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BALANCING NATIONAL PUBLIC POLICY AND FREE TRADE[±]

Diane A. Desierto*

I think we need to start a discussion about the future — a future which honors the aims of the Marrakesh Agreement, which is worthy of our role in international relations, trade and development, and which delivers for the people we are here to serve — particularly the poorest. It is time to face up to the undeniable problems we have in this organization and have an open and honest discussion about how we can move forward.

WTO Director-General Roberto Azevedo¹

INTRODUCTION: AN ‘EITHER-OR’ DILEMMA AT THE WTO?

In the wake of the impasse between the World Trade Organization (WTO) and India regarding the ratification of the Protocol to the Trade Facilitation Agreement (TFA) that concluded during the Ninth WTO Ministerial Conference in Bali, Indonesia on December of 2013, WTO Director-General Roberto Azevedo admitted that while the WTO succeeds in resolving trade disputes and monitoring trade practices, it “has failed to

[±] Paper prepared for Korea Society of International Economic Law (KSIEL) International Conference on “Trade and Global Governance: A Panoramic View of Free Trade Agreements and the WTO,” November 6-7, 2014, Novotel Ambassador Gangnam, Seoul, Korea (This paper draws from insights in this author’s forthcoming book, DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT (forthcoming 2015) [hereinafter “DESIERTO 2015”]).

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¹ WTO Director-General’s Statement at the Trade Negotiations Committee Formal Meeting, Oct. 16, 2014, *available at* http://www.wto.org/english/news_e/news14_e/tnc_stat_16oct14_e.htm.

deliver new multilateral results since its creation.”² This systemic failure in the trade negotiations pillar of the WTO is evident to all of its 160 Members. It is evident from thirteen years of stalled negotiations under the Doha Round;³ the inability of the WTO to encourage agreements between developing and developed countries on the Doha Development Agenda;⁴ the contemporaneous proliferation of around 585 regional trade agreements (RTAs)⁵ which, at best, have not facilitated any apparent global agreement under the Doha Round;⁶ and (more recently) India’s demand for permanent changes to WTO rules to avoid sanctioning developing countries’ food security policies.⁷ While many WTO Members have publicly criticized India for unfairly holding the TFA hostage,⁸ other powerful Green Room⁹

² Speech by WTO Director-General Roberto Azevedo, Canada, Oct. 9, 2014, available at http://www.wto.org/english/news_e/spra_e/spra36_e.htm.

³ See Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT’L L.J. 573, 577-82 (2010).

⁴ *Id.*

⁵ As of June 15, 2014, the 585 notifications of RTAs (separately counting goods, services and accessions), with 379 in force, available at http://www.wto.org/english/tratop_e/region_e/region_e.htm (last accessed Mar. 10, 2015).

⁶ See Colin B. Picker, *Regional Trade Agreements v. The WTO: A Proposal for the Reform of Article XXIV to Counter this Institutional Threat*, 26 U. PA. J. INT’L L. 2 (2005), 267-319; Antoni Estevadeordal, Kati Suominen, and Christian Volpe Martincus, *Regional Trade Agreements: Development Challenges and Policy Options*, Inter-American Development Bank, 1, 17-18? (Nov. 2012), available at <http://www10.iadb.org/intal/intalcdi/PE/2013/11955.pdf>.

⁷ See J.P. Singh, *India’s multi-faceted WTO refusal*, WASH. POST, Aug. 5, 2014, available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/08/05/indias-multi-faceted-wto-refusal/>; Jayati Ghosh, *India faces criticism for blocking global trade deal but is it justified*, THE GUARDIAN, Aug. 22, 2014, available at <http://www.theguardian.com/global-development/poverty-matters/2014/aug/22/india-criticism-blocking-global-trade-deal>.

⁸ See Raymond Zhong and Peter Kenny, *WTO Fails to Ratify Trade Agreement*, WALL ST. J., July 31, 2014, available at <http://online.wsj.com/articles/u-s-pressures-india-on-wto-trade-agreement-1406820288> (On criticisms against India’s position from emerging markets/developing country members as well as developed country members); See *India’s blocking of WTO deal triggers harsh criticism*, Aug. 1, 2014, <http://www.dw.de/indias-blocking-of-wto-deal-triggers-harsh-criticism/a-17825484>; Armellini and Helen Maguire, *Europe-Asia summit set to criticize India over WTO blockage*, DPA INTERNATIONAL, Oct. 17, 2014, <http://www.dpa-international.com/news/asia/europe-asia-summit-set-to-criticize-india-over-wto-blockage-a-39923664.html>; See *Kerry challenges Modi over WTO stance*, AGENCE FRANCE PRESSE AND TAIPEI TIMES, Aug. 2,

members at the WTO have maintained silence over India's concerns on food security other than to affirm the devastating consequences of failing to ratify the TFA.¹⁰ These members maintain this silence even in light of economic and policy grounds that may well publicly demonstrate the critical importance to India that its continued participation in global trade under multilateral trading rules would have in ensuring cheaper access to food for India's population and, ultimately, higher wages for India's poorest.¹¹

India's choice to block ratification of the Protocol to the TFA was more a matter of how the WTO Membership could reach permanent decisions on food security with the same expeditiousness as the TFA; –the WTO was indifferent to food security within the multilateral trade negotiation agenda. While the entire WTO membership was still negotiating a permanent solution on the critical issue of food security, the WTO Ministerial Conference at Bali issued a Ministerial Decision that would have insulated India from suit under the WTO Dispute Settlement Mechanism for any of its public stockholdings for food security purposes.¹² In response, India reiterated its position that resolving food security issues had to be prioritized with

2014, <http://www.taipeitimes.com/News/world/archives/2014/08/02/2003596499>.

⁹ See generally, Kent Jones, *Green room politics and the WTO's crisis of representation*, 9 PROGRESS IN DEVELOPMENT STUDIES 3 (Oct. 2009), 349-57 (On the heavy impact of unrepresentative Green Room members on WTO decision-making).

¹⁰ Canada Statement on WTO Failure to Adopt Protocol for Trade Facilitation Agreement, Aug. 1, 2014, available at <http://www.international.gc.ca/media/comm/news-communications/2014/08/01a.aspx?lang=eng>; Statement by US Ambassador Michael Froman on the World Trade Organization Trade Facilitation Agreement Protocol Failure, July 2014, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/Statement-by-Amb-Froman-on-WTO-Trade-Facilitation-Agreement-Protocol-Failure> (last accessed Mar. 10, 2015); Statement by EU Trade Commissioner Karel de Gucht on Trade Facilitation Agreement, Aug. 4, 2014, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1144>.

¹¹ See e.g., Joshua Meltzer, *Improving Indian Food Security: Why Prime Minister Modi Should Embrace the WTO*, Brookings, May. 16, 2014, available at <http://www.brookings.edu/research/opinions/2014/05/16-world-trade-organization-india-food-security-meltzer>.

¹² WTO Ministerial Decision of Dec. 7, 2013, *Public stockholding for food security purposes*, WT/MIN (13)/38, WT/L/913, available at http://wto.org/english/thewto_e/minist_e/mc9_e/desci38_e.htm.

same emphasis as trade facilitation under the Bali ministerial decisions, stressing that

overall balance is important even in a limited package of outcomes. The Bali outcomes were negotiated as a package and must be concluded as such . . . developing countries such as India must have the freedom to use food reserves to feed their poor without the threat of sanctions.¹³

This call for rebalancing of priorities in multilateral trade negotiations, to specifically address food security, fully aligns with the conclusions and recommendations of Olivier De Schutter, the UN Special Rapporteur on the Right to Food:

“Food security is presently treated under the WTO as the grounds for exceptions for a very limited range of trade liberalization commitments. A more appropriate reframing of agricultural trade rules would explicitly recognize that market-determined outcomes do not necessarily improve food security and that the purpose of agricultural trade rules should be to facilitate food security-enhancing policies, even though this may require limiting the pace of trade liberalization in some sectors and/or granting States additional policy flexibility in pursuit of internationally recognized food security objectives. WTO Members should preserve and create a range of flexibilities in the Doha Round negotiations in order to ensure that the future international trade regime operates in lock step with multilateral and national efforts to address food insecurity. In particular, they should:

1. Make WTO measures more compatible with the pursuit of food security and the human right to food. Negotiators should ensure that, for example, the future criteria of the green box does not impede the development of policies and programs to support food security and the realization of the right to food; and that they are tailored to the specific national circumstances of developing countries. The proposed amendment in the draft agricultural modalities to Annex 2 in the [Agreement on Agriculture] is of vital importance for many developing countries and should be agreed to immediately and without expectation of trade concessions.

¹³ *Permanent solution on food security in WTO rules is a must, says Amit Narang* LIVEMINT, Oct. 24, 2014, <http://www.livemint.com/Politics/xzW8fnSJ25UDdOsqZq5ddL/Permanent-solution-on-food-security-in-WTO-rules-is-mustm-s.html> (last accessed Mar. 10, 2015).

2. Exclude defining the establishment and management of food reserves as trade-distorting support, when these schemes serve the needs of food-insecure vulnerable groups. States should also adapt the provisions of the [Agreement on Agriculture] and other WTO agreements (e.g. public procurement) to ensure compatibility with the establishment of food reserves at national, regional and international level; and they should bring clarity to the overlap of responsibilities and commitments which could impact the efforts of countries that engage in efforts to establish food reserves at regional level.

3. Ensure that marketing boards and supply management schemes are not prohibited in the future framework for agricultural policy nor precluded under loan conditionality and other policy reforms by the international financial institutions. Options available under the WTO framework to establish such policies should be further explored.

4. Guarantee the possibility for developing States to insulate domestic markets from the volatility of prices on international markets. States, particularly developing States in accordance with the principle of special and differential treatment, must retain the freedom to take such measures. The negotiations should i) strengthen and materialize the proposed safeguard measures – Special Safeguard Mechanism (SSM) and Special Products (SPs); and ii) ensure that States maintain flexibilities to regulate the volume of imports in order for policies such as marketing boards and supply management schemes to be fully functional, as measures such as the SSM can only be implemented on a temporary basis. In particular, the conditions should be put in place so that it is in the interests of developing countries to adopt tariff-rate quotas on key tariff lines, and thus manage import volumes and price volatility more durably. States should also carefully examine the impacts of additional cuts to tariffs on national food security. States should refuse such cuts if they are unable to counterbalance negative impacts on food-insecure vulnerable groups with national policies, including social safety-nets and the creation of non-agricultural employment opportunities. States should consider reducing tariffs on key inputs for agricultural production taking into account the need to promote increased food production in a sustainable and socially-inclusive manner.

5. Take steps to limit States' excessive reliance on international trade in the pursuit of food security. In building their capacity to produce the food needed to meet consumption needs, States should support in particular poor small-scale farmers and the

production of staple foods.

6. In the case of a failed Doha Round, propose medium and long-term changes to the existing WTO framework to ensure pro-food security programs are not categorized as trade-distorting support. This should include, for example, changes to the green box criteria and rules on safeguards. Such changes should be fast-tracked and aimed at facilitating access to these measures without requiring additional concessions from food insecure developing countries.”¹⁴

India’s ongoing deadlock with the WTO over food security and the ratification of the Protocol to the TFA may well signal the ‘death’ knell and crisis, which for many, reverberates throughout the WTO and the Doha Development Agenda.¹⁵ The deadlock signals a governance crisis for the WTO in addressing the competing public policy claims of WTO Members. It is symptomatic of an erroneously hardening ‘either-or’ approach used when asserting and engaging public policy at the WTO.

Public policy could very well encompass both the State’s trade concerns, as well as other significant public interests entrusted to the State, such as environmental safety, social protection, and cultural preservation.¹⁶ This is clear from the na-

¹⁴ Olivier De Schutter, United Nations Special Rapporteur on the Right to Food, *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System*, Briefing Note No. 4, 1,16-17 (Nov. 2011), available at http://www.srfood.org/images/stories/pdf/otherdocuments/20111116_briefing_note_05_en.pdf.

¹⁵ See Rorden Wilkinson, *Of Butchery and Bicycles: The WTO and the ‘Death’ of the Doha Development Agenda*, 83 *THE POLITICAL QUARTERLY* 2, 395-401 (April-June 2012); David Kleimann and Joe Guinan, *The Doha Round: An Obituary*, Global Governance Programme Policy Brief, Issue 2011/June 2011, available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/TheDohaRound_AnObituary_June2011.pdf; Surendra Bhandari, *Doha Round Negotiations: Problems, Potential Outcomes, and Possible Implications*, 4 *TRADE LAW & DEVELOPMENT* 2, 353-84 (2012); Susan C. Schwab, *After Doha: Why Negotiations are Doomed and What We Should Do About It*, *FOREIGN AFFAIRS*, 90, 104-117 (2011); Daniel C. Esty, *The World Trade Organization’s Legitimacy Crisis*, 1 *WORLD TRADE REVIEW* 1, 7-22 (2002); SONIA E. ROLLAND, *DEVELOPMENT AT THE WTO* 243-63 (Oxford Univ. Press, 2012).

¹⁶ See Tristan Le Cotty and Tancrede Voituriez, *The Potential Role for Collective Preferences in Determining the Rules of the International Trading System*, 165, 178 in PAUL EKINS AND TANCREDE VOITURIEZ (EDS.), *TRADE, GLOBALIZATION, AND SUSTAINABILITY IMPACT ASSESSMENT: A CRITICAL LOOK AT METHODS AND OUTCOMES 1* (Earthscan 2009).

ture of public policy as a highly subjective, value-driven¹⁷ matter of governance undertaken by different authoritative decision-makers, at various levels, national and international. By definition, public policy is vague as to any *a priori* content of policy,¹⁸ other than as to matters of source (e.g. ensuring that the policy arises from public decision-makers or public agencies) and objective (e.g. aiming to address societal problems of a given population).¹⁹ Drawing from the original pioneering work of Harold Lasswell,²⁰ policy process research looks to the analysis of context in the policy cycle or the “key stages of policymaking: the ways in which people struggle to define issues as problems worthy of attention on government agendas; how people analyze problems and devise and select among policy alterna-

¹⁷ See Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 2, 203, 207 (Mar. 1943) (“None who deal with law, however, can escape policy when policy is defined as the making of important decisions which affect the distribution of values.”).

¹⁸ Robert E. Goodin, Martin Rein, and Michael Moran, *The Public and its Policies*, pp. 3-38 in MICHAEL MORAN, MARTIN REIN, AND ROBERT E. GOODIN (EDS.), *THE OXFORD HANDBOOK OF PUBLIC POLICY* (Oxford Univ. Press, 2006).

¹⁹ MICHAEL HILL AND PETER HUPE, *IMPLEMENTING PUBLIC POLICY: GOVERNANCE IN THEORY AND IN PRACTICE* 1, 5 (SAGE Publications 2002) (“What is, in general, striking about the definitions of public policy indicated here is the purposive character public policies are expected to have, and the way in which they are expected to be related to (societal) problems.”); See generally CHARLES L. COCHRAN AND ELOISE F. MALONE, *PUBLIC POLICY: PERSPECTIVES AND CHOICES* 1, 3 (5th edition, Lynne Rienner Publishers, 2014) (“Public policy can be described as the overall framework within which government actions are undertaken to achieve public goals, with a good working definition of public policy, for our purposes, being the study of government decisions and actions designed to deal with a matter of public concern. Policies are purposive courses of action devised in response to a perceived problem. Public policies are filtered through a specific policy process, adopted, implemented through laws, regulatory measures, courses of government action, and funding priorities, and enforced by a public agency. Individuals and groups attempt to shape public policy through the mobilization of interest groups, advocacy education, and political lobbying. Official policy provides guidance to governments over a range of actions and also provides mutual accountability links between the government and its citizens. The policy process includes several key aspects: a definition of the problem to be addressed, the goals the policy is designed to achieve, and the instruments of policy that are employed to address the problem and achieve the policy goals. Public policy is the heart, soul, and identity of governments everywhere.”).

²⁰ Harold D. Lasswell, *The policy orientation* in DANIEL LERNER AND HAROLD D. LASSWELL (EDS.), *THE POLICY SCIENCES: RECENT DEVELOPMENTS IN SCOPE AND METHOD*, 1, 3-15 (STAN. Univ.Press, 1959).

tives; how people implement policy; and how people evaluate and sometimes terminate policy.”²¹

With these conceptual clarifications, one can reasonably accept that compliance with the rules of multilateral trade is itself also a matter of public policy.²² When the WTO speaks of balancing “national public policy” and “free trade”, it is in reality speaking of competing priorities of public policy decision-making, (which takes place at the national level of a State that is a WTO Member) and collective multilateral level decision-making under the WTO’s political organs and dispute settlement functions. The 2001 Doha Ministerial Declaration promised that the WTO membership would collectively undertake the task of balancing public policies and integrate trade with sustainable development:

“2. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Program adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programs have important roles to play

6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. *We are convinced that the aims of upholding*

²¹ Peter de Leon and Christopher M. Weible, *Policy Process Research for Democracy: A Commentary on Lasswell's Vision*, 1 *International Journal of Policy Studies* 2, 23, 23-34 (2010).

²² See Tonia Novitz, *International law and human rights in the context of globalization in* PATRICIA KENNETT (ED.), *GOVERNANCE, GLOBALIZATION, AND PUBLIC POLICY*, 107, 120 (Edward Elgar Publishers, 2008); See World Trade Report 2012, Part II, *Trade and public policies: A closer look at non-tariff measures in the 21st century*, 36-46, at http://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2a_e.pdf (last accessed Mar. 10, 2015).

and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements. We welcome the WTO's continued cooperation with UNEP and other intergovernmental environmental organizations. We encourage efforts to promote cooperation between the WTO and relevant international environmental and developmental organizations.

8. We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.

10. Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility *to ensure internal transparency and the effective participation of all members.* While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.”²³

Thus, it is clear that the multilateral trade agenda, since the start of the Doha Round in 2001, was precisely intended to integrate national and international public policy discourses. The international community cannot frame public policy under a simplistic ‘either-or’ dilemma, where States must choose be-

²³ WTO Ministerial Declaration, Doha, Nov. 14, 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last accessed Mar. 10, 2015). Italics added.

tween trade interests and non-trade objectives. Rather, the fundamental paradigmatic shift acknowledged in the Doha Ministerial Declaration (if not implemented in practice to date in stalled trade negotiations) is to reexamine the functional decisions and interactions of the WTO and its Members. It is also ensuring that the overall global wealth created from increasing trade liberalization and expanding foreign market access under the WTO system is not being generated through multiple social externalities, such as: means and processes of production that incur severe and unjustifiable environmental damages; permitting oppressive labor conditions, tolerating food insecurity and the debilitating dislocations bred by poverty; accepting the demise of cultural traditions and theft of indigenous knowledge; and rigidly incapacitating the abilities of WTO Member States to govern in ways that render them unable to respond rapidly to economic crises and emergencies in their jurisdictions, nor appropriately address fluctuating public policy needs of their citizens.²⁴

The Doha Ministerial Declaration expressly hearkens back to the Preamble to the Marrakesh Agreement Establishing the World Trade Organization, which mandates the WTO and its Members with the duty of:

recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect the and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.²⁵

Balancing national public policy and free trade is thus a

²⁴ See WTO Secretariat, *Harnessing trade for sustainable development and a green economy*, 2011, available at http://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf (last accessed Mar. 10, 2015).

²⁵ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (last accessed Oct. 1, 2014) [hereinafter Marrakesh Agreement].

matter for cyclical coordination²⁶ by WTO Members. This is primarily to ensure trade and non-trade policy compliance, particularly since the survival of the world trade system also depends on prohibiting unjustified trade distortions and dismantling pretextual State protectionism. Such protectionism prevents consumers and producers from benefiting from the most efficient prices and production of goods and services all over the world.²⁷ The task of balancing national public policy and free trade requires, at its core, an understanding of the ways in which the world trade system responds to felt resource, environmental, and social inequalities that *unjustifiably* undergird trade.²⁸

Balancing free trade commitments with other national public policies is ultimately a search for *sustainable policy flexibility* – one that enables WTO Members’ transparent calibration of all public policy interests (trade, environment, economic social and cultural rights, among others) in a manner that is both accountable to its citizens and responsible to all other participants in world trade. In order to achieve sustainable policy

²⁶ See YVES BONZON, PUBLIC PARTICIPATION AND LEGITIMACY IN THE WTO 1, 136 (Cambridge Univer. Press, 2014) (“...policy coordination would have the benefit of regulating the interface between domestic regulations and WTO principles so as to ‘insulate from the scrutiny of negative integration domestic regulation that is assumed either non-protectionist or efficient, because it conforms to international regulation.’ When faced with sensitive questions, it can be observed that the dispute settlement organs have referred on occasions to instruments of policy coordination originating outside the WTO, a practice that some have referred to as ‘judicial activism.’ The dispute settlement organs have thus shown a preference for trade measures that are directly aimed at the protection of multilaterally approved goals or interests”).

²⁷ See SALLIE JAMES & K. WILLIAM WATSON, *Regulatory Protectionism: A Hidden Threat to Free Trade*, *Cato Inst. Policy Analysis*, 723 POLICY ANALYSIS 1 (Apr. 9, 2013), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa723.pdf> (last accessed Mar. 11, 2015); ROBERT HOWSE, REGULATORY MEASURES, THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 458 (Martin Daunton, Amrita Narlikar & Robert M. Stern eds., 2012).

²⁸ JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 3-10 (2002); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY, part III, (Harvard Univ. Press, 2014); Ajit K. Ghose, *Global Economic Inequality and International Trade*, International Labour Organization, 28 CAMBRIDGE J. ECON. 229-52 (2001), available at <http://cje.oxfordjournals.org/content/28/2/229.full.pdf+html> (last accessed Mar. 12, 2015).

flexibility, this Article contends that public policy interests within the WTO system require better functional and institutional coordination on all three functional pillars of the WTO – trade negotiations, dispute settlement, and trade monitoring. This Article also takes the position that such public policy interests also require the empirical integration of WTO Members' preexisting international commitments on environmental duties and on economic, social, and cultural rights to better inform the public policy coordination process. This approach to balancing economic and social objectives through an emerging principle of coordination is modeled after the method adopted by the International Court of Justice in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case.²⁹ In interpreting a treaty-based regime in regard to the joint demands of economic development and environmental protection when using a shared resource, the Court emphasized the importance of continuous cooperation and coordination between States to accomplish both objectives:

“76. In the *Gabcikovo-Nagymaros* case, the Court, after recalling that ‘[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development’, and added that ‘[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty’...

77. The Court observes that it is by cooperating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, *so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned*...

177. Regarding Article 27 [of the 1975 Statute], it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource,

²⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 I.C.J. 14, paras. 75, 181-89 (Apr. 20).

but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective sustainable development...Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development."³⁰

To date, the WTO lacks a functional system for coordinating the protection of trade and non-trade public policies of WTO members. **Part II (Segmented Efforts at Balancing National Public Policy and Free Trade through the DSU, TPRM, and Trade Negotiations)** discusses how public policy provisions in the WTO covered Agreements are unequally implemented and variably engaged within the three functional pillars of the WTO. These functional pillars are, namely, as follows: dispute settlement, as facilitated by the WTO dispute settlement organs (the Appellate Body and dispute settlement Panels) pursuant to the Dispute Settlement Understanding (DSU);³¹ trade monitoring conducted through the Trade Policy Review Mechanism (TPRM) administered by the WTO General Council acting in the capacity of the Trade Policy Review Board (TPRB);³² and trade negotiations under the WTO Ministerial Conference, the supreme decision-making body of the WTO.³³ Although there are numerous provisions in the WTO agreements that enable WTO Members to calibrate their compliance with trade commitments and other significant public policy

³⁰ Id. at paras. 76-77, 177. Italics added.

³¹ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, available at http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last accessed Mar. 12, 2015) [hereinafter DSU].

³² Trade Policy Review Mechanism art. 3, Apr. 15, 1994, Marrakesh Agreement, Annex 3, 1869 U.N.T.S. 401, available at http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm (last accessed Mar. 12 2015); See Fact Sheet from Steffen Grammling, FES Geneva, *WTO's Trade Policy Review Mechanism: Explanations and Reflections*, Dialogue on Globalization No. 3 (Apr. 2009); Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 JOURNAL OF INTERNATIONAL ECONOMIC LAW 1, 9-36 (2013).

³³ Marrakesh Agreement, art. IV:1-4, Apr. 15, 1994, 1867 U.N.T.S 154.

priorities,³⁴ there is no formal mechanism or mandate that requires deliberate cross-referencing between the WTO political organs and dispute settlement organs in discharging their functions in that calibration process. One, therefore, finds more development on the interpretation of public policy exceptions (as in GATT Article XX and GATS Article XIV) in the jurisprudence of the Appellate Body and Panels, in contrast to the scant consideration afforded for a WTO Member's public policy programming and priorities within the TPRM process, or the awkward compartmentalization of "trade issues" and "non-trade" issues in the trade negotiations process manifested in the deadlocks in Doha and Bali.

Part III (The Public Policy Institutional Deficits in the WTO System: Who Undertakes 'Balancing'?) discusses the unequal participation and leveraged access to information between and among WTO Members (Green Room members vis-à-vis other coalitions), as well as those involving States as WTO Members vis-à-vis other non-State public policy stakeholders, such as public interest groups, civil society or nongovernmental organizations, international institutions, and UN specialized agencies.³⁵ While each WTO Member has an

³⁴ See General Agreement on Tariffs and Trade, art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; General Agreement on Trade in Services art. XIV, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 401 [hereinafter GATS]; Agreement on the Application of Sanitary and Phytosanitary Measures art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401; Technical Barriers to Trade Agreement art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401; Special and differential treatment provisions, WT/COMTD/W/196, June 14, 2013 [hereinafter S&D]; Balance of Payments Measures, General Agreement on Tariffs and Trade art. XII Oct. 30, 1947, 61 Stat. A-1, 55 U.N.T.S. 194; see GATT Article XII, GATT 1994 Article XVIII:B, & GATS Article XII:1. *For discussion of public policy provisions in the WTO covered agreements, see* ROBERT HOWSE, *THE WTO SYSTEM: LAW, POLITICS, AND LEGITIMACY* 82 (Cameron May, 2007); DESIERTO 2015, at Chapter 3.

³⁵ JOHN H. BARTON, JUDITH L. GOLDSTEIN, TIMOTHY E. JOSLING, & RICHARD H. STEINBERG, *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 61 (Princeton Univ. Press, 2006) (on the politics of the GATT/WTO legal system); Miguel Rodriguez Mendoza and Marie Wilke, *Revisiting the Single Undertaking: Towards More Balanced Approach to WTO Negotiations* 486 in *MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT: PERSPECTIVES AND PRIORITIES FROM DEVELOPING COUNTRIES NEED PINCITE* (Carolyn Deere Birkbeck ed., 2011).

equal vote in trade negotiations in theory, participation varies in practice. Specifically, participation varies according to international economic and political influence, the capacity to effectively use the political processes of the WTO, and the basic ability to detect foreign market access violations and marshal the resources necessary to avail of the dispute settlement system.³⁶ If systemic reforms to participation and transparency (rather than incremental reforms) are not fully designed across all three functional pillars of the WTO, then it will continue to be difficult to foster durable decisions on calibrating national public policy and free trade; furthermore, WTO Members, private sector trade associations, and non-State public policy stakeholders at large will generally not accept these reforms, nor perceive them as legitimate.

In the **Conclusion (Actualizing the ‘Principles of Coordination and Cooperation’ – The WTO as the Forum for International Public Policy)**, this Article emphasizes that normatively reorienting international trade policy within the spectrum of numerous public policies of WTO Members to include environmental duties and economic social and cultural rights, while also realigning governance functions and participation rights at the WTO, would help save the WTO from growing perceptions of diminished relevance and institutional illegitimacy.³⁷ Sustainable policy flexibility, as originally

³⁶ KATI KULOVESI, *THE WTO DISPUTE SETTLEMENT SYSTEM: CHALLENGES OF THE ENVIRONMENT, LEGITIMACY AND FRAGMENTATION* 26-27 (2011) (“The 153 Members of the WTO are remarkably unequal in terms of size, population as well economic and political weight. According to Zampetti, such inequality ‘translates into an asymmetry in the ability to participate in decision-making processes, as such democratically suspect if not illegitimate which has the potential to perpetuate if not reinforce an uneven distribution of benefits and burdens in the world economy.’ In addition, many smaller developing countries also lack the capacity and human resources to participate efficiently in the WTO processes. The Geneva missions of the most influential WTO Members, such as Canada, the European Community, Japan, and the US have several professionals dealing exclusively with WTO issues. In contrast, developing country diplomats tend to represent their countries also in numerous other international agencies and not all developing country Members even have permanent missions in Geneva. This makes it difficult for such countries to participate effectively in the functioning of the WTO or to keep their national constituencies adequately informed”).

³⁷ See Henry Gao & C.L. Lim, *Saving the WTO from the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as a ‘Common Good’ for RTA Disputes*, 11 J. OF INT’L ECON. L. 4, 899-925 (2008).

envisaged in the Preamble to the Marrakesh Agreement Establishing the WTO, materializes only when the WTO recognizes that its functional pillars must approach public policy balancing through a textured understanding of a 'law of coordination'³⁸ based on the law-making agreements of States.

II. SEGMENTED EFFORTS AT BALANCING NATIONAL PUBLIC POLICY AND FREE TRADE THROUGH THE DSU, TPRM, AND TRADE NEGOTIATIONS

Public policy issues in the trade context have been differentially approached and valued within the WTO's three functional pillars. There has been more development in the interpretive practices of the WTO dispute settlement organs in regard to treaty provisions as they relate to public policy exceptions in GATT Article XX and GATS Article XIV, in contrast to the trade policy review process or the multilateral trade negotiations process.

A. 'Public Policy' Jurisprudence of the WTO Appellate Body and Panels

Article 3(2) of the WTO DSU expressly provides that dispute settlement at the WTO

is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.³⁹

Dispute settlement must thus stay within this fundamental remit of conducting 'clarification' of existing provisions of WTO agreements in order to 'preserve' the rights and obligations of WTO Members as detailed in the WTO agreements.

In practice, the WTO Appellate Body and Panels demon-

³⁸ HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INT'L CMTY* 415-16 (5th ed., 2008).

³⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 34, at art. 3(2).

strate a broad understanding of their duty to clarify provisions in the WTO agreements that inherently contemplate calibration or enable flexible ‘policy space’ for WTO Members,⁴⁰ and, in turn, appear amenable to the application of a “principle of proportionality” when interpreting ‘public policy calibration provisions’.⁴¹ Apart from proportionality, various jurisprudential tests have also been developed in the interpretation of the public policy calibration provisions in the WTO agreements, including, for example, tests of “reasonableness”⁴² as well as “ne-

⁴⁰ Olivier Cattaneo, *Has the WTO Gone Too Far or Not Far Enough? Some Reflections on the Concept of ‘Policy Space’* 57, 77-78, in CHALLENGES AND PROSPECTS FOR THE WTO (2005) (“In practice, WTO panels and the Appellate Body have contributed to the preservation and broadening of Members’ policy space by emphasizing Members’ freedom to regulate as they wish, except to the extent that WTO provisions restrain them from doing so. For example in *US-Gasoline*, the Appellate Body recognized that WTO Members ‘have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement.’ In relation to several trade remedy provisions, panels and the Appellate Body have pointed out that the methodology to be used is not prescribed and that Members may therefore determine what methodology to use. In *Japan-Alcoholic Beverages II*, the Appellate Body similarly underlined that WTO rules ‘are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. Finally, in *EC-Hormones*, the Appellate Body recognized Members’ policy space by stating that ‘[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome obligation by mandating conformity or compliance with such standards, guidelines and recommendations. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more specific and compelling than that found in Article 3 of the SPS Agreement would be necessary”).

⁴¹ Mads Andenas and Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective* 147, 166-67 in THE WORLD TRADE ORGANIZATION AND TRADE IN SERVICES (2008); Axel Desmedt, *Proportionality in WTO Law*, 4 J. OF INT’L ECON. L. 3, 441-80 (2001); Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EUR. J. OF INT’L L. 5, 985-1008 (2007).

⁴² Catherine Button, *The WTO’s ‘Objective Assessment’ Standard of Review and Panel Review of Health Measures* 85-114 in CHALLENGES AND PROSPECTS FOR THE WTO 110 (Andrew D. Mitchell ed., 2005) (“Reasonableness also recommends itself as a standard of review because the concept is familiar to panels and the WTO. First, the SPS Agreement, the TBT Agreement and GATT are all littered with references to obligations that are expressly qualified by the concept of reasonableness....Moreover, Panels and the Appellate Body have frequently turned to reasonableness when interpreting the Agreements...In short, the concept of reasonableness is not entirely at odds with GATT/WTO review”).

cessity.”⁴³ Ultimately, however, the scope of discretion that WTO tribunals assume when crafting these tests turns on the textual elasticity of each public policy calibration provision. The following subsections sketch some of these differences.

1. General exceptions under GATT Article XX and GATS Article XIV

The WTO Appellate Body and Panels have developed a fairly substantial body of jurisprudence interpreting several of the specific enumerated exceptions under GATT Article XX and GATS Article XIV.⁴⁴ These provisions operate as complete defenses for a WTO Member seeking to justify measures that would ordinarily be trade-restrictive or would not otherwise conform to any of the obligations under GATT or GATS.⁴⁵ These exceptions do not apply to obligations other than those under GATT and GATS, respectively.⁴⁶ The Appellate Body and Panels interpret GATT Article XX and GATS XIV following the same two-tiered methodology.⁴⁷ First, by provisionally

⁴³ See Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J. OF INT'L ECON. L. 1, 153-73 (2009); Panagiotis Delimatsis, *Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come*, 19 EUR. J. OF INT'L ECON. L. 2, 365-408 (2008); WTO: TECHNICAL BARRIERS AND SPS MEASURES 94 (Anja Seibert-Fohr, Peter Tobias-Stoll & Rüdiger Wolfrum eds., 2007) (“When one applies the necessity test as developed by the panels and the Appellate body, the existence of an international obligation to respect the right in question will be a strong indicator of the importance of the values protected by the measure, and even more so if the obligation has the status of *jus cogens*”).

⁴⁴ See ANTONIA ELIASON, ROBERT HOWSE & MICHAEL TREBILCOCK, *THE REGULATION OF INTERNATIONAL TRADE* 656-780 (4th ed., 2013); PETER VAN DEN BOSSCHE AND WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 543-605 (3rd ed., 2013) [hereinafter VAN DEN BOSSCHE AND ZDOUC].

⁴⁵ See DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 48 (1994); VAN DEN BOSSCHE AND ZDOUC, *supra* note 47, at 546-47.

⁴⁶ *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 307, WT/DS394/AB/R, WT/D2395/AB/R, WT/DS398/AB/R (Jan. 30 2012).

⁴⁷ See *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (Apr. 29 1996) (“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered:

examining if the WTO Member establishes that its defense applies under specific enumerated exception; and second, by determining if the WTO Member also demonstrates that the general requirements of the *chapeau* to the pertinent provision has been met. Considering the extraordinary impact of GATT Article XX and GATS Article XIV as defenses that would, if applicable, prevent any finding of liability for breach of WTO obligations from attaching to the WTO Member that issued the challenged domestic measure, it is unsurprising that the Appellate Body and the Panels appear to strive for restraint when calibrating the ordinarily trade-restrictive measure with the WTO Member's assertion of public policy interests as enumerated in GATT Article XX and GATS Article XIV. For example, the "public morals" specific exception in GATT Article XX(a) and GATS Article XIV(b) refers to "standards of right and wrong conduct maintained by or on behalf of a community or nation."⁴⁸ In *EU-Seal Products*, the Appellate Body clarified

first, provisional justification by reason of the characterization of the measure...second, further appraisal of the same measure under the introductory clauses of Article XX.") [hereafter, "*US-Gasoline Appellate Body Report*"; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 292, WT/DS285/AB/R (Apr. 7, 2005) ("Article XIV of the GATS, like Article XX of the GATT 1994, contemplates a 'two-tier analysis' of a measure that a Member seeks to justify under that provision. A panel should first determine whether the challenged measure falls within the scope of one of the paragraphs of Article XIV. This requires that the challenged measure address the particular interest specified in that paragraph and there be a sufficient nexus between the measure and the interest protected. The required nexus – or 'degree of connection' – between the measure and the interest is specified in the language of the paragraphs themselves, through the use of terms such as 'relating to' and 'necessary to'. Where the challenged measure has been found to fall within one of the paragraphs of Article XIV, a panel should then consider whether that measure satisfies the requirements of the chapeau of Article XIV") [hereafter, "*US-Gambling Appellate Body Report*"].

⁴⁸ *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.759, WT/DS363/R (Aug. 12 2009) ("...The panel in *US-Gambling*, in an interpretation not questioned by the Appellate Body, found that 'the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation'. The panel went on to note that 'the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values . . . Members, in applying this and other similar societal concepts, 'should be given some scope to define and apply for themselves the concepts of 'public morals' . . . in their respective territories, according to their own

the nature of the balancing test to ascertain the necessity of the challenged measure under the “public morals” exception:

As we noted, the Appellate Body has explained in several disputes that a necessity analysis involves a process of ‘weighing and balancing’ a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. As the Appellate Body has stated, ‘it is on the basis of this ‘weighing and balancing’ and comparison of measures, taking into account the interests or values at stake, that a panel determines whether a measure is ‘necessary’ or, alternatively, whether another, WTO-consistent measure is ‘reasonably available’. Such an analysis, the Appellate Body has observed, involves a ‘holistic’ weighing and balancing exercise ‘that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgment. A measure’s contribution is thus only one component of the necessity calculus under Article XX. This means that whether a measure is ‘necessary’ cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis. It will also depend on the nature, quantity, and quality of evidence, and whether a panel’s analysis is performed in quantitative or qualitative terms. Indeed, the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature. The flexibility of such an exercise does not allow for the setting of pre-determined thresholds in respect of any particular factor. If the level of contribution alone cannot determine whether a measure is necessary or not, we do not see that mandating in advance a pre-determined threshold level of contribution would be instructive or warranted in a necessity analysis.⁴⁹

While tribunals have been quite deferential towards the

systems and scales of values”).

⁴⁹ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.214-15, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) [hereinafter *EU-Seal Products, Appellate Body Report*].

WTO Member's assertion of the content of "public morals," they nevertheless tend to be stringent when assessing whether the challenged domestic measure indeed makes a 'material contribution' to the protection of such public morals.⁵⁰ Where a complaining party identifies an alternative measure that, in its view, the responding WTO Member should have taken, the responding WTO Member thereafter assumes the burden of showing why the proposed alternative is not 'reasonably available' in light of the interests or values pursued and the party's desired level of protection.⁵¹ The application of the GATT Article XX or GATS Article XIV chapeau requirements (e.g. 'arbitrary discrimination') is also interpreted with particularity, depending on the nature of the specific enumerated exception that the WTO member invokes as a defense.⁵² In *EU-Seal Products*, the Appellate Body affirmed that the chapeau to GATT Article XX refers to the "manner in which a measure. . . is applied;" accordingly, it would be relevant to

⁵⁰ *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶¶ 263-69, 294, WT/DSR63/AB/R, Dec. 21, 2009 ("[T]he Panel simply stated that limiting the number of import entities 'can make a material contribution' to the protection of public morals in China. Yet, the Panel neither addressed quantitative projections nor provided qualitative reasoning based on evidence before it to support that finding . . . For these reasons we disagree with the Panel's finding that China had met its burden of proof regarding the contribution of the State plan requirement to the protection of public morals in China") [hereinafter *China – Audiovisual Publications Appellate Body Report*]; *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 296-99, 304-06, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US-Gambling Appellate Body Report*].

⁵¹ *China – Audiovisual Publications Appellate Body Report*, *supra* note 53 at ¶¶ 319-332; *US-Gambling Appellate Body Report*, *supra* note 53 at ¶¶ 307-311, 317 ("In our view, the Panel's 'necessity' analysis was flawed because it did not focus on an alternative measure that was reasonably available to the United States to achieve the stated objectives regarding the protection of public morals or the maintenance of public order. Engaging in consultations with Antigua, with a view to arriving at a negotiated settlement that achieves the same objectives as the challenged United States' measures, was not an appropriate alternative for the Panel to consider because consultations are by definition a process, the results of which are uncertain and therefore not capable of comparison with the measures at issue in this case").

⁵² *Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶¶ 109-10, WT/DS276/AB/R (Aug. 30 2004) [hereinafter *Canada-Wheat Appellate Body Report*]; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 120, WT/DS58/AB/R (Oct. 12 1998) [hereinafter *US-Shrimp Appellate Body Report*].

consider the design, architecture, and revealing structure of a measure in order to establish whether the measure, in its actual or expected application, constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. This involves a consideration of both 'substantive and procedural requirements' under the measure at issue.⁵³

Applying this understanding of the chapeau requirements, the Appellate body found that various features of the EU Seal Regime constituted arbitrary or unjustifiable discrimination between countries where the same conditions prevail.⁵⁴

Tribunals have also observed deference when it comes to a WTO Member's definition of environmental concerns within the purview of measures necessary for the protection of human, animal, or plant life or health under GATT Article XX(b) and GATS Article XIV(b), or measures relating to the conservation of exhaustible natural resources under GATT Article XX(g).⁵⁵

⁵³ Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.302 WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014), available at https://www.wto.org/english/tratop_e/dispu_e/400_401abr_e.pdf.

⁵⁴ *Id.* at ¶ 5.338 ("First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from 'commercial' hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the 'subsistence' and 'partial use' criteria of the IC exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as 'commercial' hunts could potentially enter the EU market under the IC exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. Finally, we were not persuaded that the European Union has made 'comparable efforts' to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenland Inuit. We also noted that setting up a 'recognized body' that fulfills all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.").

⁵⁵ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, ¶ 7.1 WT/DS2/R (May 20, 1996), available at https://www.wto.org/english/tratop_e/dispu_e/438_444_445r_e.pdf ("Under the General Agreement, WTO Members were free to set their own environmental objectives, but they were bound to implement these objectives through measures consistent with its provisions, notably those on the relative treatment of domestic and imported products.") [hereinafter *US-Gasoline Panel Report*]; *Id.* at 30 ("Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment, there is specific acknowledgment to be found about the importance of coordinating policies on trade and the

To prove these environmental exceptions, tribunals retain a “margin of discretion in assessing the value of evidence, and the weight to be ascribed to that evidence.”⁵⁶ While tribunals observe deference towards how WTO Members identify and define their environmental objectives and targeted levels of environmental protection, the measures that they design to advance these objectives and meet these targets remain subject to scrutiny. Thus, when invoking the exceptions under GATT Article XX(b) or GATS Article XIV(b), the WTO Member has to satisfy the test of “necessity.”⁵⁷ This test involves scrutiny of the challenged measures’ contribution to the achievement of the WTO Member’s environmental objective, looking at the “genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure’s contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made.”⁵⁸ In *EC-Asbestos*, the Appellate Body further stressed that “there is no requirement under Article XX(b) of the GATT 1994 to quantify, as such, the risk to human life or health. A risk may be evaluated in quantitative or qualitative terms. . . .

environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.” [hereinafter *Standards for Reformulated and Conventional Gasoline*].

⁵⁶ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 161, WT/DS135/AB/R (Mar. 12, 2001), available at https://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf [hereinafter *EC-Asbestos Appellate Body Report*].

⁵⁷ See Benn McGrady, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures*, 12 J INT’L ECON. L. 1, 153-173 (2009); see also Filippo Fontanelli, *Necessity Killed the GATT – Article XX GATT and the Misleading Rhetoric about ‘Weighing and Balancing’*, 5 EUR. J. LEGAL STUD. 2, 36-56 (2012). (For the view that ‘no real balancing is ever performed’, and that the process of construing the necessity requirement is ‘arguably less value-neutral than the quasi-judicial bodies claim it to be’).

⁵⁸ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 145 WT/DS332/AB/R (Dec. 3, 2007), [hereinafter *Brazil – Retreaded Tyres Appellate Body Report*].

it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.”⁵⁹ Along with the test of necessity, the WTO Member has to show that there are no reasonably available alternatives to achieve the desired level of health protection.⁶⁰ Various factors would have to be considered in determining whether alternative measures are indeed ‘reasonably available’ to protect human health including: 1) whether the responding Member “could reasonably be expected to employ [the alternative measure] to achieve its health policy objectives,” (in addition to showing the difficulty of implementation of the challenged measure);⁶¹ 2) whether the alternative measure “contributes to the realization of the end pursued...[particularly] the preservation of human life and health;”⁶² and 3) “whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.”⁶³ The materiality of the contribution of the measure to the preservation of human life and health could be quantitative or qualitative in nature.⁶⁴

Tribunals apply a similar necessity test in relation to the environmental exception in GATT Article XX(g) on measures “relating to the conservation of exhaustible natural resources,

⁵⁹ See *Measuring Affecting Asbestos and Asbestos-Containing Products*, *supra* note 59, at ¶¶ 167-168.

⁶⁰ See *Standards for Reformulated and Conventional Gasoline*, *supra* note 58, at 14-22.

⁶¹ See *Measuring Affecting Asbestos and Asbestos-Containing Products*, *supra* note 59, at ¶ 170.

⁶² *Id.* at ¶ 172.

⁶³ *Id.*

⁶⁴ See *Brazil – Retreaded Tyres Appellate Body Report*, *supra* note 61, at ¶ 151 (“In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. *This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.*”). (Italics added).

if such measures are made effective in conjunction with restrictions on domestic production or consumption.”⁶⁵ In *US-Shrimp*, the Appellate Body declared that the environmental exception was not limited to mineral or non-living resources, but extended to living species that “are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.”⁶⁶ The Appellate Body further clarified that the term “natural resources” in GATT Article XX(g) was “not static in its content or reference but is rather by definition, evolutionary.”⁶⁷ Moreover, the trade-restrictive measure under GATT Article XX(g) also contemplates “even-handedness in the imposition of restrictions,” in that counterpart restrictions should have also been placed on domestically produced like products for the same conservationist reasons.⁶⁸

Despite the seeming doctrinal smoothness of the balancing methodology articulated by the Appellate Body and Panels, it should nonetheless be stressed that the balancing performed under the tests developed for the GATT Article XX and GATS Article XIV exceptions is not a mathematically precise task. Donald Regan points out the logical contradiction between saying that a WTO Member is entitled to choose its own legitimate domestic goal and articulating the level of protection to achieve such goal; at the same time the Member’s choice is subject to a balancing test that exogenously compares the challenged

⁶⁵ Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S/200 (Nov. 7 1990), at 21 [hereinafter, *Thai-Cigarettes Panel Report*] (“The Panel could see no reason why under Article XX the meaning of the term ‘necessary’ under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable”).

⁶⁶ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 128 WT/DS58/AB/R, (Oct. 12, 1998) [hereinafter *US-Shrimp Appellate Body Report*], available at https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf.

⁶⁷ *Id.* at ¶ 130.

⁶⁸ See *Standards for Reformulated and Conventional Gasoline*, *supra* note 58, at 20-21; Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶¶ 5.242-5.252, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014), available at https://www.wto.org/english/tratop_e/dispu_e/431_432_433abr_e.pdf.

measure with any other less trade-restrictive ‘reasonably available’ alternative. This contradicts the WTO Member’s choice as to the level of protection it desires.⁶⁹ However, contradiction exists only if one presupposes that the WTO Member’s choices are *unbounded* in the first place, and if one chooses to forget that GATT Article XX and GATS Article XIV are also public policy calibration provisions by nature. In developing these jurisprudential tests, however, what the Appellate Body and the Panels actually signal to WTO Members is that they will observe a measure of deference or respect for *what* a WTO Member identifies as its public policy objective or defines as its public policy priority in relation to the specific exception invoked in GATT Article XX and GATS Article XIV. The Appellate Body and Panels do not deprive themselves of the power to scrutinize the design of the measure *as it relates* to the achievement of the public policy objective asserted by the WTO Member, and therefore, such deference or respect given to the WTO Members is not absolute. There is nothing illogical about accepting that a WTO Member has chosen a particular public policy objective while also testing whether the challenged measure, as designed, is indeed tailored to meet the stated objective. A WTO Member’s ‘desired level of protection’ of public health, environmental conservation, and other non-trade public policies is not synonymous with the means that the WTO Member may employ to reach that desired level of protection.

A more pressing point of critique against the jurisprudential tests set by the Appellate Body and the Panels is the amorphous nature of these legal tests, which has oscillated throughout WTO jurisprudence. This oscillation with undisclosed reasons for the preferences between tests – between a “least trade restrictiveness,” a “reasonableness test,” a “proportionality test,” or some combination of these concepts – has proven more opaque than clear.⁷⁰ The inconsistent legal tests may account for the difficulty WTO members experience in attempting

⁶⁹ Donald H. Regan, *The meaning of ‘necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 *WORLD TRADE REV* 3, 347, 369 (2007).

⁷⁰ See Massimiliano Montini, *The Necessity Principle as an Instrument to Balance Trade and the Protection of the Environment*, 135, 154, in *ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE* (Francesco Francioni ed., 2001).

to establish a successful defense under GATT Article XX or GATS Article XIV. Most recently, the Appellate Body reversed the Panel's findings in *EU-Seal Products* in regard to the chapeau requirements of GATT Article XX, "on the basis that the Panel applied an incorrect legal test."⁷¹ The Appellate Body and the Panels could ensure better consistency in their interpretive practices if there were fewer instances of judicial crafting of what at this point ought to be settled criteria in the application of the general exceptions to both treaties. Oscillation between various forms of tests and criteria does not lend any reassurance of predictability in interpretation – particularly if other as-yet untested specific exceptions in GATT Article XX and GATS Article XIV are invoked as defenses in the future.

2. Balance of payments measures under Article XII and Article XVIII:B of GATT 1994 and Article XII:1 GATS

WTO Members also retain regulatory freedom to implement ordinarily trade-restrictive measures to temporarily safeguard their external financial positions and/or to support the implementation of their economic development programs. GATT Article XII permits a Member to "restrict the quantity or value of merchandise permitted to be imported" in order to "safeguard its external financial position and its balance of payments".⁷² Import restrictions under this provision should not exceed those necessary "to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves" or "in the case of a contracting party with very low monetary reserves, to

⁷¹ See *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, *supra* note 56, at ¶ 6.1(d)(i); see Public Citizen, *Only One of 40 Attempts to Use the GATT Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception*, available at <https://www.citizen.org/documents/general-exception.pdf> (last accessed Mar. 12., 2015). (Note that a citizens' advocacy paper reports that the GATT Article XX defense "fails in 97 percent of cases." As of this writing there has only been one occasion where a GATT Article XX exception was successfully established by a responding WTO Member and upheld by the Appellate Body); see *Measuring Affecting Asbestos and Asbestos-Containing Products*, *supra* note 59, at ¶ 192(f)..

⁷² Marrakesh Agreement, *supra* note 28, Apr. 15, 1994, 1867 U.N.T.S. 194, at art. XII(1).

achieve a reasonable rate of increase in its reserves”.⁷³ Members implementing domestic policies under this provision should “pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources...it is desirable to adopt measures which expand rather than contract international trade.”⁷⁴ Quantitative restrictions imposed under this provision are subject to limitations, as well as requirements of notification, consultation, and review.⁷⁵ GATT Article XVIII:B (on Governmental Assistance to Economic Development) authorizes similar import restrictions taken by a “contracting party, the economy of which can only support low standards of living and is in the early stages of development,”⁷⁶ for the dual purposes of “safeguard[ing] its external financial position *and* to ensure a level of reserves adequate for the implementation of its program of economic development.”⁷⁷ The import restrictions authorized under GATT Article XVIII:B are subject to similar notification, consultation, and review requirements and limitations.⁷⁸

GATS Article XII:1 (Restrictions to Safeguard the Balance-of-Payments), on the other hand, provides that “[i]n the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain re-

⁷³ *Id.* at art. XII:2(a).

⁷⁴ *Id.* at art. XII:3(a).

⁷⁵ *Id.* at art. XII:4-5.

⁷⁶ *Id.* at art. XVIII:4(a); *see also* Interpretative Notes from Annex I Ad Article XVIII on paragraphs 1 and 4, *available at* https://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm (last accessed Mar. 12, 2015) (stating that “[w]hen they consider whether the economy of a contracting party ‘can only support low standards of living’, the Contracting Parties shall take into consideration the normal position of that economy and shall not base their determination on exceptional circumstances such as those which may result from the temporary existence of exceptionally favourable conditions for the staple export product or products of such contracting party”, and that the phrase ‘early stages of development’ is not meant to apply only to contracting parties which have just started their economic development, but also to contracting parties the economies of which are undergoing a process of industrialization to correct an excessive dependence on primary production.”)

⁷⁷ *Id.* at art. XVIII:B(9).

⁷⁸ *See* Marrakesh Agreement at art. XVIII:B(10)-(12).

restrictions on trade in services for which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its program of economic development or economic transition.”⁷⁹ The permitted restrictions should not be discriminatory; should be consistent with the Articles of Agreement of the International Monetary Fund; avoid unnecessary damage to the commercial, economic and financial interests of any other Member; shall not exceed those necessary to deal with the emergency; and be temporary and phased out progressively as the situation improves.⁸⁰ Members can give priority to the supply of services that are “more essential to their economic or development programmes”, so long as the restrictions are not adopted or maintained to protect a particular service sector.⁸¹ The restrictions taken under GATS Article XII:1 are also subject to notification, consultation, and review procedures.⁸²

None of the foregoing balance-of-payments measures (quantitative or import restrictions as well as restrictions of trade in services) indicate a method for determining the adequacy of reserves (or conversely, the scope and extent of restrictions) necessary for the Member’s economic development programming. The tribunal in *India-Quantitative Restrictions* partially addressed this matter. In that case, India sought to justify quantitative restrictions on imports of agricultural, textile and industrial products through Article XVIII:B of GATT 1994.⁸³ India argued that it was reasonable “to require a direct, and therefore, clear and foreseeable causal link between the removal of the balance-of-payments restrictions and the recurrence of balance-of-payments difficulties because the indi-

⁷⁹ *Id.* at art. XII:1.

⁸⁰ GATS, *supra* note 37, at Art. XII:2.

⁸¹ *Id.* at Art. XII:3

⁸² *Id.* at Art. XII:4 - XII:6.

⁸³ Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R (Aug. 23, 1999) [hereinafter “*India-Quantitative Restrictions Appellate Body Report*”].

rect consequences of a removal of restrictions on the external financial position are difficult to trace and quantify;”⁸⁴ accordingly, it was erroneous for the WTO panel to have required India “to use macroeconomic and other development policy instruments to meet balance-of-payments problems caused by the immediate removal of its balance-of-payments restrictions.”⁸⁵ India maintained that the proviso to Article XVIII:11 of GATT 1994 (e.g. “Provided that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.”⁸⁶) and the corresponding provision in Article XII:3(d)

make it clear that the balance-of-payments provisions permit the imposition of restrictions, even if the Member has policy instruments at its disposal that could render the restrictions unnecessary. It is up to each Member to choose among those policy instruments, taking into account, not only the economic efficiency considerations on which the IMF bases its policy advice, but also its structural, institutional, and political constraints.”⁸⁷ According to India, the International Monetary Fund (IMF) “never stated that India could remove all restrictions at once, maintain its existing policies, *and* face no balance-of-payments difficulties.”⁸⁸

The Appellate Body rejected India’s contentions, finding, among others, that the IMF’s statement (e.g. that “the external situation can be managed using macro-economic policy instruments alone...Quantitative restrictions (QRs) are not needed for balance-of-payments commitments and should be removed over a relatively short period of time...”⁸⁹) did not imply any prescribed change in India’s development policy,⁹⁰ since “the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pur-

⁸⁴ *Id.* at ¶ 33.

⁸⁵ *Id.* at ¶ 34.

⁸⁶ *Id.* at ¶ 111.

⁸⁷ *Id.* at ¶ 35.

⁸⁸ *India – Quantitative Restrictions Appellate Body Report*, *supra* note 86, at ¶ 37.

⁸⁹ *Id.* at ¶ 123.

⁹⁰ *Id.* at ¶ 130.

sue.”⁹¹ Thus, it would appear from *India – Quantitative Restrictions* that the Appellate Body gives determinative weight to IMF findings that a Member’s import restrictions are unnecessary to meet its balance-of-payments difficulties. At present, there is no discernible method or legal criteria independently developed by the Appellate Body for ‘balancing’ the WTO Member’s asserted objective of addressing a balance of payments emergency or implementing an economic development program, with the WTO Member’s quantitative restrictions.

2. SPS measures in Article 2.2 of the SPS Agreement

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)⁹² regulates WTO Members’ measures for protecting human, animal or plant life or health from certain risks. An SPS measure is any measure that is applied:

“(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quar-

⁹¹ *Id.* at ¶ 126.

⁹² The WTO Agreement 1994, WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Apr. 15, 1994, 1867 U.N.T.S. 493, available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm (last accessed Mar 12, 2015) (hereinafter “SPS Agreement”).

antine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.”⁹³

SPS measures, in essence, illustrate the WTO Member’s freedom to regulate to safeguard public health concerns. Article 2.2 of the SPS Agreement explicitly obligates Members to “ensure that any sanitary or phytosanitary measure is applied *only to the extent necessary to protect human, animal or plant life or health*, is based on scientific principles and is not maintained without sufficient scientific evidence,”⁹⁴ and where such measures conform to the SPS Agreement, they are “presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).”⁹⁵ SPS measures have to be based on an “assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”⁹⁶ With respect to sources of information for the assessment of risks, the Members should “take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest – or disease – free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”⁹⁷ When assessing the Member’s SPS measure in relation to the risk to animal or plant life or health and the appropriate level of sanitary or phytosanitary protection from such risk, Member “shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to lim-

⁹³ *Id.* at Annex A, § 1.

⁹⁴ *Id.* at Art. 2.2.

⁹⁵ *Id.* at Art. 2.4.

⁹⁶ *Id.* at Art. 5.1.

⁹⁷ *Id.* at Art. 5.2.

iting risks.”⁹⁸

WTO jurisprudence has not yet articulated the legal test for determining how an SPS measure is “necessary to protect human, animal or plant life or health” under Article 2.2 of the SPS Agreement, although it has been observed that Article 5.6 of the SPS Agreement builds on Article 2.2.⁹⁹ Article 5.6 of the SPS Agreement states:

“Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Measures shall ensure that such measures are not more trade restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”¹⁰⁰

The footnote to Article 5.6 states that “[f]or purpose of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, *reasonably* available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.”¹⁰¹ The Appellate Body affirmed the interpretation of this footnote by the WTO panel in *Australia-Salmon* as the basis for a cumulative test of the reasonableness of an alternative measure: 1) the alternative measure should be “reasonably available taking into account technical and economic feasibility”; 2) it should “achieve the Member’s appropriate level of sanitary and phytosanitary protection”; and 3) is “significantly less restrictive to trade than the sanitary measure contested”.¹⁰² The characterization of “reasonableness” in the first element of the test, taking into account “technical and economic feasibility”, as well as the determination of “appropriateness” of the level of SPS protection sought by the Member in the third element, has not, as yet, been subjected by the Appellate Body or Panels to any substantive criteria.

⁹⁸ SPS Agreement, *supra* note 95, at art. 5.3.

⁹⁹ Van Den Bossche and Zdouc, *supra* note 47, at 905, 923-26.

¹⁰⁰ SPS Agreement, *supra* note 95, at art. 5.6.

¹⁰¹ *Id.* at art. 5.6, n. 3 (emphasis added).

¹⁰² Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 194, WT/DS18/AB/R (Nov. 6 1998).

2. Technical regulations under Article 2.2 of the TBT Agreement

States also retain regulatory freedom to impose technical regulations for legitimate public policy objectives. The Agreement on Technical Barriers to Trade (TBT Agreement) regulates WTO Members' technical regulations, defined as a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."¹⁰³ According to the Appellate Body in *EC-Asbestos*, product characteristics "include, not only features and qualities intrinsic to the product itself, but also related 'characteristics', such as the means of identification, the presentation and the appearance of a product";¹⁰⁴ compliance with product characteristics is "mandatory";¹⁰⁵ and the technical regulation should apply to an identifiable product or group of products.¹⁰⁶ Article 2.1. of the TBT Agreement indicates the non-discrimination requirements for technical regulations,¹⁰⁷ while Article 2.2 of the TBT Agreement regulates WTO Members' technical regulations in relation to their legitimate public objectives:

"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives

¹⁰³ Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments - Results of the Uruguay Round vol. 1 (1994), available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last accessed Mar. 12, 2015), at Annex 1, paragraph 1. [hereinafter, "TBT Agreement"].

¹⁰⁴ *EC-Asbestos Appellate Body Report*, *supra* note 59, at para. 67.

¹⁰⁵ *Id.* at ¶ 68.

¹⁰⁶ *Id.* at ¶ 70.

¹⁰⁷ TBT Agreement, *supra* note 106, at Art. 2.1 ("Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.").

are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”¹⁰⁸

Technical regulations are not of an indefinite duration – they should not be maintained “if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.”¹⁰⁹ Unlike the explicit provision in Article 2.4 of the SPS Agreement, compliance with the TBT Agreement does not give rise to a presumption that a technical barrier to trade is also consistent with GATT rules.¹¹⁰ The Appellate Body in *US – Clove Cigarettes* stressed that the “object and purpose of the TBT Agreement is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Member’s right to regulate....Article 2.1. should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems *exclusively* from legitimate regulatory distinctions.”¹¹¹ To determine whether the detrimental impact on imports stems exclusively from a regulatory distinction rather than reflecting discrimination against the group of imported products, the Appellate Body mandated panels to “carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure,

¹⁰⁸ TBT Agreement, *supra* note 106, at Art. 2.2 (emphasis added); see also Simon Lester and William Stenberg, *The GATT Origins of TBT Agreement Articles 2.1 and 2.2*, 17 J. INT’L ECON L. 1, 215-32 (2014) (commenting on the normative genealogy of Article 2.2 of the TBT Agreement from GATT).

¹⁰⁹ TBT Agreement, *supra* note 106, at Art. 2.3.

¹¹⁰ Christine Wolff, *Regulating Trade in GMOs: Biotechnology and the WTO*, in *TRADING IN GENES: DEVELOPMENT PERSPECTIVES ON BIOTECHNOLOGY, TRADE AND SUSTAINABILITY* 217, 217-34 (2005) (“The relationship between the TBT Agreement and the GATT 1994 is less clear. In the preamble, WTO Members state their desire to further the objective of GATT 1994, but there is no presumption of consistency with GATT for measures that comply with the TBT Agreement.”).

¹¹¹ Panel Report, *United States-Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 174, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *US – Clove Cigarettes Appellate Body Report*].

operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.”¹¹² As such, the particular cause of the detrimental impact is significant for purposes of establishing a violation of Article 2.1 of the TBT Agreement – if the detrimental impact stems exclusively from a “legitimate regulatory distinction” then there is no such violation.¹¹³ However, it should also be borne in mind that for detrimental impacts from regulatory distinctions to be “legitimate”, such distinctions must be applied in an even-handed manner, as stressed by the Appellate Body in *US – COOL*: “where a regulatory distinction is not designed and applied in an even-handed manner – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered ‘legitimate’, and thus the detrimental impact will reflect discrimination prohibited under Article 2.1.”¹¹⁴ The even-handedness of a legitimate regulatory distinction can be shown from the manner by which the challenged technical regulation responds to the public risks subject of the regulatory distinction.¹¹⁵

2. Article 8.1 in relation to Article 7 of the TRIPS Agreement

Article 7 of the TRIPS Agreement defines the balancing objectives of the Agreement which states: “The protection and

¹¹² *Id.* at ¶ 182.

¹¹³ *Id.* at ¶ 216.

¹¹⁴ Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 271, WT/DS384/AB/R (June 29, 2012).

¹¹⁵ Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 297, WT/DS381/AB/R (May 16, 2012) (“...we conclude that the United States has not demonstrated that the difference in labeling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is ‘calibrated’ to the risks to dolphins arising from different fishing methods in different areas of the ocean. It follows from this that the United States has not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction...”) [hereinafter *US – Tuna II (Mexico) Appellate Body Report*].

enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, *to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*¹¹⁶ Article 8.1 of the TRIPS Agreement provides that “Members may, in formulating or amending their laws and regulations, adopt *measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development*, provided that such measures are consistent with the provisions of this Agreement.”¹¹⁷ Article 8.1 in relation to Article 7 of the TRIPS Agreement has not yet been squarely adjudicated or interpreted by the Appellate Body, but these provisions were repeatedly referred to in *Canada – Patent Protection of Pharmaceutical Products* to demonstrate the “public interest” dimension of TRIPS that could assist in interpreting exceptions under Article 30 of the TRIPS Agreement.¹¹⁸ Read alongside Article 7, Article 8.1 does *not* appear to create the effect of an exception under the TRIPS Agreement, but rather operates as a principle that affirms that Members’ domestic measures can protect specific public interests in ways that do not violate the TRIPS Agreement.¹¹⁹ As can be seen from the plain texts of Articles 7 and 8.1, what is contemplated from Members’ domestic actions or measures that vindicate public

¹¹⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 7, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401, *available at* https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm [hereinafter TRIPS Agreement].

¹¹⁷ *Id.* at art. 8.1.

¹¹⁸ Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, ¶ 4.10(d), 4.30(a), WT/DS114/R (Mar. 17, 2000).

¹¹⁹ See Sisule F. Musungu, *The Trips Agreement and Public Health*, in 431 INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 421-70 (Kluwer Law International ed., 2008) (“Article 8 therefore expressly grants permission to WTO Members to introduce measures that are necessary to protect public health among other public policy objectives including measures to prevent the abuse of the exclusive rights conferred by patents and to foster innovation and R&D as well as the transfer of technology in the pharmaceutical sector...Article 8 should be read as establishing the primacy of public health considerations, both in terms of innovation, R&D, and transfer of technology and access to medicines in the formulation and amendment of laws to implement TRIPS.”).

values is a *balancing* with other values protected under the TRIPS Agreement, such as innovation, research and development. The concluding proviso within Article 8.1 of the TRIPS Agreement explicitly requires that the Member's domestic measures taken for public interest protection be "consistent with the provisions of this Agreement." It was for this reason that Canada did not directly invoke Article 8.1 of the TRIPS Agreement as an independent defense in *Canada – Patent Protection of Pharmaceutical Products*, but merely as a contextual principle to emphasize that public health and public interest values form part of the spectrum of values that ought to inform the interpretation of exceptions to patents authorized under Article 30 of the TRIPS Agreement.¹²⁰ At best, Article 8.1 of the TRIPS Agreement has been argued to have an evidentiary effect of a presumption of consistency with TRIPS:

"The constraint in Article 8.1, as it was finally adopted, is that the measures they adopt should not violate the terms of the agreement. The UNCTAD IPRs Resource Book suggests that 'measures adopted by Members to address public health, nutrition and matters of vital socio-economic importance should be *presumed to be consistent with TRIPS, and that any Member seeking to challenge the exercise of discretion should bear the burden of proving inconsistency....*This approach presumes that the sequence of examination begins with whether the measures are of the kind envisioned, and if they are, then it goes on to address the issue of whether they are inconsistent...Under such an approach, there therefore exists a difference in scope between Article 30 and Article 8. Thus, where a measure is aimed specifically to 'protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development' then Article 8 would create a presumption that the measure is consistent, which must be rebutted by the complainant...Article 8 would thus shift the burden for public interest measures whereas all other measures would be directly addressed by Articles 30 and 31...This approach however only allows Article 8.1 to have a burden shifting role in certain situations....[it] does not negate the fact that compliance with Ar-

¹²⁰ TRIPS Agreement, *supra* note 119, at art. 30. ("Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of a patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.").

ticle 8.1 would remain dependent on either not violating a right granted by a provision or by coming within the boundaries of an exception or limitation enumerated elsewhere in the TRIPS Agreement. There would still be no substantive effect to the first half of Article 8.1.”¹²¹

Article 8.1 of the TRIPS Agreement requires the Member to establish that the challenged measure meet two elements: first, that the measure is indeed necessary to promote the public interest in sectors of vital importance; and second, that the measure remains consistent with TRIPS.¹²² Whether the Appellate Body and Panels will propose the “reasonableness” or “rational relationship” tests between the objective of promoting public interest and the TRIPS-consistency of the challenged measure remains a matter to be anticipated.

2. PROVISIONS ON SPECIAL AND DIFFERENTIAL TREATMENT (S&D)

There are numerous provisions on special and differential treatment (S&D) for developing countries and least developed countries (LDCs) in the WTO agreements, but to date none of them have been interpreted in a concrete WTO dispute. While SDT provisions are known to afford a degree of flexibility for developing countries and LDCs, the WTO Appellate Body and panels have not yet had an occasion to interpret these provisions, whether as positive obligations, as some form of interpretive defense when a developing country or LDC imposes ordinarily trade-restrictive measures, or as a deferential or flexible standard of review.¹²³ The 2001 WTO Ministerial Conference

¹²¹ Dalindyebo Shabalala, *Challenges for Technology Transfer in the Climate Change Arena: What Interactions with the TRIPS Agreement in* RESEARCH HANDBOOK ON ENVIRONMENT, HEALTH AND THE WTO 507, 530-31 (Edward Elgar Publishing, 2013).

¹²² See PING XIONG, AN INTERNATIONAL LAW PERSPECTIVE ON THE PROTECTION OF HUMAN RIGHTS IN THE TRIPS AGREEMENT: AN INTERPRETATION OF THE TRIPS AGREEMENT IN RELATION TO THE RIGHT TO HEALTH 153-54 (Martinus Nijhoff Publishers, 2012).

¹²³ The argument has been made that the S&D principle could operate as a “broader principle” for interpreting obligations under the WTO agreements, as well as in relation to the inherent jurisdiction of the Appellate Body with respect to procedural aspects of dispute settlement. Andrew D. Mitchell, *A Legal Principle of Special and Differential Treatment for WTO Disputes*, 5 WORLD TRADE REV. 3, 445-69 (2006). See also Frank J. Garcia, *Beyond Special*

in Doha declared that provisions for special and differential treatment are an “integral part of the WTO Agreements”, and in turn, ordered the review of such provisions “with a view to strengthening them and making them more precise, effective and operational”.¹²⁴ The WTO Secretariat has since conducted a comprehensive review of the S&D provisions throughout the WTO agreements and the decisions of the WTO political organs.¹²⁵ S&D provisions were classified according to six categories: 1) provisions aimed at increasing the trade opportunities of developing country Members; 2) provisions under which WTO Members should safeguard the interests of developing country Members; 3) flexibility of commitments, of action, and use of policy instruments; 4) transitional time periods; 5) technical assistance; and 6) provisions relating to least developed country (LDC) Members.¹²⁶ A developing country or LDC Member’s obligations as a State Party to the ICESCR can help substantiate and provide fuller information on how a Member could fall well within the standards that often trigger S&D flexibility, such as “economic development programming needs” in the balance-of-payments provisions previously discussed under GATT Article XVIII:B. In GATT Article XVIII:7(a), a Member can seek negotiations to modify or withdraw concessions “in order to promote the establishment of a particular industry with a view to raising the general standard of living of

and Differential Treatment, 27 B. C. INT’L & COMP. L. REV. 291-317 (2004).

¹²⁴ World Trade Organization, Doha Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, ¶ 4. *See also* Decision Adopted by the General Council of 1 August 2004, WT/A/579, ¶ 1 available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#sd (instructing the Committee on Trade and Development in Special Session to “expeditiously complete the review of all the outstanding Agreement-specific proposals and report to the General Council, with clear recommendations for a decision, by July 2005. The Council further instructs the Committee, within the parameters of the Doha mandate, to address all other outstanding work, including on the cross-cutting issues, the monitoring mechanism and the incorporation of S&D treatment into the architecture of WTO rules, as referred to in TN/CTD/7 and report, as appropriate, to the General Council.”).

¹²⁵ Committee on Trade and Development, *Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat*, WT/COMTD/W/196 (June 14, 2013) available at http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm [hereinafter WTO Secretariat SDT Note].

¹²⁶ *Id.* at 3-4.

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its people”.¹²⁷ No legal criteria or jurisprudential tests have been developed to date as to the S&D provisions.

As seen from the foregoing, the DSU’s adoption of the Appellate Body and Panel Reports indicates that interpretive development of public policy calibration provisions result in different approaches to balancing trade and non-trade public policies. Much depends on what public policy provisions a responding WTO Member invokes at the DSU in responding to a fellow WTO Member’s complaint. As far as general exceptions under GATT Article XX or GATS Article XIV are concerned, such provisions have not been empirically proven as realistically successful defenses for responding WTO Members. While the Appellate Body and Panels are generally conscious of the importance of balancing, the proliferation of jurisprudential tests to undertake balancing makes it difficult and unpredictable to rely on public policy calibration provisions in the WTO agreements as legal defenses.

A. Public Policy in the Trade Policy Review Mechanism (TPRM)

A 2007 study averred that the contemporary political processes of negotiations, trade policy reviews, and WTO waiver decisions and Ministerial Conference discussions and practices already reflect the reality that “WTO members increasingly

¹²⁷ GATT, *supra* note 37, at art. XVIII:7 (“If a contracting party coming within the scope of paragraph 4 (a) of this Article considers it desirable, in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people, to modify or withdraw a concession included in the appropriate Schedule annexed to this Agreement, it shall notify the CONTRACTING PARTIES to this effect and enter into negotiations with any contracting party with which such concession was initially negotiated, and with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest therein. If agreement is reached between such contracting parties concerned, they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement, including any compensatory adjustments involved.”). *See id.* at art. XVIII:13 (“If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.”).

seek to reconcile their trade and human rights objectives,”¹²⁸ in particular revealing that: 1) accession applications frequently include questions on rule of law and the compliance with human rights by the applicant States;¹²⁹ 2) the WTO had already issued its first waiver specifically to protect human rights, e.g. the Kimberley Process Certification Scheme to prevent trading in conflict diamonds;¹³⁰ 3) human rights concerns were increasingly being litigated in the dispute settlement system through GATT Article XX exceptions;¹³¹ 4) trade policy reviews conducted by the TPRB systematically engage questions of social and environmental impacts of, and human rights considerations in, Member States’ trade policies;¹³² and 5) trade negotiations under the Doha Round increasingly reflect the prioritization of human rights obligations as the premise of the global development agenda.¹³³ Other scholars confirm various aspects of this evolving phenomenon to accommodate and coordinate human rights in the political organs and processes of the WTO system.¹³⁴

The TPRM remains a work in progress as to systematically obtaining information relating to trade and non-trade public policies of WTO Members. The TPRM is a dialogic process between the WTO and its individual Members, involving an assessment of the latter’s domestic trade policies in relation to WTO commitments. Its declared purpose is

to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements, and, where applicable, the Plurilateral Trade

¹²⁸ Susan Ariel Aaronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD TRADE REV. 3, 1-37 (2007).

¹²⁹ *Id.* at 12-15.

¹³⁰ *Id.* at 16.

¹³¹ *Id.* at 18-22.

¹³² *Id.* at 22-26.

¹³³ *Id.* at 27-32.

¹³⁴ See Marie-Claire Cordonier Segger, *Effective Implementation of Intersecting Public International Law Regimes: Environment, Development, and Trade Law*, in PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION 213-58 (Ashgate 2009); Christopher Butler, Comment, *Human Rights and the World Trade Organization: The Right to Essential Medicines and the TRIPS Agreement*, 5 U. PA. J. INT’L L. & POL’Y (2007); Abadir M. Ibrahim, *International Trade and Human Rights: An Unfinished Debate*, 14 GERMAN L.J. 321, 334-36 (2013).

Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members."¹³⁵

While the assessment in the TPRM takes into consideration "the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment," its main function is "to examine the impact of a Member's trade policies and practices on the multilateral trading system."¹³⁶ On the other hand, the Trade Policy Review Body (TPRB) of the WTO conducts the programme of reviews and actual sessions of review.¹³⁷ Despite the breadth of the subject-matter that could be covered under the TPRM, considering the "developmental needs, policies, and objectives of the Member concerned, these policies are not evaluated as to their impact on human rights or compliance with other international commitments. Democracy, the rule of law, human rights and the protection of labour rights have generally been overlooked, although there recently have been references to 'social stability.'"¹³⁸

Recent trade policy review reports written by the WTO Secretariat do reflect some institutional awareness of the impacts of trade policies on income inequalities and social protection. However, the trade policy reviews still do not require any disclosure by the WTO Member of its international social protection commitments and the status of its compliance with such

¹³⁵ Trade Policy Review Mechanism ¶ A(i), Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 401, available at http://www.wto.org/ENGLISH/res_e/booksp_e/analytic_index_e/tpm_01_e.htm.

¹³⁶ *Id.* at ¶ A(ii).

¹³⁷ See M. Benzing, *Trade Policy Review Mechanism*, in WOLFRUM, STOLL, & KAISER 619-34 (2006) (explaining trade policy review sessions conducted by the TPRB).

¹³⁸ MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, *THE REGULATION OF INTERNATIONAL TRADE* 750 (Routledge, 4th ed. 2013).

commitments. For example, as reflected under the International Covenant on Economic, Social and Cultural Rights, the disclosure of WTO Members' international obligations, such as the rights to work, favourable conditions of work, and the enjoyment of the highest attainable standard of health, social security, and education are not required. The WTO Secretariat Report for the Second Trade Policy Review of Panama, a State Party to the ICESCR,¹³⁹ specifically noted that

there remain considerable social and regional inequalities and a significant shortage of skilled labour... It would also be wise to reassess, and where appropriate, rationalize the incentive schemes in order to narrow the gap between the most vigorous economic zones and sectors and the rest of the economy, and to allocate more resources to social programmes, including improvements in the quality of education in order to meet the demand for skilled labour on which sustainable economic growth depends.¹⁴⁰

The same report also noted Panama's environmental commitments in other treaties such as the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.¹⁴¹ On the other hand, Brazil's Sixth Trade Policy Review reported that its sustained economic growth from trade enabled it to reduce poverty and income inequality.¹⁴² The WTO Secretariat report for the fifth Trade Policy Review of China¹⁴³ referred to China's domestic measures to protect state security, public morals, environmental concerns, and international commitments, but made no specific mention of China's duties as a State Party to the ICESCR. Amongst many duties, China must:

¹³⁹ United Nations International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en [hereinafter ICESCR].

¹⁴⁰ Secretariat Report, *Second Trade Policy Review of Panama*, ¶ 2, WT/TPR/S/301 (June 18, 2014), available at http://www.wto.org/english/tratop_e/tpr_e/s301_e.pdf.

¹⁴¹ *Id.* at ¶ 3.139.

¹⁴² Secretariat Report, *Sixth Trade Policy Review of Brazil*, ¶ 3, WT/TPR/S/283 (May 17, 2013), available at http://www.wto.org/english/tratop_e/tpr_e/s283_e.pdf. Brazil acceded to the International Covenant on Economic, Social and Cultural Rights on January 24, 1992. See generally ICESCR, *supra* note 142.

¹⁴³ China ratified the International Covenant on Economic, Social and Cultural Rights on March 27, 2001. See generally ICESCR, *supra* note 142.

Import licensing, restrictions and prohibitions are maintained on grounds of state security; public morality, human, animal and plant health; environmental protection; balance of payment reasons; and to comply with international commitments. China uses both automatic and non-automatic licensing. Goods subject to any of the restrictions are listed in Catalogues issued by the relevant agencies. However, these lists can be adjusted as necessary, and imports of goods that are not included in the Catalogue can be restricted or prohibited on a temporary basis by the relevant authorities.¹⁴⁴

Likewise, India¹⁴⁵ indicated that its import restrictions may be imposed on the grounds of

health, safety, moral and security reasons, and for self-sufficiency and balance-of-payments reasons. On occasion, India links the use of trade policy instruments to domestic policy considerations. For instance, import restrictions and licensing requirements are relaxed when imports are necessary to alleviate inflation or supply shortages. State trading is also used as a policy tool to ensure, *inter alia*, a 'fair' return to farmers, food security, the supply of fertilizer to farmers, and the functioning of the domestic price support system...India grants direct and indirect assistance to various sectors...the states also provide additional subsidies, especially for basic services such as education and health, electricity, and water. Price controls, which apply to some commodities, are aimed at providing subsidies to farmers and a population under the poverty line, and to ensure 'reasonable price' of quality drugs.¹⁴⁶

Indonesia¹⁴⁷ also cites similar reasons as grounds for the authority of the Ministry of Trade to prohibit exports: "a national security or public interest threat (including social, cultural and moral reasons); protection of intellectual property rights; protection of human life and health; protection of the environment and ecology; and signature and ratification of in-

¹⁴⁴ Secretariat Report, *Fifth Trade Policy Review of China*, ¶ 19, WT/TPR/S/300 (May 27, 2014), available at http://www.wto.org/english/tratop_e/tpr_e/s300_e.pdf.

¹⁴⁵ India acceded to the ICESCR on April 10, 1979. See generally ICESCR, supra note 142.

¹⁴⁶ Secretariat Report, *Fifth Trade Policy Review of India*, ¶3, 5, WT/TPR/S/249 (Aug. 10, 2011), available at http://www.wto.org/english/tratop_e/tpr_e/tp349_e.htm.

¹⁴⁷ Indonesia acceded to the ICESCR on 23 February 2006. See generally ICESCR, supra note 142.

ternational treaties or agreements by the Government.”¹⁴⁸ None of these reports, however, articulate the WTO Member’s continuing duties as a State Party to the ICESCR, and the status of social protection in their respective countries where they report in the periodic review before the Committee on Economic, Social and Cultural Rights.

Arguably, the European Union demonstrates the most remarkable trade policy review practices in regard to reflecting economic, social and cultural rights as part of its trade policy-making. The European Union stressed that its trade policy “is required to address developmental, environmental, and social objectives, and contribute to the objectives set out in the Treaty on the European Union, including development and consolidation of democracy and the rule of law, and respect of human rights”,¹⁴⁹ and for this reason the European Commission

carries out impact-assessment analysis to support its decision-making for all proposals with significant direct impact, including in the trade policy area. The impact-assessment process assesses different policy options by comparing both potential benefits and costs in economic, social and environmental terms. The system relies on stakeholder consultations, and impact-assessment reports are published once the Commission’s decision has been taken. In the case of trade negotiations, the Commission carries out ‘trade sustainability impact assessments’ (SIAs) to analyze the economic, environmental and social impact of the EU trade agreements for the EU and its trading partners. SIAs inform negotiations and are independent studies conducted by external consultants, involving comprehensive consultation of stakeholders to ensure a high degree of transparency and taking account of the knowledge and concerns of relevant interest groups both in the EU and in the trading partner. The Commission is committed to better assessing the impact of trade initiative including carrying out ex-post analysis of agreement implementation.¹⁵⁰

In contrast, other major players in the trading system do not appear to have taken a similar route of embedding human

¹⁴⁸ Secretariat Report, *Sixth Trade Policy Review of Indonesia*, ¶ 3.77, WT/TPR/S/278 (Mar. 6, 2013), available at http://www.wto.org/english/tratop_e/tpr_e/s278_e.pdf.

¹⁴⁹ Secretariat Report, *Eleventh Trade Policy Review of the European Union*, ¶ 2.12, WT/TPR/S/284 (May 28, 2013), available at http://www.wto.org/english/tratop_e/tpr_e/s284_e.pdf.

¹⁵⁰ *Id.* at ¶ 2.15.

rights compliance in trade policy reviews. The most recent Trade Policy Review for the United States (a signatory but not a State Party to the ICESCR), the Trade Policy Review for Japan (a State Party to the ICESCR), and the Trade Policy Review for Canada, all did not indicate any impacts of trade policies, and are virtually silent on issues of domestic income inequality, as well as social and environmental protection.¹⁵¹

The ultimate effectiveness of the WTO's TPRM as a surveillance mechanism as a "managerial", "compliance pull", or "peer review" process¹⁵² depends on the extent to which the process is used by the WTO Members to fully unveil critical issues in the public policy objectives behind their regulatory measures. Apart from the examining the technical requirements of trade commitments in the WTO agreements, WTO Members who are States Parties to the ICESCR could themselves initiate the periodic dialogue with the WTO on the very same public policies that undergird their exercise of regulatory freedom.

A. *Public Policy in WTO Trade Negotiations*

Where the WTO Member who is, for example, also one of the 162 State Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), cannot avail of the legal calibration afforded by broad provisions in the WTO agreements that affirm regulatory freedom to protect public policies, it is not prohibited from seeking to obtain such flexibility in complying with trade commitments through decisions of the WTO political organs.¹⁵³ The Ministerial Conference of the

¹⁵¹ See Secretariat Report, *Eleventh Trade Policy Review of the United States*, WT/TPR/S/275 (Nov. 13, 2012), available at http://www.wto.org/english/tratop_e/tpr_e/tp375_e.htm; Secretariat Report, *Eleventh Trade Policy Review of Japan*, WT/TPR/S/276 (Jan. 15, 2013), available at http://www.wto.org/english/tratop_e/tpr_e/tp376_e.htm; Secretariat Report, *Trade Policy Review of Canada*, WT/TPR/S/246 (May 4, 2011), available at http://www.wto.org/english/tratop_e/tpr_e/tp346_e.htm.

¹⁵² See SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM 160-61 (2003) ("Although the TPRM, in carrying out these policy reviews, engages in the evaluation of Member's regulations and policies for 'consistency' with the WTO system, it is a managerial, rather than 'enforcement' mechanism. In other words, it amounts to a 'peer review' process.").

¹⁵³ See Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO*

WTO – the institution’s supreme decision-making body – has the power to adopt authoritative interpretations under Article IX:2 of the WTO Agreement,¹⁵⁴ the power to adopt amendment decisions under Article X:1 of the WTO Agreement,¹⁵⁵ and the power to issue waivers of WTO commitments under Article IX:3 of the WTO Agreement.¹⁵⁶

for *Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 618 (2009), available at <http://www.ejil.org/article.php?article=1853&issue=92> [hereinafter Feichtner EJIL 2009].

¹⁵⁴ Marrakesh Agreement, *supra* note 28, at art. IX:2 (“The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.”).

¹⁵⁵ *Id.* at art. X:1 (“Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision taken by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5, or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply.”).

¹⁵⁶ *Id.* at art. IX:3 (“In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph. (a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members. (b)

The power to adopt authoritative interpretations of the WTO covered agreements lies exclusively with the Ministerial Conference and the General Council.¹⁵⁷ While there have been attempts to invoke this power,¹⁵⁸ to date the required vote has not yet been obtained for the Ministerial Conference and the General Council to adopt an authoritative interpretation of any provision of the WTO covered agreements, partly owing to the difficulties of mustering the required three-fourths majority to enact such an authoritative interpretation, the fact that Members have been able to operate within the WTO system (especially the Dispute Settlement Understanding or DSU) without having to resort to rallying political machinery at the Ministerial Conference to muster the required vote, and also out of reluctance due to the uncertain consequences of an authoritative interpretation on dispute settlement.¹⁵⁹ Accordingly, while on sheer numbers alone WTO Members who are States Parties to the ICESCR might well be able to muster the required three-fourths majority to obtain authoritative interpretations of WTO provisions that may implicate their ICESCR obligations,¹⁶⁰ it may not be necessarily the prudent decision for them to do so, given the ripple consequences of an

A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.”)

¹⁵⁷ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 19-20, WT/DS33/AB/R (Apr. 25, 1997), available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds33_e.htm.

¹⁵⁸ See Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement of the World Trade Organization, WT/GC/W/133 (Jan. 25, 1999) (commenting on the interpretation of Articles 3.7, 21.5, 22.2, 22.6, 22.7, and 23 of the DSU).

¹⁵⁹ See Claus-Dieter Ehlermann & Lothar Ehring, *The Authoritative Interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvements*, 8 J. INT'L ECON. L. 4, 803-24 (2005). DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT 242 (Oxford Univ. Press 2015).

¹⁶⁰ See Caroline Dommen, *Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law*, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 121, 131 (Frederick M. Abbott, Christine Kaufmann, Thomas Cottier eds., 2006).

authoritative interpretation of WTO provisions throughout the entire system, especially on pending and future WTO disputes.¹⁶¹

For similar reasons, political support for an amendment any of the WTO covered agreements may be difficult to obtain.¹⁶² In practice, taking decisions by voting at the WTO – instead of the usual consensus decision-making process¹⁶³ – rarely occurs in the WTO system.¹⁶⁴ The first amendment proposed and recommended for a WTO covered agreement is the amendment of the TRIPS Agreement that would make the 2003 waiver decision¹⁶⁵ for essential medicines permanent and built into the TRIPS Agreement.¹⁶⁶ WTO Members have a deadline of 31 December 2015 to have a two-thirds majority approve the amendment.¹⁶⁷ For Members that formally accept

¹⁶¹ See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* 113 (Cambridge University Press, 2003) (“...If, in the authoritative interpretation, both disputing parties agree to change the law retroactively so as to apply it also to their dispute, the judicial decision, in so far as it relies on the old law, would lose its practical effect: if the complainant had won the dispute on the basis of the ‘old law’, that party, having agreed to the ‘new law’, would no longer seek...the implementation of the judicial decision; if, in contrast, the defendant had won the original dispute, the complainant would need to seek a new panel decision for it to see the ‘new law’ applied to its case...”).

¹⁶² See William J. Davey, *Institutional Framework*, in *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 51, 70 (Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer eds., 2007).

¹⁶³ MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 12 (Oxford Univ. Press, 2006) (“...consensus differs from unanimity. In consensus decision-making, the minority will normally go along with the majority unless it has a serious objection. The majority will, in turn, not ramrod decisions through by vote but will deal with the objections of the minority. The consensus decision-making process takes a great deal of time. Voting occurs in the WTO only when a decision cannot be taken by consensus. In the Ministerial Conference and the General Council, decisions are taken by ‘a majority of the votes cast’ unless otherwise specified in the relevant WTO agreement. Each Member has one vote...”).

¹⁶⁴ See VAN DEN BOSSCHE & ZDOUC, *supra* note 47, at 142.

¹⁶⁵ See General Council Decision, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 (Sept. 1, 2003), available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

¹⁶⁶ See General Council Decision, *Amendment of the TRIPS Agreement*, WT/L/641 (Dec. 8, 2005), available at http://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm.

¹⁶⁷ See General Council Decision, *Amendment of the TRIPS Agreement –*

the amendment, they will take effect and replace the 2003 waiver decision for those Members. For the remaining members that do not accept the amendment, the waiver will continue to apply until the Member accepts the amendment and it takes effect.¹⁶⁸

Finally, WTO Members who are States Parties to the ICESCR may also seek to fulfill duties to respect, protect, and fulfill ICESCR rights through methods of international cooperation, by mustering the required three-fourths majority of the Members to wield the waiver decision powers of the Ministerial Conference. Some of the more recent waiver decisions of the Ministerial Conference include the December 14, 2001 Waiver Decision on the ACP (African, Caribbean, and Pacific states)-EC (European Communities) Partnership Agreement,¹⁶⁹ the 2003 Waiver Decision Concerning the Kimberley Process Certification Scheme for Rough Diamonds (in regard to restrictions on trade in diamonds from conflict zones),¹⁷⁰ the 2002 Waiver Decision exempting LDCs from having to provide exclusive marketing rights for any new drugs in the period when they do not provide patent protection,¹⁷¹ as well as the 2003 waiver decision for essential medicines in relation to the TRIPS Agreement. Waiver decisions can be differentiated between those that “are granted for concretely defined measures or situations...to coordinate WTO law with other international legal regimes”, and those adopted “to legalize abstractly defined

Fourth Extension of the Period for the Acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/899 (Nov. 27, 2013), available at http://www.wto.org/english/tratop_e/trips_e/amendment_e.htm.

¹⁶⁸ *Id.*

¹⁶⁹ See World Trade Organization, Ministerial Declaration of 14 November 2001, *European Communities – the ACP-EC Partnership Agreement*, WT/MIN(01)/15 (Nov. 14, 2001), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_acp_ec_agree_e.htm.

¹⁷⁰ See Council for Trade in Goods, *Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds*, G/C/W/432/Rev.1 (Feb. 24, 2003), available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=49791,3681,42337,43438&CurrentCatalogueIdIndex=0&FullTextSearch=.

¹⁷¹ Council for Trade-Related Aspects of Intellectual Property Rights, *Extension of the Transition Period under Article 66.1 of the TRIPS Agreement for Least-Developed Country Members for Certain Obligations with Respect to Pharmaceutical Products*, IP/C/25 (July 1, 2002), available at https://www.wto.org/english/tratop_e/trips_e/art66_1_e.htm.

measures for all or groups of members...includ[ing] the 1971 waivers to legalize preferential tariff treatment by developed contracting parties under the Generalized System of Preferences and among developing countries, which were both succeeded by the Enabling Clause of 1999...[and] the 1999 waiver to enable developing country members to maintain trade preferences for products from least developed countries”, among others.¹⁷² The 2003 waiver decision on essential medicines is one such decision exemplifying compliance with duties of the States Parties to the ICESCR to respect, protect, and fulfill ICESCR rights, specifically Article 12 of the ICESCR on the right to enjoy the highest attainable standard of health. However, much as securing sufficient political leverage and support for the required majority vote would not be easy for approving authoritative interpretations or amending provisions of the WTO agreements, obtaining a waiver decision as a means for realizing ICESCR rights is likewise not always a politically feasible option for WTO Members who are States Parties to the ICESCR.

Perhaps an equally, if not more, strategic route for WTO Members who are States Parties to the ICESCR to ensure that WTO decision-making fully takes into account the realization of ICESCR rights would be in wielding the agenda-setting power in the WTO, where developing countries, and particularly emerging powers such as Brazil, India, and China have started to take a more active role, especially on food and agriculture negotiations.¹⁷³ The Singapore Ministerial Meeting in 1996 witnessed political tussles between the United States (which preferred to launch a narrow trade agenda at the Seattle Ministerial Meeting), and the European Union (which “wanted to include a large number of topics including the environment, labor, trade remedies, investment and competition”). Developing countries preferred to emphasize “agriculture, trade in manufactures and tropical products, implementation issues relating to the Uruguay Round agreements, issues related to debt, technical assistance and capacity-building, and the reform of

¹⁷² See Feichtner EJIL 2009, *supra* note 156, at 621.

¹⁷³ See Brendan Vickers, *The Role of the BRICS in the WTO: System-Supporters or Change Agents in Multilateral Trade?*, in THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION 254, 261 (Amrita Narlikar, Martin Daunton & Robert M. Stern eds., 2012).

the decision-making procedures.”¹⁷⁴ The stalled Doha Development Agenda reflects increasing tensions in the relationship between trade and key aspects of economic, social and cultural rights that are intrinsic to development. The Doha Ministerial Declaration affirmed the Members’ commitment to the objective of sustainable development, stressing the balance between trade and social protection in that “the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive...recogniz[ing] that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.”¹⁷⁵ Areas identified under the Work Programme in the Doha Ministerial Declaration all involve crucial issues of economic, social and cultural rights – from special and differential treatment for developing countries in agricultural and non-agricultural products; the protection of biodiversity and indigenous knowledge and access to essential medicines in relation to the TRIPS agreement; obtaining a development-based policy analysis of the relationship between trade and investment; technical assistance and transparency with respect to issues involving the interaction of trade and competition policy as well as government procurement matters; trade facilitation special needs of developing country Members and LDC Members; negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements; recommendations on trade, debt, and finance; and targeted

¹⁷⁴ SONIA E. ROLLAND, *DEVELOPMENT AT THE WTO 91* (Oxford University Press, 2012).

¹⁷⁵ World Trade Organization, Ministerial Declaration of 14 November 2001, ¶6, WT/MIN(01)/DEC/1, 41 I.L.M. 746, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#special [hereinafter Doha Declaration].

technical assistance for LDCs.¹⁷⁶ There is no better time for WTO Members who are States Parties to the ICESCR to draw upon their obligations to respect, protect, and fulfill ICESCR rights to inform the content of their negotiations than in the present Doha Development Round.¹⁷⁷

As seen in the foregoing subsections, there are segmented efforts to achieve “balance” between trade and non-trade public policy objectives, the three core functional pillars of the WTO, and the counterpart institutions that oversee such functions. The following section identifies some dissonance between the voices that get to weigh in on these balancing processes, and those often excluded from public policy decision-making at the WTO.

II. THE PUBLIC POLICY INSTITUTIONAL DEFICITS AT THE WTO: WHO UNDERTAKES ‘BALANCING’?

WTO rules are contained in around sixty agreements, annexes, decisions, and understandings, mostly negotiated and concluded during the 1986-1994 Uruguay Round, which includes the 1994 Marrakesh Agreement Establishing the WTO, and landmark multilateral agreements in trade in goods, trade in services, intellectual property, dispute settlement, and government trade policy review.¹⁷⁸ These agreements can be categorized according to: 1) “broad principles” (e.g. the General Agreement on Tariffs and Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights); 2) “extra agreements and annexes dealing with the special requirements of specific sectors or issues”; and 3) “detailed and lengthy schedules (or lists) of commitments made by individual countries allowing specific foreign products or service providers access to their markets”.¹⁷⁹ Apart from the WTO agreements, other sources of

¹⁷⁶ *Id.* at ¶ 13-44.

¹⁷⁷ Andreas Blüthner, *Trade and Human Rights at Work: Next Round, Please?*, in *AGREEING AND IMPLEMENTING THE DOHA ROUND OF THE WTO* 355 (Cambridge University Press, 2008).

¹⁷⁸ See *Understanding the WTO: The Agreements: Overview: A Navigational Guide*, WTO (last visited Jan. 1, 2014), https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

¹⁷⁹ Doha Declaration, *supra* note 179.

WTO law (alternatively dubbed as soft law¹⁸⁰) that may “clarify or define the law applicable between WTO Members”¹⁸¹ include: the WTO dispute settlement reports, the acts of WTO bodies, agreements concluded in the context of the WTO, customary international law, general principles of law, other international agreements, subsequent practice of WTO Members, teachings of the most highly qualified publicists, and the negotiating history.¹⁸² WTO Members accept the multilateral agreements in the system as a “single undertaking...justified as necessary to prevent the kind of free-riding that was possible in the disjoint legal order of the pre-Uruguay Round GATT.”¹⁸³ While it remains much debated if this approach indeed achieves complete uniformity of WTO rules, it is nevertheless acknowledged that the single undertaking approach significantly contributes towards increasing the consistency of the content, scope, and application of these rules within the WTO membership.¹⁸⁴

Rule-making occurs from a combination of the processes of negotiating treaties at the WTO pursuant to Article III:2 of the WTO Agreement/¹⁸⁵ Rule-making also occurs from the ‘second-

¹⁸⁰ Mary Footer identifies soft law instruments in the WTO as “the resolutions adopted by the organisation’s institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman’s statements and so on. While they are not intended to be legally binding they may nevertheless have practical effect and may prove legally relevant....[soft law in the WTO] has proven to be particularly useful where there is broad lack of agreement or a lack of coordination among WTO members, where an issue is highly contestable or where cooperation gives rise to distributive conflicts.” See Mary E. Footer, *The (Re)turn to ‘Soft Law’ in Reconciling the Antinomies in WTO Law*, 11 MELB. J. INT’L L. 241, 247-48 (2010), available at <http://ssrn.com/abstract=1789830>.

¹⁸¹ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 53 (Cambridge University Press 2nd ed. 2008) [hereinafter VAN DEN BOSSCHE].

¹⁸² See PAUWELYN, *supra* note 164, at 40-52.

¹⁸³ Nicholas Lamp, *Democracy in the WTO – The Limits of the Legitimacy Debate*, in *GLOBAL RISKS: CONSTRUCTING THE WORLD ORDER THROUGH LAW, POLITICS, AND ECONOMICS* (Janna Hertwig, Sylvia Maus & Peter Lang eds., 2010).

¹⁸⁴ See generally Craig VanGrasstek and Pierre Sauve, *The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?*, 9 J. INT. ECON. LAW 837 (2006).

¹⁸⁵ Thomas Cottier, *A Two-Tier Approach to WTO Decision-Making*, in

ary legislation', functional rules, and particularized decisions of the WTO political organs issued to implement the covered multilateral agreements within the WTO system.¹⁸⁶ The institutional structure of the WTO and its key political organs is laid out in Article IV of the WTO Agreement: the Ministerial Conference (composed of all Member States meeting at least once every two years); the General Council, which conducts the day to day functions of the Ministerial Conference when the latter is not in session, and also acts as the Trade Policy Review Body (TPRB) and the Dispute Settlement Body (DSB); the three sectoral councils (Council for Trade in Goods, Council for Trade in Services, Council for TRIPS) which oversee the implementation of the GATT, GATS, and TRIPS; other specialized councils, committees, and groups as created by the Ministerial Conference (such as the Trade Negotiations committee, Committee on Trade and Development, etc.).¹⁸⁷ The WTO Secretariat discharges "exclusively international" responsibilities and administrative duties to implement instructions solely from the WTO.¹⁸⁸ These political organs of the WTO collectively discharge the WTO's core functions under Article III of the WTO Agreement:¹⁸⁹ 1) the facilitation of the implementation, administration, and operation of the WTO Agreement, the multilateral and plurilateral trade agreements; 2) providing the forum for negotiations of new agreements among its Members concerning their multilateral trade relations; 3) administer the Dispute Settlement Understanding (DSU); 4) administer the Trade Policy Review Mechanism (TPRM); and 5) coordinate with other global economic institutions such as the International Monetary Fund, the World Bank, and affiliated agencies.

Apart from these formal political organs, WTO rule-makers also appear in varied forms. WTO Member States conduct trade negotiations "in a context of flexible, interest-driven

REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY 42, 49 (Debra P. Steger ed., Wilfrid Laurer University Press 2009), available at <http://www10.iadb.org/intal/intalcdi/PE/2010/05075.pdf>.

¹⁸⁶ *EC-Asbestos Appellate Body Report*, *supra* note 59, at 51. See also Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK Y.B. UN L. 609, 625-44 (2001).

¹⁸⁷ Marrakesh Agreement, *supra* note 28, at art. IV.

¹⁸⁸ *Id.* at art. VI.

¹⁸⁹ See *id.* at art. III.

coalitions. They may belong to more than one grouping, depending on their interests.”¹⁹⁰ Depending on the negotiation agenda for a given round,¹⁹¹ formal and informal coalitions could be as durable or ephemeral as those for developing country Members, the least developed country (LDC) Members, the European Union and its Member States, the Association of Southeast Asian Nations (ASEAN), the Group of Latin America and Caribbean Countries (GRULAC), the African, Caribbean and Pacific Group (ACP), the G-20, and the ‘Quad’ at the Uruguay Round (the four largest trading entities – the European Communities, the United States, Japan, and Canada), as well as those entities with Observer status, such as intergovernmental international organizations (the United Nations, the World Bank, UNCTAD, among others).¹⁹² WTO decisions are issued through negative consensus,¹⁹³ with trade negotiations and other key decisions often facilitated through the ‘green room’ meetings between major WTO powers and select Members whose interests are most implicated in the particular meeting.¹⁹⁴ In any event, it should be clear that the legislative process does not take place in isolation from the executive implementation of WTO rules, as “the WTO Agreement is not meant to institutionalize any autonomous political process.”¹⁹⁵

The WTO also provides for guidelines in its engagement with non-governmental organizations, although this is largely limited to transparency and public information concerns, since the “Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for

¹⁹⁰ Cottier, *supra* note 188, at 46.

¹⁹¹ See generally Robert Z. Lawrence, *Rulemaking Amidst Growing Diversity: A Club-Of-Clubs Approach To WTO Reform and New Issue Selection*, 2004 World Trade Forum, available at

<http://hks.harvard.edu/fs/rlawrence/LawrenceClub%20ofClubsFinal.pdf> (proposing to delineate ‘clubs’ to which WTO members could additionally subscribe based on their interests and the core mission of the WTO).

¹⁹² VAN DEN BOSSCHE, *supra* note 184, at 107-09.

¹⁹³ See Jaime Tijmes-Ihl, *Consensus and majority voting in the WTO*, 8 WORLD TRADE REVIEW 3 (July 2009).

¹⁹⁴ Lawrence, *supra* note 194, at 144-49. .

¹⁹⁵ Bogdandy, *supra* note 189, at 614.

NGOs to be directly involved in the work of the WTO or its meetings.”¹⁹⁶ In practice, however, NGOs have been able to strategically engage the WTO throughout various areas of trade policy-making and agenda-setting.¹⁹⁷ Since the inception of the WTO Guidelines, NGOs have been able to observe plenary sessions and ministerial conferences, obtain information on trade issues, and strategically push their particular advocacies on WTO member States, such as those on enforcing labor rights, protecting the right to health and enabling access to essential medicines through compulsory licensing as an exception to TRIPS obligations.¹⁹⁸ To the extent that NGOs have been able to incrementally influence the content of interpretations of WTO norms thus far, they are still regarded as marginal players in WTO rulemaking.¹⁹⁹

Despite the robust profusion of WTO rulemaking and sources of rules, it is noteworthy in the design and nature of rulemaking at the WTO that there are institutionalized opportunities for the centralized creation and interpretation of WTO rules. The General Council – the highest political decision-making body of the WTO – also assumes other functions that critically bear upon WTO rulemaking. When it acts as the Trade Policy Review Mechanism (TPRM), it can review trade

¹⁹⁶ General Council Decision, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, ¶ VI, WT/L/162 (July 23, 1996), available at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm.

¹⁹⁷ Seema Sapra, *The WTO System of Trade Governance: The Stale NGO Debate and the Appropriate Role for Non-State Actors*, 11 OR. REV. INT'L L. 71, 105 (2009) (“... NGOs already play an important role informally and have a significant agenda-setting impact ... [n]ow that NGOs are already actively involved in trade negotiations, the more important question might no longer be whether NGOs should participate, but what influence do NGOs have and how is it being exercised.”); Julio A. Lacarte, *Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective*, 7 J. INT'L ECON. L. 683, 683-86 (2004); JL Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 433-53 (1998); Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331, 340-47 (1996); Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123, 123-34 (1998).

¹⁹⁸ See Shamima Ahmed, *Impact of NGOs on International Organizations: Complexities and Considerations*, 36 BROOK. J. INT'L L. 817, 827-28 (2010-2011).

¹⁹⁹ See Peter van den Bossche, *NGO Involvement at the WTO: A Comparative Perspective*, 11 J. INT'L ECON. L. 717, 717-49 (2008).

policies and domestic regulations of the WTO Members for consistency with WTO rules.²⁰⁰ The General Council also wears an adjudicative hat when it acts as the Dispute Settlement Body (DSB) in adopting reports of dispute settlement panels and the Appellate Body.²⁰¹ The DSB does not only adopt panel and Appellate Body reports, but is also tasked to maintain surveillance of the implementation of rulings and recommendations, authorize suspension of concessions and other obligations under the WTO covered agreements, and to inform the relevant WTO Councils and Committees of related developments arising from disputes under the WTO covered agreements.²⁰² As an acknowledged “political institution”,²⁰³ the DSB has an enviable record on enforcing compliance with WTO dispute settlement rulings.²⁰⁴ While the legislative process at the WTO primarily occurs through Member States’ trade negotiations, other sources of rules (such as Ministerial Conference and/or the General Council decisions, standards set by designated technical bodies or agencies in the WTO covered agreements) may thus also involve rule-makers beyond the primary political organs of the WTO.²⁰⁵ The WTO system appears conducive to harmonization largely because the common political institutions –the Ministerial Conference and the General Council – retain authority to issue decisions on the authoritative interpretation of the WTO covered agreements. This does not necessarily mean, however, that there is any focused, systematic, or dedicated parliamentary oversight process over WTO rule-making.²⁰⁶ The system does not encapsulate a perfect closed

²⁰⁰ Pieter Jan Kuijper, *Some Institutional Issues Presently Before the WTO*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 81, 81-83 (Daniel L. M. Kennedy & James D. Southwick eds., Cambridge University Press 2002).

²⁰¹ See VAN DEN BOSSCHE, *supra* note 184, at 225 (regarding the multifunctional nature of the General Council).

²⁰² DSU, *supra* note 34, at art. 2(1) - 2(2).

²⁰³ Benzing, *supra* note 140, at 279.

²⁰⁴ Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 *J. INT’L ECON. L.* 397, 397-403 (2007).

²⁰⁵ See Marion Jansen, *Defining the Borders of the WTO Agenda*, in *THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION* 161, 167 (Amrita Narlikar, Martin Daunton & Robert M. Stern eds., Oxford Univ. Press 2012).

²⁰⁶ Gregory Shaffer, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts*, 7 *J. INT’L ECON. L.* 629, 629-54

version of legislation under classic separation of powers theory.²⁰⁷ Rather, the doctrine of delegation²⁰⁸ in the modern regulatory state should appear to be more applicable in assessing how institutional, formal, and informal rule-makers at the WTO deploy their authority, based on the consent of States to the WTO covered agreements. The application of this doctrine as a basis for assessing public authority at the WTO would, perhaps, be appropriate when one considers the 'constitutionalizing' consequences of the WTO covered agreements on the 'international legislative process' on trade, and its concomitant impacts on domestic law-making.²⁰⁹

While States author the treaty standards and norms governing global trade, in practice, the implementation of these standards also trigger considerable rulemaking by other political institutions, such as, for trade law, the WTO General Council and Ministerial Conference, the sectoral Councils, the universe of standard-setting agencies and technical bodies involved in the SPS, TBT, TRIPS, GATT, GATS, Agriculture, and other WTO covered agreements.²¹⁰ The same functional

(2004).

²⁰⁷ Under separation of powers "the legislative power includes the power, through the enactment of laws, to specify the ends and means of public policy, but it does not include the executive power to administer and enforce those laws or the judicial power to resolve cases arising under them." RICHARD E. LEVY, *THE POWER TO LEGISLATE* 138 (Greenwood Publishing 2006).

²⁰⁸ HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 269 (Anders Wedberg trans., Russell & Russell 1973) ("The concept of 'separation of powers' designates a principle of political organization....there are not three but two basic functions of the State: creation and application (execution) of law, and these functions are not coordinated but sub- and supra-ordinated.").

²⁰⁹ See GAIL ELIZABETH EVANS, *LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION* 193-243 (Kluwer Law International 2000); see also JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW AND ECONOMICS OF THE GATT AND THE WTO* 61-90 (Princeton Univ. Press 2010); John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited*, 4 J. INT'L ECON. L. 67, 67-78 (2001).

²¹⁰ One scholar refers to a generalized model of "multilevel regulatory governance", where "the capacity of each level to carry out the regulatory function must be verified. It must be based on the comparative advantage of each level. There needs to be coordination between different levels of government before the transfer of power. This would lead to an ongoing process of a dynamic separation of powers. The key element in the new situation is coherence. In the absence of coherence there is a risk of contradictory rules, excessive regulation or regulatory gaps...." Brigid Gavin, *Reconciling Re-*

reasons for delegation – the need for agency expertise; the lack of time and resources for States to directly undertake, monitor, and coordinate rulemaking; as well as the value of removing implementation decisions from more political forums –²¹¹ may also be applied to explain the proliferation of rule-makers and rule-making beyond States' formulation of treaty standards in the world trade system. To the extent that non-delegation doctrine also makes itself amenable to critiques of public participation in the regulatory process,²¹² and also is subject to some form of judicial review,²¹³ one can also test the legitimacy of trade rulemaking. In any event, the fundamental public policy institutional deficits at the WTO demonstrably arise from a lack of institutional coordination across the three functional pillars on how to approach WTO Members' trade and non-trade public policy objectives. Members have the foremost voice at the WTO but not all Members are heard equally in the real corridors of power and decision-making at the WTO.²¹⁴ Balancing trade and non-trade public policy objectives require complex informational interfaces from the widest possible sources – governmental, non-governmental, international, and local – and yet there is no well-established and cohesive method yet established by the WTO Secretariat to systemically consult all stakeholders that may be concerned with respect to different environmental, social, labor, cultural, and developmental public policies.²¹⁵ Institutional coordination of Members' trade and non-trade public policy objectives cannot be achieved without establishing the necessary information architecture to elicit relevant information from the WTO Membership, international

gionalism and Multilateralism: Towards Multilevel Trade Governance, in MULTILATERALISM, REGIONALISM, AND BILATERALISM IN TRADE AND INVESTMENT 59, 64-65 (Philippe De Lombaerde ed., Springer 2007).

²¹¹ Kelsen, *supra* note 211, at 673.

²¹² *Id.* at 680.

²¹³ *Id.* at 682.

²¹⁴ See JOHN WARREN HEAD, *LOSING THE GLOBAL DEVELOPMENT WAR* 251 (Brill, 2008); Yong-Shik Lee, *World Trade Organization and Developing Countries: Reform Proposal, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW* 105, 108-11 (Yong-Shik Lee, Gary Horlick, Won-Mog Choi, & Tomer Broude eds., Cambridge Univ. Press 2011).

²¹⁵ See CHRISTIANE R. CONRAD, *PROCESSES AND PRODUCTION METHODS IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS* 471-72 (Cambridge Univ. Press 2011).

specialized agencies at the United Nations, non-governmental organizations, citizens, groups and other constituencies that are ordinarily consulted in a public policy and regulatory management process.²¹⁶

CONCLUSION: ACTUALIZING THE 'PRINCIPLES OF COOPERATION
AND COORDINATION' - THE WTO AS THE FORUM FOR
INTERNATIONAL PUBLIC POLICY

India's failure to ratify the Protocol to the TFA signals the most significant tipping point in the stalled Doha Round on the tensions on Members' expectations of flexibility from WTO commitments for non-trade public policy commitments. Lack of institutional coordination on the ongoing dialogue and decision-making in the standard-setting, trade policy review, and dispute settlement functional pillars of the WTO comes at the price of abrupt 'defections' from WTO compliance by those who perceive that the WTO is an inappropriate (if not paralyzed) forum for balancing trade and non-trade public policy objectives. As a World Bank publication presciently observed:

"Perceptions of inequities in the WTO decision-making system implicitly call into question other facets of governance, specifically, the failure to balance the costs and benefits arising from trade negotiations. The end result has been an absence of 'ownership' of many agreements, and a general suspicion of the WTO...To be sure, the WTO is not an international organization intended to 'govern' the global economy, or even international trade relations, as a whole. It does, however, perform some functions of governance at the international level by providing a forum for trade rule-making (legislative function); protecting trade opportunities; fostering transparency in the trading system; and enforcing rules through a dispute settlement system (judicial function). In addition, there are other functions not attributed formally to the WTO that are subject to an intense international debate as to whether they should be put under its purview. Examples include the supply of international public goods and the subjection of

²¹⁶ See CITIZENS AS PARTNERS: OECD HANDBOOK ON INFORMATION, CONSULTATION, AND PUBLIC PARTICIPATION IN POLICY-MAKING 27-39 (OECD 2001); Elizabeth Smythe, *Democracy, development, and the WTO's legitimacy challenge: Assessing the Doha Development Round*, in THE WTO AFTER HONG KONG: PROGRESS IN, AND PROSPECTS FOR, THE DOHA DEVELOPMENT ROUND (Donna Lee & Rorden Wilkinson eds., Routledge 2013).

markets to social objectives. Given the scope of the recent questioning on WTO governance, efforts to pursue new trade negotiations on a comprehensive basis will probably have to go hand in hand with a streamlining of the decision-making process that pays due attention to the requirements of efficiency and legitimacy. Unless these worries are addressed, new negotiations will add to the frustration.”²¹⁷

The international law principle of cooperation²¹⁸ – often applied in circumstances involving States’ common interests in managing shared resources and mitigating environmental risks – is especially significant to the process of balancing trade and non-trade public policies. Article XVI:4 of the WTO Agreement imposes the duty upon WTO Members to bring their national laws into conformity with WTO law, but, as seen in Parts II and III, the substance of such WTO law insofar as trade and non-trade policies is hardly made up of bright-line rules. If WTO Members are expected to harmonize domestic regulatory measures with WTO law as a matter of international obligation, then the balancing process for trade and non-trade public policies must itself be transparently and consistently undertaken in all three of the WTO’s functional pillars – dispute settlement, trade policy review, and trade negotiations – to feasibly enable WTO Members to substantiate and internalize conformity with WTO law in their respective public policy management processes. In order to achieve optimal cooperation within the WTO system to arrive at the sustainable policy flexibility originally envisaged in the Preamble to the Marrakesh Agreement and the numerous public policy calibration provisions in the WTO agreements, institutional coordination premised on equal informational access and contribution by Members and other public policy stakeholders will be critical. Coordination and cooperation should be embraced as fundamental and foundational principles WTO law, stemming from the teleological purpose and original design towards balancing trade and non-trade public policy objectives that were built into

²¹⁷ Diana Tussie & Miguel F. Lengyel, *Developing Countries: Turning Participation into Influence*, in *DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK* (Bernard Hoekman, Aaditya Mattoo & Philip English eds., World Bank 2002).

²¹⁸ See *Lake Lanoux Arb. (Spain v. Fr.)*, 12 R.I.A.A. 281 (Arb. Trib. 1957); *Nuclear Tests Cases (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20).

the WTO agreements themselves through the public policy calibration provisions, and the assumption of legislative, executive, and judicial functions dispersed across WTO organs. The crystal lesson from India's refusal to ratify the Protocol to the TFA and around fourteen years of stalled negotiations at the Doha Development Round is that balance between trade and non-trade public policy objectives – the development dimension avowed in the WTO – is the ultimate object and purpose of the WTO Agreements.²¹⁹ The piecemeal, dispersed, and incremental approach to the balancing process thus far comes at a high price for the entire WTO system, its participants, and the envisaged beneficiaries of global multilateral trade. As perceptions of illegitimacy remain unaddressed in the WTO, we risk dooming the WTO to irrelevance.

²¹⁹ See ASIF H. QURESHI, *INTERPRETING WTO AGREEMENTS: PROBLEMS AND PERSPECTIVES* 114-159 (Cambridge University Press 2006).