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Who Decides? A Comparative Institutional Approach to International Trade Law

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WHO DECIDES?

A COMPARATIVE INSTITUTIONAL APPROACH TO INTERNATIONAL TRADE LAW

Gregory Shaffer¹

A growing literature addresses the interconnected issues of power in global governance, the relation of international trade law and other public international law, and their relation with national decision-making and national democratic processes. What is lacking is an analytic framework for examining the tradeoffs between the imperfect institutional choices available to address these issues.

This article provides such an analytic framework—that of comparative institutional analysis—and in doing so, advances two theses. First, from the perspective of the interpretation of international legal texts, the domain of traditional doctrinal law scholarship, judicial bodies (and legal scholars) implicitly make institutional choices, although they are typically not explicit about them, or perhaps not even aware of them. Where they refer to them, judicial decision-makers and scholars often tend to do so from a single institutional perspective, highlighting the defects of one institutional process without reviewing with the same rigor the defects of the alternative process that they implicitly favor through their interpretation. The article shows how, since WTO rules are not fixed in meaning, their application implicitly requires WTO judicial bodies, as any court, to make institutional choices. It then examines how these judicial interpretive choices in trade and regulatory law effectively allocate institutional authority for balancing competing policy concerns to different institutional processes, be they the market, political or administrative policies or a court itself, and how, at the international level, these choices also involve allocations at different vertical levels of social organization, from the local to the global. Each of these institutions has its attributes and deficiencies in terms of the dynamics of participation within it. In sum, to understand the effects of law’s interpretive choices, one needs to understand these implicit institutional choices, choices that ultimately affect who decides.

Second, as regards the issue of power in global governance, the article maintains that

¹ Wing-Tat Lee Chair of International Law, Loyola University Chicago School of Law. Thanks go to Michael Barnett, Bruce Cronin, Bud Duvall, Neil Komemar, Duncan Snidal, and other participants in conferences and workshops at the University of Wisconsin, the University of Chicago (PIPES), the University of Loyola Chicago School of Law, and the University of Minnesota Law School (Pattee Lecture), for their comments on drafts of earlier versions of the arguments made. Thanks also to Zrinka Rukavina, Jeannine Haas and Mario Bifano for their research assistance. This article has been substantially developed from an earlier one that fit into a political science framework for a conference volume. See Gregory Shaffer, Power, Governance and the WTO: A Comparative Institutional Approach, in POWER IN GLOBAL GOVERNANCE (Michael Barnett & Raymond Duvall eds., 2005).
meaningful policy choices need to be made from a comparative institutional analytic perspective since no governance mechanism provides for completely unbiased participation or representation of affected interests. All institutions are imperfect. Resource asymmetries are always present. Thus, while it is important to examine the role of power in global governance, a risk of choosing power as a central analytic concept is that a global governance mechanism will be judged by critics from whatever political perspective against some ideal type of governance process, or without reference to a counterfactual that is subject to similar power dynamics. Institutional challenges are particularly salient in a globalizing world characterized by large numbers of affected stakeholders and complex dynamics of interaction that affect the realization of any policy goal. This article puts forward a comparative institutional analytic conceptual framework for assessing decision-making processes in terms of the relative participation, direct and indirect, of affected parties in alternative institutional settings. To pursue any normative goal, one needs to understand how its pursuit will be mediated through alternative institutional processes beset by different dynamics of participation. One thus needs to engage in comparative institutional analysis.

International trade law under the World Trade Organization (WTO), founded in 1995, to an even greater extent than its predecessor, the General Agreement on Tariffs and Trade (GATT), founded in 1947, institutionally constrains domestic political choices over regulatory policies that are trade-related, including intellectual property, consumer, health, environmental and labor policies. The WTO’s detailed rules, backed by a relatively binding dispute settlement system, implicate not only states’ economic and security interests, but also state constituents’ profits and norms. WTO rules and legal and political processes create new incentives for a variety of actors, spurring changes in national and transnational civil society and business-government relations. As a result, states and state constituents actively try to shape the WTO’s agenda, its rules, their application, and their effects.

The WTO legal system has been subject to both attack and encomium. These assessments have typically assumed a goal-oriented, functionalist bent, often promoting or criticizing the objective of trade liberalization. Early on, many academics challenged the WTO/GATT judicial processes for their biases in favor of “trade values” over other social concerns. Others

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3 International trade law spans beyond the WTO, and includes a growing complex of regional and bilateral trade agreements, sometimes referred to as a “spaghetti bowl.” See e.g. Report by the Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millennium, 19 (World Trade Organization, 2004). This article, however, will address primarily on the WTO regime as a vehicle for examining its theses.


countered that WTO rules were democracy-enhancing in that they helped to shield domestic political systems from the pressures of concentrated economic interests that would otherwise work to the detriment of consumers.\(^6\) A number of commentators, including this one, have pointed to the dominant role played by the United States (US) and its corporate constituents in the WTO legal system.\(^7\) This analysis, however, can suffer from a single institutional focus.

This article responds to assessments of the WTO legal and judicial processes in law and political science by providing an analytic framework regarding the alternative institutional choices at issue.\(^8\) It responds to predominant approaches of legal scholars that are textual and functional in orientation that tend to ignore the effects of interpretive choices, and in particular, the structural implications of judicial interpretations on other institutional mechanisms. As we will see, the WTO dispute settlement system is part of a complex web of governance mechanisms, from the local to the global, from the market to political processes. In addition, the article responds to political science approaches (sometimes adopted by legal scholars) that examine the WTO in terms of its reflection and channeling of state and corporate power. The article argues, in both cases, that the assessment of the WTO and its legal system, or any other global governance mechanism, should be a comparative institutional one or the assessment will be of little use from a positive perspective (in terms of what the judicial process actually does in most cases) or a normative one (in terms of what it should do).

As a vehicle for analysis, the article applies a comparative institutional approach to the assessment of institutional choices faced by the judicial system of the WTO when addressing some of the most controversial matters that have come before it—conflicts involving the interface of trade, development and environmental protection. The article examines the tradeoffs between these institutional alternatives, each of which is beset by problems of skewed participation in different ways. Part I first introduces four conceptions of power used in the political science and sociology literatures, which it labels as agentic, institutional, structural and productive forms of power, taking from scholars ranging from Robert Dahl, Peter Bachrach and Morton Baratz, Stephen Lukes and Michel Foucault.\(^9\) It then addresses the need for a

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\(^8\) By *legalization*, I refer to a broader concept that includes legal rules and their enforcement in international affairs.

By *judicialization*, I refer to a particular institutional process in which those legal rules are interpreted and applied through third party (i.e. triadic) dispute resolution. Abbott et al. incorporate judicialization (third party dispute resolution) as a component of the legalization of international relations, while Stone Sweet focuses on judicialization as a key component in the construction of governance through the elaboration of norms. Teubner uses a third and related concept, *juridification*, to refer to the increasing use of law in social relations. See Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, *The Concept of Legalization*, 54 Int’l Org. 401 (2000); Alec Stone Sweet, *Judicialisation and the Construction of Governance*, 31 COMPARATIVE POLITICAL STUDIES 147 (1999); and Gunther Teubner, *Juridification of Social Spheres*, A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law 18-19 (1987).

\(^9\) These labels are derived and adapted from Barnett and Duvall. See Michael Barnett & Raymond Duvall, *Power in Global Governance in POWER IN GLOBAL GOVERNANCE* (Michael Barnett & Raymond Duvall eds., 2005).
comparative institutional approach to governance choices, whether within national constitutional settings or within global and transnational governance contexts.

Part II provides a single institutional assessment of the various means through which actors have directly and indirectly shaped and used WTO law, and in the process, been shaped by it. In doing so, it examines the ways in which power may be manifested in and through the WTO system, affecting how issues are decided. It addresses the impact of market power, forum-shifting strategies in harnessing market power, the use of asymmetric material and ideational resources, links with corporate and other strategic stakeholders, the manipulation of legal rules to avoid institutional constraints, and the accompanying transformations of state-business-government interactions, social relations, and the perception of state interests. In this way, Part II applies what Part III will next challenge—a single institutional analytic critique.

Part III adopts a comparative institutional approach to examine the institutional choices that the WTO judicial process confronts when faced with a legal dispute that involves the interaction of trade, environment, and development issues. Part III demonstrates how the WTO’s supreme judicial body, the WTO Appellate Body, faces decision-making options that, in turn, can shape participation in the market and in multiple domestic and international political settings. These judicial choices shape who participates and how they participate in other institutional settings in the determination of policy outcomes. The section assesses the relative biases of market-based processes, centralized and decentralized political processes, and the judicial process itself.

To ground its analysis, Part III uses a particularly controversial dispute before the WTO as an analytic vehicle—the “shrimp-turtle” dispute—which is often viewed as a defining case for the WTO, one having a constitutional dimension. The conflict involved U.S. trade restrictions on wild shrimp imports from a large number of developing countries on account of these countries’ failure to adopt U.S.-mandated policies for the protection of endangered sea turtle species. Part III demonstrates how decision-making for the balancing of the divergent interests at stake could be allocated to alternative institutions, including national political and administrative processes, various international political bodies, the global marketplace, and international courts. It examines how each of these institutional choices would affect participation and, as a consequence, policy outcomes. Although Part III focuses on a single (albeit important, and perhaps best known) WTO case, it complements work that has applied this approach to a broad array of WTO-related issues, including those involving trade, development, public health, intellectual property protection, labor rights, other human rights, democratic representation, and the “mutual recognition” of regulatory standards and procedures.


Part IV addresses both the constraints on the WTO judicial process, and the impact of the WTO decision on other decision-making processes, including the internal administrative and judicial decisions of the WTO’s most powerful member—the United States. Part IV notes how legal analysis often fails to assess the political and social constraints on the WTO judicial process, as when scholars call for WTO panels “to balance” competing policy concerns in a different way. In particular, this analysis often fails to take account of how the targets of WTO legal decisions (states, and in particular powerful states, and indirectly corporate and civil society constituencies) influence both the legal decisions and their implementation in practice—what they mean in the world. Part IV addresses how the WTO judicial process may take account of this impact in the very process of its textual interpretation in order to ensure relatively better compliance with its decisions and thereby safeguard its authority and legitimacy.

Part V concludes about the institutional implications of the interpretive choices faced by the WTO judicial process and the importance of assessing power and policy in global governance from a comparative institutional vantage.

I. Comparative Institutional Analysis of Power in Global and Domestic Governance

Conceptions of Power and Bias

Governance mechanisms, while designed to organize power, also are constituted by power. Power operates in all domains, including when actors instrumentally pursue their perceptions of their interests through direct material coercion or attempt to indirectly shape perceptions discursively through argument. Sophisticated parties typically operate in both ways simultaneously. To give just one example, much of human rights law has been shaped by the United States pursuing its national interests, materially and discursively, in the context of the Cold War, coupled by local advocates attempting to harness this power to advance their independent goals within their own national political contexts, both in the United States and abroad.13

Critical theorists often address how institutions represent a “normalization” or “institutionalization of power.”14 Their attention to the process of power’s “normalization” provides important insights for our understanding of the origins of governance mechanisms, our examination of the effects of these mechanisms, and our imagining of alternatives. Analysts, however, should be careful not to slip implicitly into a syllogism that power is bad, all institutions are constituted by power, and thus all institutions are bad.15

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15 I thank Duncan Snidal for making this point in his comments at a conference on power and global governance in Madison. One might read a Gramscian conception of institutions in these terms. See e.g., Robert Cox, Social Forces, States and World Orders: Beyond International Relations Theory, in Neorealism and Its Critics 204, 219 (Robert Keohane ed., 1986) (“institutions reflect the power relations prevailing at the point of origin… institutions are particular amalgams of ideas and material power which in turn influence the development of ideas and material
Power is a complex concept that has been examined from numerous vantages. In general terms, power consists of influence over other person’s capacities and behavior. Influence can operate in multiple ways. First, actors can deploy material and ideational resources and offers of rewards and threats of sanctions to alter third party behavior. This behavioral (or agency) conception of power is used by Robert Dahl. As applied to the WTO system, some actors have more resources than others to define the substantive rules, to shape how they are interpreted over time, and to deploy them, whether in actual litigation or in bargaining in the shadow of the threat of litigation.

Second, actors’ power can indirectly be exercised and mediated through institutions that constrain the issues and arguments that parties may raise. This institutional conception of power is used by Bachrach and Baratz, who stressed it in response to the focus of Dahl on individual agency, writing: “But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A.” To adapt from Schattschneider, institutional power consists of the mobilization of bias. Institutional rules and decision-making processes create opportunities for skewed participation, permitting some actors to constrain the options, actions, and understandings of others. This form of power can be viewed as “context shaping,” as opposed to “conduct-shaping,” addressing, in Colin Hay’s words, “the capacity of actors to redefine the parameters of what is socially, politically and economically possible for others.” Power, is viewed under this conception, in terms of “the ability of actors… to have an effect upon the context which defines the range of possibilities of others.” Once issues come before the WTO judicial context, only certain types of arguments (concerning trade) and reasoning (legal) can be used, and some actors are in a better position to advance their interests in such an institutional setting than others.

Third, structures that underlie international relations can affect actors’ perceptions of their interests. Stephen Lukes writes, “is it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?”

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17 Cf. Robert Cox & Harold Jacobson, THE ANATOMY OF INFLUENCE: DECISION-MAKING IN INTERNATIONAL ORGANIZATIONS 4 (1974). Cox and Jacobson distinguish “power” from “influence” in that “power means capability,” measured in terms of material and other “resources . . . available to an actor,” which resources “may be converted into influence.”


22 Stephen Lukes, POWER: A RADICAL VIEW 24 (1974). See also Robert Cox, SOCIAL FORCES, STATES AND
Similarly, as Robert Cox writes, taking from the work of Antonio Gramsci, “hegemony frames thought and thereby circumscribes action.”23 Under this structural perspective, the WTO process represents an institutional legalization of capitalism, affecting institutional organization and decision-making within states, and in the process, affecting the definition of a state and societal interests.

Finally, social discourse and knowledge systems can shape actors’ subjective understandings of their very identities and thus their capacities to act. Michel Foucault for example, views individuals not as agents, but rather as products, “effects,” and “vehicles of power.” As Foucault writes, “[t]he system of right, the domain of the law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation. Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates.”24 Under this conception, law is simply a technique or method of disciplining individuals to accept the current social order as normal. Foucaultian theory has been applied to criticize development choices made by developing countries when led by the political right and political left, including the more left-leaning “dependency” theory of the 1970s25 and the more right-leaning “Washington consensus” pro-liberalization policies of the 1990s.26 Pierre Bourdieu likewise addresses the construction of social reality through patterned sets of practices, which are “inspired by taken for granted beliefs,” or what he refers to as “doxa,” resulting in an unconscious process of cooptation.27 Critical legal scholars have borrowed from Foucault, Bourdieu and other European social theorists to note, how, in Bob Gordon’s words, “the ‘interests’ that make demands upon the legal system are not self-consciously prelegal entities. They owe important aspects of their identities, traits, organizational forms, and sometimes their very existence to their legal constitutions.”28 From this productive (or constitutive) perspective of power, the WTO, in institutionalizing global capitalism, can propagate and foster a “market man.”29 Under such conceptions, many individuals are willing to see the world in ways that

WORLD ORDERS: BEYOND INTERNATIONAL RELATIONS THEORY 204-254 (1986) (referring to Antonio Gramsci’s notion of hegemony).


29 See, e.g., Stephen Gill, Globalisation, Market Civilization and Disciplinary Neoliberalism, 24:3 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 399-423 (1995) (referring to a market civilization where global order involves a liberalized and commodified set of historical structures, driven by the restructuring of capital); Stephen Gill, Global Structural Change and Multilateralism, in GLOBALIZATION, DEMOCRATIZATION AND MULTILATERALISM (Stephen Gill ed., 1997) (critiquing western notion of progress leading to “market civilization”, social hierarchy and cultural homogenization, at 5); and Stephen Gill, The Global Panopticon, the Neoliberal State, Economic Life, and Democratic Surveillance, 2 ALTERNATIVES 1, 2 (1985) (referring to “disciplinary neoliberalism” as a form of “panopticism,” “a system of control that reduces the individual to a manipulable and relatively inert commodity”).
contribute to their own disadvantage, and are unable to see alternatives.

These latter analyses of structural and constitutive forms of power are not limited to Marxist, Foucaultian, Gramscian and critical scholars. For example, Dean Harold Koh has put forward a theory of “transnational legal process” in which he concludes, from a liberal internationalist perspective, that “[r]epeated participation in the transnational legal process is thus a constructivist activity, which helps to reconstruct the national interests of the participating nations.”30 Although Koh focuses on the roles of transnational “agents,” as opposed to “products” of power, and although he holds a primarily optimistic as opposed to a critical and pessimistic conception of international law and governance, the constitutive role of identities is central to his theory of why nations obey international law. Koh sees “transnational legal process” as “seeking to shape and transform personal identity” so that political elites and broader societies “internalize” international norms.31

Peter Digeser nicely summarizes these four conceptions of power as follows: “Under the first face of power the central question is, ‘Who, if anyone, is exercising power?’ Under the second face, ‘What issues have been mobilized off the agenda and by whom?’ Under the radical conception, ‘Whose objective interests are being harmed?’ Under the fourth face of power the critical issue is, ‘What kind of subject is being produced?” 32 In other words, power can be manifested directly and indirectly through actors’ behavior, institutional constraint, social structure, and discourse. Structures and institutions can shape not only direct participation, but also, over time, inter-subjective understandings of interests and identities.33

Influence, of course, is a necessary component of any decision-making process. In fact, a world of social decision-making without influence would be tyranny. In consequence, what people often mean by power is skewed influence, or bias, however manifested, within a decision-making process. This article thus focuses on participation as a central attribute and measure of power.34 Whether a party is coerced, institutionally constrained, misled, unrepresented, uninformed, or unaware of its interests or how its understanding and identity are shaped, that party’s interests will likely not be taken into account. By focusing on participation within different institutional contexts, one can analyze how different institutional processes operate so

31 Harold Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 Hous. L. Rev. 623, 629 (Fall 1998). Koh distinguishes the social internalization of transnational norms (within mass society) from political internalization (within national elites) and legal internalization (their incorporation into national legal system by judges, legislatures and executives). See Harold Koh, Why Do Nations Obey International Law, 106 Yale L.J. 2599 (June, 1997).
34 Accounts that also link the concepts of participation and power, at least in passing, range from HAROLD LASWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY 83 (1950) (“[p]ower is participation in the making of decisions”) to AMARTYA SEN, DEVELOPMENT AS FREEDOM 31 (1991) (“the issue of participation is also central to some of the foundational questions that have plagued the force and reach of development theory”).
that different perspectives are heard to varying, and always imperfect, degrees.\textsuperscript{35}

Although distinguishing these forms of power may be beneficial analytically, from an empirical perspective, agentic, institutional, structural and productive forms of power can be so enmeshed that it would be mistaken to view them as contrasts or dichotomies. Agentic and structural forms of power are better viewed as interactive, with agents attempting to manipulate and change structures, and structures constraining and shaping agents. Agency and structure can be mutually constitutive within different institutional settings. The categories are thus used here as conceptions that help us to better understand how power manifests itself in inter-state and transnational relations.

For analytic purposes, Part II of this article primarily (although not exclusively) focuses on the first two concepts of power. It does so for two primary reasons. First, as a pragmatist and legal realist,\textsuperscript{36} I am interested in analyses of relatively better and worse choices among alternative institutions in terms of who participates in shaping outcomes. The second two concepts of power, in my view, offer less assistance to policymakers in making these institutional reductions represent social coercion or even the social determination of their identity), then there may be no institutional choice to be rationally made. Some analysts importantly point to “non-institutional alternatives,” such as “social movements” and “civil society” mobilization.\textsuperscript{37} However, social movements can also be manipulated, diverse social movements often conflict, institutional governance mechanisms do respond to them, whether through market, political or judicial processes, so that they constitute part of the dynamics of participation within these institutions, and finally, if social movements are successful, then they must operate through institutions to govern. Universalist versions of the latter two conceptions of power may help us assess a rather bleak picture of the human situation, but they offer less in terms of how we change social conditions through policy-making, as opposed to radical (and possibly, in light of historical experience, illusory) revolutionary change.

Second, it is more difficult to build an argument from empirical data that is falsifiable

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\textsuperscript{36} For a legal realist approach, \textit{see e.g.} Karl Llewelyn, \textit{Some Realism about Realism- Responding to Dean Pound}, 44 Harv. L. Rev. 1222, 1247-49 (1931) (maintaining that scholarship need focus on \textit{Athe} effects of their action [of courts, legislators and administrators] on the laymen of the community®). Llewellyn called for \textit{Athe} temporary divorce of Is and ought for purposes of study. \textit{Id.}, at 1236-37.

\textsuperscript{37} See e.g. the excellent work of Boaventura de Sousa Santos, in Santos, Toward a New Legal Common Sense (2\textsuperscript{nd} ed, 2003); and Law and Globalization from Below: Towards a Cosmopolitan Legality (Boaventura de Sousa Santos \& César A. Rodríguez-Garavito eds., 2005). Cf. Niklas Luhmann, \textit{A Sociological Theory of Law} 52 (Martin Altbrow ed., Elizabeth King \& Martin Altbrow trans., 1985) (“It should not be presumed that this institutional reduction represents social coercion or even the social determination of behavior. It just happens.”). On the concept of civil society and political theory, see Jean L. Cohen \& Andrew Arato, \textit{Civil Society and Political Theory} (1992).
under the latter two conceptions of power. These notions of power’s operation can lack specification as to how we are to identify the causal impact of power structures, how we are to know the sources and causes of social and political change, and how we are to choose among alternative institutions to address the issues at stake.38 This concern again becomes more acute when scholars use universalist arguments so that there is no variation along a continuum. However, to the extent that there is such variation, then again, causal arguments can be evaluated.39

The adoption of the term “comparative institutional analysis” does not limit the analytic method’s application to assessments of “institutional,” as opposed to other, conceptions of power. As Rubin points out, for example, Foucault is explicitly and relentlessly institutional in his approach.40 When critical analysts of structural and productive forms of power recognize that there are variations in “false consciousness” and “constructed identity” along a continuum, then comparative institutional analysis can (and should) be applied to these conceptions of power, since some governance arrangements facilitate a comparatively “truer,” less constrained representation of interests and identities than others. The dynamic of participation in different institutional contexts plays a central role in shaping “consciousness” and identity. Those with high stakes in a policy outcome and access to quality information are, as a general rule, more likely to participate and less susceptible to exhibit “false consciousness” than those with low stakes who lack cost-effective access to information.

As the critical scholar Clarissa Hayward contends in her assessment of power’s productive attributes, “social critics need to elaborate criteria for distinguishing better from worse forms of power relation, or, more specifically, relations that promote participants’ political freedom—that is, their capacity to act in ways that affect norms and other political mechanisms defining the field of the possible—from those that approximate states of domination.”41 Hayward implicitly calls for a comparative analytic approach to the examination of these forms of power, recognizing that an assessment of power’s role in any single governance mechanism is insufficient for policymaking. Institutional alternatives are available and these alternatives should be examined from a comparative institutional vantage.42

A Comparative Institutional Approach to Governance Choices

39 I find it easier to trace the impact of agentic power over outcomes in different institutional contexts, since it is much easier to trace the impact of agentic power (be it that of state or non-state actors) in determining outcomes. Some scholars may find that comparative institutional analysis tends to prioritize epistemology (that is, our understanding of the world through accounts of participation in governance mechanisms) over ontology (that is, how interests, institutions, and identities are constituted). See Steve Smith, Ken Booth, & Marysia Zalewski, Introduction, in INTERNATIONAL THEORY: POSITIVISM AND BEYOND 16, 16-18 (same eds. 1996). These approaches nonetheless can complement each other.
40 Edward Rubin, The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions, 109 HARV. L. REV. 1393, 1420-21 (1996) (also stating, “Discipline and Punish may be read to assert that freedom from the comprehensive, oppressive control mechanisms of modern society can only be achieved by transforming the specific an apparently functional elements of modern social institutions”).
41 CLARISSA RILE HAYWARD, DE-FACING POWER 7 (2000).
42 Similarly, as Rubin points out, institutions are central to the work of the critical social theorist Jurgen Habermas, as Habermas “focuses on the institutional arrangements that enable this [ideal speech rational] discourse to proceed.” Rubin, The New Legal Process, supra note…, at 1422.
A second key term used in this article is institution, which is deployed broadly to refer to any social decision-making process. Douglas North defines institution in a top-down way in terms of “any form of constraint that human beings devise to shape human interaction.”\(^{43}\) This paper, in contrast, understands institutions in a dynamic, interactive manner both in terms of how their operation depends on the dynamics of participation, on the one hand, and how they, in turn, shape participation, on the other.\(^{44}\) Although political, judicial, and market processes may be categorized as primary forms of social decision-making, I recognize that institutions and governance mechanisms can be typologized in numerous ways involving sub-parts and variations at the national, regional, and international levels.\(^{45}\)

The article makes two primary points for purposes of assessing skewed participation in alternative governance mechanisms generally, and in the WTO judicial process, in particular. First, all institutional structures are imperfect because power, in its multiple manifestations, is always present. Second, because all decision-making processes are characterized by biased participation, the key question is how parties participate, or otherwise are represented, in an institutional context in *comparison* with alternative non-idealized institutional settings. Whether from a positive, strategic, or normative perspective, a central global governance question is: *What are the relative implications of alternative institutional mechanisms for participation in decision-making involving trans-border issues, including those that pit the interests of more powerful states and powerful constituents within them against those of weaker states and their constituents or of weaker constituencies in powerful states?* The response to this question requires a comparative institutional analytic approach. In the case of the WTO, because of the open-ended nature of its rules, the WTO Appellate Body itself implicitly must make choices that involve institutional alternatives, with their ensuing imperfections. The issue is not whether biases exist (they exist in all institutional contexts), but rather, what are the effects of an institutional process on participation in the weighing of competing concerns compared to its non-idealized alternatives.

Scholars of different ideological orientations often tend to identify their ideological goals with particular institutions and thus tend to idealize these institutions. Power tends to disappear within their preferred institutions. Neoliberals, taking from neoclassical economics, favor markets which should operate “freely” toward an “equilibrium” of supply and demand. Socialists favor the alternative of state control of resources through political processes, and, in some Marxist variants, following a revolutionary change that results in a “classless” society characterized by equality. Communitarians favor decision-making by local communities in which “deliberation,” and not strategic bargaining, prevails. Civil society advocates promote models of global democracy through self-organizing transnational non-governmental networks. Advocates of the “rule of law” focus on courts which presumably will neutrally apply even-handed law.

Yet these institutional predilections are mistaken. Powerful actors can manipulate markets, as markets are beset by problems of externalities, information asymmetries, and

\(^{43}\) *See* \(D\)OUGLAS \(N\)ORTH, \(I\)NSTITUTIONS, \(I\)NSTITUTIONAL \(C\)HANGE \(A\)ND \(E\)CONOMIC \(P\)ERFORMANCE (1990).

\(^{44}\) I thank Neil Komesar for his insights in an ongoing discussion on these points.

\(^{45}\) *See* \(K\)OMESAR, \(I\)MPERFECT \(A\)LTERNATIVES, *supra* \(n\)ote _, at 9. For a broad conception in the international context, see Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 \(I\)NT’L \(O\)RG. \(395\) (1992) (“self help and power politics are institutions,” referring to Kenneth Waltz’s theory of international politics as characterized by power and anarchy). For broad perspectives from cultural anthropology and sociology respectively, see \(M\)ARY \(D\)OUGLAS, \(H\)OW \(I\)NSTITUTIONS \(T\)HINK (1987); and \(A\)NTHONY \(G\)IDDENS, \(T\)HE \(C\)ONSTITUTION OF \(S\)OCIETY (1984).
strategic oligopolistic behavior. Local deliberative communities can inflict severe costs on outsiders, as demonstrated by zoning decisions that exclude minorities and the poor. Self-serving elites can capture centralized administrative processes (under whatever political system) that are beset by collective action problems. Collective action problems likewise undermine the representativeness of self-organizing “civil society” networks. Courts have limited resources to address the range of social conflicts, and use of judicial processes on a case-by-case basis is enormously expensive, favoring parties with financial resources and high per capita stakes. In short, meaningful policy analysis cannot focus on the defects of a single institution while failing to apply the same rigor to its alternatives.

**Government vs Governance: National Law vs International Politics**

Political scientists traditionally separate “international relations” from the study of national systems. For example, Kenneth Waltz contrasted national politics as a realm “of law” which is “hierarchic,” with international politics as a “realm of power, struggle, and of accommodation” which is “anarchic.”

From the perspectives of democratic theory and legitimacy, Robert Dahl and Joseph Nye also speak of national and international processes in conceptually different terms. Dahl writes, “I see no reason to clothe international organizations in the mantle of democracy simply in order to provide them with greater legitimacy,” and thus recommends that “we treat [international organizations] as bureaucratic bargaining systems.”

Joseph Nye maintains, “For now, the key institution for global governance is going to remain the nation state,” as “national governments... are the real source of democratic legitimacy.”

National constitutions and global governance mechanisms, however, conceptually have a significant amount in common. They both address the allocation of decision-making authority to alternative institutions, and, in consequence, the operation of power. The difference between national constitutional orders and (sometimes inchoate) global governance mechanisms can be one of degree. A central role of a constitution is to create institutional frameworks for the

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48 Id. at 33.


50 See e.g. Neil Walker, The EU and the WTO: Constitutionalism in a New Key, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31 (Grainne de Burca & Joanne Scott eds., 2001). From one vantage, constitutions set forth institutional frameworks, while governance mechanisms consist of diverse institutional forms. However, constitutions and governance mechanisms also can be viewed along a spectrum. For example, one refers to constitutional law and constitutional rights, but this reference simply refers to an institutional choice to allocate certain decisions to courts and away from legislatures (on constitutional grounds). By recognizing a constitutional right, a court assumes for itself the power to decide the relevant balancing among competing views and interests. Similarly, although the World Trade Organization consists of discrete institutions, including a judicial process and a political process, this article will show how the WTO also sets forth a framework for institutional choice. In short, global governance mechanisms can have both constitutional and discrete institutional aspects. Cf Robert Howse and Kalypso Nicolaides, Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far, in EFFICIENCY, EQUITY, LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM (R.B Porter, et al. eds., 2001) (We argue that the legitimacy of the multilateral trading order requires
allocation of decision-making for the balancing of competing views and interests. Constitutions typically involve a balancing of the ordering of power through majoritarian voting, on the one hand, with limitations placed on that power, on the other. Constitutions create legislative and executive bodies held accountable to the general public through popular voting. Constitutions may place constraints on these representative bodies in order to protect political, civil, and sometimes social “rights,” with the scope of these rights sometimes defined and enforced by courts. Constitutional orders thereby attempt to balance minoritarian biases (involving elites and concentrated interests) against majoritarian ones (involving asymmetric costs imposed on minorities).

In federalist systems, they vertically allocate authority among state/provincial and national levels of social organization. Under separation of powers principles, they horizontally allocate authority among executive, administrative, legislative and judicial institutions.

In a world of increasing numbers and complexity, it is impossible for representative institutions to address all matters having a social impact. In consequence, decision-making is delegated—whether formally or informally—to non-representative institutions, such as markets, bureaucracies, courts, quasi-public bodies, private companies, and public-private networks. In the context of constitutional democracies, we differentiate the concept of governance from that of government to assess decision-making mechanisms that are not directly accountable to a popularly elected body. Governance relies on other accountability mechanisms. Most scholarship addressing international institutions and regimes focuses on the concept of “global governance” because there is no popularly elected global “government.”

greater democratic contestability and a more inclusive view of those who are entitled to influence the shape of the system. Constitutionalization of the WTO will only exacerbate the legitimacy crisis or constrain appropriate responses to it.

Although this notion of constitutionalism is a structural one, and not an organic communitarian one which views constitutions as defining a shared form of life of a people (or “demos”), there is nothing inherent in the analysis that precludes an organic communitarian approach to constitutionalism, since organic goals too require institutional mechanisms to operationalize them. For a view of constitutionalism based on population’s “common ideology,” see Joseph Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries, in CONSTITUTIONALISM 153, 153-154 (L. Alexander ed., 1998).


To give just one prominent example, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 8 (2004) (noting “the globalization paradox. We need more government on a global and regional scale, but we don’t want the centralization of decision-making power and coercive authority so far from people actually to be governed”). However, some scholarship refers to the creation of (or need for) a global democratic constitutional order. See e.g. DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE
The fact that global institutions are not subject to control through direct popular elections or referenda subjects them to frequent charges that they are “illegitimate” because they are not “democratic.” However, there is nothing inherent that makes global governance mechanisms more or less representative of affected parties’ competing views and interests than domestic processes. We live in a world of multiple constitutional orders whose disparate decision-making processes affect one another’s constituents. On the one hand, government representatives cannot control for the impact on their constituents of foreign political decisions. On the other hand, government representatives make decisions that affect foreign constituents without those constituents being represented. Global governance mechanisms address the linkages between these imperfect domestic orders.

In assessing the issue of bias in global governance, it is important to recall that analogous problems of institutional bias arise under national constitutional systems. To give an example from the trade context, protectionism often results from biased participation within a national or local political process. This is why discriminatory state regulations in the U.S. federalist context are subject to judicial review under the commerce clause of the U.S. constitution, and why discriminatory national barriers in the European regional context are subject to review under article 28 of the Treaty Establishing the European Community. The defenses raised by the respondent states in these national and regional contexts, just as at the international level, are sometimes genuine and often not, but they invariably involve competing societal goals. As with any institution, global governance mechanisms involve tradeoffs, in this case between the quality of participation (reduced because of distance and the number of persons affected) and the scope of representativeness (enhanced because of scale and inclusiveness).

Global governance mechanisms likewise address conflicts over local and foreign values, priorities, and interests. These mechanisms allocate decision-making over conflicting goals to alternative institutions. In a world of considerable interdependence, there is, not surprisingly, an increasing amount of policy initiatives and scholarship that addresses the need for such governance mechanisms. This scholarship ranges from assessments of the appropriateness of centralized global political institutions, decentralized epistemic and transgovernmental regimes, international courts, “free” global markets, civil society networks, and cross-border social movements, often contrasting the respective roles of representative, deliberative, market, and expertise-dominated processes. A comparative institutional approach compares these processes in terms of how they facilitate the participation of affected parties in determining outcomes.


57 See e.g. LORI WALLACH AND MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY (1999) (the Preface by Ralph Nader refers to a autocratic system of international governance that favors corporate interests, and concludes that Under the WTO, the race to the bottom is not only in standard of living and environmental health safeguards but in democracy itself Id., at ix, xi) (underlining included in text). Although there are serious normative concerns about the accountability of global institutions, critics can also manipulate arguments over “legitimacy” to advance their particular policy preferences.


59 See also JOSEPH STIGLITZ, WHITHER SOCIALISM (1996). As Stiglitz states, “The central economic issues go beyond the traditional three questions posed at the beginning of every introductory text: What is to be produced? How is it to be produced? And for whom is it to be produced? Among the broader set of questions are: How should these resource allocation decisions be made? Who should make these decisions?” Id. at 13
II. Power in the WTO Context: The Shaping, Application, and Effects of WTO Rules

This section provides a single institutional critique of the operation of power in and through the WTO. In particular, it examines how the advanced industrial powers and corporate interests within them can shape and deploy WTO rules to advance their interests over others. These actors’ influence operates directly and diffusely. This single institutional assessment of power’s multifaceted manifestations is (perversely) insufficient. It is easy to critique the WTO, as it is easy to critique any institution, all of which are rife with imperfections. Single institutional analysis cannot determine if the WTO should be disbanded or how it can effectively be reformed. In summarizing analyst’s critique of the WTO’s many flaws (not all of which I personally agree), this section prepares for a more nuanced understanding of the WTO’s relative, potential, and contingent advantages and disadvantages in comparative context, on the one hand, and its dynamic and unavoidable interaction with other institutional mechanisms, on the other. This section II serves to set up the comparative institutional analysis of sections III-V.

The Deployment of Asymmetric Material Resources in the Setting of WTO Rules

The WTO and its predecessor, the GATT, are in large part products of United States entrepreneurship, persuasion, and pressure, made possible by the United States’ dominant position in world politics.60 Today, the WTO’s two largest trading members, the United States and the European Community, clearly exercise more clout than any other WTO members to define WTO rules and procedures.61 Even though all WTO members have one vote in the WTO, the United States and EC wield more control in shaping WTO rules because of the importance of their vast markets to other countries. As Hirschman noted, the essence of market power is the capacity to obstruct commercial exchange.62 Economic coercion and constraints play a greater role than military coercion in the trade and regulatory realms. The mere threat of sanctions, more than their actual imposition, is typically the most effective tool.63

The United States and EC enhance their leverage in WTO multilateral negotiations through forum-shifting. They can play countries off of each other through engaging in simultaneous bilateral and regional negotiations, thereby threatening to deny benefits to some countries that they offer to others.64 Weaker states may agree to U.S. and EC demands under a bilateral agreement so as to gain or retain access to U.S. and EC markets, and, in the process, obtain an advantage over developing country competitors. Once a developing country agrees to such demands, it will more likely favor their multilateral application, such as over intellectual

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61 See id.; ROBERT GILPIN, THE CHALLENGE OF GLOBAL CAPITALISM: THE WORLD ECONOMY IN THE 21ST CENTURY (2000) (assessing the need for a hegemon to maintain a global trade liberal order); ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Duncan Sindal, The Limits of Hegemonic Stability Theory, 39 INT’L ORG. 579 (1985). International trade rules can also be explained, in part, through functionalist theories of cooperation. Functionalist approaches, however, do not focus on power-based factors or distributational outcomes, but rather on why inter-state cooperation is made possible.
62 ALBERT HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE (1945).
property protection, so that it is not disadvantaged against developing country competitors in that particular domain. In large part, this explains developing countries’ eventual agreement to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The United States and EC are able to combine market power and their ability to forum-shift with vast material and informational resources that they deploy to their advantage in the drafting and application of WTO rules.\(^\text{55}\) Most developing countries are able to post only one or a few representatives in Geneva to follow WTO matters before the WTO’s numerous councils, committees, and working groups. Yet as a former divisional director in the WTO’s secretariat notes, it is “estimated that there were 2,847 meetings in the WTO in 1997, or an average of 10 meetings per working day.”\(^\text{56}\) WTO members with greater resources, such as the United States and EC, are thus best placed to drive WTO agendas.

The United States and EC have fashioned rules, for example, whereby they can continue to protect and subsidize their domestic producers in the agricultural and textile sectors.\(^\text{57}\) It is estimated that developed countries provide about $US 1 billion per day in agricultural subsidies, with about half coming from Europe,\(^\text{58}\) adversely affecting developing country exporters and overall terms of trade. In contrast, developing country implementation of the TRIPS Agreement has been estimated to result in wealth transfers from developing countries to the United States of around $5.8 billion dollars a year.\(^\text{59}\) Although Brazil, India, and other leading developing countries have attempted to set WTO negotiating agendas in the past, the United States and EC have deployed market power and forum-shifting strategies over time to isolate them until they eventually have succumbed.\(^\text{60}\)

Similarly, the United States applies its highest tariffs on goods that the poorest countries make—agricultural and textile products. The per capita gross domestic products of Nepal and Bangladesh may be under $300, but these countries’ exports confront average U.S. tariff rates

\(^{55}\) John Braithwaite & Peter Drahos, Global Business Regulation 196 (2000).

\(^{56}\) See Gary Sampson, Trade Environment and the WTO: The Post-Seattle Agenda 24 (2000), citing World Trade Organization, Communication from Egypt, High Level Symposium on Trade and Development 17 (March 1997). The number of WTO meetings seems only to be increasing. As of November 1999, twenty-nine WTO members did not even maintain permanent offices in Geneva. WTO, 43 Focus 13 (Nov. 1999), available at http://www.wto.org/english/res_e/focuse_e/focus_e.htm (last visited Apr. 11, 2006). This number appears to have declined to about sixteen by April 2004, to the extent that each developing country that has a permanent mission for the UN in Geneva also has one for the WTO, although these missions typically only had one or two persons who could not possibly follow all matters handled before the WTO and UN. See UN list of April 2004. The following six African members of the WTO did not have a permanent mission in Geneva: Chad, Djibouti, Namibia, Sierra Leone, Malawi, and Swaziland. E-mail from Yvonne Apea of ICTSD, April 29, 2004.


\(^{60}\) Richard Steinberg, In the Shadow of Law or Power?, 56 Int’l Org. 339 (2002). Immediately following Cancun, the United States was already able to press six Latin American countries to leave the so-called G-21 negotiating block that was led by Brazil. The United States did so by offering to negotiate preferential bilateral trade deals with these countries (i.e. through forum-shifting). See Daniel Pruzin, Three More Latin American Countries Defect from G-21 Alliance on Farm Trade, 20 Int’l Trade Rep. 1685 (2003).
“of 13.2 percent and 13.6 percent respectively—over six times the average U.S. rate”. In total, the United States collects about seventy percent of its tariff receipts from goods imported from developing countries.

Powerful constituencies in the United States and Europe advance their interests through harnessing U.S. and EC leverage. They use states as agents, just as they, in turn, act as agents for states. The most successful constituencies are large multinationals and trade associations, such as those in the services and pharmaceutical sectors that lobbied for, and now benefit from, the General Agreement on Trade in Services (GATS) and the TRIPS Agreement. Although non-commercial groups wield much less clout, they too can use the U.S. threat of withholding market access to cause smaller countries to change their regulatory policies, as over trawling techniques for shrimp, as examined below. Businesses and non-governmental groups in smaller countries, however, are unable to harness state power to advance their international priorities. Although such businesses and non-governmental groups may exercise considerable influence in their domestic political contexts, their governmental representatives exercise little influence internationally.

Power can be exercised instrumentally not only in terms of which issues are incorporated into the WTO system (intellectual property rights, services and, prospectively, under the Doha Round, certain environmental issues), but also in terms of the issues that weaker states do not even consider raising, or at least pressing. For example, the United States and EU were able to demand a high level meeting on trade and environment matters held in March 1999 prior to the eventual incorporation of environmental matters in the Doha Round, but developing countries, especially smaller ones, wield no such clout. In response, a senior Brazilian delegate maintained, “It=s a question of power. We don=t have the power to call for a high level meeting on matters important to us, such as tariff escalation or agricultural protection in the EC. We would simply be ignored.” Weaker states have less power to set agendas in international negotiations involving the WTO or any other body.

Finally, despite biases against them within the WTO, weaker states may join it anyway because they perceive that they would be even worse off without it. At least they have a vote in the WTO and access to a judicial process to address certain bilateral disputes. In bilateral relations with the United States and Europe, they lack such options. As Gruber points out,

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72 A calculation was made from data compiled by the US International Trade Commission, Interactive Tariff and Trade Dataweb, http://dataweb.usitc.gov (last visited Apr. 9, 2006).
73 SHAFFER, supra note 2.
75 Interview with Carlos A. da Rocha Paranhos, Brazil=s Deputy Permanent Representative to the WTO, (June 1998).
76 Thus, the Indian non-governmental activist Vandana Shiva contends, “Industrialized countries can demand a forest convention which imposes obligations on the Third World to plant trees. The Third World cannot demand of the industrialized countries a reduction in the use of fossil fuels and energy. In the way the >global= has been structured, the North (as the globalized local) has all the rights and no responsibilities, while the South has no rights and all responsibilities.” Shiva, The Greening of Global Reach, 22 THE ECOLOGIST 258 (Nov.-Dec. 1992). Hurrell and Kingsbury similarly note that “the states and peoples of the South have had less success in securing prominence for environmental problems closely associated with development.” Andrew Hurrell & Benedict Kingsbury, INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS AND INSTITUTIONS 37 (1992).
weaker states may be damned if the do,© but they may be doubly damned if they don’t.© Developing countries could be worse off under a new global institution and nonetheless join it because the former status quo is no longer available to them.78 At least in theory, a developing country could be worse off under the Uruguay Round package of multilateral trade agreements and yet rationally agree to join the WTO because, once the WTO is formed, they would be worse off remaining excluded.79 The power of developed countries to shape WTO rules because they are willing to go forward on their own, and then potentially exclude developing countries from the organization, could induce developing countries to agree to comply with international rules that may contravene their interests, such as the TRIPs Agreement.

The Deployment of Asymmetric Ideational Resources

Much of the politics over global governance involves not direct coercion, but rather contests over principles and ideas, such as the free flow of products and information, national treatment, harmonization, deregulation, reciprocity, and national sovereignty. As Braithwaite and Drahos state: “Both economic and military coercion are cost-intensive,” whereas “principles, with their attendant rule complexity, bring about a long-term convergence of expectations among actors.”80 Converged expectations can spur the internalization of norms and habits of compliance.81 From a power-oriented analytic perspective, principles and norms can be viewed as tools and effects of power, informed by strategic interest and position that are more diffuse (and pervasive) in their influence. As Axelrod writes, “it is easier to get a norm started if it serves the interest of the powerful few... Once started, the strong support the norms because the norms support the strong.”82 Those with material and informational resources and elite status are often more adept at deploying discursive tools, whether in negotiation, litigation, or through the provision of “technical assistance.” The United States can often get its way by concentrating state and corporate expertise to shape global perceptions and outcomes, through what Joseph Nye calls “soft power.”83 The United States and U.S. corporate constituents promote ideas about

78 As Gruber writes, “institutionalized cooperation by one group of actors (the winners) can have the effect of restricting the options available to another group of actors (the losers), altering the rules of the game such that members of the latter group are better off playing by the new rules despite their strong preference for the original, pre-cooperative status quo. Once the winners seem likely to establish their new cooperative structure something they would do even if they were destined to be its only members. The losers conclude that being left out would be even worse than joining. Their entry decisions are, in this sense, purely voluntary: indeed, the losers may well plead to be admitted into the new arrangement. And yet, despite their unabashed enthusiasm for inclusion, the losers would actually be much happier if this arrangement had never been created.” Lloyd Gruber, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS 7 (2000).
79 Similarly, George Soros writes more generally in terms of the international financial system, “Periphery countries may find it painful to belong to the system, but opting out may be even more painful.” SOROS, ON GLOBALIZATION (2002).
80 JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 530 (2000).
81 Id. at 563.
83 JOSEPH S. NYE, SOFT POWER, THE MEANS TO SUCCESS IN WORLD POLITICS (2004); JOSEPH S. NYE, THE PARADOX
the benefits of intellectual property protection for investment. Developing countries without
the desired property regimes are labeled “pirates.” Representatives of pharmaceutical trade
associations work with U.S. and EC officials to draft “model” laws and to teach as “faculty” in
workshops organized by the World International Property Organization regarding intellectual
property law and its enforcement. In this way, “technical assistance” can be a form of “soft
power” to shape understandings of WTO obligations and thereby alleviate the need for “harder”
 enforcement measures through formal WTO dispute settlement. Nicolaidis and Drake reveal
how an epistemic network of academics, other “experts,” U.S. trade representatives, and U.S.
industry also reshaped perceptions of services as “traded” goods, gradually breaking down
developing country resistance to the incorporation of financial, telecommunications, insurance
and other services into the new WTO regime. Yet the provision of services is not simply
analogous to that of goods, as it often involves not only foreign direct investment or immigration
(to provide the service), but also different forms of regulatory control and oversight, such as for
banking and other financial services.

Asymmetric Deployment of WTO Rules through Litigation and Negotiation in its
Shadow

The United States and EC can also exercise power through the WTO as an institution. Even
though WTO rules may be neutral on their face, they are not used equally by all parties. Just
as in domestic litigation, the “haves” are more likely to come out ahead in litigation at the
international level where legal expertise is highly specialized and expensive. The WTO’s most
powerful members and their constituents have the resources and incentives to apply trade law to
their advantage through WTO judicial procedures and bilateral negotiations in the shadow of a
potential WTO claim. Multinational firms are the world’s largest traders and consequently the
most directly affected by the details and interpretive nuances of WTO rules. They have the
resources to engage in complex, prolonged litigation in a remote forum, which they are willing to
dedicate to these issues because of their stakes. Large and well-organized interests hire lawyers
and economists and form public-private partnerships with U.S. and EC public authorities to
prevail in WTO litigation and in settlement negotiations conducted in the shadow of WTO law.

The United States and EC remain by far the predominant users of the system, and thereby
have been most likely to advance their larger systemic interests through the judicial process.

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85 SHAFFER, DEFENDING INTERESTS, supra note __.
89 SHAFFER, DEFENDING INTERESTS, *supra* note __.
Their participation rates as parties or third parties in fully litigated WTO cases are around 99% (US) and 86% (EC) respectively. Although developing countries have high per capita stakes in trade disputes (often higher than the United States or Europe relative to their economies), their aggregate stakes are small (other than the largest ones, such as India, Brazil, and China, who do participate). Because most developing countries lack legal capacity and are not repeat players, they do not benefit from economies of scale. The uncertain benefits from litigation are less likely to surpass the costs of developing or hiring expertise for litigation, especially after discounting for the risks of losing a case or of noncompliance.

The United States and EC are also better-situated to bargain in the shadow of a potential WTO claim. Where the United States and EC can absorb high litigation costs by dragging out a WTO case, while imposing them on developing country complainants, they can seriously constrain developing countries’ incentives to initiate a claim, and correspondingly enhance developing countries’ incentives to settle a dispute unfavorably. WTO law casts a weaker shadow over settlement negotiations for poorer and smaller countries that lack lawyers conversant in WTO law. When developing countries are unable to mobilize legal resources cost-effectively, their threats to invoke WTO legal procedures lack credibility. They thus wield less bargaining leverage in WTO law’s shadow.

In addition, settlement negotiations over trade disputes have a reciprocal impact on WTO judicial decision-making. Judicial decision-making occurs in the shadow of bargaining, a phenomenon that is particularly pronounced in the international trade context. It is a common error of trade law academics to view WTO judicial opinions as the end of the process. Rather, WTO cases are ultimately resolved through diplomatic negotiations that take place in the context of the judicial decisions. WTO judicial panels may shape their decisions to induce either compliance or amicable settlement, and thereby uphold the system. The WTO Appellate Body can use ambiguous holdings so as to facilitate powerful WTO members’ ability to comply, as will be shown in Part III.

Ideational Resources in Institutional Context

Institutions privilege different norms and the participation of different actors. Trade officials and trade norms shape bargaining within the WTO to a greater extent than in environmental fora. Trade officials attempt to use trade-environment negotiations in the WTO to frame negotiations in other institutions. Similarly, by concentrating rule-making in the WTO as opposed to an organization focused on development, such as the United Nations Conference on Trade and Development (UNCTAD), the United States and EC are better able to structure negotiations in terms of “reciprocal” trade concessions, as opposed to development “rights,” wealth distribution, or the meeting of basic human needs. The United States and EC can

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90 Id. The figures in the text are updated, based on WTO, Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.
91 As Amelia Porges writes, “every WTO dispute takes place between two negotiations: one negotiation that has failed to produce compliance and another negotiation on securing compliance after the dispute process is over.” Amelia Porges, Settling WTO Disputes: What Do Litigation Models Tell Us?, 19 OHIO ST. J. DISP. RESOL. 141, 147 (2003-04). Porges has worked at the GATT, in the USTR and for a private law firm specialized in trade law.
92 Shaffer, How to Make the WTO Dispute Settlement System Work, supra note __.
similarly use the World Bank and International Monetary Fund to induce developing countries to liberalize their markets. The Bretton Woods institutions can use both coercive material tools (liberalization as a condition of financing) and normative ideational ones (liberalization as “good governance”). Developing countries may be advised to liberalize unilaterally in their “self-interest,” even though the United States and EC themselves require “reciprocity” to open their markets, sometimes justified by the adverse impact that multilateral liberalization can have on a country’s terms of trade.95

U.S. public and private actors can also attempt to shape WTO judicial decision-makers’ perceptions of principles, alternatives, and the desirability of outcomes in WTO litigation. U.S. commercial and non-governmental groups demand that WTO panels accept amicus curiae briefs, knowing that they are well-positioned to file legal submissions. They harness challenges to the WTO’s legitimacy in demanding greater deference to WTO panels’ review of U.S. antidumping measures or U.S. import bans imposed on environmental or labor rights grounds. Southern non-governmental groups are particularly wary of how northern groups can rhetorically shape “trade-environment” and “trade-labor” discourse in order to elide issues of “development” and thereby privilege their interpretations of legal texts.96

Asymmetric Avoidance of Institutional Constraints: Use of “Legal” Protection and Extra-Legal Coercion

The United States and EC can also deploy extra-legal tools to induce changes in developing country regulations and regulatory practices that actually comply with WTO rules. Intellectual property firms, in particular, have used U.S. domestic legal procedures (under Section 301 of the 1974 Trade Act) to press U.S. authorities to remove special tariff preferences granted to developing countries if they do not provide “adequate and effective” protection of U.S. intellectual property rights. In this way, private actors can attempt to use U.S. market power to compel developing countries to grant greater intellectual property protection than may be required under the TRIPS Agreement. Weaker states and their constituents are less able to deploy these extra-legal tools because they do not hold the requisite carrots and sticks. They do not wield sufficient market power to constitute a meaningful threat (sticks), and they hold fewer inducements, such as the grant of special tariff preferences (carrots), that they can withhold.

Powerful WTO members, such as the United States and EC, and powerful constituents within them also retain greater flexibility to avoid the constraints of WTO rules. The United States and EC have ensured that WTO rules provide numerous legal exceptions to market access

95 If an importing country raises a trade barrier and that country exercises market power so that foreign exporters must lower their prices in order to sell in its market, then the exporting country’s terms of trade are prejudiced. That is, the exporting country will need to sell a greater amount of its products (at the lower price) in order to obtain the same amount of imports. The removal or curtailment of the trade barrier following a successful WTO complaint can thus improve a country’s terms of trade and overall social welfare because its exporters will no longer need to reduce their prices to overcome the foreign market access barrier. For a discussion of terms of trade concerns, see Kyle Bagwell & Robert Staiger, THE ECONOMICS OF THE WORLD TRADING SYSTEM (2002); Robert Lawrence, Crimes and Punishments: An Analysis of Retaliation Under the WTO (2003).
96 B.S. Chimni, WTO and Environment: Shrimp-Turtle and EC-Hormone Cases, 35 Econ. & Pol. Weekly 1752 (May 13, 2000) (critiquing the northern NGO and academic perspective, writing, AThe WTO is far from being the anti-environment organisation it is portrayed to be by northern NGOs and academics®); Gregory Shaffer, The World Trade Organization under Challenge, supra note…; Gregory Shaffer & Yvonne Apea, Institutional Choice in the GSP Case: Who Decides the Conditions for Trade Preferences: The Law and Politics of Rights, 39 J. World Trade 977 (2005).
that can be highly technical and that they are experts at manipulating, in particular antidumping and anti-subsidy provisions. Under these provisions, the United States, EC, and their corporate and labor constituencies can trigger procedures before domestic administrative bodies on the grounds that imported foreign products are sold in an “unfair” manner, thereby justifying compensatory tariff protection. U.S. and EC bureaucratic agencies, working with domestic producer interests, can manipulate price differentials through highly technical accounting rules to ensure high dumping and subsidization margins, thereby triggering prohibitive tariffs that eliminate foreign competition. The mere threat of an antidumping lawsuit can coerce foreign producers to raise prices, reduce their imports, or simply cease importation. Similar to the tax lawyer’s advice to high net worth clients, why cheat and risk being caught for cheating when you can pay a “good” lawyer to get you the same “legitimate” result. 97 Statistical evidence reveals that lower income developing countries fare far worse in U.S. antidumping proceedings. They “are more likely to be targeted, less likely to settle cases, more likely to confront high dumping duties and less likely to bring cases to the WTO.” 98 Again, it is more difficult for poorer states that lack legal capacity to play these legal games successfully.

Transformations of State Interests and Stakeholder-Government Relations

The WTO and related global governance regimes can also affect social relations and structures within states through the exercise of “soft power.” 99 Global governance mechanisms can directly and indirectly facilitate and impede political opportunities for constituencies within national political settings, and shape perceptions of national actors regarding options, constraints, and desired outcomes. They can empower certain domestic coalitions, such as export-oriented businesses, 100 as they weaken others, such as organized labor. 101 They can facilitate the creation of new professions, such as that of a domestic intellectual property bar and corporate bar. 102 Political maneuverings may involve concurrent contests in domestic and international fora. Elite

97 See Tom Weidlich, Executive Life: Call Him to Ease the Pain of the Tax Bite, N.Y. TIMES, April 7, 2002, at C16 (“Stanley Bergman says he is amazed at how some clients cheat on taxes when a good lawyer could have legitimately produced the same results”).
102 Intellectual property law is a growing domain of study and practice in developing countries. Professors of intellectual property law in developing countries are often practicing lawyers as well in order to make a livelihood. In practice, they often represent intellectual property rights holding companies from the United States and Europe, which in turn affects their interpretation of intellectual property obligations and how they teach the subject. Discussions and interviews of author with students, academics and government representatives from dozens of developing countries, including Argentina, Brazil, Chile, Egypt, Indonesia, Kenya, Nigeria and the Philippines, to name a few. Similarly, Dezalay and Garth note how “the proliferation and growth of business law firms appears to be the most successful or even the only successful legal transplant from the north into the south.” YVES DEZALAY & BRYANT G. GARTH, PALACE WARS 198 (2002). In a study of the field of international arbitration, they likewise find, “it appears, both the Hong Kong legal profession and the Chinese legal profession are becoming increasingly oriented to the legal practices of the leading international law firms and to advanced education in the law schools of the United States.” YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 272 (1996).
interests in developing countries, educated in the United States and convinced of the need to open their economies to foreign competition, may refer to WTO rules or the threat of withdrawal of U.S. market access as a means to accomplish their own domestic political objectives. In the 1990s, the policies that many developing country governments sought were liberalization policies, at least in comparison with the dominant development models of earlier decades.

On account of the dynamics of participation in the WTO, developing countries have also adopted U.S. and EC modes of protection. As developing countries reduce their tariff barriers, they adopt, in particular, the antidumping and safeguard laws that have long been used in U.S. and EC. The adoption of these U.S. and EC legal tools, in turn, enhances the role of administrative bureaucracies, courts, and lawyers in domestic regulatory systems. These U.S. and EC systems are first authorized through WTO agreements that mirror U.S. and EC domestic regulations, and then exported globally.

III. A Comparative Institutional Approach to the WTO’s Treatment of Trade-Environment-Development Conflicts

Part II showed how, on account of power asymmetries, the WTO, in its operation, more likely reflects the interests of certain states and certain constituencies. Yet Part II (which did not address the benefits of WTO membership for weaker parties, since this issue lay outside of its focus) also suggested how power operates in international trade relations outside of the WTO, including unilaterally, since power, however conceptualized, is present in all governance mechanisms. Critiques of the WTO as being subject to power asymmetries, regardless of how sophisticated these critiques may be, are thus insufficient. This section applies a comparative institutional approach to address the relative institutional biases in the balancing of conflicting trade, environment, and development norms and interests—one of the most politically charged and challenging global public policy issues today. Recognizing that constituencies of different countries at different levels of development have widely varying priorities and perceptions, this section assesses alternative governance mechanisms in terms of these parties’ relative participation in determining outcomes. The central issues are the same as with any conflict: How do alternative institutional settings shape participation? In which institutional setting will participation be relatively unbiased compared to the alternatives? What institutional choices does a WTO judicial body necessarily make when faced with a trade-environment-development conflict? How, at the international level, where problems of numbers and complexity are severest, should decision-making be allocated? Who decides who decides?

As with any cross-border conflict, we confront issues of vertical and horizontal allocation of institutional decision-making. The vertical allocation involves the level of social organization that decides. In particular, how is participation affected by a show of deference to national and local regulations that affect foreigners? The horizontal allocation involves choices between international political and administrative processes, global market processes, international

103 See e.g. YVES DEZALY & BRYANT G. GARTH, PALACE WARS 5 (2002) (“success of import is inevitably tied to domestic palace wars and to the international competition to export state expertises”); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 541 (2000).

104 See, e.g., JOHN WILLIAMSON, THE PROGRESS OF POLICY REFORM IN LATIN AMERICA (1990) (in which the concept of “Washington Consensus” was developed).

judicial processes, and other governance mechanisms. When the WTO Appellate Body decides a legal claim, it necessarily confronts issues of vertical and horizontal allocation of authority. The Appellate Body, for example, must determine the amount of deference to show to national and local regulations, whether to issue an injunction, whether to engage in judicial “balancing” of interests, and so forth. In doing so, it can affect the operation of different decision-making processes.

Biased participation characterizes each of the decision-making processes to which a WTO judicial body can allocate authority. Although the biases may be parallel, they are never uniform. This section compares the resulting biases for affected states and constituents under five institutional choices. In order to ground analysis in a specific context, this section uses a particularly controversial international trade dispute as a vehicle—the WTO shrimp-turtle case. The WTO case involved conflicts over the appropriate balancing of trade, environmental, and development priorities of constituents and states at vastly different levels of development. The comparative institutional analysis used, however, can be applied to WTO cases generally.106

Background. We spend some time in this sub-section to examine the factual background to the shrimp-turtle dispute in order to uncover who participated in its construction, thereby providing important information for our subsequent exploration of the institutional alternatives for addressing the conflicting norms, interests, perspectives and priorities at stake from the standpoint of participation of affected constituencies.107 The story of the WTO shrimp-turtle dispute starts with U.S. legislation that, in part, was enacted to protect the environment, and, in part, to protect a domestic industry. The U.S. legislation took the form of a ban on the importation of shrimp from countries that do not impose shrimp trawling regulations to protect endangered sea turtles in a manner comparable to U.S. domestic regulation. The U.S. law, Section 609 of U.S. Public Law 101-169 of Nov. 21, 1989, mandated that shrimp cannot be imported into the United States unless “the President shall certify to Congress” that either the foreign government has adopted “a regulatory program governing the incidental taking of such sea turtles... that is comparable to that of the United States,” and “the average rate of that incidental taking by the vessels of the harvesting nation is comparable” to that of U.S. vessels, or the “fishing environment of the harvesting nation does not pose a threat [to]... such sea turtles.”108 The President delegated to the U.S. Department of State the authority to make the required certifications.

The supporters of the U.S. regulation included environmentalists concerned about endangered marine species and the U.S. shrimping industry concerned about competition from Thai and other imports. These two groups normally clash over U.S. environmental policy. They indeed did so in the domestic U.S. struggle over whether shrimping boats must use turtle excluder devices® (named TEDs) in their shrimp nets to protect sea turtles from drowning. The environmentalists maintained that TEDs, a mechanism which permits turtles to escape from trawling nets to avoid drowning, are cheap and that the loss of shrimp is minimized if TEDs are properly used.109 The U.S. shrimping industry, in contrast, dubbed TEDs “trawler elimination

106 See citations to previous work, supra note…
107 For a fuller case overview, see Gregory Shaffer, United States - Import Prohibition of Certain Shrimp and Shrimp Products, 93 AM. J. INT’L L. 507 (1999).
109 The turtle excluder device is a mechanism which permits turtles to escape from trawling nets to avoid drowning. TEDs are relatively inexpensive, costing between $75 to $400 in the United States, although the cost of the Aharder® varieties (which are increasingly being required) starts in the $200 range. There is not much data on the
devices” because of the loss of shrimp catch and the costs of using them. This US domestic conflict preceded the international conflict. The two US groups (environmentalists and shrimpers) first clashed before an administrative body (the National Marine Fisheries Service)\(^{110}\) and then before U.S. federal courts.\(^{111}\) Overall, however, the process for determining the regulation of shrimping within the United States was relatively informed, participatory, and unbiased. Environmentalists and shrimpers were relatively well-represented before the U.S. regulatory process, the U.S. political process and U.S. courts.

When the environmentalists prevailed domestically, the two groups joined forces to press Congress, and then the U.S. Department of State and the federal courts, to ban imports of wild shrimp from any country that does not mandate comparable shrimp trawling methods (i.e. the use of TEDs) in waters where the sea turtles might be present. Two years after the National Marine Fisheries Service enacted the domestic requirements to use TEDs, the Congressional representatives from the Gulf states stuck a rider into an appropriations bill which Congress passed as Section 609 of U.S. Public Law 101-162 on November 21, 1989. Section 609 was included in the last section of Public Law 101-162, entitled AGeneral Provisions,\(^{\@}\) sandwiched between a provision which set conditions for the use of funds appropriated to the Legal Services Corporation and a provision which set conditions for the approval of export licenses Afor the launch of United States-built satellites on Soviet- or Chinese-built launch vehicles.\(^{\@}\)

Not surprisingly, Section 609 was introduced and promoted by the two Senators from

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\(^{111}\) The regulation was widely contested by U.S. shrimpers, who stated that TEDs were a nuisance to operate and maintain, and permitted their shrimp catch, as well as sea turtles, to escape. The U.S. shrimpers nicknamed TEDs Atrawler elimination devices.\(^{\@}\) Unsuccessful in preventing the adoption of the regulation, the shrimping industry, supported by the governors of the states bordering the Gulf of Mexico (Louisiana and Georgia), then challenged the new regulations in federal court as an abuse of the National Marine Fisheries Service’s regulatory authority. They lost the legal case. See e.g. State of Louisiana and Concerned Shrimpers of Louisiana v. William Verity, Secretary, U.S. Department of Commerce and the Environmental Defense Fund, 853 F.2d 322 (5th Cir. 1988).
Louisiana, John Johnston and John Breaux, who had opposed the U.S. fishery service’s requirement that Louisiana shrimpers use TEDs in the first place, and fought long and hard not only in the Senate but with our colleagues in the House to try to prevent this rule from coming into operation.\(^{112}\) Now, they argued that if the United States was going to impose these costs on their constituents, it was going to impose them on everyone else who wanted to compete in the U.S. market in order to help for the price of shrimp for our shrimpers in Louisiana.\(^{113}\) In Senator Breaux’s words, \(\text{It is patently unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and, yet, we will then give them our market.}\(^{114}\) Senator Breaux simply wanted to level the playing field, by raising the regulatory compliance costs of foreign shrimpers to approach those of his constituents.\(^{115}\)

The President delegated to the Department of State the authority to make the required certifications, and the Department of State issued its first guidelines in 1991, which set forth criteria under which foreign countries would be certified.\(^{116}\) Because the National Marine Fisheries Service tightened the underlying U.S. regulations applicable to shrimp trawling in U.S. waters and because, under Section 609, the foreign regulatory program must be comparable to that of the United States,\(^{117}\) the Department of State revised its certification criteria for foreigners in February 1993 to reflect these purely domestic regulatory changes. The Department’s regulations effectively required foreign countries bordering the Caribbean Sea and Western Atlantic Ocean that had endangered sea turtles in their territorial waters to create a regulatory program requiring shrimp trawlers to use TEDs if they desired access to the U.S. market for their shrimp products.\(^{118}\)

The State Department first interpreted Section 609 to apply only to countries with coastlines bordering the wider Caribbean and Western Atlantic region.\(^{118}\) This limited application of Section 609 was successfully challenged by a consortium of U.S. environmental groups and a U.S. commercial association of shrimp trawlers, packers and suppliers. In December 1995, the United States Court of International Trade directed the Department of State to prohibit not later than May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology which may affect adversely [the designated] species of sea turtles.\(^{119}\) The Department of State then issued new guidelines which, among other matters, permitted shrimp to be imported to the extent they were certified by a foreign government official to have been caught with TEDs, even if the foreign government in question did not have a comparable regulatory program mandating the

\(^{112}\) Id.

\(^{113}\) See 135 Cong. Rec. S12191-05 (Sept. 29, 1989).

\(^{114}\) Id.

\(^{115}\) While the subsequent U.S. submission in the WTO case cited some Senators’ statements in support of our Nation’s commitment to protect endangered sea turtles from drowning in commercial shrimp nets, there was little to no debate in Congress on the matter. First submission of the United States, at 44-45 (June 12, 1997), citing comments of Senator’s Chaffee and Shelby, as well as excerpt of Senator Breaux’s comments. See Congressional Record S8375 (July 20, 1989).


\(^{117}\) Explain nuance re fresh-water shrimp....


use of TEDs. These guidelines again were challenged successfully by the same groups before the U.S. Court of International Trade. The U.S. federal court again found that the Department of State’s guidelines failed to properly implement U.S. section 609, and the court enjoined the Department to impose the U.S. ban of wild shrimp imports on a country-by-country basis (based on a country’s regulatory program), as opposed to a shipment-by-shipment basis (based on the individual shrimp trawler’s actual methods).

The resulting import restrictions spurred four South and Southeast Asian nations (India, Malaysia, Pakistan and Thailand) to initiate a trade claim in January 1997 against the United States before the WTO’s dispute settlement system. The case first went to a WTO dispute settlement panel and then, on appeal, to the WTO Appellate Body.

The Legal Context: The WTO legal rules at issue were relatively simple—consisting of articles III, XI and XX of the General Agreement on Tariffs and Trade (the GATT). The complainants, maintained, among other matters, that the U.S. import ban on shrimp and shrimp products (i) violated the prohibition of quantitative restrictions in GATT Article XI, and (ii) were not permitted under the exceptions set forth in GATT Article XX. Article XI of the GATT provides as follows:

No prohibitions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The complainants maintained that the United States’ import ban violated Article XI, a position that the United States did not contest. The reason that the United States did not contest this aspect of the claim is unclear, but one possible explanation is that the United States was concerned about setting a precedent that could adversely affect its own trading interests. For example, the United States subsequently challenged the European Union’s de facto ban on the importation of genetically modified seeds or foods. Nonetheless, it is at least arguable that another provision, GATT Article III.4, applied to this case instead of Article XI. Article III.4 prohibits a WTO member from adopting or enforcing national regulations that discriminate against imported products. It provides,

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations

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and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Some scholars, such as Rob Howse and Donald Regan, maintain that, under an Article III analysis, products produced in environmentally harmful ways are not “like products” even though they are materially identical. An import ban imposed on such products thus does not entail discrimination in violation of GATT article III. Applying such an approach, the US could have contended that, even though shrimp caught using different fishing methods may be physically the same, the different production processes have implications for the moral values of consumers, so that the products should not be considered to be “like,” in which case no discrimination occurred. Under this analysis, the United States was simply applying its regulatory regime, banning both domestic and foreign products that did not comply with US internal regulations.

Finally, even where a party violates Article III or XI (whichever provision was to apply), the respondent has an affirmative defense under GATT Article XX, the “General Exceptions” clause. Article XX provides, in relevant part:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...
(b) necessary to protect human, animal or plant life or health;...
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption....

The United States maintained that its ban was necessary to protect animal life and related to the conservation of an exhaustible natural resource, without constituting a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

There are two levels of judicial review in the WTO dispute settlement system: the panel stage and, if the panel’s decision is appealed, the Appellate Body stage. The three substantive provisions at issue were sufficiently open-ended so that the initial panel and the Appellate Body had a choice among a number of legal outcomes, each of which involved implicit allocations of institutional authority.

Alternative Institutional Choices. Most legal academics examining a case such as the

123 The US likely did not raise this defense because it did not wish to set a precedent that could be used against US exports. The US has been particularly concerned with the prospect of EU process-based import restrictions, such as EU restrictions on the import and sale of cosmetics tested on animals, of fur from animals caught with “inhumane traps,” of genetically modified food and of meat from cattle raised with growth hormones.
shrimp-turtle dispute, take an interpretive, textualist-oriented perspective, focused on the WTO judicial process. They may interpret the relevant legal texts “formally” in terms of their ordinary meaning, or “functionally” in terms of their meaning in light of a normative goal. By doing so, they tend to assume a “judiocentric” approach as to how these disputes are to be decided, and thus are largely silent as to how these judicial bodies’ decisions structurally implicate, on the one hand, who ultimately decides these questions, and, on the other, how the judicial bodies are affected by the audience that receives and responds to their decisions, which involves states and constituents that wield varying amounts of influence. The approach of WTO legal scholars is often, not surprisingly, one of textual interpretation as this is their domain of relative expertise.

Such a textualist approach tends to focus on whether disputed facts fall within different categories that are often derived from WTO texts and jurisprudence. For example, categories can be extrapolated from terms used in WTO texts, such as “like product,” “necessary,” “exhaustible natural resource,” “quantitative measures” applied at the border (under article XI) or regulatory measures applied internally (under article III). The categories can also be constructed in case law or scholarly analysis without such terms being used in the relevant WTO text, such as “least trade restrictive alternative,” “product or process requirement,” and “extrajurisdictional” measure. The role of the interpreter and advocate is to match the facts to existing categories or to create new categories for the purpose of analysis or advocacy.

Yet from the perspective of the impact of judicial interpretations on peoples’ lives and livelihoods, such a purely interpretive, textualist approach misses what, in fact, the WTO dispute settlement bodies actually do. Although the approach in this article can also be viewed as “functionalist” in terms of the importance of giving reasons, as opposed to applying categorical labels, the analysis is structural in that it examines the impact of dispute settlement decisions on other decision-making processes. From this structural perspective, the focus shifts from the positive question of what is being done, to the question of who is determining it. No longer is

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126 For contrasting arguments based on contrasting normative approaches, compare Ernst-Ulrich Petersmann, Constitutionalism and the WTO Law: From a State-Centred Approach towards a Human Rights Approach in International Economic Law, in Kennedy & Southwick, supra note 46 (including a right to trade); ROBERT HOWSE & MAKUA MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000) (addressing the need to accommodate human rights commitments); Howse & Regan, supra note 78 (maintaining that regulatory restrictions applied to imports that focus on a production process are consistent with GATT requirements); and Robert Howse, The Turtles Panel: Another Environmental Disaster in Geneva, 32 J. WORLD TRADE 73 (1998).

127 The term “judiocentric” is borrowed from Victoria Nourse, writing in respect of analogous questions concerning the analysis of questions of federalism and separation of powers under US constitutional law. See Victoria Nourse, supra note __, at 837, 856 (“I reject the judiocentric position that the separation of powers and federalism require recourse to descriptive texts or functions, and argue, instead, that our government is, in important structural senses, a set of popular relations . . . . If we move a decision from Congress to the Court we have not only moved an activity, we have moved a decisionmaker (a decisionmaker whose incentives are governed by a particular relation to the people”).

128 It is thus not functional in terms of focusing on the attainment of a particular substantive goal, such as free trade or environmental protection.

129 Similarly, although this article focuses predominantly on the (positivist) effects of institutional choice, the
the question solely about textual interpretation and the matching of a set of facts to a particular category, but rather about structural relations involving alternative decision-making processes. From a structural perspective, we are interested in the effective allocation of power “from” one institution “to” another. We are interested in the institutional effects of a WTO judicial decision, in the consequences to people of shifting decision-making authority from one institution to another. By shifting authority among institutional alternatives, the WTO judicial process effectively shifts relations between who decides and the affected publics.

The key to a structural perspective is to assess how relations between constituencies are mediated in different ways through alternative institutional processes. The optic here is to see the WTO judicial process through the lens of governance and not through a judiocentric perspective focused on judicial interpretation and review. Assessments of what the WTO process in fact does, and what it should do, are thus grounded in an understanding of the effects of a shift in decision-making “from” and “to” alternative institutional processes.

Institutional choice over trade-environment matters is a particularly salient issue in light of the sustained challenges to the legitimacy of WTO decision-making, erupting violently at the WTO=s 1999 Ministerial Meeting in Seattle. In terms of institutional alternatives, the U.S. environmental protesters in Seattle claimed that the WTO and its judicial body are anti-democratic institutions that negate U.S. environmental laws that are enacted through a democratic process. In disputes involving U.S. trade restrictions on environmental grounds, they want the WTO Appellate Body to show greater deference to national environmental regulation vis-a-vis WTO supranational rules. If one views the range of institutional choices to extend on a vertical plane from local decision-making to international decision-making, the protesters demanded greater deference to U.S. local decision-makers.

The governments of Thailand and other South and Southeast Asian countries, in contrast, maintain that it was the U.S. statute that is anti-democratic because it does not defer to local Thai policy, but rather attempts to dictate to the Thais and South and Southeast Asians how they allocate their scarce resources to protect the environment, whether through requiring and enforcing the use of sea turtle protection devices or otherwise. In their view, the WTO is merely safeguarding their national autonomy. Demanding that a WTO court invoke a political question doctrine, for example, thereby not reviewing the US trade restriction, offers little help analytically, as it effectively tells us to defer to a domestic U.S. political process, without comparing the relative and attributes and deficiencies of alternative political decision-making fora, such as a domestic Thai political process, or a global political process within the WTO, or an international environmental, developmental or other body. Political bodies within the WTO and the UN system have debated at length the core principles at stake in the shrimp-turtle case and they have adopted numerous documents concerning them.\footnote{Although the Rio Declaration on Environment and Development proclaims that “States have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,” it also affirms that “States have... the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies” and that “unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.” See Principles 2 and 12 of the Rio Declaration, adopted at the U.N. Conference on Environment and Development, 13 June 1992.}

In deciding the shrimp-turtle case, the WTO judicial bodies implicitly faced a choice among at least five institutional alternatives. The judicial bodies’ concern with institutional
malfunctions implicitly affected their choices. Each of the available institutional processes would favor some parties over others on account of the dynamics of participation within it. The five institutional alternatives were:

(i) to show deference toward the domestic political authority imposing the trade restrictions, thereby allocating decision-making to U.S. national political and judicial processes. This allocation, in turn, would favor U.S. constituents participating in those processes, which largely consisted of U.S. producer groups and environmental groups;
(ii) to hold clearly against the trade restriction (analogous to an injunction in the US domestic system), thereby allocating decision-making to the marketplace, likely favoring producer interests in developing countries;
(iii) to defer the matter to an international rule-making body, such as the WTO’s political organ (the General Council, perhaps following deliberation within its Committee on Trade and Environment) or to another international political body formed pursuant to an international treaty, thereby allocating decision-making to an international political process; here the effects on participation and outcomes are unclear (were an international political decision feasible), in part on account of the uncertain and fragmented status of international institutions;
(iv) to balance the substantive interests at stake pursuant to a vague standard on a case-by-case basis, thereby allocating substantive decision-making over the conflict to itself; yet the Appellate Body is itself subject to political pressures and constraints, and not all views are equally presented before it;
(v) to review the process, as opposed to the substance, of the national decision, thereby sharing decision-making authority between a national body that determines substantive policy, and an international judicial body that reviews the national procedure for due process, transparency, and “good faith” multilateral efforts, again favoring U.S. constituents, although to a lesser extent than in (i) above.

In other words, in deciding the case, the judicial bodies implicitly decided not just what the legal provisions meant, but who ultimately would decide the weighing of competing policy concerns, institutional choices to which we now turn. The initial panel chose the second alternative, and the Appellate Body the fifth one, weighing different institutional biases and challenges that we now examine.

1. A Policy of Deference: Allocation of Authority to National Political and Judicial Processes. One institutional choice favored by many commentators is for the WTO judicial body to show deference to the country implementing the trade restriction, thereby effectively assigning decision-making authority to a national political process, subject to judicial review before national courts under national law. For example, a WTO judicial panel could find that the U.S. national legislation and implementing regulations are in compliance with WTO rules so long as they have an environmental aim. In such case, a panel could hold that they comply with GATT Article III.4 because they do not discriminate among “like products,” but rather constitute internal regulations that are enforced against foreign products through the import ban.131

131 See, e.g., Howse & Regan, supra note 78.
Environmental activists and many legal scholars maintain that WTO rules (and, in particular, GATT Articles III.4 and XX) should be interpreted to permit trade restrictions imposed unilaterally on account of foreign production processes that are environmentally harmful so long as the same ban is applied domestically. Some contend that these WTO rules should be interpreted in deference to the “local values” of the country imposing the trade restriction. Others propose that WTO judicial panels should simply decline jurisdiction or apply a political exception doctrine in politically-charged cases that implicate trade and environment (or human rights) policies, in which case the national import restriction would remain unchallenged. Proponents of WTO deference to such local decision-making maintain that the WTO’s predecessor organization (the GATT) was trade-biased because its judicial panels focused on protecting trade of physically “like” products, and not on protecting social values reflected in the production process.

International deference toward national regulatory decisions has certain merits from the perspective of participation. Participation in democratic decision-making at the national level is of a higher quality because of the closer relation between the citizen and the state, the consequent reduced costs of organization and participation, and the existence of a sense of a common identity and of communal cohesiveness— that is, of a demos. It is a principle recognized by the framers of the US constitution as well:

Upon the principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger byass [sic] towards their local governments than towards the government of the Union.

It is a principle espoused in a variety of disciplines, from political science to institutional economics.

Moreover, given the lack of an international political process to adopt regulatory controls

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132 Daniel Bodansky, _What’s So Bad about Unilateral Actions to Protect the Environment_, 11 EUR. J. INT’L L. 339 (2000) (noting that the choice might be between unilateralism or inaction, not multilateralism); Sanford Gaines, _The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures_, 22 U. PA. J. INT’L ECON. L. 739, 785 (2001) (“the uncritical assumption that domestic and foreign conditions must be ‘different’ automatically makes any uniformly applied national measure unjustifiably discriminatory and therefore beyond the pale of Article XX. The patent absurdity of such an outcome renders the reasoning ‘abhorrent’”); Robert Howse, _The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate_, 27 COLUM. J. ENV’T’L L. 491, 504 (2002) (“whether there is an implicit territorial or jurisdictional limitation in [Article XX is] largely moot, since Article XX(g) by its explicit language only applies to environmental trade measures that are coupled with domestic environmental regulation.”).

133 Philip Nichols, _Trade Without Values_, 90 NW. U. L. REV. 658 (1996) (proposing the creation of an exception that would allow certain laws or actions to exist if they violate the rules of the World Trade Organization provided that the impediment to trade must be incidental, and the measure must be undertaken for the purpose of reflecting an underlying societal value).

134 Jeffrey Dunoff, _The Death of the Trade Regime_, 10 EUR. J. INT’L L. 733, 756 (1999) (proposing new procedural mechanisms whereby WTO dispute settlement panels would avoid controversial trade-environment cases on standing, ripeness, political question and related grounds, thereby permitting domestic trade restrictions imposed on environmental grounds to remain unchallenged before the WTO).


to suit changing contexts, there are strong policy grounds for deferring to domestic political choices for regulating market transactions. National and local processes are more likely to respond rapidly and flexibly to new developments. They are also better able to tailor regulatory measures to the demands and needs of local social and environmental contexts.

National and local decision-making processes, nonetheless, can also be highly problematic from the perspective of participation. Producer interests are generally better represented than consumers on account of their higher per capita stakes in regulatory outcomes. Producer interests’ predominance arguably explains a great deal of protectionist legislation. However, even where national and local procedures are relatively pluralistic—involving broad participation before administrative and political processes that are subjected to judicial review—they do not take account of adverse impacts on unrepresented foreigners.

Unlike in the U.S. domestic regulatory context where affected shrimpers and environmental constituencies were well-represented, foreign stakeholders who were severely affected by the U.S. legislative and regulatory decisions were unrepresented in the process. Traditionally enemies, U.S. environmentalist and U.S. shrimpers joined together to support the import ban of foreign shrimp. There was, however, no notice or opportunity for comment provided to affected stakeholders from Thailand, Malaysia, India, Pakistan, or elsewhere. There was no U.S. study of local Thai, Indian or other Asian environmental or developmental conditions to determine what measures would be appropriate. There was no analysis as to whether the measure would be successful from an environmental perspective in light of other challenges to sea turtle survival, such as the taking of eggs from nesting beaches. In short, there was a failure in the political process to take account of the interests of stakeholders who were severely affected by the U.S. regulation.

The United States has the largest market in the world for shrimp. Foreign constituencies=economic livelihoods were linked to access to the U.S. market. According to statistics gathered by the U.S. Department of Commerce National Oceanic and Atmospheric Administration, the United States imported approximately 2.5 billion dollars worth of frozen shrimp in each of 1995 and 1996. Thailand alone had exported about US$1 billion dollars of shrimp per year to the United States, constituting about 50% of its shrimp exports. The U.S. import ban resulted in a glut of shrimp in the Thai market, dropping the price, and destroying the investments of many Thai shrimpers. A number of Thai shrimpers allegedly committed suicide when their investments were wiped out. Whatever one thinks of the U.S. import restrictions from a goal-oriented perspective (that of outputs), the process of implementing the ban was highly problematic from the perspective of representation and participation of affected parties.

A policy of deference to national import bans that are imposed because of foreign

139 The Thai shrimp industry was particularly dependent on the U.S. market, selling just over 50% of its shrimp exports to the U.S. in 1994 and 1995, valued at 981 million dollars in each of those years. In 1996, the value of Thai imports of shrimp products into the United States dropped to $888 million. The 50% figure is cited in Bridges, “Executive Summary”, April 1997, Vol. 1, No. 1, published by the International Centre for Trade and Sustainable Development (Geneva, Switzerland). The other figures are set forth in Fisheries of the United States, 1997, supra note...
140 Interview with Thai fishery authorities, Bangkok, January 2000.
environmental practices also has asymmetric effects. This institutional choice permits powerful countries with large markets, such as the United States, to use their market leverage to compel foreign regulatory change, while developing countries, holding most of the world’s population, wield no such clout. Developing countries are not in the position of imposing unilateral trade bans on U.S. products because of the United States’ energy consumption, nor are U.S. environmental groups calling for these measures, even though the stakes are much higher. If global warming causes the Indian Ocean to rise, much of Bangladesh will be submerged—perhaps good for sea turtles, but not for tens of millions of Bangladeshis.

In short, were the WTO Appellate Body to defer to the U.S. legislation and its administrative application, then it would effectively allocate decision-making over the appropriate balance of the trade, environmental, and development concerns at stake to a U.S. political and administrative process. Such a decision-making process, however, would be particularly biased against affected foreigners. Moreover, a general policy of showing such deference would have asymmetric effects. The United States’ and EC’s market power facilitates their ability to compel developing countries to modify regulatory policy, while developing countries wield no such clout.

2. WTO Injunction: Allocation to the Market. Second, the judicial bodies alternatively could apply a stricter standard of review of national import restrictions. They could apply a rule that all import bans are in violation of international trade law if they do not protect health or life within the jurisdiction imposing the restriction. The judicial body would not look to the purpose behind the legislation, but rather to its effects.

The judicial body could, in particular, review the trade restriction in relation to alternative measures that are less restrictive of trade. Import bans would be particularly scrutinized because of the more market-friendly means available to inform consumers of foreign environmental impacts. Product labeling, in particular, could inform consumption decisions (and, indirectly, foreign production decisions) in a less draconian manner. Such an approach would effectively shift decision-making over the appropriate balance among trade, environmental, and development goals from a national political process to the market.

The initial WTO judicial panel in the shrimp-turtle case, the WTO’s version of a trial court, took this route, as did former GATT case law, as in the (in)famous tuna-dolphin case, as well as other international jurisprudence. The initial WTO panel showed little deference to the

141 In practice, WTO panels do not have the power to issue injunctions. The strong term of “injunction” is used simply to signify a bright line decision whereby the WTO panel finds that, in order to comply with its ruling, the respondent must withdraw the trade restriction. If the WTO decision is sufficiently persuasive, whether because of the adverse reputational effect for the respondent of not complying or otherwise, then the respondent will withdraw the trade restriction, with the end result being similar to that following an injunction in the US domestic legal context.


143 See U.S. v Great Britain, Pacific Fur Seal Arbitration case, in which an international arbitral tribunal held in 1893 that the United States’ attempt to exercise jurisdiction to prevent British fur traders from trapping allegedly endangered seals outside of US territory was in violation of international law; and JOHN BASSETT MOORE, HISTORY & DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 755-961 (1898). See also Philippe Sands, Turtles and Torturers: The Transformation of International Law, 33 N.Y.U. J. INT’L L. & POL’Y 527, 529 (2001).
U.S. national regulation, and did not seriously address the regulation’s alleged environmental merits. Similar to the panel in the earlier GATT tuna-dolphin case, it found that the US measure was an import ban in violation of GATT Article XI and was not protected under an Article XX defense because it was unjustifiable in light of the potentially huge impact of such bans on the trading system, and the other less-trade restrictive alternatives available to the US. Although the U.S. regulation was not discriminatory on its face, the panel held that, by “conditioning access to the U.S. market” on a change in a foreign government’s environmental regulatory policy, the U.S. measure “threatens the multilateral trading system.” It repeated this assertion of a threat to the system nine times. In other words, the panel expressly stated its institutional concerns—the risk of great power coercion undermining the trading system itself. The panel’s broad ruling—based on the type of the measure, and not on its alleged purpose or the details of its implementation—could foster greater commercial certainty, thereby facilitating cross-border trade, promoting development, and protecting a liberal international trading system.

This market-based model has many benefits from the perspective of participation in the decision-making process over the concerns at stake. A market-based decision-making mechanism can permit more individualized participation in determining the appropriate balance between trade and environmental goals. In this manner, markets can enhance democratic voice. Marketers of shrimp caught with TEDs could label their products “sea-turtle-safe.” Consumers, informed through advertising campaigns, could choose which shrimp to buy on the basis of how the shrimp were caught. In choosing between shrimp, U.S. consumers would implicitly choose among alternative regulatory regimes for the trawling of shrimp. Such a WTO approach could stimulate not only product competition, but also regulatory competition. Thai and U.S. regulatory requirements for the trawling of shrimp would be in competition when consumers select which shrimp to buy. In purchasing shrimp, one would effectively be voting for one regulatory system (providing for more, or for less, protection of sea turtles) over another.

The market decision-making mechanism, however, is also subject to bias, resulting in skewed participation in the determination of the appropriate balance of the policy concerns. Markets are subject to information asymmetries, externalities, and collective action problems. Information costs would be high. The labels could be misleading. Even if the labels were accurate, many consumers would not take the time to adequately review them. Some consumers,

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144 See Tuna/Dolphin I, supra note 90, at 35-36 §§ 5.27-.28:

The Panel considered that if the broad interpretations of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations . . . . The United States had not demonstrated to the Panel- as required of the party involving an Article XX exception- that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Id.


146 See, e.g., Id. ¶¶ 7.44, 7.45, 7.51, 7.55, 7.60, 7.61.

even if informed, might decide to buy the cheaper shrimp and “free ride” on more environmentally-concerned purchasers. Other purchasers might refrain from buying “sea-turtle-safe” shrimp because they doubt that their purchasing decisions would be effective in light of other consumers’ actions. The views of environmentally-concerned citizens who do not eat shrimp would not be represented in the market process. U.S. environmentalists thus fear that competition between environmentally-protective U.S. shrimping rules and non-existent foreign shrimping rules would result in a “race to the bottom” toward less protective regulations. U.S. environmental groups are wary that U.S. shrimpers would join other producer groups in demanding that the U.S. Congress overhaul or create exceptions to the U.S. Endangered Species Act in order to “level the playing field” of competition against foreign competitors. In this case, producer groups might pressure Congress to relax U.S. requirements on the use of TEDs.

Yet a WTO injunction against the U.S. trade measures, resulting in regulatory competition between shrimp trawling rules, could also facilitate a third order of decision-making in addition to the WTO judicial process and the market. As with all injunctions, to the extent that transaction costs are low, the parties could negotiate a bilateral or multilateral solution that would attain the United States’ trade and environmental goals. In the shrimp-turtle case, the United States and Asian countries could agree by treaty that all shrimp trawlers be required to use turtle-protecting devices, in exchange for the United States paying some form of compensation to the Asian countries. The payment could take the form of cash, technical assistance, or increased access to the U.S. market in other commercial sectors. In other words, regulatory competition can spur regulatory convergence, especially where U.S. regulators fear that firms engaging in regulatory arbitrage can undermine U.S. regulators’ authority.

A negotiated political solution to the trade-environment-development linkage, spurred by a WTO injunction of U.S. unilateral measures, could be more efficient and more equitable. The side payment could represent an exchange of preferences, balancing developed and developing country priorities for environmental protection and economic development. The side payment should be less than the cost of the import ban, both to U.S. consumers (in terms of price effects) and to developing country producers, and thus the transaction would be more efficient. Wealthier countries would pay compensation to developing countries which, in exchange, would enact and enforce regulations to protect endangered sea turtles in line with wealthier country priorities. From the perspective of equity, the developing countries would receive something in return for imposing regulatory measures desired by a U.S. Congress responding to U.S. constituent demands. There would be no more taxation of developing countries (in the form of U.S.-required regulatory requirements and bureaucratic and enforcement costs) without representation. The cost of South and Southeast Asian sea turtle protection programs in line with U.S. preferences would not be borne solely by South and Southeast Asian constituencies. Developing countries and their constituents would be better protected from great power coercion.

The negotiation of the requisite side payments, nonetheless, could be complicated since shrimp and sea turtles are found in multiple jurisdictions. The negotiations could create perverse incentives, with one country intentionally harming the environment in order to hold out for more compensation. Negotiators likewise would face collective action problems, since countries

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149 Howard Chang, An Economic Analysis of Trade Measures to Protect the Global Environment, 83 GEO. L.J. 2131 (1995). Similarly, Richard Parker, in an empirical study of the GATT tuna-dolphin dispute between the United States and Mexico, maintained that sanctions were necessary in order for real bargaining to take place. Richard Parker,.., Georgetown International Environmental Law Journal. Parker worked in the international division of the
might fear that a free rider that did not enforce the regulations could gain a competitive advantage over them. They therefore might refuse an agreement that would be to their mutual benefit.

In short, were the WTO Appellate Body to make the institutional choice of allocating decision-making to the market through issuing an injunction, it would shape how affected parties participate in a market-based institutional process. This institutional process would provide different opportunities for participation than under the first alternative of deference. Both choices would entail tradeoffs involving the mobilization of different biases. On the one hand, allocation of decision-making authority to a market process would be subject to collective action problems and externalities, potentially resulting in fewer undertakings to address the plight of endangered sea turtles. On the other hand, were a court to show total deference to U.S. regulatory demands, the United States would have little incentive to engage in multilateral bargaining, so that we would never know the impact of collective action problems in international political negotiations spurred by a WTO injunction. Overall, a WTO injunction could enhance developing countries’ leverage in international bargaining over the appropriate balance among the trade, environmental, and development issues at stake. Such an injunction, however, could also subject the WTO judicial process to considerable challenges regarding their legitimacy from constituencies within the US and EU, a point examined in Part IV below.

3. The International Regulatory Alternative: Allocation of Authority to an International Political Body. Third, a WTO judicial body could refer the matter to a positive rule-making body, such as the WTO General Council or another international decision-making body, to balance the competing trade, development, and environmental claims of constituencies around the world. This alternative institutional allocation would involve greater centralization of rule-making at the international level, often referred to as “positive integration,” in contrast to “negative integration” promoted through the regulatory competition model.\(^{150}\)

WTO members have already harmonized or encouraged harmonization of substantive law in a number of regulatory domains. They have harmonized regulation of intellectual property protection under the TRIPS Agreement. After international concerns arose over the impact of pharmaceutical patents on developing country access to essential medicines, WTO members modified the agreement in December 2005.\(^{151}\) Similarly, the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the WTO Agreement on Technical Barriers to Trade (TBT Agreement) respectively encourage international harmonization of standards for food safety and animal and plant health, on the one hand, and of technical regulations, on the other, by creating presumptions that national measures that conform to such international standards are consistent with the respective requirements under such agreements.\(^{152}\)

\(^{150}\) JAN TINBERGEN, INTERNATIONAL ECONOMIC INTEGRATION (1965).

\(^{151}\) See WTO Members Appear Close to Deal on TRIPs and Public Health, 23 INSIDE U.S. TRADE 1, 11 (Dec. 2, 2005).

Some commentators have promoted the incorporation of environmental, labor and other agreements into the WTO as well so that the WTO would become a global regulatory organization, and not just a trade organization with regulatory implications. As Keohane has noted, the clustering of diverse issues within a single regime could facilitate side payments among such issues.\(^\text{153}\) Andrew Guzman has built on this concept in advocating that

“the WTO be structured along departmental lines to permit its expansion into new areas while taming its trade bias... Each department would hold periodic negotiating rounds to which member states would send representatives. These ‘Departmental Rounds,’ however, would be limited to issues relevant to the organizing department. In addition to the Departmental Rounds, there would be periodic ‘Mega-Rounds’ of negotiation that would cover issues from more than one department.”\(^\text{154}\)

In this way, Guzman proposes turning the WTO into a “World Economic Organization.”\(^\text{155}\) In a different vein, I recommended in earlier work the consideration of a less ambitious alternative in which “a standing committee operated under joint WTO-UNEP or WTO-UNEP-UNCTAD auspices could serve as an ad hoc forum to engage experts to assess local environmental, developmental, and social contexts, to negotiate compromise solutions, and to raise funds to implement them.”\(^\text{156}\)

Technically, the Agreement Establishing the WTO provides for majority or supra-majority voting, including for interpretations and amendments, so it should not be difficult to modify the agreements through a political process. These decisions could be made by the WTO General Council or at a WTO ministerial meeting, depending on the issue in question. Article IX:1 provides for a general rule on WTO decision-making that “except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting,” and, in such case, by a simple majority of the votes cast. Article X provides for a specific rule on amendments, providing for a 2/3 majority vote, subject to some complications depending on whether an amendment would alter substantive rights and obligations. Article XII similarly provides for a 2/3 majority vote on the accession of new members. Articles IX:2 and IX:3 provide respectively for a 3/4 majority vote for authoritative interpretations of the texts and for the waiver of any obligations of a member.\(^\text{157}\) In practice, however, WTO decisions are made

\(^{153}\) Keohane, supra note 40, at 93.


\(^{155}\) Id., at 309.

\(^{156}\) Shaffer, Democracy and the Law and Politics of the WTO, supra note __, at....

\(^{157}\) See Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments - Results of the Uruguay Round, arts. IX, X, XII, Apr. 14, 1994, 33 I.L.M. 1140 (1994) [hereinafter WTO Agreement]. Under Article X, only a few provisions require a unanimous vote to be amended. From a technical perspective, most provisions can be amended by a two-thirds majority of the members, and will either take effect only with respect to those members or with respect to all members, depending on whether the provision alters the “rights and obligations” of the parties. See id. at art. X:1. In addition, WTO members may decide by a three-fourths majority
infrequently and always by consensus. As Posner and Rief write, “At least one thing is clear about WTO interpretations and amendments: they are not designed to be taken regularly or readily. In fact, there has not been a single interpretation or amendment adopted since the WTO came into effect in 1995, and there were only six amendments (the last in 1965) in the previous forty-eight years of GATT. Moreover, the interpretation or amendment process—particularly, achieving a consensus—is only likely to become more difficult as the number of WTO members grows.”

Because of the prevailing norm of decision-making by consensus, the WTO political/legislative system, in contrast to its judicial system, is relatively weak.

This situation of de facto voting by consensus replicates what we see generally in international law because states distrust international political processes for regulatory policymaking, and wish to maximize their national autonomy. They thus generally require international rule-making to be made by treaty, which binds only signatory states that ratify the treaty.

As for secondary rule-making, if contemplated at all, states typically require requires consensus, so that each nation effectively retains a veto right. If the treaty provides for simple or qualified majority voting, the resulting resolutions may be non-binding, the body’s jurisdiction may be severely restricted, or the bodies’ members may ignore the formal voting rules and, as in the WTO, operate by consensus.

The Montreal Protocol, for example, has a dispute settlement system that includes sanctions against non-compliance, but the parties have not used it in practice, and rather developed alternative mechanisms involving technical assistance, technology

that an amendment is of such importance that “any Member which has not accepted it within a period specified by the Ministerial Conference . . . shall be free to withdraw from the WTO or remain a Member with the consent of the Ministerial Conference.” Id. at art. X:3. For overviews, see RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW § 4(f)(3) (1998); Claus-Dieter Ehlermann & Lothar Ehring, Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and “Plurilateral” Rules?, in REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY, AND DEMOCRATIC GOVERNANCE 498 (Ernst-Ulrich Petersmann, ed., 2005).


159 From a legal perspective, obligations that constitute jus cogens (or “peremptory norms”) are another matter, but these obligations, by definition, do not depend on state consent through a treaty. States purposefully did not define what matters fall within jus cogens when they had the opportunity to do so in the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 18232 [hereinafter VLCT] (“Treaties conflicting with a peremptory norm of general international law”) and its commentary, defining jus cogens as “fill in”. The official commentary on the International Law Commission’s final draft of Article 53 notes that “[t]he Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of jus cogens and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.” International Law Commission, Draft Articles on the Law of Treaties, with commentaries, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II (1966), available at http://www.un.org/law/ilc (last visited Apr. 10, 2006).


161 See, e.g., PHILLIP SANS & PIERRE KLEIN, BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 266 (2000) (noting “a trend towards a search for ‘consensus’ as opposed to reliance on the results of formal voting.”).
transfer and monitoring.\textsuperscript{162}

The current structure of international trade, environmental, and development organizations, moreover, is fragmented. As Raustiala and Victor have noted, rather than moving toward a consolidation of international law, we are moving toward a pluralist ménage of “regime complexes” in which provisions in one agreement can contradict and undermine those in another, sometimes purposefully calculated by states to do so.\textsuperscript{163} On environmental matters, harmonized rules currently are enacted on an ad hoc basis in numerous fora, often under the auspices of UN organizations (such as the United Nations Environmental Programme, UNEP) working in conjunction with interested states and (sometimes) non-governmental organizations. The resulting institutions have overlapping and uncertain jurisdiction, reflecting the ad hoc nature of their creation. For example, there currently is no multilateral treaty that directly addresses most fact-specific trade-environment-development conflicts, as was the case in the shrimp-turtle dispute. The Convention on International Trade in Endangered Species covers only the trade of endangered species, not their preservation through domestic regulatory conservation measures. The United Nations Convention on Biodiversity, although it addresses the need to create new mechanisms at the national level to conserve biodiversity, imposes no specific standards and creates no global standard-setting body. Even were the United Nations Convention on the Law of the Sea to provide clearer guidance, neither the United States nor Thailand have ratified it.\textsuperscript{164} Similarly, the United States, Thailand, and Malaysia are not parties to the Bonn Convention on the Conservation of Migrating Species of Wild Animals, which has sponsored initiatives for the conservation of marine turtles.\textsuperscript{165} The WTO itself has a Committee on Trade and Environment that continues to debate how WTO rules should handle import bans imposed on account of foreign environmental practices, but it has been unable to reach a consensus.\textsuperscript{166} Former WTO Director General Renato Ruggiero supported the formation of a World Environment Organization to act as a counterpart to the WTO on trade and environment matters,\textsuperscript{167} but there appears to be little state support for it.

Different centralized international political institutions could favor different actors on


\textsuperscript{166} Shaffer, The WTO Under Challenge, supra note ____.

account of that institution’s rules, norms, and procedures. Environmental NGOs tend to favor an environmental forum that brings together environmental ministries, as well as the NGOs themselves, because the institutional context and normative frames can better promote an environmental agenda. They thus complain of the predominant trade focus of the WTO. Locating decision-making in a development-oriented organization, such as UNCTAD, in contrast, could facilitate more of a development orientation, but would be distrusted by northern environmental groups.

The designation of the forum as an environmental, trade, or development body, however, would matter less were the forum to enact international environmental rules that affect states’ economic interests and that are enforceable before a court empowered to authorize sanctions. One reason that NGOs have greater access to decision-making in UNEP is because it is a relatively weak organization that relies largely on the development of norms through “soft law” mechanisms.168 Were UNEP or another environmental organization to assume greater rule-making and enforcement power, it might be less effective because states would be more vigilant in protecting their economic interests within it. For example, harmonized international food safety standards have been adopted through the Codex-Alimentarius Commission, a joint venture of the UN Food and Agriculture Organization and the World Health Organization. However, the incorporation of Codex standards into the WTO’s Agreement on Sanitary and Phytosanitary Standards has transformed decision-making in Codex. In reaction to a series of WTO disputes over food standards, nations began to send trade representatives to Codex meetings instead of food safety experts.169

The United States is likewise wary of UNCTAD, seeing it as an organization dominated by developing countries that called for the creation of a “New International Economic Order” throughout the 1970s and that still promotes large capital and technology transfers. The United States has thus effectively relegated UNCTAD to being a research body for developing countries.170 Were developing countries to attempt to make UNCTAD a negotiating forum for rule-making over the interface of trade, environmental, and development policies, the United States would likely refuse to participate in decision-making and would use its diverse material and ideational resources to undermine UNCTAD initiatives.171

Allocation of decision-making authority to a centralized international political process is, as each alternative, subject to tradeoffs in terms of participation over the appropriate weighing of trade, environmental, and development concerns. Even were international political processes made more robust, they would be subject to serious biases on account of resource imbalances,


171 In his study of UNCTAD, Joseph Nye characterized it as “a pressure group” for developing countries, but one in which the United States, France and the UK were the three most influential members, largely on account of their ability to indirectly control what could come forward in light of their ability to veto any proposal. See Joseph Nye, UNCTAD, Poor Nation’s Pressure Group, in THE ANATOMY OF INFLUENCE: DECISION-MAKING IN INTERNATIONAL ORGANIZATIONS 371 (Robert Cox & Harold Jacobson eds., 1974).
collective action problems, and general citizen disinterest in a distant forum. First, the bureaucracies of northern countries have greater resources, and larger, more experienced staffs. Second, northern-based interest groups, whether commercial or environmental, have the funds to better represent their views at the international level than do NGO and commercial interests in developing countries. Third, voting mechanisms would be extremely difficult (although not impossible) to design. Voting designated by country would be undemocratic, and voting designated by population would favor a few countries, such as China, over others. Fourth, even were centralized international governance mechanisms to facilitate relatively greater voice of a broader array of stakeholders, these mechanisms may be unsuited to respond to local norms, needs, and conditions in rapidly changing environments, and they could confront considerable challenges to their legitimacy, and the implementation of their decisions.

Nonetheless, since powerful states exercise market and political-military power in the absence of international political structures, the development of new international governance mechanisms could be more important for constituents in less-powerful states to the extent that these states participate in the institution’s design, operation, and oversight. Centralized bargaining that addresses sustainable development concerns could provide a focal point for political negotiations that could make the conflicting norms, priorities, and interests at stake in trade-environment-development conflicts more transparent. Through bringing developing country perspectives to the fore that might otherwise be squelched in a polarized “trade-environment” litigation context, centralized bargaining could potentially facilitate targeted financial transfers that would be more equitable and efficient in addressing environmental and development goals.

In short, participation in an international political secondary rule-making process would also be skewed. In light of the current decentralized and fragmented nature of international institutions, it is not clear where international regulatory decision-making would occur. The WTO Appellate Body’s direct use of this institutional alternative was thus severely restricted. Were the WTO Appellate Body to attempt to facilitate international political negotiation over the appropriate weighing of competing concerns in the shrimp-turtle dispute, it would need to take a different path, as examined below.

4. The Judicial Alternative: An International Court’s Balancing of Substantive Norms and Interests. Under a fourth approach, the WTO judicial bodies themselves could “balance” competing preferences for trade, development, and environmental protection in their review of the facts of specific cases under open-ended standards. As a legal realist, I realize that judicial decision-makers are inevitably involved in some form of “balancing,” including whether they wish to balance policy concerns in an explicit manner in a decision, as under this fourth institutional choice. My interest in this article, however, lies not in judicial motivations, but

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175 Shaffer, *The WTO Under Challenge*, supra note __.

176 One option for financial transfers is through the Global Environmental Facility, established in 1991. See *http://www.gefweb.org/index.html*. 

rather in capturing the institutional effects of interpretive decisions.

Some legal academics have promoted the approach of more judicial balancing in this area.\textsuperscript{177} The Appellate Body has explicitly taken a balancing approach in other cases, including one involving consumer protection rationales under Article XX for trade restrictions. In a case involving a Korean requirement that retailers make a choice of only selling Korean or foreign beef allegedly to ease monitoring of the labeling of the origin of the beef sold, the Appellate Body concluded:

“In sum, determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’ within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”\textsuperscript{178}

On these grounds, it held against the Korean measure, finding that it was inconsistent with GATT article III.4 and was not validated under an article XX analysis.

The WTO Appellate Body also took a balancing approach, in part, in the shrimp-turtle case when it reversed much of the initial panel’s decision in the shrimp-turtle case. Rather than apply a generic analysis to all import bans based on foreign production and process methods, and thereby implicitly delegating decision-making to the market, the Appellate Body turned to the “facts making up” the “specific case,” and sought to maintain “a balance... between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.”\textsuperscript{179}

The Appellate Body recognized that preferences change over time, and defined its \textit{task} as \textit{the delicate} one of locating and marking out a \textit{line of equilibrium} which \textit{is not} fixed and unchanging, \textit{but moves} as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ \textsuperscript{(emphasis added)}.\textsuperscript{180} In particular, the Appellate Body found that the U.S. measures fell within the Article XX(g) exception for measures “relating to the preservation of exhaustible natural resources,” although it held (initially) that the ban was “unjustifiable” and “arbitrary,” as discussed below.\textsuperscript{181}

Judicial bodies generally are better-situated to weigh expert evidence and disputed facts in a specific case that is brought before them in order to balance competing concerns. WTO

\textsuperscript{177} See e.g., DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 113-136, 156 (1994) [hereinafter ESTY, GREENING THE GATT] (proposing a three-prong test to address trade-environment issues in a more balanced manner).

\textsuperscript{178} See WTO Appellate Body, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef WT/DS161/AB/R & WT/DS169/AB/R ¶ 164 (Dec. 11, 2000). See also Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes WT/DS302/AB/R ¶ 70 (Apr. 25, 2005) (affirming the “weighing and balancing” of the judicial body of these factors).

\textsuperscript{179} WTO Appellate Body, supra note __, at ¶¶ 155-59.

\textsuperscript{180} Id. ¶ 159.

\textsuperscript{181} The Appellate Body confirmed that the term \textit{natural resources} incorporates the protection of living species and that there was a \textit{sufficient} nexus between the migratory and endangered marine populations involved and the United States. AB Report, supra note __, ¶ 133. The U.S. measures were thereby \textit{provisionally} justified, subject to application of the Article XX \textit{chapeau}, which addresses whether or not the measures \textit{constitute} a means of arbitrary or unjustifiable discrimination.
panels, for example, increasingly call on experts to testify about environmental and health-related issues relevant to trade disputes in order for the panels to weigh the factual evidence. The panel in the shrimp-turtle case asked the parties for a list of individuals having expertise on matters of sea turtle conservation, and then designated five marine biologists from this list to report to it as an “expert review group.”

The panel asked the expert group detailed questions concerning the status of sea turtles in the complainants’ waters, their migratory patterns, the relative effectiveness of the complainants’ sea turtle conservation measures, the relation of shrimp trawling to sea turtle conservation, and the socio-economic conditions of the shrimping industry. In this way, WTO judicial bodies can try to take account of the trade, environmental, and development interests and concerns at stake.

Participation within the judicial process, however, is far from neutral. First, as noted above, the United States and EU, as repeat players in WTO litigation, are able to mobilize legal resources more cost-effectively than developing country governments. The dynamics of litigation thus favor them, and, indirectly, their constituents. WTO insiders, for example, found that Malaysia failed to develop available factual and legal arguments in its WTO challenge of the United States’ implementation of the Appellate Body’s shrimp-turtle decision. Second, constituents are dependent on their national representatives to put forward their concerns, and they do not have equal access to these officials. Their access is a function of domestic political processes that favor discrete producer groups with high per capita stakes in a given claim. Third, where a WTO judicial body accepts an amicus curiae brief from a private party, whether that brief is attached to the government’s brief or submitted independently, developed countries and developed country environmental NGOs are more likely to have the resources and legal expertise to submit persuasive arguments and frame debates before WTO judicial panels. In fact, all three amicus briefs filed in the shrimp-turtle case were written by members of western NGOs or legal academics, and all three supported the US position.

Many developing countries fear that the arguments presented to WTO judicial panels could, as a result, be further skewed in favor of actors from developed countries. Developed country NGOs are also located closer to Geneva to organize parallel demonstrations outside the WTO’s Geneva-based premises and complement legal arguments with more direct pressure on the judges.

The WTO Appellate Body was reluctant to allocate substantive decision-making

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

183 Interviews with delegates, private lawyers, and members of the WTO secretariat, Geneva, Switzerland (July 2003).

184 See, e.g., (i) CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, CENTER FOR MARINE CONSERVATION, ENVIRONMENTAL FOUNDATION LTD., MANGROVE ACTION PROJECT, PHILIPPINE ACTION NETWORK, RED NACIONAL DE ACCION ECOLOGICA & SOBREVIVENCIA, AMICUS BRIEF TO THE APPELLATE BODY ON UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS (1999), available at http://www.ciel.org/Tae/shrimpturtle.html (last visited Apr. 12, 2006); (ii) JAMES CAMERON & FIONA DARROCH, WORLDWIDE FUND FOR NATURE, WWF AMICUS BRIEF TO WTO: SHRIMP-TURTLE DISPUTE (1997), available at http://www.field.org.uk/tisd_12.php (last visited Apr. 12, 2006); and (iii) the Earth island institute, the Humane Society, and the Sierra Club available at http://www.earthjustice.org/library/references/WTO-20Shrimp-Turtles.pdf (the amicus brief was submitted on behalf of Earth Island, Humane Society and Sierra Club by Earthjustice, a non-profit public interest law firm - www.earthjustice.org)
authority to itself in the shrimp-turtle case. Although it did so in the Korea-beef case, that case did not involve politically-charged environmental issues that would attract the attention of transnational NGOs and the media. In the shrimp-turtle case, in contrast, the Appellate Body likely realized that it lacked the legitimacy to engage in a delicate balancing on this particular matter, involving conflicting priorities of countries of widely disparate levels of development. Although, as with any court, WTO Appellate Body members are not elected, they are even more subject to legitimacy challenges than domestic courts because of the more fragile social acceptance of their decisions. The WTO Appellate Body thus took a proceduralist turn.

5. The Proceduralist Turn: International Judicial Review of the Process of National Decision-Making. Under a fifth institutional alternative, instead of engaging in a balancing of substantive concerns, the WTO Appellate Body can review the national decision-making process to ensure that it takes into account the views of affected foreign parties. The WTO Appellate Body applied this process-based approach in the shrimp-turtle case. The Appellate Body returned the substantive issue to a lower vertical level of decision-making— that is, back to the U.S. Department of State which was responsible for implementing the U.S. legislation—subject to certain procedural conditions. By reviewing the due process and transparency of the State Department’s implementing procedures, the Appellate Body attempted to enhance the representation of affected foreign parties and thereby counter the national biases of domestic legislative and administrative bodies.

To facilitate the participation of foreign stakeholders, the Appellate Body took two primary tacks. First, the Appellate Body faulted the implementing regulations of the U.S. Department of State for a lack of multilateralism. The Appellate Body’s report noted that the United States had successfully negotiated the signature of an Inter-American Convention for the protection and conservation of sea turtles, which demonstrates that “multilateral procedures are available and feasible” (par.166-170). The report found that the United States never seriously attempted to negotiate a similar agreement with the four Asian complainants. In this way, the Appellate Body tried to foster a more centralized (albeit ad hoc) political approach by requiring the United States to attempt to negotiate harmonized substantive rules first, before implementing a ban that could trigger a dispute before the WTO judicial process.

Second, the Appellate Body faulted the United States for the national biases in its procedures for determining the import restrictions. The Appellate Body effectively required the United States to create an administrative procedure pursuant to which foreign governments or traders would have an opportunity to comment on U.S. regulatory decisions that affect them. The Appellate Body held that the application of the U.S. measure was “arbitrary” in that the certification process was not “transparent” or “predictable,” and did not provide any “formal opportunity for an applicant country to be heard or to respond to any arguments that may be

185 The Appellate Body listed a number problems with the US measure, which include the following six flaws: (i) the US regulation was unjustifiably “coercive” in requiring all “exporting Members.. to adopt essentially the same policy” (i.e. a lack of flexibility regarding the means); (ii) the US regulation applied even if the shrimper actually used US-prescribed TEDs, indicating that the US was more interested in exporting its regulatory program than in actual shrimper practice; (iii) the US expended more diplomatic efforts to negotiate a treaty for countries border the Caribbean and Atlantic than for the Asian countries; (iv) the US discriminated against countries by having shorter phase-in periods for the Asian countries compared to Caribbean countries under an earlier US regulation; (v) the US expended more efforts to transfer technology to countries in the Caribbean/western Atlantic region; and (vi) the lack of transparency and arbitrary nature of the US process for certifying countries under the regulation. See discussion in Shaffer, United States- Import Prohibition of Certain Shrimp and Shrimp Products, supra note…
made against it.” It admonished the United States for failing to take “into consideration the different conditions which may occur in the territories of... other Members.” It required the United States to assure that its policies were appropriate for the local “conditions prevailing” in the developing countries.

Process-based review may seem ideal, since it is relatively less intrusive than substantive review and it directly focuses on the issue of participation of domestic and foreign parties. However, process-based review also raises serious concerns, in particular, because processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome. Even if international case-by-case review were possible (which it is not), it will be difficult, if not impossible, for an international body to determine the extent to which a national agency actually takes account of foreign interests. Powerful actors can thus go through the formal steps of due process without meaningfully considering the views of the affected parties.

In the shrimp–turtle case, the U.S. Department of State did go through the formal steps to revise its procedural rules to comply with the Appellate Body’s criteria. Yet, in doing so, it still required developing country shrimpers to use U.S.-mandated “turtle excluder devices” if they wish to sell their shrimp in the U.S. market. When Malaysia challenged US implementation of the Appellate Body ruling pursuant to article 21.5 of the WTO dispute settlement understanding, the panel and, on appeal, the Appellate Body found in favor of US compliance. In short, at the end of the day, the US was able to maintain its ban on shrimp imports from countries that do not require their shrimpers to use TED, although it is now being applied in a modified form as we will see. Although Thailand was initially certified (unlike India and Malaysia), the US Department of State dropped Thailand from the list of certified countries in 2004. Since then, only Pakistan (of the four complainants) has been certified and one might justifiably question whether the certification of Pakistan by the US Department of State represents an effort to appease that country’s leadership in the context of the US “war on terror” and the conflict in Afghanistan more than Pakistan’s efforts to protect endangered sea turtle species from the risks of shrimp trawling nets.

By focusing on process, the Appellate Body not only ultimately upheld the legality of the US restrictions. It also created legal uncertainty for future disputes where bargaining takes place in the shadow of WTO law. Countries with market power, such as the United States, can exploit this uncertainty by harnessing their market leverage to coerce weaker countries. Weaker countries may not bring a legal challenge because it may be simpler and cheaper to simply

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186 § 180.
187 Id. § 164.
188 See, e.g., United States — Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, supra note 77; Article 21.5 Appellate Body Report, supra note 79.
190 See Department of State, Public Notice 5418, Federal Register: May 23, 2006 (Volume 71, Number 99), pp. 29705-29706 (“On April 28, 2006, the Department certified 14 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Belize, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Pakistan, Panama, Suriname, and Venezuela”). Similarly, the EC granted special tariff preferences for textile products from Pakistan, and not from India, in light of Pakistan’s situation in relation to the war in Afghanistan; and the US withdrew special tariff preferences from Nicaragua and not from El Salvador on the grounds of labor rights violations in the context of the civil conflicts in those countries during the 1980s when the Reagan administration supported the “Contras” against a leftist Nicaraguan government. See Shaffer and Apea, supra note…, at…
succumb to the stronger country’s demands in light of the uncertainty of the substantive law and the costs of the legal procedures. As Hudec wrote:

As a general proposition, a system of ambiguous legal remedies [including, in this case, those based on revisions of administrative process] tends to offer unequal pressures for enforcement for large and small countries. So long as larger governments find ambiguous remedial orders advantageous, and so long as panels remain the same sort of ad hoc bodies they have always been....., it can be expected that remedial orders will tend to lack specificity.\(^{191}\)

Nonetheless, by creating uncertainty, the Appellate Body ruling may also have opened some space for multilateral political negotiations. Through its in-depth examination of the legitimacy of the environmental claims and the need for adaptation to developing country contexts, the Appellate Body decision may have helped frame subsequent bilateral negotiations between the disputing parties, as discussed next.

**IV. Normative Choices: Beyond Textual Interpretation. The Need for Comparative Institutional Analysis**

As shown in section III, in rendering a decision, the WTO Appellate Body can shape decision-making in different institutional processes in which different parties are favored. Participation is biased under each of the five institutional choices examined, as under any governance mechanism. From a positive perspective, the institutional choice will determine who participates, directly or indirectly, in the balancing of the values and priorities at issue. As Komesar writes, “Focusing on the dynamics of participation provides a way to understand the market, the political process and the courts.”\(^{192}\)

From a normative policy perspective, in my view, the central policy question is which institutional mechanism results in relatively less-biased participation compared to the non-idealized alternatives.\(^{193}\) A participation-focused comparative institutional analytic approach takes to heart, as Isaiah Berlin wrote, an “empirical, as against the metaphysical view of politics.”\(^{194}\) It does not put forward a single normative goal to be achieved regardless of institutional context, but rather recognizes that people hold many, sometimes conflicting goals, and their articulation and pursuit of these goals inevitably are mediated through different institutional processes.\(^{195}\) A participation-centered comparative institutional approach recognizes

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\(^{192}\) Neil Komesar, *The Essence of Economics: Law and Institutional Choice (Two Ways)*, at 5 (working manuscript).

\(^{193}\) Yet because I focus on the dynamics of participation does not mean that I am a “participation-fundamentalist,” substituting a goal of “participation-maximization” for some other goal, such as “utility maximization.” As Komesar notes in his two-force model of politics, we should be just as concerned with the prospect of majoritarian bias (the infliction of intense harm by majorities on under-represented minorities, as exemplified by discriminatory regulation), as much as minoritarian bias (as in regulatory capture under “public choice” approaches). Majoritarian decision-making can lead to harmful policies, and, in particular, to policies that impose extremely severe harm on certain groups without any compensatory offset. See Komesar, *Imperfect Alternatives*, supra note __, at...


\(^{195}\) As Berlin writes, “Pluralism, with the measure of ‘negative’ liberty that it entails, seems to me a truer and more humane ideal… It is truer, because it does, at least, recognise the fact that human goals are many, not all of them
the value of “pluralism,” which it takes into account through the very design of its inquiry. In many cases, participation will define the goal, as per a “civic republican” and many “new governance” approaches. Even where a single goal is pursued (whether the goal is “resource allocation efficiency,” “fairness” or something else), a participation-based comparative institutional approach recognizes that the outcome will depend on the institutional process that filters the goals pursued. The answers from such an approach are always contingent, leading to no “final solution.” The answers rather are a function of how diverse aims and goals are pursued and mediated through different institutional processes, be they market, political, bureaucratic or judicial processes at different levels of social organization, from the local to the global.

The WTO Appellate Body ultimately had to hold the U.S. import ban either legal or illegal, or to decline jurisdiction, in which case the ban would have remained in effect. The WTO Appellate Body’s decision thereby set a default rule around which the concerned parties could negotiate. This default rule plays an important role in structuring any political negotiation, both for the dispute in question and for future disputes. If the default rule is that the United States can restrict developing country imports on environmental grounds, developing countries will more likely be forced to accept U.S. requirements without any compensation because of the United States’ greater bargaining leverage. If the default rule is that the United States cannot ban imports on these grounds, but rather can only resort to market-oriented labeling devices, developing countries are in a stronger negotiating position to demand compensation in exchange for modifying their domestic regulations.

Since the United States is central to the WTO’s existence, and since the shrimp-turtle case was followed closely by U.S. environmental and producer groups, the Appellate Body was somewhat constrained from holding that all U.S. trade restrictions based on foreign production methods are WTO-illegal. The United States likely would not have complied with such a ruling, impairing the efficacy of the WTO’s legalized dispute settlement system. Moreover, the United States may have refused to negotiate around the injunction so as to provide financial assistance to South and Southeast Asian nations in return for their enactment of sea turtle protection policies. The explanation lies in the manner in which the U.S. political process accounts for the respective costs and benefits to the United States of an import ban, on the one hand, and financial assistance for conservation efforts abroad, on the other. An import ban results in higher prices for consumers, but that cost does not appear on sales receipts and is difficult to calculate. A line item budget allocation for Asian sea turtle conservation, in contrast, is more easily seen by political representatives and reported in the media. Moreover, an import ban directly benefits U.S. producer interests, and these producers have little interest in the financing of environmental conservation efforts in developing nations. The U.S. Congress was thus less likely to authorize such environmental expenditures.

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197 Shaffer, Blue-Green Blues, supra note __.
The result of U.S. non-compliance and refusal to finance environmental adaptation in developing countries would have been a worst case scenario for the WTO institutionally. There would be no improvement in sea turtle conservation, no protection of developing countries from U.S. market coercion, disregard for a WTO ruling, and the potential unleashing of further mass protests against the institution. The WTO once more would have been an easy target for northern environmental groups to condemn it as a pro-business, anti-environment, anti-democratic organization responsible for environmental destruction. Environmentalists, trade protectionists, and sovereign nationalists in the United States could join ranks to call into question the continued existence of the WTO. Such a ruling could have threatened to undermine the very system that the initial WTO shrimp-turtle panel allegedly was attempting to protect. The WTO Appellate Body (as any court) operates collectively not as an ideal neutral judge, but one that takes into account its own interests and thus shapes decisions to encourage compliance and negotiated settlement.198 As McDougal and Lasswell wrote regarding international law almost fifty years ago, “Since the legal process is among the basic patterns of a community, the public order includes the protection of the legal order itself, with authority being used as a base of power to protect authority.”199 The Appellate Body is not free from political pressure, even if it does not expressly take that pressure into account in the language of its decisions.

As regards the WTO itself, should we thus conclude that the WTO is rigged against developing country interests so that they should never have joined the institution and it should be disbanded or radically curtailed? In the shrimp-turtle case, had there been no WTO, the U.S. legislation and implementing regulations would have been enacted pursuant to a political process in which developing country constituents were unrepresented. Developing countries would have been compelled to change their shrimp-trawling requirements to meet U.S. requirements if they were to retain access to the U.S. market for their products.

The Appellate Body decision in the shrimp-turtle case, in contrast, actually induced a U.S. administrative agency to revise its rules so as to work more closely with affected foreign interests before it restricted their imports. Most importantly, the United States confined its trade restrictions to apply on a shipment-by-shipment basis. That is, the United States no longer bans all imports of wild shrimp from a country that fails to enact legislation imposing U.S. regulatory requirements. Rather, the United States implemented a certification system that only restricts shrimp imports if they are actually caught by trawlers not using turtle excluder devices.

Perhaps the greatest irony is that the only reason that the US administration was able to comply with the Appellate Body ruling was through a US domestic legal process interpreting a US statute. It was only when a US appellate court reversed the decision of the Court of International Trade (the US court of first instance), by holding that the US administration may apply a shipment-by-shipment policy under the statute (section 609), that the US could comply with the WTO decision.200 It was a US domestic legal process interpreting a US statute that

200 Cf. Howard F. Chang, Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case, 74 S. CAL. L. REV. 31 (2000); Howard F. Chang, Environmental Trade Measures, The Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT, 8 Chap. L. Rev. 25 (Spring 2005) (both articles by Chang discussing the Appellate Body’s ruling in the shrimp-turtle case as an indication that importing countries can defend environmental trade measures—even unilateral import bans—under GATT Article XX as long as they avoid unfair discrimination); and Robert Howse, The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline
actually enabled US compliance and resolution of the dispute on more favorable terms for developing countries. This key point, highlighting how transnational legal process works in practice,\textsuperscript{201} has been missed by most scholarship interpreting the WTO shrimp-turtle case.

The WTO Appellate Body first signaled to US judges the consequences of interpreting the US statute in a manner that would conflict with WTO law. As it wrote,

\begin{quote}
\textbf{“We acknowledge that the greatly differing periods for putting into operation the requirement for use of TEDs resulted from decisions of the Court of International Trade. Even so, this does not relieve the United States of the legal consequences of the discriminatory impact of the decisions of that Court. The United States, like all Members of the WTO and of the general community of states, bears responsibility for acts of all its departments, including its judiciary.”} \textsuperscript{202}
\end{quote}

The US had thirteen months to implement the Appellate Body decision.\textsuperscript{203} The US Department of State issued revised guidelines during this period, pursuant to which the US requirements would not require a country-wide regulatory change, but rather only apply to wild shrimp actually shipped to the Untied States.\textsuperscript{204} An environmental group (the Earth Island Institute) then challenged the revised guidelines, maintaining that they were in violation of Congress’ instructions under the US statute (section 609).\textsuperscript{205} The US Court of International Trade again applied its earlier ruling, finding that the statute required a country-wide regulatory change (such as a requirement to use TEDs) in order for the country’s shrimp to be imported into the United States.\textsuperscript{206}

In the appeal, the U.S. government argued that the WTO ruling constituted “the law of nations,” and that “an act of Congress ought never to be construed to violate the law of nations, if


\textsuperscript{202} AB Report, supra note..., at par. 173.

\textsuperscript{203} See article 21.4 of the DSU, providing for an implementation period that “shall not exceed 15 months unless the parties to the dispute agree otherwise.” The US agreed to a thirteen month implementation period in this case. See United States--Import Prohibition of Certain Shrimp and Shrimp Products, Status Report by the United States, WT/DSS5/15, ¶ 1 (July 15, 1999). (“On 21 January 1999, the United States and the other parties to the dispute reached agreement on 13 months as a reasonable period for implementation.”)

\textsuperscript{204} See United States Department of State, Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946, 36949-36950 (July, 8 1999) (“requirement that all shipments of shrimp and products of shrimp imported into the United States must be accompanied by a declaration (DSP-121, revised)… and remains effective. The DSP-121 attests that the shrimp accompanying the declaration was harvested either under conditions that do not adversely affect sea turtles (as defined above) or in waters subject to the jurisdiction of a nation currently certified pursuant to Section 609. All declarations must be signed by the exporter. The declaration must accompany the shipment through all stages of the export process, including any transformation of the original product and any shipment through any intermediary nation.……The requirement that a government official of the harvesting nation not currently certified pursuant to Section 609 must also sign the DSP-121 asserting that the accompanying shrimp was harvested under conditions that do not adversely affect sea turtles species remains effective.”) Federal Register vol. 64, no. 130, 8 July 1999, Public Notice 3086, pp. 36946-36952.

\textsuperscript{205} Earth Island Institute v. Daley, 48 F.Supp.2d 1064, 1077 (C.I.T. 1999)

\textsuperscript{206} Earth Island Institute v. Daley, 48 F.Supp.2d 1064, 1080 (C.I.T. 1999)
any other possible construction remains.\textsuperscript{207} In doing so, it referred to what is known as the Charming Betsy rule in constitutional jurisprudence, pursuant to which US statutes, where possible, should be interpreted in compliance with US international obligations.\textsuperscript{208} As we saw, the WTO Appellate Body held that the US statute (Section 609) permitted compliance with the United State’s WTO law commitments, but that US judicial and administrative bodies had interpreted and applied the statute in a manner that violated them.\textsuperscript{209} In effect, the Appellate Body was requesting US judges to apply the Supreme Court doctrine from the Charming Betsy case and interpret and apply the US statute in line with the Appellate Body’s interpretation of WTO obligations. The U.S. Court of Appeals for the Federal Circuit did so, overruling the lower court’s finding, taking note of the WTO decision.\textsuperscript{210} In sum, both U.S. administrative and judicial officials responded to the Appellate Body’s decision. In turn, when Malaysia then challenged US compliance with the initial Appellate Body ruling, the panel and Appellate Body found that the US complied in light of the Department of State’s revised guidelines and their implementation.\textsuperscript{211} The revised U.S. policy on shrimp imports was significantly less coercive, since it did not force developing countries to change domestic regulations for all shrimp trawling (whatever be the shrimp’s destination), but only for the trawling of shrimp that are sold in the U.S. market.\textsuperscript{212}

\textsuperscript{207} See Turtle Island Restoration Network v. Donald Evans, 284 F.3d 1282 (2002) (dissent), at 1303.

\textsuperscript{208} Murray v. Charming Betsy, 6 U.S. 64, 118 (1804). See also USA v Palestine Liberation Organization, 695 F. Supp. 1456 (S.D. N.Y.) (1988) (“Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence to differentiate between them. Wherever possible, both are to be given effect. Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence”). But note also how Congress, in the Uruguay Round Agreements Act, provided that WTO law does not supersede US law and cannot be invoked before US courts.

\textsuperscript{209} See supra note...\textsuperscript{208}

\textsuperscript{210} See Turtle Island Restoration Network v. Donald Evans, 284 F.3d 1282, 1289-1290 (2002) (majority opinion) and dissent, at 1303.


\textsuperscript{212} Industry efforts to protect the US market from competition from shrimp imports, however, continued through US antidumping investigations and duties. See Rosella Brevetti, Dumping Shrimp Processors Allege Six Countries Are Dumping Shrimp in U.S. Market, 21:2 INTERNATIONAL TRADE REPORTER (BNA) 67 (January 8, 2004); Rosella Brevetti, Commerce Preliminarily Finds Brazil, India, Thailand, Ecuador Dumping Shrimp in U.S., 21:32 INTERNATIONAL TRADE REPORTER (BNA) 1327 (Aug. 5, 2004). These U.S. actions are subject to a number of challenge before the WTO. Two of the complainants in the US shrimp-turtle case, Thailand (DS 324 and DS 58) and India (DS 58) brought complaints against US antidumping duties on shrimp, which were ongoing in 2006. See ICTSD, US Antidumping Duties on Shrimp Face New Challenge, 10:40 BRIDGES WEEKLY TRADE NEWS DIGEST, (Nov, 29, 2006); and Esther Lam, Brazil, China, India to Join U.S., Thailand in WTO Consultations on Shrimp Zeroing, 23:31 INTERNATIONAL TRADE REPORTER (BNA) 1175 (August 3, 2006).; . Ecuador brought a complaint against the US antidumping duties on shrimp which resulted in a WTO panel report (see DS335 (Ecuador). The panel found in favor of Ecuador, concluding “that the USDOC acted inconsistently with Article 2.4.2 in its final and amended final affirmative determinations of sales at less than fair value (dumping) with respect to certain frozen warm water shrimp from Ecuador, and in its final anti- dumping duty order.” The panel held that “the United States has acted inconsistently with the provisions of the Anti-Dumping Agreement, it has nullified or impaired benefits accruing to Ecuador under that Agreement” and recommended that “the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the Anti-Dumping Agreement.” See Panel Report, United States – Anti-Dumping Measure on Shrimp from Ecuador, WT/DS335/R (Jan. 30 2007).
In addition, the United States increased its efforts to negotiate a regional treaty to address the plight of endangered sea turtles in the Indian Ocean and South Pacific, leading to a memorandum of understanding and action plan signed in 2001.\textsuperscript{213} If U.S. environmental groups continue to desire that developing countries change their regulations to cover all shrimp trawler operations, regardless of the shrimp’s destination, and if the United States continues to negotiate a treaty with these countries, both sides retain some bargaining leverage to potentially reach an end result where priorities over trade, environmental protection, and development promotion are relatively better balanced. The key term here is \textit{relatively} better balanced compared to the institutional alternatives of eliminating the WTO or curtailing its dispute settlement system’s jurisdiction.\textsuperscript{214} The WTO Appellate Body, within the institutional constraints that it faced, attempted to foster second order institutional processes of less-biased participation that involve reduced coercion and increased inclusion of affected parties.

\textbf{V. Conclusion}

WTO law is not some doctrinal “thing” that can be understood independently from its application, from its practice, from its life in the world. WTO law does not exist in a separate, autonomous sphere—such as in the treaty texts or in the Appellate Body’s adopted decisions—but operates within particular institutional contexts in which these texts and decisions play a part.\textsuperscript{215} These contexts include the interaction of the WTO judicial process with those who bring arguments to it, on the one hand, and the national institutions and “civil society” to whom the judicial decisions are addressed, on the other.\textsuperscript{216} It is national institutions who must translate the legal decisions into practice, and, by “implementing” them, help give those decisions effect. The shrimp-turtle case illustrates the \textit{recursive quality} of WTO law—the way law and legal actors, at the international and domestic levels, interact and reciprocally affect each other in the process.

Scholarly assessment of WTO legal decisions in terms of values or functions is important, but insufficient. To understand WTO jurisprudence and its impact, interpretive approaches get us only so far. We must also look at WTO judicial decisions within broader institutional contexts. This paper has thus examined the interpretive choices faced by the WTO judicial bodies not in terms of categories, but rather in terms of their structural and institutional implications.

Another way to understand this point is to think in terms of the broader intentions of the initial parties to the GATT in 1948 and to the WTO in 1995. The parties to the GATT and WTO were agreeing to a form of trade governance, not simply a “contract” to be interpreted. They came to this endeavor not with dictionaries but with political experience. They had, in particular,

\begin{itemize}
  \item \textsuperscript{214} See Christina Davis, \textit{Do WTO Rules Create a Level Playing Field for Developing Countries?} (working paper on file with author, 2003) (comparing the outcome for Peru, which successfully used the WTO dispute settlement system in its dispute over EC prohibitions against Peruvian fish being labeled “sardines,” with the outcome for Vietnam, which is not a WTO member, and can not label its fish “catfish” on account of new U.S. legislation demanded by U.S. catfish farmers).
  \item \textsuperscript{215} As Komesar writes, “Put most strongly, laws, rules and customs may have no meaning outside of the behavior of these decision-making institutions which is, in turn, determined by the dynamics of participation.” Komesar, “The Essence of Economics,” at 23.(on file). Cf Brian Bix, \textit{Law as an Autonomous Discipline, in THE OXFORD HANDBOOK OF LEGAL STUDIES} 975 (Peter Cane & Mark Tushnet eds., 2003).
  \item \textsuperscript{216} Cf. McDougal 82 Receuil des Cours de l’Academie de Droit International 1953/1, at 181 (defining international law as “flow of decision in which community prescriptions are formulated, invalidated and in fact applied.”).\end{itemize}
experienced political failure of the inter-war period when protectionist tariffs soared and quotas proliferated. They came to the WTO understanding the challenges of non-compliance with GATT decisions and the temptations and alternative of unilateral action without a functioning dispute settlement system.217 If we are to take seriously the relation of the WTO to states and other institutional mechanisms, then we need to think in broader institutional terms.

Yet examining the WTO institution in isolation is also insufficient. It is insufficient both because all institutions are beset by imperfections, and because, in fact, the WTO judicial process is itself making institutional choices. Our examination of the institutional choices that the WTO judicial system confronted in the shrimp-turtle case highlights broad questions concerning judicial interpretation, power and global governance. In an interdependent world of large numbers and complexity, no governance mechanism provides for completely unbiased participation or representation of affected interests. All institutions are imperfect. Power asymmetries are always present. As a result, this article suggests that the assessment of power’s role in the WTO or any other global governance mechanism should be a multi-level, comparative institutional one, or the assessment will be of limited use from a policy perspective.

Institutional choice is often deployed strategically. The United States, working in conjunction with business constituents, engages in forum-shifting to achieve its objectives sequentially. The United States ultimately brought intellectual property protection to the WTO through forum-shifting among bilateral negotiations, regional agreements, and alternative multilateral institutions. Non-business actors also use alternative fora to advance their goals. Environmental activists were able to press a powerful state (the United States) to adopt domestic sea turtle protection regulations and then induce that state to use its market power to effectively multilateralize these regulatory requirements.

Strategic actors, however, do not control institutional choice. They operate in a world of uncertainty in which they cannot accurately predict the results of alternative institutional processes. When an issue comes before a multilateral institution, they do not fully control either the process or the outcome. Multilateral agencies, including courts, thus have some discretion to render decisions involving institutional choices that shape participation in the balancing of competing priorities, as shown in the shrimp-turtle case.

Analysis of the operation of power in global governance is necessary because it permits us to better understand how global governance mechanisms are structured, how participation and decisions within them are shaped, and how they affect distributional outcomes and, potentially, social structures. Part II assessed how the United States, EC, and their constituents have played a central role in setting WTO rules, in shaping trade principles and norms, in using the WTO judicial process, and in advancing their interests in the dispute settlement system’s shadow. Part III showed how the WTO Appellate Body, as any court, can exercise institutional power. The WTO Appellate Body can effectively allocate decision-making over policy matters brought before it to alternative decision-making processes, each of which favors different actors to varying extents.

Parts III and IV, however, show why an assessment of power’s operation within a single institution is insufficient, since policy analysis requires an understanding of the relative biases in available institutional alternatives. Eliminating the WTO will not eliminate the exercise of power. Rather, power will simply be manifested in other ways. In some cases, attempting to reduce bias in the WTO may reduce opportunities for weaker parties because the power of the United States, EC, and their constituents will manifest itself outside of the WTO institutional

217 See similar analysis from which this paragraph borrows in Nourse, supra note __, at 848.
context in more biased ways. In social contexts involving high numbers and complexity, institutional alternatives often suffer from similar biases.\textsuperscript{218} Yet even where there are parallel biases, they will not be uniform. In criticizing how power operates in any institution, policy analysts need to view it counterfactually in relation to non-idealized institutional alternatives.

To understand how international law operates, we need to address how institutions, domestic and international, interact. To understand the role of international courts, we need to examine closely the institutional choices that they face within their own institutional and political contexts, and the impact of these choices on participation in other institutional processes. Only then will we have a better understanding of how law operates in practice. Only then will we make more effective normative choices.

\textsuperscript{218} See KOMESAR, IMPERFECT ALTERNATIVES, supra note 6, at 23.