

# SELECTIVE SUBSIDIARITY AND DIALECTIC DEFERENCE IN THE WORLD TRADE ORGANIZATION

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## I

### INTRODUCTION: TURNING THE TABLES ON/OFF SUBSIDIARITY

Whom, not what, or which purpose—does subsidiarity serve in international governance? Whom does it empower? Subsidiarity, generally, is the normative concept whereby rules and policies are better deliberated, devised, and determined at lower rather than higher levels<sup>1</sup> of authority and interest, unless convincing reasons exist to prefer otherwise.<sup>2</sup> These reasons often include some kinds of efficiency or legitimacy considerations, or both, as determinative benchmarks.<sup>3</sup> Moreover, subsidiarity is usually presumed to be an instrument for preserving and maintaining the influence of the local in the face of the increasing power of centralized, multilateral, and global institutions.<sup>4</sup> In this vein, subsidiarity appears to cut overarching structures of global governance down to their proper size, balancing their otherwise prevailing power, while

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1. “Subsidiarity” evokes vertical terminology. *See generally* René Urueña, *Subsidiary and the Public–Private Distinction in Investment Treaty Arbitration*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 99, 101–02. However, subsidiarity also has horizontal (inter-regime) applications. *See* Robert Howse & Kalypso Nicolaïdis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE 73, 75 (2005). Moreover, subsidiarity could also be perceived in spatial rather than linear terms. *See* Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT’L L. 32, 34 (1998).

2. This is necessarily a caricature of the breadth of subsidiarity’s forms. *See* Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1; Andreas Føllesdal, *Competing Conceptions of Subsidiarity*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY 214, 219–26 (James E. Fleming & Jacob T. Levy eds., 2014); Isabel Feichtner, *Subsidiarity*, in 9 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 652, 653–57 (Rüdiger Wolfrum ed., 2012). Thus, for example, the default allocation of authority may differ: subsidiarity can either determine when authority devolves from central to local, or when authority reserved to the local is nevertheless reallocated to the central.

3. *See, e.g.*, Jenna Bednar, *Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal Systems*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY, *supra* note 2, at 231 (explaining subsidiarity in federal systems as a method of enhancing adaptive efficiency, not only general social welfare).

4. *See* Jachtenfuchs & Krisch, *supra* note 2, at 6–7 (depicting subsidiarity as a presumption in favor of lower-level decisionmaking).

seemingly alleviating, if not curing, the democratic deficits inherent in international organization. In other words, the story goes, global strata of governance sacrifice some of their powers (actual or potential) through subsidiarity, empowering more localized elements (such as regional groupings, states, provinces, or municipalities) where the exercise of the latter's authority and decision-making processes would be more effective and legitimate.

At least when applied to the World Trade Organization (WTO)—a prime multilateral (indeed, almost universal)<sup>5</sup> regime of norms and institutions, whose overarching purpose is to encourage states to reduce the barriers they impose on international trade in goods and services for mutual benefit<sup>6</sup>—this idealization of subsidiarity encounters some revealing difficulties and complications, which tell us much about the operability of subsidiarity in general.

On the one hand, the WTO has no executive powers or authority independent of its Membership, and in practice it does not exercise formally binding decision-making competences beyond the adjudication of its own rules and the authorization of their enforcement through its much-vaunted dispute settlement system. Contrary to the European Union (EU) and its model of subsidiarity, with all of its baggage,<sup>7</sup> the WTO, which does not engage in direct, positive regulation, has few effective legislative or even quasi-legislative procedures and hardly ever “acts” in any traditional manner. The WTO is, as is the truism, a “Member-driven” organization, at least in the sense that “Members are part of the international organization (for example, through rulemaking) and at the same time act outside the [international organization] (for example, through implementation),”<sup>8</sup> with a heavy emphasis on consensus rulemaking associated with normative stagnation and institutional paralysis.<sup>9</sup> There is, therefore, from a somewhat positivist perspective, something discordant from the outset in discussing subsidiarity in the context of the WTO (or the WTO in the context of subsidiarity). If the paramount global trade regulation forum actually holds little formal authority, is the default not that all powers remain vested with states, subject to their political interactions within the organization and outside of it? How is subsidiarity, then, of any relevance?

On the other hand, notwithstanding the paucity of formal powers over its

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5. The WTO currently has 162 Members, including 159 states and three “Separate Customs Territories.” See *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Dec. 14, 2015).

6. This both generalizes and simplifies; for a nuanced discussion of the goals of trade agreements, see generally KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2002).

7. See generally Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 J. COMMON MKT. STUD. 72–87 (2012).

8. See Manfred Elsig, *The World Trade Organization at Work: Performance in a Member-Driven Milieu*, 5 REV. INT'L ORG. 345, 346 (2010).

9. See Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the WTO: Is the Consensus Practice of the WTO Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. INT'L ECON. L. 51, 53 (2005).

Members, the WTO is an important—to some, even a looming and threatening<sup>10</sup>—agent of global governance. At times, the engagement of the WTO dispute settlement system with (and intrusion into) significant domestic public policy issues that transcend mere trade flows, such as public health (for example, national tobacco control measures)<sup>11</sup> or public morals (for example, import bans related to animal welfare),<sup>12</sup> is sufficient testament to this. To be sure, this is negative power (the power to overrule), rather than positive authority (the power to rule), but in any case, the WTO would appear to hold much greater influence in practice than the law on the books would tell us.

Thus, despite the absence of a strict ordering system or a clear normative hierarchy within the organization, the concept of subsidiarity may hold the potential for some traction in the WTO system, serving a necessary authority-allocation function. However framed or depicted, the WTO undoubtedly possesses influence that interacts with the lower decision-making entities of its Members. Yet the default locus of power, as well as the mechanisms of allocation, remains unclearly defined in formal terms, and indeed contested. For the WTO dispute settlement organs, the point of departure is that the WTO Agreements prevail as the international law of the organization, whereas for national governments, there is a presumption of sovereignty (followed by continued—often feigned—astonishment when the constraints imposed at the international level become real). At the same time, there exists in the WTO an environment of legislative deferrals,<sup>13</sup> in which many difficult normative issues are voluntarily, at least by omission, left by the Membership to the judicial branch—the dispute settlement system—to decide.<sup>14</sup>

In these circumstances, the ultimate balance of authority, so to speak, may be the outcome of dynamic political reflexivities applying between the relevant actors—especially individual WTO Members, the Membership as a whole, the dispute settlement system (Panels and the Appellate Body (AB)), and, behind the scenes, the WTO Secretariat<sup>15</sup>—rather than any structured or otherwise reasoned forms of subsidiarity or mutual deference. In such cases, the distinction between weak and strong types of subsidiarity, depending on the “threshold” for rebutting the presumption in favor of the lower level of

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10. On antiglobalist concerns, see Tomer Brode, *From Seattle to Occupy: The Shifting Focus of Social Protest*, in LINKING GLOBAL TRADE AND HUMAN RIGHTS: NEW POLICY SPACE IN HARD ECONOMIC TIMES 91–107 (Daniel Drache & Lesley A. Jacobs eds., 2014).

11. See Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 13, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012).

12. See Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.194–203, WTO Doc. WT/DS/401/AB/R (adopted May 23, 2014).

13. In another context, see generally GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY (2010) (arguing that within American politics, lawmakers in some circumstances invite the Court to make policy decisions).

14. See TOMER BROUDE, INTERNATIONAL GOVERNANCE IN THE WTO: JUDICIAL BOUNDARIES AND POLITICAL CAPITULATION 34, 306 (2004).

15. See Sikinah Jinnah, *Overlap Management in the WTO: Secretariat Influence on Trade-Environment Politics*, 10 GLOBAL ENVTL. POL. 54, 71–74 (2010).

decisionmaking, as suggested in this issue's framing article,<sup>16</sup> is barely applicable—at least to the extent that the subsidiary entities actually prefer decisions to be made over their heads, at the organizational level. Furthermore, this observation casts more than a mere shadow of doubt on the normative prescriptiveness of subsidiarity, at least in the WTO setting and perhaps more broadly. To be fair, though, in the WTO, most forms of subsidiarity-like mechanisms (as we shall soon see) are implied rather than explicit. In any case, the preference of subsidiary entities for higher-level decisionmaking also shows that the demand for subsidiarity<sup>17</sup> is not a one-way street. In a multilevel system of governance, the lower levels might actually clamor for greater centralization, while at the same time the higher levels prefer (or demand) devolution.

Having said all this, in ways that are not entirely unlike international law more generally,<sup>18</sup> but compounded by particular trade-land phenomena (such as the malaise in multilateral rule development in the ill-fated Doha Round)<sup>19</sup> and institutional competition from regional and plurilateral machinations,<sup>20</sup> the WTO seems to be plagued by an existential fear of irrelevance, despite its unquestionable actual influence. The WTO is constantly in need of approbation and maintenance of its legitimacy, both internal (*vis-à-vis* its own Membership) and external (*vis-à-vis* international civil society, broadly construed, for example),<sup>21</sup> with mixed results as far as democratic legitimation is concerned.<sup>22</sup> In this context, expressions of subsidiarity may be employed, not merely as positive means of authority allocation, but rather as discursive devices for managing and moderating the balance of authority and legitimacy between different levels of governance. Crucially, this means that subsidiarity and deference, ostensibly empowering subglobal decision-making authorities (such as at the state level), may actually legitimate and strengthen global governance levels. Indeed, even implicit, subsidiarity-like mechanics can contribute to the legitimation of governance at the central (or higher) international level without

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16. Jachtenfuchs & Krisch, *supra* note 2, at 7.

17. *See id.*

18. *See generally* Martti Koskeniemmi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990) (providing a critical discussion of the tension between international law's quest for normative relevance and its subjection to political fiat).

19. *See* Simon Evenett, *The Doha Round Impasse: A Graphical Account*, 9 REV. INT'L ORG. 143, 144 (2014).

20. Examples of such institutional competition include the proliferation of Regional Trade Agreements (RTAs) and the rise of "mega regionals" (the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership). *See* Thomas Cottier, *The Common Law of International Trade and the Future of the WTO*, 18 J. INT'L ECON. L. 3, 3 (2015).

21. *See* Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 254; Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 194–97 (2001).

22. *See* Samantha Besson, *The Democratic Legitimacy of WTO Law—On the Dangers of Fast-food Democracy*, 22–26 (Nat'l Centres of Competence in Research, Working Paper No. 2011/72, 2011), <http://www.nccr-trade.org/publication/the-democratic-legitimacy-of-wto-law-on-the-dangers-of-fast-food-democracy/>.

detracting from its social power.<sup>23</sup> These mechanics may even enhance the social power of centralized international governance. The tables of subsidiarity can be turned, therefore, with deference serving to empower central authority no less than the constituent subunits, if not more so; but importantly, these exercises have their limits, imposed by the ongoing relations between the entities involved and the practical legitimacies they provide.

As already hinted, any descriptive and critical discussion of subsidiarity in the WTO (as opposed to a more normative, indeed almost aspirational, study of WTO waivers as an instrument of subsidiarity)<sup>24</sup> must inevitably focus on the organization's dispute settlement system and its interpretation and application of WTO law. If at the turn of the millennium many still thought that the chief function of WTO dispute settlement was simply to manage EU–U.S. trade relations—the traditional political economy of give-and-take market access—it is now increasingly clear that its role, regardless of the identity of parties to particular disputes, is to manage the balance between trade rules (whether in the WTO or otherwise) on the one hand, and domestic regulatory space on the other hand. This is closely connected to the substantive “[t]rade and . . .” discourse, the debate regarding the proper role of the trade regime in addressing nontrade values and interests—such as environmental sustainability, public morals, or public health, as already mentioned—which has a horizontal inter-regime dimension that can also be thought of, at least metaphorically, in terms of subsidiarity.<sup>25</sup> But it is much more clearly related to the allocation of regulatory authority along the vertical axis, or spatial plane, of the competing distribution of policy-making prowess between the WTO and national public authorities, as well as regional organizations.

Although subsidiarity is not an enumerated principle of international (or WTO) law, it arguably has many functional manifestations in the WTO. Indeed, according to Pascal Lamy, the (European) former Director-General of the WTO, subsidiarity is an essential principle of global governance as a normative matter, and accordingly, “Policy should be allocated at the lowest level of government (national, regional, or global) encompassing all benefits and costs.”<sup>26</sup> But given the absence of positive authority vested in the organization, and the focus on dispute settlement, the subsidiarity conceived of in the WTO is more similar to a loosely defined decision-making deference to national, or possibly regional, preferences and laws.

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23. “Power” here is used neither in a formal-legal sense, nor as empirical causation, STEVEN LUKES, *POWER: A RADICAL VIEW* (1974), but rather as a structural-realist concept involving “the capacities to act possessed by social agents in virtue of the enduring relations in which they participate.” Jeffrey C. Isaac, *Beyond the Three Faces of Power: A Realist Critique*, 20 *POLITY* 4, 22 (1987). For a discussion of this kind of power in the judicial context, see BROUDE, *supra* note 14, at 46–47.

24. See generally Isabel Feichtner, *Subsidiarity in the WTO: The Promise of Waivers*, 79 *LAW & CONTEMP. PROBS.*, no. 2, 2016, at 75.

25. See Howse & Nicolaïdis, *supra* note 1.

26. Pascal Lamy, Speech at the Singapore Global Dialogue: Governance of a Multipolar World Order (Sept. 21, 2012) (transcript available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl248\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl248_e.htm)).

With all of this in mind, this article examines, from positive and descriptive perspectives, the actual extent of subsidiarity-like provisions and processes in the WTO. In so doing, the article explores the nature and distribution of the WTO's operation. In a nutshell, the critical argument is that the (surprisingly abundant) expressions of subsidiarity (or deference) in the WTO are selective and strategic, not systemic, and that they more often than not serve to counteract the anxieties of the multilateral decision-making machinery, providing it with sources of enhanced legitimacy in its give-and-take with other actors (the Membership in particular) over influence and governance. Simultaneously, this selective subsidiarity does not clearly work to either empower or disempower national (or regional) systems, and it is in this respect that the deference becomes dialectical. This is how subsidiarity in action in the WTO should be understood—not as a technical authority-allocation rule, but as range of instruments and vocabularies through which the apportionment of authority is negotiated and adjusted through the discursive device that subsidiarity thus understood becomes.

Part II shows a small variety of elements of subsidiarity in the WTO's substantive norms. Some of these elements are interpretative in nature, including the interpretation of particular terms in the WTO agreements; in trade in goods and services; as well as in environmental, public health, public morals, and security exceptions, while others are more allocative,<sup>27</sup> such as the construction of specific liberalization commitments in the WTO's General Agreement on Trade in Services (GATS). Part III demonstrates dialectic dimensions of deference in some of the WTO's procedural rules, which include the "as such"/"as applied" complaint divide, the standard of review in dispute settlement, the choice of means of compliance following dispute settlement, and the relationship with trade agreements outside the WTO (all as discussed in this part). Part IV concludes with thoughts on the dualities of subsidiarity in international governance.

## II

### SEEKING SUBSIDIARITY IN THE WTO'S SUBSTANTIVE NORMS

Subsidiarity and deference have numerous expressions in the substantive law of the WTO. The following is just a sketch of some of these, which demonstrates these expressions can (and do) also work to strengthen and empower the supposedly higher or central WTO domain, rather than Members' decisionmaking, contrary to the conventional logic of subsidiarity. The focus is largely on the interpretation as well as on the creation of some of the rules that regulate the interface between trade liberalization and domestic regulatory autonomy, and elements of this counterintuitive dynamic can be detected in other significant areas of WTO law as well.<sup>28</sup>

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27. For the distinction between interpretative and allocative subsidiarity, see Jachtenfuchs & Krisch, *supra* note 2, at 10, 20–21.

28. For examples of this dynamic, see Agreement on the Technical Barriers to Trade, Jan. 1, 1995,

In passing, the interchangeability of subsidiarity and deference is not self-evident. Subsidiarity, strictly speaking, may be understood as a rule (however fuzzy) that governs the allocation of authority, with a preference for the local or lower levels of decisionmaking. In contrast, deference is a voluntary yet respectful submission to the authority of the other.<sup>29</sup> In many respects, the implicit subsidiarity referred to here has much in common with deference in the softer normative sense, as it derives from (and forms) the enduring relations between actors, and as already noted, is not based on a reasoned or structured norm. Having noted that, for the purposes of this article the two terms are treated as mutually substitutable.

#### A. The Interpretative Structure of GATT and GATS General Exceptions

The all-important Article XX GATT (and its services corollary, Article XIV GATS)—the general exceptions clause—acts as a central axis in managing the balance between WTO trade rules and domestic regulatory space, as well as in determining the degree of deference accorded to WTO Members' assessments of their own regulatory needs in a broad range of public policy areas, such as the protection of public morals; human, animal, or plant life or health; and the conservation of exhaustible natural resources.<sup>30</sup> The text of Article XX GATT has provided fertile ground for intricate, and at times controversial, hermeneutical discussions between Members and between them and the dispute settlement system. These include, perhaps most saliently, the interpretation of the term “necessary to” that appears in several of the subclauses of the provision.<sup>31</sup> This is the so-called “necessity test,” which contrasts with the use of the term “related to” present in the other subclauses of Article XX GATT. When is a measure necessary to protect human health or public morals? As interpreted in WTO jurisprudence, this question has certainly evolved into an instrument of subsidiarity.

The classic *EC–Asbestos*<sup>32</sup> dispute is instructive in this respect. Canada complained against an absolute ban applied by France with respect to all

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1868 U.N.T.S. 120, Sanitary and Phytosanitary Measures Agreement, Jan. 1, 1995, 1867 U.N.T.S. 3, and to a lesser extent, TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

29. See generally PHILIP SOPER, *THE ETHICS OF DEFERENCE: LEARNING FROM LAW'S MORALS* (2002) (developing a theory of law based on a moral duty to defer, as distinguished from a duty to obey or to conform).

30. The general exceptions in Article XX GATT constitute an exhaustive list of public-policy justifications for divergence from GATT obligations. See FEDERICO ORTINO, *BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE: A COMPARATIVE ANALYSIS OF EC AND WTO LAW 120* (2004).

31. See Andrew Mitchell & Caroline Henckels, *Variations on a Theme: Comparing the Concept of “Necessity” in International Investment Law and WTO Law*, 14 CHI. J. INT'L L. 93, 123–29 (2013).

32. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos Containing Products*, ¶¶ 164–175, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001). This, and other cases discussed in this article, while not recent, reflect the dilemmas of deference that have not changed significantly.

asbestos products due to their carcinogenic qualities. Canada argued, among other things, that the “level of protection” sought by France was questionable, and that there were reasonably available, less trade-restrictive measures for achieving adequate protection from asbestos-related risks.<sup>33</sup> In its Report (in essence, a judicial decision—the WTO dispute settlement system is more than functionally an international tribunal), the AB stated in no uncertain terms that “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,”<sup>34</sup> and that “France could not reasonably be expected to employ any alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to ‘halt.’”<sup>35</sup>

Surely, both legs of this decision reflect a highly deferential approach. In subsidiarity terms, this is an interpretation that leaves to the supposedly lower (that is, WTO Member) decision-making authority the power to determine the appropriate level of protection<sup>36</sup> accorded to the public policy concern that is a justification for WTO inconsistency—which in turn serves as a central factor for assessing the reasonableness of purportedly alternative measures. As far as the examination of specific public policy exceptions is concerned, the WTO dispute settlement system has proved extremely deferential to Members invoking them, in two cases even accepting China’s censorship system as supporting public morals, without question.<sup>37</sup> The very definition of public morals—as adopted by the AB in *U.S.—Gambling*,<sup>38</sup> in which U.S. restrictions on Internet gambling services were challenged by the small Caribbean island state of Antigua and Barbuda, and recently confirmed in *EC—Seals*,<sup>39</sup> in which EU prohibitions on the sale of products derived from seal hunting, which involves great suffering to the hunted animals, were at issue—is highly deferential, avoiding the establishment of some kind of central or higher image of morality. The AB has

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33. *Id.* ¶ 165.

34. *Id.* ¶ 168.

35. *Id.* ¶ 174.

36. Similar expressions appear more explicitly in the Sanitary and Phytosanitary Measures and Agreements on Technical Barriers to Trade. “Appropriate Level of Protection” is more properly a Sanitary and Phytosanitary Measures term, clearly envisioned as being determined by the Member. *See* Agreement on Sanitary and Phytosanitary Measures, pmbl., art. 4.1, Apr. 4, 1994. This is echoed by the Sixth Preamble Recital Agreements on Technical Barriers to Trade: “[N]o country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate” (emphasis added). *See* Agreement on Technical Barriers to Trade, pmbl., art. 6, 1868 U.N.T.S. 120.

37. *See* Tomer Broude & Holger P. Hestermeyer, *The First Condition of Progress? Freedom of Speech and the Limits of International Trade Law*, VA. J. INT’L L. 295, 314–17 (2014).

38. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (adopted Nov. 10, 2004); Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 296, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005).

39. LOVELL, *supra* note 13.

determined that “the term ‘public morals’ denotes standards of right and wrong conduct maintained *by or on behalf of* a community or nation.”<sup>40</sup>

This is hardly, however, the end of the story. Deference to the public policy goal as assessed by the respondent Member does not automatically mean that its measure will be justified by the relevant exception and accepted by the dispute settlement system. There are other obstacles to be surmounted, in particular the terms of the celebrated *chapeau* of Article XX GATT (emulated in Article XIV GATS).<sup>41</sup> The *chapeau* subjects any claim of exceptionality to requirements of an absence of “arbitrary or unjustifiable discrimination” or a “disguised restriction on international trade.” The record shows that these elements of the *chapeau* are an extremely difficult hurdle to jump—out of a few dozen disputes in which general exceptions have been invoked, only one or two (depending on one’s reading) have traversed the *chapeau* successfully. This is an empiric that has even recently been seized upon by opponents of new international trade agreements (such as the Trans-Pacific Partnership), as a demonstration of the lack of deference in the WTO and trade law more generally.<sup>42</sup>

Subsidiarity and deference may therefore be, in practice, significantly curtailed by the strictness of the *chapeau*. The hand that defers—by recognizing the Members’ right to regulate and their autonomy to determine appropriate goals of protection—easily taketh away by finding some otherwise unjustifiable flaw in the measure at issue. Indeed, this might even be perceived as faux deference to the extent that the negative power to strike down national measures is retained and unflinchingly employed by the higher WTO dispute settlement authority. The public policy consideration is accepted as vital—public morals in *U.S.—Gambling* and *U.S.—Seals*, public health in other cases—but the method of implementation is still subject to review, and it almost always fails.

However, a more careful reading of the cases reveals the full dialectic of subsidiarity. The reasons why a measure does not satisfy the terms of the *chapeau* do not negate the underlying deference to the justification of the measure, and they are usually not so difficult to subsequently rectify through a process of trial, error, and inter-institutional negotiation. This is why in *EC—Seals*, as but one example, the EU celebrated the AB’s recognition of animal welfare as justifiable under the public-morals exception in Article XX(a)

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40. Appellate Body Report, *US—Gambling*, ¶¶ 296–298; Panel Report, *US—Gambling*, ¶ 6.46 (emphasis added).

41. For a recent, incisive analysis, see generally Lorand Bartels, *The Chapeau of the General Exceptions in the GATT and GATS Agreements: A Reconstruction*, 109 AM. J. INT’L L. 95 (2015) (meticulously examining each element of the *chapeau*).

42. See, e.g., *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*, PUBLIC CITIZEN (Aug. 2015), <https://www.citizen.org/documents/general-exception.pdf> (providing evidence of the ineffectiveness of the GATT Article XX and GATS Article XIV).

GATT, even though its measure had failed the *chapeau* test. The faults the AB found in the measure could be cured “with some modifications that would amount to gestures of good faith,” as some commentators have noted.<sup>43</sup> The same could be said about many of the other cases in which the *chapeau* requirements have not been satisfied. Has subsidiarity not been reinstated, then?

Rather than drawing a bright line—or at least reasoned and structured degrees of deference—this discussion demonstrates that subsidiarity and deference are far from binary concepts. Through Article XX, the WTO defers to lower-level decisions, and then finds fault in them, but the flaws are rarely fatal. Who, then, does subsidiarity empower? Arguably, it empowers *both* the higher and lower actors. As a result, the regulatory space of states is only minimally restricted, but in the process, this space is subjected to the overruling power of WTO dispute settlement scrutiny.

This dialectic structure is not accidental, but it is rather the offshoot of deliberate interpretative choices made by the AB. For example, in the formative years of its influence and legitimation, particularly in the seminal *U.S.—Shrimp* case,<sup>44</sup> the WTO AB addressed the seemingly formalistic question of how to sequence the analysis of a national measure’s conformity with the Article XX GATT *chapeau* and the enumerated categories of issue-area exceptions. Should the national measure under review first be evaluated under the general terms of the *chapeau*, and only then be assessed in relation to one of the explicitly enumerated public-policy justifications, or vice versa? The *U.S.—Shrimp* Panel considered the U.S. environmental measure first under the *chapeau*, in effect striking the entire measure down in the abstract,<sup>45</sup> emphasizing its trade impact, without looking into the substantive applications of the measure relating to animal life and exhaustible natural resources.<sup>46</sup> This approach left little scope for recognition of national, subsidiary concerns. The AB, in contrast, found the Panel to be in error, reversing the sequence of analysis.<sup>47</sup> The measure should first be judged by whether it conforms to one of the enumerated exceptions, and only then be assessed under the *chapeau* terms.

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43. See Robert Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO’s Appellate Body Report in EC–Seal Products*, 18 AM. SOC’Y INT’L L. INSIGHTS (June 4, 2014), <http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93seal-products>. Indeed, commentators posit that the AB approach to public morals is appropriately deferential to the pluralism of WTO Members’ public morals. See Robert Howse, Joanna Langille & Katie Sykes, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, GEO. WASH. INT’L L. REV. 2, 66–68 (2015).

44. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 125–186, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

45. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.29, WTO Doc. WT/DS58/R (adopted May 15, 1998).

46. *Id.* ¶ 7.63.

47. Appellate Body Report, *US—Shrimp*, ¶ 117.

This order of analysis has hardly been questioned since the AB's determination.<sup>48</sup> It has been adopted in the GATS as well,<sup>49</sup> and can therefore be taken as a (technical) canon of WTO law. Importantly, it is this interpretative move that has allowed the WTO dispute settlement system, when faced with Article XX GATT (and similar) arguments, to project deference by embracing the policy goals of Members, subject to the strict terms of the *chapeau*, while simultaneously leaving sufficient room to maneuver among the technicalities of removing the causes of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."<sup>50</sup> This effect both increases the legitimacy of the WTO and its dispute settlement system without visibly detracting from its powerful oversight and influence, and provides Members with adequate, negotiated policy space.

In other words, subsidiarity and deference have served the higher level of decisionmaking no less, if not more, than the lower levels, by staking out a field of deliberation and negotiation whose ground rules are established by the WTO dispute settlement system, but require the satisfaction of the participating Members—therefore granting them in practice greater autonomy than the eye might see at first. To be sure, this discussion of Article XX GATT is merely one dimension in a much wider scheme of interpretative balancing between WTO trade rules and dispute settlement authority on the one hand, and Members' regulatory autonomy on the other. Similar dilemmas and interpretative decisions have been manifested in the Agreements on Technical Barriers to Trade (such as the "legitimate regulatory distinction" issue) and the Sanitary and Phytosanitary Measures (such as the "appropriate level of protection," and deference to scientific risk assessments conducted by a Member).<sup>51</sup> Although it is not possible to address meaningfully these additional dimensions here, they all present a similar pattern of dialectic deference that enhances the WTO's centrality while acknowledging states' decision-making authorities.

## B. The Strange Case of Security Exceptions

An interesting outlier in comparison with the *general* Article XX GATT and Article XIV GATS exceptions discussed above, but nevertheless an example of selective—and negotiated rather than reasoned—subsidiarity and dialectic deference, are the security exceptions under Article XXI GATT and Article XIV *bis* GATS. According to these provisions, exceptions to trade rules can be made regarding several prescribed security-related circumstances. Thus, a Member may refrain from disclosing information it considers to be contrary to its essential security interests; a Member is not prevented by the agreements

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48. *But see* Bartels, *supra* note 41 (raising arguments in favor of a contrary order of analysis).

49. As in the first case in which Article XIV GATS was invoked. *See* Panel Report, *US—Gambling*, ¶¶ 6.438–7.5.

50. General Agreement on Tariffs and Trade 1994, Art. XX, Apr. 15, 1994.

51. *See* Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT'L ECON. L. 639, 651–52 (2011).

from taking action it considers necessary for the protection of its essential security interests (relating to fissionable material, traffic in arms, ammunition and implements of war, or more generally, in time of war or other emergency in international relations); and a Member is not prevented by trade obligations from taking any action in pursuance of its “obligations under the United Nations Charter for the maintenance of international peace and security.”

These broad exceptions have in practice become—at least so far—significantly deferential. In a 1949 dispute regarding Cold War export restrictions imposed by the United States vis-à-vis Czechoslovakia, a majority of involved GATT Contracting Parties unsurprisingly supported the U.S. position that the measures were justified for national-security reasons.<sup>52</sup> The very subjection of the security consideration to higher scrutiny may suggest a lack of deference, but the decision itself was clearly entirely political and, consequently, highly deferential. Subsequently—almost forty years later, and after very few invocations of the exception—a 1986 GATT Panel, called to adjudicate a late Cold War dispute between the United States and Nicaragua, rejected U.S. claims that the applicability of the security exception is at the exclusive discretion of parties, by the logic that

[i]f it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the CONTRACTING PARTIES ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision?<sup>53</sup>

Under the procedural rules that applied in the old GATT system, this Panel Report was essentially vetoed by the United States, and not adopted. Ever since then, security exceptions have de facto, though not de jure, been considered, especially by the United States, to be “self-judging,” essentially—under this interpretation, which is not without controversy—a full-blown form of deference and subsidiarity.<sup>54</sup> But at the same time, this hardly tells us much, as Members have by and large displayed hesitation, if not absolute reluctance, in either lodging complaints that may involve security concerns or invoking them as justifications for WTO-inconsistent measures. As one commentator has noted, “[I]n over sixty years of international trade, invocations of the security exception have only been challenged a handful of times, and those challenges have never resulted in a binding GATT/WTO decision.”<sup>55</sup> Of course, Panels and the AB cannot discuss security exceptions *sua sponte* (of their own accord), and

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52. See *Summary Record of the Twenty-Second Meeting* (June 8, 1949), GATT BISD CP.3/SR22 - II/28.

53. Report of the Panel, *United States—Trade Measures Affecting Nicaragua*, ¶ 5.17 GATT Doc. L/6053 (not adopted Oct. 13, 1986).

54. For a more complete, yet noncritical, account of the practice of security exceptions generally endorsing the (quite exclusively) U.S. position on this matter, see generally Roger Paul Alford, *The Self-Judging WTO Security Exception*, 3 UTAH L. REV. 697 (2011). See also Dapo Akande & Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365 (2003).

55. Alford, *supra* note 54, at 699.

so this would appear to have in practice removed security issues entirely from the ambit of the WTO.

Another view, however, is that WTO Members are well aware, and wary, of the (now, but not permanently, latent) power wielded, however cautiously, by a WTO dispute settlement system. This power cannot be vetoed if the self-proclaimed “self-judging” nature of security exceptions were actually tried and tested (perhaps overturned and refuted) by the central judicial authority of the WTO. This is, therefore, not real subsidiarity or deference, but rather a normative no-man’s-land, to be left for future judicial negotiation, and it is only a matter of time until the security exceptions enter the WTO jurisprudential field again. As the Membership of the WTO approaches universality, and new conflicts emerge (such as between Russia and Ukraine),<sup>56</sup> the continuation of the traditionally depoliticized nature of the WTO<sup>57</sup> cannot be taken for granted. The point here is that the actual reach of subsidiarity depends on the continued practice of both the higher and lower actors on a vertical plane, rather than on a clearly defined line of authority allocation.

### C. The Design Architecture of Specific Commitments in the GATS

As another example of dialectic deference in substantive issues, even more relevant to the negotiation and creation of commitments than merely to their interpretation, consider the concept of GATS-specific commitments, in particular the negotiation modality of “positive listing.” The potentially consequential services trade liberalization commitments of Market Access (Article XVI GATS) and National Treatment (Article XVII GATS), as well as elements of Domestic Regulation disciplines (Article VI GATS), apply only in those sectors (for example, financial services, accounting services, and telecommunications services) in which a Member has assumed such obligations through explicit enumeration in its schedule of commitments, and subject to whatever limitations listed.<sup>58</sup> This should not be reduced merely to an expression of consent to be bound as a general matter, but should rather be understood as an important manifestation of functional subsidiarity in the design architecture of a central substantive pillar of the WTO.

In the Uruguay Round GATT negotiations on trade in services, parties were not required to liberalize services across the board; instead, they were given the greater flexibility to opt in to liberalization in sectors of their choice, subject, of

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56. See Elena Klonitskaya, *Is the WTO the Right Forum to Hear National Security Issues?*, 9 GLOBAL TRADE CUSTOMS J. 508, 508–11 (2014).

57. See Arie Reich, *The Threat of Politicization of the WTO*, 26 U. PA. J. INT’L ECON. L. 779, 788–98 (2005).

58. For analyses of “negative/positive” listings in services, see Tomer Broude & Shai Moses, *The Behavioral Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations*, in RESEARCH HANDBOOK ON TRADE IN SERVICES (forthcoming 2016); Rudolf Adlung & Hamid Mamdouh, *How to Design Trade Agreements in Services: Top Down or Bottom Up?* 1–18 (WTO Staff Working Paper, No. ERSD-2013-08, 2013), <http://hdl.handle.net/10419/80065>.

course, to negotiations and the mutual acceptability of these “concessions” among the parties. Accordingly, in sectors and modes of supply that were (and still are) politically sensitive in the domestic sphere—and hence worthy of such deference—states have chosen to refrain from liberalization. They accordingly retained their unfettered right to exclude foreign service providers or to discriminate against them, although still subject to a set of general commitments, such as Most-Favored Nation treatment and transparency. Thus, for example, the vast majority of Members have not undertaken commitments under Mode 4, relating to the temporary movement of natural persons (that is, services provision through labor migration), nor, in any mode of supply, with respect to health and social services.<sup>59</sup>

The positive listing of specific commitments therefore leaves the decision to liberalize at a (negotiated) sub-WTO national decision-making level. Hence it is referred to, sometimes, as a bottom-up approach, and ostensibly provides WTO Members with significant precommitment policy space similar to subsidiarity. The choice of services sectors in which a Member would be willing to liberalize has been left to that Member rather than made in a centralized, top-down, manner, although the Member remains subject to political negotiation pressures from other Members. In theory, Members could choose to expand their specific commitments to other sectors after the conclusion of GATS negotiations, although this has rarely happened, and the perpetuation of the positive, list-specific commitment approach in the Doha Round has not proved successful.<sup>60</sup>

There is a flipside, however, to this structural subsidiarity. Once a specific commitment has been made, WTO practice and jurisprudence can take it very seriously, ultimately seizing full, albeit deliberative and negotiated, control over its interpretation and enforcement. The rigidity of specific commitments is built in; under Article XXI GATS, a Member may not modify or withdraw a specific commitment without compensatory adjustments vis-à-vis affected Members, based on either negotiation or arbitration.

The most salient case in point is the *U.S.—Gambling* dispute discussed above in the context of the public morals exception.<sup>61</sup> In that case, regarding the claim that it was in violation of its obligations, the United States emphatically denied that it had made specific market-access commitments relating to remote gambling services. In doing so, however, the United States employed the rules of interpretation of international law in general and the WTO in particular,<sup>62</sup> essentially surrendering its claim to the interpretative discretion of the WTO dispute adjudicators.

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59. See Rudolf Adlung, *The GATS Negotiations: Implications for Health and Social Services*, 38 *INTERECONOMICS* 147, 147–49 (2003).

60. In regional and plurilateral agreements, more elaborate listing approaches have been pursued. See Broude & Moses, *supra* note 58, at 17.

61. Panel Report, *US—Gambling*.

62. *Id.* ¶¶ 3.40–47.

A different approach, only barely detectable in the arguments, would have been to claim that the WTO should defer, at least to some extent, to a Member's own understanding of its schedule of commitments. Both the Panel and the AB address this proposed window of subsidiarity negatively. Relying on earlier jurisprudence relating to the interpretation of GATT tariff schedules, the Panel inferred that the GATS schedules of commitments reflect the "common intention" of WTO Members, and that their meaning cannot be made "dependant [*sic*] on the subjective and unilateral interpretation of the United States."<sup>63</sup> In its discussion, the AB seemed to take this objectivity almost for granted.<sup>64</sup> Subsequently, both the Panel and the AB, although for different interpretative reasons, were not persuaded by the U.S. argument for greater respect for subjective understandings of what a Member had intended to become obligated to, finding instead that a commitment had indeed been made,<sup>65</sup> with all the normative weight according to it under the rules of the GATS game. Thus, even in the creation of commitments, subsidiarity may reign, but not supreme—by analogy to the "touch-move" rule in chess, decision-making autonomy can disintegrate very quickly once a decision appears to have been made.

This element of *U.S.—Gambling* can surely be understood as constituting a negative incentive to future liberalization, and in this sense, perhaps has weakened the ability of the WTO to generate new specific commitments, but that is not our concern here. Rather, the point is that the formal subsidiarity of the precommitment decision to liberalize has not translated into postcommitment deference regarding the interpretation of the scope of the commitment.

### III

#### WTO PROCEDURAL AND INTERPRETATIVE RULES AS REFLECTIONS OF SUBSIDIARITY

A dialectic of deference—in the sense that subsidiarity exists, but as a negotiated tension between Members' preferences and central WTO trends that are sometimes empowered by it—can also be detected in interpretative choices made by the WTO dispute settlement system in a range of procedural and interpretative scenarios. These seemingly technical and formal issues are actually important switches in the management of subsidiarity and deference, as well as in crafting a balance between trade liberalization and domestic regulatory autonomy. Their use in the production and justification of outcomes imparts significant effects both on the legitimacy of substantive decisions, and on the relative power of the high and low levels of decisionmaking, keeping in mind that "substance and procedure must be distinguished to make analytical

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63. *Id.* ¶ 4.9.

64. Appellate Body Report, *US—Gambling*, ¶ 159.

65. See Federico Ortino, *Treaty Interpretation and the WTO Appellate Body Report in United States—Gambling: A Critique*, 9 J. INT'L ECON. L. 117, 119 (2006).

and normative sense, but at the same time they must be seen in conjunction to understand the protection of global public goods in international law.”<sup>66</sup> The following is a series of necessarily perfunctory expositions of three of these interpretative and procedural questions.

#### A. The “As Such”/“As Applied” and “Mandatory/Discretionary” Distinctions

GATT and WTO jurisprudence have for more than a quarter of a century<sup>67</sup> grappled with the treatment of domestic (that is, national) legislation that as stated on the books may contain inconsistencies with WTO obligations. These inconsistencies, considered violations “as such,” are distinct from specific and concrete instances of breach, which are known as “as applied” violations.<sup>68</sup> Subsidiarity would suggest that a Member is free to adopt laws granting its executive and administrative agencies as much freedom as it sees fit, so long as they do not take actual actions that violate WTO commitments.<sup>69</sup> Such an approach would have the effect of excluding entirely “as such” claims from the ambit of WTO dispute settlement. There may be, however, good reasons to allow “as such” claims, detached from specific violations (or semi-detached). “As such” challenges may include cases in which a Member challenges a consistently continued practice of another Member,<sup>70</sup> such as the chilling effect of a potentially trade-restrictive statute even if it is not applied, or the cumulative litigation costs of challenging repeated specific measures (including evidentiary costs) instead of the statutory root cause of the violation. “As such” claims are therefore indisputably allowed in the WTO.<sup>71</sup> However, for deferential reasons, these claims are considered “serious challenges” and require a higher standard of proof in comparison to claims of actual violation “as applied.”<sup>72</sup> This seems to show a more generous level of respect to states’

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66. André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT’L L. 769, 791 (2012).

67. Evidence from this grappling stems from the 1988 *Superfund Amendments and Reauthorization Act* dispute. See Panel Report, *United States—Taxes on Petroleum and Related Substances*, ¶ 5.1.1 WTO Doc. L/6175–34S/136 (adopted June 17, 1987). For one review of the case and subsequent development, see Alan O. Sykes, *An Economic Perspective on As Such/Facial versus As Applied Challenges in the WTO and U.S. Constitutional Systems*, 6 J. LEGAL ANALYSIS 1, 4–10 (2014).

68. These distinctions have garnered considerable scholarly interest. See Simon Lester, *A Framework for Thinking about the ‘Discretion’ in the Mandatory/Discretionary Distinction*, 14 J. INT’L ECON. L. 369, 372 (2011).

69. “As such” claims have been called a “deference tool.” See Jing Kang, *The Presumption of Good Faith in the WTO ‘As Such’ Cases: A Reformulation of the Mandatory/Discretionary Distinction as an Analytical Tool*, 46 J. WORLD TRADE 879, 880 (2012).

70. See Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 2.1, WTO Doc. WT/DS350/R (adopted Feb. 19, 2009) (disputing the continued application by the United States of anti-dumping duties), as modified by AB Report WT/DS350/AB/R.

71. Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 60, WTO Doc. WT/DS136/AB/R (adopted Aug. 28, 2000) (recognizing that Members may “challenge legislation as such, independently from the application of that legislation in specific instances”).

72. Appellate Body Report, *United States—Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 172, WTO Doc. WT/DS268/AB/R (adopted Nov. 29, 2004).

policy space, but at the same time leaves a high degree of discretion to WTO adjudicators, with plenty of room for strategic selectiveness.

“As such” claims can reach the peak of potential intrusiveness in special cases when they target national legislation that does not mandate action that violates WTO obligations (even in particular circumstances) but nevertheless somehow grants administrative agencies the (domestic) power to infringe upon WTO rules at their discretion—the so-called “mandatory/discretionary” distinction.<sup>73</sup> The old GATT approach avoided scrutiny of discretionary legislation,<sup>74</sup> but an important (not appealed) WTO Panel Report brilliantly unpacked this as an analytical fallacy,<sup>75</sup> demonstrating that discretionary legislation might in itself be a violation of WTO rules. This stricter, more nuanced approach has largely been adopted by the AB.<sup>76</sup>

Thus, although a semblance of subsidiarity is maintained by the “as such”/“as applied” and “mandatory/discretionary” distinctions, the powers of judicial review have been bolstered. Indeed, the *U.S.—Section 301* Panel found that potential for a statutory authorization to breach WTO obligations was a violation in itself, saved only by a valid executive commitment (a U.S. “Statement of Administrative Action”) to refrain from committing violations.<sup>77</sup> This exemplifies dialectic deference: speaking the language of subsidiarity—so long as the WTO line is toed—all the while wielding the stick of supremacy.

## B. The Standard of Review in WTO Law

The standard of review—the depth and intensity of scrutiny applied by the dispute settlement system to national measures—is a central procedural mechanism for regulating subsidiarity in the WTO, as a normative valve that distinguishes between central and domestic regulatory autonomy.<sup>78</sup> The term “standard of review” does not actually appear in the WTO agreements, instead evolving jurisprudentially, yet it has been referred to as “a deliberate allocation of vertical power between WTO adjudicating bodies and national authorities to decide upon factual and legal issues,”<sup>79</sup> and it may therefore be thought of as

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73. See Nicolas Lockhart & Elizabeth Sheargold, *In Search of Relevant Discretion: The Role of the Mandatory/Discretionary Distinction in WTO Law*, 13 J. INT'L ECON. L. 379, 380 (2010).

74. See Report of the Panel, *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, ¶ 118, BISD 41S/131 (Oct. 4, 1994).

75. See Panel Report, WT/DS152/R, *United States—Sections 301–310 of the Trade Act 1974*, ¶ 7.97 n. 675, WTO Doc. WT/DS152/R (adopted Jan. 25, 2000) (“It could not be presumed, in our view, that the WTO would never prohibit legislation under which a national administration would enjoy certain discretionary powers.”).

76. See Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 88, WTO Doc. WT/DS244/AB/R (adopted Jan. 9, 2004).

77. See Appellate Body Report, *US—Sections 301–310*, ¶¶ 7.109–126.

78. For an early exploration, see generally Steven P. Croley & John H. Jackson, *WTO Dispute Procedures Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996) (analyzing the standard of review in regard to the Anti-Dumping Agreement in Article 17.6 of the Uruguay Round texts).

79. Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT'L ECON. L. 635, 635

similar to other judicial forms of deference, such as the margin of appreciation.<sup>80</sup> However, beyond the very constrained and specific terms of Article 17.6 of the WTO Anti-Dumping Agreement,<sup>81</sup> the formulation of the general standard under which WTO Panels and the AB review national decisions in relation to WTO rules has proven elusive.<sup>82</sup> Recourse is normally made to Article 11 of the Dispute Settlement Understanding (DSU), whereby “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ,”<sup>83</sup> but the vagueness of this clause provides only a vestige of systematicity. The jurisprudence has not endeavored to establish clear criteria for reviewing national measures, to the point that the adjudicators can seemingly choose when and to what extent to intervene. In practice, comprehensive analysis has shown that the standard of review tends to be quite intrusive,<sup>84</sup> at times even amounting to de novo review of national decisions and determinations. The AB has not hesitated to reproach Panels when in its view they proved too deferential to national authorities.<sup>85</sup>

The standard of review, therefore, although seemingly a legal mechanism for structuring subsidiarity and deference that in principle should empower lower decision-making levels, is rather a very fuzzy concept in which allocations of authority can be negotiated in a judicial environment that actually leaves the final word to the central or higher level of WTO adjudicators.<sup>86</sup>

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(2003).

80. See generally Andreas Føllesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—or Neither?*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 147 (referring to the margin of appreciation in international human-rights tribunals as subsidiarity); DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION (Lukasz Gruszynski & Wouter Werner eds., 2014) (examining margin of appreciation in various international law contexts); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907 (2006) (evaluating the margin of appreciation doctrine in recent International Court of Justice decisions).

81. This provision is the only premeditated standard of review in the WTO, with very limited reach. The AB has held that it is irrelevant beyond anti-dumping, even with respect to closely related countervailing duty determinations. See Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 49, WTO Doc. WTO/DS138/R (May 10, 2000).

82. See ROSS BECROFT, *THE STANDARD OF REVIEW IN WTO DISPUTE SETTLEMENT: CRITIQUE AND DEVELOPMENT* (Edward Elgar ed., 2012).

83. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

84. See Oesch, *supra* note 79. But see Michael Ioannidis, *Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach*, in DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 80, at 91.

85. See Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶ 130, WTO Doc. WT/DS277/AB/RW (adopted Apr. 13, 2006).

86. The burden of proof is another procedural vehicle of selective subsidiarity. In the WTO it has vacillated in different directions, selectively serving the legitimation ends of particular cases. This has hinged on the technical—and logically faulted—classification of a claim as a rule or an exception. See Tomer Broude, *Genetically Modified Rules: The Awkward Rule-Exception-Right Distinction in EC—*

### C. The Flexibility toward WTO Members' Choice of Compliance Measures

Yet another procedural expression of subsidiarity in the WTO is the way in which the DSU relates to the range of steps a Member may take in situations where its measures have been found by a Panel or the AB, or both, to be WTO-inconsistent. Under Article 19.1 of the DSU Panels and the AB *shall* (merely) recommend that a Member bring its measure “into conformity,” and *may* “suggest ways” to do so.<sup>87</sup> In practice, such substantive suggestions are rarely made,<sup>88</sup> and adjudicators avoid making them even when requested to do so explicitly by a complainant.<sup>89</sup> Moreover, even when suggestions are made, the Member is not duty-bound to pursue them.<sup>90</sup> In short, the WTO dispute settlement does not dictate to Members precisely which means to take in order to secure compliance. This would appear to leave a lot of policy space—the discretion to choose the modality of compliance—to Members, as an expression of deference or subsidiarity. Of course, actual measures taken to comply may be subject to renewed review if they are challenged under Article 21.5 compliance panel procedures.<sup>91</sup> When that occurs, the benchmark for adjudication is compliance with the WTO Covered Agreements, not with the conclusions of the original Panel/AB proceedings, even if suggestions were made.<sup>92</sup>

Having said that, this deference is far from absolute, and the dispute settlement system has developed means of effectively signaling to Members which methods of compliance would be acceptable. Most noticeably—although subtly so—the AB in particular has proven adept at crafting its legal analysis in ways that indicate to the infringing Member what would be required in amended legislation for a measure to survive subsequent scrutiny.<sup>93</sup> Thus, one might argue that true deference is essentially obviated, and in any case, no clear and reasoned standards of subsidiarity are affected. As a result, the power of the dispute settlement system to influence and indeed quash measures taken to comply is upheld. The middle ground, however, is that the choice of compliance measures is yet another field of dialectic deference and negotiated subsidiarity discourse between the WTO and its Members, in which a delicate balance is maintained—but with significant weight pulled by the dispute settlement system in the direction of its powers.

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Biotech, 6 WORLD TRADE REV. 215, 215 (2007).

87. DSU art. 19.4.

88. See Julien Chaisse, *Deconstructing the WTO Conformity Obligation: A Theory of Compliance as Process*, 38 FORDHAM J. INT'L L. 57, 94 (2015).

89. See, e.g., Appellate Body Report, *United States—Continued Zeroing*, ¶¶ 384–394 (“[A]s the right to make a suggestion is discretionary, a panel declining a request for such a suggestion does not act contrary to . . . the DSU.”).

90. See Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador*, ¶¶ 321–325, WTO Doc. WT/DS27/AB/RW2/ECU (adopted Dec. 11, 2008).

91. DSU art. 21.5.

92. Appellate Body Report, *EC—Bananas*.

93. As seen in Appellate Body Report, *US—Shrimp*; and discernable in the AB's reasoning in the Appellate Body Report, *EC—Seals*, at ¶¶ 5.316–.339.

One particularly illuminating example of this can be found in the seemingly esoteric arbitrations under Article 21.3(c) of the DSU on the “reasonable period of time” for compliance.<sup>94</sup> Arbitrators in these cases customarily take great pains to emphasize that their role is solely to establish the reasonable time under the particular circumstances, and not to determine the preferred method of compliance.<sup>95</sup> However, in reality, the two questions are so intertwined that beyond stating that the implementing Member has “a measure of discretion in choosing the means of implementation that it deems most appropriate,”<sup>96</sup> it is practically impossible to consider the formal issue of the implementation period without delving into the proposed methods of compliance.<sup>97</sup>

#### D. WTO Dispute Settlement and Its Interaction with Regional Trade Agreements

As a final, brief example of how subsidiarity can be selectively and indeed strategically (dis)employed as a discursive device, consider the WTO dispute settlement system’s current deliberately oblivious approach to the law and procedures of regional trade arrangements. There exist today hundreds of such agreements, the laws of which often correspond with WTO rules, necessarily creating instances of substantive and procedural overlap.<sup>98</sup> If regional trade arrangements set out particular rules and procedures (generally acceptable under WTO law),<sup>99</sup> a vertical subsidiarity-oriented approach would have suggested (for reasons of both legitimacy and efficiency) an enhanced deference thereto. Yet in several disputes,<sup>100</sup> WTO Panels and the AB have demonstrated a clear unwillingness to even take regional rules and decisions into account.<sup>101</sup>

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94. See Werner Zdouc, *The Reasonable Period of Time for Compliance with the Rulings and Recommendations adopted by the WTO Dispute Settlement Body*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 94 (Rufus Yerxa & Bruce Wilson eds., 2005).

95. See Award of the Arbitrator, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 68, WTO Doc. WT/DS384/24, WT/DS386/23 (Dec. 4, 2012) (“[My] mandate relates to the *time* by when the implementing Member must achieve compliance, not to the *manner* in which that Member achieves compliance.”).

96. See Award of the Arbitrator, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, ¶ 3.4, WTO Doc. WT/DS414/12 (May 3, 2013).

97. *Id.* ¶ 3.2 (“[T]he means of implementation available to the Member concerned is a relevant consideration.”).

98. See Gabrielle Marceau & Julian Wyatt, *Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO*, 1 J. INT’L DISP. SETTLEMENT 67, 68–73 (2010).

99. See Petros C. Mavroidis, *Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today*, 10 WORLD TRADE REV. 375, 377 (2011) (discussing Article XXIV GATT and related instruments such as the “transparency mechanism”).

100. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007); Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WTO Doc. WT/DS69/AB/R (adopted July 13, 1998).

101. Especially illuminating is the Appellate Body Report, *Mexico—Soft Drinks*, ¶ 56 (the AB’s unwillingness to undertake “a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations” reflects its concern over integrating authority); see also

Strong rationales certainly exist for eschewing a subsidiarity approach to both jurisdiction and applicable law with respect to regional agreements. Parties who choose to bring a dispute to the WTO instead of an applicable regional agreement may simply be forum-shopping,<sup>102</sup> or the WTO might be selected in order to influence not only the conduct of the respondent state in a particular dispute, but the evolution of the interpretation and application of WTO law with respect to a broader set of trading partners.<sup>103</sup> In either case, significant recourse to regional trade agreement law might indeed be inappropriate from a WTO perspective. There are, however, equally compelling reasons to proactively incorporate (indeed, co-opt) regional systems into the WTO through dispute settlement,<sup>104</sup> with subsidiarity and deference as guiding principles. Nonetheless, the approach pursued thus far in the WTO has been decidedly nondeferential. This likely reflects a marriage of the WTO's insecurity vis-à-vis regionalism with the perception that regional agreements (other than the EU) are not a relevant constituency—circumstances that induce WTO adjudicators to adopt a policy of benign ignorance toward regional systems. It remains to be seen whether this approach will be sustainable over time, or whether a more subsidiarity-oriented approach will need to be embraced.

#### IV

##### CONCLUSION: SUBSIDIARITY—A PLAYING FIELD, NOT A PRINCIPLE

In the WTO, the mechanics of subsidiarity, however implicit and at times technical, are amply evident. In spite of this, it cannot be said that there is a truly normatively principled or reasoned measure of allocating authority, as subsidiarity may aspire to be. In these respects, subsidiarity, as an overarching concept, is not very different from the more specific, yet indeterminate, substantive and procedural principles that have been identified in this article as the stuff subsidiarity and deference are made of, so long as its name is not actually spoken—such as, exceptions, standards of review, opt-in and opt-out design architecture, standards of review, burdens of proof, and more. Subsidiarity is hardly a rule or a principle, unless it is clearly stated as one, with clear parameters. It is rather a vernacular, a discursive device of negotiation over power and authority among a multiplicity of actors, pulling and pushing in different directions.

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Tomer Broude, *Fragmentation(s) of International Law: Normative Integration as Authority Allocation*, in SOVEREIGNTY, SUPREMACY, SUBSIDIARITY: THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 99–120 (Tomer Broude & Yuval Shany eds., 2008).

102. Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L. J. 77, 79–85 (2009).

103. Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 INT'L ORG. 735, 743 (2007).

104. See Henry Gao & Chin Leng Lim, *Saving the WTO From the Risk of Irrelevance: The WTO Dispute Settlement Mechanism as A 'Common Good' for RTA Disputes*, 11 J. INT'L ECON. L. 899, 899–901 (2008).

Moreover, even in this sense—in the WTO and elsewhere<sup>105</sup>—it is not possible to state with any conviction or bona fides that subsidiarity, or subsidiarity-like mechanisms, serve a clear vectorial function, whether decentralizing or centralizing, centripetal or centrifugal. There is in practice a much more nuanced, intricate interplay between subnational, national, regional, plurilateral, and multilateral levels of policy and decisionmaking, in which applications of subsidiarity are selectively and even strategically employed by all involved. As a result, subsidiarity becomes not a trump, as it is sometimes conceived, but a field of legal and political deliberation.

In this arena, the central or higher levels of governance may actually have some counterintuitive advantages over the rest. After all, in the WTO but also in other areas such as international human rights and investment protection, normative indeterminacy goes hand in hand with political complexity. And in these areas there is an additional, structural, institutional dimension to be considered—the absence of a third-party with both the competence and the capacity to determine the allocations of authority, for better or for worse. In the EU, with its array of institutions, and in federal systems, courts sometimes serve the purpose of drawing lines of power between federal and constituent entities. In contrast, in the WTO, the obvious suspect for attracting authority centralization is one and the same as the main arbiter of subsidiarity-like authority allocation rules—the dispute settlement system. Seen this way, the WTO Panels and AB can be likened to a cat guarding the milk. It is, however, a cat still dependent on a willingly providing milkman without whom there would be nothing to guard—a simple variant of the Hegelian *Herrschaft und Knechtschaft* (Lordship and Bondage) dialectic.<sup>106</sup> Indeed, subsidiarity can be selective and the deference that comes with it is dialectic, certainly in the WTO, but not only so; these are perhaps inherent attributes of the very concept itself.

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105. See, e.g., Jachtenfuchs & Krisch, *supra* note 2, at 12 & n.47 (referencing Canadian Supreme Court jurisprudence).

106. See G.W.G. HEGEL, *THE PHENOMENOLOGY OF MIND*, ch. IV.A (J.B. Baillie, trans.) (1910).