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THE LAW OF STRANGERS: THE FORM AND SUBSTANCE OF OTHER-REGARDING INTERNATIONAL ADJUDICATION

EYAL BENVENISTI & SIVAN SHLOMO AGON

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THE LAW OF STRANGERS:

THE FORM AND SUBSTANCE OF OTHER-REGARDING INTERNATIONAL ADJUDICATION

*Eyal Benvenisti** & *Sivan Shlomo Agon***

The ever-intensifying trends of global interdependence have created a complex reality in which decisions of sovereign states, like those of international courts, radiate far beyond their traditional confines, affecting the interests of a range of strangers (third-states, individuals, corporations, and others), without being politically accountable to them. Could and should international courts narrow these accountability gaps by insisting that states take the interests of disregarded strangers into account, and by opening the courts' own doors to the strangers affected by their judgments? In this article, we analyze the judicial commitment to bridge these accountability gaps towards globally affected others by (1) ratcheting up the substantive and procedural duties that states owe to strangers affected by their national policies, and (2) by facilitating the consideration and voice of affected strangers in the adjudication process itself. In analyzing these two other-regarding judicial responses, we focus on one pivotal site of global judicial governance, the World Trade Organization dispute settlement system (WTO DSS). Based on close analysis of the rich WTO jurisprudence, the article shows that since its inception in 1995, other-regarding considerations have played a significant role in the WTO DSS operation. This WTO's adjudicative philosophy of regard for others, the article argues, demonstrates an evolving judicial sensitivity to the challenges of accountability and voice generated by globalization at the national and international levels.

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I. INTRODUCTION

The ever-intensifying interdependence between countries and societies has crafted a complex reality in which regulatory acts of sovereign states increasingly affect strangers (other states, foreign individuals, and corporations), without being politically accountable to them. This raises a serious problem identified by Richard Stewart as the problem of the “disregard,” associated with the loss of voice by globally affected stakeholders.¹ How can this accountability gap be narrowed? Could and should international courts play a role in mitigating this gap by insisting that states take the interests of foreigners into account? Have they done so in fact? In this article, we offer a positive answer to these questions. We argue that international courts can and in fact do play a role in promoting the duties of states towards strangers affected by their policies, thereby alleviating some of the democratic and accountability deficits associated with globalization. We show that in carrying out the tasks of interpreting and enforcing international law, international courts not only have a unique opportunity to shape states’ other-regarding duties by elaborating on their substantive and procedural obligations, but have demonstrated an inclination to do so as well.

At the same time, international courts themselves face a similar accountability gap, as their judgments regularly affect the interests of others

¹ See Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AJIL 211 (2014).

not directly represented before them (e.g., third states, private actors, civil society groups, and other international institutions and legal regimes). Consequently, while international courts may serve as a useful mechanism for enhancing states' duties towards strangers, these global governance institutions themselves appear increasingly required to factor into their rulings other-regarding considerations and to account for the interests of a variety of affected stakeholders, beyond the specific case. We show that international courts are aware of these concerns and have developed tools to overcome their limitations.

The present article explores these two facets of other-regardingness reflected in current international adjudication by focusing on one pivotal site of global judicial governance, the World Trade Organization dispute settlement system (WTO DSS). Based on close analysis of the rich WTO jurisprudence, the article shows that since its inception in 1995, other-regarding considerations have come to play a significant role in the WTO DSS operation, manifesting themselves along two parallel and interrelated trajectories. The first concerns a series of substantive and procedural obligations imposed by the DSS on sovereign WTO member states in respect of third states and foreign nationals, requiring states to take into account the interests of foreigners and secure the voice of these often "disregarded" others in the domestic decision-making process. The second trajectory concerns substantive and procedural other-regarding considerations and rules introduced by the DSS into its own adjudication of bilateral interstate disputes, so as to broaden its perspective and allow it to weigh the interests of affected others from within and outside the WTO regime.

These two parallel trajectories, we argue, reflect an evolving sensitivity on the part of the DSS to the challenges of accountability and voice generated by globalization at the national and international levels. In this respect, we submit, the DSS jurisprudence demonstrates a judicial philosophy of commitment to other-regardingness in a world where states and international courts (among other institutions of global governance) exert effects over greater distances and wider constituencies.

As our analysis show, this multifaceted other-regarding judicial philosophy, looking past the territorial borders of states and beyond the bilateral bounds of WTO disputes, is not asserted outright but instead is often concealed behind a veil of textualism, thus appearing to remain faithful to state consent. Yet this thinly concealed judicial philosophy has driven a story of institutional expansion and change, contributing to the gradual transformation of the DSS from a purely bilateral and reciprocal mechanism for the resolution of private interstate disputes, into more of a multilateral adjudicative system with enhanced public and regulatory features.² More generally, the DSS other-regarding account, on its various substantive and

² On certain aspects of this gradual DSS transformation, see Richard Stewart & Michelle Sanchez Badin, *The World Trade Organization: Multiple Dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 563 (2011).

procedural threads, illustrates the role of international courts in the shift from bilateralism to publicness and community interests in international law.³

The article proceeds in five parts. Part II explores the concept of other-regardingness against the reality of interdependence, and elaborates on the potential role of international courts—and the WTO DSS in particular—in mitigating the accountability gaps between states and foreigners and between international courts and their affected others. Part III presents the various substantive and procedural obligations that the DSS has gradually imposed on WTO members to consider and pay respect to the interests of foreign governments or their nationals. Part IV examines the substantive considerations and procedural tools embraced by the DSS to enhance its capacity to follow its own duties towards affected stakeholders other than the formal litigants. Part V takes a broader look by weaving together the two threads of the WTO other-regarding praxis, analyzing their contradictory and complementary relationships, and assessing their ramifications for the study of the role of the DSS and international courts more broadly in responding to the global problems of “disregard”.⁴ Part VI concludes.

II. SETTING THE SCENE: OTHER-REGARDINGNESS IN AN INTERDEPENDENT WORLD

A. *Sovereign States, International Courts, and Accountability to “Global Others”*

In a fast-changing global order of growing socioeconomic interdependence across political borders, the acts and decisions of sovereign states increasingly affect not only their citizens, but also foreign governments and distant strangers. Through their most routine regulation of public health, the environment, or labor standards, not to mention their management of migration or the use of their scarce natural resources, states impact in meaningful ways the living conditions and opportunities of people residing in faraway countries, who often lack the ability to influence the decisions that affect them. While such cross-boundary effects and externalities have always been present, the nature and extent of these effects have become much more prominent in the contemporary era of globalization, where transnational relationships are more extensive and intensive.⁵

³ See COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW (Eyal Benvenisti & Georg Nolte eds., forthcoming 2018, on file with authors); Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in FROM BILATERALISM TO COMMUNITY INTERESTS: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 79 (Ulrich Fastenrath et al. eds., 2011); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994 VI).

⁴ Stewart, *supra* note 1.

⁵ Robert Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130 (David Held & Mathias Koenig-Archibugi eds., 2003).

In this reality of interconnectedness, it has been argued, the prevailing conception of sovereignty as entailing the responsibility of states only to those residing within their jurisdictions seems no longer suitable.⁶ Rather, a reinterpretation of sovereignty is needed,⁷ one which assigns sovereigns certain accountability obligations towards strangers, specifically the duties to take into account the interests of foreign stakeholders and give them voice in domestic decision-making processes that affect them.⁸ Under this reading of sovereignty, states are still entitled to prioritize their citizens' needs. Yet when they do so, they must weigh and balance these needs against the interests of affected foreigners, and abide by at least certain minimal obligations towards the strangers caught under the long shadow of their influence.⁹

In this article, we suggest that international courts have a role to play in regulating this delicate balancing, and, more significantly, that they have already endorsed this vision of sovereignty.¹⁰ These courts, we maintain, have a distinctive opportunity to define states' duties towards foreign stakeholders, as well as to oversee the implementation of such other-regarding duties. International courts are the ones often called upon (by states, non-state actors or individuals) to scrutinize "state conduct which radiates across national boundaries," when decision-makers in one country neglect foreign interests adversely affected by their legislative or administrative acts.¹¹ In reviewing the compatibility of such acts with states' international obligations, international courts may hold sovereigns

⁶ Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AJIL 295 (2013). See also Michael Ioannidis, *Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach*, in DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 91, 102 (Lukasz Gruszczynski & Wouter Werner eds., 2014); Nancy Fraser, *Reframing Justice in a Globalizing World*, in GLOBAL INEQUALITY: PATTERNS AND EXPLANATIONS 252, 253 (David Held & Ayele Kaya eds., 2007).

⁷ Benvenisti, *supra* note 6. On the evolutionary character of the concept of sovereignty and the need to reshape it in light of global interdependence, see, e.g., FRANZ PERREZ, *COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW* (2000); John H. Jackson, *Sovereignty—Modern: A New Approach to an Outdated Concept*, 97 AJIL 788 (2003); JOHN H. JACKSON, *SOVEREIGNTY, THE WTO AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* 57–78 (2006); Jean L. Cohen, *Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)*, 2 HUMANITY 127, 129 (2011).

⁸ Benvenisti, *supra* note 6. Note that elements of this reinterpretation of sovereignty seem to already manifest themselves in the practice of certain states. See Ayelet Berman, *Taking Foreign Preferences into Account: The Rulemaking Process in the United States and the European Union*, (GlobalTrust, Working Paper Series 03, 2015), available at <http://globaltrust.tau.ac.il/wp-content/uploads/2015/03/Ayelet-Berman-US-EU-Rule-Making-Process-WPS-03-15.pdf>.

⁹ Benvenisti, *supra* note 6, at 314.

¹⁰ *Id.* at 297.

¹¹ Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 920 (2005).

accountable to affected strangers, ensuring that the latter are heard and considered in pertinent domestic decision-making processes. Furthermore, through their interpretive authority, international courts may inject specific content into the often-ambiguous obligations of states under international law, and guide the exercise of state discretion in a manner that may foster a better balance of domestic and foreign interests. As Karen Alter notes, the numerous courts currently operating at the international level play an ever-increasing role in stating what international law means, and in asserting what compliance with states' obligations entails.¹² This interpretative authority removes "from governments and domestic judges the monopoly power to define what international law requires at home,"¹³ enabling international courts to elucidate whose interests states should consider in implementing their international duties and through which procedures.

We therefore argue that international courts are placed in a unique position to strengthen states' other-regarding obligations. If sufficiently independent and impartial, they are well-situated to enhance the accountability of sovereigns towards foreign constituencies, and to do so in a manner that is justified in democratic terms—helping to ensure the voice and consideration in the domestic decision-making process of the oft-neglected global others.¹⁴

Yet the same qualities of international courts that put them in a position to act as trustees of the global others, traditionally disregarded by sovereigns, confront these empowered institutions with challenges somewhat similar to those faced by states, as the effects of their decisions increasingly exceed the parties and cases coming before them. As several commentators have observed, by restating the law in a particular case, international courts no longer simply act as "dispute settlers,"¹⁵ determining the rights and duties of the litigants, but rather shape the development of international law prospectively and contribute to its making.¹⁶ Through each and every decision that so develops and adds to the law, international courts thus affect the rights and obligations of a broad range of others not immediately before them, such as third states, corporations, and individuals.¹⁷

¹² KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 28 (2014).

¹³ *Id.* at 9.

¹⁴ Eyal Benvenisti & George W. Downs, *Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance*, 56 N.Y.U. J. INT'L L. & POL. 743, 782 (2014) (arguing that international courts' "judicial interference in decision-making for the purpose of including the voice of the globally-disregarded may well be compatible with and in fact mandated by democratic and egalitarian concerns").

¹⁵ ARMIN VON BOGDANDY & INGO VENZKE, *IN WHOSE NAME: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION* 2 (2014).

¹⁶ Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 68 (2013); Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 55–57 (2013).

¹⁷ Grossman, *supra* note 16, at 68–74.

Through their rulings, moreover, international courts affect not only litigants and non-litigants, but also the fate and effectiveness of international legal and political regimes. Most international courts now operate within the framework of specific interstate treaty regimes (e.g., the European Union (EU) or the WTO), whose norms the courts are required to interpret and apply.¹⁸ Within such international governance structures, international courts are expected not merely to resolve disputes, but to promote the regime's underlying goals and interests, overcome international cooperation problems, and keep states within a particular normative community.¹⁹ At the same time, this fragmented international order of divergent legal regimes, each coupled with its own adjudicative institution, situates international courts in an intricate position, requiring them to look beyond their overarching regime to other parts and actors of the international legal system when frictions arise between norms and interests internal and external to their regime.

The expanding reach of international courts' public authority, their multiple functions, as well as their positioning in a fragmented international landscape, we argue, render these global governance bodies inherently attuned to act themselves in other-regarding fashion when adjudicating. That is, to look beyond the bilateral dispute and immediate disputants, assess the long-term ramifications of their rulings for future cases and unrepresented stakeholders,²⁰ take broader community interests into account, and construct their judicial procedures in a manner that may allow them to produce better-informed, other-regarding legal outcomes.

In what follows, we explore these two facets of other-regardingness in international adjudication—the one relating to the other-regarding duties imposed on *sovereign states* that are subject to growing international judicial scrutiny, and the other that pertains to the reviewing *international courts* themselves. In so doing, we wish to probe the extent to which international courts can serve as a mechanism for defining and enforcing the duties owed by states to global others, as well as the degree to which international courts themselves can account for the various others affected by their extended judicial authority. We carry out this endeavor by taking a close look at one key site of the evolving international judiciary: the mandatory dispute settlement system of the WTO.

¹⁸ YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 38–40, 43–44 (2014); von Bogdandy & Venzke, *supra* note 16, at 68.

¹⁹ SHANY, *supra* note 18, at 43–44; Grossman, *supra* note 16, at 75; André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769, 770, 786 (2012).

²⁰ José E. Alvarez, *What are International Judges For? The Main Functions of International Adjudication*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 158, 171 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014) (“The governance function anticipates that judges..., at the national and international level, must generally (or at least sometimes) consider the impact of their rulings on states, persons, or entities not directly represented in the case before them.”).

B. The Case in Point: The WTO DSS

International trade is probably one of the most prominent fields of growing interdependence in the global scene. “In this field of economic and social interaction, decisions made by one or some actors often have a significant impact on foreigners.”²¹ At times, this impact may be undesirable, arbitrary and unwarranted, or at least be seen as such by the strangers affected by the decisions. China’s export restrictions on rare earth minerals serves as one recent example of a seemingly domestic regulatory decision with significant impact on the interests of foreigners, disrupting the global supply of materials vital for many high-technology products (e.g., mobile phones, computers and hybrid cars), highly demanded by producers and consumers throughout the world.²²

The WTO is one important venue to face up to this type of problems that arise in an interdependent international economic environment.²³ While the WTO “assumes and assimilates the classic insights about the gains to wealth and welfare from free trade,” it is also “fundamentally concerned with the interdependency of different states’ trade and other economic policies.”²⁴ Recognizing that “decisions adopted by domestic authorities in the field of international trade have repercussions beyond their respective jurisdictions,”²⁵ the WTO thus seeks, through its various agreements on trade in goods, services and others, to manage international trade interdependencies. That is, to coordinate the regulatory systems of its member states²⁶ and constrain the external costs they impose on foreign governments and nationals by virtue of their trade-related policies.²⁷ Along these lines, for example, the national treatment obligation, which is enshrined *inter alia* in the General Agreement on Tariffs and Trade (GATT)²⁸ and forbids discrimination against foreign economic interests, seeks to ensure that the fate of outsiders will be linked to the fate of similarly situated local

²¹ Ioannidis, *supra* note 6, at 110.

²² Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014) [hereinafter *China-Rare Earths*].

²³ Steven P. Croley & John H. Jackson, *WTO Procedures, Standard of Review, and Deference to National Governments*, 90 AJIL 193 (1996).

²⁴ Robert Howse, *From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime*, 96 AJIL 94 (2002).

²⁵ Ioannidis, *supra* note 6, at 102.

²⁶ Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK YEARBOOK OF UNITED NATIONS L. 609, 651 *et seq.*, (2001) (discussing the model of “coordinated interdependence” as the most persuasive approach to the WTO).

²⁷ Howse, *supra* note 24, at 94.

²⁸ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT].

economic actors, who are likely to have voice and leverage in domestic regulatory processes.²⁹

The language of the various WTO agreements, however, even of the basic nondiscrimination rules such as national treatment or most favored nation (MFN), is often not fixed in meaning and lacks details as regards what exactly amounts to a violation of WTO law. This is the case also with respect to numerous other WTO provisions, including the exceptions enshrined in GATT Article XX or Article XIV of the General Agreement on Trade in Services (GATS),³⁰ which allow derogations from members' trade commitments for health, environmental and other societal regulatory purposes. The broadly drafted WTO norms, in turn, leave it to the adjudicators to delineate their exact scope and to elucidate the specific requirements they entail of WTO members vis-à-vis third states and their constituencies.

Central to the WTO regime, therefore, is its DSS, which has been explicitly assigned the goal of clarifying WTO rules in its constitutive instrument (the Dispute Settlement Understanding (DSU)),³¹ alongside other objectives, among them, enforcing the WTO agreements, maintaining the negotiated balance of rights and obligations between WTO members, and sustaining the operation and legitimacy of the WTO.³² In order to fulfil these objectives, the DSS has been established as a two-tier adjudicating system, composed of first-instance panels and a permanent Appellate Body (AB). Both instances hold compulsory and exclusive jurisdiction over all disputes between members under the WTO agreements, and the "reports" they issue become binding quasi-automatically, i.e., unless rejected by consensus of all WTO members.³³

The legalized WTO DSS, which replaced the GATT's more diplomacy-oriented dispute settlement mechanism, has attracted a large volume of business, elevating the DSS "into a position of leadership among international courts and tribunals."³⁴ Since its establishment in 1995, more than 500 complaints have reached the DSS docket, filed on behalf of

²⁹ Benedikt Priker, *Democracy and Distrust in International Law: The Procedural Democracy Doctrine and the Standard of Review Used by International Courts and Tribunals*, in DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 58, 65 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

³⁰ General Agreement on Trade in Services, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

³¹ See Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 40 [hereinafter DSU].

³² Sivan Shlomo Agon, *Is Compliance the Name of the Effectiveness Game? Goal-Shifting and the Dynamics of Judicial Effectiveness at the WTO*, 15 WORLD TRADE REV. 671, 677–681 (2016).

³³ For a thorough presentation of the WTO DSS, see PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: LAW, TEXT, CASES AND MATERIALS* 156–311 (3rd ed. 2013).

³⁴ Stewart & Badin, *supra* note 2, at 562.

developed and developing countries, and covering a long list of subject matters under the WTO agreements.³⁵ At their core, such disputes are interstate and bilateral in nature, fought between the complainant/s and respondent, and aimed at restoring the reciprocal balance of trade concessions originally struck among the parties and distorted by the respondent's WTO-inconsistent measure.³⁶ Yet the legal, commercial, and distributive consequences of such bilateral disputes often go beyond the immediate effects on the disputants, implicating the interests of other WTO members or the broader WTO regime. Furthermore, as WTO disputes have increasingly transcended the organization's core "trade" mandate, calling on the DSS to review the WTO-consistency of members' trade-restrictive measures in areas such as public health, consumer safety, or environmental protection, the authority exerted by the DSS further affects broader community interests of concern to multiple stakeholders *outside* the multilateral trade setting.

Given its position, its far-reaching influence, and its extensive engagement in reviewing the regulatory measures of states, the WTO DSS offers a prime site for investigating the role that such an international court could and should play in promoting and enforcing *states'* other-regarding obligations. Yet for quite the same reasons, the WTO DSS also serves as a useful venue for exploring the inclination and ability of *international courts* themselves, as empowered global actors, to integrate other-regarding considerations into their own procedures and rulings, and thereby to account for affected interests and stakeholders other than those relating to the bilateral dispute pending before them.

As the following demonstrates, both threads of other-regardingness have featured in WTO case law since its inception. In analyzing this "WTO law of strangers" as it has developed during the last two decades, Part III unfolds the first other-regarding thread, taking stock of the DSS efforts under the lead of the AB to enhance the substantive and procedural obligations of WTO members towards strangers, seeking to ensure the consideration and voice of foreign interests in relevant domestic decision-making processes. Part IV then proceeds with an analysis of the various substantive and procedural other-regarding elements followed by the DSS itself in an attempt to account for non-litigating stakeholders and community-wide interests through the adjudication of bilateral interstate disputes.

III. WTO LAW OF STRANGERS PART I: OTHER-REGARDINGNESS AND THE SOVEREIGN STATE

Whether or not one endorses the general obligation of sovereign states to take into account and be accountable to strangers, the foundations of such an

³⁵ Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2016: A Statistical Analysis*, 20 J. INT'L ECON. L. 171 (2017).

³⁶ Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules-Toward a More Collective Approach*, 94 AJIL 335, 339-340 (2000).

obligation, as hinted above, seem to be ingrained in WTO law, in rules such as national treatment that prohibits discrimination against foreign economic interests. It is also echoed in provisions such as GATT Article XX(j), which allows members to deviate from their GATT obligations and impose measures “essential to the acquisition or distribution of products in general or local short supply,” provided that such measures are consistent with the principle that all members “are entitled to an equitable share of the international supply of such products.” Such other-regarding foundations have been further elaborated by the DSS through the interpretation of the WTO agreements, leading to the entrenchment of the interests of foreign stakeholders—both governments and private actors—well within the confines of member states’ obligations under the WTO.

Below we begin with the *substantive* other-regarding duties imposed by the DSS on WTO members, as they have evolved through two decades of jurisprudence. These duties require members to take the interests of foreigners into account when devising their national regulations, to balance such foreign interests against domestic ones, and to ensure that national policies are evenhanded in the manner they treat outsiders, while further subjecting sovereigns to broader notions of burden-sharing in a world of limited resources. Thereafter, we discuss the *procedural* other-regarding duties developed by WTO adjudicators so as to reinforce these substantive obligations. This additional layer of procedural duties asks regulating members to inform themselves about the potential impact of their policies on the interests of strangers either through direct international deliberation or domestic decision-making processes that give strangers voice and reason.

A. *WTO Members’ Substantive Obligations towards Affected Others*

The substantive obligation of states to take foreign interests into account as part of WTO law may be identified early on in WTO jurisprudence, actually in the very first case to reach the AB’s docket. This case, known as *US-Gasoline*,³⁷ concerned the “Gasoline Rule” under the U.S. Clean Air Act, which set out the rules for establishing baseline figures for gasoline sold on the U.S. market (different methods for domestic and imported gasoline), with the purpose of regulating the composition and emission effects of gasoline to prevent air pollution.

While the AB found the U.S. baseline establishment rules to be provisionally justified under the environmental exception of GATT Article XX(g) (concerning the conservation of exhaustible natural resources), it held that the application of these rules did not meet the requirements of the chapeau of Article XX. Under the chapeau, for a domestic trade-restrictive measure to be justified, it must not constitute “arbitrary discrimination” or “unjustifiable discrimination,” nor must it constitute “a disguised restriction on international trade.” *In US-Gasoline*, however, the AB found that the U.S.

³⁷ Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *US-Gasoline*].

measure did not meet these requirements due to “two omissions,” one of which was the U.S. failure “to count the costs for foreign refiners that would result from the imposition of statutory baselines” under the new regulation.³⁸ Thus, the AB elaborated, while the U.S. “counted the costs for its domestic refiners of statutory baselines,” trying to save them from bearing the physical and financial burdens associated with immediate compliance with a statutory baseline, there was “nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners.”³⁹

Not in so many words, then, the AB in *US-Gasoline* effectively suggested that a WTO member is required, in its domestic regulatory process, to take “the interests of... affected members and their citizens into account, even if there is no special international obligation to do so.”⁴⁰ As the U.S. had failed to so account for the interests of foreigners, the U.S. baseline establishment rules were ultimately not entitled to the defense afforded by Article XX as a whole.⁴¹

A similar other-regarding path was followed by the AB in the later, famous case of *US-Shrimp*.⁴² At issue here was the U.S. prohibition on the import of shrimp harvested with the use of fishing technology that may adversely affect endangered species of sea turtles, unless the harvesting state was certified as having adopted a regulatory program comparable to that applied by the U.S. throughout its territory to all U.S. shrimp trawlers. In this case as well, the AB found the U.S. regulation compatible with the terms of the environmental exception in Article XX(g), but as having failed to meet the requirements of Article XX chapeau. In this respect, the AB interestingly observed that it is “acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country,” “regardless of the particular conditions existing in certain parts of the country.” Yet the AB stressed:

[I]t is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, *without taking into consideration different conditions which may occur in the territories of those other Members*.⁴³

On this basis, *inter alia*, the AB found the application of the U.S. legislation—which required other WTO members to adopt the same regulatory regime as that employed by the U.S., without allowing for any inquiry into the appropriateness of that regime for the conditions prevailing

³⁸ *Id.* at 28–29.

³⁹ *Id.*

⁴⁰ von Bogdandy, *supra* note 26, at 668.

⁴¹ *US-Gasoline*, *supra* note 37, at 29.

⁴² Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *US-Shrimp*].

⁴³ *Id.* para. 164 (emphasis added).

in those exporting countries—to constitute unjustifiable discrimination under Article XX chapeau.⁴⁴ Lately, in the *EC-Seal Products* case concerning the EU ban on the importation and sale of seal products, the AB reiterated this determination, stating that WTO members are required to assess the suitability of their regulatory standards for the conditions existing in other countries.⁴⁵

Yet in *US-Shrimp* and later cases like *EC-Seal Products*, the AB not only read Article XX chapeau as obliging regulating members to consider the conditions and interests of other states, but went further to elucidate that in designing and applying their other-affecting policies, members are essentially required to balance domestic interests against those of affected foreigners. Thus, in *US-Shrimp* the AB stated that within the bounds of Article XX chapeau “a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members.”⁴⁶ According to the AB, then, “[t]he requirements in the chapeau indicate that Members wanting to invoke an exception... need to apply their measures in a reasonable manner, taking into account not only their own treaty rights but also those of other” WTO members.⁴⁷ It is this balancing process that will determine whether a domestic measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination, or constitutes a disguised restriction on international trade.⁴⁸

And so, “[a]lthough the GATT has no specific language authorizing a balancing test,”⁴⁹ the AB conceived “the balancing of competing rights, interests and obligations as the predominant feature within the chapeau analysis.”⁵⁰ Seen through other-regarding lens, the significance of this balancing analysis lies not only in the fact that it urges sovereigns to juxtapose foreign and domestic interests in the adoption of internal regulations, but also in that it gives international adjudicators reviewing such regulations “considerable strategic space,”⁵¹ placing them in a key position to assess whether regulating members are not overly harming the interests of strangers. As the AB elaborated on this balancing task:

⁴⁴ *Id.* para. 165.

⁴⁵ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, para. 5.337 (May 22, 2014) [hereinafter *EC-Seal Products*].

⁴⁶ *US-Shrimp*, *supra* note 42, para. 156.

⁴⁷ Mads Andenas & Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 *TEX. INT’L L.J.* 371, 411 (2007).

⁴⁸ *Id.*

⁴⁹ WTO, *World Trade Report: Exploring the Links between Trade, Standards and the WTO*, 135–141 (2005), at https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report05_e.pdf.

⁵⁰ Andenas & Zleptnig, *supra* note 47, at 411.

⁵¹ Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 *GERMAN L.J.* 1141, 1162 (2011).

The task of interpreting and applying the chapeau is... essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions... of the GATT 1994.... The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.⁵²

However, being aware of the sensitivity inherent to such a case-specific balancing analysis, and in order to avoid excessive intrusion on the regulatory autonomy of sovereigns in marking out the line of equilibrium between foreign and domestic interests under Article XX chapeau, the AB chose not to engage in substantive review of the regulatory priorities and balance struck at the domestic level. Instead, as seen in *US-Gasoline*, *US-Shrimp* and other cases discussed below, the AB limited its judicial review to assessing whether a concrete measure, as applied, is disproportionate, discriminatory, or unreasonable.⁵³ In other words, the AB shifted the focus of its scrutiny “from second-guessing substantive domestic policy choices to an emphasis on the... arbitrariness of domestic regulations, on process norms and... on the examination of discriminatory elements in the detailed legal, regulatory and administrative provisions that operationalize the substantive policy choices.”⁵⁴ By so limiting its (otherwise strict) standard of review under Article XX chapeau to the regulatory design and operational features of domestic regulations, the AB seems to have walked a fine line between its other-regarding judicial philosophy and the right of states to regulate—respecting members’ policy space, “but with a warning not to abuse this policy space for protectionist ends,”⁵⁵ or to project the costs of their policies on strangers.

Subsequent WTO jurisprudence further elaborated this balancing act and the underlying duty of members to weigh their internal interests against those of foreigners. Thus, in cases such as *Korea-Beef*, *US-Gambling*, *Brazil-Tyres*, *China-Publications*, and *EC-Seal Products*, the AB construed the necessity test (enshrined in several policy exceptions in GATT Article XX and GATS Article XIV), as entailing a “weighing and balancing” process of a series of factors, among them the importance of the policy objective pursued by the regulating member, and “the restrictive effect of the measure on international commerce” and on the interests of other stakeholders in the multilateral trade system.⁵⁶

⁵² *US-Shrimp*, *supra* note 42, para. 159.

⁵³ Andenas & Zleptnig, *supra* note 47, at 411.

⁵⁴ Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L. L. 9, 53 (2016).

⁵⁵ *Id.*

⁵⁶ Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, paras. 240, 251, 306–307 WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China-Publications*]; Appellate

Yet again, quite in line with the reinterpretation of sovereignty presented in Part II above, in so requiring sovereigns to weigh and balance foreign and domestic interests, the AB did not suggest that states should forgo the interests of their citizens. Rather, it acknowledged members' right to give precedence to their domestic interests, and to set the policy objectives (e.g., public health or environmental protection) they seek to achieve and the level of protection they want to obtain.⁵⁷

With the development and diversification of WTO case law, the balancing approach transcended the bounds of the GATT/GATS general exception clause, extending its reach into new legal terrains such as the Technical Barriers to Trade Agreement (TBT). Thus, in *US-Clove Cigarettes*, addressing the U.S. anti-tobacco regulation prohibiting flavored cigarettes other than tobacco or menthol, the AB read the object and purpose of the TBT Agreement as "to strike a balance between... the objective of trade liberalization and... Members' right to regulate,"⁵⁸ suggesting that also under the TBT Agreement members must consider, in the exercise of their right to regulate, whether their policies do not overly harm the interests of outsiders and global economic welfare. Thereafter, in *US-Tuna II* concerning the U.S. labeling scheme certifying tuna caught by using dolphin-safe methods, the AB incorporated the "weighing and balancing" analysis into TBT Article 2.2, noting that in assessing the necessity of a regulatory measure a balance must be struck between several factors, including the measure's trade-restrictiveness and impact on foreigners, its contribution to a legitimate regulatory objective, and the risks of not fulfilling that objective.⁵⁹

From an other-regarding perspective, however, no less significant than the assimilation of the balancing test to the TBT Agreement is the notion of evenhandedness, which the AB read into this agreement in *US-Clove Cigarettes*, *US-Tuna II*, and *US-Cool*,⁶⁰ to indicate members' duty to

Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, paras. 164, 166, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, paras. 304–308, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US-Gambling*]; Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, paras. 178, 182, 210, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil-Tyres*]; *EC-Seal Products*, *supra* note 45, paras. 5.169, 5.214; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, paras. 172, WT/DS135/AB/R (Mar. 12, 2001).

⁵⁷ *Brazil-Tyres*, *supra* note 56, para. 140. See also *US-Gambling*, *supra* note 56, paras. 304–311; *EC-Asbestos*, *supra* note 56, para. 168; *Korea-Beef*, *supra* note 56, para. 176.

⁵⁸ Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, paras. 89–96, 174, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *US-Clove Cigarettes*].

⁵⁹ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, paras. 318–323 & n.643, WT/DS381/AB/R (May 16, 2012) [hereinafter *US-Tuna II*].

⁶⁰ *Id.* para. 225; *US-Clove Cigarettes*, *supra* note 58, paras. 95, 182, 215; Appellate Body Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, paras. 271, 293, WT/DS384,386/AB/R (June 29, 2012).

reconcile their legitimate regulatory interests with their obligation to treat foreigners in an “even-handed” manner.⁶¹ Thus, for example, in *US-Clove Cigarettes* the AB found the less favorable treatment of imported clove cigarettes to violate the national treatment obligation in TBT Article 2.1,⁶² although the discrimination against the imported products was probably not motivated by a narrow protectionist goal of switching market share from foreign to domestic producers.⁶³ The reason for this finding of violation was that the U.S. ban was not evenhanded, in the sense that its design and application reflected “an imposition of a disproportionate burden on foreign economic interests for the achievement of albeit legitimate regulatory goals.”⁶⁴ As Howse and Levy stress, under this “somewhat broader notion of even-handedness,” the idea of national treatment as treatment no less favorable to foreign producers “extends beyond a discipline on protectionism in the narrow sense,” which seeks to eliminate inefficient protection of domestic producers, to a mechanism of “ensuring that states do not externalize the costs of managing their own social and economic challenges on outsiders.”⁶⁵ In that sense, then, the evenhandedness test read into the TBT Agreement thus seems to convey an idea closer to equal concern and respect for all affected stakeholders, requiring sovereigns not merely to abstain from inefficient protectionism, but to positively pay regard to the interests of foreign constituencies and ensure that national regulations treat foreign and domestic producers evenhandedly.

Finally, following a similar notion of evenhandedness, the substantive duties of WTO members towards strangers saw significant elaboration by both panels and the AB in the recent high-profile disputes challenging China’s export restrictions on key raw materials⁶⁶ and rare earth minerals.⁶⁷ While the complainants in these cases claimed that the export restrictions imposed by China were aimed at ensuring the Chinese industry lower prices and secure supplies at the expense of foreign producers and consumers, China sought to justify its export barriers pursuant to the exceptions in GATT Article XX. Particularly, the environmental exception in Article XX(g), which allows countries to adopt trade-restrictive measures relating to the conservation of exhaustible natural resources “*if such measures are made*

⁶¹ Robert Howse & Philip I. Levy, *The TBT Panels: US–Cloves, US–Tuna, US–COOL*, 12(2) WORLD TRADE REV. 327 (2013). Thus, in *US-Clove-Cigarettes* the AB understood the TBT preamble as suggesting that “Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner” in addressing foreign and domestic interests. *US-Clove Cigarettes*, *supra* note 58, para. 95.

⁶² *US-Clove Cigarettes*, *supra* note 58, para. 226.

⁶³ Howse & Levy, *supra* note 61, at 344.

⁶⁴ *Id.*

⁶⁵ *Id.* at 344–345.

⁶⁶ Appellate Body Report, *China–Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, W/TDS395/AB/R, WT/DS398/AB/R (Jan. 30, 2012) [hereinafter *China-Raw Materials*].

⁶⁷ *China-Rare Earths*, *supra* note 22.

effective in conjunction with restrictions on domestic production or consumption” of the finite resource.

In the first case of *China-Raw Materials*, the panel found that China’s export restrictions did not meet the conditions of Article XX(g), among other things, because they failed to meet its evenhandedness requirement; that is, the export restrictions did not operate in conjunction with parallel limitations on domestic production and consumption of the exhaustible natural resources that imposed an evenhanded burden on foreign and domestic users and consumers.⁶⁸ This finding of the panel was not appealed before the AB,⁶⁹ which further elucidated in its decision that Article XX(g) encapsulates a requirement of evenhandedness of treatment between foreign and domestic producers, according to which trade-restrictive conservation-related measures are permitted only when they work together with restrictions on domestic production or consumption so as to conserve an exhaustible natural resource.⁷⁰ From the panel and AB rulings thus emerges, in turn, the significant conclusion that while a resource-endowed country is free to decide whether to exploit its natural resources and is entitled to manage the supply of those resources through conservation-related measures, it may not place the burden of conservation on foreign consumers alone. Hence, if such a state nevertheless decides to exploit its natural resources, it “must ensure an evenhanded distribution of the natural resources that it decides to mine or harvest amongst the WTO membership.”⁷¹ As concluded by Bronckers and Maskus with respect to the *China-Raw Materials* rulings:

The implications of the Appellate Body’s ruling (coupled with the unappealed part of the panel decision) are far-reaching in a world where natural resources are unevenly distributed amongst the WTO membership, yet where most WTO members are hungry for them. The principle that would seem to emerge from this case is that WTO members are free in their decision whether or not to mine or harvest their natural resources, or the extent to which they do so. Yet whenever they mine or harvest, they must normally make the natural resources they produce available to other WTO Members as well – except in a case of temporary, critical shortage.⁷²

⁶⁸ Panel Report, *China–Measures Related to the Exportation of Various Raw Materials*, paras. 7.465–7.567, WT/DS394/R, W/TDS395/R, WT/DS398/R (Jul. 5, 2011) [hereinafter *China-Raw Materials* Panel Report]. The evenhandedness requirement in the context of Article XX(g) was originally introduced by the AB in *US-Gasoline*, *supra* note 37, at 20–21.

⁶⁹ VAN DEN BOSSCHE & ZDOUC, *supra* note 33, at 568.

⁷⁰ *China-Raw Materials*, *supra* note 66, paras. 356–357.

⁷¹ Marko Bronckers & Keith E. Maskus, *China–Raw Materials: A Controversial Step towards Evenhanded Exploitation of Natural Resources*, 13 WORLD TRADE REV. 393 (2014). See also Julia Ya Qin, *Judicial Authority in WTO Law: A Commentary on the Appellate Body’s Decision in China-Rare Earths*, 13 CHINESE J. INT’L L. 639, 640 (2014) (addressing the *Raw Materials* ruling which required “China to treat foreign and domestic users evenhandedly in the distribution of its raw materials”).

⁷² Bronckers & Maskus, *supra* note 71, at 406.

Whereas this other-regarding approach of the panel and AB in *China-Raw Materials*, and the restricted conception of sovereignty it encapsulates, may not be endorsed by all, it aptly echoes the reading of sovereignty presented in Part II above. Likewise, this other-regarding approach seems “consistent with the evolving ‘soft law’ that suggests the unacceptability of taking an intransigently beggar-thy-neighbor response to the scarcity or finitude of natural resources, while at the same time recognizing that a state can legitimately put the pressing needs of its own citizens first in a time of a crisis.”⁷³

A similar approach was followed by WTO adjudicators in the *Rare Earths* dispute. On this occasion, the panel again found that China did not meet the conditions of Article XX(g). Furthermore, while it recognized, like the panel in *Raw Materials*, “the permanent sovereignty” of WTO members over their natural resources, it observed that members must exercise this right consistently with the WTO obligations they have taken upon themselves as sovereigns,⁷⁴ among them the obligation to treat foreign and domestic consumers evenhandedly in the imposition of restrictions on the production or consumption of exhaustible natural resources.⁷⁵ On appeal, the AB further developed the interpretation of Article XX(g), while providing several clarifications on its evenhandedness requirement. Among other things, the AB elucidated that a member seeking to justify its measure under Article XX(g) is not required to show that its regulatory regime “evenly” distributes the burden of conservation between foreign consumers, on the one hand, and domestic consumers, on the other hand (as some statements in the panel reports may have implied).⁷⁶ Yet the AB importantly added, “it would be difficult to conceive of a measure that would impose a significantly more onerous burden on foreign consumers or producers and that could still be shown to satisfy all of the requirements of Article XX(g).”⁷⁷

This statement of the AB is remarkable not only because it articulates a duty of exporting members to consider the interests of global others who in an interconnected economy are dependent on their exports; it is striking because it brings to the fore a broader notion of burden-sharing in a world of limited natural resources,⁷⁸ thereby expressing a more demanding conception

⁷³ Robert Howse & Tim Josling, *Agricultural Export Restrictions and International Trade Law: A Way Forward*, International Food & Agricultural Trade Policy Council 14 (2012), at http://www.agritrade.org/Publications/documents/Howse_Josling_Export_Restriction_final.pdf.

⁷⁴ Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, paras. 7.266–7.270, WT/DS431/R, WT/DS432/R, WT/DS433/R (Mar. 26, 2014) [hereinafter *China-Rare Earths* Panel Report]; *China-Raw Materials* Panel Report, *supra* note 68, paras. 7.380–7.381.

⁷⁵ *China-Rare Earths* Panel Report, *supra* note 74, paras. 7.330–7.331, 7.337.

⁷⁶ *China-Rare Earths*, *supra* note 22, paras. 5.128–5.136.

⁷⁷ *Id.* para. 5.134.

⁷⁸ Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*, 23 *CONSTELLATIONS* 58, 64 (2016).

of members' other-regarding duty—not only the negative duty to “do no harm,” but also the positive duty to “do good,” by respecting dependency and considering the continued supply of their own resources. More generally, this interpretative approach of WTO adjudicators exposes the evolving other-regarding philosophy that informs their reading of members' substantive obligations under WTO law, as well as their recognition of the potential vested in international judicial review as a mechanism for remedying the accountability gap of sovereigns towards strangers.

B. WTO Members' Procedural Obligations towards Affected Others

The substantive duties of sovereign states under WTO law to weigh and balance other-regarding considerations, as developed over two decades of WTO jurisprudence, have been accompanied by various procedural obligations that members must implement in the process of adopting and applying their other-affecting policies. These procedural obligations, including requirements such as giving voice, participation opportunities, and reason to affected foreigners, are to vindicate the substantive duties assigned to WTO members towards others,⁷⁹ by securing channels through which unrepresented foreign interests may be heard and considered in domestic decision-making processes.

Notably, in certain areas of WTO law, such procedural obligations that ought to be met by domestic decision-makers in response to the externalities they project on foreign actors have been explicitly anchored in the WTO treaty.⁸⁰ Such is the case, for example, in the area of anti-dumping, subsidies, or safeguard measures, where the applicable agreement specifically requires national regulators to reach their decisions after having followed basic due process standards vis-à-vis affected foreigners, among them providing adequate notice, allowing an effective right of hearing, and supporting final decisions with appropriate reasons.⁸¹

In other fields of WTO law, however, where domestic procedures have not been regulated in detail (e.g., GATT Article XX), the treaty-based procedural obligations provided in certain WTO agreements have offered WTO “adjudicating bodies a starting point in developing standards that enhance the participation of otherwise excluded interests in the processes that affect them.”⁸² As shown below, on various occasions, WTO adjudicators have introduced such standards by way of a “proceduralist reading” of

⁷⁹ Cf. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 822 (2010) (noting generally that “substantive law... is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law”).

⁸⁰ Michael Ioannidis, *A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law*, 12 GERMAN L.J. 1175, 1193–1195 (2011).

⁸¹ *Id.*

⁸² *Id.* at 1193.

broadly drafted WTO provisions,⁸³ requiring members to procedurally account for the interests of strangers “either through direct international cooperation, or through appropriate domestic decision-making processes.”⁸⁴

The first such stride, here as well, was taken in the early *US-Gasoline*, where the AB required a member seeking regulation with cross-border effects to explore deliberative and cooperative solutions with affected foreigners before erecting trade barriers against them. Thus, among the reasons for finding the U.S. “Gasoline Rule” to constitute “unjustifiable discrimination” and a “disguised restriction on international trade” under Article XX chapeau was the U.S. failure “to enter into appropriate procedures in cooperation with the [complaining] governments of Venezuela and Brazil” in an attempt to jointly address the problems that led the U.S. to subject their refiners to stricter regulatory standards.⁸⁵

Yet the AB in *US-Gasoline* not only asked the U.S. to pursue multilateral negotiations as a means to curb the external effects of its regulation, but further stressed that such negotiations should be conducted “with both *foreign refiners* and the *foreign governments* concerned.”⁸⁶ As von Bogdandy notes, by so “requiring negotiations to be held with the trading partners as well as with affected private interests, the Appellate Body introduced a procedural prerequisite which extends an important element of the democratic principle to foreign interests,”⁸⁷ aimed at ensuring that all those affected by a state’s decisions are granted the opportunity to participate and be heard.

A comparable approach was followed in the successive *US-Shrimp*. On this occasion, the AB took two key moves to enhance the voice and representation of foreign stakeholders in its application of Article XX chapeau and the balance embodied therein. First, along the lines of *US-Gasoline*, the AB denounced the U.S. for not engaging relevant third countries in “serious, across-the-board negotiations” with the objective of concluding an international agreement for the protection of sea turtles—as it did in fact with some WTO members—before enforcing its import ban against them.⁸⁸ Troubled by the inconsistent recourse by the U.S. to multilateralism as a means of resolving the global environmental issue at hand,⁸⁹ the AB thus tried to foster a more cooperative approach to the resolution of cross-border problems, urging members to negotiate

⁸³ Ioannidis, *supra* note 6, at 111.

⁸⁴ ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER 328 (2011). *See also* Kleinlein, *supra* note 51, at 1171; von Bogdandy, *supra* note 26, at 666.

⁸⁵ *US-Gasoline*, *supra* note 37, at 27–28 (alteration added).

⁸⁶ *Id.* at 27 (emphasis added)

⁸⁷ von Bogdandy, *supra* note 26, at 668–669.

⁸⁸ *US-Shrimp*, *supra* note 42, paras 166–172.

⁸⁹ Gráinne de Búrca & Joanne Scott, *The Impact of the WTO on EU Decision-making, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 1, 20 (Gráinne de Búrca & Joanne Scott eds., 2001).

harmonized rules before implementing trade restrictions that inflict substantial costs on others.⁹⁰

No less striking in *US-Shrimp*, though, was the AB's second procedural move, where it read into Article XX chapeau "general norms of regulatory due process,"⁹¹ with a view to enhancing the representation of affected foreign parties and promoting more deliberative, other-regarding domestic decision-making processes.⁹² Thus, in finding that the U.S. measure was applied in an arbitrarily discriminatory manner, the AB stressed that the administrative procedures followed by the U.S. in deciding whether to grant certification to exporting states were not transparent, did not afford foreign interested parties a formal opportunity to be heard, and provided no formal reasoned decision or procedure for appeal.⁹³ Hence, rather than assess whether the U.S. policy decision was *substantively* correct, for which the AB would have had to second-guess the U.S. decision and substantively balance competing values and interests, the AB strictly scrutinized the processes through which the U.S. other-affecting policy was applied,⁹⁴ articulating the procedural requirements its administration should implement vis-à-vis foreign governments and traders for its policy to be considered WTO-consistent. Notably, through this strict yet less intrusive process-based review, as several commentators have aptly observed, the AB effectively "disciplined its own law-making potential and relocated the decision-making power back to the domestic level, under the condition that it is exercised after the meaningful consideration of affected foreign interests."⁹⁵

In later jurisprudence, the AB followed a similar course. In the recent *EC-Seal Products* dispute, for example, the AB paid close scrutiny in its analysis of Article XX chapeau to the structural and procedural aspects of the EU ban on seal products, while steering clear of passing judgment on its substance. Thus, reviewing the exception provided in the EU seal regime for products resulting from subsistence seal hunting by indigenous communities (the "IC exception"), the AB faulted the EU for not pursuing "cooperative arrangements" in order to facilitate access to the IC exception by relevant actors in third states, such as Canada (a co-complainant in the case).⁹⁶ The AB then went further to criticize the "ambiguities in the criteria of the IC exception and the broad discretion" consequently accorded to the EU authorities in applying these criteria, which could result in the abuse of the exception to the detriment of foreign interests.⁹⁷ According to the AB, then,

⁹⁰ Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, in *POWER AND GLOBAL GOVERNANCE* 130, 154 (Michael Barnett & Raymond Duvall eds., 2005).

⁹¹ Stewart & Badin, *supra* note 2, at 571.

⁹² Shaffer, *supra* note 90, at 153, 158; LANG, *supra* note 84, at 326.

⁹³ *US-Shrimp*, *supra* note 42, paras. 180–181.

⁹⁴ Ioannidis, *supra* note 6, at 108; LANG, *supra* note 84, at 326.

⁹⁵ Ioannidis, *supra* note 6, at 108. *See also* Shaffer, *supra* note 90, at 153.

⁹⁶ *EC-Seal Products*, *supra* note 45, para. 5.337.

⁹⁷ *Id.* paras. 5.324–5.328.

for the seal regime to meet the requirements of Article XX chapeau, it needed to more clearly delimit the discretion of the EU administration and establish more transparent procedures for the benefit of foreign states and economic actors.

This is the place to note that comparable patterns to those envisaged in the context of GATT Article XX may be identified in DSS jurisprudence in other domains of WTO law. One such site is the Enabling Clause, which provides the legal basis in the WTO for developed countries to adopt Generalized System of Preferences (GSP) schemes, under which they may offer preferential tariff treatment to products originating in developing countries. The operation of such regulatory schemes was subject to judicial review in the case of *EC-Tariff Preferences*,⁹⁸ which concerned the EU's GSP program, particularly its special "Drug Arrangements," under which developing countries could have been provided with additional tariff preferences (beyond those accorded by the EU to all developing countries) if they instituted measures to combat illegal drug production and trafficking.

Reviewing the WTO-consistency of the EU scheme, the AB determined that, as a general matter, the Enabling Clause's nondiscrimination requirement does not prohibit developed countries from attaching conditions to their grant of GSP preferences, and thereby differentiating between developing countries, provided that identical tariff treatment is available to all "similarly-situated" GSP beneficiaries.⁹⁹ That said, the EU's GSP program was ultimately found inconsistent with the Enabling Clause's nondiscrimination requirement, as it failed to meet two procedural tests read by the AB into this requirement.¹⁰⁰ First, the AB noted, for a GSP program to satisfy the nondiscrimination norm, it must provide for a mechanism under which the list of beneficiaries receiving additional preferences can be changed, allowing other developing countries to be added to or removed from the list.¹⁰¹ The EU's Drug Arrangements, however, were limited to a "closed list" of twelve predetermined beneficiaries, and included no apparatus that could allow other developing countries suffering from similar drug problems to be added to the list of beneficiaries.¹⁰² Second, a GSP program, the AB added, must also establish "objective criteria" for deciding whether a developing country qualifies for the special preferences and can be added as a beneficiary.¹⁰³ Yet the EU failed this test as well, as its regulation offered no criteria to determine a country's entitlement to obtain the preferences, and

⁹⁸ Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC-Tariff Preferences*].

⁹⁹ *Id.* para. 173.

¹⁰⁰ *Case Note: European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, 6 MELB. J. INT'L L. 118, 131 (2005).

¹⁰¹ *EC-Tariff Preferences*, *supra* note 98, paras. 182, 187.

¹⁰² *Id.* paras. 181–182, 187.

¹⁰³ *Id.* paras. 183, 188.

gave no indication as to how the twelve beneficiaries under the Drug Arrangements were originally chosen.¹⁰⁴

Hence, while the AB showed deference to the EU in terms of the substance of its regulation, permitting it to grant conditional GSP preferences based on its own value-choices, the AB limited the EU discretion through a close review of its domestic regulatory decision-making process,¹⁰⁵ subjecting it to stricter disciplines of transparency, reason-giving, and fairness that may better account for the conditions and interests of affected foreign parties.¹⁰⁶

A similar other-regarding approach, it should finally be noted, was manifested by WTO adjudicators in those fields of WTO law that do regulate domestic procedures in some more detail, further entrenching members' obligation to follow fair and visible regulatory decision-making processes vis-à-vis strangers.¹⁰⁷ One illustrative example in this respect may be found in the panel and AB's interpretation of TBT Article 2.12 in *US-Clove Cigarettes*, which requires regulating members to "allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members... to adapt their products or methods of production to the requirements of the importing Member." Following this provision, in *US-Clove Cigarettes* the U.S. allowed an interval of three months before its trade-restrictive tobacco regulation came into effect. This period, however, was found insufficient to address the interests of foreign producers, which according to the panel should have been given an adjustment period of at least six months.¹⁰⁸

On appeal, the AB upheld, albeit for different reasons, this finding of the panel.¹⁰⁹ In this framework, the AB first importantly elucidated that the "obligation imposed on Members by Article 2.12... carefully balances the interests of... the exporting Member whose producers might be affected by a technical regulation and... the importing Member that wishes to pursue a legitimate objective through a technical regulation."¹¹⁰ Having so articulated the relationship between foreign and domestic interests in terms of balance, the AB then went on to draw further guidance from an interpretative clarification to Article 2.12 provided in the Doha Ministerial Decision, thereby ultimately concluding that regulating members should "normally" give foreign producers "a period of at least six months to adapt their products

¹⁰⁴ *Id.*

¹⁰⁵ Joanne Scott, *Comment in the Panel "Dispute Settlement: Jurisprudential and Procedural Features"*, in *WTO LAW AND PROCESS* 410, 411 (Mads Andenas & Federico Ortino eds., 2005). *See also* Maureen Irish, *GSP Tariffs and Conditionality: A Comment on EC-Preferences*, 41 *J. WORLD TRADE* 683, 684, 687 (2007).

¹⁰⁶ Scott, *supra* note 105, at 411.

¹⁰⁷ Ioannidis, *supra* note 6, at 106–107.

¹⁰⁸ Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, para. 7.595, WT/DS406/R (Sept. 2, 2011) [hereinafter *US-Clove Cigarettes* Panel Report].

¹⁰⁹ *US-Clove Cigarettes*, *supra* note 58, para. 297.

¹¹⁰ *Id.* para. 274.

or production methods” to new regulatory requirements.¹¹¹ Furthermore, the AB clarified, it is the regulating member who bears the burden of proving the existence of any conditions permitting it to derogate from this six-month rule, and which justify compromising the interests of strangers.¹¹²

Through this and other rulings, then, the DSS, under the guidance of the AB, has continually worked to reconstruct more participatory and transparent other-regarding decision-making processes at the domestic level. The positioning of WTO adjudicators as the interpreters of members’ WTO obligations has allowed them to carry out “a process-perfecting task of regulation with international repercussions,”¹¹³ subjecting states to certain procedural duties that—while not depriving them of their right as sovereigns to have the final say—temper their power vis-à-vis foreigners, and enable national decision-makers to better gauge the actual consequences of their policies. Furthermore, particularly in sensitive regulatory cases, as seen above and further seen below, the higher level of scrutiny over the decision-making processes underlying members’ regulations has allowed the DSS to apply a lower level of scrutiny over the substantive compatibility of such regulations with the agreements,¹¹⁴ and thereby to avoid serious challenges to the legitimacy of its judicial intervention.¹¹⁵

That said, it is important not to overestimate the promise of the process. As Shaffer notes, “processes can be manipulated to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome.”¹¹⁶ Likewise, it might be difficult sometimes “for an international body to determine the extent to which a national agency actually takes account of foreign interests.”¹¹⁷ Such concerns are no doubt valid, yet they reaffirm the need for courts, including international courts such as the DSS, to closely monitor state compliance with procedural other-regarding obligations to ensure that they are genuinely followed. It also behooves such courts to develop tools to enhance their capacity to monitor state practice. We now turn to examining the tools that the WTO DSS has developed.

IV. WTO LAW OF STRANGERS PART 2: OTHER-REGARDINGNESS AND THE WTO DSS

This Part explores the second pivotal thread of other-regardingness in WTO jurisprudence, pertaining to other-regarding considerations and procedures incorporated into the DSS’s own operation and rulings. Hence, whereas the previous Part addressed the DSS’s role in mitigating the

¹¹¹ *Id.*

¹¹² *Id.* para. 289.

¹¹³ Ioannidis, *supra* note 80, at 1176; Ioannidis, *supra* note 6, at 109.

¹¹⁴ Scott, *supra* note 105, at 410; Andenas & Zleptnig, *supra* note 47, at 412.

¹¹⁵ Ioannidis, *supra* note 80, at 1176.

¹¹⁶ Shaffer, *supra* note 90, at 154.

¹¹⁷ *Id.*

influence of sovereigns over distant strangers and in strengthening states' other-regarding obligations, the present Part concerns its attempts to address the extended effects of its own public authority, which often exceed the bilateral dispute pending before it or the bounds of the WTO edifice in which it is nested.

As indicated in Part II, the DSS operation implicates several circles of affected others. First, within the WTO trade setting, bilateral inter-state conflicts frequently impact the interests of non-litigants—third-states or private economic actors—as well as wider interests of the community of WTO members and the WTO regime as a whole. Second, oftentimes the adjudication of bilateral WTO disputes has implications for stakeholders outside the WTO system, especially when trade-restrictive policies in areas such as public health or environmental protection are at stake. We suggest that these different spheres of influence that inhere in the DSS operation require WTO adjudicators to embrace a complex conception of their own role as an other-regarding judicial institution that must account for those relevant others who are not direct parties to the dispute and, at times, are situated outside the WTO domain of which the DSS forms a part.

An investigation of WTO jurisprudence indeed reveals the manner in which the DSS's extended spheres of influence have paved the way for weaving substantive and procedural other-regarding considerations and rules into WTO adjudication, so as to reach better-informed and more accountable judicial outcomes. Below we unfold this second part of the other-regarding account of the DSS. First, we describe the substantive other-regarding considerations taken into account by WTO adjudicators when rendering their rulings, while distinguishing in this respect between other-regardingness towards stakeholders *within* and *outside* the WTO trade circles. Thereafter, we proceed with an analysis of the complementary, procedure-oriented aspect of other-regardingness in the DSS operation, examining the various mechanisms through which WTO adjudicators have sought to ensure that the voice and concerns of affected strangers are considered as part of the judicial process.

A. DSS Other-Regardingness: The Substantive Dimension

1. DSS Other-Regardingness within the WTO's Trade Circles

As noted by Pauwelyn, while drawing a comparison with national legal systems, in many respects the WTO DSS seems to be rooted within the sphere of private law, where the parties' contractual relationship lies at the center, rather than in the public law domain, where public goods are at stake.¹¹⁸ WTO disputes are conducted in a bilateral inter-state fashion, between the complainant/s and respondent, which “may be called to justice when and because it upsets the balance negotiated with another member, not because it violated multilaterally agreed rules in place for the benefit of all

¹¹⁸ Pauwelyn, *supra* note 36, at 340.

WTO Members and their economic operators.”¹¹⁹ In this classic bilateral judicial process, it is the interests and rights of the litigating states that take the forefront and which the DSS is asked to address,¹²⁰ whereas a variety of mechanisms in the institutional design of the DSS are aimed at sustaining those interests, such as the confidential nature of WTO disputes.¹²¹

At the same time, not only do WTO disputes often affect the legal, economic, and social interests of other members in an interdependent global environment, but in resolving such bilateral conflicts the DSS mandate itself asks it to promote some more communal, systemic goals such as “providing security and predictability to the multilateral trading system,” “preserving the rights and obligations of Members” under the WTO agreements, and clarifying “the existing provisions of those agreements.”¹²² These goals essentially call upon the adjudicators to look beyond the individual case and disputants in developing their legal interpretations and, while the disputants pursue their own national interests, to act as the membership’s trustees in an attempt to vindicate the political compromises made by the community of WTO members as a whole.¹²³ Such other-regarding ideas, as seen below, have featured indeed in the judicial and interpretative choices taken by the adjudicators from an early stage.

Thus, addressing questions of treaty interpretation under Article 31 of the Vienna Convention of the Law of Treaties,¹²⁴ in *EC-Computer Equipment* the AB asserted that the purpose of treaty interpretation carried out in the context of a specific WTO dispute “is to ascertain the *common* intensions of the parties” to the agreement. “These *common* intentions,” the AB elucidated, “cannot be ascertained on the basis of the subjective and unilaterally determined ‘expectations’ of one of the parties to a treaty.”¹²⁵ It follows that they are to be ascertained on a more holistic basis, accounting for the expectations of the various others comprising the community of Members to which a disputing party belongs.

In subsequent cases, such as *EC-Tariff Preferences*, the AB followed a similar other-regarding thrust, steering against “a purely bilateral conception” of WTO obligations and dispute settlement and highlighting the collective aspects of WTO law,¹²⁶ *inter alia*, by conceptualizing the WTO legal system

¹¹⁹ *Id.* See also Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT’L L. 907, 934–936 (2003).

¹²⁰ Nollkaemper, *supra* note 19, at 770.

¹²¹ See e.g., DSU Arts. 17.10 and 18.2.

¹²² DSU Art. 3.2.

¹²³ Croley & Jackson, *supra* note 23, at 209.

¹²⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹²⁵ Appellate Body Report, *European Communities–Customs Classification of Certain Computer Equipment*, para. 84, WT/DS62,67,68/AB/R (June 5, 1998).

¹²⁶ Christian Tietje & Andrej Lang, *Community Interests in World Trade Law*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW (Eyal Benvenisti & Georg Nolte eds., forthcoming 2018, on file with authors).

as consisting of “*universally-applied* commitments.”¹²⁷ In line with such rulings, in turn, and aware of the interests that members other than the litigants consequently have in the interpretations developed in the framework of bilateral disputes, both the AB and panels have continually displayed a sympathetic other-regarding stance towards non-litigating members assuming a third-party role in WTO disputes, taking their views into account in a manner shown to substantively affect the content of DSS rulings.¹²⁸ To get just a sense of the substantive regard paid to such views, one may look, for example, at the massive references made by panels to third-parties’ arguments in recent cases such as *EC-Biodiesel*,¹²⁹ *US-Cool*,¹³⁰ or *US-Clove Cigarettes* where the panel explicitly chose to follow the interpretative approach suggested by the complainant “as well as the third parties that have addressed” the issue at stake.¹³¹ The AB, on its part, has followed a similar pattern, explicitly alluding in its jurisprudence to the “relationship” between third participants and the AB, and emphasizing that their views “on questions of legal interpretation that come before the Appellate Body are always valuable and thoroughly considered.”¹³²

In some cases, however, WTO adjudicators seem to have taken into account the interests of affected third states in an even more meaningful way. A notable example of such may be seen in the perennial dispute over trade in bananas brought by the U.S. and several Latin American countries against the EU,¹³³ but which also implicated the economic and development interests of various ex-European colonies in Africa, the Caribbean, and the Pacific (known as the “ACP countries”), some of which assumed a third-party status in the case. Under the contested EU banana regime, bananas originating in the ACP countries were granted preferential conditions of access to the EU market, while all other imports—mainly bananas originating in Latin America—were subject to a series of tariff, quota, and license requirements. Consequently, the discriminatory regime, infringing *inter alia* the basic MFN obligation that requires WTO members to treat all their trading partners equally, was repeatedly declared WTO-inconsistent by the DSS.

Yet in their rulings, WTO adjudicators seem to have taken a rather complex, other-regarding stance, seeking to account for the interests of both

¹²⁷ *EC-Tariff Preferences*, *supra* note 98, para. 107.

¹²⁸ Marc L. Busch & Eric Reinhardt, *Three’s a Crowd: Third Parties and WTO Dispute Settlement*, 58 *WORLD POL.* 446, 472–475 (2006).

¹²⁹ Appellate Body Report, *European Union–Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R (Mar. 29, 2016).

¹³⁰ Panel Report, *United States–Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384,386/R (Nov. 18, 2011).

¹³¹ *US-Clove Cigarettes* Panel Report, *supra* note 108, para. 7.368.

¹³² Appellate Body Report, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute*, Annex IV, para. 9, WT/DS320/AB/R (Oct. 16, 2008) [hereinafter *US-Continued Suspension*].

¹³³ Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter *EC-Bananas*].

the formal disputants and the third parties concerned.¹³⁴ Such attempts were particularly noticeable in the uncommon suggestions under DSU Article 19.1 made to the parties by the first compliance panel,¹³⁵ which manifested a mindful “attempt to factor into the suggestions ‘other-regarding’ considerations related to the potential effects of the panel’s decision... on affected third-states – the ACP countries.”¹³⁶ Thus, in delineating three possible courses of action that could be taken by the EU with respect to its noncompliant banana regime, the panel did not simply suggest options that may improve the position of the Latin American complainants vis-à-vis the EU market, but such that may also maintain the EU’s trade preferences for the ACP countries within the legal flexibilities of the WTO rules-based system.¹³⁷ Moreover, in line with these other-regarding suggestions, accounting for the interests of non-litigating developing countries, the panel chose to close its (unappealed) ruling in this case with the following “concluding remark”:

We recall that the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it... As illustrated by our suggestions on implementation..., the WTO system is flexible enough to allow... appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas.¹³⁸

The panel’s suggestions in *EC-Bananas*, which form a constitutive element of the agreement ultimately settling the case in a manner accommodating the interests of both the disputants and the third states concerned,¹³⁹ illustrate the adjudicators’ look beyond the bilateral setting of the dispute and the regard they pay to members other than the litigants, with a view also to promoting broader community interests. Moreover, this case demonstrates how the DSS, by accounting for members other than the immediate disputants, may work in turn to shape other-regarding solutions in the shadow of the law, where states better account for the concerns of their fellow-WTO members, thus indirectly enhancing, once again, states’ accountability to affected strangers, along the lines discussed in the previous Part.

A comparable look beyond the bilateral member-member matrix of WTO disputes and obligations, taking into account systemic WTO interests

¹³⁴ For a thorough discussion, see Sivan Shlomo Agon, *Non-compliance, Renegotiation and Justice in International Adjudication: A WTO Perspective*, 5 GLOBAL CONSTITUTIONALISM 238 (2016).

¹³⁵ Panel Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21.5 of the DSU by Ecuador*, paras. 6.154–6.158, WT/DS27/RW/ECU (Apr. 12 1999) [hereinafter *EC-Bananas* compliance panel].

¹³⁶ Shlomo Agon, *supra* note 134, at 258.

¹³⁷ *Id.* at 257–258.

¹³⁸ *EC-Bananas* compliance panel, *supra* note 135, para. 6.164.

¹³⁹ Shlomo Agon, *supra* note 134, at 259.

and actors other than the immediate disputing states, was patent in other cases as well. Such was the case, for example, in *US-Section 301*, addressing a legislative act authorizing the U.S. government to take unilateral actions in response to trade barriers imposed by recalcitrant trade partners.¹⁴⁰ This legislation, the complainant argued, was inconsistent with DSU Article 23, which requires members to refrain from unilateral actions as a means to redress WTO violations, and to have recourse to the DSU procedures when seeking such redress.

In reviewing the U.S. legislation, the panel determined that under DSU Article 23 domestic legislation is prohibited not only when it actually mandates unilateral actions, but also when its statutory language grants a WTO member the discretion to make unilateral determinations.¹⁴¹ This unappealed panel ruling was largely informed, in turn, by the other-regarding rationale “of protecting the interests of individual economic operators,”¹⁴² which, despite having no formal role in the WTO and its DSS, play a central role in the multilateral trade system. Thus, the panel noted, among the central objects and purposes of the WTO are those relating to the creation of market conditions conducive to individual economic activity in national and global marketplaces, and to the provision of a secure and predictable multilateral trading system.¹⁴³ “Of all WTO disciplines,” the panel added, the DSS, as DSU Article 3.2 suggests, “is one of the most important instruments to protect the security and predictability of the multilateral trading system”—a system “composed not only of States but also, indeed mostly, of individual economic operators,” who are the main stakeholders to be affected by the lack of security and predictability.¹⁴⁴ In this light, the panel concluded:

It may have been plausible if one considered a strict Member-Member matrix to insist that the obligations in Article 23 do not apply to legislation that threatens unilateral determinations but does not actually mandate them. It is not, however, plausible to construe Article 23 in this way if one interprets it in the light of the indirect effect such legislation has on individuals and the market-place, the protection of which is one of the principal objects and purposes of the WTO.¹⁴⁵

Thus, looking beyond the bilateral state-to-state matrix of WTO dispute settlement and obligations, in its interpretation of DSU Article 23 the panel openly accounted for the interests of (unrepresented) private economic stakeholders, seeking to make such individuals “confident that their

¹⁴⁰ Panel Report, *United States–Section 301–310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) [hereinafter *US-Section 301*].

¹⁴¹ *Id.* paras. 7.47–7.92.

¹⁴² Yoshiko Naiki, *The Mandatory/Discretionary Doctrine in WTO Law: The US-Section 301 Case and Its Aftermath*, 7 J. INT’L ECON. L. 23, 40 (2004).

¹⁴³ *US-Section 301*, *supra* note 140, para. 7.71.

¹⁴⁴ *Id.* paras. 7.75–7.76.

¹⁴⁵ *Id.* para. 7.86.

economic activities are protected from disturbance by violations of substantive WTO obligations.”¹⁴⁶

Driven by a similar will to promote the security and predictability of the multilateral trade system for its various constituencies, beyond the state parties to a specific case, in *US-Stainless Steel (Mexico)* the AB went further to derive from this security and predictability goal a rule of *de facto* stare decisis.¹⁴⁷ Thus, the AB held, “[e]nsuring ‘security and predictability’ in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”¹⁴⁸ In reaching this decision, the AB drew on several other-regarding considerations pertaining to non-disputing parties, while acknowledging the extended effects that DSS rulings usually have beyond the “specific case.”¹⁴⁹ First, reiterating its previous jurisprudence in *Japan–Alcoholic Beverages* and *US-Shrimp (Article 21.5–Malaysia)*, the AB stated that while panel and AB reports have no binding force beyond the specific case and parties, they do create “legitimate expectations” among members other than the litigants, and must therefore be considered in subsequent adjudication.¹⁵⁰ Turning then to more clearly articulating these “legitimate expectations” and the consequent need for WTO adjudicators to follow previous rulings, the AB noted:

Dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted... reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted... reports becomes part and parcel of the *acquis* of the WTO dispute settlement system.¹⁵¹

Yet, as the AB further elucidated, it is not only the legitimate expectations generated among other WTO members on account of which previous AB rulings should be followed, but also the systemic interest of assuring the “proper functioning of the WTO dispute settlement system” and

¹⁴⁶ Naiki, *supra* note 142, at 43.

¹⁴⁷ Appellate Body Report, *United States–Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter *US-Stainless Steel*].

¹⁴⁸ *Id.* para. 160.

¹⁴⁹ *Id.* para. 161.

¹⁵⁰ *Id.* paras. 158–159, citing Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, para. 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Japan–Alcoholic Beverages*], and Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products–Recourse to Article 21.5 of the DSU by Malaysia*, paras. 108–109, WT/DS58/AB/RW (Oct. 22, 2001).

¹⁵¹ *US-Stainless Steel*, *supra* note 147, para. 160.

the attainment of the goals prescribed for it in the DSU.¹⁵² Thus, the AB noted:

The creation of the Appellate Body... to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements.... The... failure to follow previously adopted Appellate Body reports... undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU....¹⁵³

According to the AB, then, within the WTO's multilateral framework, the DSS has a duty to solve bilateral disputes, but to do so while advancing the harmonious development of WTO jurisprudence and addressing the legitimate expectations of the broad community of WTO members as regards certainty and stability of the law. This consequently requires the adjudicators, as the AB statements suggest, to ensure consistency and to resolve the same legal questions in the same way in subsequent cases. Moreover, this further implies that with a view to such future cases, in any given dispute WTO adjudicators must, in a sense, be "other-regarding," taking broader interests into account and considering the ramifications of each and every judgment on future litigants.

Finally, quite in the same other-regarding spirit, in the more recent *US-Boeing* case, the AB criticized the panel for not addressing a certain legal issue, which according to the AB should have been addressed in order to clarify WTO law for the benefit of the wider community of WTO members. Thus, in response to the panel's refusal to provide legal clarification requested by the EU, based on the view that such clarification would require the panel "to offer guidance on an issue that would not affect the resolution of this dispute,"¹⁵⁴ the AB observed:

By refusing to undertake a more comprehensive analysis of the legal issue of how the DSB is to initiate an Annex V procedure, *the Panel deprived Members of the benefit of "a clear enunciation of the relevant WTO law"* and failed to advance a key objective of WTO dispute settlement, namely, the resolution of disputes "in a manner that... clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law."¹⁵⁵

¹⁵² *Id.* para. 162.

¹⁵³ *Id.* para. 161.

¹⁵⁴ Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, para. 486, WT/DS353/AB/R (Mar. 12, 2012).

¹⁵⁵ *Id.* para. 500 (emphasis added).

This pronouncement of the AB is significant not only for stating that the interest of the broad WTO membership in the clarification and development of WTO law is to be considered by the adjudicators in rendering their rulings, but also for revealing the self-perception of the AB as the guardian of a public-like legal system that must account for the interests of relevant others, rather than a mere resolver of private bilateral disputes. In other words, this statement, like the preceding ones, exposes the DSS under the lead of the AB as not simply an agent of contracting states, but a trustee of a wider cooperative community, discharging “various ‘fiduciary’ duties in the service of the overarching objectives of the regime” in which it is embedded.¹⁵⁶

As indicated earlier, however, in carrying out such duties, the mandatory DSS often renders rulings whose ramifications extend beyond the WTO regime and affect public goods and interests pursued by other stakeholders at the national or international level (e.g., NGOs, other international regimes, domestic constituencies, or the broad international community). Illustrative in this respect are disputes involving the friction between the WTO’s trade liberalization goal and noneconomic values such as human health or environmental protection. Also known for their external effects are WTO disputes involving the interface between the multilateral system and the proliferating regional systems of trade regulation. Such external effects are almost inevitable in a fragmented international legal space, characterized by diversification and expansion of international norms and regulatory institutions with overlapping jurisdictions and often ambiguous boundaries.¹⁵⁷ Yet they require the DSS to further account for various stakeholders from outside the WTO, and for this purpose to take into consideration the societal interests such stakeholders represent. As shown below, attempts of WTO adjudicators to so account for stakeholders external to the WTO trade community—starting from the days when criticism against neoliberal globalization and the WTO as a trade liberalization-driven institution was looming—have come to form another piece in the complex DSS other-regarding puzzle.

2. DSS Other-Regardingness towards Stakeholders External to the WTO

The seeds of this part of the DSS other-regarding puzzle can be traced, as in other instances discussed above, to *US-Gasoline*, where the AB stated rather clearly that the WTO agreements are “not to be read in clinical isolation from public international law.”¹⁵⁸ Drawing on DSU Article 3.2, which requires WTO adjudicators to clarify the WTO agreements “in accordance with customary rules of interpretation of public international

¹⁵⁶ Alec Stone Sweet & Thomas L. Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J.L. & CT. 61, 62 (2013).

¹⁵⁷ Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596 (2007).

¹⁵⁸ *US-Gasoline*, *supra* note 37, at 17.

law,” the AB seized the opportunity in its very first case to assert that the WTO is firmly embedded in general international law.¹⁵⁹ Hence, in contrast to the inward-looking, trade-focused approach of the WTO’s predecessor, the GATT, and its tradition of seclusion from general international law, the AB confirmed “the openness” of the WTO regime towards other parts of the international legal system,¹⁶⁰ laying the grounds for possible consideration of the interests of stakeholders and institutions outside the WTO.

In the immediate cases that followed, the AB took several complementary jurisprudential moves that could so enable better accommodation of the interests of stakeholders beyond the trade circles. In the first WTO intellectual property dispute, known as *India-Patents*, the AB “rejected the pro-liberalizing doctrine that WTO commitments should be read in light of the legitimate or reasonable expectations of those seeking the benefit of liberalizing disciplines”¹⁶¹ (such as exporters or private right-holders).¹⁶² No less important, in *Japan-Alcoholic beverages* the AB infused a measure of “flexibility” into the interpretation of the WTO agreements, which could ensure their adaptability to changing circumstances and contemporary concerns. Thus, the AB stated:

WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind.¹⁶³

It was in *US-Shrimp* that the AB then moved to draw on these jurisprudential advances to introduce a legal framework more accountable to stakeholders and concerns external to the trading system. Departing from the textual interpretation generally associated with its jurisprudence, on this occasion the AB chose to pursue a teleological “evolutionary” interpretation of the term “exhaustible natural resources” in GATT Article XX(g), in light of “modern” international environmental conventions and the goal of sustainable development enshrined in the preamble of the WTO agreement.¹⁶⁴ Following this interpretative approach, Article XX(g) was consequently read in a broad, environment-friendly manner, as covering not only finite natural resources (e.g., minerals), as suggested by the complainants based on the original intent and drafting history of the GATT, but also living natural resources, such as sea turtles,

¹⁵⁹ Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT’L L. 483, 492 (2006).

¹⁶⁰ *Id.* at 510.

¹⁶¹ Howse, *supra* note 54, at 33.

¹⁶² Appellate Body Report, *India–Patents for Pharmaceutical and Agricultural Chemical Products*, paras. 33–48, WT/DS50/AB/R (Dec. 19, 1997).

¹⁶³ *Japan–Alcoholic Beverages*, *supra* note 150, at 31.

¹⁶⁴ *US–Shrimp*, *supra* note 42, paras. 129–134.

which the contested U.S. regulation sought to protect.¹⁶⁵ Hence, as opposed to originalist interpretation that would have privileged “the supposed intentions and expectations of a fairly narrow ‘interpretive community’... of... treaty negotiators,”¹⁶⁶ the flexible interpretation employed by the AB based on evolving international law allowed it to consider the expectations of wider consistencies in the international community as they have developed over time, since the drafting of GATT 1947.

When it turned to Article XX chapeau in *US-Shrimp*, the AB took a similar other-regarding stance towards stakeholders and values traditionally considered to be external to the GATT/WTO. Following the seeds planted in *EC-Hormones*—where it had been stated that “merely characterizing a treaty provision as an ‘exception’ does not by itself justify a ‘stricter’ or ‘narrower’ interpretation of that provision”¹⁶⁷—in its analysis of the chapeau, the AB framed the relationship between the WTO’s trade rules and the non-trade policy exceptions of Article XX in terms of “balance.” Thus, through the balancing act discussed earlier, “between the right of a Member to invoke an exception under Article XX and the rights” of other WTO members under the substantive GATT provisions,¹⁶⁸ the AB not only sought an equilibrium between domestic and foreign interests, as elaborated in Part III. At the same time, as Van den Bossche and Zdouc underscore, it also searched for “the appropriate *line of equilibrium* between, on the one hand, the right of Members to adopt... trade-restrictive... measures that pursue certain legitimate societal values... and, on the other hand, the right of other Members to trade.”¹⁶⁹

While in searching for this balance, as seen in Part III, the AB strictly reviewed the design and application of members’ regulatory measures under Article XX chapeau (thereby seeking to hold members more accountable to foreigners affected by their regulations), the AB followed a rather expansive approach in interpreting the specific policy exceptions under Article XX, thereby seeking to manifest its own accountability to regulating members and stakeholders outside the trade community in the pursuit of non-trade policy goals. For example, in line with the expansive reading of the environmental exception in *US-Shrimp*, the AB broadly construed the public morals exception in GATT Article XX(a) and GATS Article XIV(a),¹⁷⁰ finding it to

¹⁶⁵ *Id.* para. 131.

¹⁶⁶ Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 35, 57 (Joseph. H.H. Weiler ed., 2000).

¹⁶⁷ Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, para. 104, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter: *EC-Hormones*].

¹⁶⁸ *US-Shrimp*, *supra* note 42, para. 159.

¹⁶⁹ VAN DEN BOSSCHE & ZDOUC, *supra* note 33, at 574.

¹⁷⁰ Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products*, 48 *GEO. WASH. INT’L L. REV.* 81 (2015).

cover trade-restrictive measures relating to betting services in *US-Gambling*,¹⁷¹ censorship of films in *China-Publications*,¹⁷² and animal welfare in *EC-Seals*.¹⁷³

This broad interpretative approach, manifesting respect for members' regulatory choices and accounting for the non-trade interests of external stakeholders, was also envisaged in AB jurisprudence on the necessity test enshrined in several exceptions in GATT Article XX and GATS Article XIV. Instead of the strict "least trade-restrictive measure" test of the old GATT, under which a measure had to be indispensable to be considered "necessary," the AB took several moves to tone down the necessity requirement and thereby allow national regulators and the general public greater policy space for the pursuit of non-trade objectives. Thus, in *Brazil-Tyres* the AB stated that for a member to make a *prima facie* case that its measure is "necessary," it only needs to show that the measure makes a 'material contribution' to the achievement of its non-trade objective.¹⁷⁴ Likewise, while the AB noted that a regulatory measure may be considered "necessary" only if no alternative "less trade-restrictive measure" is available, in *EC-Seal Products* it reiterated once again that in order to qualify as a "genuine alternative," a "proposed measure... should preserve" for a regulating member "its right to achieve the desired level of protection" of health or the environment that it considers appropriate in a given situation.¹⁷⁵

These pronouncements of the AB under the GATT/GATS general exceptions clause illustrate, in turn, its evolving approach, to use the words of the former AB Member, George Abi-Saab, towards greater "openness" to "other major values or concerns of the international community."¹⁷⁶ This other-regarding approach, incrementally penetrating also to the panel level,¹⁷⁷ reflects a fundamental equilibrium between the inherent right of states to regulate in the pursuit of noncommercial values, and the limits on the use of this right embedded in their WTO obligations.¹⁷⁸ According to this judicial philosophy, as Howse has put it:

One cannot presume a broad meaning to an obligation and/or that exceptions are narrow. The kind of equilibrium to be preserved in interpretation is to be ascertained through the holistic view of the interaction of obligations and exceptions in the WTO system,

¹⁷¹ *US-Gambling*, *supra* note 56.

¹⁷² *China-Publications*, *supra* note 56.

¹⁷³ *EC-Seal Products*, *supra* note 45.

¹⁷⁴ *Brazil-Tyres*, *supra* note 56, paras. 150–151.

¹⁷⁵ *EC-Seals*, *supra* note 45, para. 5.261. *See also* *Brazil-Tyres*, *supra* note 56, para. 178.

¹⁷⁶ Georges Abi-Saab, *The Normalization of International Adjudication: Convergence and Divergencies*, 43 N.Y.U. J. INT'L L. & POL. 1, 14 (2010).

¹⁷⁷ Sivan Shlomo Agon, *Clearing the Smoke: The Legitimation of Judicial Power at the WTO*, 49 J. WORLD TRADE 539, 579–580 (2015).

¹⁷⁸ Howse, *supra* note 54, at 44.

beginning from the notion of the system as a set of fixed, bargained constraints on an inherent plenary power to regulate.¹⁷⁹

Significantly, the same balance between trade and other societal values identified in the context of the GATT/GATS general exception clause, accounting for the interests of constituencies internal and external to the WTO, was sought by the AB also when turning to WTO agreements that lack a comparable derogation clause, such as the TBT Agreement or the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).¹⁸⁰ Illustrative in this regard are the SPS disputes of *EC-Hormones* and *US-Continued Suspension*. In these consecutive cases concerning the EU import ban on hormone-fed beef, the AB first generally pointed to the need to maintain “the delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.”¹⁸¹ Thereafter, in its interpretation of specific SPS provisions, the AB tried to devise a more accommodating framework for the discussion of the competing trade and health values at stake, allowing states to base their trade-restrictive SPS measures on non-mainstream scientific opinion,¹⁸² and to meet a rather deferential threshold in adopting provisional SPS measures.¹⁸³

In later jurisprudence under the TBT Agreement, the AB went even farther in sustaining the balance between societal values internal and external to the WTO regime. Leading in this respect is the case of *US-Clove Cigarettes*, where the AB, based on a teleological account of the preamble of the TBT Agreement, read the object and purpose of this agreement as “to strike a balance between... the objective of trade liberalization and... Members’ right to regulate” for non-trade values.¹⁸⁴ This balance, the AB stressed, “is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX.”¹⁸⁵ Turning then to infusing specific content into this balance, the AB introduced a sort of exception equivalent to GATT Article XX to the national treatment rule in TBT Article 2.1, by reading into it the new concept of “legitimate regulatory distinction.”¹⁸⁶ Following this interpretative move, in turn, a member’s technical regulation found to accord less favorable treatment to like imported products could nevertheless be found TBT-consistent, if such detrimental

¹⁷⁹ *Id.* at 45.

¹⁸⁰ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

¹⁸¹ *EC-Hormones*, *supra* note 167, para. 177.

¹⁸² *Id.* para. 194.

¹⁸³ *US-Continued Suspension*, *supra* note 132, paras. 683–726; Sungjoon Cho, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, 103 AJIL 299, 303 (2009).

¹⁸⁴ *US-Clove Cigarettes*, *supra* note 58, paras. 94–95, 174.

¹⁸⁵ *Id.* para. 96.

¹⁸⁶ Shlomo Agon, *supra* note 177, at 570–574.

impact “stems exclusively from legitimate regulatory distinctions.”¹⁸⁷ By pursuing this interpretative route, then, the AB effectively offset the original rigidity of the TBT Agreement in the absence of an explicit exceptions clause, leaving domestic regulations that genuinely serve non-protectionist policy objectives outside the bounds of TBT Article 2.1.

Finally, in the recent *Canada-Renewable Energy* dispute a somewhat similar interpretative move was taken by the AB in an effort to account for the international community’s pressing concern of mitigating climate change.¹⁸⁸ At issue here was a Canadian measure aimed at incentivizing the production of renewable energy by providing a financial contribution to producers of electricity from wind and solar generators. These payments—a known instrument of government support in renewable energy markets given the higher cost of generating such energy—were claimed to be a prohibited subsidy. Yet if indeed such payments were to be considered a “subsidy,” no public policy defense could have absolved their infringement of the subsidies disciplines, since the Agreement on Subsidies and Countervailing Measures (SCM Agreement), like the TBT Agreement, does not provide for a general exceptions clause.

In this state of affairs, where “[e]ven the ‘cleanest’ of green measures would find no safe harbour in facing the SCM Agreement as currently formulated,”¹⁸⁹ the AB, looking beyond the WTO trade framework, sought once again to relax the rigidity of the WTO treaty in a manner that may allow regulating governments and, in a sense, the broader international community more latitude in the pursuit of clean energy policies. For this purpose, the AB proceeded to qualify the notion of “benefit”—one of the requirements in the WTO definition of subsidy. In this respect, the AB observed that while government intervention in support of certain players in *existing* markets may amount to a subsidy, a situation where a government (simply) creates a *new* market that would not otherwise exist (as is often the case in markets of renewables) is not “in and of itself” a subsidy.¹⁹⁰

Through this interpretation, as Rubini has noted, the AB “managed to take certain forms of subsidization in the clean energy sector outside of subsidy control.”¹⁹¹ While some commentators have criticized this interpretative exercise,¹⁹² it illustrates the attempt of the AB to bridge the gap

¹⁸⁷ *US-Clove Cigarettes*, *supra* note 58, para. 175.

¹⁸⁸ Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector; Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R; WT/DS426/AB/R (May 6, 2013) [hereinafter *Canada-Renewable Energy*].

¹⁸⁹ Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17 J. INT’L ECON. L. 11, 28 (2014).

¹⁹⁰ *Canada-Renewable Energy*, *supra* note 188, para. 188.

¹⁹¹ Luca Rubini, “*The Wide and the Narrow Gate*”: *Benchmarking in the SCM Agreement after the Canada-Renewable Energy/FIT Ruling*, 14 WORLD TRADE REV. 211, 212 (2015).

¹⁹² *Id.*; Cosbey and Mavroidis, *supra* note 189.

of the missing exceptions clause in the SCM Agreement, introducing legitimate policy considerations into the determination of “benefit”¹⁹³ that may shelter certain measures of governmental support for environmental purposes from the WTO subsidies disciplines.¹⁹⁴

Alongside such interpretative moves, it should finally be noted, at times the AB’s other-regarding stance towards stakeholders external to the WTO and the non-trade values associated therewith have also been manifested in the plain rhetoric it used. One notable example of such may be seen in *US-Clove Cigarettes*, where the AB, after ultimately declaring the U.S. anti-tobacco regulation inconsistent with TBT Article 2.1, closed its ruling with the following explanatory note:

In reaching this conclusion, we wish to clarify the implications of our decision. We do not consider that the TBT Agreement... is to be interpreted as preventing Members from devising and implementing public health policies generally, and tobacco-control policies in particular.... Moreover, we recognize the importance of Members’ efforts in the World Health Organization on tobacco control.

While we have upheld the Panel’s finding that the specific measure at issue... is inconsistent with Article 2.1... we are not saying that a Member cannot adopt measures to pursue legitimate health objectives such as curbing and preventing youth smoking. In particular, we are not saying that the United States cannot ban clove cigarettes; however, if it chooses to do so, this has to be done consistently with the TBT Agreement....¹⁹⁵

These “explanatory paragraphs,”¹⁹⁶ joined by similar statements of the panel,¹⁹⁷ represent an additional, rather overt means by which WTO adjudicators have sought to show their accountability to stakeholders outside the trade circles, among them national regulators, civil society actors, the general public, and the World Health Organization—another international organization with interests at stake.

This is the place to note, however, that this other-regarding approach stands in sharp contrast to the rather non-accommodating manner in which the WTO DSS has addressed one particular segment of international law—

¹⁹³ Steve Charnovitz & Carolyn Fischer, *Canada–Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, 14 *WORLD TRADE REV.* 177 (2015). In its formal statements, however, the AB claimed, of course, that it may not introduce legitimate policy considerations into the determination of benefit. See *Canada–Renewable Energy*, *supra* note 188, para. 5.185.

¹⁹⁴ Cosbey & Mavroidis, *supra* note 189, at 28.

¹⁹⁵ *US-Clove Cigarettes*, *supra* note 58, paras. 235–236. Similar language was used in several other cases involving non-trade concerns. See *US-Gasoline*, *supra* note 37, at 29–30; *US-Shrimp*, *supra* note 42, paras. 185–186; *China-Publications*, *supra* note 56, para. 335.

¹⁹⁶ On these “explanatory paragraphs” and the various stakeholders to which they were communicated, see Shlomo Agon, *supra* note 177, at 581–587.

¹⁹⁷ *Id.* at 577–580.

the expanding field of regional and bilateral free trade agreements (FTAs), in the framework of which trading partners seeking closer economic integration offer each other more favorable treatment in trade matters than that offered to non-parties. While such agreements may entail deviations from members' WTO commitments, particularly the MFN obligation that forbids them to treat their trading partners differently, FTAs are contemplated and accepted by WTO law subject to the conditions set forth in GATT Article XXIV and GATS Article V.

Despite the substantive proximity of the WTO and FTAs, and perhaps because of such proximity in a reality of enduring stalemate in the WTO legislative arm, WTO adjudicators have largely manifested a stance of disregard towards such international trade arrangements, maintaining a “‘clinical isolation’ from these other trade fora” and their respective dispute settlement systems.¹⁹⁸ Thus, in cases such as *Argentina-Poultry*,¹⁹⁹ *Mexico-Soft Drinks*,²⁰⁰ and *Brazil-Tyres*,²⁰¹ panels and the AB have demonstrated their unwillingness to engage in a discourse with other international trade dispute settlement systems, defer to their judgments, suspend proceedings pending the outcome of a related dispute, or otherwise apply comity towards such international fora with overlapping jurisdiction on trade matters.²⁰² Rather than pay any regard to such fora, WTO adjudicating bodies have continually asserted the right to a WTO judicial review that cannot be waived by an FTA, sustaining the authority and perhaps also the superiority of the WTO dispute settlement processes over FTAs' processes.²⁰³

In the same spirit of seclusion, the AB substantively limited the ability of WTO members to derogate from their WTO obligations through the conclusion of FTAs.²⁰⁴ In *Turkey-Textiles*, for example, the AB narrowly construed the exception for FTAs in GATT Article XXIV, holding that while this provision “may be invoked as a... ‘defence’” for measures that would otherwise be WTO-inconsistent,²⁰⁵ this defense “can only be employed in limited circumstance.”²⁰⁶ Quite differently, then, from the expansive interpretative approach taken towards the policy exceptions enshrined in

¹⁹⁸ Howse, *supra* note 54, at 73.

¹⁹⁹ Panel Report, *Argentina-Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R (Apr. 22, 2003).

²⁰⁰ Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and other Beverages*, WT/DS308/AB/R (Mar. 6, 2006).

²⁰¹ *Brazil-Tyres*, *supra* note 56.

²⁰² Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19 EUR. J. INT'L L. 571, 576–579 (2008); Howse, *supra* note 54, at 73–74.

²⁰³ Joanna Langille, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out through Regional Trade Agreements*, 86 N.Y.U. L. REV. 1482, 1513, 1515 (2011).

²⁰⁴ *Id.* 1508–1510.

²⁰⁵ Appellate Body Report, *Turkey-Restriction on Imports of Textile and Clothing Products*, para. 45, WT/DS34/AB/R (Oct. 22, 1999).

²⁰⁶ Langille, *supra* note 203, at 1508–1509.

GATT Article XX, the AB narrowed the operative scope of the exception for FTAs in GATT Article XXIV. In the latest case of *Peru-Agricultural Products*, the AB reaffirmed this narrow interpretation, stressing that GATT Article XXIV is aimed at facilitating trade and closer integration, and not to provide “a broad defense for measures in FTAs that roll back on Members’ rights and obligations under the WTO agreements.”²⁰⁷

Yet in this recent case, the AB went farther in interpreting WTO rules in clinical isolation from FTAs, clarifying that the ability of members to contract out of their WTO obligations through FTAs is not governed by the general conflict rules of public international law, but by the terms of WTO law itself.²⁰⁸ Thus, the AB observed that Article 41 of the Vienna Convention, allowing two parties to a multilateral treaty to modify the treaty as between themselves, may not serve as the basis for two WTO members to modify WTO rules by means of an FTA, and to permit among themselves an otherwise WTO-inconsistent measure. The WTO, the AB stressed, contains its own provisions for amendments, waivers, as well as exceptions for FTAs, which prevail over Article 41.²⁰⁹ According to the AB, then, as far as FTAs are concerned, “the WTO is largely a self-contained regime,”²¹⁰ and not much interest is to be found on its part “in treaty interpretations that could accommodate or facilitate harmonious co-existence with regional regimes.”²¹¹ In the eyes of the AB, so it seems, any other approach would go against its normative duty “to protect the integrity and coherence of the WTO’s legal system.”²¹²

Thus, while the AB has quite often looked to the outside in its jurisprudence, accounting for various external stakeholders and integrating public international law concerns over the environment, public health or animal welfare into its interpretation of WTO law, to its closest strangers—FTAs operating alongside the WTO—it has shown little but disregard.

B. DSS Other-Regardingness: The Procedural Dimension

With the exception of FTAs, the attempts of the DSS, under the guidance of the AB, to be more accountable to affected others have manifested themselves not only on the substantive front, in the plurality of internal and external stakeholders and interests explicitly and implicitly taken into account in DSS rulings. Rather, as in the previous part of the article, this substantive other-regarding dimension has been intertwined with a procedural

²⁰⁷ Appellate Body Report, *Peru-Additional Duty on Imports of Certain Agricultural Products*, para. 5.116, WT/DS457/AB/R (July 20, 2015) (hereinafter *Peru-Agricultural Products*).

²⁰⁸ Tietje & Lang, *supra* note 126.

²⁰⁹ *Peru-Agricultural Products*, *supra* note 207, paras. 511–512.

²¹⁰ Gregory Shaffer & Alan L. Winters, *FTAs as Applicable Law in WTO Dispute Settlement: Was the Appellate Body Wrong in Peru-Additional Duty?* 26 (UC Irvine School of Law, Research Paper No. 2016-43, 2016), at <http://ssrn.com/abstract=2832910>.

²¹¹ Howse, *supra* note 54, at 75.

²¹² Tietje & Lang, *supra* note 126..

one, along which WTO adjudicators have sought to expand participation in WTO proceedings of relevant others from within and outside the organization, and to establish judicial procedures that may facilitate the delivery of better-informed other-regarding decisions.

Judicial procedures determine who makes use of the court, who frames the arguments, and which voices are to be heard about how the substantive law is to be interpreted, or how the balance between competing interests is to be struck.²¹³ As von Bogdandy and Venzke note, “[t]he procedural law of international judicial institutions is largely a product of their own making.... International courts rule over procedures.”²¹⁴ This, as Sorel further highlights, is an important source of independence for an international court, “and one of the ways in which such a creature may escape its makers.”²¹⁵

WTO adjudicating bodies, as shown below, have drawn on this source of independence from an early stage, seeking to ensure the representation in WTO disputes of various others, including some often marginalized others (e.g., developing countries), and to improve the quality and quantity of information and evidence available to the adjudicators from various sources, among them private legal counsel, third states, and non-state actors.²¹⁶ Some of these procedural moves initially attracted criticism from WTO members, in part because they entailed a departure from past GATT practices.²¹⁷ Yet these procedural rules, as implied in the reasoning brought in their support, have enabled the DSS to acquaint itself with voices, facts and arguments beyond those raised by the disputants, and thereby to assess the aggregate benefit of any potential legal outcome, reduce the probability of rendering decisions that disregard the interests of non-litigants, and possibly promote broader systemic interests.

Prominent procedural strides in this other-regarding direction were taken already in the early *EC-Bananas*, where WTO adjudicators significantly loosened the conditions members must meet to file a WTO complaint. Thus, affirming the U.S. standing to act as a co-complainant in this case though it was not even a banana exporter, both the AB and panel reasoned that no explicit DSU provision requires a member to have a “legal interest” in order to have recourse to the DSS.²¹⁸ In fact, they observed, the DSU language suggests that members have broad discretion in deciding whether to file a

²¹³ Nollkamper, *supra* note 19, at 781–782.

²¹⁴ Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 EUR. J. INT’L L. 7, 25 (2012).

²¹⁵ Jean-Marc Sorel, *International Courts and Tribunals, Procedure*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 1 (R. Wolfram ed., 2007).

²¹⁶ James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 WORLD TRADE REV. 65, 83 (2003).

²¹⁷ *Id.*

²¹⁸ *EC-Bananas*, *supra* note 133, para. 132; Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, para. 7.49, WT/DS27/R/USA (May 22, 1997) [hereinafter *EC-Bananas* Panel Report].

complaint, and “whether such action would be ‘fruitful’.”²¹⁹ Yet in support of their decision, WTO adjudicators did not simply rely on the DSU text, but further alluded to the interdependent reality in which WTO members and WTO rules are embedded, thereby highlighting the other-regarding rationale underlying their broad conception of standing. Thus, they observed, “with the increased interdependence of the global economy... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.”²²⁰

Through this broad reading of standing, reinforced in later jurisprudence,²²¹ the AB and panels have consequently enabled a wide range of states—other than those directly affected by a given violation—to bring claims for alleged breaches of WTO law before the DSS. Lacking centralized enforcement power, WTO adjudicators have essentially empowered member states “to act as agents of the common interest” in compliance with WTO law,²²² and increased the DSS’s ability to promote the shared goals and public goods enshrined in the WTO agreements.

Second, in *EC-Bananas* the AB moved further in opening up the WTO judicial process to relevant others by approving the request of Saint Lucia—one of the developing countries acting as third parties in the case—to be represented by private legal counsel.²²³ Departing from the long-standing GATT practice, where only government officials had provided legal representation, the AB reasoned here as well that no WTO provision prevents sovereign member states from determining the composition of their delegations in dispute settlement proceedings.²²⁴ Alluding then to basic notions of fairness, the AB added that “representation by counsel of a Government’s own choice” may be of particular significance for developing countries, in order “to enable them to participate fully in dispute settlement proceedings.”²²⁵ Finally, highlighting the DSS’s systemic interest in private counsel representation, the AB noted that given its mandate “to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel” in the appellate process.²²⁶

In allowing private counsel representation, as these justifications suggest, the AB looked out for various others beyond the parties to a bilateral dispute. First, it sought to protect the systemic interest of the DSS itself, by improving the quality of legal claims to inform its judgments. Second, it sought to address broader concerns over inequalities among WTO members, by

²¹⁹ *EC-Bananas*, *supra* note 133, para. 135.

²²⁰ *Id.* para. 136; *EC-Bananas* Panel Report, *supra* note 218, para. 7.50.

²²¹ VAN DEN BOSSCHE & ZDOUC, *supra* note 33, at 176.

²²² Tietje & Lang, *supra* note 126.

²²³ *EC-Bananas*, *supra* note 133, para. 10.

²²⁴ *Id.*

²²⁵ *Id.* para. 12.

²²⁶ *Id.*

enhancing the “sophistication of the legal arguments made by governments that otherwise have low levels of internal legal capacity,” and by making it “more feasible for them to participate in the first place.”²²⁷

Attempts to shape judicial procedures more accountable to relevant others within the WTO setting, as well as to systemic WTO interests, can also be discerned in the manner in which the AB “has fostered the active participation of third parties” in WTO proceedings.²²⁸ In drawing up its Working Procedures, the AB maximized the rights of interested third participants in the appellate process, granting them an opportunity to be heard, both orally and in writing, and allowing them full access to all written submissions and oral hearings.²²⁹ In a similar vein, the AB worked to enhance the procedural rights of third parties outside the appellate process, for example, by facilitating their access to the disputants’ written submissions in compliance panel proceedings under DSU Article 21.5.²³⁰ Such access, the AB reasoned, would benefit not only the members acting as third parties, by exposing them to information essential for making meaningful contributions to the dispute; it would also allow WTO panels themselves to “benefit more from the contributions made by third parties,” and thereby be better able to “fully” “take into account the interests” of other members in disputes coming before them.²³¹

A similar tendency to extend third parties’ participation has been exhibited by WTO panels. Thus, whereas the DSU rights for third parties in panel proceedings are somewhat limited, in various cases, among them *EC-Hormones*, *EC-Tariff Preferences*, *EC-Export Subsidies on Sugar*, and *EC-Bananas*, panels found it to be within their discretionary authority to grant third parties “enhanced” participatory rights.²³² In justifying the grant of such rights, the panel in *EC-Bananas*, for example, alluded to the major interest of the third parties that are developing countries in the outcome of the case, stressing the “very large” “economic effect” of the contested EU banana regime on those countries.²³³

This statement of the panel, like the previous statements of the AB, illuminate in turn the other-regarding judicial philosophy underlying the consistent expansion of third-party rights in the DSS, consequently exercised in more than 60 percent of WTO disputes.²³⁴ Third-party participation, as these statements connote, provides the DSS with evidence and arguments not

²²⁷ Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 L. & CONTEMP. PROBS. 237, 252 (2016).

²²⁸ *US-Continued Suspension*, *supra* note 132, Annex IV, para. 9.

²²⁹ See *Working Procedures for Appellate Review*, WT/AB/WP/6 (Aug. 16, 2010).

²³⁰ Appellate Body Report, *United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Article 21.5 of the DSU by the European Communities*, para. 251, WT/DS108/AB/RW (Jan. 14, 2002).

²³¹ *Id.* para. 249.

²³² See VAN DEN BOSSCHE & ZDOUC, *supra* note 33, at 280.

²³³ *EC-Bananas* Panel Report, *supra* note 218, para. 7.8.

²³⁴ Leslie Johns & Krzysztof J. Pelc, *Who Gets to Be in the Room? Manipulating Participation in WTO Disputes*, 68 INT’L ORG. 663, 666 (2014).

necessarily reflected in the submissions of the disputants, thereby allowing the adjudicators to better gauge the interests at stake and the consequences of their ruling, which often transcend the immediate effects on the litigants. Furthermore, engagement by third parties provides a mechanism whereby interested states may prevent litigants from reaching bilateral settlements behind closed doors that discriminate against other WTO members.²³⁵ Indeed, recent scholarship has shown that third-party participation significantly reduces discriminatory deals between disputants to the detriment of the broader WTO membership.²³⁶ Finally, from a more systemic viewpoint, increased third-party access offers non-litigating members with “a systemic interest in the interpretation” of the WTO agreements²³⁷ an opportunity to contribute to the development of WTO law,²³⁸ and serves the interest of WTO adjudicators themselves in obtaining the views of governments beyond the litigants when confronting general issues concerning the operation of the WTO agreements and the bodies designed to enforce them.²³⁹ Taken to signal the preferences of the broader WTO community, such views, as indicated earlier, are substantively considered by panels and the AB, which on important systemic questions has been known to press “third participants for their views on issues that were not even addressed in their written submissions.”²⁴⁰ Such was the case, for instance, in the deliberations held by the AB before first opening its hearings to the public in *US-Continued Suspension*.²⁴¹

Thus, in a move aimed at further bolstering the transparency and accessibility of WTO disputes to pertinent strangers, in *US-Continued Suspension* the AB (and panel) found a basis for opening up the hearings to the public upon the parties’ request,²⁴² thereby bringing to an end “the consistent practice of sixty years of GATT/WTO dispute settlement hearings behind closed doors.”²⁴³ While DSU Article 17.10 states that the appellate proceedings “shall be confidential,” the AB circumvented this confidentiality requirement by observing that this requirement is “relative” and “has its limits,” and that it is within the AB’s authority (*compétence de la compétence*) to lift confidentiality at the request of the participants.²⁴⁴

The open hearings procedure, seen in various WTO disputes since, relaxed further the confidential bilateral structure of the DSS, and exposed—like the procedural advances mentioned above—the adjudicators’

²³⁵ Busch & Reinhardt, *supra* note 128, at 446–447, 475.

²³⁶ See Jeffery Kucik & Krzysztof J. Pelc, *Measuring the Cost of Privacy: A Look at the Distributional Effects of Private Bargaining*, 46 BRITISH J. POL. SCI. 861 (2015).

²³⁷ *US-Continued Suspension*, *supra* note 132, Annex IV, para. 9.

²³⁸ Johns & Pelc, *supra* note 234, at 665.

²³⁹ Smith, *supra* note 216, at 85–87.

²⁴⁰ *Id.* at 85.

²⁴¹ *US-Continued Suspension*, *supra* note 132, Annex IV, para. 1.

²⁴² *Id.* para. 11.

²⁴³ Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, 11 J. INT’L ECON. L. 1021, 1021–1022 (2008).

²⁴⁴ *US-Continued Suspension*, *supra* note 132, Annex IV, paras. 5–7.

understanding of the public aspects of WTO proceedings and of the need to account for various others beyond the specific case. By allowing public hearings, in turn, the DSS enabled relevant others from within the WTO (members not parties or third parties to the dispute), and from outside the organization (e.g., NGOs, journalists, and individuals), to gain a foothold in WTO proceedings, acquire knowledge they were previously deprived of, and follow disputes more closely than they otherwise could.²⁴⁵

Finally, the AB has sought to elevate the standing of such strangers, and of the non-trade interests they often represent, also through its precedential decisions on the admissibility of *amicus curiae* submissions in WTO disputes. In *US-Shrimp*, in a rather “‘acrobatic’ interpretation” of DSU Article 13,²⁴⁶ the AB overturned the panel’s decision to reject unrequested *amicus curia* briefs from nongovernmental sources.²⁴⁷ In its ruling, the AB explained that the power to accept unsolicited submissions is found in the DSU’s grant to a panel of “extensive authority... to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms... applicable to such facts.”²⁴⁸ Despite the criticism launched at the ruling by some WTO members, which saw no role for actors other than member states in the DSS, in the subsequent *US-Steel* dispute the AB asserted its own jurisdiction to receive *amicus* briefs, similarly pointing to its “broad authority to adopt procedural rules” that do not conflict with the DSU, as well as its authority to consider any information it believes “is pertinent and useful.”²⁴⁹

In so permitting *amicus curiae* submissions, giving voice to relevant others without standing in the DSS (e.g., NGOs, individuals, and companies), the AB further worked to improve the information available to WTO adjudicators. Like other procedural mechanisms elaborated and utilized by the AB and panels, such as third-party participation or consultations with scientific experts,²⁵⁰ *amicus curiae* briefs offer access to facts and arguments other than those submitted by the parties, which broaden the adjudicators’

²⁴⁵ Shaffer, Elsig & Puig, *supra* note 227, at 255; Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation: A Report Card on WTO Transparency Mechanisms*, 4 TRADE L. & DEV. 19, 36–39 (2012).

²⁴⁶ Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN 317, 319 (Armin von Bogdandy, Petros C. Mavroidis & Yves Mény eds., 2002).

²⁴⁷ *US-Shrimp* AB, *supra* note 42, paras. 104–110.

²⁴⁸ *Id.* para. 106.

²⁴⁹ Appellate Body Report, *United States–Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, para. 39, WT/DS138/AB/R (May 10, 2000).

²⁵⁰ On expert consultation in WTO proceedings see Daniel Ari Baker et al., *When Science Meets Law: The Rule of Law in the Development of the Panel’s Expert Consultation Process*, in A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM 434 (Gabrielle Marceau ed., 2015); Joost Pauwelyn, *The Use of Experts in WTO Dispute Settlement*, 51 INT’L & COMP. L. Q. 51.02 325 (2002).

perspective and enhance their ability to look past the parties' limited interests, particularly when broader community values (e.g., health or the environment) are at stake.

Yet perhaps in response to the criticism leveled at the AB's *amicus* decisions by some WTO members, which reached its apex in *EC-Asbestos*,²⁵¹ and the continuing divide within the WTO membership on the matter, in later cases the AB has been rather cautious in its approach to *amicus curiae* submissions.²⁵² On the one hand, the AB has never repudiated its power to accept *amicus* briefs, and its continuing acceptance of such briefs attests to its support of this practice.²⁵³ Also, while the AB has never formally referenced *amicus* briefs in its rulings, commentators indicate that "the AB reads them and thus is subject to the persuasive force they might have."²⁵⁴ On the other hand, given the opacity that characterizes the AB's treatment of *amicus* submissions, and frequent statements that it did not find it "necessary" to rely on them when rendering its rulings, it is hard to get a clear view as to how *amicus* briefs actually influence the outcomes of WTO disputes.²⁵⁵ This ultimate duality in the AB's approach to *amicus curiae* briefs, so it seems, reflects its own fragile standing as an international court when trying to accommodate voices internal and external to its regime, illustrating the constraints that such an adjudicating institution may face in its other-regarding endeavors.

V. ASSESSMENT: THE WTO DSS OTHER-REGARDING THREADS WOVEN TOGETHER

A. *The Emergence of an Other-Regarding Judicial Philosophy*

As noted by the former AB Member, George Abi-Saab, "the judicial policy of the Appellate Body on interpretation, appears, at first glance, as belonging to the strict constructionist school that interprets texts literally and narrowly.... [T]here is a great emphasis on words," as well as a "tendency to stick the reasoning very closely to, and keep it in constant contact with, the words...."²⁵⁶ "Faced with this obsession with words," Abi-Saab then writes:

[T]he man from Mars may ask, "Where is the reasoning in all that?"
Indeed, the reasoning seems to disappear; but, in fact, it is there,

²⁵¹ See General Council Minutes, WT/GC/M/60, 22 November 2000.

²⁵² Maria Perez-Esteve, *WTO Rules and Practices for Transparency and Engagement with Civil Society Organizations* 23 (WTO Staff, Working Paper ERSD-2012-14, 2012), at https://www.wto.org/english/res_e/reser_e/ersd201214_e.htm.

²⁵³ Shaffer, Elsig & Puig, *supra* note 227, at 255.

²⁵⁴ *Id.*

²⁵⁵ Marceau & Hurley, *supra* note 245, at 33–34.

²⁵⁶ George Abi-Saab, *The Appellate Body and Treaty Interpretation*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 453, 461 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006).

though camouflaged in this seemingly wild-word (rather than—goose) chase. The question remains: if the reasoning is there, is it not better to shed the camouflage?²⁵⁷

In that spirit, the analysis in Parts III and VI of this article has sought to shed the camouflage over one critical aspect of WTO legal reasoning, throwing light on the various other-regarding considerations underlying it, and which have permeated many of the legal interpretations developed by the DSS during the first two decades of its existence. In the shadow of textualism and less often recourse to teleological interpretations, from the very first case of *US-Gasoline*, a steady body of jurisprudence has emerged, so this analysis suggests, infused by a salient other-regarding judicial philosophy, seeking to bring the interests and voice of some closer, some more distant strangers within the confines of member states' obligations under the WTO, and within the bilateral interstate framework of WTO disputes.

This judicial philosophy—as it becomes clearer once the various substantive and procedural DSS other-regarding threads are woven together—is multifaceted and complex, encapsulating the adjudicators' conception both of the duties of sovereigns under WTO law in a reality of global interdependence, as well as of the role and responsibility of the DSS in global trade and judicial governance.

And so, the various other-regarding obligations read into members' commitments under the WTO (unfolded in Part III), reinforcing members' substantive and procedural accountability towards foreign stakeholders, reveal the adjudicators' understanding of the enhanced duties owed by sovereigns to global others—both foreign governments and private actors—affected by states' acts and regulations. By reading WTO commitments as requiring national regulators to take foreign interests into account, to balance such interests against domestic ones, to ensure that the burden imposed on domestic and foreign actors is evenhanded, and that the procedural due process rights of affected strangers are protected, WTO adjudicators have not only manifested their recognition of the changing interconnected economic scene in which states currently exercise their sovereignty; they have also expressed their recognition of the required shift in the conception of sovereigns and their obligations towards others that this reality entails. In that spirit, indeed, already in the early *Japan-Alcoholic Beverages* case, the AB laid down the ground for such a shift to materialize, highlighting the limits imposed on state sovereignty by the various WTO commitments that members have taken upon themselves, and which the DSS has been set out to interpret and enforce. Thus, the AB stated:

The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they

²⁵⁷ *Id.* at 461–462.

expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.²⁵⁸

On this basis, when turning to review members' compliance with their WTO commitments over the years, pouring concrete content into the often open-ended language of the WTO treaty, the DSS, as seen in Part III, has worked so as to guide the exercise of states' discretion in the devise and implementation of their other-affecting policies, to instill other-regarding disciplines into their domestic procedures and administrations, and thereby to hold sovereigns more accountable to the strangers they have increasingly come to affect. Though not always explicitly, then, through its legal interpretations in bilateral disputes, the DSS under the lead of the AB has expressed the view that when it comes to the assessment of states' decisions from a WTO perspective, "[a] domestic decision that affects the condition of foreign actors cannot be deemed legitimate only on the basis that it responds to the considerations of domestic constituencies."²⁵⁹ Rather, accounting for the interests of foreign stakeholders, as well as procedural openness to their voice and arguments, is essential for such domestic decisions to be considered compliant with members' WTO commitments.

Yet alongside this other-regarding trajectory, as seen in Part IV, the adjudication of noncompliance in bilateral WTO disputes has generated a constant stream of cases that the DSS under the AB's lead has used not only in order to enhance the duties of sovereigns towards foreigners, but also to instill other-regarding considerations and procedures into its own conduct vis-à-vis strangers affected by its rulings—i.e., stakeholders and interests beyond those pertaining to the specific dispute laid before the DSS or the WTO edifice in which it is nested.

Thus, within the bilateral paradigm of settling contractual interstate disagreements, both panels and the AB have actively striven to bring the interests of affected others partaking in the global trading system—both third states and private economic operators—into the purview of WTO adjudication. Likewise, from an early stage, and with a view to promoting the WTO's broader community interests, the AB has stressed the need to develop interpretations that meet the legitimate expectations and ascertain the common intentions of not only the disputants, but of WTO members as a whole, also maximizing for this purpose the procedures through which non-disputing members may participate and contribute to WTO judicial proceedings and outcomes.

This practice of settling interstate disputes in ways that reflect the interests of the overarching WTO regime and various parts thereof manifests, in turn, the DSS philosophy that adjudication of bilateral conflicts in an interdependent multilateral setting cannot account for the considerations of the litigants alone, but requires a constant look beyond the member-member

²⁵⁸ *Japan–Alcoholic Beverages*, *supra* note 150, at 14.

²⁵⁹ Ioannidis, *supra* note 6, at 102.

matrix of WTO disputes. More generally, this other-regarding practice illuminates the DSS's conception of the collective aspect of WTO dispute settlement and obligations, and its self-perceived role as a trustee of a wider, integrated international legal regime, rather than merely a resolver of episodic interstate disputes, although the institutional structure in which it operates is clearly bilateral.

Interestingly, as further seen in Part IV, this integrated vision of the WTO legal system and the other-regarding stance attendant thereto has not hindered the AB from simultaneously developing a more accountable approach towards stakeholders and interests external to the WTO, thereby expressing its recognition of the wide policy choices made at the WTO, and the view of the latter as part of a broader international legal construct. Thus, departing from the self-regarding trade-oriented approach previously associated with the GATT/WTO, the AB has sought, *inter alia*, to shape a more deliberative judicial process, reiterated the regulatory discretion reserved to members to pursue noncommercial policy objectives, and read WTO provisions as reflecting a fundamental balance between trade and non-trade concerns even when no policy exception attesting to such a balance has been included in the applicable WTO agreement.

Yet in introducing such other-regarding considerations to the DSS's own discipline, the AB—in the same way as when it imposed other-regarding duties on sovereigns—has often sought to conceal the new law created in the (scant) text of the agreement or its preamble, playing its judicial role in such a way as to scuttle possible assertions of judicial overreach. This, of course, should not come as a surprise. After all, the legal and political system in which the DSS is located does not explicitly recognize its lawmaking function. In fact, it expressly cautions WTO adjudicators against playing such a legislative role,²⁶⁰ and endows them with no explicit mandate to advance global welfare or global justice concerns.²⁶¹

B. The Mutually-Contradictory and Mutually-Reinforcing Relationship of the DSS Other-Regarding Threads

As one might expect, however, the complex DSS other-regarding philosophy, composed of two parallel threads—one relating to the states subject to international judicial scrutiny, the other to the reviewing court itself— exhibits some inner tensions that may render inevitable certain tradeoffs between the two threads. Perhaps most notable in this respect is the tension arising between the DSS's will to hold sovereign states more accountable to foreigners affected by their domestic trade-related regulations (discussed in Part III), and the DSS's will to be itself more accountable to stakeholders outside the WTO and to the non-trade interests they pursue

²⁶⁰ See DSU Arts. 3.2 and 19.2.

²⁶¹ Eyal Benvenisti, *Community Interests in International Adjudication*, in *COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW* (Eyal Benvenisti & Georg Nolte eds., forthcoming 2018, on file with authors).

through domestic regulatory measures (discussed in Part IV). Arguably, the more other-regarding the DSS is towards stakeholders and interests external to the WTO, and, consequently, the less it intervenes in members' non-trade regulations, the less onerous are likely to be the other-regarding obligations its judicial review may yield for members with respect to the foreigners affected by such regulations. And vice versa, the more demanding the duties imposed by the DSS on regulating members towards affected foreigners are, and the stricter its judicial scrutiny over members' policies with cross-border effects, the less room may be left for states in the pursuit of non-trade policy objectives of concern for domestic constituencies and other stakeholders in the international community.

Tensions and tradeoffs can be identified not only between the two parallel threads comprising the DSS's other-regarding philosophy, but also between different facets of the same thread itself. Such is the case with the thread analyzed in Part IV, which encapsulates an inherent tension between, on the one hand, the inward-looking other-regarding efforts of the DSS, seeking to account for various others within the WTO trade circles and promote WTO community-wide interests, and, on the other hand, the DSS's outward-looking other-regarding efforts, seeking to embrace a more systemic vision of "international law" and account for other parts, stakeholders, and values of the fragmented international legal system. As seen in Part IV, this tension has reached its apex in disputes involving FTA-related aspects, where WTO adjudicators, committed to protecting the integrity and coherence of the WTO legal system, have demonstrated considerable disregard towards the international trade arrangements proliferating outside the WTO, in contrast to their generally rather accommodating approach to public international law. Such tensions highlight, in turn, the multiple institutional, political and legal forces that are at work in the exercise of the DSS's other-regarding judicial philosophy, shaping and directing its actual manifestation on the ground.

Still, alongside such tensions, and this is the point to note, the DSS's other-regarding threads share many common, mutually-reinforcing elements. Not only do they both seek to respond to certain fundamental accountability challenges presented by the extended reach of national and international authority in an interconnected world, but they both do so while trying to penetrate the interstate structure in which the DSS is situated. Thus, while states remain the primary actors with whom WTO adjudicators communicate, the latter's rulings along the two other-regarding trajectories reveal a mindful effort to interact not only with states as unitary units, but also with actors within the state (e.g., national regulators or private economic operators), as well as actors at the global level (e.g., other international institutions).

Similarly, the two other-regarding threads disclose the adjudicators' attempt to improve the position of some marginalized others in the WTO setting, such as developing countries and their economic actors. Attempts of this sort may be discerned, for example, along the first other-regarding trajectory, in the manner in which WTO adjudicators have worked in cases such as *US-Shrimp* and *EC-Tariff Preferences* to ensure that stakeholders from developing-country members have effective opportunities to influence decision-making processes in developed countries. Comparable attempts may be identified, in turn, along the second other-regarding trajectory, where WTO adjudicators have sought to enhance the voice and participation of developing countries in WTO proceedings. In part due to the opposition of developing countries, however, the efforts of WTO adjudicators to improve the access and voice of some other marginalized stakeholders to the DSS, particularly NGOs, have been, at least on the surface, less successful.

Another notable element featuring in both threads of DSS other-regardingness is the coupling of each thread's substantive layer with a secondary layer of a procedural nature, which fortifies the former and introduces administrative law principles of participation, transparency, and reason-giving to the interaction of both sovereign states and the DSS with affected strangers. As shown in Part III, the substantive other-regarding obligations read by the DSS into members' WTO commitments have been reinforced by a series of procedural duties, requiring states to account for potentially affected strangers through direct international cooperation or through domestic decision-making procedures that meet basic standards of fairness. Part IV then unfolded a similar pattern with respect to the DSS itself, showing how WTO adjudicators have coupled their substantive other-regarding considerations with a parallel effort to form more open, accessible and participatory judicial procedures, which may strengthen their ability to take into account interests and stakeholders other than those pertaining to the particular case and parties appearing before them.

Here it should be highlighted, however, that by taking the various other-regarding procedural strides reviewed in Part IV—lowering threshold requirements for initiating WTO proceedings, permitting private counsel representation, facilitating third-party participation, and allowing civil society to provide information to the DSS through *amicus* briefs—WTO adjudicators have not only improved their own ability to deliver better-informed judgments that account for the “others” they affect. In doing all that, they have indirectly also improved the information needed and opportunities available for the DSS itself to call on sovereigns to render an account of their other-affecting policies, and to hold them accountable for the externalities they project on foreigners, thereby illustrating how the advancement of one DSS other-regarding thread may essentially reinforce the other.

Notably, the mutually-reinforcing relationship of the DSS's two other-regarding threads is further reflected in the manner in which they have concurrently worked so as to expand and consolidate the authority of the DSS, and of the WTO as a whole. First, by substantively and procedurally accounting for a range of others—states and non-state actors, in and outside the WTO, at both the national and international level—the DSS has increased the quantity and quality of its information, established new connections and coalitions (e.g., with less powerful states, civil society, private actors, and other international organizations), and expanded the potential bases of support for its decisions and authority. Hence, in protecting relevant strangers along the two other-regarding threads, the DSS, in several meaningful ways, has also protected itself.

Second, along both threads, the DSS has further worked so as to sustain the normative and institutional WTO framework of which it forms a part. Thus, by reading WTO rules in a manner that enhances members' other-regarding obligations towards foreign governments and nationals, the DSS has essentially worked to validate and strengthen WTO norms and their nondiscrimination underpinnings, preventing regulating members from undermining the WTO trade liberalization project through their propensity for parochialism and neglect of foreign interests. At the same time, along the second other-regarding thread, the AB has operated to solidify the WTO legal framework through its systemic vision of WTO law and disputes, as well as through its accommodating stance to interests and stakeholders external to the WTO, recognizing that such openness to strangers may not necessarily undermine the WTO's trade liberalization endeavor. On the contrary, it may guarantee the WTO the degree of legitimacy and credibility needed to achieve its own trade-related economic objectives.

Against this backdrop, it should finally be stated, the two other-regarding threads, when woven together, recount a story of institutional evolution and change, highlighting the transformation of the DSS from a purely bilateral dispute-adjudication system for the enforcement of reciprocal contractual commitments,²⁶² towards a more multilateral and public adjudicating body that exhibits enhanced regulatory and administrative features. The other-regarding inclinations of the DSS are surely not the sole factors that explain and have contributed to this institutional shift. Yet they elucidate the manner in which the DSS has gradually taken on an enhanced international administrative review role, monitoring and regulating states' discretion, ensuring that it adequately accounts for affected others and adheres to appropriate procedures, much as administrative courts do.²⁶³ Furthermore, they illuminate how through other-regardingness, the DSS has worked to enhance the communal aspects of WTO dispute settlement and obligations,

²⁶² Karen J. Alter, *Delegating to International-Courts: Self-Binding vs. Other Binding Delegation*, 71 L. & CONTEMP. PROBS. 37, 62–64 (2008).

²⁶³ On these features of international administrative review, see ALTER, *supra* note 12, at 199–211.

and to promote a global trading system that itself more closely follows administrative law practices of transparency, participation, reason giving, and accountability.

C. Lessons for International Courts More Generally

While this article has focused on other-regardingness in the specific context of WTO adjudication, the basic questions considered herein transcend the WTO domain. As noted in Part II, in an interconnected global setting, questions of other-regardingness in international adjudication may arise whenever sovereign members of a treaty delegate interpretive and dispute settlement powers to an international court, which is then called upon to scrutinize states' decisions that radiate across national boundaries. Additional other-regarding issues may surface whenever an international court itself affects the interests of others beyond those appearing before it, particularly when embedded in a broader cooperative international framework, the norms and goals of which it is expected to advance. In these respects, therefore, the other-regarding account of the WTO DSS may generate several important insights and reflections about the role, operation, design, and conception of international courts more generally.

First, the DSS other-regarding account exemplifies the potential role that may be played by international courts as mechanisms for improving the external accountability of sovereigns in a reality of interdependence, and thereby rectifying some of the undemocratic features of globalization, by helping to ensure that domestic decision-makers give voice to and take into account affected foreign stakeholders. The story of the DSS, entrusted with the power to examine the conformity of states' actions with international law, attests to the unique position and ability of international courts to enhance states' other-regarding obligations, by gradually elaborating on and developing existing international norms in a context that would have traditionally required the consent of all states concerned. Furthermore, alongside other international courts that have shown an appetite for imposing other-regarding duties on states,²⁶⁴ the DSS case illustrates the apparent willingness and inclination of international adjudicators to actually use their judicial review power as a mode of circumventing states' self-regarding predispositions, of "changing understandings of law... and of incrementally shifting expectations" about what state compliance with international law entails.²⁶⁵

Second, the DSS case, which reveals the philosophical leaning of WTO adjudicators to not only enhance states' other-regarding duties, but also to act themselves in an other-regarding manner when adjudicating, provides further insights into ongoing discussions on the design of international courts and the manner in which it may affect the considerations they ultimately take into account. Thus, the other-regarding practices displayed by the DSS over two

²⁶⁴ See Benvenisti, *supra* note 6, at 330–331; Benvenisti, *supra* note 261.

²⁶⁵ ALTER, *supra* note 12, at 27.

decades of adjudication attest to the likely inclination of international adjudicators—if relatively independent and insulated from the control of the powerful—to look beyond the specific case and litigants in rendering their rulings, and to foster broader community interests through the resolution of bilateral disputes. Such other-regarding propensities, the DSS case further suggests, may be especially conspicuous when a permanent appellate court like the AB is concerned. Focusing on questions of law and with a view to promoting a more stable, coherent, and predictable legal environment, such a court appears all the more inclined to embrace a systemic vision of the law, assess the ramifications of each legal interpretation adopted for future litigants, and make every judgment part of a broader jurisprudential picture. For these reasons, such a court may also be more prone to expanding the bounds of the judicial process it orchestrates, facilitating the participation of otherwise excluded stakeholders, so as to improve and diversify the voices and arguments that may inform its rulings.

While these other-regarding inclinations may not be detached from the specific legal and political context in which the DSS operates, they may serve as pertinent lessons, *inter alia*, in ongoing deliberations on the creation of a permanent “Investment Court System,” including an “Appeal Tribunal” based on “similar principles to the WTO Appellate Body,” in the framework of the Transatlantic Trade and Investment Partnership (TTIP) negotiations.²⁶⁶ The constitution of such a permanent two-tier court system, departing from the classic model of investment arbitration, has in fact already been agreed upon in the text of the Comprehensive Economic Trade Agreement (CETA) concluded between the EU and Canada in 2016.²⁶⁷ If it ultimately enters into force, a more fruitful ground for the development of expansive other-regarding patterns on the part of investment adjudicators would be established.

VI. CONCLUSION

This article has explored the phenomenon of other-regardingness in international adjudication in a reality where the decisions of sovereign states, like those of international courts, radiate far beyond their traditional confines, affecting the interests of a range of strangers with no voice in the decision-making processes that affect them. Focusing on one major site of global judicial governance, the WTO DSS, which reveals an evolving and multifaceted commitment to other-regardingness, this article has illustrated the role such an international court can and should play in bridging the

²⁶⁶ European Commission, *Commission Proposes New Investment Court System for TTIP and other EU Trade and Investment Negotiations*, IP/15/5651, Sep. 16, 2015, at http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

²⁶⁷ European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, Feb. 29, 2016, at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

accountability gap of sovereigns, enhancing their substantive and procedural duties towards the distant strangers they have come to affect. At the same time, it has also demonstrated the awareness of WTO adjudicators of their own need to be more accountable to various strangers to the dispute, caught under the long shadow of the court's authority, as well as the adjudicators' inclination to introduce into their rulings and operation a range of substantive and procedural other-regarding tools.

In light of these findings, we ultimately submit, the DSS other-regarding account, on its various threads, invites us to more generally rethink the traditional conceptualization of international courts like the one operating within the WTO setting as merely "agents" or "trustees" of their founding states. In an international political and legal order embedded in a vision of state sovereignty as the prime source of authority, international courts have often been theorized as "agents" or "trustees" of the member-states principals that have created them.²⁶⁸ Also contributing to this prevalent conception has been the traditional emphasis on the bilateral dispute settlement function of international courts.²⁶⁹

The other-regarding story of the DSS suggests, however, that while states retain their central role vis-à-vis the adjudicators, the traditional conceptualization of international courts can only explain certain aspects of the operation and decisions of the WTO adjudicating system in the real world. Oftentimes, as seen herein, WTO adjudicators act not simply as agents of contracting states, but rather as trustees of the overarching WTO regime, considering not only the bilateral relationship between the disputing states, but also collective interests related to the wider community of states of which the disputants form a part.²⁷⁰ Moreover, not infrequently, though not always explicitly, the adjudicators go further to consider broader community interests and global concerns, thereby acting in various ways as trustees of humanity. Hence, the DSS case seems to suggest that, at least as a descriptive matter, but probably as a normative matter as well, the prevalent conceptualization of international courts, like the traditional conception of sovereignty that has nourished it, should be revisited and reassessed.

²⁶⁸ See Keren J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 *EURO. J. INT'L REL.* 33 (2008); Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 *EUR. J. INT'L REL.* 391 (2014).

²⁶⁹ von Bogdandy & Venzke, *supra* note 16, at 59.

²⁷⁰ Stone Sweet & Brunell, *supra* note 156, at 62.