Rebalancing Law and Politics in the WTO: A Case Study in Subsidies Negotiations

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ABSTRACT

This paper attempts to link the activity of the Dispute Settlement Body of the World Trade Organization (WTO) to its effects on the Doha Rounds of negotiation and the increasing technicalization of WTO law. It will argue that the interpretative path chosen by the Dispute Settlement Body (DSB) over the last decade has contributed to the stagnation of the trade rounds by avoiding a re-discussion of the underlying purposes and goals of the trading system whilst adding to the legal and technical complexity of Rules Negotiations. In order to do so, this paper will test this hypothesis on three subsidy disputes, Brazil–Aircraft, US–Cotton, and Australia–Leather and their parallel effect on trade negotiations.

I. INTRODUCTION

This paper has one main underlying purpose. It will shed light on the increasing political scope in the twenty-first century of the WTO’s Dispute Settlement System (DSS). This proposal is of timely importance for matters of international governance. In a context of ten years of institutional deadlock in Rules Negotiations, much decision power now emanates in the form of DSS reports. This work emphasizes that there are institutional, systemic, and global effects associated with this new configuration of the trading regime.

The politics of trade law making within the WTO will be thus presented through a unique institutional and legal framework. This will be one of the main innovative contributions of this thesis. It will demonstrate how the legislative and adjudicative branches of this organization have come to operate during the last decades through a very specific form of legal reasoning. It will argue that the role played by law within the WTO greatly influences its workings as well as its substantive effects. In recognizing an increasing “relative judicial power”\(^1\) of the WTO’s DSS in the context of the Doha Deadlock, this thesis will suggest that the current

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legal approaches to dispute resolution taken by the WTO’s panels and Appellate Bodies (ABs) have added to the system’s stalemate. As will be demonstrated, the DSS has favored methods of increased legal dexterity in its solving of disputes that directly influence Rules Negotiations. It provides a counter-perspective to the conventional welcoming of legalization within the WTO since the GATT years.

Subsequently, the paper will proceed to demonstrate that the role that law has played within the WTO’s DSS has negatively influenced Rules Negotiations and it is partially accountable for the organization’s legitimacy dilemma. In placing such importance on the rule of law within the trading system, this paper will be an attempt to reconnect policymakers and negotiators to the substantive effects and ideational implications professional language. Towards that purpose, this work is divided into several parts.

Part I consists of this introduction. Part II will critically engage in a constructivist view of the trading system as a means to understand the extent, forms, and limits through which the role and ideas of this organization have been continuously redesigned. To accomplish this, a comparative approach will focus on the role that law has played in each of these ideational shifts. A third focus of the research will be institutional explanations for this “judicial shift” within the WTO. The paper will attempt to demonstrate that the very nature of the WTO presupposes an enmeshment of its legal and political organs, demonstrating that a mixed political outcome has come from this “judicialization shift” at the WTO. Second, the interaction between legislative and adjudicative organs at the WTO has become ever more organic as DSS’ disputes are increasingly able to influence Rules Negotiation’s agenda setting, clarification of rules, and legal interpretation in certain issues. Part IV will review three different subsidy cases in order to exemplify the implication that legal and institutional choices have for the trading regime.

Having made these three separate but interrelated arguments, this paper will offer its conclusions on the different sort of attention that needs to be directed to understanding the new modus operandi of the WTO. As this thesis reviews, a simple yet innovative logic is in place at the WTO. This new logic can be summarized in three cyclical phases. First, a multipolarity of ideational perspectives has close to stagnated the workings of the Rules Negotiations Group. For this reason, countries have begun resorting to the DSS in search of understandings of trade law. Second, and almost as a reflex, a formal language and legal processes that allow for this diversity of interests to be argued under has been developed by the DSS. Thirdly, the procedural responses found by the panels

and ABs have circularly contributed to the difficulties in trade law negotiations. Procedural interpretation of WTO rules has attached significant weight and an extended breath of meaning to each term in trade agreements. There is an increased demand for technical and legal expertise, enhancing negotiators' awareness of potential implications of every word, gap, or ambiguity dueled on.

Lastly, this paper will argue that the stagnation of negotiations has altered the organization's working dynamics, and, in consequence, new issues have arisen. These new issues have been insufficiently addressed by the literature despite their enormous political implications. It is in this literature gap that this thesis fits and contributes. Uniquely, this paper attaches great importance to the role of law within the WTO. It will link DSS legal interpretations and rule negotiations to their direct consequences for international trade governance. Innovatively, it will suggest that the manner in which law is understood and interpreted within the DSS exemplifies this intertwining of law and politics within the WTO. Additionally, this paper will add to the existing literature by providing a constructivist explanation of how the Doha Deadlocks has come to be associated with the over-activity of the DSS and an emerging form of judicial dispute resolution. It will also contribute, policy-wise, with the realization that this shift towards the DSS is actually counter-productive in terms of the system's sustainability. It has arrived at being a manner of avoiding a re-discussion of the underlying purposes and goals of the trading system whilst adding to the legal and technical complexity of Rules Negotiations.

II. THROUGH THE WINDOW OF A MOVING TRAIN: IDEATIONAL SHIFTS IN THE GATT AND WTO SYSTEM

Telling the “story” of modern international economic law is very much like “describing a landscape while looking out the window of a moving train,” says J.H. Jackson. Events tend to move faster than one can describe them. This part (and indeed, this paper) aims to demonstrate how ideational shifts have shaped the GATT bargain throughout the years and to provide insights as to how further challenges may be tackled. It will consider that the common assumption that the world trade system, evolved from a power-based (trade politics) regime to a rules-based (trade law) regime in a steady process of legalization, does not accu-

rately represent the reality of this regime. This part will first draw upon Andrew Lang's sociological construct of the history of the GATT, identifying the era of embedded liberalism and purposive law, the legal and technical shift of a "neoliberal consensus," and finally, the post-neoliberal ideational change of the post-WTO years. This overview will be accompanied by basic systemic and material explanations of the changes that have occurred. In doing so, this part will outline the role that law has played in these changes. Concomitantly and lastly, it will present the legal choice associated with each of these ideational shifts as institutional choices made within the WTO.

The ideational narrative of the trading system, for the purposes of this paper, commences with the end of the classical liberal era and with the coming into being of the so-called modern public economic law. This was marked by two divergent worldviews that greatly politicized world economy. On one side of the Atlantic, Cordell Hull, the U.S. Secretary of State, was fighting against widespread protectionism, beggar-thy-neighbor policies such as the Smoot-Hawley Tariff Act of 1930, exchange control devaluations, and nationalization of foreign property. He professed his belief that peace and welfare of nations were connected to the maximum practicable degree of freedom in international trade. On the other, the British were taking this logic a step further and designing multilateral systems of economic governance. The works of Meade and Keynes heralded this approach during the late thirties and early forties. Respectively, they envisaged a multilateral Commercial Union for trade to stabilize world demand through buffer shocks of primary products and an International Clearing Union to structure the post-war financial system, addressing the depression as mostly a problem of free market instability and persistent unemployment.

Only after World War II was common ground found between Americans and the British. Both understood that the war had profoundly scarred every aspect of international relations and law, and that the drafting of a new framework was urgent to avoid repetition of the worst of

9. Lang, supra note 2, at 190.
11. Id. at 13–14.
12. Id. at 6–7.
inter-war years. In this perception, U.S. bilateral negotiations witnessed a seminal shift towards multilateralism and embrace of the British perspective. This shift is referred to as the "embedded liberalism compromise." Whlist there is vast literature on the convergences and divergences of this bargain, it may be summarized that there was a shared understanding that multilateral regimes of international law should be redesigned as forums for negotiations and as guardians of international rules. As Slaughter puts it, the regimes of the post-war period, GATT included, were intended to internationally project organizing principles of political power, characteristic of the welfare state of the period. Ideally, they would form a tripod of shared democracy, international law, and economic interdependence as a means to establish enduring post-war peace.

This thin overlap of a normative consensus embodied in the GATT would thus define the role that law was to play in this new regime. Like divergences in the ideas and role of the GATT, its architects also diverged regarding the role law should play. The United States was inclined to install a formal and enforceable complaints procedure, based on spelled-out and precise legal obligations. The United Kingdom favored less emphasis on formally binding obligations. They understood legal ambiguities as a constructive force of the system and a more operational form of dispute mechanism. As Hudec explains, "[t]he point was not to clutter economic experts in legalistic rituals, but rather to create a dispute settlement animated by negotiations and compromise." Some argue that the GATT was better understood as a contract between these two sets of interests and players. All cases during the first few years of the GATT had to make "face-to-face negotiation with the community value structure." Results were established gradually and as

22. Lang, supra note 2, at 199.
23. Id. at 200.
cautiously as they emanated from the self-given authority placed upon the decision bodies. This led to a malfunctioning DSS that could not operate without full cooperation of the respective party states. This format of the DSS had a limited scope of action, interpretation, and decision-making. Although GATT dispute settlement had its moments of success, until 1958 it was far from being an established independent authority.

The GATT legal system inclined towards the British-favored approach of legal ambiguity as a constructive force and instrument enabling the broader purposes of the system to take place. Constructive ambiguities were more than pragmatic concessions amongst states; they were the agreed legal format engendering effective and operational dispute settlements. The overarching purpose of dispute settlement at that stage was to rebalance expectations and create a forum for amicable resolutions of controversies—an “unwritten credo” of maintaining a balance in international trade transactions. On a more concrete level, it was a “messy, multifaceted legal system solution” that embodied a legal “purposive” approach to the role of law.

A. Tokyo and the Formal-Technical Turn

The Tokyo Round of negotiations (1973–1979) is the second key moment of relevant analysis in GATT’s history. It offered the first set of attempts to combat the “diplomatic jurisprudence” quality that the system had acquired throughout its first thirty years. Although some argue that this was not such a decisive moment, this paper sides with Hudec in that, prior to the 1970s, the GATT was dominated by an anti-legal culture that only began to melt away in the late 1960s, not completely collapsing until the early 1980s. The end of this anti-legalistic culture was closely related to a new ideational shift reflecting new states’ priorities and international configurations. The “embedded liberalism compromise” began to falter and the GATT was seen as a forum for controversies and an unclear framework for the trading system. This shift regarding the purpose of the trading system transformed the many levels of the GATT bargain.

There are contextual reasons for this ideational shift. There was economic turmoil in many Western economies and significant change in the international commercial circumstances. The European Community, established in 1958, accounted for a higher percentage of world trade than

27. Id. at 205.
28. LANG, supra note 2, at 201.
did the United States. Former wartime opponents, Germany and Japan, as well as other newly industrialized nations, were no longer willing to import inflation associated with the rise in North American expenditure and lack of increase in domestic taxation. In 1971, in the midst of a decline in its competitiveness and an increase in international barriers to its knowledge-intensive industries and services, the United States faced its first trade deficit in over a decade. Concurrently, the par value Bretton Woods' system of exchange rates ended with the aggravated economic shocks associated with the 1970s oil crisis.

This international context prompted one prevailing ideational reaction. The barriers the United States faced worldwide gave rise to domestic sentiments of unfairness in international trade. Legislation was passed demanding strict reciprocity and the “principle supplier” rule in goods of particular interest to the United States in trade negotiations. The sentiment of unfairness in international trade was also present in international trade litigation in the GATT. Throughout the 1950s and 1960s, GATT’s dispute settlement had become a focus for Contracting Parties' “hypersensitivities.” There were doubts about reciprocity and fairness of procedures. Retaliation in famous disputes such as “The Chicken War” and the “Uruguayan Recourses to Article XXIII” had not been successful and the number of GATT procedures continuously declined until the end of the decade. The “embedded liberalism bargain [was] under stress” and a new shift was under way. Neoliberalism was echoed enthusiastically not as mere free trade, but rather as the basic economic objective of the system and as a promoter of general welfare to all nations.

On that account, new legal demands followed GATT’s neoliberal shift. Tokyo was marked by a shift from focus on tariff barriers to “non-tariff” barriers to trade. Whereas barriers to trade had been initially identified according to the governmental protectionist intention behind them, now

34. Lang, supra note 2, at 224.
35. Id. at 228.
38. See id. 242–43.
40. The definition of neoliberalism, however, is “hydra-headed,” suggests Andrew Gamble. The term has constantly evolved and adapted itself since its creation in the 1970’s. Crucially, for the purpose of this paper, neoliberalism will be understood as a political turn from communal goals and collective purposes of a group of actors. Economically, it will refer to a normative preference to free market and free trade in the pursuit of individuals' private goals and interests. In political economy, it will represent a critique of Keynesianism and a shift towards practical politics, both in the national politics of particular states and in the international agencies of the global order. Andrew Gamble, Neo-Liberalism, 75 Capital and Class 127, 128–34 (2001).
what mattered was the economic effect deriving from such a governmental act. This change allowed for a much broader interpretation of what constituted a barrier to trade. As the liberalization ethos became the mainspring of the work of trade diplomats and negotiators, a concomitant change was seen in their interpretational bias, styles, and techniques.

Gradually, different institutional forms of domestic regulations were questioned at the GATT level. Towards this purpose, GATT's articles I and III had their scope expanded to reflect the underlying understanding that free markets should be the primary strategy for growth and prosperity. It was the shift from embedded liberalism to neoliberal consensus. Lang argues that the trading regime re-imagined itself as a "political marketplace" and "market access" became the coin of exchange in the new format of the GATT regime. This neoliberal approach characterized the last three decades of the twentieth century and drastically modified the regime's legal order.

This shifting logic was accompanied by significant legal developments during the Tokyo Round. There was a proliferation of GATT treaties and an expansion of their regulatory scopes. During the 1970s, dispute settlement panels were assisted by a new legal section of the GATT Secretariat. GATT panels began to write longer reports, more precise and legally reasoned. In 1976, a Framework Group, first established during the Tokyo Rounds, attempted to describe the practices taking place for three decades without any written guidance. Finally, in 1981, the GATT established an Office for Legal Affairs to elaborate an Analytical Index to make GATT law and practice more transparent.

The Uruguay Rounds (1986–1994) and the creation of the WTO represented the consolidation of this legalistic tendency. A compulsory and automated DSM with enforceable sanctions was established. Whereas in times of embedded liberalism contracting parties would have a veto power in all stages of the dispute settlement process, the Uruguay Round discouraged disagreement through the adoption of the reverse consensus

41. Lang, supra note 2, at 224.
42. Id. at 159.
44. Lang, supra note 2, at 228.
A "power play" by the United States and the European Commission, the world's two largest markets, was named "the single undertaking" and guaranteed that all countries accepted all of the WTO multilateral agreements—including the Agreement on Trade-Related Intellectual Property Rights (TRIPs), the General Agreement on Trade in Services (GATS), the Understanding on Balance-of-Payments Provisions of the GATT 1994, and other agreements, which most developing countries had previously refused to accept.\(^5\)

At this point, justifications for a "rules-based" regime defended that the trading system should serve mainly as a free trade facilitator for governments and private business.\(^5\) This neoliberal concept of law emerged as "a limit on the state."\(^5\) Its operation became less about fulfilling shared purposes and more about creating a forum for the pursuit of individual economic interests against arbitrary behavior by public powers.\(^5\)

In this sense, whilst the entanglement of diplomacy and DSS had been coherent with a purposive approach to trade law, this was no longer acceptable with the shift to legalism. It was no longer adequate to analyze the legitimacy of a trade measure according to perceptions of a trade elite or a diplomatic ethos. The DSS was expected to draw upon legal and "apolitical" standards to identify barriers to trade.

It was an attempt to separate law from politics within the WTO and frame the trading system as a neutral regime with the goal of liberalization of markets. Soon, WTO legal formalism walked hand-in-hand with technical expertise in diverse areas of trade. The elaboration of domestic regulations under the standards of trade law was to be measured against specific borrowing from technical discourses, fertile in the area of food safety, health standards, and technical barriers. Law became a gatekeeper,\(^5\) crystallizing trade law as an apolitical, technical standard upon which free trade as a common goal was to be pursued.

B. THE TWENTY-FIRST CENTURY'S POST-NEOLIBERALISM AND PROCESS-BASED REVIEWS

The WTO's last decade, and the main focus of this work, has been a period of fast rise of "non-trade" concerns in trade matters within the WTO. The notion of trade liberalization, as consistent with regulatory diversity and as capable of "accommodating a full range of non-economic
public values," began to be questioned.\footnote{Howse & Nicolaidis, \textit{supra} note 39, at 8.} The quest for global standards in trade for labor, environment, and social goals responded to the "race-to-the-bottom" that characterized developing countries in economic recovery from the diverse 1980s' debt crisis. Pressure arose from a range of external constituencies concerned with specific political issues as well as countries' generalized concerns over the intrusiveness of WTO law on domestic regulatory autonomy. The 1980s and 1990s saw the emergence of cases touching upon the jurisdictional limit of the WTO and the questioning of the "'dis-embedded' character of the international liberal order."\footnote{Id. at 9.} Fears alternated between a lack of international minimal standards to the imposition of foreign standards and "the sustainability of the domestic social contract under conditions of globalization."\footnote{Id. at 9.}

tions. Also, a cosmopolitan civil society began to gain a stronger voice and participation in trade matters. Petersmann points out that there were growing critiques voiced by NGOs regarding the legitimacy of power-oriented, producer-driven economic regulation. A rapid expansion of world trade during the last decade of the twentieth century made explicit the linkages between the WTO's liberalizing bias and its influence in other areas of national and domestic life. The growing debate centered on whether trade law would be able to master the appropriate regulatory flexibility for WTO members. The legal and technical body of legislation developed during the previous thirty years began to have its purposes questioned, although the complex set of trade regulations remained solidly established.

This had a novel and aggravating context. The aftermath of the Uruguay Round up to the Doha Round has been a period marked by complex changes in the world economy with consequent reflections on the WTO. Multipolarity entrenched the configuration of deadlocks. New actors became primordial in the trading system; India, China, and Brazil became crucial in decision making procedures. Green room meetings, although expanded, no longer held any decisive power. Rule-making power was wholly shifted to multilateral member negotiations by means of the consensus rule. Increased legitimacy of the negotiating process was developed at the cost of decreased efficiency. A new Single Undertaking was ambitiously drafted to seek a unanimous compromise in over twenty-six different issue areas in international trade.

Increased multilateralism in the WTO caused not only difficulties in negotiations but also characterized an ideational shift marked by a plurality of ideas under one legal framework. Current analysis seems to suggest that this new ideational shift is pushing for a deconstruction of the previous neoliberal mentality. It points towards a re-balancing of adequate respect for the liberalization ethos and an equivalent respect of members' internal regulations. Such re-imagination seems to be increasingly visible on a case-by-case analysis by a socially and politically sensitive DSS. For example, the economies of developing countries meant that agricultural protection and access were now central. The G-20 negotiating group inaugurated the motto: "Agriculture is the engine of the Round." Focus on a "Development Round" and agreement to "less-than-full reciprocity" created expectation among developing countries that concessions needed to be asymmetrical. Ten years on, developed country domestic politics

70. See generally Peter Sutherland et al., Reforming the World Trade System: Legitimacy, Efficiency, and Democratic Governance (Ernst-Ulrich Petersmann & James Harrison eds., 2008).
72. See id.
73. Jagdish Bhagwati & Peter Sutherland, The Doha Round: Setting a Deadline, Defining a Final Deal 7 (2011); Paul Blustein, The Misadven-
also changed. The United States, in particular, now claims full reciproc-
ity—at least from the largest developing countries—to sell the deal at
home.\footnote{US Ambassador Punke stated: "In the past and again today, I have heard some say
that the U.S. approach needs to be more ‘realistic’ in its expectations for the
Round. But we hold a different perspective on realism in Doha. What is not real-
istic is the notion that a few of the world’s most powerful trading nations can play
by a set of rules that gives them largely unfettered access to global mar-
kets—without giving appropriate reciprocity in return. That is not the basis for a
sustainable trading system. And it cannot be the outcome of this Round." \textit{Statement by Ambassador Michael Punke to the Trade Negotiations Committee, Off.
U.S. Trade Representative} (Nov. 30, 2010), http://www.ustr.gov/about-us/
press-office/press-releases/statement-ambassador-michael-punke-trade-negotia-
tions-committee.}

What is characteristic of the current trade politics dynamics, therefore,
is that the initial neoliberal political agreement has disappeared and no
further agreement has yet filled the vacuum. There is unsureness as to
what will follow. In this sense, when resorting to the adjudicative bodies,
states are not only seeking a particular interpretation of relevant WTO
provisions. They are also asking them to choose the political and social
vision of liberalized trade that \textit{should} infuse and orient the trading re-
gime. Notably, the DSS has become a space to re-discuss and to contest
the purpose of trade barriers in the turn of the century. The conciliation
between substantive regulatory choices by members in pursuing “non-
trade” goals and the definition of the concept of “legitimate barriers to
trade” became the main challenge of the GATT/WTO legal system. A
debate that is most commonly framed as the “trade and” or “linkages”
debate (trade and environment, trade and development, human rights,
labor, and so forth)\footnote{Andrew T.F. Lang, \textit{Reflecting on ‘Linkage’: Cognitive and Institutional Change in
the International Trading System}, 70 \textit{Mod. L. Rev.} 523, 524–525 (2007).} turned into a central matter in the trading system.
Trade professionals struggle to find ways to enmesh these diverse regimes
in the trading regime as a response to global concerns.\footnote{See generally Peter Sutherland \textit{et al.}, \textit{The Future of the WTO: Address-
ing Institutional Challenges in the New Millennium} (2004) (Report of
the Consultative Board); Joost Pauwelyn, \textit{The Sutherland Report: A Missed Oppor-
tunity for Genuine Debate on Trade, Globalization, and Reforming of the WTO}, 8 \textit{J. Int’l Econ. L.} 329 (2005).}
The “trade and” debates not only became the focus of vast academic literature on the
WTO but also readily influenced its institutional workings.

The search for a “social pact” or a legal framework that would respond
to the disquietudes of the trading system in the twenty-first century is the
third moment of legal analysis of GATT/WTO law. With the turn of the
century, most trade professionals became aware of the contentious
grounds upon which the multilateral trading system rests. As Dunoff
puts it, they are aware that the “fundamentals” of the system are “up for
grabs.”\footnote{Jeffrey L. Dunoff, \textit{The Death of the Trade Regime}, 10 \textit{Eur. J. Int’l L.} 733, 755
(1999).} While the “neoliberal consensus” still accounts for a large part
of legal work in the trading system, there is an emerging trend developing as a result of the WTO's legitimacy crisis of the late 1990s. An adequate response to the situation needs to address value-sensitive areas touched by trade regulation while upholding the importance of a regulated and enforceable trading system. In noting that the AB seems not yet to have yet settled on a single coherent approach, Lang recognizes a few legal turns that have been taken to face this dilemma. Amongst "deferentialism, cautious formalism and judicial minimalism," a majoritarily "procedural approach" appears to have prevailed.

There are distinct features involved with the notion of law and process-based review within the WTO dispute settlement system. First, it signals that the panels and AB have gained more political space for deliberating on the legal method they wish to pursue in each specific dispute. But there are also signs of a lacking interpretational and application framework for the DSS to follow. This lack of direction or underlying social purpose has serious implications for impacts and consequences of the DSS activities. Also, it greatly influences perceptions and activities of Rule Negotiations, as the following parts will endeavor to demonstrate.

This is a normative challenge due to novelty of its practice and content. Some have understood, for instance, the practice of proceduralism to mean the use of jurisprudential techniques to do justice to the delicate interrelationship of values and interests. Others suggest that it is better explained by what it denies. Being centered on the idea of deference, it primarily aims to ensure that WTO law does not intrude on the regulatory prerogative of states. Practically, the idea of deference to states also revolves around the tendency of proceduralization of claims rather than on analysis of the measure. Bogdandy argues that this approach is instrumental in the sense that it coordinates different regulatory systems, and forces members to take into account the economic interest of others when designing their own domestic regulatory frameworks.

To facilitate comprehension of this new logic of legal reasoning, a closer look at the United States—Shrimp decision is particularly helpful. On a very basic level, the dispute centered on a complaint placed by Asian States regarding provision section 609(b)(1) of U.S. Public Law 101-169, prohibiting the importation of foreign shrimp that had been har-

78. LANG, supra note 2, at 343.
79. Id. at 338.
82. LANG, supra note 2, at 343.
vested with technology that could adversely affect the relevant species of sea turtles.\textsuperscript{84} Central to the findings of the issue was the applicability and interpretation of article XX exceptions by the AB.\textsuperscript{85} The applicability of article XX translated balancing environmental concerns on the one hand, and trading obligations on the other.\textsuperscript{86} Thus, the AB had an explicit substantive choice in its lap. Instead of rising to the challenge, the AB chose a legal path of proceduralism.\textsuperscript{87} It employed a two-fold approach that would repeat itself in most process-based reviews.\textsuperscript{88} Initially, it overlooked the substantive review of the matter and directly turned to a hypothetical analysis of the requirements of an article XX justification.\textsuperscript{89} By turning around the issue in this way, the AB avoided passing judgment on substantive matters relating to the U.S. regulation and dismissed the case on procedural requirements inherent in the chapeau of article XX and in the concept of unjustifiable and arbitrary discrimination.\textsuperscript{90} More precisely, the AB found that the United States had applied the measures in a “rigid” and “unbending” manner\textsuperscript{91} and had failed to respect the principles of “basic fairness and due process” owed to its trading partners in the design and application of the certification process.\textsuperscript{92} Also, it found that the certification processes carried out by U.S. officials were “singularly informal and casual.”\textsuperscript{93} In light of such, it can be understood that the AB’s interpretation of article XX and consequent imposition of stringent preconditions on member governments greatly shapes and limits the role of this provision.\textsuperscript{94}

This turn has substantively affected trade politics. Initially, the focus on legal and administrative procedures has worked to deviate attention from broader questions about the underlying motives and roles of the trading system.\textsuperscript{95} Legalization of the trading regime is in itself a political choice.\textsuperscript{96} Jens Ladefoged Mortensen argues that it is a reflection of rules and procedures of dominant actors of the multilateral trade regime, thus

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{84} US—Shrimp, \textit{supra} note 64; Department of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, § 603(b)(1), 103 Stat 988 (1989).
\item \textsuperscript{85} See US—Shrimp, \textit{supra} note 64.
\item \textsuperscript{86} \textit{id.} para. 12.
\item \textsuperscript{87} \textit{See generally id.}
\item \textsuperscript{88} \textit{See id.}
\item \textsuperscript{89} \textit{See id.}
\item \textsuperscript{90} \textit{See id. paras. 161–86.}
\item \textsuperscript{91} \textit{id. paras. 163, 177.}
\item \textsuperscript{92} \textit{id. para. 181.}
\item \textsuperscript{93} \textit{id.}
\item \textsuperscript{95} \textit{See LANG, supra note 2, at 344.}
\end{enumerate}
\end{footnotesize}
constituting evitable political choices. Accordingly, this shift to “proceduralism” is by no means solely a legal development. It is also a broader and deliberate “institutional choice” shaped by perceptions of the role of the DSS within the WTO. It is a choice not to act as decision-maker in the political dispute regarding “liberalized trade” that should infuse the present trading regime. It is, instead, a choice to defer to national decision-making bodies on substantive matters and to manage and review domestic regulatory procedures at the WTO level.

This logic of proceduralism has concomitantly originated in and reconstructed this third ideational shift. The workings and mind-set of trade professionals seem to have internalized this perspective through which to interpret WTO provisions. Through the procedural approach, the trade community, and especially the AB, has sought to interpret relevant WTO provisions in such a way that leaves regulatory space open to member states to pursue domestic policies depending on the manner in which this is done. Such an attempt to avoid wading into political waters has, in fact, created opportunities for frameworks that potentially shape the capacity and incentive of other actors “to engage in effective problem-solving and accountable norm elaboration.”

Logically, the WTO review cannot be neutral as to the substance of regulation and there is no way to preserve such regulatory autonomy if “such autonomy is illusory to begin with.” As a consequence, there are negative outcomes associated with the turn to proceduralism. First, the promise of enabling a larger regulatory space for countries seems unrealistic, as a substantive aspect to regulatory space has not been put in question. Second, the WTO’s legitimacy crisis continues because the results of WTO policy continue to evolve unattached to the substantive outcomes it produces. Third, it creates a tendency to over-proceduralize WTO law, attaching great weight and formalistic implication to every term in every treaty. Negotiators have become increasingly aware of the legal maneuvers crafted through the WTO procedural approach. It has fallen on their shoulders the responsibility of skillfully interpreting and designing provisions that will not accrue unforeseen burdens to their countries by this very active DSS.

This historical overview has evidenced how GATT/WTO ideational and legal interpretative tendencies have oscillated between showing

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97. Id.
101. LANG, supra note 2, at 346.
greater or less deference to the political process of the preference provider. Also, to the role reserved for the AB "as a function of the open-endedness of the created guidelines." This last choice is the one currently chosen by the AB, through its reliance on procedural standards to generate case-by-case "contextualized jurisprudence." This part has attempted to demonstrate that a social construction remains. What seems like an inclination towards procedural-review methods responds to a momentary focus on possibilities for legal paths and not on the motives for their causation. The consequences of this choice become particularly interesting in the current international economic context, as well as in regard to the WTO's institutional challenges. The choice for proceduralism is not only a choice by the trade community but an influence upon it. As the next part will attempt to demonstrate, proceduralism has contributed to a shift of momentum from rule-negotiations to the dispute litigation, adding to the complexity of ways in which trade rules are understood and advanced in the WTO.

III. LAW, POLITICS, AND INSTITUTIONAL CHOICE

It has been argued that in the context of Doha negotiations the interconnectedness of WTO branches has brought about a shift of trade negotiations from trade rounds to the judicial process. This is not, by any means, an unforeseen phenomenon. Jackson, Hudec, and Davis had already argued that the post-Uruguay DSS operated in an atmosphere of pure negotiation with the settlement procedure itself becoming part of the negotiating tactics for various dispute settlement attempts. Thus, although legislative gridlock and judicial law-making have frequently been understood to walk hand in hand, this relationship has provoked a varied range of reactions in the context of the WTO. Whilst some have found for an excessively activist AB others have observed a political capitulation of WTO members. In recognizing that both approaches add valuable insights to the matter; this paper observes that they remain insufficient to wholly explain the logic of politics in the making of trade law. For this reason, it provides a deeper inquiry into the formation and the limits of this newly found political space inside the WTO's adjudicative system.

104. Shaffer & Apea, supra note 98, at 996.
105. Id.
106. Goldstein & Steinberg, supra note 3, at 2.
107. John H. Jackson, The Role of Effectiveness of the WTO Dispute Settlement Mechanism, in Climate Change, Trade, and Competitiveness: Is a Collision Inevitable? 179 (2000). The author remembers the cases of Costa Rica and Japan against the United States and their success in advancing their claim in the years of the WTO.
109. For an overview, see William J. Davey, Has the WTO Dispute Settlement System Exceeded its Authority?, 4 J. INT'L ECON. L. 79 (2001).
In analyzing this altered institutional framework, this Goldstein and Steinberg argue that this institutional imbalance has “not only deadlocked the legislative process that for half a century liberalized global trade, but has also dampened the legislative check on judicial lawmaking.” In saying this, the authors make a compelling case for a regulatory shift taking place at the WTO. As a result of such regulatory shift, the authors argue that WTO’s rule-making capacities have been transferred from its legislative organs, namely, Ministerial Conferences, to its quasi-judicial organ, the DSS. This “institutional paradox,” between an efficient DSS and an inefficient political or legislative branch, has been understood by great part of the literature as an institutional flaw. In this sense, suggestions for reform are many and diverse.

Barfields argues that the two consensus requirements present at the WTO are “constitutional flaws” of the WTO regime. He finds the consensus required to block an AB report together with the consensus required to legislate are highly unworkable. Boldly, he suggests that the issue might be solved by the possibility of a panel or AB report to be blocked by a minority of one-third of WTO members representing one-quarter of world trade. Alternatively, he suggests empowering a committee of the DSB or the WTO Director General to identify cases as political or as involving legal issues that are still ambiguous and thus forcing parties to resolve their issues through political/diplomatic negotiations.

Further exploring the issue, Amrita Narlikar sees usefulness in the institution of an executive board like the International Financial Institution to overlook decision-making. Cottier and Takenoshita, likewise, deconstruct the concept of consensus voting to suggest a system of weighted voting, based on each WTO member’s trading power.

These reform proposals share an underlying belief that the current institutional imbalance between the deadlocked legislative and the freed judicial branches of the WTO can potentially create serious systemic problems for the GATT/WTO regime. This is mainly because these circumstances have transformed the WTO DSS from a purely bilateral

110. Goldstein & Steinberg, supra note 3, at 2.
111. Id.
113. Id.
115. Id. at 9.
116. Id.
117. Id. at 112–13.
120. Du, supra note 102, at 639–75.
and reciprocal system of episodic dispute settlement “towards a multilateral system with a regulatory character.” Accordingly, worries also arise as to the democratic character of this supposed new forum for international law making. As Claus-Dieter Ehlermann puts it, this institutional weakness breaches “the fundamental principle of democracy which requires that judges are subject to the law, and that the law can be changed by the legislator.” Although proponents of high-level panels have favored this as a manner to create momentum for reform and unlock the political stalemate, this practice puts in check principles of international cooperation and accountability. This is because, notwithstanding that expert panel and AB opinions might sharpen the effectiveness of an organization, and move it beyond immediate interests of members, they do so without any means of legislative check or effective mechanism for members’ review.

Others differ from this view. Pauwelyn argues that, although there is indeed a sub-optimal institutional balance at the WTO, addressing it through the lenses of a “law and politics” divide fails to grasp the complexities of the WTO’s institutional functioning. For him, “the rule of law” within the WTO was never entirely disassociated with the political aspect of the institution. Progressive legalization within the trading system was accompanied by a concomitant strengthening of political mechanisms. This was a necessary condition for the system’s evolution. Hence, as the author argues, it is problematic to understand GATT/WTO history and present through an evolutionary narrative from politics/power-based negotiations to law/rule-based negotiations: “[r]ather than a paradox or puzzle, the juxtaposition of a strong, automatic dispute settlement system . . . and a tedious, consensus-based rulemaking process . . . is a logical—although not necessarily optimal—phenomenon.”

123. Claus-Dieter Ehlermann, Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, 36 J. WORLD TRADE 605, 636 (2002).
126. See id.; Considering that the reverse consensus rule for the adoption of panel reports is seldom used and has commonly been considered a diplomatic fragile instrument. WTO Bodies Involved in the Dispute Settlement Process, WTO, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_eb1_e/c3s1p1_e.htm (last visited Apr. 29, 2014).
127. Pauwelyn, The Transformation of World Trade, supra note 112.
128. See id.
129. See id.
In this sense, there is an intimate and bi-directional interaction between the trade system's legal structure and its political mechanism.\footnote{131} The legalization tendency that took place in the last three decades of the twentieth century is thus logically accompanied by a growing desire and need of participation in the WTO political process. Conversely, the lack of a consensus rule would not have enabled the establishment and the sustainment of a strong and automated DSS. Pauwelyn proceeds to conclude that limited exit and strong DSS in tandem with higher levels of participation and politics is the best recipe for an effective and legitimate world trade system.\footnote{132} Thereby, he understands that the WTO needs more not less politics, more not less control by domestic politics, more not less consideration of non-trade concerns.

At this point, this institutional understanding is important in order to help grasp the complexities involved in current negotiations and in the way law is being used in this scenario. This paper takes Pauwelyn's argument a step further to identify the extent to which this dichotomy between law and politics is deeply fictional within the trading regime. Just as a low exit adjudicative system such as the WTO DSS requires high political input to support it,\footnote{133} high political input requires a legal format under which different sets of ideational values can be defended. This is where the procedural use of WTO law comes in. Following Pauwelyn's line of argument, progressive proceduralization should also be accompanied by concomitant strengthening of the political mechanisms as a necessary condition for the system's evolution.

The procedural interpretation of WTO rules allows for a much broader set of ideational perspectives to be considered as being, possibly, legitimate. By allowing considerations of measures designed with all sorts of different purposes, it seems to increase the political input of the organization. Also, it presents itself as an alternative for the narrow economic analysis of trade barriers during the neoliberal era. This interpretation of WTO law has a direct impact on Rules Negotiations as well as on perceptions of the effects and biases of trade law. Portraying itself as a neutral medium to resolve political and economic claims, the AB's choice for a process-based review impacts on Rules Negotiations to the extent that it becomes a choice about a right procedural path instead of an underlying substantive value.

More interestingly, the procedural approach itself greatly allows for this role shift between adjudicative and legislative functions of the WTO. This approach to WTO law has enabled the adjudicative bodies to preserve their legitimacy amongst members of the trade community\footnote{134} while providing an immediate response to members' social concerns. This is

\begin{itemize}
  \item \footnote{131}{Id. at 339.}
  \item \footnote{132}{Id. at 340.}
  \item \footnote{133}{Id. at 339.}
  \item \footnote{134}{See Joseph H.H. Weiler, The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement, 35 J. World Trade 191 (2001).}
\end{itemize}
mainly because it leaves a margin of room for legalism to craft socially friendly trade barriers according to predefined standards. Hence, the process-based review has proved to be an efficient tool for maintaining the WTO's external legitimacy\(^ {135}\) whilst avoiding committed engagement with non-trade concerns. This second aspect of the "law and politics" debate within the WTO is of equal importance. This is because any debate about the reform of WTO legal and judicial systems needs to take into account the role that the legal language being used performs within the organization. So long as the equilibrium between law and politics is maintained through a common understanding of how the law works within the WTO, this role needs to be further explored.

A. Towards Liberalization or Autonomy?

The consequences of the so-called "regulatory shift" have been largely explored. In the uncertainty brought by this shift to judicialization, a tendency to litigate instead of negotiate advances in trade law has been astutely commented on.\(^ {136}\) Goldstein and Steinberg have suggested that the Doha Deadlocks and its opened space for litigation have initiated an era of judicial liberalization at the WTO.\(^ {137}\) Their argument can be summarized as follows: unanticipated institutional and political developments have led to a collapse of the legislative process, thus transforming the DSS into a venue for lawmaking. Given that the very nature of dispute settlement relies on the asymmetry of many exporters against a single import-competing group, it "creates the political space that pushes liberalization forward."\(^ {138}\) Consequently, the authors conclude that judicial lawmaking is not only taking over the place of multilateral lawmaking, it is doing so with a "liberalizing bias."\(^ {139}\)

In a parallel argument, Mortensen suggests that the legalization process of the WTO has been highly asymmetrical, privileging liberalization and producer interests as opposed to safeguarding the provision of public goods and consumer interests.\(^ {140}\) He argues that "decentralised bargaining processes surrounding the WTO and the legal activities within the WTO are two sides of the same coin."\(^ {141}\) In addition, he suggests that the WTO is undergoing two mutually constitutive processes of legalization and privatization. In this sense, the rule of law is by no means the end of politics.\(^ {142}\) In reality, legalization at the WTO has tended to facilitate trade liberalization in response to private initiative on specific issues.\(^ {143}\)

\(^{135}\) Id.
\(^{137}\) See Goldstein & Steinberg, supra note 3.
\(^{138}\) Id. at 32.
\(^{139}\) Id. at 15.
\(^{140}\) Mortensen, supra note 96, at 195.
\(^{141}\) Id. at 193.
\(^{142}\) Id. at 177.
\(^{143}\) Id. at 195.
Its DSS, consequently, results from "politics of judicialization" and is subject to private misuse. Likewise, respected authors have argued that in light of recent institutional changes, the DSS has not yet shown enough deference to members' trade policy decisions and that the system is biased towards trade liberalization.144

On these accounts, Goldstein and Steinberg explore the possibility of "liberalization through litigation" so as to identify advantages and disadvantages of this phenomenon.145 Positively, this institutional adaptation would have worked as an engine to keep the organization and the "trade bicycle" running. It has increased "efficiency of the organisation and enhanced open trade by freeing member states from capture by entrenched domestic interests."146 On the downside, judicial liberalization is supposedly limited in its pace, reduced in its scope, and shallow in its depth.147 This perception of the role played by the DSS is not, however, unanimous.

Following a different line of thought, some of the literature identifies a reinjection of governmental intention behind each measure. Ming Du argues that the shift in balance between WTO branches has allowed for a broader regulatory autonomy of WTO members.148 For him, regulatory autonomy left for members is always contestable under WTO agreements.149 Recent case law, according to him, has shown much more institutional sensitivity and is increasingly more deferential to members' national regulatory autonomy.150 He also uses the changing jurisprudence under article XX of the GATT as well as the resurrection of the GATT's "aims and effects" test of a measure under article III:4 as proof of this increased deference.151 Of the same mind, Knox adopts a literal interpretation of the agreements so as to fit signs of multilateral political agreement in non-trade contexts.152 In overviewing the first ten years of WTO's judicial balance of trade and environment disputes, it can be concluded that the AB has "greened trade jurisprudence."153

It seems, therefore, that an analysis of the effects of this judicial shift has mixed results. It has taken form of an institutional and legal adaptation constructed by the trade community for less, not more politics, con-

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144. See John Greenwald, WTO Dispute Settlement: An Exercise in Trade Law Legislation, 6 J. INT. ECON. L. 113, 123 (2003); See also, John Ragosta et al., WTO Dispute Settlement: the System is Flawed and Must Be Fixed, 37 INT'L L. 697, 727 (2003); John R. Magnus et al., What Do All These Adverse WTO Decisions Mean?, TRADEWINS (Jan. 20, 2003), http://www.tradewinsllc.net/publi/GULC-1-03.pdf.
145. Goldstein & Steinberg, supra note 3, at 15.
146. Id. at 3.
147. Id. at 33.
148. Du, supra note 84, at 639–75.
149. Id. at 654.
150. Id. at 655.
151. Id. at 655–58.
153. Id. at 47–48.
trary to Pauwelyn's pleadings. Thus, this procedural approach is not a result of a concrete re-imagination of the WTO. Instead, it is an institutional and practical response to a context of dissatisfied international voices. It is not grounded in any common agreement amongst its members as to its normative and descriptive effects. For this reason, interpretations of the current dynamics diverge. There has been no consensus on what comprises a member's "regulatory autonomy" just as there has been no agreement on what comprises "liberalization" at this point in time. This empty legalistic response has been successful in calming spirits and compensating for slow-paced negotiations, but its usefulness, if any, ends there.

The second important point to be made has to do with the inverse effect that this "judicial shift" has on Rule Negotiations. Although it has originated from a deadlocked scenario, the "judicial shift" has had the cyclical effect of adding to the complexity of negotiations. It demands an increasing amount of political input in negotiations to accompany the sophisticated decision-making taking place at the DSS. The strengthened and active panels and AB have also shown to have great influence on agenda setting for rules negotiations and have contributed with uncertain legal methods and lack of engagement with non-trade concerns through frequent legal maneuvers. This approach to law, characterized by daily institutional choices and process-based reviews also adds to the legal and political difficulty of rules negotiations.

B. INSTITUTIONAL CHOICES AND IMPLICATIONS FOR NEGOTIATIONS

As exemplified above, this paper finds it somewhat complicated to delineate political consequences associated with a turn to "judicialization" of the WTO. For such, a broader concept of the phenomenon of legalization and the resulting process-based review is needed. This understanding is valid insofar as it is capable of analyzing the effect that these choices have had on aspects of legitimacy as well as on underlying social practice at the WTO. Hence, an analysis of the institutional choices available to the panels and AB seems to be closely associated with the initial purposive interpretation of law presented in the first section of Part II. What is needed is not an evaluation of possible overreaching of the panels and AB in their decision-making capacities but rather, inquiries into the nature of the process by which those decisions are made. As such, this section is dedicated to exploring and understanding the ways that these decisions have been made in the present expanded political mandate of the DSS.

154. Pauwelyn, The Transformation of World Trade, supra note 112.
155. Goldstein & Steinberg, supra note 3, at 31.
156. See Barfield, supra note 114, at 45-46.
It is no news that WTO law contains a plethora of major gaps, ambiguities, and contradictory elements. These have been the sources of agreement and disagreements of members since the creation of the GATT/WTO system. As Posner insightfully explains, legal (and WTO) texts may be indeterminate and vague due to a basic tension between on the one hand: "the willingness of legislator to draft laws using all-encompassing language in order to subsume the maximum number of transactions, and, [on the other hand,] the limits inherent in our human nature to predict future events on which we have, at the stage of drafting, imperfect information."  

Jackson comments that gaps are necessary in order to get the consent required to come to a resolution. In this sense, "diplomats gloss over real differences with language that both sides can interpret the way they want to in order to reach a meeting of the minds as to language." Currently, however, gaps, overlaps, and constructive ambiguities have become the "battleground" for the WTO's search of legitimacy. As Steger argues, this battle is staged in the DSS, through the many ways in which these gaps are interpreted and the political implication of each interpretational route. So far, as argued in the previous section, this battle has not yet yielded any definitive biased inclination. Instead, adjudication has taken the route of "proceduralism" and has barely recognized that it, in fact, has political implications. It is with this in mind that this paper will further explore the ideational and legal turn to "proceduralism"—explained in Part II—to inquire into the possibilities and consequences of the panels' and AB's institutional choices.

The decade of Doha significantly altered the previous underlying logic of trade law interpretation. Thus, the first legal consequence of this turn to methods, institutions, and process-based reviews is the unwillingness of the DSS to engage in substantive decisions that involve balancing of values that the negotiating members have equally failed to achieve. The logic of "proceduralism," as explained above, finds a way to avoid substantive value judgments and is presented as an appropriate basis for international oversight of domestic procedures and legislation. As Von Bogdandy explains, national procedures tend to merely reflect domestic interests, ignoring foreign interests that are deeply affected through these decisions. Such foreign interests, with no standing in domestic proce-
dures, reflect the transnational impact of internal measures. In the case of WTO law, the author argues that the AB can rectify this through a process of "simulated multilateralism" in the domestic process of legislation. This process-based review upholds principles of due process and basic fairness, which the AB developed on the basis of article X: 3 of the GATT. He notes, nevertheless, that, "[p]rocedural requirements have the function of serving the accomplishment of substantive obligations and cannot function as a general substitute for them."

Whilst it has not gone unnoticed that "proceduralism" may manifest in different manners, they share an alternating tendency from principles of transparency, accountability, participation, and rational democratic deliberation to other regulatory decision-making processes. As follows from Trachtman and Shaffer's Institutional Choice framework, the interpretative approach that the AB chooses to undertake is particularly important insofar as it directly relates to policy discretion in treaty implementation. The authors' proposed framework tries to map the behavior of the AB and the DSS in the midst of this judicialization tendency of the WTO. The choice of a particular method is dependent on the specifics of the case and on the efficiency of each determined approach. More accurately, they account for the relationship between judicial interpretative choices and its effects on international governance. Their point is there is no right answer or pre-determined consequence regarding the approach chosen by the AB.

To this purpose, they outline some of the ways in which the WTO panels and ABs effectively delegate responsibility to different social decision-making processes: more specifically, allocating decision-making to WTO process or subsets of WTO members; recognizing other international political processes through international law; textually incorporating other international law and delegation to international standard-setting bodies, as well as delegation to experts regarding factual issues. Secondly, in cases of evident conflict of social goals, the panels and ABs find themselves choosing between interlinked legal strategies to deal with the claims. These are the institutional choices of judicial balancing, deference to states and process-based reviews. Finally, given that there seems to exist a very thin and unexplored line separating these institutional choices, great uncertainty remains regarding the method that will be chosen in each dispute, as well as the consequences they will unleash.

166. Id.
167. See id. at 667.
168. Id. at 669.
169. Id. at 667.
171. See id. at 152–53.
172. Id. at 153.
173. Id. at 120–35.
174. Id. at 106.
In light of this, it is necessary to remember that these institutional choices mapped by Schaffer and Trachtmann are not merely legal phenomena and interpretative techniques. Instead, they are part of a discursive practice that takes place within the WTO community through thoughts and arguments (ideas) of members and an iterative and ritualized process (discourse) that eventually institutionalized these ideas as norms. In this sense, narrow conceptions of law and legalization, associated with the mere manifestation of law in public bureaucracies, fail to describe the politics of legalization at the WTO as well as institutional consequences associated with it. Accordingly, in recognizing that there are benefits and costs associated with different kinds of legalization, it is necessary to observe the substantive and political consequences of this legal turn.

As Finnemore and Toope argue, a broader vision of law is necessary to direct more attention to procedures, methodologies, and processes that generate legitimacy in and of themselves. This is the reason why these approaches also need to be understood as a constituent of law insofar as they affect its application and outcomes. The adherence to legal process values is a move to a "very particular kind of law." Finnemore and Toope argue that such an approach is necessary to explore the causes' nature and effects of legal legitimacy. With the increased perception of a "narrow" legalization, critiques on WTO law have insufficiently focused on long-term systemic that this turn to "proceduralism" and DSS legal methods might result in.

This review of members' measures is not solely restricted to principles of due process enshrined in the GATT. It is also largely discussed in matters of health and scientific risk in the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) agreements. The role of science in trade disciplines has been a polemic issue since the Uruguay Round. The "Three Sister Organizations"—the Codex Alimentarius (Codex), the International Office for Epizootics (OIE), and the International Plant Protection Convention (IPPC)—are often seen as quasi-legislators and yet another undemocratic and procedural manner of advancing WTO law. For example, it was largely discussed in the EC–Hormones dispute where the WTO was accused of overriding do-

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177. Id. at 421.
178. Id. at 750.
179. Id. at 751.
181. Id. at 632.
182. Id. at 649.
mestic regulatory choices of members due to the procedure-based approach chosen by the AB with regard to the importation of genetically modified organisms (GMOs) meat into the European Community.\textsuperscript{185} The idea of "science as a neutral arbiter" as a parameter for contestability of domestic regulation\textsuperscript{186} has many times been counterweighted to the effective existence of sound science and methodology free from policy and value judgments.\textsuperscript{187} Parallels are observed in cases involving the Agreement on Subsidies and Countervailing Measures (ASCM or SCM Agreement) and the Anti-Dumping Agreement as they often refer to expert opinion and economic analysis of the effects of domestic and international trade law.\textsuperscript{188} This specific "crafting of trade law" has been named in different contexts and disputes analysis as "judicial minimalism"\textsuperscript{189} and "passive virtue of judicial decision making."\textsuperscript{190}

It is due to this uncertainty and to the concomitant stagnation in rules negotiations that litigation has become an interesting option for WTO members to engage in, in this sub-optimal rule-making process. In understanding the complexity of multilateral negotiations and in observing the unusual high engagement of the AB in providing answers for members' trade concerns, strategies of rule-advancing through litigation have been described.\textsuperscript{191} Lack of clarity regarding political effects of judicial liberalization in specifics, as explained in the previous section, leaves one other important consequence that arises with this tendency of process-based review. Decisions have become gradually more deferential to the words used in the WTO agreement, which are often read in clinical isolation from their context.\textsuperscript{192} What is found is a lack of legal reasoning by judges questioning and answering the functions of any given legal instrument. Rulings are also very often criticized for lacking economic logic (see subsidies below),\textsuperscript{193} calling for neither economic analysis nor purely legal analysis of case law but rather, more consistent quality of case law. Thus, it seems that the effects of trade legalization on world politics in the long run will depend on its continuing uneven spread. Its spread will depend on the evolution of international norms, its consequences for domestic and transnational politics, and its perceived benefits for key actors.
IV. INSTITUTIONAL CHOICE AND RULES NEGOTIATIONS: A CASE STUDY THROUGH SUBSIDIES

The fourth and final Part of this paper will provide a concrete example of the theoretical observations found in Parts II and III. It will focus on the political room that the panels and AB have been provided in disputes under the ASCM. Subsidy law is particularly helpful to illustrate the re-interpretative biases that have shaped WTO law. As Hoekman and Kostecki have put it, multilateral subsidy rules are deeply connected to understandings of desirable forms of government intervention, rather than merely as the product of protectionist business lobbies. From the nineteenth-century U.S. law on sugar targeting export duties to a complex ASCM in 1993, subsidies are continuously reinterpreted under trade law. An analysis of the frequency in which cases are brought under the ASCM shows that uncertainty remains as to the definition provided by article I of the ASCM and its Illustrative Lists.

The cases commented on below indicate that the development of subsidy regulation over the past decades has failed to encompass all the political changes in the current role of subsidies in domestic and international governance. Departing from a neoclassical economic approach that found no use for subsidies in governmental policy space, distinct categories of subsidies have come to be crafted under WTO law. Research and development subsidies have now been openly used in over two decades, governmental bailouts to financial institutions are among many actions that call for a re-discussion of the underlying purpose of this governance instrument. DSS' interpretation, however, remains in a "state of denial." As the DSS comes to operate in a skillful procedural manner, skepticism remains as to the sustainability and effectiveness of such approach. The WTO (and its DSS) need to demonstrate greater consciousness of the problems that are inherent in the ASCM. Attaching substantive meaning and follow-through effects to the norms that have come to be textually interpreted seems to be an adequate path to pursue.

As will be demonstrated, the technique of well-crafted decisions, as a manner to derive abstract, general, and prospective rules from individual cases, works in the opposite direction of clarifying WTO law and advancing negotiations. A less evasive style of judging can already be seen in some of the U.S.–China Countervailing Duties disputes where

governmental and ideational ideas are increasingly in shock.\textsuperscript{199} Arguably, this is a step forward towards abandoning the heritage of past ideational interpretative tendencies. Not only so, the current and present struggles with climate change policies will come to demand a straightforward legal method of analysis and of social response to the WTO.

A. Brazil—Aircraft

The Brazil—Aircraft dispute had its compliance proceedings completed just with the start of the Doha Round of Negotiations.\textsuperscript{200} Even so, having experienced at least seven years of WTO’s institutional changes, it is noteworthy at this point in time. The dispute was substantially linked to article XVI of the GATT and centered upon some crucial points of the ASCM, specifically the burden of proof under articles 27, 27.4, 27.5, and the definition of a subsidy under article 1, as well as the link between permissible export subsidies in article 3.1 (a) and the Illustrative List of annex I.\textsuperscript{201} Due to the purposes and necessarily limited nature of this study, the latter will be used as a case example of the delicate balance found by the Panel and the AB in addressing such provisions.

The key issue in dispute was Canada’s complaint regarding the Brazilian PROEX system of financing exports on sales of aircrafts by Brazilian manufacturer EMBRAER. In a simplistic overview, the Brazilian program sought to provide interest rate equalization subsidies for sales by Brazilian exporters, mainly EMBRAER. This equalization system added up to 3.8 percentage points of the actual interest rate of any transaction,\textsuperscript{202} thus reducing the overall costs of the manufacturer. Based on such data, the Panel considered that Brazilian equalization system qualified as a subsidy within the meaning of article 3.1 (1) of that Agreement.\textsuperscript{203} Subsequently, it also found that Brazil failed to comply with the burden of proof criteria under article 27 and that; therefore, it was in breach of the provisions of the ASCM.\textsuperscript{204}

Although Brazil rightfully agreed that the PROEX was indeed a subsidy under article 1 of the ASCM, it contested that its interest equalization was permitted by the specific terms of article (k) of the Illustrative List in annex I. Thus, central to the disagreement between the parties was the interpretation of item (k) of the Illustrative List of annex I. Under this specific item, Brazil understood that “such payments were prohibited only ‘insofar as they are used to secure a material advantage in

\begin{itemize}
  \item \textsuperscript{199} See Panel Report, United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R (Oct. 22, 2010).
  \item \textsuperscript{201} Panel Report, Brazil—Export Financing Programme for Aircraft, para. 4.151, WT/DS46/R (Apr. 14, 1999) [hereinafter Brazil–Aircraft Panel Report].
  \item \textsuperscript{202} \textit{Id.} para. 2.3.
  \item \textsuperscript{203} \textit{Id.} paras. 7.13–7.14.
  \item \textsuperscript{204} \textit{Id.} para. 7.57.
\end{itemize}
the field of export credit terms,' and that a contrario ‘such payments are permitted in so far as they are not used to secure a material advantage in the field of export credit terms.' Furthermore, PROEX payments, instead, were understood by Brazil as subsidies intended to match the subsidies provided by the government of Canada to Canadian company Bombardier.

Canada and the European Communities (as a third party to the dispute), on the other hand, argued that Footnote number five should be used to establish that a measure is “permitted” by the ASCM. More controversially, they argued that a measure that does not fall under the Illustrative List of Export Subsidies, namely, under the first paragraph of item (k), or does not fall within the scope of that footnote is prohibited. In addition, Canada rejected the Brazilian view that PROEX payments are the “payment by [governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits” and also argued that the PROEX payments were in fact in breach of the “material advantage” clause in the first paragraph of item (k).

Relying on a step-by-step procedural approach, the Panel conducted a review of Brazil’s item (k) defense. This review entailed: i) finding that PROEX payments are the “payment by [governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits” within the meaning of item (k); ii) finding that PROEX payments are not “used to secure a ‘material advantage’ in the field of export credit terms” within the meaning of item (k); and iii) finding that a “payment” within the meaning of item (k) which is not “used to secure a ‘material advantage’ in the field of export credit terms” is “permitted” by the ASCM even though it is a subsidy within the meaning of article 1 of the ASCM, which is contingent upon export performance within the meaning of article 3.1 (a) of that Agreement.

In avoiding the need to scrutinize the three cumulative points of methodological review, the Panel dismissed Brazil’s claim on the basis of its view of the “material advantage” clause constituting an affirmative defense. As Brazil had argued that the burden of proof was allocated on the challenged party, this was seen to go largely against that which had been established by WTO jurisprudence, thus failing its invocation of article 24.7 of the ASCM. Whilst the AB upheld all the findings of the

205. Id. para. 7.15. 'The a contrario approach in subsidy law is seen as a “saga.” See MARC BENITAH, THE LAW OF SUBSIDIES UNDER THE GATT/WTO SYSTEM 140–51 (2001).
207. Brazil–Aircraft Panel Report, supra note 201, para. 7.16.
208. Id.
209. Id. para. 7.17.
210. See Appellate Body Report, United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R at 16 (Apr. 25, 1997) (“It is only reasonable that the burden of establishing [an affirmative] defence should rest on the party asserting it.”).
Panel, it reversed and modified the Panel’s interpretation of “used to secure a material advantage in export credit terms.” Nevertheless, it upheld the Panel’s conclusion that Brazil failed to establish that the payments fell within the first paragraph of item (k) as well as its consequential finding that the PROEX payments were prohibited export subsidies under article 3.1(a). As can be observed, in the midst of the methodology put forward to establish compliance with item (k), the definition of “material advantage” had a significant role in this dispute.

For Brazil, the crux of the dispute seemed to be the interpretation of clause (k). For Brazil, the Panel’s interpretation reduced the “material advantage” requirement to “redundancy or inutility.” Theoretically, this interpretative approach used by the Panel would grant comparative advantage to the purchaser with respect to each transaction in question. Brazil’s defense rested on the Panel’s interpretation of the “material advantage” clause (footnote five of the Agreement specifies that annex I contains not only a list of prohibited exported subsidies but also measures that do not constitute export subsidies) in items (h), (i), and (k). Insofar as government payments were not used to secure a “material advantage” in the field of export credit terms, Brazil contended that they were permitted.

The relevant facts and legal matters of the dispute are interesting for the purposes of this paper insofar as they help to identify the many levels of the legal and political dynamics that are present within the WTO.

1. Procedural Review

Following the above-mentioned frameworks of “proceduralism” and institutional choices taken by the AB as appropriate to solving specific disputes, Brazil—Aircraft helps to illustrate how these tendencies become clearer in practice. The vagueness of concepts such as “material advantage” and the language used in paragraph (k) are useful examples of legal trends that have been developing within the WTO. This first example is particularly curious given that it shows how undefined substantive concepts in WTO regulation are analyzed in the midst of very technical and procedural reviews. Due to this logic they are seldom the main focus of analysis and are sidelined when an easier legalistic disqualifying alternative is available.

This seemed to be the case when the Panel first interpreted the term “used to secure a material advantage in the field of export credit.

211. Brazil—Aircraft Panel Report, supra note 201, para. 7.17.
212. Brazil—Aircraft AB Report, supra note 206, para. 196.
215. See generally Brazil—Aircraft Panel Report, supra note 201.
216. Id. para. 7.17.
In turning the issue into a three-step process analysis, it characterized “material advantage” as “materially more favorable as the terms that would have been available in the absence of the payment.”

Although the Panel’s interpretation changed considerably throughout the report, oscillating from “as simply 'more favourable than the terms that would otherwise be available in the marketplace’” to a mere “advantage,” it was unsuccessful in providing an acceptable meaning to the term “material advantage.” In handing down its decision, the Panel did not rule on whether the export subsidies for regional aircraft under PROEX were indeed “payment by [governments] of all or part of the costs incurred by exporters or financial institutions in obtaining credits.” Nor did it opine on whether a “payment” within the meaning of item (k), which is not “used to secure a material advantage within the field of export credit terms” is, a contrario, “permitted.”

The AB then paid significantly more attention to the meaning of “material advantage” under item (k). In noting that the Panel erred in its analysis, it also recalled that the Panel’s benchmark for determining what constituted a “material advantage” for comparing the subsidies on sales of regional aircraft was found to be solely the “marketplace” in which they were bought and sold. This definition is a matter of great importance under the ASCM and one that is eagerly avoided by the DSS.

It is important to note that by the absence of appropriate benchmarks or even “market-benchmarks,” the interpretation and application of the ASCM currently depends on evaluations by domestic Export Credit Agencies (ECA), the framework of the Organization for Economic Cooperation and Development (OECD) and the WTO. It is no news, therefore, that the way in which those rules have been written creates an “unbalanced playing field between developing and developed countries.” As Soprano has put it, the lack of global rules to calculate interest or premium as well as ECAs guidelines has left a normative gap that has been fielded by an international arrangement organized by the

217. *Id.* paras. 7.19–7.22; *Brazil–Aircraft AB Report*, supra note 206, para. 171.
219. *Id.*
221. *Id.*
222. The AB also clarified the distinction between “benefit” in article 1.1(b) of the SCM Agreement to the “material advantage” clause in item (k) of the Illustrative List. *Brazil–Aircraft AB Report*, supra note 206, para. 179.
223. *Id.* paras. 177–78.
224. The term “material advantage” refers to the last sentence of the first paragraph of item (k) “in so far as they are used to secure a ‘material advantage’ in the field of export credit terms.” *Brazil–Aircraft Panel Report*, supra note 201, para. 7.15.
In its reasoning, the AB assured not to be persuaded by “the safe haven” of the “OECD exemption.” According to OECD standards, officially-supported export credit terms provided by another government are allowed to be matched by countries of the OECD Arrangement. Nevertheless, it is not too uncommon to see horizontal linkages and reallocation of authority with non-WTO Agreements under the WTO normative system. This is precisely the case for item (k) and the OECD Arrangement.

Substantive ideas remained untouched. While the Panel and AB avoided threading into domestic regulation, they upheld the Gentlemen’s Agreement concluded in 1978. This OECD Agreement provides neither sanctions nor sanction mechanisms in the case of violation of the Arrangement’s provisions. The linkage between the Arrangement and the ASCM may make a violation or derogation (and the matching thereof) of the Arrangement a violation of WTO norms. Also, it greatly contrasts with the Brazilian understanding of “material advantage.” In Brazil’s view, the proper benchmark for determining whether PROEX payments are “used to secure a material advantage in the field of export credit terms” was to compare the export credit terms of transactions supported by PROEX payments with the export credit terms available to purchasers of Canadian regional aircraft. The concept of “material advantage” for Brazil, necessarily needed to relate to “advantage vis-à-vis someone or something.” Thus, to secure a “material advantage” in the field of export credit terms, Brazil’s risk as well as Canada’s subsidies to Bombardier had to be taken into account.

As can be seen from the above arguments, Brazil’s concerns relate to the impact that the meaning of the “material advantage” clause may have in protecting the rights of developing countries’ members. Through this perspective, developed country members have negotiated for themselves, in the second paragraph of item (k), a special safe haven from the export subsidy prohibition for export credit practices that conform to the interest rate provisions of the OECD Arrangement on Guidelines for Officially Supported Export Credits.

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227. Brazil–Aircraft AB Report, supra note 206, para. 185.
229. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 225 (2002) (“one may say that at least de facto, the WTO Agreement combined with the Dispute Settlement mechanism renders the ‘gentlemen’s agreement’ negotiated under the auspices of the OECD an enforceable agreement, if a competing State chooses to initiate the process.”)
231. Id. para. 7.20.
232. Id.
As in Schaffer's and Trachtmann's account, a logic of "proceduralism" and authority delegation (to the OECD country members) does not add to the delicateness of AB's political space. Additionally, Lang pointed out the unlikeness that this new approach by itself should offer a substantively neutral or non-intrusive form of regulatory review.\textsuperscript{234} This is because states' regulatory freedom is already constrained by international economic structures and, to a significant extent, is subject to the logics of those structures.\textsuperscript{235} This seemed to be the case regarding the relationship between Brazil's regulatory autonomy under item (k) of the Illustrative List of annex I and the OECD Agreement for export credits. In this sense, even the procedural review of Brazilian PROEX becomes intrusive in its lack of commonly contracted international benchmarks and an underlying understanding of economic differences between markets of certain products and between countries themselves.

2. Influence on Negotiations

The simple expression of "material advantages" in the ASCM adds to the list of carefully designed WTO treaty language. As previously mentioned, it is not uncommon for ambiguity to be purposefully left to provide adaptation space to treaty interpreters and WTO Members. This is also a simple link with the previous outlines of law-and-politics interaction within the WTO system. Not only so, but it is important to note that there is also yet another concomitant trend that emerges from this altered institutional scenario. As many have suggested, deadlocked negotiations and over-legalization have lead WTO Members to seek confirmation and clarification of aspects of trade law not through rule negotiations, but through dispute settlement system.

In this sense, the Brazil–Aircraft dispute has made some of the latent differences between the developed/developing countries' market conditions and market-oriented criteria obvious. Differences in creditworthiness and in the amount to be paid for the loans are related to differences in financial markets, which are well developed in OECD countries and thus enabling OECD ECAs to provide cheaper financial instruments for domestic exports.\textsuperscript{236} In response to this perceived imbalance through the Brazil–Aircraft case, the Brazilian delegation, as well as developing countries, has shown increased sensitivity to this issue.

Brazil submitted its first document in 2002\textsuperscript{237} and complemented it

\textsuperscript{234} Lang, supra note 2, at 344.
\textsuperscript{235} Id.
\textsuperscript{236} Soprano, supra note 225, at 621.
with another paper circulated in 2005.\textsuperscript{238} The proposal was two-pronged. Initially, it stated that items (j) and (k) are "clearly insufficient in . . . and reflect outdated and unbalanced benchmarks."\textsuperscript{239} As it pointed out, "the word advantage involves the concept of comparison–advantage vis-à-vis someone or something."\textsuperscript{240} Following this interpretation, the benchmark should be the export credit terms and conditions of potential competing transactions and must include the country risk and the total subsidy packages available to competing firms.\textsuperscript{241}

Thus, after Brazil–Aircraft, the Brazilian delegation brought the debate to the diplomatic stage of the Doha Round of Negotiations. First, it proposed changes in the area of export credit practices, emphasizing that a cost-to-government approach to export credits represented an inherent disadvantage for developing members whose costs of borrowing are higher due to higher risk.\textsuperscript{242} Consequently, Brazil tried to demonstrate to the Panel that the alleged subsidies payment merely "offset" the higher cost of funding of Brazil in order to give purchasers of domestic exports, export credit terms similar to those available for purchases from Brazilian competitors in the "developed world."

The Draft Rules text proposed by the chairman provided a new first paragraph for item (k). The proposed changes in the area of export credit practices emphasized that a cost-to-government approach to export credits represented an inherent disadvantage for developing members whose costs of borrowing are higher due to higher risk.\textsuperscript{243}

Second, as an attempt to clarify and to re-interpret matters scrutinized during the dispute settlement proceedings, the Brazilian proposal also touched upon matters of procedural fairness and sovereignty given the substance of items (j) and (k) and the relationship of the ASCM (via item (k)) to the Arrangement on Guidelines for Officially Supported Exported Credits (Arrangement), whose participants are all members of the OECD.\textsuperscript{244} With regard to the "evolutionary interpretation method adopted by the DSBs," the proposal stated: [u]nder no circumstances, however, should a small group of WTO Members be allowed to change those rules through decisions taken in another forum. Any renunciation of sovereignty by the Members of the WTO must be explicit and unambiguous, in accordance with customary rules of public international law.\textsuperscript{245}

\begin{footnotesize}
\textsuperscript{238} Negotiating Group on Rules, Treatment of Government Support for Export Credits and Guarantees Under the Agreement on Subsidies and Countervailing Measures, Paper from Brazil, 1, TN/RL/GEN/66 (Oct. 11, 2005).

\textsuperscript{239} Negotiating Group on Rules, Export Credits in the WTO, Paper by Brazil, 1, TN/RL/W/5 (Apr. 26, 2002).

\textsuperscript{240} Brazil–Aircraft Panel Report, supra note 201, paras. 4.80, 7.20.

\textsuperscript{241} Id. paras. 7.20–7.22.

\textsuperscript{242} Soprano, supra note 225, at 624.

\textsuperscript{243} Id.

\textsuperscript{244} Treatment of Government Support for Export Credits and Guarantees Under the Agreement on Subsidies and Countervailing Measures, supra note 238, para. 3.

\textsuperscript{245} Id. para. 9.
\end{footnotesize}
These two important aspects of the ASCM were initially raised in the DSS of the WTO and subsequently transferred to the Rules Negotiations in their capacity to contribute to agenda setting as well as offer detailed legal explanations that are sometimes lacking amongst negotiators.\textsuperscript{246} Thus, proposals of the sort began to arise during the Doha Development Round.

Countries began proposing amendments to current WTO norms in order to modify items (j) and (k) of the Illustrative List of annex I of the ASCM and reduce the imbalances due to the financial and risk conditions of developing countries against developed countries.\textsuperscript{247} According to Hufbauer, the Illustrative List of annex I was originally created as to sharpen the lines between permissible and impermissible practices in the export credit field.\textsuperscript{248} The very manner in which those rules were written, Hufbauer argues in Soprano's paper, creates an unbalanced playing field between developing and developed countries.\textsuperscript{249}

As can already be seen from one of the initial cases in this new ideational shift at the WTO, the difficulties in reaching the final Doha Agreement underline a fundamental difference from previous trade rounds. Fast-growing developing countries have become new key players in the world trading system. The Brazil–Aircraft dispute demonstrates from day one that technical terms in trade are up for re-interpretation and re-definition in this new ideational shift and include a variety of players' characteristic of the twentieth-first century.

B. US–Cotton

From 2003 to 2009, Brazil initiated an era of disputes that greatly impacted on not only the manner in which export subsidies were understood but also how this issue was reflected during the Doha negotiations. In 2002, Brazil—"a major cotton export competitor—expressed its growing concerns about U.S. cotton subsidies."\textsuperscript{250} Brazil initiated a WTO dispute focusing on six specific claims relating to U.S. payment programs to cotton producers.\textsuperscript{251} Brazil argued that the United States had failed to abide by its commitments in the Uruguay Round Agreement on Agriculture (AoA) and the ASCM.\textsuperscript{252} It was also within the Brazilian intention to limit the initial implementation period of export subsidies, "the Peace Clause," in article 13.\textsuperscript{253}

\textsuperscript{246} Id. at 1.  
\textsuperscript{247} Id. para 1.  
\textsuperscript{248} Soprano, supra note 225, at 630.  
\textsuperscript{249} Id.  
\textsuperscript{251} Id.  
\textsuperscript{252} Id. at 2.  
\textsuperscript{253} Id.
Five subsequent Cotton decisions clarified and interpreted the limits of agricultural subsidies through the dispute settlement process of the WTO. It was only in April 2010 that the two countries agreed upon a path to negotiate a settlement, highlighting strengths and weakness of the current DSS at the WTO. The Cotton disputes were important for they constituted the first successful challenge to highly trade distorting prohibited agricultural subsidies under the WTO. Not only so, they also provided a useful example for the matter here in analysis regarding the law-and-politics interaction within the WTO. Regarding the case in question, increased policy space for the WTO’s DSS has demanded institutional answers for it.

In U.S.-Cotton, this analysis will proceed to examine the effects of the Panel’s and AB’s delegation of authority to expert bodies as well as its engagement in procedural review of a matter of great relevance to the new powers and members within the WTO. Through these lenses and in a very specific analysis, U.S.-Cotton will serve to demonstrate some of the fallacies and uncertainties created by this institutional choice undertaken by the WTO’s “quasi-judicial” system. Instead of dueling on the merits of the dispute, this section will restrain itself to exemplifying how this successive tendency of “proceduralism” and delegation of authority to scientific methods has not benefited the trading system with certainty or predictability.

The U.S.-Cotton dispute involved many horizontally related regulations such as the Agreement on Agriculture (AoA), and the FSC Repeal and Extraterritorial Income Act of 2001 (ETI), as well as a series of evidentiary items in the SCM Agreement such as serious prejudice determinations, local content determinations, arbitration determinations, and the expiration of the “peace clause.” What is relevant for the current analysis, however, are the U.S. export credit guarantee programs as they directly relate to the above-mentioned dispute and affect the manner in which these matters were addressed by the DSBs and the consequent effects in rule negotiations.

1. Procedural Review

U.S. export credit programs constituted export subsidies under both articles 8 and 10.1 of the Agreement of Agriculture and under the meaning of item (j) of the Illustrative List of Exports Subsidies under articles 3.1 (a) and 3.2 of the ASCM. In agreeing with the Panel, the AB was


256. Andersen & Taylor, supra note 254, at 2, 4-5.

satisfied that the two-fold link between these provisions had been fulfilled, given that the ASCM was applicable to agricultural subsidies in the lack of a specific provision on the AoA dealing with the same matter.\textsuperscript{258} Also, the AB reminded that the AoA should prevail over the ASCM "only to the extent that the former contains an exception."\textsuperscript{259} Thus, in finding the applicability of the ASCM and the one in favor of Brazil under this Agreement, the Panel determined that:

programs are provided by the U.S. at premium rates which are inadequate to cover long term operating costs and losses within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement, and therefore constituted per se export subsidies prohibited by Articles 3.1 (a) and 3.2 of the SCM Agreement.\textsuperscript{260}

Brazil's initial claim focused on a rather wide variety of U.S. subsidies supporting the production and the export of cotton that caused "serious prejudice" in the form of "significant price suppression," according to article 6.3 (c).\textsuperscript{261} In analyzing U.S. subsidies' procedural way of implementing this subsidy scheme, the Panel found that three of the price-contingent subsidies—the marketing loan, the counter-cyclical payments, and the domestic Step 2 subsidies—had collectively caused significant price suppression in the world market and were, therefore, in breach of the ASCM.\textsuperscript{262} The effect of the decision required the United States to eliminate or otherwise make significant changes to the marketing loan and counter-cyclical program legislation.\textsuperscript{263} This process-based review of the U.S. subsidy scheme led to the eventual elimination of the U.S. Step 2 regulation program in 2006 but also avoided diving into the discussion of what constituted a "serious prejudice determination" under those terms.\textsuperscript{264}

This lack of evaluation in the Panel's decision soon was transferred to the AB on appeal. As were its claims, the AB criticized the Compliance Panel for not examining in detail the parameters of the competing economic models presented by Brazil and the United States and for not going far enough in its comparative analysis of these models.\textsuperscript{265} It also clarified that the effect of subsidies need not be the only cause of price

\begin{itemize}
\item \textsuperscript{258} Id. para. 532 n.771. The Panel formulated examples but noted it was possible to determine on a case-by-case basis. Panel Report, \textit{U.S. Subsidies on Upland Cotton}, paras. 7.1038–7.1039, WT/DS267/R (Sept. 8, 2004).
\item \textsuperscript{259} U.S.–Cotton AB Report, supra 257, para. 530.
\item \textsuperscript{260} Gehring, supra note 136, at 110.
\item \textsuperscript{261} Appellate Body Report, U.S.–Subsidies on Upland Cotton Recourse to Article 21.5 of the DSU by Brazil, para. 4, WT/DS267/AB/RW (June 2, 2008) [hereinafter ABR Cotton 21.5].
\item \textsuperscript{262} Id.
\item \textsuperscript{263} Id. paras. 248, 447.
\item \textsuperscript{264} Id. paras. 8–10.
\item \textsuperscript{265} U.S.–Cotton AB Report, supra note 257, para. 458. The original AB had also criticized the original panel for failing to provide a "more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute." Id.
\end{itemize}
This is a pragmatic acknowledgement that there are other factors impacting the movement of prices and that a significant price suppression claim may be maintained even if there are other factors influencing world prices.

Thus, yet another subjective concept was central to the dispute and invoked aspects of legal and economic judgments to secure its full understanding. As Shaffer and Trachtman explained, a delegation to experts regarding factual analysis emerged as a new tendency under the DSB’s policy space. In this sense, where the ASCM called for the analysis of whether the U.S. subsidy “cause” was to be interpreted as “significant price suppression,” the Panel relied on both economic and legal analysis. Therefore, just as hard sciences provide tools to determine the scientific basis for sanitary measures, economics does the same to analyze price suppressions and the market effect of subsidies.

The AB endorsed the use of economic modelling and other quantitative techniques to “provide a framework to analyse the relationship between subsidies, other factors, and price movements.” The AB’s decision criticized the Compliance Panel for not examining in detail the parameters of the competing economic models presented by Brazil and the United States and for not going far enough in its comparative analysis of these models. Finally, the AB clarified that the effect of subsidies need not be the only cause of price suppression.

This was an important turn of the game, with the acceptance of the arbitrator’s calculations of what effectively “trade damages” were. The arbitrator found the appropriate amount of concessions for Brazil was limited on the impact on Brazil of the price suppression in the world market resulting from the granting of a marketing loan and counter-cyclical payments. This entailed a continued retaliation for Brazil until all counter-cyclical subsidies are eliminated and all of their worldwide effects removed. This acceptance of the arbitrator was also an acceptance of economic models as useful evidentiary tools in conducting a necessary analysis of subsidy effects. The endorsement of such models represents a fairly unique use of this economic tool by the WTO decision-makers and foreshadows the import advisory role of the WTO Economics Division as reviewers of the models in future cases.

266. AB Report Cotton 21.5, supra note 251, para. 374.
267. Shaffer & Trachtman, supra note 170, at 135-40.
268. Id. at 138.
271. Id. para. 374.
272. Decision by the Arbitrator, United States—Subsidies on Upland Cotton: Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement, 6.1-.5, para. 4.92, WT/DS267/ARB/2 (Aug. 31, 2009) [hereinafter Arbitrator’s Report, Cotton 7.10].
274. Id. at 4–5.
275. Id. at 5.
The *U.S.–Cotton* proceedings demonstrate how document-intensive and expert-intensive a task it is to quantify the effects of subsidies and otherwise establish the causal link to serious prejudice in agricultural commodity markets. In addition, the permitted arbitrator report provided precedents on several novel legal issues that are relevant to future challenges to agricultural subsidies. As Schaffer and Trachtmann have framed it, while such congruence may provide greater precision in the application of these concepts and improve economic welfare, the use of experts also could be viewed as enhancing overall political welfare if the economic concepts are consistently applied without favoring some members over others.\textsuperscript{276} The authors proceed to argue that the downside of a DSS delegation to experts also relates to the fact that expertise is no guarantee against bias or ideology, and affected stakeholders will be concerned, in particular, if questions raising value judgments (such as economic development policy) are being delegated to unaccountable economic experts who help to justify in technocratic terms judicial decisions with political implications.\textsuperscript{277}

The process-review and the delegation to specialist, once more, seem to reach dubious results. It is not a matter of the results being consistently biased towards a specific ideological or economic perspective. Rather, it is a matter of a DSS that is able to provide consistency in its methods of dispute resolution. It is important, therefore, to acknowledge the limits of expertise in solving "real life cases" in markets that are defined through contrasting characteristics. Whilst panels may use experts to justify their decisions from a technical and scientific perspective, their findings are not sufficient to justify an institutional choice towards deference, judicial balance or even process-review, thus contributing to the legitimacy challenges at stake in the WTO.

2. **Influence on Negotiations**

The wake of the *U.S.–Cotton* dispute greatly impacted negotiations regarding agricultural subsidies during the Doha Round.\textsuperscript{278} Not only so, but the two avenues were mutually reinforcing in the case of *U.S.–Cotton*. Throughout the almost complete decade of *U.S.–Cotton* negotiations, and with the growing perception that the U.S. cotton subsidies would be ruled inconsistent with the ASCM and AoA, the United States began re-thinking their negotiation position on the demands by the “Cotton 4” group.\textsuperscript{279} Cotton producing countries in West Africa, Benin, Burkina Faso, Chad and Mali had been trying to get the United States to reduce their cotton subsidies for almost a decade.\textsuperscript{280} With the outcome of *U.S.–Cotton*, a United States change in negotiating position seemed in-

\textsuperscript{276} Shaffer & Trachtman, supra note 170, at 140.
\textsuperscript{277} Id.
\textsuperscript{278} Gehring, supra note 136, at 111–14.
\textsuperscript{279} See generally id.
\textsuperscript{280} Id. at 111.
evitable. This can be seen through the analysis of the easy United States’ negotiating position in Cancun and the previous one in the 2004 July Framework.

This influence was not merely one-sided. In lending moral support to the Brazilian case, the African initiative showed that it was not only Brazil that was adversely affected by the U.S. subsidies. Many Least Developing Countries were also in play. Concomitantly, Benin, Burkina Faso and Mali submitted a proposal to the WTO to eliminate export subsidies on cotton over three years, including a transnational compensation mechanism put forward at the Fifth Conference in Cancun, Mexico. It is interesting to note how, after the U.S.–Cotton dispute, the group of G-20 enjoyed a position of prominence in cotton negotiations undermining the ability of the former Quad (United States, EU, Japan and Canada) to dominate negotiations. In addition, with the advent of the Hong Kong Ministerial Declaration, cotton negotiations were put back on the agenda influenced by their recent attention in the international scenario. As Gehring points out, this is interesting to the extent that, since the beginning of agricultural negotiations, cotton only appeared as a separate negotiating item after the conclusion of the dispute at hand.

Dominic Coppens’ analysis is particularly helpful in understanding the important interplay in subsidies’ matters between dispute settlement and negotiations. Negotiators seemed surprised by an increasingly flexible jurisprudence instead of more rigid ones on export credit support for agricultural products at the Doha Round. Although the interaction between these two branches of the WTO is especially visible in this case, it is nevertheless important to pay special attention to the way in which these rules were articulated and what their effects might be. The different treatment of WTO Members depending on whether they have scheduled products as well as the limited flexibility in terms of self-financing periods may still be a disadvantage to developing countries. Thus, whilst this approach does seem to provide more policy space allowing members to recur to private market export credits, it is well known that private trade financing instruments can quickly run dry in times of financial crisis. Insofar as the reading of agricultural export credits follows the increasingly more stringent provisions elaborated by members, these policy changes have generally been welcomed. It is imperative to note, however, that this objective “is only legitimate insofar as S&D treatment is

281. Id. at 111–12.
282. Id. at 112.
283. Id.
284. Id. at 112–13.
286. Id. at 349.
not put upside down and rules are articulated coherently.”

“An analysis of future potential claims after the Cotton cases is appropriate, especially given the fact that such domestic subsidy regimes remain and international condemnation of the negative impacts on the trade and development of many developing country agricultural producers continues.”

C. Australia–Leather

The Australia–Leather dispute, initiated in 1999 also had a long story of permanence at the WTO. It “has been credited with legalizing the relationship between the WTO and its members,” pointing to revealing processes about the organization’s direction. If not for the successive Panel and AB Reports, this dispute would be valid for its impacts in rule negotiations during the Doha Round. The dispute concerned assistance provided by the government of Australia to Howe, a wholly-owned subsidiary of Australian Leather Holdings (ALH). “Howe [was] the only dedicated producer and exporter of automotive leather in Australia.”

In 1997, the Australian Government agreed on a loan and a grant package to ALH and Howe due mid-2000, with facilitated payment conditions and below market interest rates. This happened through various government programs, including the Import Credit Scheme and Export Facilitation Scheme. These schemes gained increased attention as American competitors began losing market share to the Australian company. Initially, through a mutually agreeable settlement, parties to the dispute agreed that Howe should “repay A$18 million to the Australian Government” and that the government, in turn, should “immediately exclude automotive leather from the export schemes and to phase out the entire programme by 2000.”

Soon after such settlement, suspicions arose as to whether further compensation being paid to Howe from the Australian Government constituted a form of restructured subsidy. In light of this, the United States requested fresh consultations in May 1998. The complaint rested on the fact that the Australian grant and loan subsidies remained export-contingent and in breach of the ASCM in article 3.1(a). The Panel found that Australia was in breach of its SCM obligation only insofar as they re-

289. Id.
290. Andersen & Taylor, supra note 254, at 5.
293. Id. paras. 2.2–2.4.
294. Id. para. 3.1.
ferred to the grant given to the Howe Company. That being the case, the Panel requested Australia withdraw the subsidy without delay as required under SCM article 4.7.\textsuperscript{296} Even so, “the government granted Howe a further loan in the amount of $13,065 million on the day that repayment of the grant was due to be paid.”\textsuperscript{297} Finally, in article 21.5 of the Compliance Panel, it was found that Australia had failed to sufficiently withdraw the subsidy in its entirety. Australia was thus required to withdraw all of the subsidies conceded to Howe. This was the first time in WTO jurisprudence that a “retroactive repayment of subsidies had ever been required under the [DSS].”\textsuperscript{298} Howe returned the payments to the Australian Government over twelve years and the removal of automotive leather was no longer eligible for support under government assistance schemes.

1. Procedural Review

Under the new trend of the last ideational shift of the WTO, the new trend triggered by the last ideological shift is an interesting dispute to analyze. It exemplifies some of the insecurities that may arise from institutional choices made by Panels and ABs. Even after the full settlement of the Australia-Leather dispute, uncertainty remains as to its lasting effects. This is because the Panel underwent a “mixed” procedure leading to “mixed results.”\textsuperscript{299} In defining what constituted a prohibited subsidy, the Panel formulated a two-step procedural review of countries’ domestic processes to determine whether their measures were contingent upon export performance. Initially, the Panel established that there must be a “close connection” between the grant/subsidy and export performance; and subsequently, the grant/subsidy must be “conditioned” on export.\textsuperscript{300}

To add to the confusion in these requirements, “the Panel failed to clearly explain what it meant by the term ‘conditional’ and did not specify whether, under Article 3.1(a), an export must be a necessary condition for receiving the subsidy or whether it must be a sufficient condition for receiving the subsidy.”\textsuperscript{301} Moreover, the difference between loans and grants provided by the Australian Government seemed to provide little guidance to differentiate between both requirements.\textsuperscript{302} The dispute also initiated a long and winding discussion about remedies available to controversies over subsidy disputes. Given that article 4.7 does not envision

\begin{itemize}
\item \textsuperscript{296} Australia-Leather, supra note 292, para. 10.7; Panel Report, \textit{Australia – Subsidies Provided to Producers and Exporters of Automotive Leather Recourse to Article 21.5 of the DSU by the United States}, WT/DS126/RW (Jan. 21, 2000) [hereinafter Australia-Leather 21.5 Panel Report].
\item \textsuperscript{297} Mercurio, supra note 295, at 30.
\item \textsuperscript{298} Id. at 60.
\item \textsuperscript{300} Australia-Leather 21.5 Panel Report, supra note 296, paras. 9.55–9.57.
\item \textsuperscript{301} Mercurio, supra note 295, at 61.
\item \textsuperscript{302} Id.
\end{itemize}
repayment of subsidies, the subsidy could be ended at any time without fully restoring the *status quo ante* and depriving the recipient of the prohibited subsidies in the first place.\(^\text{303}\)

Due to this issue, yet another legally interesting answer was crafted. "Article 21.5 Panel creatively sidestepped this dilemma by requiring, as a condition of compliance," a retroactive subsidy repayment from Howe.\(^\text{304}\)

There are many issues associated with this Panel demand. First, it was a very direct and controversial interference in a country's domestic policies. Paradoxically, it has also served as a reminder of the strength of the WTO DSS.\(^\text{305}\) In such a scenario, *Australia-Leather* created a fearful atmosphere given the strength of a "quasi-judicial" system to enforce such invasive and, to a certain extent, unpredictable rules. Whilst intruding on domestic sovereignty, this Panel recommendation directly affects members' internal legal systems and procedures.

2. Influence on Negotiations

The decision of the Panel in *Australia-Leather* provoked emotional responses by WTO Members and concurrent Trade Rules Negotiations. For one thing, it was seen as an irresponsible misinterpretation of WTO law, which could lead to a watershed of retrospective payments that were not in line with the purpose of the WTO. Second, the Panel's legal reasoning and systemic implications were found to be largely unsustainable due to its implications for the countries involved.\(^\text{306}\) As Australia commented at the time, the Panel's finding was so at odds with democratic governance and economic reality that Australia could, in a theoretical sense, find itself in an eternal stage of non-implementation.\(^\text{307}\) As can be seen in the minutes of the DSB meeting, this was a common concern amongst most countries in analyzing this specific dispute, finding this dispute as an "aberration" not to be followed.\(^\text{308}\)

Regardless, it is crucial to clearly understand the consequences attached to the Panel's procedural manner of deciding on the case. Its approach raised several concerns regarding the creation of further lack of predictability and certainty to the trading system. Unsatisfactory review and interference with members' domestic regulations also contributed to that overall sentiment. At this point, the Panel's institutional choice seemed to add substantive confusion to the role to be played by Doha negotiators on the matter.

\(^{303}\) *Australia-Leather* 21.5 Panel Report, *supra* note 296, para. 6.49.
\(^{305}\) *Id.*
\(^{306}\) Dispute Settlement Body, *Minutes of Meeting*, 5–7, WT/DSB/M/75 (Feb. 11, 2000).
\(^{307}\) *Id.* at 6.
The Panel’s decision added complexity to negotiations in two main aspects. First, it cast more doubts on the legal standard for determining whether a measure is contingent upon export performance. Second, there was uncertain treatment of remedies available in disputes over subsidy payments. At this point in time, it was clear that the finding that the withdrawal of a subsidy under article 4.7 of the SCM Agreement, which required retrospective repayment of past subsidies, challenged the notion that the WTO had a role of redressing past injury. Renato Ruggiero, the then-Director-General of the WTO, recognized that DSB operations have been the subject of “skepticism” and formed “test(s) of credibility.” In this context, Rules Negotiations seemed to have a tough task ahead in redressing the Panel’s decision.

There is strong evidence to prove the agenda setting power that this powerful dispute had on Doha Round Rules Negotiations. Whereas in the cases above, the Panel and AB reports have been brought over to Rules Negotiations with different purposes, in the case of Australia-Leather, Australia fiercely worked on a rules proposal to deny the findings of the Panel and to avoid new dispute resolutions in this direction. Australia continuously acted in the Group of Rules Negotiation to clarify and to deny the Panel’s understanding in Australia-Leather. As it stands, Australia has now worked in proposals in this sense for almost five years. During this period and as a pushing force for change, Australia has been elaborating and re-elaborating proposals on addressing the meaning and scope of what constitutes “withdrawal” of the subsidy as provided under article 4.7 of the WTO Agreement on SCM. Australia’s attempts have been, in a sense, to clarify the text of SCM article 4 by setting out the parameters of what is required in order to “withdraw,” grant or maintain a subsidy. Australia has constantly intended to convey that, depending on the facts and circumstances, the remedy of “withdrawal” may need to address the ongoing benefit of a subsidy.

V. CONCLUDING REMARKS

In a joking comment, dated from 2006, Pascal Lamy, WTO Director General, stated that the negotiations were “merely on a coffee break.” This paper has argued that a lot has happened during this “coffee break.” This article attempted to illustrate a novel cyclical logic in which WTO’s political and adjudicative groups have come to operate in during this pro-
longed coffee break. It has attempted to demonstrate how the legal turn towards "proceduralism" can be understood as an institutional response to the difficulties faced in the latest multipolar round of trade negotiations. This particular understanding of law has both contributed to and been created in the context of this judicialization shift and stagnation of negotiations. Thus, this process-based legal method feeds back into the current cyclical dynamics of the workings of the WTO. By providing negotiators with over technicalized and abstract legal methods upon which to base their negotiations, it has created yet another challenge to the conclusion of trade negotiations. Indeed, a very long "coffee break" that needs to be further addressed by literature.

In conclusion, this thesis offers three cutting-edge insights into the legalization trend and "judicial shift" currently taking place at the WTO. First, it understands that this "judicialization shift" need not be a negative thing. In a quest for more political space and means to comprehend the substantive choices of the trading regime, this institutional change may indeed provide paths towards renovated social purposes of the organization. Arguably, this paper understands that this new political space might even be an option for approximating abstract trade rules to their substantive effects. What is needed, however, is that the role of law and the turn to "proceduralism" be thoroughly investigated. As Kennedy acutely puts it, proceduralization of International Relations may be seen as a positive development if not understood as an inevitable consequence of market preferences, private institutions, and initiatives.313 It is also for this reason that trade professionals should be aware of current importance of the DSS in international governance.

Second, despite recognizing that DSS activities are organically linked to members' strategies in the Rules Negotiations Group and that this relationship may facilitate advances in politically salient, sensitive and controversial policy areas;314 this paper considers this alternative path to be unsustainable to the maintenance and legitimacy of the trading system. What is needed, therefore, is that such institutional choices look beneath the blanket insistence on technical transparency and on the unrealistic sanitary way in which they appear to deal with disputes.315 In this sense, the choice for "proceduralism" and institutional oriented methods of law are in and of themselves political choices undertaken by the WTO and its DSS. As suggested in Part III, the adherence to legal process values is by no means an "apolitical choice." Instead, it is an anticipated social and political choice insofar as such legal methodology leads to specific applications and outcomes. Hence, the focus on the legal processes undertaken by the DSS is the second contribution of this thesis to the relevant literature. In this account, it has argued that the processes and workings

315. Kennedy, supra note 313, at 121.
of trade professionals are the mainspring of substantive consensus in trade matters. This focus on processes is intended to verify how a new ideational shift is being formed within the organization and what its concrete and systemic effects are.

Third, this thesis has suggested that the robust body of panel reports to guide DSS decision-making is currently floating on a political vacuum. By itself, legalization is not a distributive economic or developmental strategy. It is simply a manifestation of "global law and governance without global politics." In this sense, the legal regime simply offers an arena to contest economic and social choices; it is not a substitute for them. The case analyses have attempted to show the emptiness and the lack of foreseeability brought by the approaches taken by the DSS in the crucial area of subsidy law. Whilst it is true that economic systems do not exist without legal instruments, legalization cannot be used as a "flight from economic analysis and political choice." In this sense, this thesis claims that these decisions are part of constraining processes that contribute to rule making at the WTO legislative bodies.

Processes are a significant part of international governance and should call for more choices between finance and production, capital and labor, and consumers and producers. For that, it is necessary to understand this turn as an opportunity to justify its methods and have them linked with their substantive and systemic outcomes. Procedural interpretation of WTO law, as here presented, has not only failed to provide a consistent response to the worries of members and their respective societies, but has also cast a shadow on the original intent of ambiguous and gap-filled treaty language. It is no news that this characteristic was inherent to GATT 1947 and that it was workable in the diplomatic settings of those circumstances. Decades of legalization and technicalization have changed the purpose and the consequences of constructive ambiguities in treaty language. With legalization, these well-known characteristics of treaties have been transformed into a dueling arena of technical expertise and not of open political negotiation.

316. Kennedy, supra note 313, at 123.
318. Id. at 153.