Legitimate Economic Efficiency in International Trade Law: Externalities and the future of WTO Dispute Settlement

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ISSN 2309-7248
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Legitimate Economic Efficiency in International Trade Law: Externalities and the future of WTO Dispute Settlement

Jan-Frederik Keustermans*

Abstract

This paper explains how the World Trade Organization (‘WTO’) dispute settlement system can cope with ongoing sociocultural globalization and the changing role of state sovereignty. These evolutions have influenced our understanding of the legitimacy of international organizations. In this context, the WTO receives heavy criticism for its democratic deficit. State consent no longer suffices to legitimize its actions. The democratic deficit is especially high with respect to the WTO dispute settlement system, which is increasingly pushed to engage in judicial activism and to rule on non-trade issues.

The paper first argues that the traditional economic goals of the WTO no longer suffice. The paper proposes a new dual goal for WTO dispute settlement, coined 'legitimate economic efficiency.' The WTO dispute settlement system should increase its own legitimacy, and, at the same time, seek to overcome collective action problems in international economic relations, but only when doing so is efficient.

Next, the paper offers a theory for WTO dispute settlement, based on three principles that implement the dual goal: (i) legitimacy, (ii) efficiency, and (iii) subsidiarity. Specific sets of tools are proposed to operationalize these principles. The paper proceeds to show in how these tools are reconcilable with the current legal framework, thereby avoiding the unrealistic pre-requisite of amending the WTO agreements, and how political, institutional and financial hurdles may be addressed.

Finally, a case study of the EC – Seal Products dispute shows how the WTO dispute settlers may already be applying some of the tools and principles in their current practice, and how that practice can quite easily be improved in order to better pursue legitimate economic efficiency.

* New York University School of Law, LL.M. expected, May 2015, with the support of the Belgian American Educational Foundation. The author would like to thank Professor Eyal Benvenisti for his comments and interesting discussions during the seminar “Sovereignty and the Future of International Law” during the fall of 2014, at New York University School of Law.
“Globalization, by increasing the interdependence among the people of the world, has enhanced the need for global collective action and the importance of global public goods. That the global institutions which have been created in response have not worked perfectly is not a surprise: the problems are complex and collective action at any level is difficult.” (JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 224 (2002)).

“Utopian visions are unworkable precisely because they hinge upon the transformation of individual and social human nature.” (Erik Gratzke, Economic freedom and peace, in ECONOMIC FREEDOM OF THE WORLD: 2005 ANNUAL REPORT 39 (2005)).

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1 Introduction

The paper is about how World Trade Organization (‘WTO’) dispute settlement can cope with the changing role of state sovereignty. The GATT/WTO-system has successfully remained relevant in the initial, mainly economic stages of globalization.1 As a "member-driven" organization, the WTO has even been able to legitimize itself democratically for as long as state consent remained the centerpiece of international law.2 However, now that economic globalization has brought with it sociocultural and environmental globalization, it is greatly influencing the concept of state sovereignty and the legitimacy of some international organizations.3 In this context, the WTO received heavy criticism for its democratic deficit and state consent is no longer enough to legitimize its actions.4

The risk of a democratic deficit is especially high with respect to dispute settlement. Where many non-state actors and national parliaments weigh in on international negotiations, there is no such democratic involvement or effective institutional check with respect to WTO dispute settlement.5 In fact, the virtually

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1 The GATT is the General Agreement on Tariffs and Trade (30 October 1947) 55 U.N.T.S. 194, entered into force 1 January 1948; the GATT was incorporated in the WTO at its establishment by the Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154; (1994) 33 ILM 1144, entered into force 1 January 1995 (‘WTO Agreement’).
2 See, for example, James Bacchus, A Few Thoughts on Legitimacy, Democracy, and the WTO, in REFORMING THE WORLD TRADING SYSTEM 429-435 (Ernst-Ulrich Petersmann ed., 2005) (arguing, as an member of the WTO Appellate Body, that there is not even such a thing as ‘the WTO’, because it is merely the collective will of the Members. Bacchus argues that the only problem with WTO legitimacy is the lack of legitimacy of some undemocratic Members.).
3 See, for example, JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 60-61 (Cambridge: Cambridge University Press, 2006).
5 Matthew Windsor, A Fine Balance? Delegation, Standards of Review, and Subsidiarity in WTO Dispute Settlement, 14 TE MATA KOI AUCKLAND U. L. R. 51-53 (2008); see also the fact that no response came against the decision by the AB to allow amicus curiae briefs, despite the fierce criticism by an overwhelming majority of WTO Members, discussed by Claus – Dieter Ehlermann
insurmountable constraint on reversing or amending the WTO Agreements and the need for judicial gap-filling this creates, is arguably “the most troubling aspect of the WTO’s ‘democratic deficit’.” This could, in part, explain why the AB has generally taken an approach of value pluralism, holding that WTO law represents a “delicate and carefully negotiated balance . . . between . . . shared but sometimes, competing interests . . .”

This paper will not provide radically new solutions for the WTO’s legitimacy crisis. In fact, the WTO dispute settlement system may already be applying some of the solutions proposed in some cases. The relevance of the paper, however, is that it provides a coherent theoretical framework, setting out clear and generally applicable goals and principles for WTO dispute settlement, which can be implemented in all cases. The novelty therefore lies in the coherent approach, rather than any truly radical changes. This way, I hope my proposals will be realistic and achievable. They do not require many controversial changes in practice or politically sensitive amendments to the WTO Agreements, which many other scholarly proposals addressing the democratic deficit of the WTO do require.

The paper will proceed in five parts. After, this introduction, I argue in part 2 that the traditional economic goals of the WTO no longer suffice in the modern world. Inspired by recent scholarship, I propose a new dual goal for the WTO dispute settlement system: legitimate economic efficiency. Fleshed-out, this means that the WTO dispute settlement should increase its own legitimacy, and, at the same time, overcome collective action problems in international economic relations, but only when doing so is efficient.

Part 3 of the paper offers a general theory of WTO dispute settlement, based on three principles that implement the dual goal: (i) democratic legitimacy, (ii) economic efficiency, and (iii) the jurisdictional principle of subsidiarity. Next, these principles are fleshed out even further. Specific sets of tools operationalize the principles in ways that can be applied by WTO dispute settlers without requiring prior amendments to the legal or institutional structure of the WTO.

Part 4 of the paper sets out the main legal, institutional, political and financial challenges raised by the proposals, and addresses them in turn.

Part 5, a case study of the recent EC - Seal Products dispute shows how the WTO dispute settlers may already be applying some of the tools and principles, and how its

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6 Howse, Democratic Deficit, supra note 4, at 94.
8 For a similar approach see ROSS BECROFT, THE STANDARD OF REVIEW IN WTO DISPUTE SETTLEMENT. CRITIQUE AND DEVELOPMENT 33 (Edward Elgar, 2012).
9 See, for example, STOLL & SCHORKOPF, supra note 4, at 268-274; and the many proposals by scholars listed at Stein, supra note 4, at 489 and more specifically at 531-534.
practice can quite easily be improved where it does not conform to the proposed theoretical framework.

Part 6, finally, concludes.

2 The goals of WTO Dispute Settlement

In this section, I will show how the historical goals of WTO dispute settlement can be modified to remain relevant today. Inspired by recent scholarship I will argue that the primary goals of WTO dispute settlement should be increasing its legitimacy and overcoming collective action problems in international economic relations, but only when doing so is efficient.10

2.1 A short historical note

2.1.1 Goals of WTO law and policy

The preambles of the GATT and WTO Agreements make it clear that the system has always had multiple goals, without there being a single overarching object and purpose.11 But many goals overlap and most of them fit the general category of increasing global welfare by overcoming collective action problems in international economic relations.12

When properly managed and regulated, economic globalization should increase global economic welfare and reduce poverty.13 The main historical goal of WTO law is therefore regulating and managing the liberalization of trade by countering protectionism to create a global rise in income and welfare.14 Pressured by politically

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10 The concept of collective action was first developed in MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION, PUBLIC GOODS AND THE THEORY OF GROUPS (Harvard University Press, 1965).
13 JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 219 (W.W. Norton & Company, 2002); JACKSON, supra note 3, at 86-87, citing RONAL H. COASE, THE FIRM, THE MARKET AND THE LAW (1988), at Ch. 5; Although it is obviously not the only requirement for eliminating poverty, see PETER VAN DEN BOSSCHE, LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 29-31 (2nd ed. 2008).
14 ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 36-37 (1997); Robert Howse & Kalypso Nicolaidis, Enhancing WTO Legitimacy: Constitutionalization or
powerful local and external minorities, politicians can be inclined to choose short term benefits over long term global welfare gains. When a government is implementing protectionist policies, even if they are beneficial for the state in the short run, they will most likely be economically inefficient from a global welfare perspective in the long run. The WTO was created to overcome this major collective action problem in international economic relations and to mitigate negative externalities that often arise from unilateral state action.

The WTO was also created to ensure security and predictability for transnational investors and traders. It should mitigate the potentially devastating effects of global economic crises.

Next to these two economic goals, the GATT/WTO system represents a balance struck, as an inter-state bargain, between trade liberalization and the right to regulate in areas such as public morals, health, the environment and consumer safety, as long as the regulations do not constitute arbitrary or unjustifiable discrimination. By exhaustively listing the "key societal values" that are worthy of protection, the WTO limits the scope of policymaking in non-trade areas. This points to a third goal of the WTO: harmonizing social policies.

A fourth historical goal of the GATT is to empower developing countries. Without rules such as the principle of special and differential treatment and rules addressing information asymmetries, developing countries would arguably not be able to integrate fully in the world trading system. The theoretical argument is sound, but the gains from increased incentives for efficient innovation have arguably been outweighed by welfare losses in developing countries in practice.

Sustainable development can be seen as the fifth historical goal of the WTO. There should be some consideration for the environment in the design and application of

16 HORN & MAVRODIoIS, supra note 12, at 15.
18 VAn DEn BOLschE, supra note 13, at 33; JAcKson, supra note 13, at 5-6.
19 JAcKson, supra note 3, at 86.
20 GATT Article XX; Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 77.
21 VAn DEn BOLschE, supra note 13, at 34 and 615-695 (see also at 42 and 741-884 about social policy standard setting in the TBT Agreement, SPS Agreement and TRIPS Agreement).
22 Id., at 34.
23 Alan Deardorff, Should Patent Protection be Extended to all Developing Countries? 13 WORlD ECONOMY 497 (1990); Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 78 (arguing that this is especially the case with respect to the TRIPS Agreement and access to medicine).
international trade law, ensuring the development of a “more viable and durable multilateral trading system.”

Some argue that international trade prevents wars, as people become interdependent and connected. The original GATT, agreed shortly after WWII, was therefore also about creating and promoting stability and peace in international relations.

Finally, international trade arguably promotes democracy, by creating a stronger middle class, enabling it to seek political participation rights.

2.1.2 Goals of WTO dispute settlement

The primary goal of WTO dispute settlement is settling disputes between states. The Dispute Settlement Understanding (‘DSU’) is primarily designed for the prompt settlement of disputes through a complex but streamlined process of negotiation, conciliation, mediation, consultation, arbitration, implementation, monitoring and enforcement.

The DSU also brings trade disputes from the realm of power politics into a “rule-oriented” or “rule of law” system, making the Members’ commitments credible. It is “is a central element in providing security and predictability to the multilateral trading system” and it “serves to preserve the rights and obligations” of Members under WTO law. Accordingly, the DSU should be seen as part of the bargain between strong and weak states. It is designed to increase compliance, through retaliation, deterrence and stabilizing normative expectations of states. Some call this the “governance” function of WTO dispute settlement.

24 See SONIA E. ROLLAND, DEVELOPMENT AT THE WORLD TRADE ORGANIZATION (Oxford University Press, 2012); see also JACKSON, supra note 3, at 75; but see the lack of focus on sustainability in WTO, World Trade Report 2014. Trade and development: recent trends and the role of the WTO (2014).
26 JACKSON, supra note 3, at 85; VAN DEN BOSSCHE, supra note 13, at 19.
27 JAGDISH BHAGWATI, FREE TRADE TODAY 43-44 (2003); VAN DEN BOSSCHE, id., at 21.
28 VAN DEN BOSSCHE, id., at 171; STOLL & SCHORKOPF, supra note 4, at 74 (at no. 211); JACKSON, supra note 3, at 146.
29 STOLL & SCHORKOPF, id., at 74 (at no. 212).
30 Art. 3(2) DSU; see also WTO Panel Report, US – Section 301 Trade Act, para. 7.75.
WTO dispute settlement can also develop the law. Where the negotiators left ambiguities in the text, the Dispute Settlement Body (‘DSB’) must “clarify the existing provisions.” Nevertheless, the choice of the word ‘clarify’ over ‘interpret’ is a first indication that judicial activism is not part of the WTO DSB mandate. In addition, the DSU explicitly provides that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Moreover, only the Ministerial Conference and the General Council have the authority to adopt binding interpretations of WTO law. The prohibition on judicial law-making is present in the enforcement stage as well: although compliance by modifying or withdrawing the measure that violates WTO law is the ideal outcome, even after the decision is handed down, parties can still settle and there is no strict requirement to withdraw the WTO-incompatible measure. Nevertheless, because of the many ambiguities in the texts, reasoned decisions by the panels and the Appellate Body (‘AB’) will inevitably lead to the creation and development of a body of law.

2.2 Recent Scholarship

Considering the aspiring original goals of the GATT/WTO system, it is striking that the WTO currently faces an existential legitimacy crisis. This section will provide an overview of selected, but representative recent scholarship concerning the legitimacy crisis of the WTO and international law more generally. In the next section, we will draw from this scholarship and refine it. The central question will be whether the WTO can be scrutinized from the perspective of this recent scholarship, and how we can use its insights to develop a new theory for WTO dispute settlement.

2.2.1 Ronald Dworkin: New Philosophy for International Law

Ronald Dworkin envisioned a new philosophy for international law in a posthumously published article. He argued that since state-consent may solve the “paradox” of how a state can be both sovereign and subject to international law, it is tempting to construe a theory of international law around that traditional concept. But state-consent has too many defects. It binds people who have in fact never consented. It does not allow international law to solve collective action problems appropriately and efficiently. It is

34 Art. 3(2) DSU.
35 Stoll & Schorkopf, supra note 4, at 74-75.
36 Art. 3(2) & 19(2) DSU.
37 Art. IX:2 WTO Agreement.
38 Art. 22 DSU; see also Art. 3(6) DSU (on mutually agreed solutions during dispute settlement proceedings); Art. 3(7) DSU (on the preference for mutually acceptable resolutions over solutions through adjudication).
40 Ronald Dworkin, A New Philosophy for International Law, 41 PHILOSOPHY & PUBLIC AFFAIRS 2 (2013); although the article has been criticized for its lack of pragmatic solutions, we will mainly engage in the underlying normative discussion at this point, see Adam S. Chilton, A Reply to Dworkin’s New Theory of International Law, 80 THE UNIVERSITY OF CHICAGO LAW REVIEW DIALOGUE 105 (2013). Pragmatic limitations to this paper’s proposals will be discussed in other sections.
41 Chilton, id., at 107.
too static a principle for a fast-moving world and it does not allow us to take into account the interests of future generations.\textsuperscript{42}

As an alternative, Dworkin proposed a normative theory of international law, based on what "morality and decency require of states and other international bodies in their treatment of one another."\textsuperscript{43} Unchecked state sovereignty may go against the demands of human dignity and threatens the legitimacy of the individual sovereign states as well as the legitimacy of the international system.\textsuperscript{44} Coercive power must be justified in substance and in the way it is exercised.\textsuperscript{45} Each state has an obligation to increase its legitimacy towards the people over which it exercises power. Because individual lives are increasingly affected by actions of other states, this obligation includes a duty for states to do what is feasible to improve (the legitimacy of) the international system as well. The true moral basis of international law lies in this requirement for states to accept certain international constraints on sovereign power.\textsuperscript{46} Dworkin generalizes this idea. All forms of coercive government, including international organizations (‘IOs’), have a continuous duty to improve their legitimacy.\textsuperscript{47}

Actors fail to fulfill the obligation to increase their legitimacy "when they accept an international system that makes impossible or discourages the international cooperation that is often – and increasingly, essential to prevent economic, commercial, medical or environmental disaster."\textsuperscript{48} In other words, because of the demands of human dignity in an increasingly interconnected world, states and IOs alike have an obligation to create an international system that is able to address collective action problems. Additionally, because of current "strong and increasing economic interdependencies", they have an obligation to increase the possibilities of participation for the people who are affected by national or international law.\textsuperscript{49}

This way, the failures of state sovereignty should be mitigated by states themselves, with the help of an appropriately designed international system. These ideas lead Dworkin to a new theory for international law, based on a “principle of salience”, formulated as follows:

"If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole" (own emphasis).\textsuperscript{50} International obligations should be created by the moral force of this principle instead of by state consent, and only if the international obligations improve the legitimacy of the international order.

\textsuperscript{42} Dworkin, supra note 40, at 7-10.  
\textsuperscript{43} Id., at 13.  
\textsuperscript{44} Id., at 17.  
\textsuperscript{45} Id., at 16.  
\textsuperscript{46} Id., at 17.  
\textsuperscript{47} Id., at 19.  
\textsuperscript{48} Id., at 18.  
\textsuperscript{49} Id.  
\textsuperscript{50} Id., at 19.
It is important to note that Dworkin’s principle of salience requires more than international consensus. Through its proviso, it requires that the rule at issue improves the legitimacy of the international legal system. One of the mechanisms proposed by Dworkin to increase the legitimacy of the international system is a European-style principle of subsidiarity. International law is legitimate only if it can be “sensibly regarded as of international dimension” instead of as “a matter properly left to national determination.” Dworkin therefore advocates that the role of international courts should be to protect against international overreach. For a more WTO-centric theory of subsidiarity, we move to the scholarship of Robert Howse.

2.2.2 Robert Howse: Global Subsidiarity

Robert Howse proposes that instead of looking at the WTO through a lens of federalism and constitutionalization – which would arguably only exacerbate its legitimacy crisis – the WTO system would actually be served better by the implementation of a principle of global subsidiarity. The best way to increase the legitimacy of the WTO requires "greater democratic contestability and a more inclusive view of those who are entitled to influence the shape of the system." He argues for more politics, not less, as a tool for increasing WTO legitimacy. In particular the dispute settlement mechanism should be open to pluralism and rely on non-WTO institutions and norms when regulating international trade.

Howse’s principle of global subsidiarity is two-sided. Horizontal subsidiarity – deference towards other IOs and non-WTO international law – complements vertical subsidiarity – deference towards the national or local governance level, "below" the WTO.

There are two main arguments in favor of relying on this principle of global subsidiarity. First, by relying on subsidiarity and deference, the need for legitimizing the WTO is arguably lowered, as the impact of its decisions on non-trade issues such as human rights, environment, health and labor standards, is lowered as well. Second, the principle emphasizes what the WTO is all about according to Howse: striking a correct balance between trade liberalization and deep regulatory diversity based on a range of non-economic and non-instrumental values.

51 Id., at 28.
52 Id.
53 Amongst others because the divergence of views and values at the global level is immensely greater than that at many constitutional levels, see Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 86; see also Robert Howse & Joanna Langille, Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values, 37 Yale Journal of Int'l Law 367, 432 (2012) (hereinafter ‘Permitting Pluralism’); and more generally ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS AND LEGITIMACY (2007).
54 Howse & Nicolaidis, Global Subsidiarity, supra note 14.
55 Id., at 74.
56 Id., at 75
57 Howse & Langille, Permitting Pluralism, supra note 53.
58 Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 75
But Howse’s proposals are more complicated than merely deferring to other levels of governance when appropriate. Global subsidiarity entails strict scrutiny of measures with respect to fundamental norms of international law in general and WTO law in particular. It also includes participation and increased political inclusiveness in international economic policymaking.

Global subsidiarity does not require the WTO dispute settlement to be value-neutral either. Although in its most radical form, the principle requires the WTO to yield its authority completely to another institution or governance level, some measures may be completely incompatible with international values. Howse leaves the question open of how the WTO should identify these values, as well as the question how the WTO dispute settlement system should deal with these possible conflicts.

2.2.3 Eyal Benvenisti: Sovereigns as Trustees of Humanity

Eyal Benvenisti offers a provocative and innovative approach to sovereignty and international law. He applies a concept of trusteeship to sovereign power. A sovereign state must act as a trustee of humanity, taking the externalities of its domestic and international actions into account, and protecting the interests of humanity, not just the interests of its own citizens.

Benvenisti’s theory retains the sovereign state as a key democratic venue for policymaking. It is a space for the exercise of personal and communal self-determination. But several moral grounds and principles indicate that state sovereignty should be restrained. First, the right of individual and collective self-determination limits the way in which states can use coercive power over individuals, both citizens and foreigners. This right has come under pressure by globalization, which increased global interdependency of communities and individuals, combined with an increasing democratic deficit in the form of a severe disconnect between the people who have the right to vote, and thus the power to influence policymaking, and the people who are affected by states' policies involving negative externalities. The second principle that limits sovereignty is the equal moral worth of all individuals. This principle is most clear in the principles of

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60 For example the prohibition of discrimination and procedural norms of transparency and due process, see Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 87.
61 Howse & Nicolaidis, id., at 88 (arguing that this would strengthen indirect accountability and allow for top-down empowerment of local actors who might have been previously disempowered domestically).
62 Howse, Adjudicative Legitimacy, supra note 4, at 62 (containing the most radical formulation of a principle of deference recently advocated by Howse).
63 Howse & Langille, Permitting Pluralism, supra note 53, at 430.
65 Benvenisti, Trustees of Humanity, supra note 64, at 303-305.
universal human rights, codified in international human rights law. The principle requires states to balance external interests against the interest of their own citizens, considering both are of equal moral worth. A third principle limiting sovereign power, intrinsically linked to the first, is based on the fact that states have the power to exclude portions of global resources from the rest of humanity. This power arguably comes with a responsibility to justify its use towards the people who are excluded from using these global resources as a result and the obligation for each state to use the resources at its disposal in an efficient and sustainable way. This responsibility is based on the grave negative consequences untethered domestic use of resources can have for foreign stakeholders. Fourth and finally, Benvenisti argues that sovereignty is a freedom that exists by virtue of international law. States can continue to exercise sovereign power because it is recognized by other states, and only to the extent they have not limited their power by consenting to international constraints.

Considering these normative reasons, even absent specific treaty obligations, sovereigns, as "agents of humanity", should "take other-regarding considerations seriously into account in formulating and implementing policies." Benvenisti calls this "other-regarding dualism", where it is still valid for states to prioritize the interest and values of their own citizens, but they are at the same time under a general obligation to seriously take interests of others into account.

Concretely, the trusteeship concept does not require states to grant extensive participation rights to foreigners or to allow free access to all domestic resources. Instead, states have a more modest obligation to provide remedies that correct or minimize "the loss to individuals of the ability to participate meaningfully in shaping their life opportunities, that allow individuals, in certain situations, access to the territory and natural resources of other states, and that promote global welfare." Benvenisti identifies four of such key remedies and obligations for states as trustees of humanity: the obligation to (i) take external interests into account, (ii) provide minimum participation rights to external affected actors in policymaking, and (iii) accommodate external interests if doing so is costless to the state or (iv) in case of catastrophe.

Although the idea of sovereigns as trustees of humanity is primarily applicable to the domestic conduct of states towards foreign stakeholders, it can apply equally to IOs created by those states in furtherance of their interests. Accordingly, the WTO should act as a trustee of humanity. In the context of a treaty regime such as the WTO, the role of states as trustees of humanity is also more important than absent such a specific treaty regime. For instance, both the GATT and the Agreement on Agriculture contain

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67 Benvenisti, Trustees of Humanity, supra note 64, at 307 (citing John Stuart Mill, Mathias Risse, John Rawls, Charles Beitz, David Miller, James Griffin and Joseph Raz).
68 Benvenisti, Trustees of Humanity, supra note 64, at 309; see also KANT, supra note 25.
69 Benvenisti, id., at 310-312; two WTO cases on point are China – Raw Materials and China – Rare Earths [Complete cites].
71 Id., at 300-301.
72 Id., at 300-301.
73 Benvenisti, Trustees of Humanity, supra note 64, at 313.
74 Id., at 314-326.
provisions requiring states to take other states’ needs into account when taking trade restrictive measures. These can be seen as codifications of the trusteeship concept, strengthening its underlying principles. Additionally, the WTO allows for the review of domestic policies from the perspective of global welfare (avoiding negative externalities) and the goal of overcoming collective action problems in economic relations. Accordingly, WTO dispute settlement can be used as a tool to promote trusteeship obligations of states. Benvenisti adds that a specific set of normative criteria should be developed in order to clarify sovereign states’ other-regarding obligations in the context of economic cooperation.

Finally, Benvenisti also criticized the state-consent based legitimacy of the current WTO system. The complexity of the rules and the fact that there is no possibility for states to make substantial reservations or carve-outs – the rules must be accepted or rejected as a single package – means that domestic democratic systems fail in this context. Although he acknowledges that IOs are “indispensable for resolving co-ordination and co-operation problems and for promoting global welfare . . . they also pose challenges to democracy at the national level.”

2.3 A new goal for WTO dispute settlement: Legitimate Economic Efficiency

If you compare the normative theories outlined above with the way WTO disputes settlement works in practice, problems and questions arise. Are the current goals of the WTO in line with the principle of global subsidiarity (Howse)? Does the WTO dispute settlement system do enough to increase its legitimacy, and thereby the normative basis of international law in general (Dworkin)? Do the WTO dispute settlers enforce the trusteeship principle by sufficiently mitigating the negative externalities originating from unfettered state sovereignty, while at the same time allow for the participation of individuals and peoples in their own governance (Benvenisti)? In fact, in many ways it does not.

First of all, part of the legitimacy crisis arose from the fact that the WTO is encroaching on non-trade territory of international relations. Instead of being deferential to other policy levels, it engages in policymaking on environmental matters, labor rights and health issues, without being sufficiently equipped for these fields. At the same time, because it is ill-equipped for the task, it limits the possibility to mitigate negative externalities in non-economic fields by encroaching on this territory. Further, because of the legitimacy crisis, the WTO risks lower compliance levels and less coercive power to actually overcome collective action problems in economic areas.

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76 GATT Art. XX(j) (state must observe “the principle that all contracting parties are entitled to an equitable share of the international supply of [certain] products”) and Agreement on Agriculture Art. 12, 1, a) (requiring states to “give due consideration to the effects of such prohibition or restriction on importing Members’ food security”); discussed at Benvenisti, Trustees of Humanity, supra note 64, at 316; see also PETROS C. MAVROIDIS, TRADE IN GOODS 355 (2d ed. 2012).
77 Benvenisti, id., at 329-331.
78 Id., at 318.
Fundamentally, if WTO dispute settlers are to continue to exercise influence and coercive force over peoples and states, increasing the WTO's legitimacy is crucial. At the same time, the WTO can be an excellent forum for overcoming collective action problems and avoiding negative externalities, even if it is only well-equipped for this task in the field of economic relations. This opportunity should not be lost because of the current democratic deficit of the organization. In order to accomplish this, the focus of WTO dispute settlement should shift to a new dual goal: increasing global welfare by overcoming collective action problems in international economic relations, when doing so is efficient, while at the same time increasing its own legitimacy. This dual goal can be coined 'legitimate economic efficiency'.

By putting increasing the WTO's legitimacy as a separate goal, next to, and independent from creating efficiency in international trade, WTO dispute settlement will be better aligned with the demands of the modern world. Increasing legitimacy will both serve the moral demands outlined by the recent scholarship discussed above and, indirectly, the second goal of increasing global welfare. By purely focusing on its traditional goals, the WTO risks losing both its legitimacy and its effectiveness.\(^81\) However, if the WTO would increase its legitimacy, its measures are arguably more likely to be accepted, compliance may increase, as will the incentive to tackle collective action problems through WTO fora.

One could argue that WTO dispute settlement need not be more legitimate than needed for an effective administration and implementation of WTO law. But I would counter that legitimacy is a continuous moral duty for the WTO and its Members, irrespective of, but at the same time together with, efficiency. This is why it is a dual goal and here lies part of the relevance and novelty of my argument. Legitimacy is added as a goal of equal worth to overcoming collective action problems in economic relations, not just as a means to keep the WTO functional and compliance high. Additionally, the fact that the legitimacy goal is not grounded in state consent, but in normative concepts outlined above, is certainly a radical improvement for a traditionally "member-driven" organization. In a recent WTO Report, the WTO Secretariat seemed to acknowledge the importance of both policy objectives itself, without going as far as stating that legitimacy should be one of the goals of the WTO: “A concern with most of [the] proposals [for reform] is that efforts to increase efficiency may come at the expense of legitimacy.”\(^82\)

The dual goal also addresses a problem with Dworkin’s and Benvenisti’s theories of international law. If international law should function as a check on unmitigated use of state sovereignty and international adjudicators would interpret international law accordingly broad, there is a risk that states will not create any new international robust adjudication and/or enforcement mechanisms in the future. International law is a repeat game, and progress will be hard if states believe that they cannot control what they create.\(^83\) By ensuring that legitimacy is always within the WTO corsairs, and the WTO dispute settlement system only takes such actions that efficiently tackle collective action

\(^{83}\) Chilton, supra note 40, at 113-114.
problems within its field of expertise, this side-effect of an externalities focused theory of WTO-law is mitigated.

Next, I will show that the best way to achieve this new dual goal is through the application of three adjusted principles: efficiency, subsidiarity and legitimacy. Both the normative and the economic values of the dual goal will become clear throughout the discussion of the principles.

3   New law and policy principles for WTO dispute settlement

Just outlining the new dual goal of WTO dispute settlement obviously does not suffice. The WTO will need to adjust the (implicit) principles underlying its dispute settlement system if it is ever to achieve its new dual goal. I propose three complementary law and policy principles: efficiency, legitimacy and subsidiarity.\(^4\) These three principles are the normative means to reach the dual goal.

3.1   The Principle of (Economic) Efficiency

The principle of efficiency is the most straightforward one of the three principles. Much has been written about the economic rationales behind multilateral free trade agreements, some of it summarized earlier in this paper.\(^5\) It must nevertheless be stressed that efficiency in the context of WTO dispute settlement encompasses not just one, but three ideas: (i) the idea that overcoming collective action problems in international economic relations creates global economic efficiency (cf. supra), (ii) the idea that the WTO should use its available means in an efficient manner, and (iii) the idea of efficient allocation of competences (cf. infra on subsidiarity).

WTO dispute settlement can only reach its dual goal if its actions are guided by the principle of (global) economic efficiency. This way, it can enforce Benvenisti’s trusteeship concept, by avoiding negative economic externalities caused by protectionist policies. But the principle of efficiency requires more than pursuing economic efficiency. It requires the WTO to operate in an efficient manner and is inherently linked with the

\(^{4}\) Compare with Mattias Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 908 (2004) (putting forward three principles limiting the legality of international law: the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability and the substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable.) Except for subsidiarity, however, the principles put forward in this paper are broader and more demanding than Kumm’s principles. At the same time, they are more specific. Where Kumm makes a distinction between jurisdiction, process and outcome, my distinction may be better tailored for studying the WTO and reaching the dual goal proposed above, by making a distinction between legitimacy (both in process and outcome), economic efficiency (both in process and outcomes) and jurisdiction (subsidiarity as a principle that ties legitimacy and efficiency together, as well as process and outcomes); another similar approach was taken by BECROFT, supra note 8, who proposes a new standard of review based on three principles: enhancing the traditional goals of WTO dispute settlement (security, predictability, enforcement and clarification of WTO law), ensuring adjudicative legitimacy and developing appropriate procedures.

\(^{5}\) For a recent overview, see POSNER & SYKES, supra note 17, at 283-287 (Cambridge: Harvard University Press, 2013).
effectiveness of WTO law and policy. This can be assessed in many ways. Leaving efficient procedures within WTO administration aside, perhaps the most prominent means of assessing efficiency and effectiveness is the extent to which states actually comply with WTO decisions. Of course, compliance is not the only way international law can be effective. Moreover, empirically assessing compliance, in the sense of the “real world effects” of WTO cases, is difficult, according to some even impossible.

This brief overview shows that the principle of efficiency, because of its link with effectiveness and compliance, will overlap with the principles of legitimacy and subsidiarity. Even within its own area of expertise, it will be hard for the WTO to act efficiently if it lacks (input) legitimacy, while at the same time (output) legitimacy is higher if its decisions are efficient. In fact, until recently the effect of increasing economic welfare has been put forward as the main justification of WTO law. But this seems to be no longer sufficient. Some go even further, arguing that it is impossible to assess the effects of WTO adjudication on global welfare and that any prediction of the long term effects of specific disputes on the global economy is speculative. Therefore, we also need an independent principle of legitimacy.

3.2 The Principle of (Democratic) Legitimacy

The principle of legitimacy requires the WTO to (i) only take actions it can legitimately take and (ii) seize each effort it has to increase its legitimacy. The first prong of the principle is limiting, the second empowering. The first prong contains a negative obligation, the second a positive.

I use a normative concept of legitimacy. This is the legal and moral "right to rule", not the sociological legitimacy concept, which entails that an institution is legitimate if it is "widely believed to have the right to rule." However, an increase in normative legitimacy might have positive impacts on sociological legitimacy and the line is not easy to draw.

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87 Id., at 9.
88 BECROFT, supra note 8, at 90 (focusing on output legitimacy and standards of review).
89 Howse, Legitimacy of the WTO, supra note 4, at 363.
90 David Collins, Towards a Grand Unified Theory of International Economic Law (October 2, 2014). Available at SSRN: http://ssrn.com/abstract=2504501, at 27 (arguing that because chaos theory is more suitable to study the effects of international economic law than any theory of predictive economics or politics, the traditional value assigned to legal certainty and predictability is too high. It is more appropriate to assess legal institutions “on their capacity to provide just outcomes in each circumstance rather than by reference to long term economic benchmarks.”).
92 EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 160-161 (2014); quoting Sabino Cassese, A Global Due Process of Law?, in VALUES IN GLOBAL ADMINISTRATIVE LAW 6 (G. Anthony, J.-B. Auby, J. Morison & T. Zwart (eds.), 2011) (arguing that a fair procedure plays an important role in building social consensus); see also Buchanan & Keohane, supra note 4, at 29; Howse, Legitimacy of the WTO, supra note 4, at 363; see also EYAL BENVENISTI, THE LAW OF
This paper is not the place to expand on broader theoretical questions of what normative legitimacy in international law encompasses. For this purpose, I will agree with a number of scholars that normative legitimacy should be guided by the values of universal human rights, human dignity and democracy. I am aware of the Western bias that can be ascribed to democracy (and human rights, for that matter), but democracy can mean many things in international law, none of which need to relate to elections or direct representation. Rather, it includes mechanisms of accountability, participation and transparency.

The principle of legitimacy requires WTO dispute settlers to make full use of their discretionary power to increase economic efficiency (cf. above) as well as WTO legitimacy. But it may require even more, such as increasing democratic legitimacy at the domestic level. The WTO should arguably require states which enact trade-disruptive measures to take relevant (foreign) interests into account, provide for participation rights and accountability mechanisms, and conduct itself in a transparent manner towards outsiders. This way, the WTO can help states to increase their external legitimacy at the same time as it increases its own legitimacy. However, the WTO might not have the required local sensitivities to intervene in domestic processes like this.

Legitimacy can be increased both through process (input legitimacy) and results (output legitimacy). It can be dangerous to focus solely on input legitimacy, as this may enable international actors to simply find a more satisfactory way to achieve predetermined results favoring a certain elite group of states, by rationalizing their specific legal analysis. The process can be inspired by democratic principles, while the outcome can be inspired by various normative standards, such as human rights. But increasing the legitimacy of the WTO should not amount to merely transposing domestic

GLOBAL GOVERNANCE 144 (2014) (arguing that effectiveness requires adherence to legitimacy enhancing global administrative law norms).

Mattias Kumm seems to take these principles together (even though the devil is in the details, and there are differences between his and my approach) under the heading ‘constitutional democracy’, see Kumm, supra note 84, at 907.


Famously in US – Shrimp/Turtle; for a general discussion of this idea with respect to domestic intervention by IOs, see EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 222-231 (2014).

EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 231 (2014) (discussing the general principle, not applied to the WTO in particular).


Howse, Adjudicative Legitimacy, supra note 4, at 68; the concept “rationalizing legal analysis” comes from ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (New York: Verso, 1996).
ideas of democracy and human rights to the international level. The requisite social and political conditions are not met at the WTO level, in the absence of a global *demos* or adequate political structure. A preferable approach is to adapt certain democratic principles to the specific situation of the WTO. Also, with respect to output legitimacy, I will not argue that the WTO should promote human rights, but it should respect them and pursue justice within the limits of its competences. Finally, achieving its historical goals itself, including increasing global welfare for all in a context of sustainable development, is an obvious, but often underestimated element of increasing legitimacy. In this sense, the dual goal is truly that, not just two overlapping separate goals. It can only be achieved through a combination of normative principles, not just through normative considerations as afterthought of economic principles.

### 3.3 The (Jurisdictional) Principle of Subsidiarity

As stated above, the WTO should only intervene when it can intervene efficiently and legitimately. Such an intervention is one where the global negative externalities on non-economic interests do not outweigh the positive consequences of WTO action. In order to make this assessment, the WTO dispute settlers must identify which interests will be affected, how they will be affected, and whether the economic gains expected to be obtained from WTO action outweigh the non-economic losses. In order to make this assessment in a diligent manner, the dispute settlers will need to apply a principle of subsidiarity.

The principle of subsidiarity is a jurisdictional principle, which allows the WTO to draw boundaries between its competence and that of other actors. Subsidiarity is at the cross-roads of efficiency and legitimacy and will be the glue that ties both principle together. It governs both the decision making process and the substance of the decision itself.

There are several normative reasons for including a separate principle of subsidiarity, next to the principles of efficiency and legitimacy. First, the need to increase the legitimacy of the WTO dispute settlement system is directly related to the extent of its powers and the impact of its decisions on non-trade issues. This need will be lower if WTO powers are limited by subsidiarity. Second, subsidiarity allows the WTO dispute settlement system to strike a correct balance between the goal of trade liberalization and WTO Members’ deep regulatory diversity. Third, subsidiarity allows for more sensibility towards local (idiosyncratic) preferences, meaningful participation by affected

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99 Kumm, *supra* note 84, at 926.  
100 See, for example, Buchanan & Keohane, *supra* note 4, at 39-40.  
101 Buchanan & Keohane, *supra* note 4, at 47-49.  
102 See also Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 Columbia Journal of European Law 231 (2011) (arguing that the core of the principle of subsidiarity as enshrined in EU law is actually economic efficiency).  
103 Kumm, *supra* note 84, at 921.  
104 Howse & Nicolaidis, *Global Subsidiarity*, *supra* note 14, at 75  
individuals, accountability and “enhancement of local identities” more generally.\footnote{106} It does so, amongst other, by bringing the level of decision-making closer to the people and, thus, at the same time increasing democratic legitimacy and compliance.\footnote{107}

The principle will be most helpful in areas where trade intersects with other fields, such as labor rights, climate change, finance, monetary policy, security, … and where the WTO enters the field of other IOs, such as the IMF, the World Bank, the UN, the ILO and various other organizations. Notice, however, that these fields or not solely regulated at the international level, but also at the local level. The principle also applies with respect to conflicts between WTO competences and its Members’ national sovereignty. But subsidiarity has a slightly different role in the distribution of competences between the WTO and its Members (vertical subsidiarity) and in the distribution of competences at the supranational level (horizontal subsidiarity).

3.3.1 Vertical subsidiarity

As Dworkin argued, one of the four goals of international law is to facilitate coordination, but only when this is essential.\footnote{108} Mattias Kumm wrote that the principle of vertical subsidiarity requires “any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reason.”\footnote{109} A prominent reason is the presence of a collective action problem “of sufficient weight to override any disadvantages connected to the pre-emption of more decentralized [local] rule-making.”\footnote{110} Vertical subsidiarity therefore requires a two-step test. First, good reasons for taking a decision at the supranational level must be found. Second, a proportionality-test or cost-benefit analysis must be made, weighing the benefits and disadvantages of WTO action when compared to local action.\footnote{111}

Jurisprudence concerning various exceptions in Article XX GATT already made it clear that there is no general preference for multilateral measures or international agreements as compared to unilateral domestic measures when it comes to protecting moral values, human, animal or plant life or health, or the conservation of exhaustible natural recourses.\footnote{112} Taking an issue up at a higher level, with more room for democratic deficits, misinterpretations of the interests at stake and lower base legitimacy, should be justified on the basis of efficiency. Accordingly, the principle of vertical subsidiarity contains a rebuttable presumption in favor of the local level.

However, if a certain decision is likely to create negative externalities, the presumption is rebutted. This way, the principle of vertical subsidiarity strengthens the WTO dispute settlement system. As clarified by Mattias Kumm: subsidiarity is not a

\footnote{106} Kumm, supra note 84, at 922.
\footnote{107} Jackson, supra note 3, at 74.
\footnote{108} Dworkin, supra note 40, at 22.
\footnote{109} Kumm, supra note 84, at 921.
\footnote{110} Id.
\footnote{111} Id.
\footnote{112} US – Shrimp; EC – Asbestos; EC – Seals; China – Audiovisual Products; US – Gambling, Korea – Beef; Brazil – Retreated Tyres (all showing considerable sensitivity to domestic regulators in the form of vertical deference); see Michael Trebilcock, Robert Howse & Antonia Eliason, The Regulation of International Trade 678-679 & 682 (New York: Routledge, 2013).
Rather, it is a double-edged sword. If there are good reasons for WTO intervention, because the issues at stake are most efficiently addressed at the international level, this level enjoys “greater jurisdictional legitimacy” than the local level. Especially domestic measures taken for the protection of global non-economic values, such as the protection of the environment, will be inefficient if the interests of foreign stakeholders are insufficiently taken into account. Since transaction costs and political barriers prevent optimal Coasean bargaining between states with respect to such measures, the outcome will likely produce more negative externalities than global benefits. These externalities may not even be foreseen if the policy is designed without procedures for taking foreign interests into account. Of course, this does not mean that all collective action problems should be solved internationally, but there is a strong efficiency argument in favor of international coordination.

If the local level lacks legitimacy, taking an issue up at the level of the WTO is also justifiable. Domestic measures enacted in a democratic way and responsive to deeply held moral concerns of affected citizens, should deserve more deference than measures taken at the executive level with a perceived intent to shield certain business interest groups from international competition. The WTO can serve as a check on national sovereignty, but it can enhance it as well. By reviewing national law for their compatibility with international rules, it can protect states from internal or external capture by special interest groups. The AB, by stating that it might defer to a domestic precautionary principle when dealing with actions of “responsible representative governments”, has already suggested that more deference is justified when dealing with properly functioning democracies than with more authoritative states.

Finally, it is important to clarify that the local level should not be equated to the level of the state. Sometimes the correct level to defer to is the regional level (such as MERCOSUR, NAFTA or the EU), or other non-state actors. The choice of which level the WTO should defer to should be based on who can best assess the interests involved and who can address the issues at stake most effectively and legitimately. This is how vertical subsidiarity, efficiency and legitimacy fit together.

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113 Kumm, supra note 84, at 922.
114 Portuese, supra note 102, at 232.
115 Kumm, supra note 84, at 922.
116 Id. at 922-923.
117 Portuese, supra note 102, at 242.
118 HORN & MAVROIDIS, supra note 12, at 16.
119 JACKSON, supra note 3, at 73; HORN & MAVROIDIS, supra note 12, at 17; Kumm, supra note 84, at 922-923; WTO, WORLD TRADE REPORT 2004. EXPLORING THE LINKAGE BETWEEN THE DOMESTIC POLICY ENVIRONMENT AND INTERNATIONAL TRADE 151 (2004); more generally Portuese, supra note 102, at 231.
122 AB Report, EC – Hormones.
3.3.2 Horizontal subsidiarity

Horizontal subsidiarity requires the WTO to defer considerably to other international institutions if they can show superior credentials, based on their expertise, specialization, legitimacy and efficiency in dealing with non-trade issues relevant for solving a WTO dispute. The WTO is not the superior forum for addressing all collective action problems. Its dispute settlement system is not equipped to perform complex cost-benefit analysis outside the field of international trade and it should become more sensitive to the fact that certain issues may be more efficiently dealt with by other policymakers. Linking non-trade issues to the WTO dispute settlement regime, or incorporating them within the WTO system, might even threaten the degree of commitment and compliance with WTO law and may lower the acceptance of the outcomes of dispute settlement cases.

Because of the specific trade expertise of members of the panels and the AB, often trade lawyers by education, I argue that the WTO is the most efficient international governance level to solve externalities only with respect to international trade and economic relations. But subsidiarity is not mere deference. It still requires strict scrutiny of state measures with respect to their compatibility with WTO law.

Subsidiarity is also not just a crude tool to distribute exclusive competences. Rather, it is a nuanced principle that allows for cooperation and deference in a field, international law, which is increasingly faced with overlaps and fragmentation. Requiring the WTO to defer to another institution of governance should not mean that its involvement in solving the issue at hand should seize. In specific cases, it can mean deferring with respect to one question, for instance whether asbestos does in fact pose a threat to public health in the EU, and exercising its competence in another area, such as the question whether the protection of public health has been done in a way compatible with WTO non-discrimination rules.

Where vertical subsidiarity contains a presumption in favor of the local level, horizontal subsidiarity contains an efficiency based presumption in favor of specialized IOs. Relevant knowledge or “expertise” can be a source of both efficiency and (social) legitimacy. The core of the principle requires “sensitivity to the superior credentials that other institutions of governance may have in addressing the substantive value trade-offs entailed in domestic measures that the WTO . . . [is], necessarily, required to review form the perspective of WTO rules on trade.”

Horizontal subsidiarity comes into the picture where the domestic level does not have a claim of “superior legitimacy”, but another international level does. Accordingly, the principle is most relevant in areas where trade law and policy overlap with other areas of international law and policy, such as development (UNCTAD; World Bank), intellectual property (WIPO; Convention on

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123 Stein, supra note 4, at 506; Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 87.
125 Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 87.
126 Rüdiger Wolfrum, Legitimacy of International Law from a Legal Perspective, in LEGITIMACY IN INTERNATIONAL LAW 24 (Rüdiger Wolfrum & Volker Röben (eds.), 2008).
127 Howse & Nicolaidis, Global Subsidiarity, supra note 14, at 87.
128 Howse, Adjudicative Legitimacy, supra note 4, at 62.
Biological Diversity), public health (WHO), monetary policy (IMF), human rights and labor standards (UN; ILO; regional human rights bodies) and animal welfare and the environment (NGOs; specific treaties such as CITES; Kyoto Protocol; Rio Declaration and Rio+20 Summit).\textsuperscript{129}

The fact that perfect coherence will rarely be achieved in practice, does not mean that the WTO should not strive to obtain it to the highest extent possible. For instance, when a WTO Member enacts unilateral trade sanctions (meaning, without UN Security Council authorization or obligation) against a regime that violates fundamental human rights, and such a measure would be challenged in front of the WTO DSB, one would expect the WTO to defer considerably to the relevant international human rights bodies, such as the UN Human Rights Council and the ILO, and to regional human rights bodies, such as the Inter-American Court of Human Rights or the Council of Europe (and the European Court of Human Rights), for assessing the gravity of the human rights violations in question.\textsuperscript{130}

### 3.3.3 Choosing the right level of governance and whether or not to intervene

In order to apply the principle of subsidiarity, the WTO must be able to judge which level of governance is the most legitimate and efficient and to what extent its own action is legitimate and may affect individual interests and the scope of policymaking of these other levels of governance. The legitimacy assessment can be based on the ideas covered by the principle of legitimacy, but the efficiency assessment requires some elaboration. It requires the WTO dispute settlers to refrain from intervening if the negative externalities on non-trade fields related to the intervention would outweigh the benefits of overcoming a specific economic collective action problem.

First, the WTO dispute settlers should rely on the presumptions outlined above. There is a vertical presumption of legitimacy (and to some extent efficiency) in favor of the local level and a horizontal presumption of efficiency in favor of the relevant non-WTO supranational level. If these presumptions are rebutted, a more nuanced and complex analysis is required. I suggest an approach based on economics, tailored to the more complex value trade-offs the WTO is dealing with, but without interfering with the independent legitimacy assessment.

The economic concept of efficiency best suited for this assessment is Kaldor-Hicks efficiency, as it allows for complex value trade-offs and taking externalities into account. It only requires that a majority gains sufficiently from taking a certain decision at a certain level, so that those who are worse of as a result may theoretically be compensated, thereby leaving everybody better off (in theory at least).\textsuperscript{131}

\textsuperscript{129} For a more detailed discussion of some of these examples, see Gary P. Sampson, \textit{Is There a Need for Restructuring the Collaboration among the WTO and UN Agencies so as to Harness their Complementarities?}, in \textit{REFORMING THE WORLD TRADING SYSTEM} 523-533 (Ernst-Ulrich Petersmann ed., 2005); WTO, \textit{WORLD TRADE REPORT 2013. FACTORS SHAPING THE FUTURE OF WORLD TRADE 277-279} (2013); and more generally in Gary P. Sampson, \textit{THE ROLE OF THE WTO IN GLOBAL GOVERNANCE} (2000).

\textsuperscript{130} \textit{TREBILCOCK ET AL., supra} note 112, at 728-730.

\textsuperscript{131} \textit{Portuese, supra} note 102, at 241.
However, traditionally, Kaldor-Hicks efficiency is tied to wealth-maximization and interests that can be expressed in monetary values.\textsuperscript{132} This will not suffice in the search for the most efficient governance level, as pure wealth-maximization criteria will almost inevitably always lead to pro-trade outcomes. It is necessary to take additional factors into account such as relevant expertise, institutional process, expected compliance, political and financial capabilities (for assessing the correct level of governance) and the effects on cultural and social preferences, human rights, environmental considerations (for assessing whether to refrain from exercising power). Another (normative) reason for using a more utilitarian approach to subsidiarity, is that wealth-maximization favors the economic interests of the wealthy over the non-economic interests of the poor. Only a complex utilitarian model truly values the equality of all individuals.\textsuperscript{133} Finally, because this limitation expects the WTO to make an assessment of non-economic externalities, an efficiency criterion that focusses on purely economic values is inherently flawed.

This brief elaboration, at best a modest attempt to provide content to the practical requirements of subsidiarity, shows that applying the principle might be difficult and controversial. But because of the uniqueness of every case, it may not be useful to develop a more elaborate or rigid assessment tool. The relevance of subsidiarity lies not in predicting the result of specific cases, but in structuring the assessment process “in a way that is likely to be sensitive to the relevant empirical and normative concerns.”\textsuperscript{134}

### 3.4 Specific tools (implementing the principles into practice)

In this part, I will briefly outline some tools which the WTO DSB can use to implement the three principles outlined above. The tools will take the form of flexible standards rather than strict rules. Some will be pragmatic and concrete, some can only be general in application to remain useful in changing circumstances. This is not a choice for less international law or more flexibility for states. It is simply reflective of the reality that it is impossible to predict the long term effects of WTO dispute settlement or the correct outcome of each individual case in the abstract.\textsuperscript{135}

#### 3.4.1 Independence and impartiality

A first set of tools must ensure that the WTO dispute settlers are impartial and independent. These tools primarily implement the principles of legitimacy and efficiency. Independence allows the decision-maker to take all relevant interests into account without endangering his or her position. Impartially requires the decision-maker to leave bias and personal interest out of the question.\textsuperscript{136}

Impartiality is primarily an obligation for the arbitrators themselves. Tools to encourage impartiality can take the form of ethical rules governing the conduct of the AB

\textsuperscript{132} See, for example, POSNER & SYKES, supra note 17, at 13; Jules L. Coleman, The Normative Basis of the Economic Analysis of Law, 34 STANFORD LAW REVIEW 1110-1113 (1982) (explaining that Kaldor-Hicks cannot be an index of utility).

\textsuperscript{133} Coleman, id., at 1116.

\textsuperscript{134} Kumm, supra note 84, at 921.

\textsuperscript{135} Collins, supra note 90, at 27.

and Panel members such as the current “Rules of Conduct”\textsuperscript{137}, the already generally accepted requirement of legal reason-giving and a system of appellate review to ensure unbiased panel rulings. Increasing transparency, participation and accountability (below) will also encourage impartiality.

The obligation of independence lies primarily with others. Tools to increase judicial independence can include transparency requirements in the nomination process of the arbitrators and keeping a record of the government, NGO, business or other ties of the appointees. This should strengthen the accepted practice of not appointing an arbitrator with strong ties (through citizenship or otherwise) to any of the parties or the interests involved in the dispute.

3.4.2 Fair process, coherence, integrity and institutional sensitivity

A second set of tools must increase the overall performance of the adjudicative process, by focusing on the requirements of (i) fair process, (ii) coherence and integrity in legal interpretation and (iii) institutional sensitivity.\textsuperscript{138}

Fair process concerns democratic input legitimacy.\textsuperscript{139} It can be ensured by tools such as transparent proceedings and participation by the affected stakeholders.\textsuperscript{140} At a minimum, the directly affected parties, arguably the states, have to be heard and there has to be equality of arms.\textsuperscript{141} In specific cases, more far-reaching measures could be necessary. Specifically, the acceptance of \textit{amicus briefs} and opening dispute settlement proceedings to the public are helpful tools, as are raising awareness of the impact of a dispute with the affected population. For the latter purpose, NGOs and specialized interest groups are arguably better placed than the WTO itself, but the WTO can incentivize these groups by empowering them and allowing them to participate in the proceedings. Another tool, complementary to the former, is scrutinizing whether a government, NGO or other IO is in fact correctly representing who it claims to be representing, or just a more narrow interest group. The dispute settlers can work with certain assumptions, such as that a state is the best democratic representative of its nationals, but these need not be irrefutable.

Coherence and integrity are in essence the assurance that adjudicators’ decisions are not just a result of their “personal choice of the value that should prevail in a given


\textsuperscript{139} Howse, \textit{Legitimacy of the WTO}, supra note 4, at 376.

\textsuperscript{140} Howse, \textit{Adjudicative Legitimacy}, supra note 4, at 42.

\textsuperscript{141} This can be an issue with respect to developing countries and small states, with a less generous legal defense budget. There is a risk that the big players will hire the best law firms, “out-lawyering” smaller players, who in fact need the protection of dispute settlement the most.
situation.” They are therefore intrinsically linked with independence and impartiality (above) and can be enhanced with several tools, such as relying on customary rules of interpretation. Another tool to increase coherence is relying on precedent, because it disciplines case-by-case, result oriented legal interpretation. Evolutionary interpretation can be another tool to increase integrity, because retrospective, originalist methods of interpretation of WTO law almost always favor the narrow interests of trade, to the detriment of non-trade interests.

Institutional sensitivity is at the core of the law and policy principles discussed above, because it relates to knowing your own strengths and weaknesses and resorting to deference (or restraint) when appropriate. The set of tools supporting institutional sensitivity is primarily meant to help the dispute settlers to assess when overcoming collective action problems in international economic relations is efficient, and when the dispute settlers should hold back.

The most important tool to increase institutional sensitivity is dialogue and cooperation with other actors and institutions. In the absence of formal reform, there must be informal, but transparent cooperation and consultation between WTO dispute settlers and other relevant actors, such as specialized IOs, NGOs, business organizations and national parliamentary bodies. One way for the WTO to start that dialogue unilaterally, while at the same time increasing coherence in international law more generally, would be for the WTO dispute settlers to increasingly engage with non-WTO sources of international law in their decisions.

A second important tool to increase institutional sensitivity is a smart application of presumptions. As discussed above, rebuttable presumptions in favor of the local and/or specialized level can be justified. But these presumptions must be used diligently, and when rebutted, the dispute settlers should not shy away from complex (and sometimes controversial) assessments of which governance level is superior with respect to a specific legal or political question.

Third, in some cases, institutional sensitivity will require a strategic use of obiter dicta. Where the outcome of the case seems to go against certain values, the dicta can explain how these values were nevertheless given due weight and consideration. This tool also indirectly pursues the principle of efficiency, by increasing the likelihood that decisions are accepted by both the “winners” and the “losers”. Obiter dicta have little to

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142 Howse, *Legitimacy of the WTO*, supra note 4, at 384.
143 Article 3.2 DSU; Articles 31-33 VCLT; Howse, *Adjudicative Legitimacy*, supra note 4, at 54.
145 Howse, *Adjudicative Legitimacy*, supra note 4, at 57.
146 Howse, *Adjudicative Legitimacy*, supra note 4, at 62.
147 Howse, *Legitimacy of the WTO*, supra note 4, at 391.
149 *Id.*, at 178-179.
do with normative legitimacy, although they can increase transparency and accountability by creating a space for public debate.\textsuperscript{150} They are also linked to the social function of judicial impartiality. “Not only must justice be done; it must also be seen to be done.”\textsuperscript{151}

Another tool with a similar effect is including dissenting opinions in dispute settlement reports.\textsuperscript{152} But there are arguments against using \textit{dicta} or dissenting opinions. Sometimes, the less one says, the more attention is paid to what is said. Also, international decision-makers may jeopardize their legitimacy if they go beyond their competences. They may chill states from submitting future disputes. It would accordingly be improper for the WTO dispute settlement body to produce broad statements about environmental or human rights issues, considering states created the WTO just to deal with matters relating to trade and economics, and its expertise outside this field is limited.\textsuperscript{153} Institutional sensitivity can therefore also be enhanced by applying the tool of judicial economy to avoid unnecessary conflicts with other international or national decision-makers.\textsuperscript{154} A balance needs to be struck between judicial economy, deference and \textit{dicta}, on a case-by-case basis.

\subsection*{3.4.3 Transparency, participation and accountability}

A third set of tools must more directly increase legitimacy and therefore focuses on “good governance.” Accountability is often argued to be the most obvious requirements of good governance, but is hardly effective without transparency and appropriate participation rights.\textsuperscript{155}

The WTO is often criticized for having a “transparency deficit”, especially in the context of dispute settlement.\textsuperscript{156} Transparency requires that relevant information should be accessible to affected actors and interested parties. The relevant information includes proper legal reasoning and information about how collective action problems are solved.\textsuperscript{157} Accordingly, it requires clear and unambiguous reason-giving, essential for

\begin{footnotesize}
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  \item\textsuperscript{150} Also suggested by Robert Howse at \textit{Discussion Following Presentations by Tullio Treves and Rein MÜLLERSON}, in \textsc{Legitimacy in International Law} 207 (Rüdiger Wolfrum & Volker Röben (eds.), 2008).
  \item\textsuperscript{151} UK Court of Appeal, \textit{R v Sussex Justices, Ex parte McCarthy} [1924] 1 KB 256, [1923] All ER Rep 233 (related to the external (social) aspects of judicial impartiality).
  \item\textsuperscript{152} Meredith Kolsky Lewis, \textit{The Lack of Dissent in WTO Dispute Settlement}, 9 J. INT’L ECON. L. 895 (2006); Windsor, \textit{supra} note 5, at 61.
  \item\textsuperscript{153} Rein Müllerson, \textit{Aspects of Legitimacy of Decisions of International Courts and Tribunals: Comments}, in \textsc{Legitimacy in International Law} 200 (Rüdiger Wolfrum & Volker Röben (eds.), 2008)
  \item\textsuperscript{154} Treves, \textit{supra} note 138, at 176.
  \item\textsuperscript{155} On accountability and transparency, see Buchanan & Keohane, \textit{supra} note 4, at 51-53; see also Eyal Benvenisti, \textit{The Law of Global Governance} 158-166 (2014); on participation and transparency as necessary conditions for accountability, see Jackson, \textit{supra} note 3, at 118; see also Windsor, \textit{supra} note 5, at 55; Daniel C. Esty, \textit{Good Governance at the World Trade Organization: Building a Foundation of Administrative Law}, 10 J. INT’L ECON. L. 510-512 (2007).
  \item\textsuperscript{156} Jackson, \textit{id.}, at 119; Bronckers, \textit{supra} note 31, at 555-556; see also Julio A. Lacarte, \textit{Transparency, Public Debate, and Participation by NGOs in the WTO: a WTO Perspective, in Reforming the World Trading System} 450-451 (Ernst-Ulrich Petersmann ed., 2005).
  \item\textsuperscript{157} Buchanan & Keohane, \textit{supra} note 4, at 54-55.
\end{itemize}
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linking transparency with accountability. The available information should also include the arbitrator’s potential bias or ties to affected stakeholders.

Further, tools to enhance transparency include publishing written submissions and airing hearings. In highly symbolic cases, were the need may arise to take unpopular or controversial decisions, transparency may be in conflict with efficiency. But the presumption should remain in favor of transparency, because the problems raised by too much information can be addressed by public debate and normative standards, where there are no alternative tools available to address the problems of secret decision making.

Overcoming information asymmetries is a means to an end, not and end in itself. Therefore, transparency should work both ways. The dispute settlers need to be aware of the interests at stake and the preferences of the affected individuals as well. The legitimacy of a decision depends, in part, on the way it handles conflicting values and interests and takes into account the expectations and views of affected stakeholders. This can be done through participation mechanisms. Reducing information asymmetries enables individuals to take meaningful ownership of these mechanisms, which, in turn, enables upstream transparency towards the DSB. This way, participation will allow more efficient solutions to collective action problems by granting equal voice to affected actors, broadening the marketplace of ideas, deferring to local, specialized actors and creating a transnational flow of advocacy. This, in turn, increases output legitimacy. Accordingly, participation, when properly enabled by transparency, pursues all three law and policy principles.

Direct democratic participation at the international level is not pragmatically feasible, nor necessarily effective. At the international level, the best we can do may be to provide “voice without a direct vote”. One tool to allow for indirect participation is creating incentive for states to create participation mechanisms at the local level, by tying deference to the procedure in which measures have been adopted. This procedure can be

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158 Treves, supra note 138, at 173-175 (referring to the ICJ, Nuclear Weapons opinion as an infamous example or ambiguous reason-giving); Eyal Benvenisti, The Law of Global Governance 165 (2014).
160 Buchanan & Keohane, supra note 4, at 57-58.
164 Eyal Benvenisti, Welfare and Democracy, supra note 161, at 349.
166 Eyal Benvenisti, Welfare and Democracy, supra note 161, at 347.
assessed by looking at legislative history, opinion polls and domestic democratic processes. In this respect, the WTO Secretariat has called for increased transparency at the national level, in particular with respect to non-economic policy measures, in order to have them scrutinized more carefully for their consistency with WTO law.\footnote{WTO, WORLD TRADE REPORT 2013. FACTORS SHAPING THE FUTURE OF WORLD TRADE 286-287 (2013).} Indirect participation can also be increased if the WTO DSB accepts transparency “that indirectly expose[s] [its] discretion to public scrutiny”, such as the tools discussed above.\footnote{EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 248 (2014).}

More direct participation can be enhanced by creating venues for NGO involvement in dispute settlement. The most discussed example in the context of WTO dispute settlement is accepting \textit{amicus curiae} briefs.\footnote{STOLL & SCHORKOF, supra note 4, at 273 (at no. 788) (citing this as the only effort by the AB so far to increase its legitimacy).} However, allowing broad participation rights for NGOs might put economic power back into the picture in full force. Non-state actors are also often “single-issue” entities, whereas states are arguably better placed to balance different and conflicting interests.\footnote{Julio A. Lacarte, Transparency, Public Debate, and participation by NGOs in the WTO: a WTO Perspective, in REFORMING THE WORLD TRADING SYSTEM 449 (Ernst-Ulrich Petersmann ed., 2005); JACKSON, supra note 3, at 120.} Because of this, a specific tool for increasing participation in a diligent manner is setting up a system of accreditation.\footnote{Christian Marxsen, The Promise of Global Democracy – The International Impact of Civil Society, 47 N.Y.U. J. INT’L L. & POL. (forthcoming 2015); Eyal Benvenisti, Welfare and Democracy, supra note 161, at 358.} This can even be done without any institutional reforms, by creating informal mechanisms, where the DSB weighs NGO input based on specific criteria such as credibility, competence, local and specific knowledge, representation, accountability, good governance and institutional capacity.\footnote{See, for example, Article 15 World Bank Operational Manual “Good Practices Involving Nongovernmental organizations in bank-Supported Activities”, GP 14.70, available at http://go.worldbank.org/Z1R2COYCB0 (last accessed on January 19, 2015).} These criteria can also be used when assessing whether or not to defer to another institution or governance level or have it participate in WTO disputes.\footnote{See, for example, Howse, Adjudicative Legitimacy, supra note 4, at 63 (stressing the importance of relying on another IO, \textit{in casu} the WHO, if it has local knowledge of the situation on the ground, which the WTO generally lacks).} Participation through such independent informal accreditation also mitigates the (rational) practice by some states to support certain NGOs over others, depending on policy goal alignment.\footnote{Eyal Benvenisti, Welfare and Democracy, supra note 161, at 353.} Another, more far-reaching tool to increase participation in WTO dispute settlement is the recognition of an individual or collective right to be heard for affected stakeholders.\footnote{EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 166-184 (2014); for an argument on the even more far-reaching right to bring a complaint, see CHARLES-EMMANUEL CÔTÉ, LA PARTICIPATION DES PERSONNES PRIVÉES AU RÈGLEMENT DES DIFFÉRENTS INTERNATIONAUX ÉCONOMIQUES : L’ÉLARGISSEMENT DU DROIT DE PORTER PLAINTE À L’OMC (Brussels: Bruylant, 2007).}

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\footnote{168} EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 248 (2014).
\footnote{169} STOLL & SCHORKOF, supra note 4, at 273 (at no. 788) (citing this as the only effort by the AB so far to increase its legitimacy).
\footnote{170} Julio A. Lacarte, Transparency, Public Debate, and participation by NGOs in the WTO: a WTO Perspective, in REFORMING THE WORLD TRADING SYSTEM 449 (Ernst-Ulrich Petersmann ed., 2005); JACKSON, supra note 3, at 120.
\footnote{173} See, for example, Howse, Adjudicative Legitimacy, supra note 4, at 63 (stressing the importance of relying on another IO, \textit{in casu} the WHO, if it has local knowledge of the situation on the ground, which the WTO generally lacks).
\footnote{174} Eyal Benvenisti, Welfare and Democracy, supra note 161, at 353.
\footnote{175} EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 166-184 (2014); for an argument on the even more far-reaching right to bring a complaint, see CHARLES-EMMANUEL CÔTÉ, LA PARTICIPATION DES PERSONNES PRIVÉES AU RÈGLEMENT DES DIFFÉRENTS INTERNATIONAUX ÉCONOMIQUES : L’ÉLARGISSEMENT DU DROIT DE PORTER PLAINTE À L’OMC (Brussels: Bruylant, 2007).
qualifies as an affected stakeholder and who does not?176 Participation by other governmental actors, such as national parliaments, does not raise this issue to the same extent.177 The first objection can be countered by pointing to minority rights and democratic deficits at the national level.178 The second objection is more persuasive. WTO disputes affect an enormous amount of individuals and if the circle of participation is drawn overly broad, the decision process becomes overburdened and deadlocked.179 Moreover, the recognition of an individual right to be heard would require a politically controversial amendment to the WTO dispute settlement procedures. For this reason, in combination with doubts about its effectiveness and the related boundary problems, an individual right to be heard does not qualify as a proper tool for implementing the three principles for the purpose of this paper.

Accountability, finally, requires (i) standards to be held accountable to, (ii) information based on which it is possible to hold the relevant actors accountable and (iii) procedures that allow for holding the actors to account.180 This way, transparency and participation are necessary conditions for accountability.181

The standards can be the WTO Agreements themselves, general public international law, and the existing body of ethical rules binding the arbitrators, ensuring that they comply with the requirements of independence and impartiality set out above. Information is made available through the transparency tools outline above. So what remains is procedures for holding arbitrators accountable for their actions. These can take various forms and should be implemented at various levels. A first tool is internal review.182 For example, the AB internally reviews panel decisions. A second is peer review.183 The WTO could unilaterally make itself informally and indirectly reviewable by other IOs by providing for deference to their judgment or by striving for greater coherence in international law. Third, the WTO disputes settlement system is reviewed by the “court of public opinion”, especially with respect to controversial cases, such as many trade and environment disputes. Finally, review by national actors, including courts, is perhaps the most effective accountability tool currently available.184

3.4.4 Assessing economic outcomes

A fourth set of tools must increase the capabilities of the dispute settlers to efficiently overcome collective action problems in international economic relations, thereby increasing global welfare step by step. This can be done by increasing internal and external economic expertise.

176 BENVENISTI, id., at 172.
179 Id., at 178.
180 Buchanan & Keohane, supra note 4, at 51.
181 Id., at 52-53.
182 EYAL BENVENISTI, supra 178.
183 Id., at 264-270.
184 Id., at 270-282.
The parties usually present their own economic evidence and often have their own economic experts. A tool the WTO dispute settlers should use itself to draw from external economic expertise is increasingly ask for expert opinions from impartial and independent economic experts or relying on existing economic reports by other organizations, such as the IMF, the World Bank, the OECD, UNCTAD and the WTO’s own trade policy review mechanism.

With respect to internal expertise, there is arguably already sufficient economic expertise present at the WTO Secretariat, but in order to enable independent assessment of economic sources and to enhance cooperation with external economic experts, economic expertise should also figure into the equation when choosing experts to be appointed to panels and the AB. In addition, AB members should be encouraged to keep up to date with current macro-economic theory and science, as well as with political science and international relations theory, in order to better assess the effects of their decisions.

### 3.4.5 Dealing with conflicting principles: the proper standards of review

Usually, the three principles will reinforce each other and many of the tools implement multiple principles at once. In many cases, a correct application of the principle of subsidiarity will automatically lead to the correct balance between efficiency and legitimacy. However, sometimes there may still be a conflict between the principles. In such case, a fifth set of tools must enable the WTO dispute settlers to balance the law and policy principles and decide which principle should prevail in case of an unresolvable conflict. This set of tools are the proper standards of review.

A full discussion of possible standards of review is outside the scope of this paper. Moreover, different provisions of WTO law may call for different standards of review. Further, non-trade measures based on scientific arguments (in areas such as health, environment and product safety) should arguably be more strictly scrutinized than measures based on moral reasons (human rights, labor rights and animal welfare). Nevertheless, I will suggest which requirements the standards should meet to qualify as appropriate tools for implementing the three law and policy principles.

The proper standard of review should apply sufficient deference in line with the principle of subsidiarity and the tools of institutional sensitivity outlined above. If a

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186 For a recent overview, and quite innovative view on the most common standards of review in WTO dispute settlement, see BECROFT, supra note 8.

187 Croley & Jackson, supra note 185; Ehlermann & Lockhart, supra note 185, at 493 (both arguing that a sufficiently deferential standard of review is required in order to preserve the WTO’s legitimacy); see also BECROFT, supra note 8, at 90 (arguing that standards of review can be based either primarily in legitimacy considerations, or with the intent to pursue the traditional goals of the WTO, and that there is a complex relation between the two, because the WTO’s legitimacy is inherently linked with its efficiency).
measure falls within the (narrow) scope of international trade policy, subject to WTO law, and it has primarily economic effects, stricter scrutiny may be justified, as the WTO is the superior institution in that field. But with respect to non-trade policy, the proper standard of review should allow for normative pluralism wherever WTO law leaves scope for such domestic policymaking.\textsuperscript{188} Jeffrey Atik suggested the following standard of review that could be a useful starting point: a WTO panel should reject a claim of WTO incompatibility in cases where “the national measure reflects a deeply embedded value (which at times may be idiosyncratic)” and “enjoy[s] the clear support of [a state’s] population”, and where “the country imposing he measure bears the greater part of the cost” related to the trade distortion caused by the measure.\textsuperscript{189} Concretely this means that whenever WTO Members have retained their right to regulate or exceptions are made to otherwise strictly applicable provisions, like the general exceptions of Article XX GATT or XIV GATS, it is not up to the WTO dispute settlement mechanism to significantly interfere with the way WTO Members use this scope of policymaking.

There is one important caveat, though. To the extent a specific use of the scope for policymaking leads to negative economic externalities, the WTO should subject the non-economic policy to strict scrutiny again. In doing so, the WTO should (i) take the views of other supranational governance levels into account, according to specialization (see \textit{supra}) and (ii) assess whether the state in question has put sufficient effort in addressing these negative externalities itself. This way, the WTO dispute settlement system acts as a trustee of humanity and an enforcer of the trusteeship concept. Through its adjudicative powers, it can rectify the purely inward looking nature of domestic legislative functions. It can do this through either directly taking externalities of domestic measures into account, or by requiring due process at the domestic level, either through a negotiated solution between those affected\textsuperscript{190} or through “simulated multilateralism” in the domestic legislation process.\textsuperscript{191} The latter would require evidence that the domestic legislature, executive or judicial branch (in reviewing the measure) has taken “other-regarding considerations” sufficiently into account.\textsuperscript{192}

Another factor to take into account should be whether the national regulator, in adopting the measure and trying to take into account foreign interests, acted as a “reasonable regulator” in the specific circumstances of the case, comparable to similar tests in domestic tort and administrative law (combining both objective and subjective

\textsuperscript{188} Howse & Langille, \textit{Permitting Pluralism, supra} note 53.


\textsuperscript{190} TREBILCOCK ET AL., \textit{supra} note 112, at 678-679 (focusing on affected states and explaining that it is inaccurate to read the famous US – Shrimp case as requiring prior negotiation with affected states in order to be able to justify unilateral environmental measures. The requirement is one of non-discrimination, which, of course, can be facilitated by negotiation, but also in a variety of other ways.).

\textsuperscript{191} See AB Report, \textit{Shrimp/Turtle} on due process, para. 177; von Bogdandy, \textit{supra} note 5, at 126-130 (discussing “simulated multilateralism”).

\textsuperscript{192} Benvenisti, \textit{Trustees of Humanity, supra} note 64.
The “reasonableness test” is much more nuanced than the alternative all-or-nothing approach, which can be particularly ill-suited for the assessment of non-economic policy. It also takes into account the means available to the Member who took the measure, which will likely lead to more deference to less-developed countries than to countries who have the means to organize multi-stakeholder consultation or take other-regarding considerations into account in their existing legislative process. Depending on the extent to which the measure in fact creates negative economic externalities, however, the standard may be stricter, requiring “all feasible measures/precautions” to be taken in order to take foreign interests into account, not just all “reasonable” measures. Thus, were the national level acts in a reasonable, democratically legitimate way and the negative externalities related to the measure are limited, the role of WTO dispute settlement should be limited and a more deferential and flexible standard of review is appropriate.

4 Main weaknesses and challenges

The principles and tools outlined above will be subject to challenges and criticism. This part will give a brief overview of the main weaknesses of the proposals.

4.1 Legal

Since the purpose of this paper is to propose new principles and tools that do not require amendments to the WTO Agreements, it is important to explain how the proposals are reconcilable with current WTO law and non-WTO public international law. Further, it is important that the proposals do not aggravate the fragmentation of international law. International law is faced with increasing horizontal and, due to the rise of multi-level governance, vertical fragmentation. The main risks of fragmentation of international law lie in its potential to create conflicts and uncertainty in international law, stall the democratization of global governance and limit the opportunities for weaker actors to build cross-issue coalitions that could counter the bargaining power of the strongest states. Because there is no international supreme court with a final say, the risk of fragmenting international law through dispute settlement is especially high when a regime-specific dispute settler broadens its own mandate and enters the realm of general

193 For instance in Panel Report, EC – Asbestos, para. 8.193; discussed at CATHERINE BUTTON, THE POWER TO PROTECT: TRADE HEALTH AND UNCERTAINTY IN THE WTO 217 (Hart, 2004); and at BECROFT, supra note 8, at 75; but see AB Report, EC – Hormones, paras. 112-113.


public international law, or even specific law of another regime.\textsuperscript{198} Fragmentation, decentralization and the non-hierarchical nature of international law make coherent global governance very difficult, even if it arguably offers opportunities for experimentation at various policy levels.\textsuperscript{199}

The principles and tools I proposed can operate within the boundaries of current WTO law. WTO law is already targeted at efficiency, there are provisions that allow for considerations of subsidiarity and, in fact, the principle of legitimacy can only fully operate within the boundaries of legality. By discussing a number of specific tools I will show that (i) the DSU is sufficiently flexible for the AB to implement the procedural tools presented above in an informal way, (ii) the substantive provisions of WTO law are sufficiently ambiguous for the implementation of general principles such as efficiency, legitimacy and subsidiarity and the accompanying standards of review, and (iii) the tools will mitigate fragmentation rather than aggravate it.

First, the tools with respect to independence, impartiality and economic expertise of the arbitrators require only one significant deviation from current practice: more transparency in the nomination process of members of the panels and the AB. Although this would require a move away from the traditional heavily politicized process of appointing arbitrators, it would not require any amendment to the formal nomination procedures enshrined in Articles 8 and 17 DSU.\textsuperscript{200} Nothing prevents governments from taking economic expertise into account when appointing arbitrators either. The Members and the WTO Secretariat are also free to set up (and require) continued economic training of members of the AB without amending the WTO Agreements.\textsuperscript{201} Rules of conduct ensuring that the arbitrators themselves remain impartial and disclose any information that could affect their independence are already in place.\textsuperscript{202} Here, minor steps to improve compliance, for instance publishing the most relevant disclosures (with due respect for individual privacy) could strengthen this practice and would not require amendments to the WTO Agreements.

Second, a major obstacle for what may be perceived as lawmaking activities is the limitation that WTO dispute settlement panels and the AB may only clarify existing obligations and they may not “add to or diminish the rights and obligations” of Members under WTO law.\textsuperscript{203} This restriction significantly reduces the possibilities for the WTO dispute settlement system to contribute to WTO (and non-WTO international) law.\textsuperscript{204} However, although the current DSU does not authorize the WTO DSB to apply non-WTO international law and prohibits judicial lawmaking, the majority of the tools

\textsuperscript{198} ALVAREZ, supra note 81, at 517-18.
\textsuperscript{199} WTO, WORLD TRADE REPORT 2013. FACTORS SHAPING THE FUTURE OF WORLD TRADE 277 (2013).
\textsuperscript{201} On (legal) training of WTO adjudicators see also Häberli, supra note 148, at 20.
\textsuperscript{203} Article 3(2) DSU.
\textsuperscript{204} ALVAREZ, supra note 81, at 413 (See also 232-233 & 458-520).
(standards of review, horizontal and vertical deference, relying on precedent, referring to legislative history and opinion polls related to domestic measures, judicial economy, evolutionary interpretation, obiter dicta) can be implemented through changing the adjudicators working procedures (Article 17.9 DSU), or through creative use of interpretative tools part of customary international law, which the panels and AB are required to follow and are therefore part of the rights and obligations of WTO Members. For instance, much of the tools implementing horizontal subsidiarity can be based on the obligation to take other relevant rules of international law into account when interpreting a treaty (Art. 31(3)(c) VCLT). This allows the WTO dispute setters to mitigate fragmentation risks to a significant extent, including through judicial dialogue. Other cases may be covered by explicit links between WTO and non-WTO law, such as in the TRIPS Agreement to non-WTO IP treaties, in the SPS Agreement to the Codex Alimentarius or in Article XV GATT to the competence of the IMF with respect to monetary policy. In these cases, the WTO Members themselves put fragmentation-mitigating mechanisms in the WTO Agreements.

Through these interpretative and deferential linkages, a correct implementation of the principles of legitimacy and subsidiarity and the use of relevant non-WTO international law, the systemic integration of the WTO in public international law will be enhanced. Such linkages and institutional sensitivity offer the most promising prospects in areas where linking different international levels seams unavoidable, such as in the area of trade and labor rights, trade and monetary policy, or trade and the environment.

Further, in case there is a conflict between WTO law and another treaty, the rules of lex posterior or lex specialis may be used to solve the issue. In case of overlapping membership, the amount of conflicting obligations may in fact be expected to be very low to begin with. But in case WTO membership does not perfectly coincide with the membership of the other IO or treaty, or in case of unilateral action in pursuit of a non-

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205 Windsor, supra note 5, at 77 (on subsidiarity and a flexible standard of review).
206 Article 3.2 DSU.
207 See, for example, WTO Panel Report, EC – Biotech, paras. 7.69-7.70; Panel Report, US – Shrimp; see also ÁLVAREZ, supra note 81, at 490-91; Häberli, supra note 148, at 4; Howse, Adjudicative Legitimacy, supra note 4, at 55 (arguing that this allows the WTO DSB to consider non-WTO international law when interpreting WTO law); see also TREBLICKO ET AL., supra note 112, at 699-700; Howse, Legitimacy of the WTO, supra note 4, at 387.
211 STOLL & SCHORKOPF, supra note 4, at 258 (at no. 749).
economic goal, the proposed legal approach can lead to fragmentation and legitimacy issues. These legitimacy issues were already raised in the context of references in the SPS Agreement to rules of the Codex Alimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention, to which not all WTO Members were a party at the time of their incorporation in WTO law.\textsuperscript{213} Accordingly, linkages and the application of relevant rules of non-WTO law through creative use of Article 31(3)(c) VCLT will not always suffice. But these issues are mitigated by the principle of specialty, arguably applicable to all supranational organizations and part of customary international law.\textsuperscript{214} This principle requires IOs to stay within their areas of expertise and defer to other organizations when faced with a question relating to another specialization. The principle of horizontal subsidiarity is in fact based on this principle and on the comparative advantage specialized organizations have in solving certain specialized issues.\textsuperscript{215} Moreover, a specialization-approach is already present in current WTO law to a certain extent. WTO Members faced with conflicts may rely on exceptions in the non-WTO agreement, or on one of the several (general) exceptions present in the WTO Agreements.\textsuperscript{216} For instance, in the area of environmental measures, the TBT Agreement, SPS Agreement, and the relevant GATT jurisprudence (concerning Article XX(b) and (g)) all contain “multi-faceted” tests where a combination of non-WTO international standards and scientific evidence is usually required to justify a measure.\textsuperscript{217}

But horizontal subsidiarity should be accompanied by appropriate safeguards. Otherwise, we might completely foreclose the until know virtually unrealized potential for inter-IO judicial review.\textsuperscript{218} This potential could be tapped by the WTO adjudicators by using any of three tools provided to them by international law: expansive or evolutionary treaty interpretation, the doctrine of implied powers of IOs and customary international law.\textsuperscript{219} However, the possibilities are limited by the fact that IOs are not themselves subject to most rules of international law and IOs are generally deemed to be more independent from other IOs than, for example, national executives are from domestic courts or the legislature.\textsuperscript{220} Finally, the lack of hierarchy between IOs, as compared to the hierarchical structure of (most) domestic judiciaries, could lead to an escalation of retaliation, causing inter-IO review to significantly affect the effectiveness of the global legal system. Therefore, IOs may be better designed for cooperation and coordination than for reviewing each other.\textsuperscript{221}

\begin{thebibliography}{99}
\item \textsuperscript{213} von Bogdandy, \textit{supra} note 5, at 109.
\item \textsuperscript{214} First formulated by the ICJ in \textit{Nuclear Weapons} advisory opinion (request by WHO); but see \textit{ALVAREZ, supra} note 81, at 488.
\item \textsuperscript{215} See, for example, Steve Charnovitz, \textit{The WTO and Cosmopolitics, in Reforming the World Trading System} 443 (Ernst-Ulrich Petersmann ed., 2005).
\item \textsuperscript{216} \textit{STOLL \& SCHORKOPF, supra} note 4, at 259-260 (citing the \textit{US – Tuna I \& II} cases as prominent examples); Other examples (of unilateral measures applied extraterritorially in pursuit of a non-economic goal) include the \textit{US – Gasoline, Shrimp/Turtle} and \textit{EC – Seal Products}.
\item \textsuperscript{217} \textit{TREBLICKO ET AL., supra} note 112, at 665; see also \textit{Häberli, supra} note 148, at 2.
\item \textsuperscript{218} Eyal Benvenisti & George W. Downs, \textit{Toward global checks and balances}, 20 \textit{Constitutional Political Economy} 375 (2009).
\item \textsuperscript{219} Id., at 375-376.
\item \textsuperscript{220} Id., at 378-379.
\item \textsuperscript{221} Id., at 379 (also arguing that domestic courts may serve as a more adequate check on IOs).
\end{thebibliography}
Vertical subsidiarity, in turn, can be based on the general *in dubio mitius* principle, as well as on several specific areas of WTO law where states are explicitly left scope for domestic policymaking, such as in general exceptions in Articles XX GATT and XIV GATS, or in anti-discrimination provisions which depend on whether states are pursuing a legitimate objective or not, such as Article 2 TBT Agreement. This is all evidence of the fact that the WTO system is a system of negative integration, which calls for significant deference to the lower governance levels because any competence not explicitly awarded to the supranational level remains with the states. With respect to customary international law, for instance, the WTO DSB already made it clear that customary law applies generally to international economic relations covered by WTO law, unless WTO Members contract out of it *explicitly* in a WTO agreement. If there is no conflict between CIL and WTO law, the WTO dispute settlers apply both simultaneously.

Third, tools such as accepting views by NGOs and other non-state actors can be based on the right of panels to seek information (Articles 12 & 13 DSU, or articles referring to specific other non-state actors, such as Article XV:2 GATT with respect to the IMF) and the discretionary powers of the AB with respect to its working procedures (Articles 16 & 17 DSU). Since the AB accepted unsolicited amicus briefs in *Shrimp/Turtle*, it has become clear that a panel may not fully discharge its duty under Article 11 DSU if it does not seek sufficient information pursuant to Articles 12 and 13 DSU. Accordingly, the discretionary right *not* to seek certain information is limited by the duty to make an objective assessment of the matter pursuant to Article 11 DSU. Arguably, this means that there is plenty of room to expand existing procedures to include the tools proposed, such as other informal consultation mechanisms, dialogue, participation through accreditation and asking specific questions to superior institutions in specialized fields. Considering the scope of Article 13 DSU, this room is especially broad at the level of the panel. Admittedly, just like the first time *amicus* briefs were accepted and hearings were made open to the public, it will require broad interpretation of the panels’ and AB’s discretionary power. Accordingly (and because of expected political counter-pressure), it might be advisable to focus on information that is already readily available, such as NGO and IO reports, statements, research and views, than to solicit new information through informal dialogue between the WTO dispute settlement system.

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223 JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 788 (1969); Howse, *Adjudicative Legitimacy*, supra note 4, at 35; Croley & Jackson, supra note 185, at 193; Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT’L ECON. L. 639 (2011); EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* 234 (2014); However, I do not agree with some of these authors who state that the fact that the WTO is a system of negative integration means that promoting global welfare cannot be one of its core goals. The distinction between positive and negative integration plays a role with respect to implied powers and deference, not so much with respect to the object and purpose of a treaty regime.


225 Howse, *Adjudicative Legitimacy*, supra note 4, at 50.
and the non-state actor in question. This points to an important weakness in some of the proposals targeted at increased legitimacy: they are dependent on actions by organizations and individuals not part of the WTO.

Fourth, some of the tools requiring increased transparency, such as publishing written submissions and airing hearings, are essentially at the mercy of the parties to the dispute. DSU Articles 14.1, 17.10 and 18.2 are designed to ensure that proceedings are confidential. The first public hearings, in 2005 in the case US/Canada – Continued Suspension (at the request of the parties), and the recent highly public EC – Seal Products dispute were arguably already steps in the right direction. But instances of transparency are still very much at the discretion of the parties to the dispute. At the same time, however, there is no prohibition on more transparent proceedings as long as the parties consent. Here, there is little legal room for panels and the AB to make their own contribution, although the tool of reason-giving can be expanded by the panel to providing an extensive overview of arguments raised by the parties, third-parties and NGOs, thereby at least allowing for some public scrutiny in the interim between panel and appellate proceedings.

Fifth, the inclusion of dissenting opinions in AB reports is permitted, at the discretion of the adjudicators, but only anonymously. However, it may be against the WTO’s “institutional culture”, deciding mostly on the basis of consensus, and it is therefore unlikely to become a common practice.

Sixth and finally, scrutinizing the purported democratic character of domestic measures and the representativeness of non-state actors relevant to the dispute already fits in the duty of panels to make an objective assessment of the facts and the duty of the AB to assess whether the panel has fulfilled this duty.

4.2 Institutional

First, through institutional bias, there will be a tendency for the dispute settlement system to increase its discretionary power and broaden its jurisdiction. Accordingly, the WTO dispute settlement system may overemphasize the efficiency principle and attach less value to the principles of legitimacy and subsidiarity. However, this is precisely one of the reasons why increasing legitimacy should be part of the goal of WTO dispute settlement and it is expected that a correct application of all tools and principles will counter tendencies of institutional bias.

226 TREBILCOCK ET AL., supra note 112, at 204.
228 In fact, only 5% of panel reports and barely 2% of AB reports contain separate opinions of any kind, see Meredith K. Lewis, The Lack of Dissent in WTO Dispute Settlement, 9 J. INT’L ECON. L. 895 (2006); see also Claus Dieter Ehlermann, Reflections on the Appellate Body of the WTO, 6 J. INT’L ECON. L. 695 (2003); Windsor, id.
229 Article 11 DSU.
230 See, for example, the analysis of the law-making activities of a number of quasi-judicial international entities, including the WTO DSB, in ALVAREZ, supra note 81, at 465-85.
Second, there is the issue of institutional weakness, both within the WTO and in other IOs, which may be a harder problem to overcome. There may be incompatibility between procedures of the WTO and procedures of other non-state actors. An important reason for many to want to include labor standards and environmental issues into the WTO framework is the non-existence or weakness of the institutions dealing with these issues. However, informal coordination and focusing on information that is already out there, instead of requiring other non-state actors to respond to specific questions in the context of a specific dispute, already mitigates this problem. If there are no institutions at the supranational level dealing with certain specialized issues that are also outside the scope of WTO expertise, the area should be subject to vertical subsidiarity. In the long run, the institutional incompatibilities must be addressed either through informal dialogue or formal linkages and amendments, which are outside the scope of this paper.

Further, some argue that the WTO insider community, mainly diplomats and trade bureaucrats, is not up to the task of applying complex tools, such as a nuanced and flexible standard of review, and requiring them to do so will therefore lead to bad outcomes and reduce the efficiency and legitimacy of the dispute settlement system. However, by implementing three coherent law and policy principles, the actual tools are less vague or complex than they might seem at first sight. Moreover, diligent selection of arbitrators and proper support by the WTO Secretariat and affected non-state actors may also significantly aid the panels and the AB in dealing with complex issues. In fact, through the principles of efficiency and subsidiarity, the WTO dispute settlement mechanism should be empowered to deal with complexity and flexibility, rather than weakened.

Third and finally, there is a risk that the actors to whom the WTO is deferring are subject to capture. One of the famous historic examples is the capture of the Codex Alimentarius Commission in the context of hormones standardization. Related to this, and to the institutional weakness of some actors is the risk that the WTO defers to an actor with even lower democratic legitimacy than itself. However, as explained above, the principle of subsidiarity should not simply be guided by efficiency concerns, it should also be guided by the principle of legitimacy and it is a principle in its own right. The legitimacy of other governance levels, whether local or supranational, should figure into the decision whether to defer or not and what the proper amount of institutional sensitivity and participation is, as well as which type of standard of review the panels and AB should apply. Moreover, the principle of vertical subsidiarity, by allowing for

233 Id.
234 Id.
decentralized governance where centralization at the level of the WTO is not necessary, lowers the probability of capture. It is arguably easier for powerful actors to exercise influence over one central supranational actor than over a large collection of decentralized, local governance institutions.\footnote{Portuese, supra note 102, at 240 and references there; but see Anthony Ogus, The Economic Basis of Legal Culture: Networks and Monopolization, 22 O.J.L.S. 419 (2002).}

4.3 Political

A full political analysis is outside the scope of this paper (and the expertise of the author), but a few notes on the political feasibility and consequences of the proposals are in order.

First, because of the highly unpredictable and politicized nature of international law, it is very hard for anyone, let alone for the tribunal itself, to predict the impact of a dispute settlement report on international law and politics.\footnote{ALVAREZ, supra note 81, at 463.} This makes it significantly more difficult to apply the law and policy principles put forward in this paper in an efficient way. However, as argued above, from a normative perspective we should assess and improve the WTO dispute settlement system with a view to getting just outcomes in each specific case, instead of striving for long term results for the global economy which are impossible to predict.

Second, quite a number of WTO members objected when the panel and the AB first accepted amicus briefs in Shrimp/Turtle, so additional political counter-pressure may be accepted if consultation mechanisms with non-state actors are expanded. In general, Northern states, often liberal democracies, are more in favor of increased NGO participation than Southern developing states. One of the reasons for this could be that liberal democracies already feel NGO pressure at home and want to allow that pressure to be channeled to the right level of governance. The executive branches of many developing states, however, are less democratically constrained domestically and may not want to lose this freedom at the level of the WTO. Moreover, some developing states claim that NGOs most often represent the interests of the well-off and environmental concerns, rather than development concerns or the fight against poverty.\footnote{Eyal Benvenisti, Welfare and Democracy, supra note 161, at 355.} In order to mitigate this, greater involvement by non-state actors could be accompanied by a program of “southern empowerment” and providing an effective voice to the world’s poorest.\footnote{Id., at 359.} Moreover, amicus briefs, as well as opening some hearings to the public, are now part of common practice in WTO dispute settlement, despite the objection of states. Since the WTO system is based on consensus, and there will rarely be a consensus against opening disputes to non-state actor participation and increased transparency, the panels and the AB have considerable political room to expand these mechanisms.

Third, according to realist political theory, powerful actors may simply walk away from an international organization as soon as they realize that they are losing relative

\footnote{Portuese, supra note 102, at 240 and references there; but see Anthony Ogus, The Economic Basis of Legal Culture: Networks and Monopolization, 22 O.J.L.S. 419 (2002).}
power within the IO and have no reasonable prospect of regaining it. However, the possibility of exit with respect to a quasi-universal organization as the WTO is estimated to be low, even for powerful actors. Mostly this is used as an example of why the WTO lacks legitimacy, but in this case, it can increase the political feasibility of legitimacy and efficiency enhancing principles and tools. Nevertheless, it is important to keep an eye on the proliferation of bilateral and regional trade agreements, which may constitute a more subtle form of de facto exit from the WTO regime.

Fourth, there is a risk that increasing legitimacy, certainly by applying deference and subsidiarity, weakens the WTO system. Too much deference can undermine the legitimacy of the dispute settlement system, and it can raise issues of fairness. Similarly, a flexible standard of review may open the door for differential treatment and might arguably reduce some of the WTO obligations to “regulatory guidelines” rather than hard international rules. In doing so, the standard may “erode the trade liberalization outcomes” of the WTO so far. This risk may be exacerbated by the increasing possibility for states to engage in forum shopping. However, flexibility and deference are in fact a strength, not a weakness. As discussed above, predicting the long term effects of specific adjudicative decisions on the international economy in a world as complex as ours is a matter of pure speculation. It is therefore more appropriate to assess the WTO “on [its] capacity to provide just outcomes in each circumstance rather than by reference to long term economic benchmarks.” A more flexible standard of review which ensures that the WTO dispute settlement systems applies the principles of efficiency, legitimacy and subsidiarity as means to reach the new dual goal in each case separately, increasing global welfare and legitimacy case-by-case, is therefore preferable to a more rigid standard (such as de novo review or the current objective assessment test), which will force the WTO dispute settlement body to make some good and some bad decisions, in the hope the balance will be positive in the long run. As argued by Eyal Benvenisti, “[t]he application of legal constraints to decision-makers is never a simple exercise, because those who cherish unfettered discretion are tempted to manipulate the new rules and create new islands of arbitrariness and impunity. This is why the law on global governance . . . can be expected to shift and turn in an everlasting struggle to tame power, while power seeks to perpetuate itself by translating itself into law.” For this reason, it is important that the tools are flexible. The focus should be on procedure, not substance, because it is impossible to decide about what justice is and how to increase

239 Joseph M. Greico, Anarchy and the Limits of Cooperation: a Realist Critique of the Newest Liberal Internationalism, 42 INTERNATIONAL ORGANIZATION 485 (1990); discussed at Howse, Legitimacy of the WTO, supra note 4, at 370.
240 BECROFT, supra note 8, at 78, referring to Dean R. Knight, A Murky Methodology: Standards of Review in Administrative Law, 6 NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW 1 (2008).
241 ALVAREZ, supra note 81, at 518-19 (Arguing that developing countries, with a less robust government structure, may be unfairly disadvantaged by forum shopping and the possibility to initiate multiple simultaneous legal proceedings); see also J.H.H. WEILER, THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? (Oxford University Press, 2000).
242 Collins, supra note 90, and references to legal and economic literature there.
243 Id., at 27.
global welfare in all cases and all situations. These are decisions that cannot be made in advance, in the abstract. They have to be made in a lot of different situations, with many different interests involved.

4.4 Financial

Finally, because of the vast number of cases (still increasing), there have been some funding concerns for WTO dispute settlement recently. Although most proposals can be implemented virtually costless, through interpretative adaptation rather than institutional reform, some proposals might stretch the funding of the WTO dispute settlement system, and will therefore be more difficult to achieve in practice. In particular, in order to avoid that only powerful NGOs and other non-state actors will benefit from the increased focus on legitimacy and subsidiarity, there should be WTO-funded mechanism for participation, transparency, accountability and institutional sensitivity, which may be out of reach considering the current financial position of the WTO (and the potential unwillingness of states to invest in legitimacy-enhancing tools, if they are not convinced of the long term efficiency benefits these tools will create).

5 Case Study: EC – Seal Products

In this section, I will explain how the WTO might already be applying the law and policy principles in its current practice to a certain extent, by analyzing recent controversial rulings by a panel and the Appellate Body in the case European Communities — Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products).

5.1 Context of the dispute

EC – Seal Products is about the challenge by Canada and Norway of the EU Seal Regime.\(^{245}\) This regime prohibited the placing of seal products on the EU market unless certain limited conditions were fulfilled.\(^{246}\) The seal products must either (i) be obtained from hunts traditionally conducted by Inuit and other indigenous communities (“IC exception”), (ii) result from by-products of hunting for the sole purpose of sustainable marine resource management, in which case the products may only be marketed on a non-profit basis (“MRM exception”), or (iii) brought into the market by travelers on an occasional nature, in which case they must exclusively consist of goods for the personal use of the travelers or their families (“Travelers exception”). Taken together, these measures effectively limited the commercial sale of seal products within the EU to products originating from traditional hunts conducted by indigenous communities.


\(^{246}\) Article 3 Regulation (EC) No. 1007/2009.
Allegations quickly rose that the exceptions were protecting EU sealing industries from the effects of the general ban. Under the IC Exception, for instance, most seal products originating from Greenland were allowed on the EU market, compared to only 5% of Canadian seal products.\footnote{Panel Report, \textit{EC – Seal Products}, para 7.161.} This led Canada and Norway, the states with the biggest non-EU sealing industry, to bring a complaint at the WTO. The complainants claimed that the IC and MRM exceptions had no scientific basis and resulted in unjustifiable discrimination against foreign producers of seal products. Moreover, the exceptions were allegedly contrary to the overall goal of the measure: protecting seals and addressing public moral concerns concerning seal welfare. This arguably made the EU measure incoherent and unjustifiable.

The EU argued that its measure was consistent with its WTO obligations and even if it was not, the Seal Regime could be justified under the general exceptions of Article XX(a) (protection of public morals) or XX(b) (protection of human, animal or plant life or health) of GATT, and under Article 2 TBT Agreement, which allows technical distinctions pursuant to a “legitimate” objective. The EU’s main substantive argument was that the measure pursued two closely related objectives: (i) addressing the public moral concerns of the EU population on seal welfare and (ii) contributing to the welfare of seals by reducing the number of seals killed in an inhumane way. According to the EU, the exceptions were enacted pursuant to legitimate objectives as well. The MRM exception, non-commercial per definition, was modelled pursuant to the legitimate objective of marine resources management, which could arguably fit under the protection of animal life and health. The IC exception, the only commercial, and therefore most controversial exception, was arguably based on public moral concerns relating to indigenous peoples rights. More specifically, the EU claimed to be protecting the rights of the Inuit. It relied on the United Nations Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention concerning Indigenous and Tribal Peoples in order to prove that there is an internationally recognized interest in the protection of indigenous peoples and in preserving their traditions and cultures.\footnote{Declaration on the Rights of Indigenous Peoples, Resolution A/RES/61/295, UN General Assembly, September 13, 2007; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 2 International Labour Conventions and Recommendations 1919–1991 p 1436, entered into force September 5, 1991.} The EU argued that it was bound by these international agreements.\footnote{Panel Report, \textit{EC – Seal Products}, paras. 7.254 & 7.292.} According to the EU, this justified the fact that it did not ban all commercial hunts, by leaving an exception for commercial hunts by indigenous peoples. The EU argued that the “widespread international consensus” reflected in these instruments of general international law confirmed the legitimacy of protecting indigenous peoples and their traditional way of life, thereby justifying the IC Exception as pursuing a legitimate objective in the sense of Article 2 TBT agreement and necessary for the protection of public morals in the sense of Article XX(a) GATT.
5.2 Assessment of the WTO approach

This case presented the WTO adjudicators with an interesting and complex set of negative externalities, perfectly suited for testing the correct application of the principles of efficiency, legitimacy and subsidiarity. By enacting a general ban on seal products, the EU damaged not just its domestic sealing industries, but also foreign commercial seal hunters, including indigenous peoples. By including the IC exception, the EU claimed to be mitigating these negative externalities by allowing for an exception based on indigenous peoples’ rights. However, Canada and Norway claimed that the exception, while mitigating the effect on indigenous peoples in Greenland (Denmark), created a new negative externality. The IC exception allegedly created a WTO-incompatible discrimination between Greenlandic Inuit and Canadian and Norwegian indigenous peoples and other commercial seal hunters. In doing so, the EU allegedly shifted the entire burden of the economic and cultural trade-off with animal welfare to foreign hunters.

With respect to the tools primarily related to the principle of efficiency, the WTO DSB relied on its economic expertise and economic evidence presented by the parties to assess the discriminatory effects of the EU seal regime. This way, the panel and the AB fulfilled their traditional role of applying WTO non-discrimination tests strictly to the EU measure. It is no coincidence that the EU measure was found to be incompatible with WTO law on narrow grounds. Based on consumer preferences and other technical and economical characteristics, imported seal products were found to be “like” domestic and other foreign seal products at issue, irrespective of the hunt’s type (indigenous or not) or purpose (commercial or not). At the appellate level, the final verdict was that the IC exception constituted arbitrary and unjustifiable discrimination on various technical grounds. First, the way the EU Seal Regime was designed, with much ambiguity and discretion in its application, created unjustified opportunities for abuse, enabling products originating from what should in fact be properly characterized as regular commercial hunts, to enter the EU market under the IC exception. Second, the EU had not made “comparable efforts” to facilitate the access of Canadian Inuit to the IC exception as it had done with respect to Greenlandic Inuit. These traditional forms of economic de facto discrimination are reminiscent of the AB report in US – Shrimp and the AB seemed to be enforcing the economic trusteeship obligations of the EU in this context. If the EU would just take the initiative to mitigate the negative externalities of its measures through good faith efforts, the measure could arguably be brought in compliance with WTO law without any substantive amendments to its core structure.

However, there was one additional ground, first put forward by the panel and subsequently upheld (although slightly modified) by the AB, which was less technical.

\[\text{Panel Report, } EC – Seal Products, \text{ paras. 7.134-140.}\]
\[\text{AB Report, } EC – Seal Products, \text{ para. 5.339.}\]
According to the AB, the EU could not show how the IC exception could be reconciled with the objective of addressing public moral concerns regarding seal welfare. Although the AB held that there was no requirement of complete coherence for a policy measures to be justifiable under Article XX GATT, the AB went further than assessing economic efficiency. As would be required under the approach presented in this paper, it entered the areas of legitimacy and subsidiarity.

First, several aspects of the case can be tested against the principle of legitimacy. With respect to independence and impartiality, the composition of the panel was unusually politicized (even for WTO standards) and the lack of transparency was striking. With 532 days it was the longest it ever took to compose a WTO panel. There was no public or transparent scrutiny of the three panel members and any potential conflicts of interest. They were all trade experts, with no apparent expertise in the field of animal welfare or indigenous peoples' rights. However, as discussed above, it is not for the WTO to make judgment calls on non-economic policy from another perspective than international trade. The choice for trade experts may therefore have been justified. Moreover, the politicized and secretive nomination of the panelists was somewhat mitigated by the fact that the case was afterwards taken up to the AB, where it is considerably more difficult for states to link the nomination of arbitrators to a single specific case.

With respect to fair process, the panel and the AB made significant efforts to increase transparency, partially forced by the large public and media interest for the dispute. Some hearings were opened for the public, written submissions by the parties were published, as were the answers by the parties and third parties to specific panel questions and both the panel reports. The AB reports elaborated extensively on the arguments raised by the parties and the legal reasoning behind their own decision. However, EC – Seal Products showed that the way participation is currently envisaged at the WTO dispute settlement system can still be considerably improved. The amicus curiae briefs officially were not taken into account. Rather they were dismissed by the now customary AB phrase “[t]he Division did not find it necessary to rely on the . . . amicus curiae briefs in rendering its decision.” Moreover, non-party participation came mostly from animal welfare interest groups, although the International Fur Trade Federation was also represented. The Inuit were arguably represented by Canada,

254 AB Report, EC – Seal Products, para. 5.200-5.201.
256 AB Report, EC – Seal Products, para. 1.15.
257 Amicus curiae at the panel stage were: (i) as a group, Anima, Animal Rights Action Network (ARAN), Animalia, Bont Voor Dieren (BVD), Change for Animals Foundation (CFAF), Compassion in World Farming (CIWF), Djurens Rätt (Animal Rights Sweden), Eurogroup for Animals, Fondation Brigitte Bardot (FFB), Fondation Franz Weber (FFW), Four Paws, Global Action in the Interest of Animals (GAIA), Humane Society of the United States/Humane Society International (HSUS/HSI), International Fund for Animal Welfare (IFAW), Lega Anti Vivisezione (LAV), Prijatelji životinja (Animal Friends Croatia), Respect for Animals, Royal Society for the Prevention of Cruelty to Animals (RSPCA), Svoboda zvířat and World Society for the Protection
Norway and the EU, but they were primarily representing commercial seal hunts and animal welfare concerns, respectively. Separate involvement of indigenous peoples rights groups, the ILO, the UN, the Arctic Council or the Inuit Circumpolar Council on the one hand, and additional business organizations representing the commercial sealing industry on the other hand, would have improved participation and institutional sensitivity. However, as mentioned above, there is little the WTO can do to incentivize these organizations to participate. Nevertheless, because of the highly publicized nature of the dispute and the efforts of the dispute settlers to increase transparency, accountability in 

EC – Seal Products was relatively high, even if just in the court of public opinion.

Coherence and integrity were in part upheld by the traditional (implicit) WTO reliance on precedent, especially with respect to the discussion whether or not the EU measure could be justified based on the public morals exception of Article XX(a) GATT.258 The AB also rightly stressed that the fact that WTO covered agreements should be interpreted in a “coherent and consistent manner, giving meaning to all applicable provisions harmoniously”, does not mean that the legal standards for similar obligations, such as those in Articles I:1 and III:4 GATT and 2.1 TBT Agreement should be identical.259 The context of these provisions should always be taken into account. Because Article XX GATT contains general exceptions protecting WTO Members’ right to regulate, there was no need to transpose the “legitimate regulatory distinction” standard from Article 2 TBT Agreement to the GATT.260 However, in doing so, the AB shifted the entire discussion about the GATT-compatibility of measures with de facto discriminatory effects to the general exceptions provision. This means that many domestic measures, for instance those with respect to safety, environmental and health rules, which may have a different impact on products originating from different countries, will now all have to be justified under Article XX GATT and its exhaustive list of exceptions.261 According to Robert Howse, Joanna Langille and Katie Sykes, amicus curiae in this case, “the logical implication is that a large universe of laws and regulations is now prima facie illegal

of Animals (WSPA); (ii) Robert Howse, Joanna Langille, and Katie Sykes; (iii) Pamela Anderson on behalf of People for the Ethical Treatment of Animals (PETA); (iv) International Fur Trade Federation; and (iv) Jude Law; Jude Law and Pamela Anderson did not participate at the appellate level.


259 AB Report, EC – Seal Products, paras. 5.123.


under WTO law. That outcome seems extreme and hard to reconcile with the intent and text of GATT. Perhaps in future decisions the AB will step back from this position.\textsuperscript{262}

Overall, cooperation and consultation with affected actors was limited, but the panel was willing to apply significant vertical deference and seemed to implicitly apply a flexible standard of review similar to the one proposed above. Because of this approach, however, Canada and Norway alleged that the panel did not sufficiently scrutinize the EU claim that animal welfare was part of its public morals. Amongst others, Canada argued that the persistence of wildlife hunts and slaughterhouses showed that animal suffering was “commonplace” within the EU and that there was therefore no sufficiently strong moral concern for animal welfare to justify the seal products ban. The level of deference applied by the panel would arguably result in an open-ended standard, and therefore no standard at all. But the AB clarified that neither Article XX(a) GATT nor Article 11 DSU required the panel to identify the exact content of the public morals standard put forward by the EU. The content of public morals could be characterized by “a degree of variation”, and, for this reason, the EU was given “some scope to define and apply for [itself] the concept of public morals, according to [its] own systems and scales of values.”\textsuperscript{263}

This view is in line with the principles of efficiency, legitimacy and subsidiarity. In a world increasingly governed at multiple levels simultaneously, a state finds itself confronted with fragmented bodies of international law and diverse, sometimes conflicting interest protected by such different bodies of international law. The nature of most democratically drafted legislation is that it reflects an imperfect compromise or trade-off between various interests.\textsuperscript{264} In this case, the EU argued that it was reconciling animal welfare with indigenous peoples rights, two issues increasingly regulated at the international level. This requires flexibility at all governance levels. But in the end, the AB seemed to have deviated from its own previous statement. By holding that the EU Seal Regime could not be justified because the IC exception was contrary to the “main” goal of the regime, animal welfare, the AB arguably shut the door for justifying pluralistic measures under Article XX(a) GATT. The public morals analysis was limited to the main goal, ignoring the possible public morals rationales behind the exceptions. Nevertheless, the effects of the case should not be overstated, as the outcome was highly context-specific. More specifically, what led the AB to its conclusion was that the EU had not put any effort in pursuing animal welfare outcomes in the context of indigenous hunts. The EU might therefore be able to justify the IC exception if it simply tweaks design flaws like that, which caused the regime to defeat itself to a certain extent.\textsuperscript{265}

The EU was also free to determine the level of protection it considered appropriate with respect to the public moral concerns at issue. It was not under an obligation to award the same level of protection to animal welfare in different contexts, such as terrestrial wildlife hunts and slaughterhouses.\textsuperscript{266} Implicitly, in doing so, the AB applied a smart presumption in favor of the local level when it came to determining the scope of public

\textsuperscript{262} Howse, Langille & Sykes, Sealing the Deal, supra note 146.
\textsuperscript{263} AB Report, EC – Seal Products, para. 5.199.
\textsuperscript{264} Howse & Langille, Permitting Pluralism, supra note 53.
\textsuperscript{265} Howse, Langille & Sykes, Sealing the Deal, supra note 146.
\textsuperscript{266} Id., at paras. 5.200-201.
morals, while at the same time subjecting the EU measure to strict scrutiny under the applicable non-discrimination provisions (since it was eventually deemed to constitute unjustifiable discrimination under the *chapeau* of Article XX GATT).

Further, scientific evidence played an important role in the panel proceedings. Requiring substantial amounts of scientific evidence in the context of WTO dispute settlement to justify challenged measures, can be a strong constraint on otherwise unmitigated state sovereignty.\(^\text{267}\) For instance, the panel looked extensively at opinion polls which showed a lack of EU public concern with indigenous communities. Even though the EU was able to counter this by referring to the legislative history of the measure in this case, the AB took a step back and rejected the panel’s focus on opinion polls. The AB held that while scientific evidence may be relevant for other subparagraphs of Article XX GATT, it is not required when a state claims to be acting in pursuit of public morals.\(^\text{268}\) By relaxing the scientific standard for public morals and focusing on the discriminatory aspects of the measure with a stronger link to overcoming collective action problems in international economic relations, the AB has struck the right balance between increasing its legitimacy, applying vertical subsidiarity and institutional sensitivity, and increasing global welfare through economic efficiency.

The reluctance of the AB to attach much value to opinion polls is justified for several other reasons as well. For instance, looking at majority opinion is at odds with a measure aimed at protecting moral concerns related to animal and minority rights.\(^\text{269}\) The very concept of minorities implies that they may be ignored by majority opinion, even when there are strong normative reasons for protecting minority rights. The same applies to animals, which are obviously not directly represented in opinion polls, but only indirectly through people who care about animal welfare. Yet, both minority rights and animal welfare are increasingly recognized as valuable and worthy of protection in international law. At the panel level the relevant UN Declaration and ILO Convention were considered additional pieces of “factual evidence” of the international recognition of interests of indigenous peoples in preserving their traditions and cultures.\(^\text{270}\) But apart from being factual evidence, these non-WTO instruments were not interpreted as setting out legal obligations for WTO Members.\(^\text{271}\) Moreover, at the appellate level, Canada alleged that the Panel committed a legal error by relying on these international instruments “extraneous to the case”, stressing that they did not require the EU to protect the interests of indigenous communities by discriminating against the products of non-indigenous peoples, and they were no longer taken into consideration by the AB. This brings us to the last point for assessment: horizontal subsidiarity.

To start on a positive note, the panel did extensively look at external scientific reports detailing the practical aspects and animal welfare outcomes of different types of seal hunts and the AB upheld this approach.\(^\text{272}\) However, contrary to the amount of


\(^{268}\) AB Report, *EC – Seal Products*, para. 5.198.

\(^{269}\) Wilke, *supra* note 261.


deference the panel showed on factual issues with respect to animal welfare, there was little legal deference to questions of indigenous peoples’ rights and international instruments supporting the moral concerns with animal welfare. While the international legal protection of animal welfare is scarce and the panel was reluctant to rely on the few European instruments out there, there are quite a few international agreements, and arguably many more norms of customary international law, protecting the rights of minorities and indigenous peoples such as the Inuit. The IC exception was arguably designed to address this. However, even though the IC exception was the most heavily discussed and scrutinized part of the EU measure, the parties and the AB painstakingly avoided talking about human rights or indigenous rights, instead using community or indigenous “interests” as an all-encompassing term. By finding a WTO violating in the fact that the design and application of the IC exception was contrary to the animal welfare objective of the EU Seal Regime, the WTO even managed to avoid the sensitive question of whether trade interests trumped indigenous rights in this case. However, this can be explained by the fact that (a) the EU did not rely on international law justifications at the appellate level like it did in the panel proceedings, and (b) the AB’s approach towards public morals focused on domestic moral concerns within the EU. Because the approach was so deferential to the EU, there was no need to rely on non-WTO international obligations. This will be the case for many similar measures, as long as states can prove a genuine domestic moral concern, evidence by public opinion or the legislative history of a measure (which will be unproblematic for most democratically enacted legislation), or if the measure can be justified on other grounds, such as Article XX(b) GATT, allowing for the protection of, amongst others, animal and plant life. Here, vertical and horizontal subsidiarity are connected. If the dispute settlers apply a higher amount of one, there may be less need for the other.

Finally, by holding that the “legitimate regulatory distinction” test from Article 2.1 TBT Agreement is not relevant for the analysis under GATT, the AB shifted the analysis of non-trade goals underlying measures completely to Article XX. Allowing for a legitimacy test under both the core non-discrimination provisions of GATT and the general exceptions in Article XX would arguably have allowed the WTO to achieve greater coherence in international law, by allowing non-WTO international law considerations to enter the picture at the stage of establishing violations of the core WTO obligations, instead of at the more inward-looking, sovereignty based general exceptions clause in GATT. Where the EU found it useful to cite the ILO Convention and the UN Declaration as support for a legitimate regulatory distinction, it understood that Article XX(a) GATT is about domestic public morals, not international law. Although justifiable

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274 Wilke, supra note 261.

275 Id.
from the perspective of internal coherence within GATT, this could also be seen as a missed opportunity to leave some more space in WTO law for horizontal subsidiarity, non-WTO international law and increase coherence and integrity at the WTO dispute settlement level.276

6 Conclusion

Based on the case study presented above, it is clear that the WTO DSB is doing some things right and some not. Many tools proposed, and more generally the implementation of the three principles of efficiency, legitimacy and subsidiarity, however, would not require radical changes from dispute settlement practice. There are challenges and weaknesses to my proposed approach, but none of them unsurmountable. I have shown that it would be best for WTO dispute settlement to develop a general and flexible theory like the one presented in this paper, and apply it consistently in all cases. The proposed tools should help the WTO dispute settlement system in getting to just outcomes in all cases if they are combined and if they are used to implement all three principles simultaneously. Their selective application (such as in some parts of the *EC – Seal Products* decision) can lead to unfair advantages for certain states and/or interest groups. Overall, the fact that the AB often takes a highly technical approach to morally sensitive issues, is worse than if it would explicitly defer to the appropriate governance levels and openly balance the interests at stake.277

Finally, it is important to stress that the WTO AB should not become a general world court. The temptation to use the WTO enforcement system for non-trade goals is big, but as I have argued, the WTO DSB should limit itself to overcoming collective action problems in international economic relations when doing so is efficient, while at the same time increasing its normative legitimacy.

Pure trade cases will become increasingly rare.278 Accordingly, the need for a coherent application of the principles of efficiency, legitimacy and subsidiarity becomes increasingly acute. Although deference is already present to a large extent in what the AB does, a more systematic and principle-based approach is needed if the dispute settlement system wishes to achieve just outcomes in all cases. It is needed to increase WTO legitimacy – not just its social legitimacy within the trade world – but its normative legitimacy towards individuals, like you and me, who are directly affected by WTO decisions in their day-to-day lives.

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276 On the lack of external coherence in *EC – Seal Products*, see also Häberli, *supra* note 148.

277 A similar technical approach, open to the same critique, was seen in the recent cases of *China – Raw Materials* and *China – Rare Earths*.