth.[508] Again, this is not a convincing argument: even where a society decides that there ought to be limitations on the aggregate increase of welfare when losses may be acutely felt by a group of individuals, the use of safeguard measures is not the most effective method to redistribute economic gains. Direct aid to affected individuals would be a more efficient method of redistribution than protection that is considered 'an exceptionally clumsy method of redistribution.'[509]

It would seem, therefore, that the economic arguments in favour of safeguards are not entirely convincing. However, irrespective of the potential economic benefits of

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[506] C.P Bown & R McCulloch, 'Trade Adjustment in the WTO System: Are More Safeguards the Answer?', 23 Oxford Review of Economic Policy 3 (2007) 415, 416

[507] A Sykes, *The WTO Agreement on Safeguards* (OUP 2006) 51, though, note problems with this position at 56.

[508] Ibid, 56. Once again, this is not a wholly satisfactory argument, ibid. 58-59. Though, note WTO Director General Pascal Lamy's criticism of the lack of measures at the domestic level to compensate those who have suffered from the impact of trade liberalization (BBC News 'Trade Boss Criticises Financial Mess', 30th May 2008 < http://news.bbc.co.uk/1/hi/business/7425027.stm> accessed 1 October 2012)

[509] A Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations.' 58 University of Chicago Law Review (1991) 255, 272

safeguard measures to the economy (or lack thereof) this is not the only motivation for their use. Political economy arguments can help to understand the importance of using or including safeguards in trade agreements in order to gain political support for the proposed treaty, or a broader liberalising policy.[510]

Political Economy Arguments for the Use of Safeguard Measures

Viewed from an international perspective, the existence of an escape clause in a trade agreement has two potential advantages. Escape clauses have been linked to minimising dangers of the withdrawal of contracting parties when under domestic pressure (the 'safety valve' argument), and increasing in likelihood of granting concessions at the negotiation stage by virtue of a legitimate and temporary opt-out in the case of emergency (the 'contractarian' position).[511]

The contractarian position, put forward by Alan Sykes, attempts to explain the existence of safeguard measures in both a descriptive and normative manner. First, he draws parallels between a safeguards clause and comparable *force majeur* clauses in ordinary contracts; the cost of temporary protection by one party is less than the cost of withdrawal from the agreement *in toto* (approaching it as an efficient breach).[512] The normative implication of his argument is that negotiators are more likely to agree to

[510] J Stiglitz, 'Dumping on Free Trade: The US Import Trade Laws', 64 Southern Economic Journal 2 (1997) 402, 407
[511] A Sykes, *The WTO Agreement on Safeguards* n507, 59-72
[512] A Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations' n509, 259

concessions if they are aware of a potential revocation where the political costs of the concession become overwhelming.[513]

The 'safety valve' argument is centred on the scope of protectionist pressures from domestic groups on policy makers. Where concessions have been made, safeguard measures allow domestic industries to petition for protection from the State through administrative processes.[514] By providing a 'safety valve' from these pressures, it is hoped that industries will content themselves with engaging in a rule-based process rather than direct lobbying. It has been observed that this is based on the premise that protection received from administrative bodies will be less harmful to free trade than legislative protection.[515] There is scope for this as safeguard measures are temporary in nature; however, it is unclear that where access to legislative protection remains, those industries will not target both administrative and legislative options where their resources allow it.[516] Nonetheless, the safety valve argument has been an influential one, viewed by a Swiss representative at the Uruguay Round as the key objective of Art XIX; the GATT system was to function as 'part of the liberalization machinery, of which [Article XIX] is in a sense the "safety valve".'[517]

Each of these theories attempts to find an acceptable middle point on a spectrum between the general benefits of free trade and protecting individuals or industry from unexpected import fluctuations. As they focus on the international plane, and in particular, the GATT/WTO system, these theories tend toward the liberal end of this

[513] Ibid
[514] Discussed in chapter 2 (C) (iv), p149ff
[515] A Sykes, *The WTO Agreement on Safeguards* n507, 59
[516] Ibid, 60-61
[517] Communication from Switzerland (5 October 1987) GATT Doc MTN.GNG/NG9/W/10, para. 4

spectrum.[518] The tensions at the heart of safeguard measures are viewed through the prism of the traditional liberal/protectionist conflict.[519] This approach is helpful though it can be limited, failing to appreciate the strength of safeguard measures from a domestic perspective within a narrative based not on selfish or short-sighted protectionism but instead on an understanding of fairness and society's duty to the disenfranchised.

(ii) Safeguard Measures as an Expression of Fairness

It is claimed that safeguard measures differ from other TDIs insofar as they were not based on a response to 'unfair' trading behaviour. While this is the case, fairness still underpins the popular motivation for safeguard measures. 'Unfair' acts such as subsidies and dumping are classified as unfair due to the perception that they are a form of 'cheating'. This is based on an understanding of trade relations as a game with specific rules, where those who commit certain acts[520] are viewed to be unfairly advantaging themselves.[521] It is also true that at times, the 'cheating' language is applied when safeguard measures are introduced. The US safeguard measures on steel were a clear example of this. Introducing temporary safeguard measures on steel imports, President George W. Bush stated:

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[518] So-called 'GATT-think' which has been described as a form of enlightened mercantilism: K Bagwell & R Staiger, 'GATT-Think', Columbia University Economics Discussion Paper Series, no. 0102-39, March 2002, 43-44 applying Paul Krugman's observations of negotiating tactics at the GATT level.

[519] This is to be expected given the public choice theory basis for these political economy arguments which presupposes a 'policy market-place' and two broad objectives by the policy consumers within the market, either protection or liberalization. A Sykes, 'Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations' n509, 272

[520] These acts are not necessarily prohibited: dumping, for example, is not restricted by the covered agreements

[521] This has been classified as a breach of the Golden Rule, 'rules-of-the-game' fairness. S Suranovic, 'A Positive Analysis of Fairness with Applications to International Trade', 23 The World Economy 3 (2000) 294

> I take this action to give our domestic steel industry an opportunity to adjust to surges in foreign imports, recognizing the harm from 50 years of foreign government intervention in the global steel market, which has resulted in bankruptcies, serious dislocation, and job loss. We also must continue to urge our trading partners to eliminate global inefficient excess capacity and market-distorting practices, such as subsidies.[522]

In December of the following year, announcing the suspension of the safeguard measures, he again returned to the 'fair play' issue:

> I strongly believe that America's workers can compete with anyone in the world as long as we have a fair and level playing field.[523]

In this regard, safeguard measures are not distinguished in their purpose from other TDIs. This view of their role is to enforce the rules of the game, to encourage 'fair play' in international trade. However, this approach is contingent on other activities that are deemed unfair (subsidies or other forms of government intervention). Instead, there is another conception of fairness underpinning safeguard measures: one focussed on the outcomes or trade liberalisation rather than the way that trade is conducted.

Safeguard measures are underpinned by competing conceptions of fairness. Thomas Frank argues that fairness is composed of two, at times conflicting aspects:

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[522] President Announces Temporary Safeguards for Steel Industry, March 5 2002, Statement by the President < http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020305-6.html> (accessed 1 October 2012)

[523] President's Statement on Steel, December 4 2003, Statement by the President < http://georgewbush-whitehouse.archives.gov/news/releases/2003/12/20031204-5.html> (accessed 1 October 2012)

procedural fairness and distributive justice.[524] One might characterize the first as the fairness of process and the second as the fairness of outcomes. Safeguard measures represent a battleground over the type of fairness that should be prioritized. On the one hand, as discussed above, they can serve to encourage fair play (i.e. fairness of process). Alternatively, they can serve to protect people from the unpredictable damage associated (rightly or wrongly) with the functioning of the market. Just as the welfare state implies a duty to provide aid to those who have been harmed by the functioning of the market,[525] so safeguard measures serve to protect domestic industries and workers from certain unexpected changes in the market. This view of the market is an important narrative in modern discourse on the relationship between trade and society. Susan Strange vividly describes the strength of the market and its unpredictability (and that unpredictability's attendant consequences) when she states:

> [States'] failure to manage the national economy, to maintain employment and sustain economic growth, to avoid imbalances of payments with other states, to control the rate of interest and the exchange rate is not a matter of technical incompetence, nor moral turpitude nor political maladroitness. It is neither in any direct sense their fault, nor the fault of others. None of these failures can be blamed on other countries or on other governments, they are, simply, the victims of the market economy.[526]

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[524] T Frank, *Fairness in International Law and Institutions* (OUP 1997) 7

[525] The Beveridge Report ('Social Insurance and Allied Services', Report by Sir William Beveridge, November 1942 HMSO) which is credited with initiating the Welfare State in the United Kingdom. It stated that the objectives of Welfare included: 'Abolition of want requires, first,... provision against interruption and loss of earning power. … Abolition of want requires, second, adjustment of incomes, in periods of earning, as well as interruption of earning, to family needs....' (paras. 12 & 13)

[526] S Strange, *The Retreat of the State* (CUP 1996) 14

In this view of safeguard measures, they are initiated in order to protect domestic industry from unforeseen import surges, granting industry and workers a temporary reprieve as they either enhance their competitiveness or reallocate resources into different, more viable sectors.[527] It recognises that while freer trade ought to increase overall welfare, the gains from this liberalisation may not be evenly spread across society. Safeguards can offer a fairness of outcomes to the liberal project, minimising the harm to those negatively affected by the reduction of trade barriers. Even though the economic evidence may not support this view, it still enjoys a place in society's narrative on the market and its relation to society.[528]

The danger, however, is that by encouraging protection to protect the 'losers' of the trade bargain, the entire project is undermined. A concern over ensuring just results from trade may, if unchecked, raise levels of protection and minimize the gains from free trade. Most notably, the value of 'corporate economic autonomy'[529] is potentially at odds with the State-centred intervention inherent in safeguard measures. Corporate economic autonomy places an emphasis on the freedom of action of actors in the marketplace. Based on the fundamental propositions of classical economic theory, corporate economic autonomy encourages both flexibility in the behaviour of market actors and restrictions

[527] Something that President Bush accepted in his statements on the steel safeguards: 'The U.S. steel industry wisely used the 21 months of breathing space we provided to consolidate and restructure. The industry made progress increasing productivity, lowering production costs, and making America more competitive with foreign steel producers. Steel producers and workers have negotiated new groundbreaking labor agreements that allow greater flexibility and increase job stability. The Pension Benefit Guaranty Corporation has guaranteed the pensions of eligible steelworkers and retirees and relieved the high pension costs that burdened some companies. My jobs and growth plan has also created more favorable economic conditions for the industry, and the improving economy will help further stimulate demand.' President's Statement on Steel, December 4 2003 n523

[528] Thus playing a constitutive role in the objectives of the State and other transnational actors: chapter 1 (C) (iii), p70ff and chapter 2(A)(i-iii), p83ff

[529] D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System', 15 European Journal of International Law 4 (2004) 651, 656

on the interference of the State in the functioning of the market. The State is to be limited in its actions, only regulating or involving itself where necessary (for example, impending market failure) and incurring a political cost when it does so.[530]

(iii) Reconciling Outcome-based Fairness and Corporate Economic Autonomy

The desire to cushion the impact of liberalisation on workers and industry can fall into conflict with the belief in the overall merits of free trade, and the best way to encourage the development of the market. A system that permits the protection of workers from self-confessed competitive imports risks undermining the trading system. In order to reconcile outcome-based fairness with corporate economic autonomy, safeguard measures must be understood in a way that neither ignores requirements of fairness, nor unduly harms the benefits from trade.

In light of this need to reconcile these two values, the use of safeguard measures has been curtailed: as transnational actors attempt to encourage their own interpretation of their proper role and the 'correct' balance between these values they attempt to mould the regulation of safeguard measures to support their approach. As discussed in the previous chapter, one of the most obvious ways for actors' to pursue their preferences is to embed their conception of the correct role of safeguard measures in the international agreements themselves.[531] This not only relates to the text of the agreement (Art XIX

[530] For example, note the heated Congressional debates in the US during the passage of the 2008-2009 financial rescue bills.
[531] Chapter 2 (B) (i), p105ff

GATT and Agreement on Safeguards) but also by determining the conditions for their use, as well as their temporary nature. In this way, transnational actors encourage their own conception of where the line is to be drawn between protection and liberalisation in the face of uncertain economic changes: this has broader consequences than for safeguard measures, it is a core element in how a Member approaches the role of private and public power in the market.

In the case of safeguard measures, the US has been the principal determinant of their place within the larger international trade regime. This is not say that the US maintains a static position on the proper interpretation and role of safeguards. The State itself is subject to its internal influences[532]: in this instance, the interpretation of the proper use of safeguard measures has been one of the key battlegrounds between liberal and protectionist actors within the US political system.

The next section will examine how the US has sought to project its conception of the proper role of safeguard measures onto the international trading system, and in turn, onto the legal systems of other Members, by embedding its normative preferences within the GATT and Agreement on Safeguards. The success of this instrumental use of law will then be questioned and instead it will be argued that a broad causal approach which takes into account other influences (most notably the constraining and enabling influences of the dispute settlement system), explains the development of certain areas of safeguard regulation in light of the US' failure to determine the interpretation of the legal regime of safeguard measures in its own interest.

[532] Chapter 2 (A) (i-iii), p83ff

B. The Development of Article XIX GATT and the WTO Agreement on Safeguards: Norm Export by the US

This section examines the background and result of two attempts of norm export by the US of its approach to safeguard measures. These are the most visible of all methods of projection: the crystallisation of norms within an international agreement thereby embedding its normative preferences in the international trade system. This section will show how, as the US developed an understanding of how safeguard measures should be used, it applied its conception of them onto the GATT and then the WTO Agreement on Safeguards.

This section will examine key moments in the development of safeguard measures and the importance of the US approach to their application. It will analyse how the US' determination of the proper role for safeguards in a trading system has influenced their development at the *national* level. While safeguard measures are underpinned by an understanding of outcome-oriented fairness, the US' concerns not to let this method of projection undermine liberal trade relations have had a formative influence on them. It will then examine how the US has gone on to project its understanding of safeguard measures and the consequences of such a projection on the development of the legal regime of safeguards. Rather than examining the development of the law on safeguard measures through the lens of progressive panel and Appellate Body reports, it will be suggested that this broader causal approach provides a more convincing explanation.

The legal regime for safeguards is divided between international and domestic systems. At the international level there exist agreements between trading States;

originally these were in bilateral agreements but were soon incorporated into the multilateral trading system, under the GATT. Since 1994, there has been further development of the disciplines in the Agreement on Safeguards. Domestically, trade laws implement a regime for the use of safeguard measures, determining who may initiate an investigation into whether a safeguard is warranted, under what circumstances, when a safeguard may be applied and for how long. The US system was originally the most developed, however, in the past decades others Members have brought into force their own laws providing for the imposition of safeguard measures.[533]

(i) The US Origins of Safeguard Measures

The earliest escape clause was introduced in the US – Mexico Reciprocal Trade Agreement 1942[534] negotiated under the authority of the Trade Agreements Act of 1934[535], which delegated considerable trade policy powers from the Congress to the Executive.[536] The act outlined a trade programme targeted at liberalization that was to become US policy following the Smoot-Hawley debacle.[537] As the Executive negotiated

[533] For example, Members of the WTO such as the EU, Canada, India, Philippines, New Zealand, Brazil, Korea, Argentina, *inter alia*, as well as candidate Members such as Kazakhstan (under Art XII WTO Agreement, accession to the WTO is a negotiated process. Currently the Working Party for the candidate Member requires implementing legislation necessary to comply with WTO obligations, which often includes safeguards legislation) <http://www.wto.org/english/thewto_e/acc_e/docum_e.htm> (accessed 1 October 2012)

[534] This agreement had been negotiated as part of a warming of US – Mexico relations. In essence, to reward Mexican entry into World War II earlier in the year, the US eased its restrictions on the exportation of Mexican oil to the US: L Zorrilla, *Historia de las Relaciones enre Mexico y los Estados Unidos de América 1800-1958* (Porrua 1965) 495

[535] Ch 474 sec 1, 48 Stat 943 (1934)

[536] D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System' n529, 660

[537] The 1930 Act that raised tariffs on US imports in order to protect domestic industries (in particular the farming industry) and arguably sparked the rising levels of protectionism during the interwar period.

bilateral agreements with its trading partners and reduced tariffs on a range of products,[538] Congress became increasingly concerned with the impact of such measures.[539] Taking the escape clause present in the US – Mexico Reciprocal Trade Agreement 1942 as its security against the harm caused by overeager negotiators, Congress required then President Truman to include such escape clauses in all future agreements[540] and to set up a procedure for safeguard petitions. In return for this, Congress granted continuing authority under the Reciprocal Trade Agreements programme.[541]

Under the US petition procedure, an industry could petition the Tariff Commission (later to become the USITC) for relief in response to serious injury caused by the results of tariff concessions. The Tariff Commission would then decide according to its own requirements whether the claim merited a recommendation of relief. The Tariff Commission used a 'four point test:' that (1) as a result of unforeseen circumstances, and (2) obligations incurred under an Agreement, (3) there is an increase in imports, that (4) threatened or caused serious injury to a domestic industry. An affirmative decision (or tie) would be passed to the President who could then act upon it with broad discretion (including, if so desired, not at all, as was often the case).[542] This granted a right under US law for industry to claim for action in response to the result of an agreement entered

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[538] D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System' n529, 660 citing D Beane, *The United States and GATT: A Relational Survey* (2000), that 'between 1934 and 1945 the US entered into 32 bilateral trade agreements with 27 countries, granting tariff concessions on 64 per cent of dutiable imports and reducing tariff rates to an average of 44 per cent.'

[539] Subjected to pressure from constituents and representing specific geographic areas, Congressional members engage in furthering a more protectionist stance than the membership of the Executive: R Brewster, 'The Domestic Origins of International Agreements', 44 Virginia Journal of International Law 2 (2003) 1, 32

[540] Executive Order No. 9832, signed February 25 1947

[541] W Murayama, 'The Evolution of the Escape Clause – Section 201 of the Trade Act of 1974 as Amended by the Omnibus Trade and Competitiveness Act of 1988', Brigham Young University Law Review (1989) 393, 400

[542] Executive Order No. 9832, para. 2

into between the importing and exporting States. As a matter of domestic law, it led to the determination of a quasi-judicial agency with potential to give rise to international liability on the part of the State, (via the raising of tariffs on goods from other trading partners). This resulted in greater influence on trade policy by domestic industry than is the case in other areas. Whilst domestic industry customarily lobbies Congress and exerts its influence in the policy marketplace, this system permits a direct channel from industry to Executive via a quasi judicial-administrative body. The effect of this greater voice for domestic producers and the convergent interests of an increasingly resurgent Congress in matters of trade policy, was for the strict domestic safeguard disciplines to be relaxed so as to best accommodate the two increasingly protectionist factions.[543]

The resulting 1951 Trade Agreements Extension Act[544] was a victory (at least at the time) for the protectionist tendencies in the US system. It placed the petitioning system on a statutory footing and relaxed many of the requirements of the escape clause for domestic industries. As will be discussed below, the 'unforeseen developments' clause was removed and lessened the causation requirements of injury.[545] The 'unforeseen developments' clause in particular became representative of the importance of safeguard measures as a way of protecting industry and workers, at the cost of corporate economic autonomy. However, before this change took place the US had

[543] See D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System' n529, 661 for an analysis of the change of Congress' trade policy over the 30s to the 60s, highlighting a complimentary passing of responsibility to the President whilst still attempting to 'direct and constrain the Executive.' This can be seen as freeing the hands of Congress to pander more openly to its constituents without concerning itself with the castigation of a failed policy as was the case after the Smoot-Hawley Act.

[544] [Ch 141 sec 10, 65 Stat 75]

[545] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* (Kluwer Law International 1993) 1733

already achieved a considerable victory in projecting its definition of safeguard measures internationally.

(ii) The First Example of Norm Export by the US: Article XIX GATT 1947

Article XIX of the GATT was based very closely on the aforementioned escape clause in the US – Mexico Reciprocal Trade Agreement of 1942[546] that read:

> If, as a result of unforeseen developments and of the concession granted on any article enumerated and describer in the Schedules annexed to this Agreement, such article is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or similar articles, the Government of either country shall be free to withdraw the concession, in whole or in part, or to modify it to the extent and for such time as may be necessary to prevent such injury.

While Art XIX 1(a) reads:

> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in

[546] Ibid, 1720

> respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

The Havana Charter also contains a safeguard clause based on the US – Mexico provision, though it relaxed some of the prerequisites for the initiation of safeguards.[547] The inclusion of a safeguards clause was non-negotiable for the US that was required to include such a clause in all its new trade agreements.[548] However, the clear transplant of the US provision to the GATT must have been viewed as an assurance that other States would approach the use of safeguard measures in a similar way to the US.

This formulation of a safeguards clause displays key elements that are at the heart of safeguard measures even today: their temporary nature, the requirement that domestic producers suffer injury (or are threatened by injury) and the 'emergency' nature of safeguards requiring a connection to 'unforeseen developments.'

While the text of Article XIX has not changed since its adoption, the domestic provisions (including the US inspiration for Article XIX) have been altered considerably.[549] In the US the disciplines became more rigorous leading to a situation described by John Jackson:

> This means that industry groups within the United States who seek escape-clause relief find that in many circumstances they are not eligible under US

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[547] Art 40 Havana Charter, Final Act of the United Nations Conference on Trade and Employment (April 1948) UN Docs E/Conf. 2/78 <www.wto.org/english/docs_e/legal_e/havana_e.pdf> (accessed 1 October 2012) though in the view of Stewart, 'Since 1947, the contracting parties have generally interpreted GATT Article XIX in a manner consistent with the revisions made at the Havana Conference.' T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1720

[548] Executive Order 9832

[549] J Jackson, *The World Trading System* (2nd ed. MIT Press 1997) 181

law for that relief, although they might well be eligible for such relief if the GATT language were the applicable legal standard.[550]

This divergence would eventually be lessened with the introduction of the Agreement on Safeguards. It once again took the example of following the domestic provisions of US safeguards law and incorporated it into a distinct situation.[551]

(iii) The Second Norm Export by the US: The WTO Agreement on Safeguards

In the years that followed the inclusion of the GATT, the US had witnessed many changes to its own safeguards legislation. This reflected the changing circumstances of international trade in which the US found itself. In the seventies, confronted with international economic disorder and progressive competition, partly from the EC but more importantly Japan,[552] Congress pushed for a safeguard system that would provide protection for domestic industries in light of this new competition and curtail the President's powers to override determinations of the USITC.

The current petitioning procedure is found in ss201-204 of the Trade Act 1974. A domestic industry[553] may petition the USITC to conduct an investigation into whether 'an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry

[550] Ibid, 182
[551] URAA Statement of Administrative Action, H.Doc 103-316 (I), 4298
[552] S Strange, *The Retreat of the State* n526, 21-22
[553] by means of an 'entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry.' 19 USC §2252(a)(1)

producing an article like or directly competitive with the imported article.'[554] Despite the relaxation of certain requirements, a determination by the USITC requesting relief is still a difficult goal to achieve. Since the 1988 Omnibus Trade and Competitiveness Act domestic industries must now also show how they intend to adapt if relief is to be granted. This includes whether or not they will focus their resources on improving competitiveness or instead focus on a separate area of business.

Once a petition has been lodged, the USITC conducts detailed investigation and produces a report. Where three or more of the six Commissioners vote in favour of a determination of serious injury (or threat thereof), they pass their recommendations onto the President. The President then has a wide range of considerations to factor in (from national security to trade diversion[555]), and an even wider range of actions available to him from the list found in the Act, including the broad catchall 'any other action…which the President considers appropriate and feasible.'[556]

The Agreement on Safeguards follows the tradition of Art XIX and once again uses US law as its model. During the Uruguay Round the US representative at the Working Group preparing the Agreement on Safeguards stated somewhat coyly:

> The purpose of this paper is not to advocate that the specific procedures of the United States be incorporated into a safeguards agreement or that the United States experience readily lends itself to use by other contracting parties. This paper is presented more for the purpose of demonstrating how one country has defined injury in its national trade law and developed a

[554] 19 USC §2251(a)
[555] 19 USC §2253(a)(2)
[556] 19 USC §2253(a)(3)(i)

transparent process for making injury determinations consistent with Article XIX.[557]

The resulting Agreement on Safeguards, however, does incorporate the US position. With the exception of certain procedural requirements (which are more detailed under US law), the WTO Agreement on Safeguards is overtly modelled on the US system under s201 Trade Act of 1974,[558] including a lack of the 'unforeseen developments' clause.

(iv) Structural Adjustment Assistance: A Failure to Embed Norms?

One notable difference between the US law and the WTO Agreement on Safeguards is the lack of an obligation to ensure a plan for structural adjustment at the time of a petition to the relevant agencies. The Agreement on Safeguards, unlike the US legislation, lacks any requirement for structural adjustment.

The Agreement on Safeguards makes reference to structural adjustment but offers no more than an exhortation. There are four references to adjustment in the Agreement on Safeguards. In the preamble it states the general importance of structural adjustment:

> *Recognizing* the importance of structural adjustment and the need to enhance rather than limit competition in international markets;

The remaining references are in Articles 5.1, 7.1 and 7.4. Article 7 is concerned with the duration of safeguard measures and uses structural adjustment as one of the motivations for the use of safeguards. They are to be applied only so long as is necessary to either

[557] Communication from the United States (3 March 1988) GATT Doc MTN.GNG/NG9/W/13, 1
[558] URAA Statement of Administrative Action, H.Doc 103-316 (I), 4298

'prevent or remedy serious injury and to facilitate adjustment.'[559] As specific time-frames are then included, this provision, like the preamble, appears to provide a context for their use rather than a specific obligation.

Art 5.1 is, on its face, more demanding as it states that a 'Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.' The panel in the *Korea – Dairy* case, however, was not convinced.[560] It held:

> We wish to make it clear that we do not interpret Article 5.1 as requiring the consideration of an adjustment plan by the authorities, as the European Communities asserts. The Panel finds no specific requirement that an adjustment plan as such must be requested and considered in the text of the Agreement on Safeguards. Although there are references to industry adjustment in two of its provisions, [Arts 5 and 7] nothing in the text of the Agreement on Safeguards suggests that consideration of a specific adjustment plan is required before a measure can be adopted. Rather, we believe that the question of adjustment, along with the question of preventing or remedying serious injury, must be a part of the authorities' reasoned explanation of the measure it has chosen to apply. Nonetheless, we note that examination of an adjustment plan, within the context of the application of a safeguard measure, would be strong evidence that the authorities considered whether the measure

[559] Art 7.1 Agreement on Safeguards
[560] *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, Panel Report (21 June 1999) WT/DS98/R ('*Korea – Dairy Panel*')

was commensurate with the objective of preventing or remedying serious injury and facilitating adjustment.[561]

While developing countries, in particular, pushed for structural adjustment to be included as a requirement in the Agreement on Safeguards during the Uruguay Round,[562] the US was unhappy with the inclusion of a formal requirement for structural adjustment.[563] Given that US law already requires that a plan for adjustment be presented at the same time as a petition for relief,[564] it might seem odd that it would not push for an internationalized version of this commitment.

When safeguards are examined through the lens of conflicting values (corporate economic autonomy and outcome-based fairness), the US' reticence becomes representative of an understanding that though values can be projected, there still remains scope for differing interpretations. In the US, structural adjustment plans are arranged by industry in the first instance as it demonstrates how it plans to adapt to changing conditions, either by enhancing competitiveness or by orderly contraction. The underlying values of the US system, such as a desire for the free action of companies and a generalized dislike of government intervention ensures that structural adjustment serves as a tool to provide long-term solutions to industry. Where a Member takes a separate view, inclined more toward government intervention or dirigisme, structural adjustment could be guided by governmental advice or direction. Though structural adjustment would still be part of the process for enacting safeguard measures, the role of government

[561] *Korea – Dairy Panel* n560, para. 7.103
[562] Brazil in particular, Communication from Brazil, (25 May 1987) GATT Doc MTN.GNG/NG9/W/3. The 1990 Draft of the Agreement on Safeguards contained Art 15 permitting the use of adjustment assistance in lieu of border measures. This provision did not survive to the final version, however. (Negotiating Group on Safeguards, 'Draft Text by Chairman' (31 October 1990) GATT Doc MTN.GNG/NG9/W/25/Rev.3)
[563] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1775
[564] 19 USC §2252(a)(2)(a)

would be central – something contrary to the policy of the US in the rest of its negotiations on the Agreement on Safeguards. From its position, it could well be that requirements for structural adjustment programmes might risk encouraging further movement away from corporate economic autonomy within the systems of the other Members.

C. The Limited Success of the US' Norm Export in Safeguard Measures

The previous section outlined two very clear and visible projections by the US of its own understanding of the proper definition of safeguard measures. Perhaps the most easily identifiable method of projection, the US domestic law was used as a model for Art XIX, and then later, the Agreement on Safeguards. While it would appear that US aims were achieved, this has not been the case. US law and the international regime for safeguards have either diverged (in the case of the GATT years) or come into conflict (in the case of the WTO Agreement on Safeguards).

Chapters 1 and 2 referred to the complex nature of the relationship between domestic and international trade law. It was argued that the system's complexity and fluidity meant that a broad causal approach could offer explanatory benefits in understanding how a legal regime develops. By examining the behaviour of transnational actors in using law instrumentally to further their aims it was possible to explain the legal regime's development in a more convincing manner. It also highlighted the limits of

using the crystallisation of norms within treaties as a method for norm export.[565] These limitations find form in this chapter as the development of safeguard measures has been, in part, determined by the failure of the US to embed norms in the relevant treaties (both the GATT and the Agreement on Safeguards).

The following sections study the behaviour of the US in responding to the consequences of its norm export as a way of understanding the development of safeguard measures. While the US was successful in using its own model of law for the international safeguard regime, it failed to achieve synchronisation between its own law and the international regime applicable at the time. During the GATT years a notable divergence took place, while since 1994 the US has yet to successfully defend the legality of a safeguard measure before the Appellate Body.

The reasons behind these divergences are distinct in each period (the GATT years and the WTO era). However, the constitutive and systemic influences of the institutions of the dispute settlement system in interpreting the meaning of Art XIX and the Agreement on Safeguards were important in both. By embedding certain norms in the adjudicative system of the WTO, the US undermined its attempt to successfully export its norms in the regulation of safeguard measures, going so far as to opening itself to influence from the international system that it had always sought to avoid.

(i) The Consequences of US Textual Projection at the GATT and the 'Unforeseen Developments' Clause

[565] Chapter 2 (C) (i), p131ff

This section will follow the application of a specific clause of Art XIX, the 'unforeseen developments clause.' The application and interpretation of this clause has been emblematic of the tensions underlying safeguard measures, both within the US' own domestic system as well as at the GATT/WTO level. As this section will attempt to show, the traditional explanations for the jurisprudence relating to the 'unforeseen developments clause' is unsatisfactory and that, instead, by examining the consequences of the US' norm export, a more convincing explanation can be made.

The following section will then examine how the US has attempted to maintain its conception of safeguards as the dominant understanding of them at the international level by resorting to second-best options, primarily Voluntary Export Restraints ('VERs') and Orderly Market Agreements ('OMAs'). These agreements, largely overlooked within the WTO, represent a new wave of norm export by the US and a new development in the legal regime of safeguard measures.

The Origins and Rationale of the 'Unforeseen Developments' Clause of Art XIX GATT

Art XIX:1(a) of the GATT reads:

> If, *as a result of unforeseen developments and of the effect of the obligations incurred* by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in

> respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[566]

This clause serves two key purposes; first, in the context of the original GATT negotiations, it provided a safety net for States entering into unprecedented tariff reductions where the results of certain concessions may not have been possible to calculate accurately. Second, the unforeseen developments clause serves to guide the calculation for an increase in imports. Under Article XIX, a requirement for the invocation of a safeguard measure is an increase of imports. This has led to much debate over how the increase is to be calculated. What point in time should be used as the starting point for the increase in imports? The 'unforeseen developments' clause requires that the increase in imports be both the result of unforeseen developments but also 'of the obligations incurred' under the GATT. This suggests using the most recent tariff binding as the point from which to increase the import surge. If this clause is ignored, there is no clear point from which to calculate.[567] Yet, despite having a clear place in the agreement[568] as well as an important purpose, the very application of the unforeseen developments clause has been subject to great debate.[569]

As discussed, the inclusion of the 'unforeseen developments' criterion has its origins in the 'escape clause' of the United States – Mexico Reciprocal Trade Agreement

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[566] Art XIX GATT (emphasis added)

[567] A Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence', 2 World Trade Review 3 (2003) 261, 266

[568] It is an established rule of both public international law and international trade law that a treaty should be interpreted 'in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose.' (Art 31(1) VCLT 1969): *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17; *Territorial Dispute Case (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, para. 41

[569] E.g., P Mavroidis, *Trade in Goods* (OUP 2007) 366 fn 101

of 1942. A subsequent Executive Order of the US President required an escape clause in any trade agreement the US was to enter into, including the GATT.[570]

As a matter of US domestic law, however, the 'escape clause' was altered. The Trade Agreements Extension Act 1951 replaced the Executive Order as the obligation to include an escape clause placing the requirement on a legislative footing. It also removed the 'unforeseen developments' requirement from the domestic provision of the escape clause. This was in response to the perception that it was too difficult to obtain an affirmative determination by the Tariff Commission on safeguard relief by domestic industries.[571] It has not been part of the criteria for determination by the USITC since. Similarly, neither the EU's current regulations,[572] nor those prior to the entry into force of the Agreement on Safeguards[573] required 'unforeseen developments' as a cause of an increase in imports. Of the three largest global economies only Japan's domestic safeguard laws still mention 'unforeseen developments.'[574]

1951 was a significant year as not only was the 'unforeseen developments' clause removed from the US legislation but it was also one of the issues before a GATT Working Group. This case was an important indicator of the problems facing the GATT system: its diplomatic, power oriented approach to the dispute at hand. This case also foreshadowed a problem with crystallising norms in treaty provisions: primarily that

[570] Executive Order No. 9832
[571] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1731. This would appear to be at variance with the position that the further from the 1947 tariff bindings one got, the easier it became to comply with the 'unforeseen developments' criterion; A Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence' n195, 265
[572] Council Regulation (EC) No 260/2009
[573] Council Regulation (EEC) No 288/82 of 5 February 1982 on common rules for imports [1982] OJ L35/1 (repealed), Council Regulation (EC) No 3285/94 of 22 December 1994 on the common rules for imports and repealing Regulation (EC) No 518/94 [1994] OJ L349/53 (repealed)
[574] Article 9 bis, The Law No. 68 of March 1963

while the domestic system may have changed, the international rules stay the same until amended.

The Hatters' Fur Case: A Brief Overview

The *Hatters' Fur Case*[575] is the only dispute arising from the old GATT system over the meaning and scope of the 'unforeseen developments' clause. In the *Hatters' Fur Case* the US granted concessions on certain types of women's fur felt hats. Following a change in the fashion of ladies' hats, imports into the US from Czechoslovakia increased to such an extent that the US, invoking Article XIX, withdrew its concessions. The position taken by the Working Group is an interesting one. It takes the position (the US representative dissenting) that:

> the term 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.[576]

The Working Group continued, noting the peculiarities of the fashion industry and its propensity to change.[577]

It concluded that changing fashions in and of themselves could not constitute 'unforeseen developments', the implicit reasoning being that it would be reasonable for a

[575] *Hatters' Fur Case*, Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade (27th March 1951) CP/106)
[576] *Hatters' Fur Case*, para. 9
[577] 'change is the law of fashion', ibid, para. 10

negotiator to expect that there would be a change in the circumstances of the industry in the foreseeable future. While the Working Group found the US' safeguard measure Article XIX consistent it was not because *any* change in women's fashion satisfied the 'unforeseen development' requirement. On the contrary, a change in women's fashion *per se* will not constitute an 'unforeseen development.'

The point at which the Working Group did accept the US position was over the manner of the change. Therefore, in the words of the Working Group, it was '*the degree to which* the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States authorities.'[578]

This sets out a two-stage approach: first, there must be a development which could not reasonably have been foreseen at the time of the concession negotiation, and second, if a development was reasonably foreseeable then it is necessary to examine the extent, gravity, or length of the development. If it is so far beyond the reasonable expectation in the first stage then the development can be termed 'unforeseen.' This raises a host of questions that were to lie dormant until after the entrance into force of the Agreement on Safeguards. During the intervening years, no other contentious case brought to dispute settlement focused on this provision.

<u>The Traditional Interpretation of the Hatters' Fur case and its problems: US Influence on International Behaviour</u>

[578] Ibid, para. 12 (emphasis added)

The traditional approach to *Hatters' Fur* is that it was responsible for 'reading out' of the GATT the 'unforeseen developments' requirement by virtue of its lax interpretation.[579] This approach had been widely followed and expanded by commentators; Yong-Shik Lee, for example, argues that the *Hatters' Fur* report is indicative of 'the fact that this particular clause [i.e. the 'unforeseen developments' requirement] is too ambiguous and equivocal to create objective legal criteria.'[580] These arguments have continued in spite of contrary Appellate Body reports (discussed below) that confirmed the legal weight of the 'unforeseen developments' clause. Such arguments are based on the *Hatters' Fur* case as a starting point and then citing continuing State practice to explain the non-binding nature of the 'unforeseen developments' clause.

It is argued here that this presents problems as first, the text of *Hatters' Fur* does not, on the face of it, remove the legal obligation of the 'unforeseen developments' clause. It represents an application of an, albeit loosely worded, legally operative clause. Importantly it contains both objective and subjective criteria in interpreting Art XIX: a subjective examination of what negotiators would have considered to be foreseeable at the time of tariff concessions and an objective determination of the extent of the change. It is symptomatic of an approach that only takes into account the influence of legal obligations at one level (i.e. the international) that leads to the conclusions advocated above. By separating the sources of the obligations in regulating safeguard measures (international and domestic) but understanding that they influence each other's development nonetheless, it is easier to interpret the *Hatters' Fur* case in this context.

[579] J Jackson, *The World Trading System* n549, 187
[580] Y.S Lee, 'Destabilization of the Discipline on Safeguards', 35 Journal of World Trade 6 (2001), 1241

It is true that there was a lack of further regulation of the 'unforeseen developments' clause in safeguard measures, however, this is indicative of the general lack of international oversight of safeguard measures due to the limitations of dispute settlement during the GATT years. While this provision of Art XIX may have had a limited constraining or enabling influence, this was characteristic of the GATT system as a whole: hence the desire to move to a more formal, rule-based system in the WTO era. Further, the opportunities for actors to stimulate a challenge over this provision were limited in the GATT years that saw the dwindling use of safeguard measures over the four decades following *Hatters' Fur*.[581]

Second, by ignoring the influence of domestic legal developments one can see only part of the picture. Not that, as is the case in the traditional reading of the 'unforeseen developments' clause, the subsequent practice of Members (specifically their own legislation) altered the meaning of the clause by virtue of Article 31(3)(c) VCLT. This is an argument routed in the rules of public international law; rather, it is the influence of domestic law on the development of the legal regime *as a whole*. In this case, as the US removed 'unforeseen developments' as a requirement from its domestic 'escape clause' requirements, it altered its position on the balancing between competing underlying conceptions of the proper role for safeguard measures.[582] This had been part of a battle between the legislative and executive branches of government for close to a decade, predating the *Hatters' Fur* dispute.[583] The influence of the change in domestic

[581] Compare the 24 Art XIX measures in force in 1991 compared to the 284 VERs (T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1726)
[582] Trade Agreements Extension Act 1951 [Ch 141 sec 10, 65 Stat 75]
[583] Beane characterises trade legislation during the period 1947-1956 as being concerned with the internal conflict between the legislative and executive branches: D Beane, *The United States and GATT: A Relational Survey* n538

practice in the US on the international system should not be underestimated.[584] Rather than approaching *Hatters' Fur* from a public international law perspective, the approach advocated here is to see it within a broader relationship not concerned with primacy of one over another but rather the influence that one area of law can have on the development of a legal regime that crosses jurisdictional borders.

This helps to explain the inconsistency between the proposition that the international perception was that a standard interpretation of Art XIX in *Hatters' Fur* could be so easy as to lead to *de facto* automatic compliance whilst the domestic position in the US was that it was necessary to remove the requirement from legislation in order to relax the stringent obligations under the Trade Acts. The diplomatically focused panel system at the international level produced a report that was abided by the parties to the dispute. Domestically, however, the influence from groups that desired a greater willingness on the part of the State to protect their industry (or the industry of their constituents) led to a relaxation of the legal requirements for an affirmative petition. The US system, however, was so strictly enforced by the Tariff Commission (later USITC) that the possibility of negative GATT determinations was of secondary concern. If a claim survived the US petitioning procedure, it was likely to survive GATT scrutiny.

The groups that desired a greater degree of protection through safeguard measures were not entirely successful, however. The USITC still applied strict standards and the President could negotiate his own Voluntary Export Restraints ('VERs')[585] with trading partners resulting in less protection for the domestic industry, though sufficient to placate

[584] As discussed in Chapter 2, the capacity of certain States to influence the international behaviour of other States is considerable.

[585] VERs are 'gentleman's agreements' which restrict imports. These import restraints function as de facto quotas.

domestic pressures. Art XIX, therefore, did not become an issue at the level of international litigation, not because of any change in the line of jurisprudence at the GATT but because domestic legal systems, especially that of the US, did not give rise to such a claim. The US system, for example, predominantly rejected domestic petitions but then placated industry by using the non-justiciable VERs.

Another argument put forward for the decline in the use of the unforeseen developments clause is that it was designed specifically for the unique circumstances surrounding the GATT, but that as the years passed and subsequent rounds were completed, this clause no longer became applicable in any meaningful way.[586] This does not explain, however, the existence of a comparable clause in the previous US- Mexico Reciprocal Trade Agreement 1942 where, while concessions were made, the reduction of tariffs was not as dramatic as that in the first GATT round.[587]

The traditional view of the *Hatters' Fur* case was influential and when the new Agreement on Safeguards came into being the general view was that the unforeseen developments clause was not legally operative. This assumption was based on the flawed interpretation of practice of the GATT years (discussed above) and failed to take into account the innovations of the new covered agreements and their impact on the safeguard measures system.

The limitation that the US found in its first attempt to embed norms in an international agreement (that it set the US model of 1947 as the international norm) was, in part, corrected by the US' influence in undermining the 'unforeseen developments'

[586] A Sykes, 'The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute', 7 Journal of International Economic Law 3 (2004) 523, 528

[587] 1947 saw '45,000 tariff concessions affecting $10 billion of trade' <http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm> (accessed 1 October 2012)

clause. As many States did not yet have developed safeguard systems, the US' which had detailed procedural requirements (certainly more so than Art XIX) served as an influential model.

The GATT Contracting Parties began to treat the 'unforeseen developments' clause as if it were not there, following their domestic practice in removing it from the legal requirements of the implementation of a safeguard measure.[588] This was an infrequent act, however, as Members preferred using other TDIs or, more likely, VERs as their method of dealing with import surges. The first attempt at norm export in the regulation of safeguards appeared to have had a limited success; Members avoided using them and where they did they mimicked the US' own domestic requirements rather than the Art XIX wording. While the US was a key player in undermining the use of Art XIX, its motivation was routed in the divergence between its own law and the GATT system's. Internationally safeguard measures were barely regulated, theoretically permitting States to apply a range of interpretations of how safeguards should be used. Instead, within the US, a successful petition under s201 of the Trade Act was particularly difficult.[589]

The US' first norm export had failed to produce the results that might have been expected. Instead, the legal regulation of safeguard measures responded to the alternate pressures of the US on the international system. The second norm export, however,

[588] While Japanese law included the 'unforeseen developments' clause, Japan did not, in fact, initiate any safeguard investigations or subsequent measures until the WTO era; N Komuro, 'Japan's Safeguard Law and Practice', 35 Journal of World Trade 5 (2001) 851

[589] Between 1943 and 1951 only one petition was found to merit safeguard relief by the Tariff Commission (T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1731), from 1951-1958 ten industries out of 87 petitions received protection (T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1732), three out of twenty-eight petitions were successful under the 1962 Trade Expansion Act (T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1736), nineteen industries received some sort of relief out of 62 petitions under the Trade Act of 1974 (T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1737), with the 1988 Omnibus Trade and Competitiveness Act still setting the requirements for successful petitions particularly high (T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1738)

offered a new chance. The new WTO system was not going to be hobbled by a weak dispute settlement system, and the model used for the WTO Agreement on Safeguards had developed to a state that had not altered notably since 1988.[590] The dual failures of a change in domestic legislation leading to divergence and a failure of international oversight appeared to have been resolved.

In the next section it is argued that while the US succeeded in embedding its normative preference in the Agreement on Safeguards, it failed to take into account the consequences of other exercises of norm export that took place simultaneously during the Uruguay Round: in this instance, in the Dispute Settlement Understanding and its effects in both constituting and constraining the panels and Appellate Body.

(ii) The 'Unforeseen Developments' Clause in the WTO Era

The Agreement on Safeguards marked one of the great successes of the Uruguay Round. A clear rule-set to deal with safeguards and bring them back into the multilateral fold had been a priority for some time.[591] Failure to address this was one of the great disappointments of the Tokyo Round. The WTO Agreement on Safeguards achieved a great deal: a clearer set of rules for the use of safeguards, prohibition of 'grey-area measures'[592] (and providing a limited life span for those existing at the time), and more

[590] Omnibus Trade and Competitiveness Act 1988 [Pub L 100-418, 102 Stat 1107]

[591] Preamble to the Agreement on Safeguards: 'Recognizing the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control;'

[592] The generic term for VERs, OMAs and similar instruments, though on the actual success of this prohibition, see section D (iii) below (p228ff)

besides. This led to an increase in the use of safeguard measures by Members and a rekindling in the interest of their application and the legal disciplines to be applied.

While the US had successfully used its own legislation as the model for the international agreement once again, it was to suffer a series of defeats at the Appellate Body. Contrary to the opinion of many commentators, who are highly critical of the Appellate Body's interpretation of the Agreement on Safeguards and Art XIX,[593] it is argued that a better explanation of these decision lies not in the incompetence or empire-building of the Appellate Body[594] but rather as a consequence of the larger process of norm export by Members, and specifically the US' concerns with the DSU.

While the US' projection of a position on safeguard measures was largely successful within the Agreement on Safeguards, the US failed to anticipate the consequences of a separate though parallel projection: embedding certain values in the institutional workings of the new dispute settlement system. The new DSU and its attendant methodology were responsible for the position taken by the Appellate Body in the *Korea – Dairy* and the *Argentina – Footwear* reports. This has had a lasting impact on the review of safeguard determinations at the WTO level with numerous negative determinations passed on the legality of safeguard measures since. The importance of the DSU in this section can only be explained by analysing its domestic influences

[593] Alan Sykes calling them 'a series of wooden, largely useless and often logically incoherent decisions that simply underscore the deficiencies of the treaty text without clarifying them in the least.' A Sykes, 'The Fundamental Deficiencies of the Agreement on Safeguards: A Reply to Professor Lee', 40 Journal of World Trade 5 (2006) 979, 993

[594] Inter alia: Y.S., Lee, 'Not Without a Clue: Commentary on "the Persistent Puzzles of Safeguards"', 40 Journal of World Trade (2006), 385; J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation?', 6 Journal of International Economic Law 1 (2003) 113; A Sykes, 'The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute', 7 Journal of International Economic Law 3 (2004) 523; P Rosenthal & J Beckington, 'Dispute Settlement Before the World Trade Organization in Antidumping, Countervailing and Safeguard Actions: Effective Interpretation or Unauthorized Legislation?', speech delivered at a conference presented by the Trade and Customs Law Committee of the International Bar Association, 'Developments in WTO Law', Geneva, Switzerland, March 20 & 21, 2003, 1

(Congress' desire to restrict the possible freedom of the panels or Appellate Body in coming to a decision at the WTO level which might then limit US autonomy in trade relations) and, in turn, the interaction between the two separate instances of norm export by the US.

The Agreement on Safeguards and the 'Unforeseen Developments' Clause

Art 2(1) of the Agreement on Safeguards sets out the conditions for the use of safeguards as follows:

> A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.[595]

Largely modelled on s201 of the US Trade Act 1974, it replicated the lack of 'unforeseen developments' or 'obligations incurred' requirements.[596]

The result of this omission was an EU claim in response to safeguard measures enacted by Korea on certain dairy products and Argentina on certain items of footwear respectively. Amongst the claims of the EU, was that the appropriate trade bodies in Korea and Argentina had not fulfilled their obligations under Art XIX by showing that

[595] Art 2.1 Agreement on Safeguards
[596] URAA Statement of Administrative Action, H.Doc 103-316 (I), 4397

the increase in imports was a result of 'unforeseen developments.' The importing Members' claims can be divided into three separate threads.

First, it was argued that the Agreement on Safeguards contained the full set of disciplines relating to the use of such measures and compliance with it sufficed legal requirements.[597] Second, that where a conflict exists between the GATT and the Agreement on Safeguards, it is to be resolved in favour of the Agreement, as per the Interpretative Note to the WTO Agreement.[598] Third, engaging with the possibility of the validity of the 'unforeseen developments' clause, that the rise in imports could not have been foreseen.[599] The EU, for its part, submitted that the obligations under the covered agreements were part of a 'single undertaking' and as such were cumulative in nature. The entirety of both Art XIX and the Agreement has to be applied.[600] In the context of the Argentinean case, the EU also pointed out that as Argentina had pursued a conscious policy of liberalization over the period of 1989/1990, an increase in imports could not be 'unforeseen' for the purposes of Art XIX.[601]

The *Korea – Dairy* panel in this case took an approach in line with academic opinion at the time; it interpreted the text so as to avoid conflict (citing the principle of *l'effet utile*[602]) and proceeded to examine the text of Art XIX:1 'based on the ordinary meaning of the terms' in it.[603] The conclusion was that the 'unforeseen developments' clause did not create any specific obligation but was instead explanatory.[604] The panel

[597] *Korea – Dairy Panel* n560, para. 7.33
[598] WTO Agreement Annex 1a
[599] *Argentina – Safeguard Measures on Imports of Footwear*, Panel Report (25 June 1999) WT/DS121/R ('*Argentina- Footwear Panel*') para. 848
[600] *Korea – Dairy Panel* n560, para. 7.36
[601] *Argentina – Footwear Panel* n599, para. 847
[602] *Korea – Dairy Panel* n560, para. 7.37
[603] Ibid, para. 7.39
[604] Ibid, para. 7.45

elucidated the *raison d'être* of Art XIX in light of the historic commitments made in 1947 and in doing so, cited both the *Hatters' Fur* dispute as well as (via Art XVI:1 of the WTO Agreement) 48 years of State practice.[605] The conclusion was that Art XIX contained no obligation with reference to the 'unforeseen developments' clause.[606]

The *Argentina – Footwear* panel reasoning was somewhat distinct, citing Art 11.1(a) of the Agreement on Safeguards which stipulates the requirement to enact safeguard measures in compliance with Art XIX 'applied in accordance with Agreement [on Safeguards].'[607] The panel then concluded, both due to this provision (and drawing a comparison with *Brazil – Desiccated Coconut*[608]), that Art XIX and the Agreement on Safeguards were 'intrinsically linked' and that Art XIX was to be read in light of the 'subsequently negotiated and much more specific provisions of the Agreement on Safeguards.'[609] The 'unforeseen developments' clause is then read in light of the object and purpose of the Agreement on Safeguards. The Agreement is intended (as per its Preamble) to 'clarify and reinforce' the disciplines found in Art XIX.[610]

The 'unforeseen developments' clause is fit into the panel's analysis by virtue of two conceptual exercises. First, it posits that the omission of the 'unforeseen developments' clause in the Agreement on Safeguards was an intentional, express omission. There is no detailed examination of negotiating histories but this is instead based upon speculation of the mind-set of negotiators at the time.[611] Second, a division is made between the provisions in the Agreement on Safeguards in light of its aim to

[605] Ibid, para. 7.46
[606] '[W]e consider that Article XIX of GATT does not contain such a requirement.' Ibid, para. 7.48
[607] Art 11.1(a) Agreement on Safeguards
[608] *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body (21 February 1997) WT/DS22/AB/R
[609] *Argentina – Footwear Panel* n599, para. 8.56
[610] Ibid, para. 8.62
[611] Ibid, para. 8.65

reassert control over the multilateral system of safeguards; on the one hand the tightening of disciplines (e.g. elimination and restriction of VERs) and on the other hand, the relaxing of disciplines (e.g. flexibility over compensation actions).[612] By making the omission of the 'unforeseen developments' clause an intentional alteration the panel is free to include it in the latter category. In this manner, the panel can view the omission of the unforeseen developments clause as part of the new provisions in the Safeguard Agreement that are designed to make it easier to apply safeguard measures. The panel here echoes the motivations in 1951 for the omission of the unforeseen developments requirement under US law. While playing lip-service to the limits on adding to or diminishing rights or obligations under the covered agreements[613] it still concludes that 'conformity with the explicit requirements and conditions embodied in the Agreement on Safeguards must be sufficient for the application of safeguard measures within the meaning of Article XIX of GATT.'[614]

The Influence of the DSU and its Attendant Methodology

The two panel reports in *Korea-Dairy* and *Argentina-Footwear* represent a failure to understand the systemic shift that took place following 1994 with the introduction of the DSU. The DSU not only introduced the rules and regulations for a new dispute settlement system but also created a mechanism not centred on equitable results but instead on the maintenance of security and predictability.[615] While equity and

[612] Ibid, para. 8.63
[613] DSU Art 3.2
[614] *Argentina – Footwear Panel* n599, para. 8.67
[615] Art 3.2 DSU

predictability are not exclusive categories, it is important to understand, via the domestic motivations and terms of the DSU why it was created and what its method was to be. The DSU sets out a strictly textual approach to judicial interpretation in the WTO.[616] The desire to create a body which would ensure compliance with the covered agreements but limit itself, as far as possible, in its judicial function to their application and interpret restrictively created an institution preoccupied with ensuring its own legitimacy. The requirement of post-report adoption by the Dispute Settlement Body, while unquestionably easier now than during the GATT years, still restricts the freedom of panels or the Appellate Body.[617]

The appeal of the *Korea – Dairy* and *Argentina – Footwear* reports to the Appellate Body gave it the opportunity to bring them into line with the new textual approach of the interpretation of the GATT.

The Appellate Body's response to these disputes was released almost simultaneously and the relevant passages were essentially the same. In particular, it took issue with the panels' approach by stressing the need to give meaning and effect to all provisions in the text[618] and reversed the panels' findings that the 'unforeseen developments' clause created no legal obligation. [619] The Appellate Body also took the opportunity to clarify the aim of this interpretation; that is, in line with the object and purpose of the Agreement on Safeguards, to reassert control over the multilateral

[616] C.D., Ehlermann, 'Six Years on the Bench of the "World Trade Court"', 36 Journal World Trade 4 (2002) 605, 616: recounting criticism that the 'Shorter Oxford Dictionary, which, in the words of certain critical observers, has become "one of the covered agreements".' See also, Chapter 2 (B) (iv) above (p123ff)

[617] Hence their description as 'quasi-judicial' bodies in some quarters: L Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', 53 International and Comparative Law Quarterly 4 (2004) 861, 864

[618] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body (14 December 1999) WT/DS98/AB /R ('*Korea – Dairy Appellate Body*') para. 82

[619] Ibid

disciplines on safeguards.[620] This is useful in clarifying the position of the 'unforeseen developments' clause during the intervening years. By stressing the need to reassert control over the safeguard system the clear implication is not that the 'unforeseen developments' clause had been legally inoperative but instead that there lacked a suitable enforcement method or cases raised.[621]

The traditional view that the *Hatters' Fur* dispute interpreted the 'unforeseen developments' clause in such a lax way so as to, *de facto*, remove it from the text is an approach based on the examination of only one side of the picture. It is, by itself, an unsatisfactory position as it fails to explain *how* this has happened when the text of the report is far from being so clear. Not only does the text of the report not support such a dismissive application but even if it were to, legal requirements must still be complied with, no matter how easy. States do not ignore making claims because they suspect that the other side has probably satisfied the requirements. Nor can dispute settlement bodies skip over required steps by assuming that compliance exists.

The reason for this period of non-application stems from the practice of the Members and the systemic influence on their actions of their own domestic law. By removing the 'unforeseen developments' requirement from US law (the most developed 'escape clause' action system at the time) it set a precedent for others to follow. The strict domestic interpretation of these requirements by quasi-judicial bodies such as the USITC and the lack of willingness on the part of the executive (in the US system) resulted in a situation where claims simply did not arise, as they failed to stimulate or oblige the

[620] Ibid, para. 88

[621] The lack of a non-State enforcer of the covered agreements, such as the Commission in the EU results in a lack of disputes in areas where many states have potentially violated the WTO rules (the 'glass house' problem).

introduction of an international safeguard measures. This was not, however, due to the elimination of the 'unforeseen developments' clause as a matter of public international law.

Conversely, the reintroduction of the 'unforeseen developments' requirement following the Appellate Body's decisions in *Korea – Dairy* and *Argentina – Footwear* is a result of the DSU's constitutive and systemic influence on the Appellate Body: constitutive, in that it required a textual approach to interpretation by the Appellate Body as a keystone of its institutional legitimacy[622] and systemic in that it was constrained by the binding nature of the WTO obligations at hand (in this instance, Art 3.2 DSU).[623]

The result of the domestic (predominately US) influence on a strictly limited scope of action for the WTO dispute settlement system and its textual focus has led to an inability to ignore a textual provision by interpreting it away. Criticisms of the Appellate Body's position in these cases, arguing that too rigorous an application of Art XIX and the Agreement on Safeguards undermines the 'safety valve' purpose of the provisions,[624] miss the broader imperatives that drive the Appellate Body. This is its concern with prioritising its own legitimacy. Highlighting the Appellate Body's focus on an 'textual' approach to maintain its legitimacy, J.H.H Weiler argues:

> On the whole the legitimation strategy practised by the Appellate Body (whether express or implicit) has been one of hermeneutic prudence and institutional modesty with a keen eye on balancing internal and external legitimacy. The almost obsessive attempts of the Appellate Body to

[622] Chapter 2 (B) (iv), p123ff
[623] Chapter 2 (B) (iii), p119ff
[624] A Sykes, 'The "Safeguards Mess" Revisited – A Reply to Professor Jones', 3 World Trade Review 1 (2004) 93, 95-96

> characterize wherever possible the normal wide-ranging, sophisticated, multifaceted and eminently legitimate interpretations of the Agreement as "textual" resulting from the ordinary meaning of words is another manifestation of the internal-external legitimacy paradigm. [625]

Without this strict adherence to its own limits under the DSU, the already vocal opposition (again, particularly in the US Congress[626]) would increase. For the time being, a legitimate dispute settlement system in the WTO system appears to be more important to the actors involved than the potential effect of strict legal criteria on the use of safeguard measures.

This is not to argue that neither the Appellate Body nor panels have extended the text of the Agreements but, instead, stresses their need to justify clearly such an act. For example, the position taken by the Appellate Body that safeguard measures ought to be extraordinary has been criticized as 'an exercise in policy-making' rather than 'even-handed interpretation.'[627] This position is justified by the Appellate Body, grounding its stance in the text of Art 11.1(a) of the Agreement on Safeguards and the title of Art XIX GATT that safeguard measures are to be emergency actions. 'Thus, Article XIX is clearly, and in every way, an extraordinary remedy.'[628]

Whether or not the Appellate Body engages in 'policy-making' is of lesser concern than the issue of how the Appellate Body or panels behave in light of the

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[625] J.H.H Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Harvard Jean Monnet Working Paper 9/00 (2000), at IV (6)

[626] For an overview of the typical concerns: I Fergusson & L Sek, 'World Trade Organization: Issues in the Debate on US Participation', CRS Report for Congress, Order Code RL32918, Updated on June 9, 2005

[627] J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Legislation?', Journal of International Economic Law (2003) 113

[628] *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body (14 December 1999) WT/DS121/AB/R ('*Argentina – Footwear Appellate Body*') paras. 93-94

constitutive influence of the DSU. The behaviour of the panels and Appellate Body is influenced by the norms embedded in the DSU that in turn has to be examined in light of norm export from a variety of transnational actors (in this example, principally the US). The US has enjoyed limited success in its exercise of norm export by embedding norms within the international agreements at the international level. However, the unintended consequence of its influence on the DSU has altered its own domestic practice. The constraining influence of the dispute settlement system has, in the case of safeguard measures, encouraged the US to change its own administrative practices.

The next section outlines this change, making the case for examining the development of the legal regime of safeguard measures not only at the international level in light of domestic influences but also at the domestic level, in light of international influences.

(iii) The Alteration of Practice in the US' Administrative Bodies

Chapter 2 argued that the process of norm export by transnational actors is a continual one.[629] The potential to both project on to another and be projected onto encourages a continual process of norm export and value contestations. In this case, one of the consequences of the US' attempted projection in safeguard measures was its own change in practice as a direct result of the new DSU. The purpose of this section is to highlight the influence of WTO obligations on domestic systems, even where they are 'insulated' from international obligations and to make the case that, in order to understand how the

[629] Chapter 2 (A) (i-ii), p83ff

law develops in an area of international trade a broad causal approach will provide the most convincing explanatory tool. This broad approach accepts both the international and domestic as well as judicial and non-judicial sites of decision-making.

As in many States, in the US administrative bodies are given considerable responsibilities for governing the application of WTO rules within the US. This is primarily the competence of the Department of Commerce ('DoC') and USITC. However, while the US has attempted to insulate itself, the international pressures still influence its domestic practice.[630]

For example, in *US – Wheat Gluten*, the US claimed that it was not required to conduct a separate investigation into whether or not the safeguard measures it imposed on EU products was a response to an increase in imports that resulted from 'unforeseen developments.' [631] The question arose as while Art XIX GATT requires an increase in imports to be linked to 'unforeseen developments', the WTO Agreement on Safeguards does not repeat this provision. The Appellate Body did not agree, however, and ruled against the US.[632]

In *US – Lamb,* the US argued that there was no requirement in the USITC report to include a separate section or conclusion on the existence of 'unforeseen developments.' [633] The US claimed that the requirement was met where the existence of 'unforeseen developments' could be inferred from the factual evidence in the report.[634] As the Appellate Body noted, the position taken by the US may have been influenced by

[630] Chapter 2 (B) (iv), p123ff
[631] *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the EC*, Report of the Appellate Body (22 December 2000) WT/DS166/AB/R ('*US – Wheat Gluten*') para. 37
[632] Above, chapter 3 (C) (ii), p204ff
[633] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia*, Report of the Appellate Body (1 May 2001) WT/DS177-178/AB/R ('*US – Lamb*') para. 13
[634] Ibid, para. 67

the fact that the USITC report was published before the Appellate Body had released its landmark cases of *Korea – Dairy* and *Argentina – Footwear* in which the Appellate Body first held that compliance with the 'unforeseen developments' clause of Art XIX GATT was a necessary requirement for the imposition of safeguard measures.

However, in the *US – Steel* dispute,[635] prior to introducing safeguard measures on steel products the USTR requested that the USITC produce a report on whether the increase in imports was the result of 'unforeseen developments.'[636] As was made clear during the ensuing litigation, the USITC was not required as a matter of domestic law to take such an analysis and yet a report was requested to ensure WTO compliance. The issues that arose in the *US – Steel* case was not the lack of a proper report (as in *US – Wheat Gluten* and *US – Lamb*) but the level of analysis that the USITC undertook.[637]

While the US accepts that 'it is no longer of the view that it is unnecessary to demonstrate the existence of unforeseen developments',[638] given the US approach to the domestic applicability of its international obligations,[639] one must assume that this refers to an obligation existing under international law and not domestic US law. However, the costs of not adapting to the newly enforced requirements at the international level pressure the State into complying and changing its procedures when possible, irrespective of its own view on the binding nature or otherwise of international obligations. Whether or not, in the case of US practice, this application of the unforeseen developments requirement will become codified in US legislation or become administrative practice is

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[635] *United States – Definitive Safeguard Measures on Imports of Certain Steel Products,* Report of the Appellate Body (10 November 2003) WT/DS248-259/AB/R ('*US – Steel*')
[636] Ibid, para. 12
[637] Ibid, para. 330
[638] *US – Lamb* n633, fn 40
[639] See, Chapter 2 (B) (iii-iv), p119ff

unclear, though the trend appears to be toward an acceptance of the international obligation, as evidenced in the recent US safeguard cases, indicating the strong systemic influence of the WTO dispute settlement system.

The second attempt at norm export by embedding preferences appears to have had an equally disappointing result from the perspective of the US. The WTO system also raises greater problems in the case of failed projections: more effective dispute settlement leads to the potential for retaliation. This section highlighted the systemic influence of WTO law, even where the domestic legal system of the Member is, in theory, insulated from such pressures as a matter of law.

As the next section shows, however, the US has not stopped engaging in norm export. It continues to attempt to project its understanding of the proper role of safeguard measures, consistently influencing the international system and the legal systems of other Members by undermining Art XIX and, potentially now also the Agreement on Safeguards by resorting to VERs or similar agreements. The consequence of the Appellate Body's interpretative method in restricting the US's freedom in applying safeguard measures as it sees fit has been for the process of norm export to attempt to avoid the WTO dispute settlement system. The shift away from WTO scrutiny allows the US to attempt to correct its failed norm export by avoiding one of the key limitations of embedding normative preferences: by removing actions comparable to safeguard measures from the oversight of the WTO dispute settlement system, the US evades the unintended consequences of the norm export in the DSU on decision-making.

D. The Conclusion of 'Prohibited' Agreements under the Regulation of Safeguard Measures: Pursuing Norm Export outside of WTO Scrutiny

Throughout the development of the legal regime for safeguard measures, 'grey-area' measures have been present. This section argues that contrary to the traditional explanation of the rise of grey-area measures during the GATT years and their final demise under the Agreement on Safeguards, the picture is more nuanced. Instead of viewing their existence as contingent on the existence of a legal prohibition and/or effective dispute settlement system, grey-area measures have, in fact, arisen in instances where Members' attempts to embed their normative preferences at the WTO have failed. Furthermore, in light of the US' lack of success in embedding its preferences in the Agreement on Safeguards, their use has not diminished but rather continued in spite of their prohibition under the Agreement on Safeguards and the existence of a developed dispute settlement system.

(i) Responding to the First Failed Norm Export: Voluntary Export Restraints and their Increased Use over the GATT Years

Voluntary Export Restraints ('VERs')[640] are restraint arrangements between two Members, where the exporting Member agrees to limit exports so as not to harm the

[640] Also called Orderly Marketing Arrangements and Grey-Area Measures amongst others.

domestic producers of the importing Member. These agreements are, in essence, de facto quotas and function to limit 'damaging' levels of imports to Member. [641] Clearly this is the role of a safeguard measure, however, VERs provide several advantages.

A key advantage is their lack of regulation. VERs are difficult to identify or quantify: they are often concluded between industries though, in fact, governments play a key role.[642] This is often necessary due to the rigours of domestic competition or anti-trust law that would otherwise penalize such market coordination. Another advantage is that VERs provide an acceptable solution to both parties to the agreement: the importing Member cushions its domestic producers from import fluctuations, while the exporting Member can benefit from quota rents if the VER is properly arranged. The exporting Member may also view the imposition of a VER as a second-best solution in the face of stricter restrictions on its exports. Equally, the importing Member is not required to pay its own compensation and can target individual exporters rather than all exports of a given product (as required for a safeguard measures in the majority of cases).

Given all these advantages, one might question the use of safeguard measures at all. As set out earlier, it is more helpful to view safeguard measures in terms of a value dichotomy rather than the traditional liberal/protectionist debate.[643] When examined from the perspective of a value contestation between outcome-based fairness and corporate economic autonomy, VERs risk undermining the attempt at a balance to this conflict found in safeguards. In safeguards, the US in particular stresses the need for structural adjustment, and limits safeguards temporally. VERs require no structural adjustment and

[641] *Consumers Union of US v Kissinger* 506 F 2d 136 (DC Cir 1974), dissenting opinion Judge Leventhal
[642] Background Note by the Secretariat, 'Grey-Area Measures' (16 September 1987) GATT Doc MTN.GNG/NG9/W/6, para. 8
[643] While actors with liberal or protectionist objectives are involved in these debates, the debate itself is not over whether the policy should be liberal or protectionist *per se*.

indeed undermine the motivation for such adjustment by lasting for indefinite periods.[644] Equally, VERs are not subject to the same oversight that safeguard measures are: there is no administrative process to evaluate their worthiness nor judicial oversight of their merits. This predisposes them to achieve neither the desired distributive goal of safeguards, nor encourage a system that understands the value of corporate economic autonomy. VERs are, in of themselves, a second-best option. Their increased use by the original promoter of safeguard measures seems then, at first sight, unusual.

As was demonstrated above, the first attempt by the US to embed its normative preferences was not as successful.[645] Without a stable and effective dispute settlement system there could be no genuine detailed oversight of national safeguard determinations. The text of Art XIX, when examined side-by-side with the more detailed administrative and investigative provisions of US law began to look vague and imprecise. Meanwhile, at the domestic level, successful safeguard determinations were becoming harder and harder to achieve.[646]

The use of VERs helped resolve these problems. First, their principal advantage was not that they escaped international adjudication but rather that they escaped domestic adjudication. In the US context these 'gentlemen's agreements' had been used since 1937.[647] Their informal nature was a necessity to avoid incurring liability under US anti-trust law.[648] VERs had the added advantage that in the US, the Court of Appeals in *Consumers Union of US v Kissinger* held that they were not subject to review by the

[644] Of the VERs in force in 1991, close to 60% had no specific end date. T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1726
[645] Chapter 3 (C) (i), p193ff
[646] See n589 above
[647] The first documented US VER was the US-Japan agreement concluded in Osaka 1937; M Wolf, 'Why Voluntary Export Restraints? A historical analysis', in A Koekkoek, *International Trade and Global Development: Essays in Honour of Jagdish Bhagwati* (Routledge 1991) 86
[648] Ibid

courts.[649] Judge Danaher, voicing the majority opinion rejected the proposition that VERs created appreciable legal effects and were subject to judicial scrutiny. He stated:

> In this great nation with its complex economy and its varying conflicts requiring judicious accommodation, flexibility in achieving desirable results is a constant imperative. Fairly we may say that here there had been no Presidential action, legislative in character…[650]

Similarly at the European level, in *Edeka AG v Germany* the ECJ granted the Commission a wide discretion that led to only a cursory review.[651] Within the EU context, 'block exemptions' of certain industries from competition law further excluded VERs from judicial oversight.[652]

Second, VERs provided a negotiated approach that gave the President (in the US context) a wider ranging mandate than he would otherwise have had. This allowed VERs to be used on the executive's terms, often following a negative determination by the USITC domestically.[653] The President had more freedom to aid those with a greater influence if desired. One documented example is the use of a restraint in the case of automobiles where the consumer is to bear the burden, whereas no restraint was introduced where the cost was to be borne by industry in the case of copper imports.[654] Both acts were contrary to the USITC determinations in those cases; the VERs allowed

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[649] *Consumers Union of US v Kissinger* 506 F 2d 136 (DC Cir 1974)
[650] Ibid, para. 40
[651] Case 245/81 *Edeka AG v Germany* [1982] ECR 2745, for example at paras. 19 and 27
[652] For example, the automotive industry. See, A Mattoo & P Mavroidis, 'The EC-Japan Consensus on Cars: Interaction Between Trade and Competition Policy', 18 The World Economy 3 (1995) 345
[653] For examples of the automotive industry and the steel industry, M Wolf, 'Why Voluntary Export Restraints? A historical analysis' n652, 90-93
[654] J Jackson, W Davey & A Sykes, *Legal Problems of International Economic Relations* (4th ed. West Group 2002) 641, citing *Certain Motor Vehicles* and *Unwrought Copper*, both reproduced in part at 624ff and 630ff

the President to prioritize constituencies given the actual political climate, placate Japanese interests in the first case and domestic industry in the second.[655]

Why would the US engage in the conclusion of so many VERs when they undermined Art XIX? VERs do not encourage structural adjustment, they do not provide direct aid to those suffering from import surges, nor do they necessarily limit themselves temporally in the way that safeguards do. A potential answer is that, as discussed above, the GATT system failure to enforce the 'correct' application of safeguard measures from a US perspective, coupled with the divergence in US practice over the decades since 1947 led the US to search for another option. As the domestic regime for import surge protection in the US was so difficult, irrespective of international adjudication it could be argued that VERs served as a 'second-best' option. An inability or refusal to use safeguard measures is itself a value judgment in choosing between corporate economic autonomy and outcome-based fairness. Non-use of safeguards leaves the potential protection of the sufferers of harm from the market at zero. VERs, though not ideal from an economic or political economy perspective, permit a case-by-case basis decision-making process by the President to negotiate protection.

The US was not alone in its use of VERs (though the earliest and most prolific adopter). The EU also engaged in concluding VERs with Japan amongst others, as did many other Contracting Parties. In this manner, the US helped to undermine the involvement of GATT structures in import surge protection, letting others follow its lead

[655] Consumers are widely considered to lobby less effectively as a group than industry and thus have their considerations given less weight in decision-making processes; A Sykes, *The WTO Agreement on Safeguards* n507, 65

instead.[656] By 1991 284 VERs were known to be in force, with the possibility of more VERs undocumented due to their extra-legal or informal nature.[657]

(ii) Voluntary Export Restraints Under the Agreement on Safeguards: Unclear Motivation for their Prohibition

The Preamble to the Agreement on Safeguards sets out the principal aims of the agreement:

> *Recognizing* the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control.[658]

This reflected the concerns that Art XIX was not being utilized properly by the GATT Contracting Parties and that the use of VERs had created an alternative that escaped international examination and scrutiny. The elimination of VERs, greater transparency in the application of safeguard measures, and predictability in the determination of their use were key aims of the negotiators.[659] The purpose of the negotiators of the Agreement on Safeguards can be described as legalising the safeguard actions of Members (whether by safeguard measures, or more likely, by 'grey area' measures).

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[656] The US, EC and Canada accounted for close to 80% of these VERs: T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1726

[657] Ibid

[658] Preamble para. 2, Agreement on Safeguards.

[659] Note by Secretariat, 'Work Already Undertaken in the GATT on Safeguards' (7 April 1987) GATT Doc MTN.GNG/NG9/W/1, Annex 1

It prohibited the introduction of new grey-area measures and put a time limit on those still in force, requiring their notification to the Committee on Safeguards.[660] The Agreement also set out clearer requirements for the application of safeguard measures and the process of determinations carried out by the trade bodies of the Members.

The development of the new safeguard regime at the international level seems clear: Members, wanting to reengage safeguards with the GATT system sought to eliminate the most conspicuous tool to side-line the GATT. Yet, why would Members wish to eliminate VERs? They had served them well over the previous decades, allowing ad hoc protection with minimal scrutiny, a reduced amount of overall protection than if the measure had been applied in a non-discriminatory manner (as required by Art XIX), and, in theory, permitted for negotiated settlements that would be preferable to unilateral action.[661]

While the majority of the advantages were on the side of importing States,[662] two of the most habitual users of VERs were the two key players in the Uruguay Round. Why would the EU and the US want to limit the use of one of their methods of restricting imports? At the international level it can be argued that the proliferation of VERs and the possibility of them being applied on their own products made them question the wisdom

[660] Art 11 Agreement on Safeguards. The prohibition extends to 'encourag[ing] or support[ing] the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to' grey area measures (Art 11(3)).

[661] For reasons exporting and importing states may agree to grey area measures, see Background Note by the Secretariat, 'Grey-Area Measures' (16 September 1987) GATT Doc MTN.GNG/NG9/W/6, paras. 9-11

[662] Ibid, para. 11. However, depending on the structure of the VER it is possible that the reduced quantity of sales of the product could be compensated by the increase in price, conceding a net gain to the exporting State; A Sykes, *The WTO Agreement on Safeguards* n507, 22-23. In the case of no such structuring, exporters may still prefer a VER as a 'second best' to safeguard measures (or other threatened TDIs); C Bown, 'Why are Safeguards under the WTO so Unpopular?' 1 World Trade Review 1 (2002) 47, 53.

of such devices.[663] Another important element is the increase in number of parties negotiating the Uruguay Round and the preference for a lack of VERs on the part of exporters (and specifically developing countries).[664] The aims of the developing Members would still have had to converge with the objectives of the EU and the US. In order to explain the willingness of the US and EU to agree to such terms, an examination of their internal affairs is useful. By referring to the actors engaged from the domestic level, we can see motivations that, at a purely international level, seem counter-intuitive. It shows the influence of the executive in the US and, to a lesser extent, other interests of the Commission in the EU.[665]

In the US, the President most commonly negotiated VERs in situations where there had been a negative determination by the USITC, or where the President himself had refused to initiate s201 safeguard measures but was under sufficient pressure from certain actors to arrange protection for a domestic industry. While we may conclude, as a generalisation, that the executive dislikes distorting the trading relations between the US and its partners,[666] it still must be explained why the President would wish to limit himself in external relations. By following Rachel Brewster's approach[667] in examining the internal relationship of the executive with the legislature, in this case, the elimination of VERs removes a channel of pressure from protectionist actors to the President. As VERs may no longer be negotiated, the negative determination of the USITC no longer

[663] A Sykes, *The WTO Agreement on Safeguards* n507, 25
[664] Compare the GATT 1947 (23 signatories) with the Uruguay Round that included 124 governments plus the EC.
[665] See, chapter 2 (C) (i), p131ff
[666] This is not to say that the executive is always liberal, though this has been the case over the past decades. Given the President's external competences, avoiding unnecessary conflicts (i.e. those that do not further his objectives) with international partners may also be a key factor.
[667] R Brewster, 'Rule-Based Dispute Resolution in International Trade Law', 92 Virginia Law Review 2 (2006) 251

places pressure on the President to act in a way that it did previously. When examining the use of VERs in line with the earlier interpretation, however, their rejection can be interpreted as a desire to return to the 'first-best' option in hand for the US. While VERs had served their purpose, they were still limited in their ability to provide meaningful aid to the 'losers' from recent trade-concessions. Safeguard measures remained the better-suited instrument.

A return to a rule-based form of protection, subject to quasi-judicial determinations did not need to undermine the President's freedom. The Agreement on Safeguards not only increased the judicial scrutiny of safeguard measures but also relaxed certain conditions to make the measures more appealing to the WTO membership. In the case of an absolute increase in imports, for the first three years of the safeguard measure, if no compensation has been negotiated, the exporting Members may not suspend concessions of its own volition.[668] In practice, this allows the President to enact a measure without fear of retaliation for a three-year period, during which, if a negative determination by a panel or the Appellate Body is found, the new binding nature of the dispute settlement system disavows the President of blame in the domestic system.[669]

In the case of the Commission, VERs had previously represented a threat to the unity of the common market with Member States concluding their own agreements with trading partners. This led to the Commission claiming exclusive authority over the use of such agreements via the completion of the internal market in 1992.[670] However, instead of

[668] Art 8(3) Agreement on Safeguards
[669] R Brewster, 'The Domestic Origins of International Agreements' n539, 185
[670] S Ó'Cléireacáin, 'Europe 1992 and Gaps in the EC's Common Commercial Policy', 28 Journal of Common Market Studies 3 (1990) 201, 206

shunning such agreements, once they were put into the EU-wide system, the EU became a frequent user. There had been no advantage in removing a tool that was now firmly under the control of the EU institutions and which they used on a regular basis.

Having become proficient in the use of such bilateral restrictions, during the Uruguay Round negotiation on the new Agreement on Safeguards, the EU had wanted to maintain the possibility of the selective application of safeguard measures.[671] Facing considerable pressure from the other Members, the European position was clarified. It argued not for abandoning the application of the most-favoured nation principle to safeguard measures, but that, in certain circumstances, a 'limited selective option' be available under strict conditions.[672] The motivation for retaining a limited form of selectivity (as found in Art 5(2)(b) Agreement on Safeguards) is various; it can be argued that where the increase in imports is limited in its source, selective measures reduce the level of trade-restriction caused by a non-discriminatory measure.[673] More importantly, discriminatory measures potentially reduce the political cost of the measure, causing resentment from only one or two exporters rather than all exporters of the product, and easing the facility for rewarding certain trading partners over others (in the EU context, often former colonies).[674]

Yet, with such a restricted form of selectivity included in the Agreement (subject to overview by the Committee on Safeguards), it would not appear that the EU's goals were achieved. Why would the EU agree to the changes when it stood to lose freedom in

[671] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol II* n545, 1761-66
[672] Communication from the European Communities, 'Safeguards: Stricter Disciplines Applicable to the Limited Selective Option' (29 November 1990) GATT Doc MTN.GNG/NG9/W/32
[673] Though, criticising the likelihood of such a situation arising, A Sykes, *The WTO Agreement on Safeguards* n507, 219
[674] Ibid

action and gain little in terms of domestic arrangements (i.e. a shift in competences to the EU from the Member States)? As has been mentioned, the negotiation of the covered agreements was conducted as a single unified package. The GATT à la carte system of the Tokyo Round (where Contracting Parties could pick and choose which agreements bound them) was comprehensively rejected by ensuring that the core agreements were automatically agreed by all WTO Members. An interpretation of this situation is that the aims of the EU were insufficiently undermined by these developments to risk loosing agreement over other priorities (most notably GATS and TRIPS).[675] It could also be pointed out that the EU was heavily involved in the negotiations on the new Anti-dumping Agreement, potentially foreseeing the preference for using anti-dumping duties over safeguard measures in the years since 1994.[676]

(iii) Responding to the Second Failure of Norm Export: The New Generation of Voluntary Export Restraints

At the WTO level there has been concern that the Appellate Body, in particular, has applied the Agreement on Safeguards too strictly, or at least, inconsistently.[677] The Appellate Body has found each safeguard measures before it in violation of the

[675] This is a parallel interpretation to Brewster explaining the willingness of Congress to agree to the DSU in the face of a (perceived) loss of autonomy: R Brewster, 'Rule-Based Dispute Resolution in International Trade Law' n667, 278-281

[676] E.g., Communication from the European Communities (21 March 1990) GATT Doc MTN.GNG/NG8/W/74

[677] A Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence' n195, 262; K Jones, 'The Safeguards Mess Revisited: the Fundamental Problem', 3 World Trade Review (2004) 83, 86; Y.S Lee, 'Destabilization of the Discipline on Safeguards' n 199, 1245

Agreement on Safeguards and/or Art XIX GATT.[678] If it is felt that there is a systemic bias against safeguard measures, Members may begin to feel that there is no point in using them at all. At the same time, the administrative procedures of the membership are influenced by panel and Appellate Body reports in so far as they can find logic behind the decision.

As discussed above, the domestic petitioning systems of the EU and US are demanding and relief is difficult to attain. If even more requirements are imposed as a result of negative determinations at the WTO level (such as the requirement of a specific 'unforeseen developments' determination), domestic petitioning procedures are even less likely to grant relief.

This is evidence of another failure of the US' attempt to embed its normative preferences in an international agreement, this time the Agreement on Safeguards. Despite more detail and a clear dispute settlement system, the divergence between the US system and the WTO system is still acute. Given the current state of the Doha Development Round, there seems limited potential for a new agreement or amendment of the current Agreement on Safeguards.[679]

By examining the regulation of safeguard measures at both the domestic and international level we can see the highly restricted scope for introducing safeguard measures. In light of these restrictions, it is expected then that actors will pursue continue

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[678] *Korea – Dairy Appellate Body*, *Argentina – Footwear Appellate Body*, *US – Steel*, *United States – Definitive Safeguard Measures on Imports of Circular Wielded Carbon Quality Line Pipe From Korea*, Report of the Appellate Body (15 February 2002) WT/DS202/AB/R, *US – Lamb*, *US – Wheat Gluten*

[679] Its very conclusion is in doubt, with Pascal Lamy encouraging negotiators to make headway though accepting that the Round may grind to a halt: 'Those of you who believe that, as time passes, inexorably, the Round might lose all its remaining steam may be right, whether we like it or not.' P Lamy, 'Report by the Chairman of the Trade Negotiations Committee', 25 July 2012 <http://www.wto.org/english/news_e/news12_e/gc_rpt_25jul12_e.htm> (accessed 1 October 2012)

to pursue their objective of norm export through other means in an attempt to overcome this limitation on their action within the WTO system. One avenue left open is to undermine the legal disciplines that may no longer suit them. Indeed, despite the hope that the Agreement on Safeguards might eliminate grey-area measures, transnational actors have pursued an alternative policy of norm export by side-lining the WTO system and validating non-compliant WTO behaviour.

At the Committee on Safeguards, the EU asked the US directly how it squared the provisions of the 1974 Trade Act that potentially permit the negotiation of VERs[680] with the prohibition of such agreements under the Agreement on Safeguards. The US responded cautiously, claiming:

> Article 11:1(b) does not prohibit agreements, but rather prohibits so-called grey area and other measures not taken in conformity with the provisions of Article XIX and in accordance with the Agreement (e.g., not based on a serious injury determination). Indeed, Article 5:2 specifically authorizes a Member applying restrictions "to seek agreement with respect to the allocation of shares in the quota with all other members having a substantial interest in supplying the product concerned." Moreover, Article 11:1(b) itself specifically provides, in a footnote that: "An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and the Agreement may, by mutual agreement, be administered by the exporting Member."

[680] ss202(e)(4)(a) and 203(a)(3) Trade Act 1974

> Thus, the mere negotiation of limits is not *per se* a violation of Article 11. Under US safeguard law, the President may negotiate agreements only after receiving a report from the ITC containing an affirmative injury determination. Any agreement negotiated would comply with all requirements and limitations contained in the Safeguards Agreement.[681]

The US went on to state that while this may be the case, to the best of the reporters' knowledge, no such agreement had been concluded. This may no longer be the case (if indeed it ever was).

There is evidence that Members have already begun to influence the application of the Agreement on Safeguards in this continual process of norm export. A new wave of VERs that range in form from Member-to-Member agreements, agreements purporting to be commodity agreements or traditional 'gentleman's agreements' by non-executive bodies are being concluded.

Member-to-Member Agreements: The Softwood Lumber Agreements

In the case of Member-to-Member agreements, a highly publicized example is the result of the long-standing dispute between Canada and the US over softwood lumber. Since 1982 the US and Canada have been engaged in numerous disputes over alleged Canadian dumping and subsidies of softwood lumber and the US' responses to this.

[681] Committee on Safeguards, 'Replies to Questions Posed by the European Communities Concerning the Notification Provided by the United States of Laws and Regulations under Art 12.6 of the Agreement' (23 April 1996) G/SG/W/126, second question

In 2006, a mutually agreed solution was notified to the WTO that involved the conclusion of a new Softwood Lumber Agreement ('SLA 2006').[682] The previous Softwood Lumber Agreement (1996) had been criticized for its inconsistency with the Agreement on Safeguards.[683] Whilst nominally designed to resolve a dispute over anti-dumping duties,[684] the SLA 2006 maintains the principal elements that would classify it as a VER; it is discriminatory as it applies only to softwood lumber from Canada (in violation of Art 2(2) Agreement on Safeguards[685]), prevents the US from initiating s201 investigations (or using other applicable trade defence instruments),[686] and sets out export charges for Canadian lumber exports to the US that go over a set price ($355 USD per thousand board feet).[687] It even includes a 'surge mechanism' to deal with sudden increases in imports to the US:[688] the very situations that safeguard measures are designed to deal with (and in violation of Art 11(1)(b) Agreement on Safeguards[689]). As any mutually agreed solution to a dispute must still conform to the requirements of the covered agreements,[690] the SLA 2006 has dubious grounds to claim WTO consistency.

The WTO structures do not appear suited to dealing with this type of VER as this agreement was reported to the DSB as part of the mutually agreed solution to a dispute without opposition.[691] Under the terms of the SLA 2006, neither party may raise a claim

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[682] United States – Final Dumping Determination On Softwood Lumber From Canada, Notification of Mutually Agreed Solution, [2006] WT/DS264/29. The Notification also includes a copy of the SLA 2006
[683] Y.S Lee, 'Revival of Grey-Area Measures?' 36 Journal of World Trade 1 (2002) 155
[684] In this instance: *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada,* Report of the Appellate Body (15 August 2006) WT/DS264/AB/RW
[685] 'Safeguard measures shall be applied to a product being imported irrespective of its source'
[686] Art V SLA 2006
[687] Art VII, VIII SLA 2006
[688] Art VIII SLA 2006
[689] 'Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side…'
[690] Art 3(5) DSU
[691] n.682 above

under either the WTO or NAFTA but rather only settle disputes via arbitration at the London Court of International Arbitration.[692] Unless a third party is inclined to involve itself, it seems unlikely that the dispute settlement procedures within the WTO will be invoked before the termination of the agreement (either 2013 or 2015 depending on agreement between the US and Canada).

Bilateral Commodity Agreements

If there is one area where the control of irregular import/export patterns is frequently called for, it is in the area of commodities. The effect of volatile prices in commodities can have wide-felt repercussions from countries whose primary export is a commodity to those whose industries are dependent on commodities as inputs in the manufacturing process. Most recently, commodity prices have once again drawn attention as States face inflationary pressures from rising prices in energy and food. VERs are being used more frequently in the guise of commodity agreements. These agreements breach, as a minimum, Art XI GATT, Art XIX GATT and Art 11(2) Agreement on Safeguards, much like the SLA 2006. However, in the context of commodity agreements that often cover agricultural goods, they may also breach the prohibition on grey-area measures under Art 4 Agreement on Agriculture.[693]

The Commonwealth Secretariat has reported on the recent increasing misuse of commodity agreements, turning them into de facto VERs in a wide range of product

[692] Art XIV SLA 2006
[693] Agreement on Agriculture (15 April 1994) LT/UR/A-1A/2 <http://docsonline.wto.org>

areas from steel, wine, textiles and automobiles amongst others.[694] The GATT permits an exception for international commodity agreements in the form of Art XX(h),[695] and goes so far to encourage Members to conclude 'international arrangements' for access to, and stability of, commodity markets of particular interest to developing Members.[696] The conformity of these bilateral agreements with Art XX(h) is not clear in many of these cases, however.

The status of international commodity agreements under the WTO system is not clear: while the envisaged International Trade Organization had a specific range of disciplines for commodity agreements,[697] these did not survive in the GATT, nor return under the WTO. The result is a commitment to their importance to developing countries under Art XXXVIII GATT, and a general exception under Art XX(h) for their use.[698] There are serious deficiencies in these provisions, not least in a failure to define exactly what goods are to be considered a commodity[699] and what requirements an international commodity agreement must meet in order to satisfy Art XX(h).

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[694] R Grynberg et al, 'Bilateral Commodity Agreements – New Generation Grey-Area Measures? A Scoping Study', in V Qalo (ed.) *Bilateralism and Development: Emerging Trade Patterns* (Cameron May 2008)

[695] While Art XI:2(b) excludes the prohibition of quantitative restrictions in the case of commodities, this is only insofar as the restrictions are "necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." The necessity requirement relates directly to the question of minimum marketing or quality standards rather than controls on trade flows of the commodity in question. See: Background Note by the Secretariat, 'Relevant Provisions in the General Agreement and MTN Agreements and on Relevant Uruguay Round Proposals' (2 February 1990) GATT Doc DPG/W/6, 3

[696] Art XXXVIII(2) GATT 1994

[697] Havana Charter 1948, Chapter VI

[698] Including the requirements of the chapeau, intended to prevent abuses of Art XX GATT: *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 22

[699] The term 'primary commodity' was defined in Art 56, Havana Charter 1948 as 'any product of farm, forest or fishery or any mineral in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.'

The panel in *EEC – Import Regime for Bananas*[700] set out the requirements under Art XX(h) for a commodity agreement to be exempted from GATT obligations. It stated that the agreement should conform to criteria submitted to the Contracting Parties (which have yet to be agreed upon), or that the agreement has been submitted to the Contracting Parties and has not been challenged or that the agreement conforms to the 'principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.'[701] This ECOSOC resolution makes reference to the chapter on international commodity agreements in the draft Havana charter (Chapter VII in the resolution though the final draft places them in Chapter VI).

While the details of how an international commodity agreement is to be defined and the rules on their integration into the GATT are not clear, at a minimum they appear to require the following elements: they should be open to participation by interested exporting and importing Members,[702] be notified as commodity agreements to the WTO Membership[703] and function on a non-discriminatory basis.[704] Until recently, the more general requirements, developed from the proposed principles set out in the Havana

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[700] *European Communities – Import Regime for Bananas, Panel Report (18 January 1994) 34 ILM (1995) 180*

[701] *Ad* Article XX GATT 1994

[702] See: Art 60, Havana Charter 1948; Art 1(2) Agreement Establishing a Common Fund for Commodities (concluded 27 June 1980) 1538 UNTS 3; though, a Revised Draft Modalities for Agriculture (6th December 2008, TN/AG/W/4/Rev.4) suggested altering this in the case of agricultural commodities, at para. 95: 'an understanding will be reflected in the Agreement on Agriculture that the term "arrangements" [in Art XXXVIII GATT taken with Art XX(h) GATT] covers both commodity agreements of which all interested producing and consuming countries are parties; and agreements of which only commodity-dependent producing countries are parties.' It is unclear whether this reflects a changing view of the traditional requirement that both exporters and importers are to be involved in any international commodity agreement.

[703] Art XX(h) GATT, supported by the panel in *European Communities – Import Regime for Bananas, Panel Report (18 January 1994)* n700, 53

[704] If justified under Art XI:2 GATT, Art XIII clearly requires non-discrimination. Where the Member argues for an Art XX(h) GATT exception, the chapeau of Art XX GATT also demands: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or a disguised restriction on international trade…' (emphasis added)

Charter have been accepted by many international commodity organizations with Khabir-Ur-Rahman Khan arguing in 1982:

> Subsequent evidence indicates that the salient principles, particularly those relating to the organization for commodity regimes, have become an accepted part of international commodity law and policy.[705]

Bilateral commodity agreements do not adhere to the most basic underlying principles for compliance with Art XX: they function on a discriminatory basis and are not open to all interested parties. Their purpose is not to control the fluctuations of commodity prices at a global level but rather, restrict imports into the markets of Members whose own industry is incapable of responding to the competitive pressures of other trading partners. Such agreements mark a rejection of the requirements under the Agreement on Safeguards and Art XIX for import controls and instead highlight the pursuit by actors of another instrument 'that escape such control' of the WTO system.[706]

Gentlemen's Agreements and Restrictions on Gold Sales

The third example where actors have begun to pursue forms of VERs, undermining the regime on safeguards is in the field of 'gentlemen's agreements.' One example of a VER being concluded without notable international scrutiny is the case of the Central Bank Gold Agreements ('CBGAs'), also known as the Washington Agreements on Gold after

[705] K.U.R Khan, *The Law and Organisation of International Commodity Agreements* (Martinus Nijhoff Publishers 1982) 71
[706] Preamble, Agreement on Safeguards

the first agreement's conclusion at the annual IMF meeting in Washington DC in 1999.[707] In light of concerns over the historic low price of gold in the 1990s and the openly announced auctions of gold by certain European States (primarily the UK), the CBGAs were intended to 'stabilise' the gold market.

The CBGAs are informal agreements between the Central Banks of the Eurozone states, the UK, Sweden, Switzerland and the European Central Bank restricting their sales of gold. Under the CBGAs the central banks involved commit to restrict sales as follows: 400 tonnes annually from 1999, 500 tonnes annually from 2004 and now, in the most recent agreement, 400 tonnes annually and no more than 2000 tonnes over the 2009-2014 period.[708]

The agreement is not limited to these countries, however. The IMF, the third largest holder of gold supplies globally,[709] has stated that in the event of a sale of its gold reserves it would be subject to existing or future CBGAs.[710] While it has not signed the 2009 CBGA, agreement was reached whereby the IMF's intended sale of 403 tonnes of gold 'can be accommodated within' the agreed restrictions.[711] As is usual for a VER, the agreement is an informal 'gentleman's agreement' and apparently unilateral. Such an agreement that on the surface would appear to breach both Art XI GATT and Art XIX (supplemented by Art 11 Agreement on Safeguards), has received no international

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[707] A copy of the text of the 'agreements' can be found as a joint press release at <http://www.ecb.int/press/pr/date/1999/html/pr990926.en.html> for the 1999 agreement, <http://www.ecb.int/press/pr/date/2004/html/pr040308.en.html> for the 2004 agreement and at <http://www.ecb.int/press/pr/date/2009/html/pr090807.en.html> for the 2009 agreement (all accessed 1 October 2012)

[708] Ibid.

[709] World Gold Council, Reserve Asset Statistics < http://www.research.gold.org/reserve_asset/> (accessed 1 October 2012)

[710] Committee to Study Sustainable Long-Term Financing of the IMF, Final Report January 31st 2007 < http://www.imf.org/external/np/oth/2007/013107.pdf> (accessed 1 October 2012)

[711] CBGA 2009, para. 3

challenge.[712] That these agreements are not legally binding is no barrier to challenge. In the context of non-violation complaints, the panel in the *Japan – Film* dispute stated:

> [A] government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII(1)(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria.[713]

In light of Art 4(1) of the ILC Articles on State Responsibility,[714] the acts of central banks are attributable to the Members involved, irrespective of their independence from executive interference.[715]

Like the bilateral commodity agreements referred to above, the CBGAs do not involve importing (i.e. purchasing) Members, are discriminatory in their function and purpose and are not reported to the WTO membership. Insofar as any Member might claim the agreements as falling under Art XX(h), this seems an untenable position. More

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[712] n397 and accompanying text

[713] *Japan – Measures Affecting Consumer Photographic Film and Paper,* Panel Report (31 March 1998) WT/DS44/R, para. 10.49

[714] 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.' J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002)

[715] Setting attribution rather than the *de iure* acts of the State as the test: *United States – Sunset Review of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*, Report of the Appellate Body (15 December 2003) WT/DS244/AB/R, para. 81

convincingly, it could be argued that the exception under Art XX(c) applies, 'relating to the importations or exportations of gold or silver'.[716] However, as with the other VERs discussed above, the obligations under the chapeau of Art XX still apply: the restriction of these cannot be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.[717]

These brief examples serve to demonstrate how the Agreement on Safeguards did not conclusively eliminate VERs. On the contrary, as the process of norm export and the value contestations behind it are continual, they never went away. The US' failure to project its conception of safeguards into the WTO era successfully has spurred it on to pursue its own objectives, irrespective of the prohibition under the Agreement on Safeguards. Once again, reverting to a second-best option the US has sought to maintain its influence on the proper role of import surge protection.

Concluding Remarks

This chapter has examined the development of the legal regime of safeguard measures, in light of value contestations and the norm export that follows from them. It has been argued that a broad narrative approach accepting multi-jurisdictional analysis and a range of causal influences has offered examples of a convincing explanation where more restricted investigations did not.

The norm export involved in safeguard measures has been largely from the

[716] Art XX(c) GATT
[717] Chapeau, Art XX GATT

perspective of the US. By attempting to influence the points of intersection between domestic and international trade law, the US has sought to project its understanding of the role of safeguards in trading relations. This case study has raised certain interesting points. The most visible and seemingly successful method of norm export (the crystallisation of norms as treaty obligations) suffered here from two notable weaknesses. First, where the US' domestic legal regulation of safeguard measures and their petitioning procedures changed over time, the international obligations needed to be adjusted to avoid dissonance. Second, the US' influence on how the Appellate Body takes decisions, its method of adjudication, had a crucial influence on the way in which the law developed at the both the WTO and within the US. Just as the GATT period failed to enforce a strict rule-based dispute settlement system, in the WTO dispute settlement is inherently bound to a textual approach as mandated by the DSU. Its influence on the US practice indicated that the causal strength of the WTO as a system was not fully resisted simply by virtue of the US' attempt to insulate itself from WTO pressures in its implementing legislation.

Another interesting development has been the conclusion of agreements (VERs) that avoid WTO scrutiny. The expectation was that actors such as the US use the systemic influences of international legal systems (the GATT first and then the WTO and its institutions) to help ensure their normative preferences be accepted by the Membership. However, where the ability to project their preferences is undermined by these institutions (in this case, the US' numerous losses at the Appellate Body) and they further influence the Member's own regulation (noting the US' alteration in practice in spite of clear legal necessity as a matter of domestic law), it appears that moving the

process of norm export out of the reach of the WTO institutions is preferable.

Safeguard measures provided a useful starting point for a causal examination of the development of a legal regime in light of manipulation by transnational actors. This case-study is, however, limited in certain respects: the influence of the US on the development of safeguard measures and their use over the years is not typical of all GATT/WTO instruments, nor is the clear instance of attempted projection (the conspicuous use of crystallising norms as treaty obligations). The next case study offers a more complex example. Sanitary and Phytosanitary ('SPS') measures have been developed in different locations, primarily the US and EU, though increasingly at international standards bodies and associations of private actors. The regime for their application is also more complex as it involves bodies other than the WTO at the international level.

4. The Development of Sanitary and Phytosanitary Measures and their Legal Regulation at the WTO

Introduction

This chapter examines the legal regulation of sanitary and phytosanitary measures at the WTO, analysing how it has developed over the previous decades. SPS measures offer an interesting point of study, as they are a necessary tool in responding to the potentially harmful effects of increased cross-border trade in goods that can have a deleterious impact on the human, animal or plant life or health.

As international trade is liberalized, both by quantity and by sector, more goods travel between markets across the world. While the traditional consensus is that increased trade in both goods and services benefits the parties involved,[718] there are potential dangers involved, and not just those connected with import surges, as was the case with safeguard measures in the previous chapter. As agricultural goods are traded more widely and produced more intensively, [719] the potential risks to human, animal and plant life or

[718] See generally, J Bhagwati, *In Defense of Globalization* (OUP 2007), M Wolf, *Why Globalization Works* (Yale Nota Bene 2005), though subject to caveats: E Reinert, *How Rich Countries Got Rich and How Poor Countries Stay* Poor (Constable 2007), J Stiglitz, *Making Globalization Work* (Penguin 2007)

[719] For example, concerns over the connection between intensive farming methods and drug-resistant pathogens: recent studies indicate concerns over the prevalence of multidrug-resistant *Staphylococcus aureus* ('MRSA') in intensively farmed livestock within the US: 'Conventional concentrated animal feeding operations (CAFOs) provide all the necessary components for the emergence and proliferation of multidrug-resistant zoonotic pathogens. In the United States, billions of food animals are raised in densely stocked CAFOs, where antibiotics are routinely administered in feed and water for extended periods to healthy animals.' (A Waters et al, 'Multidrug-Resistant *Staphylococcus aureus* in US Meat and

health pose potentially complex challenges for a global system interested in increasing trade flows. Combine this with other factors such as greater demands by the public for health protection and improved detection and management techniques, and the relationship between trade and health becomes critical.[720] The WTO system attempts to balance the legitimate objectives of members as they protect the health of humans, plants and animals within their jurisdiction with concerns over unjustifiable restrictions on trade such as overtly burdensome regulation or import bans.[721]

The original GATT 1947 already made provision for trade restrictions where 'necessary to protect human, animal or plant life or health'.[722] In 1994, the Agreement on the Application of Sanitary and Phytosanitary Measures[723] developed a clearer set of disciplines in this area at the WTO level. Building on some of the concepts developed in the Tokyo Round Agreement on Technical Barriers to Trade[724] (such as the principle of

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Poultry', *Clinical Infectious Diseases* (2011) 52 (10), 1227-1230 at 1230. The EU has also echoed similar concerns: *Joint scientific report of ECDC, EFSA and EMEA on meticillin resistant Staphylococcus aureus (MRSA) in livestock, companion animals and food*, EFSA-Q-2009-00612 (EFSA Scientific Report (2009) 301, 1-10) and EMEA/CVMP/SAGAM/62464/2009

[720] The Food and Agriculture Organization ('FAO') and World Health Organization ('WHO') report *Food Safety Risk Analysis: A Guide for National Food Safety Authorities* (FAO 2006) 1-4 cites the following reasons for increasing focus on food safety: increasing volume of international trade, expanding international and regional bodies and resulting legal obligations, increasing complexity of food types and geographical sources, intensification and industrialization of agriculture and animal production, increasing travel and tourism, changing food handling patterns, changing dietary patterns and food preparation preferences, new food processing methods, new food and agricultural technologies, increasing resistance of bacteria to antibiotics and changing human/animal interactions with potential for disease transmission.

[721] Acknowledged by the Appellate Body as the 'shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.' *European Communities – Measures Concerning Meat and Meat Products*, Report of the Appellate Body (16 January 1998) WT/DS26/AB/R and WT/DS48/AB/R ('*EC – Hormones Appellate Body*'), para. 177

[722] Art XX(b) GATT 1947

[723] Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) LT/UR/A-1A/12 <http://docsonline.wto.org> hereafter 'SPS Agreement'

[724] Terminated on 1st January 1996 following decision of the WTO and GATT Committees on Technical Barriers to Trade (20 October 1995) TBT/M/50. Superseded by the Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 <http://docsonline.wto.org> hereafter 'TBT Agreement'

harmonization[725]) and the experiences of the negotiators in the Uruguay Round in other fields, the SPS Agreement was negotiated as part of the broader issues in agriculture.[726] The final agreement regulated all SPS measures, defined as any measure:

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
>
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.[727]

Despite the potentially wide and controversial scope of such measures, the SPS Agreement had a comparatively smooth transit through the Uruguay Round as part of the negotiations in the field of agriculture.[728] Both the EU and US had, or were developing, particularly influential models of SPS protection. However, at the time of negotiations, there appeared little to indicate the level of debates that would arise in the years after 1994. It is as a result of processes of norm export and value contestation *since* the

[725] Now under Art 3 SPS Agreement
[726] A similar position to that taken in the drafting of the North American Free Trade Agreement (concluded 17 December 1992, entered into force 1 January 1994) 32 ILM 289, 605 ('NAFTA') where Chapter 7 couples 'Agriculture and Sanitary and Phytosanitary Measures'.
[727] SPS Agreement, Annex A(1)
[728] Section A (i) below (p248ff)

conclusion of the SPS Agreement that the most intractable debates in this area have arisen.

This chapter will examine the development of SPS measures in two contentious areas: the distinction between risk assessment and risk management, and the regulation of private standards at the WTO. It is argued that by examining these debates as part of a multi-causal approach, motivated by a process of value contestation, we can provide more convincing narrative explanations for the development of the legal regime of SPS measures as a whole. It will be argued that the debates surrounding SPS measures are part of a broader value contestation that goes further than mere SPS regulation: it is a proxy for the larger debate over the nature of international regulation itself. Who should decide on these matters and how should they reach these decisions? What should the place of 'specialists' (be they scientists, lawyers or bureaucrats amongst others) be in relation to representatives of national governments and what should their methods be?

A. The Contestation of Values in SPS Regulation

Numerous areas of disagreement over the use of SPS measures have been highlighted since 1994. Of these, some of the most intractable have been the role of science in the decision-making of panels and the Appellate Body,[729] interference of the WTO in the

[729] For example, E Fisher, *Risk Regulation and Administrative* Constitutionalism (Hart 2010), E Fisher, 'Beyond the Science/Democracy Dichotomy: The World Trade Organization Sanitary and PhytoSanitary Agreement and Administrative Constitutionalism' in C. Joerges & E. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart 2006), R Howse 'Democracy, Science, and Free Trade: Risk Regulation on Trial at the WTO', (2000) 98 Michigan Law Review 2329, M Echols, *Food Safety and the WTO: The Interplay of Culture, Science and Technology* (Kluwer 2001), J Peel, 'Risk Regulation Under the WTO SPS Agreement: Science as an International

regulatory autonomy of its members (including debates over what constitutes an SPS measure),[730] and over whether the WTO is the proper place to debate issues related to SPS measures more broadly.[731] It is suggested here that these debates are all part of a broader process of contestation taking place over how the international community is to develop, with the focus increasingly on the identity of decision-makers rather than substantive areas of regulation. Which transnational actors are to be privileged at the international level and what criteria should we use to decide who they should be? We can find a proxy for this debate in the regulation of SPS measures at the WTO.

SPS measures differ from other forms of protection examined in this thesis in one key respect: the debate over SPS measures is not concerned with their aims or objectives but rather how they are used. The questions surrounding the use of SPS measures is not what they are for (something contested in safeguard measures, for example) but instead what procedure a Member goes through in determining if they should be used or not. The protection of human, animal or plant life or health is not controversial: *who decides* what the risks are and *how they decide* to respond to them is. This debate is a proxy for a much larger process of contestation taking place within all levels of transnational regulation today: are decisions taken on the basis of democratic pressures and/or checks, accepting

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Normative Yardstick?' Jean Monet Working Paper 02/04, June 2004, J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2009) chapter 3

[730] J Peel 'A GMO by Any Other Name . . . Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO Sanitary and Phytosanitary Measures Agreement', 17 European Journal of International Law 5 (2007) 1009, R Quick & A Blüthner, 'Has the Appellate Body Erred? An Appraisal and Criticism of the Ruling in the WTO Hormones Case', Journal of International Economic Law (1999) 603-639

[731] These can range from providing a critique of the *EC – Biotech* (*European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* Panel Report (26 September 2006) WT/DS291,292,293/R) panel's restrictive approach to 'non-WTO' materials in M Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case', 56 International and Comparative Law Quarterly (2007) 907, to advocating the removal of disputes with an environmental element from the WTO: Adelphi Consult, Friends of the Earth Europe and Greenpeace, 'Is the WTO the Only Way? Safeguarding Multilateral Environmental Agreements from International Trade Rules and Settling Trade and Environment Disputes Outside the WTO' (2005) <http://www.foeeurope.org/sites/default/files/publications> (accessed 1 October 2012)

that such a process will not always be based on the best evidence but rather influenced by the opinions of the majority? Or is technical expertise to be prioritized, potentially at the cost of accountability? In the face of complex problem solving and challenges to governance, should the priority be on increasing accountability and limiting any 'democratic deficit' at the cost of effectiveness or encouraging technocratic modes of resolution and risking an entrenchment of the 'bureaucratic feudalism of expertise'?[732]

Questions over the place of SPS measures in international trade and who wants to regulate them come from various sources. As chapters 1 and 2 indicated, legal instruments and systems each alter the preferences and values of transnational actors. SPS measures present a complex challenge to understanding the development of the legal regime through a process of value contestation in light of numerous causal influences. Unlike safeguard measures, which have largely developed between two jurisdictions (the US and the WTO), SPS measures at the WTO level are the result of a transatlantic dialogue. This is not to say that the internal debates over food safety and the regulation of agricultural produce in protecting human, animal and plant life or health at a domestic level are irrelevant: the transatlantic dialogue and process of stimulating challenges merely adds an extra layer of complexity to those that take place within the jurisdiction of each Member.[733] Furthermore, as chapter 3 foreshadowed, to understand the development of certain types of legal regulation it cannot be assumed that only the debate over the proper use of that instrument is of importance. Just as the resulting norm export by the US onto the text of the Dispute Settlement Understanding undermined the US's

[732] C Miéville, *Embassytown* (Macmillan 2011) chapter 11, 1

[733] The EU and US play pivotal roles in determining the scope and nature of international regulation, particularly in areas where technical expertise is prized. See generally, D Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton 2007)

attempts to structure a safeguard system in its own image, it will be argued that SPS regulation can be explained not only in light of the debates around the measures themselves but also the institutions involved in this process of value contestation and norm export.

The following sections will outline: first, the relative ease with which the negotiating parties came to consensus over the SPS Agreement; second, the shifts in the EU's approach to SPS regulation over the past two decades; and third, a similar brief examination of the US's tradition in regulating SPS issues. It will be suggested that each system has developed in light of different concerns faced by those systems at different times. The fourth section will examine these differing priorities as they interact at the WTO level and interpret the debate surrounding SPS measures since the introduction of the covered agreements through the lens of value contestation and norm export. By identifying how this process of value contestation differs at the EU and US levels and then continues through to the WTO level, it will be suggested that this offers a way to examine the different examples of SPS regulation later in the chapter as part of a broader discussion which goes to the heart of international regulation in all matters rather than disparate disagreements.

(i) Negotiations over the SPS Agreement

Amongst some of the most intractable negotiations during the Uruguay round, namely those on agriculture, the SPS Agreement passed through with relative ease. Linking SPS regulation with negotiations on agriculture was seen as necessary: the former essential to

ensure that the gains made by the latter were not undermined. The US submission in this area made clear the general approach:

> The broad array of policy instruments [in the agriculture negotiations] is categorized into four subsets: import access, export competition, internal support and sanitary and phytosanitary measures. The United States proposal calls for reform in all four areas, and these reforms should be viewed as integral parts of a comprehensive package and not as four separate proposals. Our comprehensive proposal is designed to guide agricultural production and trade toward a market oriented system governed by strengthened and more operationally effective GATT rules and disciplines and to integrate agriculture fully into the GATT.[734]

While there were tensions over the EC position with regard to certain issues (agricultural subsidies granted through the Common Agricultural Policy in particular), the negotiations over SPS regulation did not attract the same level of animosity. It is striking that one of today's most contentious covered agreements would have betrayed so little of the future disagreements surrounding it at the negotiation stage.

The disagreements that appear in the reports of the Negotiating Group on Agriculture and the Working Group on Sanitary and Phytosanitary Regulations were not over what we now consider the most controversial areas of the agreement. There was broad agreement that the general position should be based around a requirement for scientific justification. The more controversial issues related instead to the treatment of developing countries, the scope of measures more stringent than the international

[734] Submission of the United States on Comprehensive Long-Term Agricultural Reform (25 October 1989) GATT Doc MTN.GNG/NG5/W/118

standard and the extent to which non-scientific concerns might be used to justify measures.[735] More broadly, however, it is notable that the submissions of numerous diverse members such as the Cairns group,[736] the EC, [737] the Nordic countries,[738] the US[739] and Brazil[740] were all met with general agreement in discussion. It is also telling that the Working Group on the SPS Agreement was the only negotiating group in agricultural negotiations to successfully produce a draft[741] by 20 November deadline in 1990,[742] further indicating general consensus.[743]

In order to tackle the concern that developed members may have to 'trade down' their level of health protection, both the US and EC agreed on the core principle of scientific justification of SPS measures but also balancing it with the use of international standards and harmonisation as a means to ensure both uniformity and an avenue to maintain their own desired level of protection. The package gained widespread support amongst Members,[744] as there was widespread concern that increasing numbers of SPS measures may undermine any gains made in negotiations over the reduction of

[735] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol I* (Kluwer Law International 1993) 201

[736] Comprises of States that are principally agricultural exporters: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, and Uruguay. Communication from the Cairns Group (2 October 1989) GATT Doc MTN.GNG/NG5/W/112

[737] Submission of the European Communities on Sanitary and Phytosanitary Regulations and Measures (20 December 1989) GATT Doc MTN.GNG/NG5/W/146

[738] Submission of the Nordic Countries on Some Elements in a Comprehensive Long-Term Agricultural Reform Programme (December 1989) GATT Doc MTN.GNG/NG5/W/143

[739] Submission of the United States on Comprehensive Long-Term Agricultural Reform (25 October 1989) GATT Doc MTN.GNG/NG5/W/118

[740] While a member of the Cairns Group, Brazil also provided its own specific views: Statement by Brazil on Special and Differentiated Treatment (2 October 1989) GATT Doc MTN.GNG/NG5/W/108

[741] Negotiating Group on Agriculture: Working Group on Sanitary and Phytosanitary Regulations and Barriers, 'Draft Text on Sanitary and Phytosanitary Measures' (20 November 1990) GATT Doc MTN.GNG/NG5/WGSP/7

[742] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol I* n742, 200

[743] This is the case amongst the active negotiators; clearly it is not possible to extrapolate these views to the membership as a whole

[744] The Cairns Group being an exception to this: T Stewart, *The GATT Uruguay Round: A Negotiating History Vol I* n742, 201

agricultural subsidies or market access. Indicative of this is the fact that the final agreement, even in light of considerable public notice, was little altered from the 1992 draft.[745]

The specific role of scientific justification did not appear to be a matter of great disagreement: the text in the draft produced by the SPS working group on 20th of November 1990, refers to 'generally accepted scientific principles' while other issues such as 'genuine consumer concern' were bracketed.[746] Questions over consumer concern appear to have been side-lined as they do not appear in the final draft, and nor do the concerns raised by both Japan and Korea over their cultural traditions in areas which may fall under the liberalisation of agricultural produce.[747] The focus on the requirement of scientific justifications rather than cultural or political grounds appears to have been a response to fears over 'trading down' levels of SPS protection in developed countries rather than intentionally excluding any other justification that was not purely scientific. This is supported by the response to an Austrian proposal[748] that any question over the legitimacy of a measure should be referred first through the appropriate international scientific body (e.g. one of the Three Sisters: Codex Alimentarius Commission, World Organization for Animal Health[749] or International Plant Protection Convention[750]) before going through the dispute settlement system at the WTO. In rejecting such an approach:

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[745] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol IV* (Kluwer Law International 1999) 41

[746] Negotiating Group on Agriculture: Working Group on Sanitary and Phytosanitary Regulations and Barriers, 'Draft Text on Sanitary and Phytosanitary Measures' (20 November 1990) GATT Doc MTN.GNG/NG5/WGSP/7

[747] T Stewart, *The GATT Uruguay Round: A Negotiating History Vol I* n742, 188ff

[748] Note by Secretariat, 'Summary of the Main Points Raised at the Fifth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers' (19 March 1990) GATT Doc MTN.GNG/NG5/WGSP/W/13

[749] Formerly the International Office of Epizootics

[750] 'CAC', 'OIE' and 'IPPC' respectively hereafter. In conjunction, 'the Three Sisters'

'It was further observed that sanitary and phytosanitary measures were not based only on science, but on a risk assessment which also took account of potential economic damage.'[751]

Given the seeming lack of controversy surrounding the negotiation of the SPS Agreement it is surprising that it be the subject of so much debate today. It is argued here that the primary reason for such a development is the process of value contestation and norm export by transnational actors *since* the conclusion of the SPS Agreement. Pollack and Shaffer offer a lucid account of this process, having conducted a detailed analysis of the motivations and mechanics of the transatlantic dispute over genetically modified organisms in the food chain.[752] They argue:

> …that the very different approaches to GMO regulation that we observe between the US and the EU, were not determined in any straightforward way by either the institutions, the political culture or the interest-group configurations present on either side of the Atlantic. It was *not* inevitable that US regulators would adopt a product-based approach to GMO regulation, nor was it obvious from the outset that the EU would adopt the strict, politicized, and highly precautionary system that emerged over the course of the 1990s. The best explanation for the observed transatlantic differences, we believe, is multi-causal, lying in the ability of interest groups to capitalize on preexisting cultural and institutional differences,

[751] Note by Secretariat, 'Summary of the Main Points Raised at the Fifth Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers' n748, 2-3

[752] M Pollack & G Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (OUP 2009)

> with an important role played by contingent events such as the European food safety scandals of the 1990s.[753]

While the development of SPS measures is multi-causal, as Pollack and Shaffer argue, it is better viewed through a lens of value contestation and norm export rather than interest seeking by individuals or groups.[754] It is not only the use of law as an instrument that furthers the objectives of actors but also the constitutive influence of law. Though they examine the role of culture as an influence on approaches to GMO regulation,[755] this is a separate investigation to how law both serves to influence cultural outlooks but also is the target of these value/cultural debates. Without taking into account the constitutive influence of law, it is not possible to reconcile how an actor can both change the law and *be changed* by that very instrument. Further, Pollack and Shaffer examine the role of the WTO as a space that offers opportunities for cooperation where bilateral and transnational US – EU attempts have failed.[756] It is suggested here, however, that the WTO is part of the same process that takes place at the domestic and regional levels. It is the continued concerns over *internal* processes of value contestation that encourage norm export at the WTO.

The next two sections briefly sketch the differing debates within the EU and the US over the nature of SPS regulation, setting the scene for a transatlantic process of value contestation at the WTO. The purpose here is to highlight the different concerns that arise from the law-science interface within administrative governance at the EU and US,

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[753] Ibid, 11
[754] Pollack and Shaffer are empirical in their approach which it is argued here, is not appropriate: Chapter 1 (B), p47ff
[755] M Pollack & G Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* n752, 74-75
[756] Ibid, chapter 3

identifying how the different legal systems exert both systemic and constitutive influences on these actors at the WTO. This in turn influences how the debates progress at the international level.

(ii) Experiences in SPS Regulation: The European Union

As has often been the case within the European Union, its laws have developed not in light of external influences but rather as a response to the internal construction of the single market and the shifting concerns of European citizens over the relationship between themselves, their States and the EU.[757] As a result, SPS regulation at the European level can be characterized as trying to balance the maintenance of a single market dependent on the free movement of goods and services with the concerns of the Member States and their polities.

The EU experience in regulating SPS matters has informed its current position. In particular, the move from national regulation of SPS measures to EU-wide regulation of food safety took place in response to some very public and damaging food crises in the late 1980s and into the 1990s including BSE ('mad cow disease') and dioxin scares.[758] Food safety in the EU falls under its competences in the area of environmental policy. The legal basis for such powers is Title XX TFEU, with Art 191 TFEU setting out its aims:

[757] For a lucid overview: E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 American Journal of International Law 1 (1981)

[758] It is an interesting characteristic that food safety has tended to develop in response to crises: E Fisher, 'Food Safety Crises as Crises in Administrative Constitutionalism', 20 Health Matrix (2010) 55

> Union policy on the environment shall contribute to pursuit of the following objectives:
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> - preserving, protecting and improving the quality of the environment,
>
> - protecting human health,
>
> - prudent and rational utilisation of natural resources,
>
> - promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

While the competence to act in environmental matters was granted under the Single European Act in 1986 with further competences granted under the Maastricht Treaty in 1992, it was not until a series of crises[759] (most notably BSE or 'mad cow disease') that the EU dramatically changed its system for regulating food safety.[760] Previously, the EU's model granted far greater autonomy to the Member States, playing a far more restrictive role than is now the case.

The new system centred on the European Food Safety Authority ('EFSA') was created following a comprehensive consultation process.[761] Established by the Council and Parliament,[762] the EFSA focuses exclusively on the scientific analysis of risk ('risk assessment') rather than the determination of the appropriate level of risk for a society

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[759] For an account on other crises: R Löfstedt & D Vogel, 'The Changing Character of Regulation: a Comparison of Europe and the United States'. (2001) 21 Risk Analysis 399

[760] For an account on the BSE crisis: E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2010) chapter 2

[761] Commission, 'White Paper on Food Safety' (12 January 2000) COM (1999) 719 Final. The EFSA is the principal institution for risk assessment in the area of SPS regulation at the EU level though there are others that can play potential roles such as the European Centre for Disease Prevention and Control.

[762] Council Regulation (EC) No 178/2002 of June 28 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1, laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

('risk management'), which is left to the Union institutions.[763] The EFSA coordinates and cooperates with the national regulators of the Member States in an attempt to ensure wider consistency and transparency of scientific assessment.[764] EFSA is charged with providing 'scientific advice and scientific and technical support for the Community's legislation and policies in all fields which have a direct or indirect impact on food and feed safety. It shall provide independent information on all matters within these fields and communicate on risks.'[765] In matters of food and feed safety, the EFSA works with the Commission (under DG SANCO[766]) and the representatives of the Member States via the Standing Committee on the Food Chain and Animal Health[767] (chaired by a member of the Commission). In the case of potential food or feed crises within the EU, the Member States may act to restrict certain products though must inform the Commission immediately[768] while where the Member State is unable or unwilling to act, the Commission can act under its own authority.[769] It is expected that the Member States' own authorities will analyse the scientific evidence though the EFSA is involved where necessary.[770]

At first sight, this would appear to be an unremarkable development in European integration: competencies slowly and progressively transferred to the European level are then matched by increasing institutional developments for those competences to be able

[763] For a more detailed account of risk assessment and risk management: Chapter 4 (B) below (p275ff)
[764] See, *Strategy for Cooperation and Networking Between the EU Member States and EFSA*, MB 19.12.2006 – 6a Strategy for cooperation and networking
[765] Council Regulation (EC) No 178/2002 Art 22(2)
[766] Taken from its French name, Direction Générale: Santé et Consommateurs
[767] Council Regulation (EC) No 178/2002 Art 58(1)
[768] Council Regulation (EC) No 178/2002 Art 50(2)
[769] Council Regulation (EC) No 178/2002 Art 53
[770] See the non-binding: Standing Committee on the Food Chain and Animal Health (section Toxicological Safety) 2.2, *Modus operandi for the management of new food safety incidents with a potential for extension involving a chemical substance* (January 2006)

to be exercised effectively.[771] However, the EFSA only conducts risk assessment; risk management is carried out by the committee relationship between Commission and Member States. This allows the political organs of the EU to produce 'outcomes with little relation to scientific findings, allowing Member States to block approvals even if EFSA has not found a significant risk.'[772] While the hope was that deference would be given to the EFSA on the basis of its expertise and requirement to apply the precautionary principle,[773] this has not been the case.

There are some notable differences in the regulation of food safety over other matters coming into the EU's purview. Of particular note is the criticism arising from the handling of the BSE crisis was not only concerned with a question of technical capacity but also over legitimacy.[774] The legitimacy of decision-makers taking actions that could potentially have a wide-ranging impact on populations was of particular concern. In a European context this criticism has added weight as the EU is, and has been for decades, attempting to tackle a profound existential challenge: the so-called 'democratic deficit.'[775] Elizabeth Fisher has argued that the simple science/democracy dichotomy is inaccurate as at a national level such decisions are usually taken by administrative bodies and not democratic organs.[776] While this is certainly true, the *distance* from national decision-

[771] Recent increasing cooperation on fiscal policy within the Eurozone is a paradigmatic example. See: Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (concluded 2 March 2012) T/SCG/ en 1, < http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf> (accessed 1 October 2012)

[772] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 216, fn125

[773] G Skogstad, 'Contested Accountability Claims and GMO Regulation in the European Union', 49 Journal of Common Market Studies 4 (2011) 895, 903-904

[774] J Peel, 'Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?' Jean Monnet Working Paper 02/04, 36

[775] For example: European Parliament Resolution on the democratic deficit (1988) OJ C 187/229

[776] See generally: E Fisher, 'Beyond the Science/Democracy Dichotomy: The World Trade Organization Sanitary and PhytoSanitary Agreement and Administrative Constitutionalism' in C. Joerges & E. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart 2006)

makers increases people's sensitivity to the perceived democratic illegitimacy or lack of accountability of administrators.[777]

In response to these criticisms the EU system permits wide ranging political inputs into its decision-making process in determining appropriate levels of protection for food safety. Scott describes the authorization process for GMOs at the EU as 'involving actors across different levels of government, from the local to the European' and structured so that it 'establishes a role for political and expert actors.'[778] While the influence of public opinion is limited, the continual presence of political actors opens the process to greater influence by motivated and well-organized transnational actors than other systems.

The primary EU legislation in the area of food law further enshrines the position of the consumer as central to food regulation:

> Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the *protection of consumers' interests*, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment.[779]

The focus on consumer interests is buttressed by incorporating the precautionary principle[780] that inclines the system to greater caution and a more conservative approach

[777] A Follesdal & S Hix 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravscik', 44 Journal of Common Market Studies 3 (2006) 533
[778] J Scott, 'European Regulation of GMOs: Thinking about "Judicial Review" in the WTO', Jean Monnet Working Paper 04/04 (2004) 2-3
[779] Council Regulation (EC) No 178/2002 Art 5(1) (emphasis added)
[780] Council Regulation (EC) No 178/2002 Art 7(1), also, Art 191 TFEU

to authorizing novel agricultural technologies.[781] Recourse to the precautionary principle is designed to strengthen the legitimacy of regulators in the eyes of a population that had serious concerns in light of the crises of the 1990s.[782]

The EU system is not simply constituted with an instinctive bias toward conservative policies toward novel technologies in agriculture. Were Member States free to restrict feed and food products simply on the basis of consumer interests or their perceived concerns over certain issues, without scientific basis, the internal market would be fundamentally threatened.[783] And so, while the EFSA was born out of a desire to assuage the concerns of European citizens and support the vertical relationships of the European Union (that is to say, the relationship between citizen, Member State and Union institutions), these priorities must find an accommodation with the other principal purpose of the European Union: the internal market.[784] Thus, a process of value contestation with regard to the legitimacy of certain institutions within the EU sparks a parallel contestation over the ability of Member States to exert their influence at EU institutions and decision-makers in SPS matters in such a way that will not undermine a defining feature of the internal market, the free movement of goods.[785]

It has fallen to the judicial branches of the European Union to balance the inbuilt caution within the EU's food safety regime. While political influences have numerous

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[781] Compare Chapter 4 (A) (iii) below (p261ff)

[782] R Löfstedt, 'The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis', 28 The Journal of Risk and Uncertainty 3 (2004) 237, 252-253

[783] Quantitative restrictions on the basis of protecting human, animal or plant life or health under EU law are governed by Art 36 TFEU

[784] Art 26(2) TFEU: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'

[785] On the need to find an accommodation between food safety and free trade: K Vignarajah, 'Reconciling Free Trade and Safe Trade: New Paradigms for Regulating Imports in the Twenty-First Century', 43 Journal of World Trade 4 (2009) 771

points of entry in the decision-making process, once the decision has been made the courts have given short thrift to any argument made that might then undermine the free movement of goods within the EU. It may seem self-serving for European courts to be willing to defer to the decisions of the EU institutions where scientific uncertainty exists (in the case of beef hormones, for example[786]) while at the same time giving far less leeway to the Member States that wish to introduce restrictions on the free movement of goods on the basis of limited scientific evidence as was the case with Danish restrictions on additives in foodstuffs[787] or restrictions on British beef post-BSE.[788] Peel identifies the key difference when reviewing decisions based on unclear science: 'these preconditions are reviewed more lightly in the case of Community measures, where the countervailing considerations of internal market regulation are less salient.'[789]

The EU system is not only structured by its own processes of value contestation but also, to a lesser extent, by the results of debates and contestations within specific Member States. In their work on the transatlantic dispute over genetically modified organisms, Pollack and Shaffer describe a EU system with cultural traditions quite distinct to those of the US.[790] Unlike the US system described below, the EU can be characterized by a larger number of smaller agricultural producers and more limited space for agricultural development. Combined with a cultural concern over the mechanization in the agricultural industry, sections of the EU have been more cautious in the reception of novel agricultural technologies. As Pollock and Shaffer point out, this is

[786] Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* [2002] ECR II-03305
[787] Case C-192/01 *Re the Prohibition of Marketing of Enriched Foods: Commission of the European Communities v. Denmark* [2003] ECR I-9693 29
[788] *France v Commission* [2003] ECR I-5405
[789] J Peel, 'Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?' Jean Monnet Working Paper 02/04, 47
[790] M Pollack & G Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* n752, 73ff

not to be confused or caricatured as a purely risk-averse position. The consumption of unpasteurized cheeses, considered both acceptable and desirable within many European communities, is viewed with considerable concern in the US.[791] It is not that the European model is risk-averse, rather that it is averse to novel technologies in agricultural production, or at least those that are not identifiable as being part of either a food tradition or culture within that society.

The regulation of SPS measures within the EU has been a story of crisis response and institution building. Behind these developments exists a multi-layered process of value contestation, setting the terms and priorities for the EU's food and feed safety policy. Across Europe, preoccupations over the EU's capacity to protect the health of the citizenry have had to find an accommodation with countervailing concerns over the legitimacy of EU decision-makers and the continued success of the internal market. At a more local level, the specific structure of the agricultural industry within the EU and the cultural outlook of its communities (itself the result of a contestation) have resulted in a cautious approach to novel technologies in food production.[792] This can be contrasted with the US experience that has been informed by drastically different internal priorities.

(iii) Experiences in SPS Regulation: The United States

The US regulation of SPS measures can be characterized as one based around administrative agencies with considerable discretion in decision-making and institutional

[791] Ibid

[792] This is not universal amongst EU Member States. See poll commissioned by British Science Association and cited by the Guardian indicating rise of people not concerned by GM crops from 17% in 2003 to 25% in 2012: 'Public concern over GM food has lessened, survey shows', *The Guardian*, Friday 9 March 2012

autonomy. Administrative agencies are the key players in determining which products might or might not constitute a risk to human animal or plant life or health within the US. Unlike the EU system, the US process is more insulated from political influences during the process of regulating SPS risks. Determinations take place outside of the charged political sphere and, importantly, do not incorporate the EU approach of considering consumer interests in determining what course of action to take. Nor is the precautionary principle, now viewed as a principle of EU law, treated in a similar manner in the US where its application is more limited.[793]

Whereas the processes of value contestation within the EU were concerned with the relationship between citizen, Member State and the Union institutions and the role of food safety within a single market, the US has a distinct constitutional settlement and priorities. Further, the cultural outlook in the US vis-à-vis food safety (also the result of national processes of contestation) is less hostile to technological developments in agri-business. Pollack and Schaffer refer to the relative comfort with which the US population views the use of science and technology in its food production as a result of numerous factors including: a large-scale agricultural industry developing after mechanisation; no genuine limitation on space that may be used for arable pastoral land; and the lack of highly publicized failings by the key regulators involved in assessing and determining SPS risks.[794]

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[793] On the pedigree of the precautionary principle under US law: N Ashford, 'The Legacy of The Precautionary Principle In U.S. Law: The Rise of Cost-Benefit Analysis and Risk Assessment as Undermining Factors in Health, Safety and Environmental Protection' in N de Sadeleer (ed.), *Implementation of the Precautionary Principle: Approaches from the Nordic Countries. the EU and the United States* (Earthscan 2007)

[794] M Pollack & G Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* n752, 43ff & 73

While the EU has been attempting to tackle issues of scientific evidence in legal decision-making more recently, the US has an established tradition in this field. Since the 1960s the US courts have been confronted with questions over the relationship between law and science,[795] while issues of judicial review of the actions of administrative agencies have a longer pedigree.[796] While the EU system was influenced by the processes of contestation relating to questions of legitimacy, competence and integrity of the single market, the US system has been informed by other considerations. The most obvious of these is the distinct constitutional settlement that serves as a backdrop: the US federal legal system has a highly developed and nuanced jurisprudence engaging with the appropriate levels of judicial oversight of administrative agencies as bodies exercising delegated powers.[797]

The deference shown to the decisions of agencies under US law by the judiciary is of particular relevance here. US courts have been wary not to review the actions of agencies in detail under the *Chevron* doctrine.[798] Under the *Chevron* doctrine, in instances of delegated executive authority, both agency and courts are to abide by Congress' intent where it is clear. Where Congress' intent under the delegating legislation is not clear the agency's interpretation of the legislation (and thus its duties and how it carries them out) is to be deferred to so long as it is not unreasonable.[799] In practice this creates a hierarchy of authority: Congress' wishes are to be given priority where clear; failing that, where its

[795] J Peel, 'Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?' Jean Monnet Working Paper 02/04, 20

[796] The cornerstone of modern US administrative law dates to the Administrative Procedure Act 1946 [Pub L 79-404, 60 Stat 237]

[797] See generally, S Breyer, R Stewart & C Sunstein (eds) *Administrative Law and Regulatory Policy* (6th ed. Aspen 2006), S Breyer, 'Judicial Review of Questions of Law and Policy', 38 Administrative Law Review (1986) 363, A Scalia, 'Judicial Deference to Agency Interpretations of Law', Duke Law Journal (1989) 511

[798] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

[799] Ibid, 842-44

instructions are unclear (intentionally or inadvertently[800]) the agency's judgment is to be given priority. Only where the agency acts unreasonably is the judiciary to review its acts.

The reasons given for such deference is debated though four bases have been suggested:

> The Court suggested that the judiciary should defer to agencies because (1) Congress intends the courts to do so, (2) agencies exercise delegated legislative power when they issue interpretations, (3) agencies are more politically accountable than courts, and (4) agencies have the necessary technical expertise that courts often lack.[801]

Here we can see the priority given to Congress as the political fountainhead of the agency's legitimacy. In this context, judicial restraint in reviewing agency interpretations is part of the courts' desire to support the premise at the heart of the US constitutional bargain: that it is for the courts to interpret and review where necessary but it is for the political branches of government (i.e. Congress and the executive) to exercise authority. Accountability is to be best achieved where there is political oversight or at the least the possibility of such oversight. Agencies, which derive their powers from legislation and exercise executive authority are closer to the politically accountability elements of government. In the words of the Supreme Court, '[w]hile agencies are not directly accountable to the people, the Chief Executive is'.[802] Whereas the EU's priorities were to establish a legitimate framework for the relationships between citizen, Member State and

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[800] Ibid, 865-66
[801] Editorial, 'Justifying the *Chevron* Doctrine: Insights from the Rule of Lenity', 123 Harvard Law Review (2010) 2043, 2043-2044
[802] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc* n798, 865

Union Institutions,[803] the US approach is designed to 'foster democratic values by ensuring that policy decisions are being made by politically responsible bodies.'[804] It is concerned with ensuring legitimacy of decision-making via horizontal balances (i.e. between the branches of government and the exercise of their powers through delegation).

Just as the EU courts became involved in a compromise between the integrity of the internal market and the desire to ensure the legitimacy of the Union institutions in health matters, so the US courts have had to accommodate the relative autonomy of the agencies with a genuine need to ensure appropriate outcomes in their decision-making. The *Benzene*[805] decision is the landmark case in this area, with the Supreme Court encouraging the use of scientific evidence as the basis for decisions on potential areas of risk regulation.[806] The result has been widespread, encouraging a decision-making process by agencies focussing on standard setting and the prioritisation of scientific evidence.[807] This approach, taken up by the US handbooks on risk assessment,[808] is an attempt to counter the autonomy that courts grant agency decisions with the need to ensure that they do not exercise authority in an unfettered manner.

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[803] n775 and corresponding text

[804] 'Justifying the *Chevron* Doctrine: Insights from the Rule of Lenity', 123 *Harvard Law Review* (2010) 2043, 2063. This has been strengthened by the Supreme Court's opinion in *Coeur Alaska, Inc. v Southeast Alaska Conservation Council,* 557 US 1 (2009) in which the Court retreated from previous opinions that had served to undermine *Chevron* deference, notably *United States v Mead Corp.* 533 US 218 (2001)

[805] *Industrial Union Department v. American Petroleum Institute*, 448 US 607 (1980) ('*Benzene*')

[806] Ibid, at 656

[807] 'Standard setting was increasingly being understood as primarily an analytical process in which there was little role for professional judgement, deliberation or administrative policy choice.' E Fisher, *Risk Regulation and Administrative* Constitutionalism (Hart 2010) 116

[808] National Research Council, *Risk Assessment in the Federal Government: Managing the Process* (National Academy Press 1983), National Research Council, *Science and Judgment in Risk Assessment* (National Academy Press 1994)

The considerable leeway and autonomy granted to the administrative agencies that take decisions on food safety have insulated them from political pressures that characterize the European system while the prioritisation of scientific evidence in a structured decision-making process has discouraged non-experts from engaging with key areas of regulation. This is exacerbated by the piecemeal regulatory arrangements[809] for areas such as GMO regulation.[810] Indeed, enforcement mechanisms for concerns over food and feed safety under US law are decentralized, prioritising claims through tortious liability rather than the centralized enforcement mechanisms under the EU system where institutions such as the Commission play a key role.[811]

(iv) Value Contestations over SPS Measures at the WTO

It was argued in the previous chapter the process of value contestation by actors in the use of safeguard measures provided an explanatory rationale for their development. SPS measures however, result from a different form of value contestation. Rather than being concerned with the purpose of the instrument, i.e. what SPS measures are for; they are instead concerned with the process of determining what constitutes a *legitimate* SPS measure. Sanitary and phytosanitary measures encompass a range of different regulatory acts with different objectives. There are those whose objective is the protection of certain

[809] The principal institutions involved in SPS regulation (depending on the subject-matter) are the Food and Drug Administration, the Environmental Protection Agency and the US Department of Agriculture.
[810] M Pollack & G Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods*, OUP (2009) 53
[811] Ibid 53. This may change with the introduction of wider preventative obligations in food safety for the FDA under ss101-116, Food Safety Modernization Act 2011 [Pub L 111-353, 124 Stat 3885]

plants[812] or animals[813], some measures concern protecting human health and safety as well as other biological factors (for example, the EU's position over the potential risk of genetically modified organisms in the food chain[814]). There are other measures, however, the objective of which is specifically the protection of human health and safety.[815] With a potentially wide range of distinct measures falling under regulation of the SPS Agreement and their potential impact on trade, the key disputes over how SPS measures are to be regulated have instead been concerned with deciding the criteria of validity for such measures. Put simply, this comes in two distinct questions: who decides whether an SPS measure is justified or not; and how are they to come to that decision?

In the EU and US, these debates have taken place in different contexts. The EU concern over the identity of the regulators and their method were a response to perceived legitimacy crises,[816] while in the US, the regulation of SPS matters has been the subject of a shifting battle between the appropriate limits of the separate branches of government.[817] The same fundamental debate at the WTO level is again expressed in a different context with actors trying to maintain their own priorities within the domestic sphere whilst simultaneously ensuring parallel interpretations at the international level.[818]

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[812] *Japan – Measures Affecting Agricultural Products*, Report of the Appellate Body (22 February 1999) WT/DS76/AB/R

[813] *Australia – Measures Affecting Importation of Salmon*, Report of the Appellate Body (20 October 1998) WT/DS18/AB/R

[814] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products,* Panel Report (26 September 2006) WT/DS291,292,293/R ('*EC – Biotech*')

[815] For example, those challenged in: *European Communities – Measures Concerning Meat and Meat Products*, Report of the Appellate Body (16 January 1998) WT/DS26/AB/R and WT/DS48/AB/R ('*EC – Hormones Appellate Body*'). *European Communities – Measures Concerning Meat and Meat Products (Hormones) Complaint by the US*, Panel Report (18 August 1997) WT/DS26/R/USA ('*EC – Hormones Panel (US)*') and *European Communities – Measures Concerning Meat and Meat Products (Hormones) Complaint by Canada*, Panel Report (18 August 1997) WT/DS48/R/CAN ('*EC – Hormones Panel (Canada)*')

[816] Chapter 4 (A) (ii) above (p254ff)

[817] Chapter 4 (A) (iii) above (p261ff)

[818] See, Chapter 2 (A) (ii) above (p87ff)

It has been argued that the key debates in the use of SPS measures at the WTO have revolved around certain key issues: the role of science in decision-making by WTO bodies, undue incursions by the WTO into the regulatory autonomy of its members (including the question of what constitutes a SPS measure), and questions over whether or not the WTO is the appropriate forum for discussing SPS measures.[819] While important, each point of contention is an example of how competing interests and preferences interact and conflict in an attempt to resolve underlying value differences. Each of these points of disagreement feeds into a single, broader debate: what constitutes a legitimate SPS measure? In the first instance, who decides on the measure itself? Should scientists or lawyers determine what constitute acceptable levels of risk? Should national governments or supranational bureaucracies determine how members respond to threats to their polity's health? Should debates over which issues of the day constitute risks to human and animal plant life and/or health take place within a uniquely trade-oriented institution, or rather broader multilateral environmental institutions? Further, where should the review of such decisions take place? Should this be conducted at the national level, at the international level, within trade bodies or other organizations? Once the *who* element has been decided, it still leaves open the question of *how* the process of decision-making should be conducted.

The Locus of Decision-Making

[819] Many of these debates have been examined through questions over the appropriate standard of review applied by panels and interpreted by the Appellate Body. See generally: M Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003), R Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar 2012)

The increasing need to regulate measures with an impact on human, animal or plant health at the international level raises serious questions over where such decisions should take place. It may well be that specialization is a necessary consequence of increasing levels of global cooperation and increasing global governance.[820] Whether or not this is the case, a fundamental debate over the face of administration and governance in a globalized world is taking place as we determine how increasing areas of regulation are to be overseen at the international level. Robert Howse identified the broad issue:

> Among the most common critiques of globalization is that it increasingly constrains the ability of democratic communities to make unfettered choices about policies that affect the fundamental welfare of their citizens, including those of health and safety, the environment, and consumer protection.[821]

This debate, indeed the entire process attempting to determine who decides appropriate levels of risk protection and management is not restricted to the regulation of SPS measures. The question over who should decide on matters of international regulation (that is to say matters which have been specifically transferred to the international level due, at least in part, to the inability of national governments to deal with these issues by themselves) is one that is taking place in all areas of international law.

The choice of one particular forum over another for regulating certain matters is one way in which transnational actors pursue their objectives. While forum-shopping is traditionally viewed in the context of litigation (the instrumental use of law), it equally applies to rule-making activities (taking advantage of the systemic use of law). In his

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[820] Increasing specialization in international regulation serves as the backdrop for the International Law Commission's work on fragmentation: ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN4/L682

[821] R Howse, 'Democracy, Science, And Free Trade: Risk Regulation On Trial At The World Trade Organization', 98 Michigan Law Review (2000) 2329

study of interacting legal regimes and institutions, Nico Krisch examines the preference of the EU and others for the Biosafety Protocol[822] as the focal point for regulating GMOs rather than from the WTO, which the EU felt could offer a challenge under the SPS Agreement to its directives on the cultivation and sale of GMOs.[823] Deciding on one forum rather than another is not determined only by the rules applicable or institutional structures within that regime but also by the influence that the culture of that organization or institutional framework has.

There is considerable literature on the consequences of multiple specialized regimes in international law that tend toward a bureaucratisation and specialisation in the regulation of certain types of subject matter.[824] For some such as Koskenniemi, the concern is not that multiple different regimes might exist but rather how those who are part of them behave. It is a warning not against the fragmentation of international law *per se* but rather the risks of so-called 'epistemic communities'[825] within these regimes.[826] He states:

> This is why I am not worried about multiplicity of regimes or the clash of legal rationales. On the contrary, they are the platform for today's politics. The real concern is the urgency of the cultural and professional outlook of the participants, the pretence that their decisions follow cognitive or technical grounds and are therefore immune to political contestation. As a

[822] Cartagena Protocol on Biosafety to the Convention Biological Diversity (concluded 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208
[823] N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 189-197
[824] For example: M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 Modern Law Review (2007) 1; J Becket, 'Fragmentation, openness and hegemony: adjudication and the WTO', in M Lewis & S Frankel (eds.), *International Economic Law and National Autonomy* (CUP 2010)
[825] P Haas, 'Introduction. Epistemic Communities and International Policy Co-ordination', 46 International Organization 1 (1992) 1
[826] As discussed in chapter 1, the term 'regime' is not used in the same way as Koskenniemi (see p28ff)

> prelude to that, however, I would suggest that the discourse of multiplicity should itself be described in political terms, as a competition between different systems and criteria for allocating resources between social groups. Who will win and who will lose?[827]

Whether or not one agrees with Koskenniemi's final focus on the allocation of resources, his prior reasoning is compelling: in particular, his willingness to analyse the roles of those within institutions as politically informed. It is a flaw in much of the reasoning in the subject at the WTO level that commentators will contrast decision-making on the basis of a value judgement or a normative preference of 'political' entities with the strict formalism of panels or the Appellate Body.[828] It is false to assume that by cleaving to the text of the agreement, the dispute settlement organs at the WTO are not in fact engaged in a process of value contestation of their own. As discussed in previous chapters, the very wording of the Dispute Settlement Understanding can be understood as an exercise of norm export by the US (specifically the U.S. Congress) over fears of international regulation and its potential to undermine Congress' trade powers.[829] This is not to say that panels or the Appellate Body do as the US wishes or wished due to its successful drafting of the DSU[830] but instead that in attempting to maximize their own legitimacy they adhere to what they have determined to be the primary responsibility of the dispute

[827] M Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought', Paper presented at Harvard, 5 March 2005 <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d%5B1%5D.pdf> (accessed 1 October 2012)

[828] Views that were reflected in the debates in the previous chapter over the Appellate Body's interpretations of the Agreement on Safeguards and Art XIX GATT (see Chapter 3 (C) (ii), p204ff)

[829] n625 and accompanying text

[830] Specifically Arts 3.1 and 7.2 DSU

settlement at the WTO: namely the maintenance of order, predictability and certainty in international trading relations.[831]

The DSU constrains the behaviour of the Appellate Body but also helps to constitute its identity - one in which textual justifications are necessary to promote its own legitimacy. In the realm of SPS measures, as the following sections will show, there is a heated process of value contestation at the WTO over these debates, further complicated by the similar though different concerns playing out at the domestic and regional levels.

Decision-Making Approaches

If the first debate over SPS measures is where decision-making is to take place, the second is how the decision is reached. In particular, one of the most contentious areas of SPS regulation at the WTO is the role of scientific evidence. While the original hope was that science would serve as a value-neutral yardstick with which to determine which measures were genuine and which were protectionist, practice has been more complex. There are serious questions over the nature of scientific evidence, how to use minority evidence and what to do in the absence of evidence. Further, concerns have been raised over the inability of WTO members to restrict imports where there is a lack of scientific evidence but the population is particularly hostile to certain products. This is framed as a choice between 'science' on one hand and 'democracy' on the other (though it could equally be distinguished on the basis of expertise or populism).

[831] Art 3.1 DSU: 'The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system'

In her work on administrative constitutionalism, Fisher disagrees with the fundamental premise of the science/democracy dichotomy arguing that at the national level such decisions are routinely taken by administrative agencies that are neither elected nor subject to popular oversight.[832] Instead she sees the debate surrounding regulation of risk as symptomatic of the debate surrounding the appropriate use of technical information and expertise within a system that requires such skills in areas of complex regulation. To reframe the debate, she distinguishes between two different models of decision-making in risk regulation. In the first, the 'Rational-Instrumental' paradigm, agencies are given very strict specific instructions with legislators viewing their role instrumentally, applying rules and following the guidance set down for them in the legislation. This approach reconciles the legislature that is democratically legitimate and a public administration that is not. 'Public administration may not be democratic, but it can be structured to ensure the efficient pursuit of goals generated by the democratic process.'[833] Such an approach is premised on restricting the autonomy of administrative decision-makers to ensure the primacy of democratic institutions, giving agencies a series of 'discrete analytical tasks.'[834] This presents problems as the science related to risk necessarily contains uncertainties and value judgments must be made.

The second paradigm Fisher suggests is the 'Deliberative-Constitutive' model. In this approach administrative agencies are given considerable leeway in how they come to their decision, 'granting to public administration substantial and ongoing problem-

[832] E Fisher, *Risk Regulation and Administrative* Constitutionalism (Hart 2010) 180-185. In a similar vein: A Arcuri, 'Food Safety at the WTO after "Continued Suspension": a Paradigm Shift?' in A Antoniadis, R Schütze & E Spaventa (eds.), *The European Union and Global Emergencies: A Law and Policy Analysis* (Hart 2011)
[833] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 28
[834] Ibid, at 29

solving discretion in relation to particular issues.'[835] This gives agencies greater scope to exercise authority in a way that the legislators may not have foreseen or, more importantly, may not have wanted. Most usefully, it encourages open deliberation and discourse that in turn, it is hoped, will provide better outcomes.[836]

In raising these issues and reframing the debate, Fisher attacks the caricature of science as value neutral and precise as opposed to political decision-making or judicial interpretation as unhelpful and harmful.[837] She further indicates how such a dichotomy strengthens the conceptual divide between trade and non-trade areas of regulation, a divide that may serve only to undermine an accurate understanding of how the WTO does and should work.[838] Instead the real debate is over the way in which administrative bodies reach decisions and if the method chosen produces the best outcomes and satisfies the preoccupations of the polity in question.

Each paradigm offers advantages and disadvantages to governments and it is for this reason that no one approach is ideal. Fisher makes clear that systems will swing between the two approaches depending on their legal culture and priorities,[839] often as a response to specific events that inform them. Taken with the concerns over the location of decision-making in the international system, we can see how the primary issues underpinning SPS measures relate to the identity and method of the decision-maker. The consequences of the contestation of the values involved in this debate are far-reaching as they impact on the way the membership then regulate SPS matters internally. Where

[835] Ibid, at 30
[836] A prominent proponent of such 'deliberative democracy' in the context of risk regulation: C Sunstein, *Risk and Reason: Safety, Law, and the Environment* (CUP 2002)
[837] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 16ff
[838] On the importance of appreciating the role that conceptual frameworks have on the development of law, A Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (OUP 2011), chapter 6
[839] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 32

those Members have already engaged in on-going and profound processes of contestation within their own jurisdictions, it raises serious concerns over the outcome at the WTO that may then risk altering their settlement.

The following sections examine the development of certain issues in SPS regulation at the WTO in light of this contestation, identifying the types of cause that have played a key role. It is argued in the next section that the approach of the Appellate Body to the interpretation of Art 5.1 SPS, and specifically the distinction between risk assessment and risk management in the *EC – Hormones* litigation, is best explained as the result of a failed US attempt to embed its norm relating to *how* to determine SPS risks. While the US encouraged limited decision-making powers on the part of agencies in deciding on the appropriateness of SPS measures, the Appellate Body accepted an approach more appealing to the EU that engaged with its own exercise of norm export. It is argued that this is due to the Appellate Body's own preoccupations with its legitimacy rather than a successful EU challenge of the appropriate interpretation of the SPS Agreement.

B. The Distinction between Risk Assessments and Risk Management

The SPS Agreement contains a simple yet powerful compromise between minimising the trade distorting effects of SPS measures and the desire of members to maintain potentially higher standards of protection than the international standard. Art 3(2) states:

> 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.

This allows members to use 'off the rack' standards and be confident in the knowledge that, so long as they are applied appropriately, their SPS controls will be considered GATT compliant (though this presumption is rebuttable).[840] However, should a Member feel that the international standard is not sufficient for its needs, it can create its own 'bespoke' regulation. This comes at an additional cost,[841] as Art 3(3) makes clear:

> Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based

[840] It is possible to 'base' measures on an international standard but not incorporate it in such a way as to 'conform to' the international standard. In such cases, the measure does not enjoy the presumption of consistency that a measure conforming to the international standard would (*EC – Hormones Appellate Body*, para. 171). It has been questioned what advantage a Member has in only 'basing' a measure on an international standard: J Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the First Three Disputes: *EC – Hormones, Australia – Salmon and Japan – Varietals*', Journal of International Economic Law (1999) 641, 656

[841] J Peel, 'Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?' Jean Monnet Working Paper 02/04: 'unless a Member simply adopts the same risk regulatory measures as are recommended by international bodies or taken by other Member States, it will need to have sufficient technical capacity to be able to verify that there is an objective link between the scientific findings of a risk assessment and the measures it wishes to adopt.' In support Peel cites the concern of the FAO during the negotiations on the SPS Agreement: FAO paper submitted to the Working Group on Sanitary and Phytosanitary Regulations and Barriers, 'Technical Assistance in the Field of Plant Protection' (20 April 1990) GATT Doc MTN.GNG/NG5/WGSP/W/16

on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.

The requirements of Article 5 are the focus of this section: 'Assessment of Risk and Determination of the Appropriate Level of Sanitary and Phytosanitary Protection'[842], more commonly known as risk assessment and risk management. It will be argued that the distinction between these exercises, and its treatment at the hands of panels and the Appellate Body, can be understood through a lens of value contestation at the WTO level between three primary players: the US, the EU and the participants of the dispute settlement system itself. Each of these participants engages in a process attempting to transplant their own preferred outcome at the WTO level. The constitutive and systemic influences on those involved and their priorities result in a complex interaction between them.

The analysis of this section is in three stages: first, a brief examination of the distinction between risk assessment and risk management in risk regulation generally; second, an overview of the *EC – Hormones* litigation[843] in this area, identifying the key causes for the panels' and Appellate Body's approach to the distinction; and finally, identifying key insights in the development of the law on risk assessment/risk management at the WTO in light of the interactions between EU, US and the dispute settlement institutions of the WTO.

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[842] Title of Art 5, SPS Agreement

[843] Principally: *EC – Hormones (Appellate Body)*. *EC – Hormones Panel (US)*, *EC – Hormones Panel (Canada)* all supra n815, and *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, Panel Report (21 March 2008) 1WT/DS320/R ('*EC – Hormones Continued Suspension Panel (US)*'), *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, Panel Report (21 March 2008) 1WT/DS321/R ('*EC – Hormones Continued Suspension Panel (Canada)*'), *United States – Continued Suspension Of Obligations In The EC – Hormones Dispute*, Report of the Appellate Body (16 October 2008) WT/DS320/AB/R ('*EC – Hormone Continued Suspension Appellate Body*')

(i) Approaches to Distinguishing Risk Assessment from Risk Management

The distinction between risk assessment and risk management is a widespread one: the Codex Alimentarius Commission[844] maintains it, as does the Cartagena Protocol[845] and numerous national regulatory systems including the EU, Australia, Japan and the US.[846]

Risk assessment, is defined by Codex as: 'A scientifically based process consisting of the following steps: (i) hazard identification, (ii) hazard characterization, (iii) exposure assessment, and (iv) risk characterization'.[847] It is a scientific process designed to identify and determine the level and nature of risk in a specific case.

Risk management is a different process, politically sensitive insofar as it is not restricted to science alone. Codex defines risk management as: 'The process, distinct from risk assessment, of weighing policy alternatives, in consultation with all interested parties, considering risk assessment and other factors relevant for the health protection of consumers and for the promotion of fair trade practices, and, if needed, selecting appropriate prevention and control options.'[848]

It would appear to be a clear distinction: risk assessment serves as a scientific process undertaken by expert risk assessors who provide evidence to risk managers who then undertake decisions in light of policy choices and preferences tailored to the society in question. From a Rational-instrumental perspective the appeal of such an approach is clear: risk specialists can be given instructions to provide quantitative or qualitative

[844] Codex Alimentarius Commission, *Procedural Manual* (17th ed. FAO 2007) 112
[845] Arts15-16, Cartagena Protocol on Biosafety to the Convention Biological Diversity, n822
[846] See generally: Food and Agriculture Organization & World Health Organization, *Food Safety Risk Analysis: A Guide for National Food Safety Authorities* (FAO 2006) 7
[847] Codex Alimentarius Commission, *Procedural Manual* (17th ed. FAO 2007) 112
[848] Ibid

evidence for the levels of risk for certain hazards. This is done in a neutral scientific manner while leaving the risk management process to a distinct group of specialists who in turn can be given appropriate guidance over which criteria should be used to determine the appropriate level of protection for the SPS risk.

Risk assessment is not a value neutral process, however. The view of science as a cold arbiter, concerned only with empirical data is not an accurate one in the context of risk regulation (or indeed more broadly).[849] Winkoff et al identify various ways in which risk assessment is influenced by values and policy judgments. In the first instance, they point out how the first stage in the risk assessment process ('risk identification') already involves value judgments: 'A policymaker's perceptions and judgments are a function both of empirical observation and of the conceptual lenses used to view the evidence'.[850] Determining which risks we think require assessment is itself a value judgment.[851]

Further, assumptions made over the way risk analysis is conducted in the face of uncertainty are again deeply influenced by value judgments. Winkoff et al again:

> For example, limiting the probabilistic measures for risk assessment to human mortality tacitly places zero value on protecting non-humans; it also places little value on protecting humans from non-fatal forms of harm. Even the tradeoff between mortality and morbidity (for example, pain associated with illness) involves tacit value judgments.[852]

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[849] D Winkoff, S Jasanoff, L Busch, R Grove-White & B Wynne, 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law', 30 Yale Journal of International Law (2005) 81, 93ff

[850] Ibid, 94

[851] This is merely another form of the relationship between values and law discussed in chapter 1 (C) (iii), p70ff: the determination of what should be subject to a form of regulation or, in this case, scientific analysis is the result of a process of value contestation.

[852] Ibid

At a practical level also, the relationship between risk assessment and risk management is not as clear-cut as it might seem. It is common for risk managers to interact with risk assessors as SPS measures are tailored to the identified risk in order to achieve the desired level of protection for that Member.[853]

Within the WTO, however, the distinction between risk assessment and risk management is not evident from the text. While the SPS Agreement defines risk assessment[854] it makes no explicit mention of risk management. The text of the SPS Agreement itself is unclear. Art 5.1 sets out the core obligation as regards risk assessment:

> Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

Questions are raised, however, over the nature of the 'taking into account' provision with regards to other International Organizations such as Codex. It is also unclear what factors should be taken into account in a risk assessment for it to comply with Art 5.1. There is some guidance under the SPS Agreement as it goes on to say:

> In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant

[853] Providing a convenient diagram indicating the interactions between the risk assessment and risk management phases: L Gruszcyzynski, 'Risk Management Policies under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures', 3 Asian Journal of WTO & International Health Law and Policy 1 (2008) 261, 268

[854] Annex 1(A) Para 4 SPS Agreement, 'The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.'

> inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.[855]

Is this a closed list? Or is it merely indicative? If other factors are rejected, would they undermine the entirety of the risk assessment or simply be set aside? The precise scope of the risk assessment obligation is not as clear as it might have been hoped, especially in light of the differing cultures of risk regulation amongst members.

The risk assessment obligations under the SPS Agreement was to become one of the key issues in the *EC – Hormones* dispute brought by Canada and the US over EU restrictions[856] on the treatment of cattle with certain types of hormone and the sale of meat from any such cattle.[857] The question with regard to the risk assessment/risk management distinction was whether the evidence examined as part of the EU's risk assessment complied with the requirements of Art 5 SPS Agreement.[858] The next sections will analyse the manner in which the panels[859] and Appellate Body approached this issue. It will be argued that their interpretation of the SPS Agreement in this area is in part a

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[855] Art 5.2 SPS Agreement. In the case of risks to animal or plant life or health, 'Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.' (Art 5.3 SPS Agreement)

[856] Primarily: Council Directive 81/602/EEC 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action [1981] OJ L222/32, Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action [1988] OJ L70/16 and Council Directive 88/299/EEC of 17 May 1988 on trade in animals treated with certain substances having a hormonal action and their meat, as referred to in Article 7 of Directive 88/146/EEC [1988] OJ L128/36

[857] The hormones used were largely to encourage growth (though they also have applications for the fertility of cattle). See: *EC – Hormones Panel (US)*, II ('Factual Aspects')

[858] Of particular importance for the EU's case was the use of reports of the European Parliament and opinions of the EC Economic and Social Committee (*EC – Hormones Panel (US)*, paras. 8.108-109)

[859] In the first *EC – Hormones* dispute two panels were constituted (one for each claimant). However, as they are near identical and composed of the same panellists, for clarity the *EC – Hormones (US)(Panel)* will be used as the reference point unless otherwise specified.

reflection of the value contestations related to SPS measures. It is also (and perhaps more importantly) closely related to the panels' and Appellate Body's desire to self-legitimate in the eyes of the international community in light of the constitutive and systemic influence of the DSU and their own Working Procedures.

(ii) The Panels' Interpretation of Art 5 SPS Agreement in the *EC – Hormones* litigation

The panels in *EC – Hormones* started by describing Art 5 as relating to two separate sets of rights and obligations: those relating to risk assessment and those relating to risk management.[860] The panels interpreted Art 5 as containing both risk assessment disciplines (Arts 5.1 – 5.3) and risk management disciplines (Arts 5.4 – 5.6).[861] For the panels it was self-evident that any process of risk regulation was divided in this manner and an examination of the risk procedures indicated by other International Organizations such as Codex supported this.[862]

In dividing risk assessment and risk management, the panels chose to characterize the processes as deeply distinct. In general terms, the panel maintained 'that there is a distinction between *risk assessment* which is a *scientific* examination and *risk management* which involves social value judgments.'[863]

Risk assessment was identified as 'an assessment of risks is, at least for risks to human life or health, a scientific examination of data and factual studies; it is not a policy

[860] *EC – Hormones Panel (US)* para. 8.91
[861] Ibid, para. 8.95-8.96
[862] Ibid, para. 8.103
[863] Ibid, para. 8.160 (emphasis in original)

exercise involving social value judgments made by political bodies.'[864] Risk management, on the other hand, follows risk assessment whereupon 'a Member will need to decide, on the basis of its own value judgments, whether it can accept these risks. In so doing a Member sets its "appropriate level of sanitary protection". The determination and application of the appropriate level of protection by a Member is part of risk management.'[865]

In this manner, the panels contrasted the two separate processes, characterising them in what Fisher identifies as rational-instrumental, i.e., interpreting risk assessment as a purely instrumental tool comprised of a series of clear decisions in the field of scientific investigation, followed by the application of the 'science' via risk management in order to achieve specific policy objectives.[866]

Consequently, the panels rejected the use of two reports of the EC Economic and Social Committee and four reports of the European Parliament on the basis that such reports 'evaluated' the scientific evidence and thus were part of the risk management process (and not eligible to contribute to the obligation to base measures on adequate risk assessment).[867] In addition they equated the requirement for a measure to be 'based on' a risk assessment under Art 5.1 to being 'in conformity with' the conclusions of the scientific studies (i.e. the process of risk assessment).[868] Fisher identifies these decisions along with a focus on the evidence of appointed experts and a refusal to engage with broader principles or the difficulties associated with scientific uncertainty as

[864] Ibid, para. 8.94
[865] Ibid, para. 8.160
[866] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 186
[867] *EC – Hormones Panel (US)* para. 8.109
[868] Ibid, para. 8.117

demonstrating the panels' view of risk assessment as a purely instrumental and technical process 'not to be complicated by scientific uncertainty or socio-political complexity.'[869]

The approach taken by the panels at this stage can be explained in different ways: overreliance on the international standards of other International Organizations (even where such standards had not been finalized),[870] taking the US' own approach to risk regulation processes as a model,[871] being influenced by its own frame of reference in determining the appropriate standard of review,[872] or apparent ignorance of the rules of treaty interpretation.[873]

It will be suggested below that no one explanation offers a clear rationale for the panels' treatment of Art 5 and that instead, the reports should be viewed as part of a multi-causal event with the panels' own desire to self-legitimate as the centre-point of the analysis.[874]

(iii) The Appellate Body's Response: Pursuing Self-Legitimation through Deference

The Appellate Body's response to the distinction drawn by the panels was clear: the panels had failed in their primary duty to interpret the SPS Agreement in light of the text

[869] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 187
[870] Ibid, 186
[871] Ibid, 189
[872] M Du, 'Standard of Review Under the SPS Agreement After *EC- Hormones II*', 59 International and Comparative Law Quarterly (2010) 441, 442
[873] *EC – Hormones (Appellate Body)* para. 181 'The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.' The unhelpful tone with which the Appellate Body overturns panel decisions has been criticized elsewhere: P Van Den Bossche, 'The WTO Appellate Body and Its Rise to Prominence', in G Sacerdoti, A Yanovich & J Bohanes (eds.) *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 316
[874] Section B (v), p289ff

as it exists.[875] By distinguishing the provisions of Art 5 on the basis of risk assessment and risk management they had interpreted the text in a way that was inconsistent with actual wording of the agreement. The Appellate Body highlighted the lack of explicit provisions on risk management within the SPS Agreement:

> We must stress, in this connection, that Article 5 and Annex A of the SPS Agreement speak of "risk assessment" only and that the term "risk management" is not to be found either in Article 5 or in any other provision of the SPS Agreement.[876]

The Appellate Body's correction of the panels' application of the risk management/risk assessment distinction was only in part to correct the panels' interpretative method of examining the SPS Agreement. The Appellate Body was also preoccupied by the panels' 'restrictive notion of risk assessment,'[877] reflecting concerns raised in the previous section of a preference for a rational-instrumental approach to the regulation of risk. The Appellate Body was particularly critical of the panels' desire to place within the realm of risk assessment under Art 5.1 only factors that are subject to 'quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences'.[878] Instead, the Appellate Body identified the type of risk to be examined under Art 5 in its now famous statement:

> It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in

[875] *EC – Hormones (Appellate Body)*, para. 181
[876] Ibid
[877] Ibid
[878] Ibid, para. 187

> human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[879]

From a rational-instrumental perspective[880] this is counter-intuitive: the scientific basis for risk assessment is not dependent on the location of the analysis. To contrast risk in a laboratory with risk in the 'real world' misunderstands the process of risk assessment that must necessarily take place under controlled conditions from which risk managers may then extrapolate. If, however, one takes a deliberative-constitutive approach[881] then the Appellate Body's analysis of the requirements of Art 5 view 'standard setting more as a reasoning process that encompassed a fact-finding process rather than solely as a fact-finding process.'[882]

A more deferential position was also taken by the Appellate Body's finding that for a measure to be 'based on' risk assessment for the purposes of Art 5.1 the measure had to have a 'rational relationship' to the risk assessment.[883] Such a relationship was to be determined by the conclusions of the scientific evidence in the risk assessment and the implicit conclusions identifiable from the measure itself (as the panels had indicated) though not at the exclusion of all else.[884]

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[879] Ibid

[880] Under which 'public administration is a Weberian bureaucracy, a "transmission belt" that applies facts to specific legislative commands. Facts include information rigorously policed by scientific and social scientific methodologies and preferences voiced through a fair pluralist participatory process.' (footnotes omitted) E Fisher, 'Food Safety Crises as Crises in Administrative Constitutionalism', 20 Health Matrix (2010) 55, 62

[881] Under which 'public administration is understood as a substantive institution engaging in ongoing problem solving through the exercise of flexible discretion based on deliberation and analysis.' E Fisher, 'Food Safety Crises as Crises in Administrative Constitutionalism' n881

[882] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 188

[883] A Arcuri, 'Food Safety at the WTO after "Continued Suspension": a Paradigm Shift?', Rotterdam Institute of Law and Economics Working Paper Series, No 2010/04, 13. See also, J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2009) 104ff

[884] *EC – Hormones (Appellate Body)* para. 193

By rejecting the panels' interpretation of Art 5 as being divided by risk assessment and risk management, the Appellate Body was not removing the risk management activities from the scope of the SPS Agreement[885] but rather was incorporating them into a broader understanding of risk regulation that accepts qualitative and quantitative information in the analysis.[886] Fisher suggests that the deliberative-constitutive turn of the Appellate Body in this case could reflect a choice between regulatory styles with the Appellate Body accepting the 'more deliberative nature of EU regulatory standard setting.'[887]

Questions over the appropriate interpretation of Art 5 arose again when the EU raised claims against both the US and Canada for continuing to suspend WTO concessions despite (from its own perspective) the EU having complied with the recommendations of the Dispute Settlement Body.[888]

Citing the Appellate Body's criticism of the prior panel determinations, the panels accepted that the lack of reference to risk management provisions under Art 5 specifically and the SPS Agreement more generally, meant that there could be no risk management components in the risk assessment process.[889] However, the Appellate Body, implicitly supported the EU' submission that the panels had misunderstood the purpose of the Appellate Body's previous reasoning. Rather than excluding risk management factors *per se* the Appellate Body confirmed that its concern was at once with the panels'

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[885] In support of this interpretation and arguing for the existence of risk management disciplines in the SPS Agreement: L Gruszcyzynski, 'Risk Management Policies under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures', 3 Asian Journal of WTO & International Health Law and Policy 1 (2008) 261

[886] E Fisher, *Risk Regulation and Administrative Constitutionalism* n832, 188

[887] Ibid, 189

[888] The *EC – Continued Suspension* cases: n843 above

[889] *EC – Hormones Continued Suspension Panel (US)* paras. 7.519-520. While there were two separate panels in this dispute also, as was the case in *EC – Hormones* they are near identical and so, for concision and clarity, references will be made to the panel constituted for the EC – US dispute.

disregard for the text as it was but also the overly restrictive (rational-instrumental) characterisation of risk assessment:

> Therefore, in our view, the Panel's interpretation of "risk assessment" resulted in the same "restrictive notion of risk assessment" that the Appellate Body found to be erroneous in *EC – Hormones*. The Panel sought in this case to rewrite the Appellate Body Report in *EC – Hormones* and to re-establish the rigid distinction between "risk assessment" and "risk management" that the Appellate Body had rejected in that case.[890]

Making it abundantly clear that Art 5 was not to be interpreted in such a fashion that would unduly restrict the factors that might be examined in complying with their obligations under Art 5, the Appellate Body went further, strengthening its deferential stance in light of the appropriate standard of review. Rejecting either *de novo* review that would see the panels substituting members' determinations for their own scientific judgement or total deference that would give members such discretion as to undermine the obligation of the panels to provide an 'objective assessment', the Appellate Body clarified the position to be taken:

> 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.[891]

[890] *EC – Hormones Continued Suspension (Appellate Body)*, para. 542 (footnote omitted)
[891] Ibid, para. 590

Such a stance grants considerable deference to Members in their risk assessments,[892] allowing Members greater freedom over defending their SPS measures.[893] In the next section, it is argued that the interpretation of Art 5 given by the Appellate Body is part of a preoccupation to pursue its own objective as a constituted institution with its own concerns separate to those of the litigants at hand.

(iv) Intra-Institutional Contestations and the Causal Influence of the Dispute Settlement Understanding

It has been argued that WTO law develops in light of three different types of causal influence: the instrumental use of law, the constraining and enabling influence of law as a system and the constituting role of law influencing identities and interests.[894] It was further proposed that this found expression in international trade law as transnational actors sought to project their own preferences onto the institutions and legal framework of the WTO, and thus, the membership as a whole.[895] It would seem clear, therefore, that the debate at the panels and Appellate Body over the appropriate definition of risk assessment under Art 5 SPS Agreement is part of a challenge between alternative EU and US approaches to risk regulation with the former inclined toward a deliberative-constitutive model and the latter a rational-instrumental paradigm.

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[892] S Cho, 'United States: Continued Suspension of Obligations in the EC-Hormones Dispute', 103 American Journal of International Law 2 (2009) 299, 302
[893] M Du, 'Standard of Review Under the SPS Agreement After *EC- Hormones II*', 59 International and Comparative Law Quarterly (2010) 441, 458
[894] Chapter 1 (p28ff)
[895] Chapter 2 (p81ff)

It is hard to reconcile this interpretation with the manner in which the panels and the Appellate Body approached the interpretation of Art 5, however. Such an analysis would ignore the critical focus that the Appellate Body and the panels lent to the 'appropriate' interpretation of the text of Art 5 and their own standard of review. While the alternative approaches of the US and EU may have inspired these bodies, they can only have been part of the process. The Appellate Body and panels do not act in a normative vacuum. Though the EU and US attempt to use law instrumentally by raising claims to pursue their objective (in this specific example, to encourage a specific interpretation of Art 5) they are not the only relevant actors; the Appellate Body and panels themselves also pursues their own objectives that do not necessarily run in tandem with the aims and objectives of the parties to the dispute.

The Appellate Body and panels are constituted under the Dispute Settlement Understanding. In essence, the DSU functions as their constitution, granting them the legal competence and legitimacy to act.[896] The previous chapter saw how the US' desire for the Appellate Body to be limited in its scope, instilling a textual fixation at the level of its constitutive document had unintended consequences for the interpretation of Art XIX GATT. A similar though more complex process has taken place in this instance with the panels and the Appellate Body approaching the interpretation of Art 5 not only through a lens of the paradigms on offer (i.e. rational-instrumental v deliberative-constitutive) but also in light of their own legal framework. Constituted by the DSU, and constrained and enabled by its controls on their behaviour (including the consistent threat of DSB criticism),[897] panels and the Appellate Body see their own interests in

[896] Chapter 2 (B) (iv), p123ff
[897] n340 and accompanying text

maintaining their own legitimacy as grounded in the direction they are given under the DSU.

Panels as Finders and Assessors of Facts

For panels, Art 11 DSU sets out their responsibilities as well as the appropriate standard of review to apply. The Appellate Body confirmed this in *EC – Hormones*[898] and set out what it saw as the key points of emphasis within Art 11:

> The function of Panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[899]

The Appellate Body was at pains to emphasize the appropriate standard of review for panels: neither *de novo* nor total deference but instead an 'objective assessment' which involved considering evidence and making factual findings.[900] The concept of an

[898] *EC – Hormones (Appellate Body)* para. 116
[899] Ibid, underlining in original
[900] Ibid, para. 133

'objective assessment' is unclear and there has been considerable debate over its limits,[901] however, the role of the panel as fact-finder and fact-assessor has considerable conceptual weight.

The negotiating history of Art 11 DSU shows serious concerns of the US over the level of deference that panels were to give national agency determinations.[902] In particular, the US was keen to have a form of *Chevron* deference[903] included in the DSU.[904] The concerns of other participants in the Uruguay Round over limiting the potential strength of panels in examining national measures lead to a deadlock[905] that was only resolved by accepting Art 11 DSU as it now stands with a more restrictive standard of review under Art 17.6 Anti-Dumping Agreement.[906] The wording of Art 11 DSU has encouraged panels to view their role as defined by the text of the agreement, with the focus on fact-finding particularly relevant.[907] Focussing on its role as fact-finder and assessor of facts produces a far closer fit with a rational-instrumental approach to

[901] R Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar 2012) 50-52

[902] Indicated in interviews conducted by John Jackson: S Croley & J Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', 90 American Journal of International Law 2 (1996) 193, 194-195

[903] On *Chevron* deference: n798 and accompanying text.

[904] S Croley & J Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments', n902, 194-195

[905] On the negotiating history of Art 11 DSU: M Oesch, *Standards of Review in WTO Dispute Resolution* (OUP 2003) 72-80

[906] Art 17.6, Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994: 'in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned; (ii) the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.'

[907] See generally, M Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (OUP 2009) chapter 5

regulation and review of decision-making.[908] It makes sense that in trying to legitimize itself, the panels would be more inclined to support a restrictive view of what constituted risk assessment.

The Appellate Body as the 'World Trade Court'

The Appellate Body has constructed a different role with a different purpose within the WTO institutional framework. Rather than acting as a trier of fact, the Appellate Body's role has become that of the 'World Trade Court' in all but name.[909] This development, by no means inevitable,[910] has had a profound influence on the way that the Appellate Body examines cases before it and, in the specifics of the conflicting paradigms here, inclines it toward a deliberative-constitutive model of decision-making.

It was not clear at the founding of the WTO, that the Appellate Body would take the form that it has since taken.[911] Art 17 DSU sets out the competences of the Appellate Body specifically and is cautious in its terminology. There is no mention of a 'court' 'tribunal' or 'judges' and the number of permanent members is considerably lower than

[908] n832 and accompanying text

[909] C.D Ehlermann, 'Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the WTO', Journal of World Trade (2002) 605. An alternative name previously suggested is the 'International Court of Economic Justice': JHH Welier, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Harvard Jean Monnet Working Paper 9/00 (2000) IV:1

[910] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization', in R Yerxa & B Wilson, *Key Issues in WTO Dispute Settlement: The First Ten Years* (CUP 2005) 63-64. Also, P Van Den Bossche, 'From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System', Maastricht Faculty of Law Working Paper 2005/1

[911] R Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 American Journal of International Law 2 (2004) 247, 250

comparable international tribunals.[912] Though permanent, members of the Appellate Body are not contracted on a full-time basis but rather maintained on monthly retainer with daily fees factored in.[913] They do not sit together but in divisions of three,[914] potentially minimising their ability to lay down particularly authoritative decisions of the full Appellate Body as is customary in other legal systems.[915] Finally, the Dispute Settlement Body, a political organ of all members of the WTO, must adopt decisions of the Appellate Body. While in practice adoption is a formality due to the negative consensus rule,[916] in theory it constitutes a serious limitation on the autonomy of the Appellate Body. At the very least is creates opportunities for the public criticism of Appellate Body decisions by the Membership.

The first seven members of the Appellate Body were instrumental in defining its role as it stands today.[917] The role of judicial actors in creating transnational institutions is not new, Eric Stein identified the process in the European context in 1981.[918] The WTO has been little different with the Appellate Body acting to consolidate its position and maintain its own legitimacy.[919] In spite of limited guidance from the DSU[920] and a weak

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[912] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization' n910, 65-66 citing the numbers of other permanent judges on international tribunals: 15 on the International Court of Justice, 18 on the International Criminal Court and 21 on the International Tribunal for the Law of the Sea

[913] Establishment of the Appellate Body: Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (19 June 1995) WT/DSB/1, paras. 10-12

[914] Art 17.1 DSU

[915] The practice of sitting *en banc* to enhance the authority of decisions of a court and thus provide greater certainty is principally found in courts within common law systems.

[916] Art 17.14 DSU

[917] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization', n910 69: 'most, if not all, members appointed in November 1995 shared a nearly missionary belief in the importance of the task entrusted to them.'

[918] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 American Journal of International Law 1 (1981) 1

[919] Behaving as a 'strategic quasi-judicial actor', J McCall Smith, 'WTO Dispute Settlement: The Politics of Appellate Body Rulings', 2 World Trade Review (2003) 65, 79

mandate from its accompanying negotiating history, the Appellate Body members constituted their identity through their decisions (some considered of particular 'constitutional' importance[921]) and their own Working Procedures[922] that served to 'cure' some of the obstacles to the Appellate Body's legitimacy; Van den Bossche identifies Rule 4 of the Working Procedures, which sets out a mechanism for the 'exchange of views' between all members before finalizing a report, as a key way to resolve the dangers of inconsistency and reduced authority that the three member divisions may otherwise have caused.[923] More generally the Working Procedures have served to ensure the judicial character of the procedures at the Appellate Body as opposed to the more informal pre-WTO dispute settlement practices.[924]

A consequence of the judicialization of the Appellate Body system has been its need to ensure its own legitimacy in face of claims of activism. Chapter 3 saw how the textual focus of the Appellate Body in the interpretation of the 'unforeseen developments' clause could be understood as an attempt to strengthen its position following the guidance set out in the DSU (particularly Art 3.2 DSU).[925] Taking the embedded textual focus stemming from the DSU and the Appellate Body's desire to

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[920] The limited guidance offered by the DSU to the members of the Appellate Body may well further explain their fixation with what little guidance exists: i.e. Art 3.2 DSU and thus the textual methodology on which their legitimacy rests.

[921] The Shrimp-Turtle report (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body (12 October 1998) WT/DS58/AB/R), for example, setting out the scope of non-WTO obligations within the interpretative role of the Appellate Body: 'perhaps the most interesting constitutional case' according to J Jackson, 'The Varied Policies of International Juridical Bodies – Reflections on Theory and Practice', 25 Michigan Journal of International Law (2004) 869. Arguing for the role of the Appellate Body in engaging in constitutional behaviour: D Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm Generation as the Engine of Constitutional Development in International Trade', 12 European Journal of International Law (2001) 39

[922] Currently: *Working Procedures for Appellate Review (4 January 2005) WT/AB/WP/5*

[923] P Van Den Bossche, 'The Making of the "World Trade Court": the Origins and Development of the Appellate Body of the World Trade Organization' n910, 69-71

[924] R Hudec, 'The New Dispute Settlement System of the WTO: An Overview of the First Three Years', 8 Minnesota Journal of Global Trade (1999) 1

[925] Chapter 3 (C) (ii), p204ff

establish a mandate as a global trade court, the result is a balance between a textual focus in interpreting the covered agreements and, insofar as this textual approach allows, deference to the Member's own determination. This is a two-stage legitimising tactic: first, identifying the proximate source of legitimacy (the DSU) and second, shielding the institution from criticism of activism from the membership (greater deference). The key point to note here is how the legal instruments constituting the Appellate Body as an institution influence its identity, though not necessarily as expected: the individual actions and priorities of the actors involved (in this case, the Appellate Body members) have also played a part in its development.

When deciding on the appropriate distinction between risk assessment and risk management, the Appellate Body chooses the model that fits best within its own preferred approach: specifically the deliberative-constitutive paradigm. Though the Appellate Body does not go so far as to review the decisions made by the EU along deliberative-constitutive lines, what is does is accepts the paradigm as one that fulfils the requirements of the SPS Agreement. Its priority, therefore, is not to prefer one approach to another in a neutral fashion but instead, selecting the approach that allows it to ensure its own legitimacy as it sees it. The process of value contestation between the litigating parties feeds into the options available to the Appellate Body as it examines them as an autonomous transnational actor itself. While the panel focussed on a rational-instrumental model that coincided with its own understanding of its constituted role as fact-finder and assessor of fact, the Appellate Body encouraged a deliberative-constitutive approach that fits how it understands its own constituted role. Conscious of its own conception of its appropriate behaviour, the Appellate Body marries its own

priority to self-legitimize with the available paradigms developed within the jurisdictions of the Members before it. The result is a focus on textual fidelity compounded by deference to the details in national agency determinations.

The development of the risk assessment/risk management distinction under the SPS Agreement in the *EC – Hormones* litigation is best understood as part of a broader process of value contestation surrounding the locus of decision-making in SPS matters and the methods that these decision-makers should use. It has been argued here that the outcome of the *EC – Hormones* cases owes just as much to the way the Appellate Body and panels understand their own roles as dispute settlors as the challenges between the primary litigants.

The following section will examine how the WTO system has been responding to the increasing importance of private standards in SPS regulation. While the debate in this section was centred at the dispute settlement system, the WTO's response to private standards stems from another site of development: the committee system.

C. Private Standards

The debate over the appropriate level of review and the locus of decision-making in determinations of risk by administrative bodies serves as the backdrop for many of the debates surrounding SPS measures.[926] While the previous section examined this debate in light of the dispute over the proper distinction between risk assessment and risk management under WTO law, this section examines the role of private standards. While

[926] Chapter 4 (A) (iv), p266ff

debates at the WTO level over the appropriate distinction between risk assessment and risk management took place through the dispute settlement system, the contestations and norm export pursued over private standards takes place within the committee structure of the WTO.

(i) Description and Rationale

Private standards are non-governmental measures; they are neither mandated nor directly regulated by governmental authorities.[927] They are widespread and their numbers are increasing.[928] The definition currently suggested at the SPS Committee (in draft form) defines SPS-related private standards as:

> … [voluntary] requirements which are [formulated, applied, certified and controlled] [established and/or adopted and applied] by non-governmental entities [related to] [to fulfil] one of the four objectives stated in Annex A, paragraph 1 of the SPS Agreement and which may [directly or indirectly] affect international trade…[929]

[927] Though there may be indirect legal regulation through competition law or consumer protection law, for example.

[928] At last count, in 2007, the International Task Force on Harmonization and Equivalency in Organic Agriculture ('ITF') identified 400 certification schemes for the classification of 'organic' produce alone: ITF (Joint Initiative International Federation of Organic Agriculture Movements, Food and Agriculture Organization, UN Conference on Trade And Development) 'Requirements for certification bodies – situation and scope for harmonization' (October 2005) 55

[929] Note by the Secretariat, 'Proposed Working Definition On SPS-Related Private Standards' (6 March 2012) G/SPS/W/265, 1-2

Private standards serve a range of purposes and 'cover, safety, quality, labour, social and environmental issues'.[930] Private standards potentially affect numerous products, setting requirements for certification that is desirable to consumers and thus producers and suppliers.

SPS-related private standards have developed as a result of consumer concerns on one hand, and producer concerns on the other. For some consumers (within the European Union most notably), the public failings of governments to prevent, and in some instances respond to, food crises undermined trust in the ability of public authorities to protect the health of the citizenry in this regard.[931] Even within States where consumers did not experience such failings, they demonstrate an increased interest in food production methods whether for their impact on personal health or for social or environmental reasons.[932] Producers and retailers can take advantage of such concerns by differentiating their products within the market on the basis of certification that demonstrates commitment to one or more priorities of consumers.[933] Furthermore, the globalization of supply chains (and the use of vertical integration to minimise costs) as well as the increasing international reach of supermarkets and restaurant chains adds an incentive for these industries to minimize costs by creating harmonized standards across their businesses.[934] In some instances, adherence to private standards can also

[930] Decision of the Committee on Sanitary and Phytosanitary Measures, 'Actions Regarding SPS-Related Private Standards' (6 April 2011) G/SPS/55, para. 4

[931] See n758 and accompanying text

[932] J Wouters & D Garaets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 World Trade Review 3 (2012) 479, 480

[933] For example, The Marine Stewardship Council 'Certified Sustainable Seafood' label requires compliance with standards on sustainable fishing practices and traceability (<www.msc.org>) and is recommended as a minimum standard by popular campaigners for sustainable fishing (e.g., 'Fish Fight' <http://www.fishfight.net/sustainable-tips>) (accessed 1 October 2012)

[934] Note by the Secretariat, 'Private Standards and the SPS Agreement' (24 January 2007) G/SPS/GEN/746, 2

demonstrate due diligence for the purposes of food safety regulations within certain jurisdictions.[935]

Some private standards are developed within a global framework such as the GLOBALG.A.P system that provides certification for farmers that comply with certain 'Good Agricultural Practices'.[936] Other private standards are Member-specific such as the UK-specific 'Freedom Food' certification monitored by the Royal Society for the Protection of Cruelty to Animals,[937] or firm-specific such as Waitrose's 'Select Farm' label. All of these standards share a key characteristic: they are developed and maintained by private interests rather than public ones. The private interests involved are not necessarily producers or retailers (though this is the most common arrangement) but also consumer groups and NGOs. Their private nature does, however, create a serious difficulty for regulating the potential effects of such standards on international trade.

The trade impact of private standards can be serious. For producers who are required to comply with numerous different firm-specific or Member-specific certification processes in order to access foreign markets, private standards may undermine economies of scale and add cumulative burdens in compliance costs.[938] Indeed, for some Members (particularly those with large tourist industries) private standards can limit the access of domestic producers to buyers such as multinational

[935] Ibid
[936] On the legitimacy of GLOBALG.A.P in particular: N Hachez & J Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards: Assessing the Public Accountability of GLOBALG.A.P.', 14 Journal of International Economic Law 3 (2011) 677
[937] See: <http://www.rspca.org.uk/freedomfood> (accessed 1 October 2012)
[938] WTO World Trade Report 2012, 'Trade And Public Policies: A Closer Look At Non-Tariff Measures In The 21st Century' (WTO 2012) 86

hotels within the territory of that very Member.[939] While private standards can offer producers the opportunity to market their own products distinctly (and potentially adding value), [940] the use of these standards is increasingly being seen as a one-sided process with powerful retailers in developed countries setting down further requirements (over and above governmental SPS requirements) for producers in the developing world.[941] The complexity of the standards further adds burdens to the producers and contributes to the impression that such requirements are unnecessary and constitute an arbitrary exercise of power.[942]

At the SPS Committee, in debates over SPS-related private standards, the government of Uruguay expressed its frustration, shared by many developing Members:

> 3. Our export sectors have been successful in gaining access to the demanding import markets of many developed countries. This has been made possible over the years by the tireless and persistent joint efforts of the competent national authorities and the private actors concerned. But since the requirements of importers and the sanitary and phytosanitary situations in the different countries tend to evolve extremely rapidly, remaining in the markets is a full-time job for exporters. And so far, we are referring only to official sanitary and phytosanitary import requirements.

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[939] Communication from the Bahamas, 'Report By The Commonwealth Of The Bahamas To The WTO-SPS Committee On Private Standards And The SPS Agreement: The Bahamas Experience' (28 February 2007) G/SPS/GEN/764, para. 2

[940] WTO World Trade Report 2012, 'Trade And Public Policies: A Closer Look At Non-Tariff Measures In The 21st Century' (WTO 2012) 86

[941] Ibid

[942] '[Private standards] may be light-years more detailed and complicated than what is required nationally, therefore they may appear whimsical and capricious with little scientific basis.' Communication from the Bahamas, 'Report By The Commonwealth Of The Bahamas To The WTO-SPS Committee On Private Standards And The SPS Agreement: The Bahamas Experience' (28 February 2007) G/SPS/GEN/764, para. 6

> 4. However, the situation has become even more complex with the appearance in recent years of so-called "private standards", which impose additional requirements. *So that in practice, to enter an importing country where there are companies that impose private standards, many export products have to meet both official and private requirements. Otherwise, there simply is no trade*.[943]

It is the contribution of private regulation to the more traditional burden of public regulation that is causing such concern. The shift from a site of public governance to private governance for some areas of SPS regulation stem from the failures of public administration in food crises by some Members and the globalization of supply chains amongst others. However, it presents a serious problem for the WTO system that, though a site for continual processes of contestation over the appropriate levels of regulation and their nature in trade, did not contemplate the extension of SPS matters into the private sphere.

The next section briefly outlines the legal difficulty with regulating SPS-related private standards at the WTO. It will be argued that while the WTO cannot regulate them directly, the institutions of the WTO still serve as a site of contestation for transnational actors who can then use the committee structures to encourage adoption of their own preferences amongst the membership. Interestingly, just as the constituted institutions of the dispute settlement system influenced the interpretation of Art 5 SPS Agreement, the

[943] Statement by Uruguay at the Meeting of 2-3 April 2008 'Private Standards' (21 May 2008) G/SPS/GEN/843, paras. 3-4 (emphasis added)

SPS Committee is playing an increasing role in the regulation of private standards as an autonomous actor.

(ii) The Legal Difficulties with Regulating Private Standards at the WTO

At the heart of the debate surrounding SPS-related private standards is the proper scope of Art 13 SPS Agreement that sets out the scope of Members' obligations under the SPS Agreement:

> Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or

phytosanitary measures only if these entities comply with the provisions of this Agreement.[944]

Members are responsible, therefore, for their own actions through governmental bodies but must also 'take such reasonable measures as may be available to them' to ensure compliance by regional and non-governmental entities within their territory. Further, they shall not 'take measures which have the effect of directly or indirectly, requiring or encouraging' those bodies to act inconsistently with the SPS Agreement and where they use the services of these bodies to implement SPS measures they can do so 'only if these entities comply' with the SPS Agreement.[945]

The interpretation given to 'non-governmental entities', 'regional bodies' and 'local government bodies' was likely intended to be a narrow one from the drafters' perspective.[946] Importantly this would not have been meant to include, for example, a large supermarket chain in most instances. Rather, the priority appears to have been to resolve potential issues with members that have federated structures where certain SPS competences are at a regional or local level. This is an unusual stipulation from the perspective of public international law[947] as the responsibility on the part of the State for the actions of sub-State bodies is largely uncontested.[948] Similarly, the requirement that

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[944] Art 13 SPS Agreement

[945] Ibid

[946] J Wouters & D Garaets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 World Trade Review 3 (2012) 479, 484

[947] Which WTO law is part of: *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body (29 April 1996) WT/DS2/AB/R, 17. See generally, J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003)

[948] Art 4(1) Articles on Responsibility of States of Internationally Wrongful Acts (2001) GAOR 56th Session Supp 10, 43 ('ASR'): 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, *and whatever its character as an organ of the central Government or of a territorial unit of the State*.' (emphasis added) See also, *LaGrand* (*Germany v United States of America)* (Provisional Measures) [1999] ICJ Rep 9, 16 para. 28

where Members 'rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures' such entities must comply with the provisions of this Agreement is already covered under rules of State responsibility in public international law: specifically, either Art 5 ASR ('Conduct of persons or entities exercising elements of governmental authority') or Art 8 ASR ('Conduct directed or controlled by a State').[949]

An analogy has been drawn between the panel's approach in *Japan – Film*[950] (considering seemingly private acts to be governmental in nature) and attributing the actions of private actors in SPS measures to Members.[951] However, for the act to be governmental in some way, the level of involvement by the Member is sufficient that it would already fall within both Article 13 SPS Agreement and the rules on State responsibility.[952] This is in a large part as the concern in *Japan – Film* was for measures that were governmental in all but form to escape scrutiny. This is not the case here where private standards are not necessarily encouraged by government (indeed, one could imagine circumstances where governments would prefer private standards not to exist so as not to create disputes with trading partners).

It appears that Members are only under an obligation for what they do themselves, or what they authorize or direct others (including private bodies) to do in their name. A more fruitful avenue for attempting to include private standards within the remit of the SPS Agreement is the more general obligation under Art 13: the obligation

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[949] The inclusion of such provisions in Art 13 in spite of this may reflect the nature of the negotiators (i.e. largely diplomatic rather than legal) or alternatively, foreseeing potential concerns with the European Union or other regional groupings that do not fit into the traditional rules of State responsibility: hence the need for the development of, and difficulties in concluding the ILC 'Draft Articles on the Responsibility of International Organizations' (2011) UN Doc A/66/10

[950] *Japan – Measures Affecting Consumer Photographic Film and Paper*, Panel Report (31 March 1998) WT/DS44/R, 10.328

[951] J Wouters & D Garaets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 World Trade Review 3 (2012) 479, 485

[952] Particularly Arts 4,5 & 8 ASR n948

'not take measures which have the effect of, directly or indirectly, requiring or encouraging' such bodies to breach the agreement. The prohibition on measures that might 'encourage' non-governmental bodies to breach the SPS Agreement is potentially broad, however, there again an analogy could be drawn to non-violation complaints[953] that are similarly broad in potential yet have been interpreted narrowly.[954]

The problem faced in regulating SPS-related private standards at the WTO is not unlike the problems faced in an attempt to regulate new voluntary export restraints identified in the previous chapter. The shift from public actors to private actors, or from the public sphere to the private sphere has created difficulties for those that wish for regulation to be centred at the WTO and opportunities for those who see greater possibilities for norm export in moving measures away from WTO oversight.

For actors keen on retaining WTO oversight, the limited legal basis for regulating SPS-related private standards at the WTO provides a serious challenge. In the previous chapter, the limitations of using the text of an agreement to export a transnational actor's own preference was identified: notably that a change in circumstances could potentially undermine the original aim. In the development of some areas of safeguards regulation, the result was an attempt to develop the law via the quasi-judicial organs of the WTO. The response by some members in SPS matters has been to use the committee system of the WTO.

[953] Article XXIII:1(b) GATT 1994

[954] On the limited application of non-violation complaints: *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products,* Report of the Appellate Body (19 December 1997) WT/DS50/AB/R, 14-18

(iii) The SPS Committee as a Mechanism for Norm Export

First raised at the SPS Committee in 2005 by St Vincent and the Grenadines,[955] private standards have been a regular point of contention at the Committee.[956] In 2011, however, tentative agreement was reached over five 'actions' to be taken by the Committee and Members in relation to SPS-related private standards.[957] A sixth 'action' was not adopted and is currently subject to further negotiation.[958] This section will examine the content of these proposed actions and highlight their purpose in refocusing the debate within the institutions of the WTO. Whereas private standards escaped WTO oversight by shifting to the private sphere, the new movements of the SPS Committee attempt to bring them back into the WTO fold and thus subject them to WTO regulation. Due to their inherently private nature, however, this takes place not through traditional legislative/judicial oversight institutions but rather through two complementary mechanisms: alternative, 'softer' quasi-legislative/adjudicative processes constraining and enabling actors; and by maximising the opportunities to 'educate' those involved in SPS-related private standards in the outlook and priorities of the WTO institutions.[959]

The content of the five adopted actions within the Private Standards Decision[960] and their difference to the sixth all point to a new approach to engaging with SPS-related

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[955] Committee on Sanitary and Phytosanitary Measures, Summary of Meeting Held 29-30 June 2005, G/SPS/R/37, paras. 16-20

[956] E.g., 'Private Standards, Mediation Cause Conflict at WTO Committee Meeting', Bridges Weekly Trade News Digest (7 July 2010) Vol. 14 No. 25

[957] Decision of the Committee on Sanitary and Phytosanitary Measures, 'Actions Regarding SPS-Related Private Standards' (6 April 2011) G/SPS/55 ('Private Standards Decision')

[958] Committee on Sanitary and Phytosanitary Measures, 'Proposed Revisions To Action Six Of The Report Of The Ad Hoc Working Group On SPS-Related Private Standards (20 June 2011) G/SPS/W/256

[959] J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2009) 45-48

[960] Private Standards Decision, n957

private standards. While the discussion had previously focussed on the competence of the WTO to regulate such measures,[961]these actions concentrate on taking subtle consensual measures that take care not to impinge on sovereignty concerns.[962]

The five actions in the Private Standards Decision are as follows: first, the SPS Committee is to develop a working definition of 'SPS-related private standards';[963] second, the SPS Committee should inform the Three Sisters of developments in discussions over SPS-related private standards and encourage them to do the same;[964] third, the SPS Committee is to invite the Secretariat to inform it on relevant developments in other WTO bodies;[965] fourth, Members are to communicate with relevant actors involved in private standard-setting within their territory and 'underline the importance' of the Three Sisters' standards and the concerns of others with regard to private standards;[966] and finally, fifth, the SPS Committee is to 'explore the possibility' of working with the Three Sisters to develop and disseminate materials highlighting the importance of international SPS standards (i.e. public standards).[967]

The purpose of the five actions is to establish the SPS Committee as the centre-point for debates surrounding SPS-related private standards. By ensuring that it sets the framework of the debate by defining the contours of what constitutes 'SPS-related private standards' (Action 1), acting as a meeting point for the relevant public international

[961] E.g., T Epps, 'Demanding Perfection: Private Food Standards and the SPS Agreement', in M Lewis & S Frankel (eds.) *International Economic Law and National Autonomy* (CUP 2009), J Wouters & D Garaets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 World Trade Review 3 (2012) 479

[962] For example, in the actions, the phrase 'given its mandate' is used to indicate the limitations on the SPS Committee's freedom to act given its limited legal competence (Private Standards Decision, n957 paras. 6,7)

[963] Private Standards Decision, n957 paras. 5-7

[964] Ibid, paras. 8-9

[965] Ibid, para. 10

[966] Ibid, paras. 11-12

[967] Ibid, paras. 13-14

bodies in the field (Action 2), as well as other WTO institutions (Action 3), and initiating a publicity campaign to encourage the use of (public) international standards (Action 5), the SPS Committee sets itself as the nexus for debates in the field. The role of the SPS Committee in carrying out transparency and reporting functions within the SPS legal regime is already documented,[968] allowing the Committee to perform a rule generating role as well as a fulfil a compliance function. The traditional legislative/adjudicative approach is shifting for a 'softer' form of governance that allows the WTO to remain the principal site for value contestations. This is a particular priority for those actors who are privileged by the WTO system: governmental representatives and (public) international standard setters.[969]

The SPS Committee also enhances its position by co-opting Members to carry out its functions within their own territory (Action 4). While the other actions focus on horizontal challenges to the WTO's primacy (i.e. amongst international actors), this action uses the Members to pursue the objectives set by the SPS Committee without raising the sorts of sovereignty concerns that might be expressed in instances of more overt and formal vertical integration of governance structures.[970]

It is telling that the sixth proposed action that was not adopted is the only action that would (in one version) have potentially undermined the SPS Committee's role as institutional centre-point. The sixth action encourages Members:

> to exchange, outside the formal and informal sessions of the SPS Committee, relevant information regarding SPS-related private standards to

[968] J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP 2009) chapter 2

[969] See Chapter 2 (B) (iii) & (C) (ii), p119ff and p137ff respectively

[970] Cf. The EU model that turns national courts into EU courts by virtue of the doctrines of direct effect and indirect effect.

> enhance understanding and awareness on how these compare or relate to international standards and governmental regulations…[971]

While this would achieve the goal of bringing private standards back into public regulation it would have done so away from the SPS Committee. Without this action, fora used to encourage particular ways of thinking about SPS-related private standards and institutional learning take place under the aegis of the SPS Committee.

One recent example of the SPS Committee serving as the focal point for institutional learning and the 'teaching' of appropriate behaviour is a workshop on coordination between national and regional bodies in SPS regulation.[972] The workshop was primarily targeted at improving regional and national coordination, not between or at the WTO:

> The objective of the workshop was to bring together officials responsible for participation in and implementation of the SPS Agreement, … [and] the "Three Sisters"… for an in depth discussion, at a technical level, *on best practices in coordination at national and regional levels*. The WTO Secretariat, through the Global Trust Fund (GTF), sponsored the participation of fifty officials from least-developed and developing countries to the workshop and the subsequent meetings of the SPS Committee.[973]

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[971] Emphasis in original: Committee on Sanitary and Phytosanitary Measures, 'Proposed Revisions To Action Six Of The Report Of The Ad Hoc Working Group On SPS-Related Private Standards (20 June 2011) G/SPS/W/256, 1

[972] Note by the Secretariat, 'Summary Report of the Workshop on SPS Coordination at the National and Regional Levels - 17 October 2011' (17 January 2012) G/SPS/R/65

[973] Ibid, para. 3 (emphasis added)

The SPS Committee serves as the primary site for attracting interested actors in the development of SPS-related private standards. Instead of the blunt and more obvious methods of incorporating preferences in provisions of the covered agreements or prioritising judicial decision-making, in this instance the law is developing at the SPS Committee. In spite of the different location for decision-making and value contestation, the Committee (like the dispute settlement system) still functions as a nexus for the same three types of cause: systemic, instrumental and constitutive.

Concluding Remarks

The process of value contestation in private standards differs only slightly from the debate surrounding the appropriate distinctions between risk assessment and risk management. Both focus on the locus of decision-making in regulating SPS matters. In the case of the *EU – Hormones* litigation the focus was on the identity and methodology of the regulator, how proximate to the citizen should the decision-maker be? How should the decision-making take place? And how are these questions to be answered in light of the priorities and cultures of the societies that take these decisions?

In the case of private standards the questions are also concerned with the identity and approach of the regulator, only here the question is whether this should be a private matter or a public one. It is an interesting theme that reappears: as public regulation at the international level becomes more effective or demanding, some actors seek to shift the battlefield to the private sphere with the expectation or hope that Members will not

involve themselves at an international level.[974] It is not only governments that are involved with these debates: one of the key points raised in this chapter was the importance of actors other than the parties to a dispute. Whether it is the Appellate Body or the SPS Committee, these institutions are both sites of value contestation themselves as well as actors in their own right with their own priorities.[975]

The principal objective of this chapter has been to highlight the complexities of how WTO law develops in this area. It is tempting to approach debates as between two sides, each putting forward their own interpretation of the facts and law with the judicial organs acting as neutral arbiters. The version put forward here is far more complex, indicating numerous actors competing within a multi-layered framework of legal influences that interact in different and unexpected ways.

[974] This has also become an issue with safeguard measures in the completion of new voluntary export restraints, see chapter 3 (D) (iii), p228ff

[975] See: chapter 2 (A) (iii), n240 and accompanying text

Conclusion

This thesis set out to examine how WTO law develops in light of transnational influences. Accepting a wide range of influences, the framework incorporated numerous transnational actors engaging across numerous jurisdictions. By taking into account various causal influences (systemic, instrumental and constitutive) on the behaviour of transnational actors, it is hoped that this offered a convincing explanation of how certain areas of WTO law have developed in light of these transnational processes.

The primary objective of this thesis has been to offer convincing explanations of why WTO law has developed in the way that it has in two key areas of international trade regulation: safeguard measures and SPS measures.

In the development of safeguard measures it was argued that the approach of the Appellate Body in interpreting the obligations of Art XIX GATT was the result of its own attempt to self-legitimize in light of prior norm exports by the US. Rather than demonstrating an ignorance of the law on safeguard measures, or failing to appreciate the consequences of its decisions, the Appellate Body's role in developing the law on safeguard measures was motivated by processes of norm export and value contestation. By ensuring its own legitimacy (as it saw it), the Appellate Body sought to offer a principally 'textual' interpretation of Art XIX, not out of narrow-minded automation but rather as part of a broader process to ensure its own position as the ultimate arbiter of WTO law.

Meanwhile, the traditional account of the Agreement on Safeguards' success in abolishing or even regulating voluntary export restraints was challenged. The inclusion of

such measures within the regulatory system of the WTO did not guarantee long-term compliance with WTO law. Instead, as part of a continuing process of norm export and value contestation by various actors, acting across jurisdictions, voluntary export restraints continue to exist and indeed continue to be concluded.

In the case of SPS measures, the interpretation of Art 5 SPS was examined in light of the competing interests of the principal litigants but also the panels and Appellate Body. The importance of the values underlying the regulation of SPS measures gave the litigants particularly strong motivations to ensure the dominance of their position, while the interpretation given by the different dispute settlement institutions reflected their own preoccupations and processes of value contestation. The development of the application of Art 5 SPS turned not on the specific interpretation given by the panels or Appellate Body. The interpretation was instead part of a wider exercise in competing interests and positions of various transnational actors, each coming with their own perspective and priorities.

The regulation of SPS-related private standards was examined in light of the constituted identity of the SPS Committee acting as an autonomous institution, itself engaged in ensuring its own legitimacy and centrality within the regulation of measures that might otherwise escape WTO scrutiny. Rather than viewing private standards as a novel development presenting new challenges for international trade regulation, parallels were drawn with the movement away from WTO scrutiny in safeguard measures by voluntary export restraints, as well as the more profound debates over the role of SPS measures and the nature of international legal regulation.

It is hoped that the causal framework developed in this thesis has been validated in two ways. First, that the processes of legal development outlined in chapters 1 and 2 were identified in the regulation of safeguard measures and SPS measures. Second, that examining the development of safeguard measures and SPS measures in light of these processes provided a convincing explanation for how the WTO law in these areas has progressed.

While this thesis did not seek to provide a predictive model, explanatory accounts can nonetheless offer insights. There are four key points that arose in this thesis that merit discussion and potentially, further investigation. The first is a general observation of the effectiveness of different methods of norm export. The second point is the importance of institutions as constituted and autonomous actors on the development of WTO law. The third is the possible trend of behaviour at the international level moving from the public to the private sphere, thus avoiding the increasingly effective oversight of international institutions. The fourth point of interest is whether a causal account continues to have merit in light of the increasing importance of emerging economies and the changing political dynamics at the WTO.

A. The Effectiveness of Different Methods of Norm Export

Drawing conclusions from the effectiveness of different types of norm export helps to understand the development of WTO law more clearly. It was posited that there were two primary ways to export norms: embedding norms and stimulating challenges between

competing conceptions of the law.[976] Some methods suggested appear to have been more effective than others, though the overall picture is one where the objectives of those engaged in norm export are rarely achieved in the expected manner.

In the first instance, embedding norms by crystallising them as treaty obligations seems to have had limited success. Not only is this difficult given the required power asymmetries and right timing but such crystalized norms are then subject to interpretation and development by the institutions set up to monitor them. Embedding norms within institutional structures through their constitutive instruments would appear to have a greater impact, however, this does not seem to be particularly predictable. We have seen how the US' hope for a restricted dispute settlement system that would exercise a particularly deferential standard of review with regard to administrative agency decisions has not materialized. While Members tend to complain when they lose cases and the US has been losing far more than it expected to, however, there is also a sense that the reason that these cases are being lost is because others do not properly understand how to apply or interpret trade law.[977]

Stimulating a challenge over competing interpretations of the proper role or use of a legal provision does seem to be more effective. Indeed, even Members such as the US that attempt to insulate themselves from potentially negative determinations at the WTO level do, in practice, alter their behaviour over time in order to comply.[978] While there are still instances of non-compliance, largely in highly politicized and emotive areas such as

[976] Chapter 2 (A) (i), p83ff
[977] E.g.; J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation?' 6 Journal of International Economic Law 1 (2003) 113
[978] The case of the alteration of US practice in agency investigations over safeguard measures (p214ff)

those arising from SPS measures (with the Beef Hormones litigation and GMO dispute[979] being the most notable of these), the dispute settlement system and accompanying compliance mechanisms at the WTO still ensure the general effectiveness of the WTO system. The scope of stimulating such challenges at the WTO, therefore, would still appear to hold interest for Members.

There are nonetheless limitations on stimulating legal challenges as a method of norm export: stimulating challenges over the use of a provision is not simply a matter of putting forward one interpretation against another. The judicial or administrative bodies themselves have a clear role to play as do other forums such as the SPS committee or other international standard setting bodies. This is further complicated by the processes of value contestation encouraged by transnational actors at the domestic level. Where the actor's preferred stance is accepted by the State, it becomes privileged and, as is the case in dispute settlement proceedings, while not offering the only options available to a panel or the Appellate Body, do frame the debate thus constraining the decision-making of the institution in question.

B. The Importance of Institutions as Transnational Actors

One of the key insights that the case studies highlighted was the importance that created institutions had as autonomous actors. States, International Organizations, and the bodies within them such as administrative agencies, committees and dispute settlement

[979] In instances where non-compliance is accepted it may be easier to find a resolution via mutually agreed solution (such as the apparent conclusion to the Beef Hormones litigation) rather than situations of 'false' compliance where a Member claims compliance but the subsequent actions are questionable. The EU's response to the GMO litigation is the most notable example of such a situation.

institutions all play a role in the development of WTO law, not only as forums but also as actors in their own right. The interesting issues here arise by virtue of their autonomy from the aims of those that create them or attempt to control them. Often unexpected, it is suggested here that their behaviour is best understood through the three different types of cause, and that where actors are surprised by the behaviour of the institution it is as a result of only examining one type of causal influence.

As transnational actors seek to pursue their objectives they are constrained and enabled by the rules of domestic law as well public international law. As a consequence, they are encouraged to use the institutions and personality of the State or create new institutions such as International Organizations or the bodies within them. We have seen, however, that these institutions then constitute actors in their own right pursuing their own interests such as legitimising themselves and ensuring that their own preferences are accepted. The result is that they can be difficult to predict. The difficulties arising from explaining their behaviour comes from examining them in light of one of the three causal influence: instrumental, systemic and constitutive.

A purely instrumental view of the law would suggest that institutions behave as they are told to.[980] However, institutions do not do exactly as instructed for various different reasons, principally that it is not clear what it is that they are instructed to do, as their mandate requires some form of interpretation.[981] Further, there is a necessary margin of discretion and independence for all institutions as they carry out their roles.[982] The legal framework that these institutions are constituted by 'is not a straightjacket which

[980] Reflecting certain elements of the 'Rational-Instrumental' paradigm (n833 and accompanying text)
[981] n140 and accompanying text
[982] n240 and accompanying text

leaves no room for an imaginative interpretation.'[983] Instead the law gives them guidance but this is to be interpreted by the institution in pursuing its objectives.

A purely systemic view of the law would suggest that the institution, however constituted, follows certain parameters and that these encourage it to towards some form of predictability.[984] While predictability is often considered a virtue by judicial decision-makers it is still held in tension with the need to be 'responsive to the legitimate needs and aspirations of the international community.'[985] By prioritising predictability, a systemic view caricatures the way in which (particularly judicial) institutions behave. The criticisms cited over the Appellate Body's interpretation of the 'unforeseen developments' clause is a clear example of this.[986] Such a criticism fails to accept the other types of cause that influence the institution at the same time.

A purely constitutive examination of the role of law with regard to these institutions is equally limited, failing to explain the institution's existence in the first place, why it was constituted and how. The constitutive influence of the law helps to explain why the institution acts in the way it does by identifying its interests and objectives. It does not explain *how* the institution pursues those interests or in what way. Instead the three causal influences together offer an explanation that identifies how these institutions behave but also why. It is an attempt to marry the different roles of these institutions: forums for Members to interact and autonomous actors in their own right.

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[983] P Koojimans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', 56 International and Comparative Law Quarterly (2007) 741, 742

[984] 'We must continue to provide that *core predictability* that distinguishes law from politics…' (Emphasis added) R Higgins, 'Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, at the solemn sitting on the occasion of the sixtieth anniversary of the inaugural sitting of the Court' Press Release (12 April 2006) < http://www.icj-cij.org/presscom/index.php?pr=1004&lg=en&pt=1&p1=6&p2=1&PHPSESSID=5c407> (accessed 1 October 2012)

[985] Ibid

[986] See Chapter 3 (C) (ii), p204ff

The dual role of institutions as forums and actors is only going to become more important over time. As institutions for transnational governance become more common and effective, we can expect that their identities and how they pursue them will become increasingly important in the development of international law more generally. Where it seems unlikely that further institutional development will take place, such as in the WTO in light of the deadlock at the Doha Round, these institutions will continue to develop their identities as independent actors (the SPS Committee's response to SPS-related private standards is one example).[987]

C. Shifting Behaviour to the Private Sphere to Avoid WTO Scrutiny

The premise behind the process of norm export is that transnational actors use legal regimes to compel or convince other actors to share their own value preferences. A challenge to this premise is the behaviour of some actors identified in both safeguard measures and SPS measures in shifting their activities from the public sphere to the private sphere.

By concluding voluntary export restraints and other such 'gentlemen's agreements' the locus of the trade restriction is moved away from the scrutiny of the

[987] A further indication that process of value contestation is continual and not static (n142 and accompanying text). While the role of the judicial decision-making bodies at the WTO are expected to increase in importance (see, P Eeckhout, 'The Scales of Trade – Reflections on the Growth and Functions of the WTO Adjudicative Branch', 13 Journal of International Economic Law 1 (2010) 3, 5) it is argued here that other institutions such as the committees will also play an increasingly important role.

WTO. In SPS measures, by setting standards privately, the WTO's authority to oversee and restrict such measures is limited.

If we suggest that actors are interested in institutions such as the WTO because they allow them to project their values via the normative influence of the system, it would seem counterintuitive that they would then seek to undermine the process. In the case of safeguard measures it is perhaps more understandable than others: Members may prefer to use the WTO but in the light of a particularly restrictive set of Appellate Body reports, it may be felt that the second-best solution is preferable. Alternatively one might suggest that a Member prefers the less trade-enhancing yet more predictable advantages that voluntary export restraints offer in the trade of commercially sensitive materials such as international commodities.[988] Concerns over market stability could be increased by the perceived lack of predictability of reports of the Appellate Body (a particularly systemic view of its function).

In the case of SPS measures, the move to the private sphere from the public has not been led by Members or institutions exercising public authority but rather by private transnational actors. Here, whether responding to the increasing demands and concerns of consumers, or exerting their power in an attempt to protect certain elements in their chain of production, the move is for greater activity in the private sphere. The SPS Committee, as an interested actor, has responded by attempting to ensure its monopoly (or at least central position) in the debates over this issue and, it is presumably hoped, the regulation of SPS-related private standards.

[988] The creation of a Global Food Crisis Response Program under the auspices of the World Bank in the wake of the 2008 food price crisis is testament to the increasing difficulties faced by States < http://www.worldbank.org/foodcrisis/> (accessed 1 October 2012)

This trend (if it is one) could also indicate a broader challenge to WTO law. As we progress from an era of international institution building, actors are responding to the increasing effectiveness of these international institutions. International Organizations have become more effective in constraining and enabling behaviour (with the normative strength of these influences increasing through more effective compliance mechanisms such as those at the WTO). They offer more opportunities for actors to use the law instrumentally at domestic, regional and international levels, developing norms within forums or initiating litigation in ways that were previously unforeseeable. Transnational actors have responded by using these institutions but also by trying to protect themselves from the behaviour of others. It may be that as the international community progresses in its attempt to regulate matters more effectively, actors will increasingly find ways to behave outside of the spheres of influence of these institutions that took such a great effort to create.

Whereas debates over international regulation were previously over States transferring sovereign powers to International Organizations,[989] or other institutional frameworks, as actors have become globalized they have become more adept at acting across jurisdictional borders. As a consequence the concern might instead be over the autonomy of actors at the international level seeking to carve out a greater private sphere from encroaching international organisations rather than between the division of governmental authority between States and International Organizations. This would have more in common with debates at the domestic level over the proper role of the State and

[989] See generally: D Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2007)

the Market.[990] Such debates could pose a serious challenge to the WTO that has until now been preoccupied with the relationship between itself and its Members or between itself and other legal regimes in international law.

D. The Merits of a Causal Approach in a Multipolar WTO

The case studies examined in this thesis focused heavily on the US and the EU. As key players in the development of the GATT system and the constitution of the WTO, it was impossible not to. However, one can question the utility of the approach advocated herein as the US and EU play less dominant roles in international trade negotiations. How can one give a convincing overview or provide some sort of framework for examining the development of WTO law if there is limited engagement with the role of emerging economies?

The approach advocated in this thesis continues to function in a more balanced international trading system.[991] Transnational actors will continue to engage in processes of norm export. The difference is that some methods of norm export will become increasingly difficult: embedding norms by crystallising them as treaty obligations is the most obvious example as consensus becomes increasingly difficult to attain.

The deadlock of the Doha Round does not stop the development of WTO law; rather it moves the focus from Members negotiating over the covered agreements to the

[990] Discussed above in Chapter 2 (A) (ii), p87ff

[991] Whether the current developments will lead to a permanent recalibration of international trading relations is not necessarily assured: the 1970s saw similar predictions with States in Latin American and East Asia supposedly changing the dynamics of the global economy in the face of US decline. No claim is made here, merely that a genuinely multilateral WTO may not be guaranteed even in the face of the increasing importance of Brazil, Russia, India and China.

role of institutions. Indeed, they can be expected to become more relevant as judicial decision-making bodies and the committees are required to respond to changing circumstances in the face of quasi-legislative arms of the WTO that are incapable of reaching a consensus. Understanding the confluence of instrumental, systemic and constitutive influences on the development of law would be even more important in such instances than prioritising the examination of obligations under the covered agreements alone.

E. Final Remarks

As international law expands in both scope and reach, lawyers become increasingly important in helping to identify the relevant rights and duties for those concerned. There is a danger, however, that in focussing on identifying the applicable law in a case we set aside broader questions over the development of the law discussed. The challenges posed by globalization to the traditional model of public international law are frequently examined, however, this is increasingly left to scholars working in international relations. While offering insightful and interesting conclusions, there is an important place for lawyers to engage with the way in which the law develops: appreciative of law's difference from other norms and mindful of the importance of the legal rules *as they stand*, lawyers can offer insights into the changing nature of international regulation. This thesis has been one such attempt, identifying a range of different influences on the development of law. The approach used in this thesis has not been social-scientific but instead one more suited to the skills of lawyers based on pragmatic reasoning and

analytical explanation. It is hoped that some insights have been gleaned and convincing explanations offered over the course of this thesis and that where it has failed to do so, that it has made the case for a *legal* approach to explain developments in international regulation. There are ways to explain how the international system is developing and why without resting upon coding and datasets. There are approaches that take advantage of what law offers as a discipline: it is hoped that this thesis offered one such possible model.

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