A Fine Balance? Delegation, Standards of Review, and Subsidiarity in WTO Dispute Settlement

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I INTRODUCTION

The need for global governance in the absence of global government is a fundamental reason for sovereign states to delegate authority to supranational regulatory institutions. However, the aphorisms that "[a]ll politics is local" and "all economics is international"[1] highlight a perennial tension in multilateral trade governance under the auspices of the World Trade Organization ("WTO"). An effective mediating principle that balances domestic regulatory preferences with trade liberalization imperatives would increase the legitimacy of the WTO and its accountability to Member States. The central thesis of this article is that the introduction of a subsidiarity standard of review principle would have these legitimacy and accountability effects. It would recognize the need for deference in some situations to Member State interpretations of WTO law, within a larger paradigm of co-operation. Although it has been discussed at a theoretical level in the WTO context, there has been remarkably little consideration of subsidiarity in relation to WTO dispute settlement and standards of review.

Part II characterizes the relationship between Member States and the WTO Appellate Body as one of supranational delegation. Delegation of adjudicative authority to a juridified WTO dispute settlement mechanism has resulted in a democratic deficit for Member State principals. This contrasts with the compromise of embedded liberalism that reflected multilateral trade liberalization under the General Agreement on Tariffs and Trade 1947 (the "GATT"). Standards of review in WTO dispute settlement are considered as ex ante control mechanisms to minimize the risk of "agency slack" in Part III. The current de novo "objective assessment" standard of review for panels and the Appellate Body's correctness rather than deferential review of Member States' interpretations of WTO law in domestic administrative law parlance fail to mediate effectively between

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1 Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (2006) 268 ["*Sovereignty*"].

the jurisdictional competences delegated to dispute settlement agents and those retained by Member State principals. While acknowledging the pitfalls of doctrinal transplantation, Part IV analyses the judicial approach to agency interpretation of statutes in the United States, and the principle of subsidiarity in the European Union. Subsidiarity is advocated as a normatively desirable mediating principle in WTO dispute settlement, preferable to a presumptive correctness or deference standard. Part V draws on principal-agent theory to illuminate the relationship between democratically legitimate hierarchical supervision and the degree of deference ceded. This is examined by reference to the relationship between federal courts and regulatory agencies in the United States, the delegation of authority to European Union institutions, and the relationship between Member States and WTO dispute settlement. A subsidiarity standard of review principle is advocated for use in WTO dispute settlement, "bridging the gap" by increasing accountability to Member States and "stooping to conquer" by helping make the WTO a more democratically legitimate international organization.

II DELEGATION, AGENCY, AND WTO DISPUTE SETTLEMENT

This section argues that WTO panels and the Appellate Body can be characterized as supranational adjudicative agents, exercising delegated authority on behalf of their controlling Member State principals. In analysing the relationship between sovereign states and international organizations, the principal-agent optic provides a "generalizable and testable theoretical framework".[2] This principal-agent framework can be structured in four steps: first, the rationale for delegation; secondly, the institutional design of control mechanisms; thirdly, the consequences of delegation; and fourthly, the dynamics of subsequent delegation and institutional design to enhance principal control.[3]

Principal-Agent Theory

Principal-agent theory originated in transaction-cost economics but has expanded to encompass a variety of institutional relationships in national politics and international relations.[4] The theory has been fleshed out by rational choice analysis of the relationship between the United States

2 Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU* (2003) 17 ["*Engines of European Integration*"].

3 Tallberg, "Delegation to Supranational Institutions: Why, How, and with What Consequences?" in Thatcher and Sweet (eds), *The Politics of Delegation* (2003) 24.

4 For a seminal treatment, see Ross, "The Economic Theory of Agency: The Principal's Problem" (1973) 63(2) Am Econ Rev 134.

Congress and regulatory agencies,[5] and explanations of delegation by Member States to European Union institutions.[6] There is also a growing body of scholarship applying principal-agent theory to the relationship between states and international organizations such as the WTO.[7]

Central to principal-agent theory is the concept of delegation, the "conditional grant of authority from a principal to an agent" that empowers the latter to act for the benefit of the former.[8] A principal delegates functions to an agent in the expectation that the agent will act in ways that produce outcomes desired by the principal. In delegating authority to an agent, the principal commonly encounters two types of problems, labelled as agency losses and agency costs. The key objective for the principal is to establish optimal incentive structures that lead the agent to maximize the principal's interests, minimizing both agency losses and costs.[9]

Agency losses refer to the extent to which an agent generates outcomes that are different from the policies preferred by those who have delegated the power,[10] and are an inevitable by-product of delegation.[11] This opportunistic action by an agent is identified in the literature as "agency slack". There are two categories of slack: slippage, where the constraints or incentives provided by the principal induce the agent to behave in different ways from those preferred by the principal; and shirking, where an agent pursues preferences of its own rather than, or to the detriment of, the principal's preferences.[12]

Principals incur agency costs in overcoming agency loss and slack, creating institutional control mechanisms that realign the agent's preferences with that of the principal.[13] The control mechanisms attempt to reduce information asymmetries and to modify the divergent incentives that exist as a corollary of agent specialization. As agents accumulate technocratic expertise in their policy area and become "specialised purveyors" vis-à-vis

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5 See Pollack, "Learning from the Americanists (Again): Theory and Method in the Study of Delegation" in Thatcher and Sweet (eds), *The Politics of Delegation* (2003) 200–219.

6 See generally Majone, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance" (2001) 2(1) European Union Politics 103.

7 The most comprehensive text is Hawkins et al (eds), *Delegation and Agency in International Organizations* (2006).

8 Hawkins et al, "Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory" in Hawkins et al (eds), *Delegation and Agency in International Organizations* (2006) 7.

9 Pratt and Zeckhauser, "Principals and Agents: An Overview" in Pratt and Zeckhauser (eds), *Principals and Agents: The Structure of Business* (1985) 3.

10 Epstein and O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (1999) 25.

11 Kiewiet and McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (1991) 5.

12 See generally Pratt and Zeckhauser, supra note 9.

13 See Huber and Shipan, "The Costs of Control: Legislators, Agencies and Transaction Costs" (2000) 25 Legis Stud Q 25.

their principals,[14] there is a tendency towards reversal of control between principal and agent.[15]

The function of the agent will determine the design of control mechanisms used to delineate both the scope of agency activity and procedures to implement.[16] Specificity in the formulation of the original delegation contract constitutes a strategic initial constraint on the agent's margin of manoeuvre.[17] Notwithstanding the advantages of specificity for the principal, the conversion of discretion to rules potentially reduces the benefits of the delegation.[18] Other common mechanisms employed to control agency behaviour include monitoring and reporting requirements, screening and selection procedures, institutional checks and balances within the agency, and sanctions for deviation from the principal's preferences.[19]

Agency autonomy describes the residual range of discretionary actions open to an agent, taking into account any control mechanisms implemented.[20] The extent of the autonomy determines an agent's ability to pursue independent policy preferences. Autonomy is significantly reduced if the delegation of authority is expressed contingently, requiring the agent to seek prior approval from the principal in carrying out actions.

Like fiduciaries, agents are most effectively controlled when the interests of principals are clearly ascertainable and point in a single direction. However, delegation to international organizations involves an agent "serv[ing] many masters".[21] The existence of multiple principals, with preference heterogeneity, increases agency autonomy and the scope for agency slack.[22] Preference heterogeneity helps the agent avoid ex post sanctions: if the agency slack advantages any of the multiple principals, that principal is likely to block the application of sanctions. The ability of an agent to advance their independent preferences in this way critically depends on the voting rules governing the principals. An agent's scope for slack is greatest where there are unanimity decision-making requirements and least where sanctions can be adopted by a majority or minority of principals.[23]

The consequences of delegation realign the scope of future control

14 Karl Llewellyn, cited in White, "Agency as Control" in Pratt and Zeckhauser (eds), *Principals and Agents: The Structure of Business* (1985) 188.

15 Ibid 208.

16 Tallberg, "The Anatomy of Autonomy: An Institutional Account of Variation in Supranational Influence" (2000) 38 J Common Mkt Stud 843, 846.

17 Coglianese and Nicolaidis, "Securing Subsidiarity: The Institutional Design of Federalism in the United States and Europe" in Nicolaidis and Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001) 284.

18 Cooter, *The Strategic Constitution* (2000) 94.

19 Hawkins et al, supra note 8, 26–31.

20 Hawkins and Jacoby, "How Agents Matter" in Hawkins et al (eds), *Delegation and Agency in International Organizations* (2006) 200.

21 Pratt and Zeckhauser, supra note 9, 1.

22 See generally McCubbins, Noll and Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies" (1989) 75 Va L Rev 431.

23 Cortell and Peterson, "Dutiful Agents, Rogue Actors or Both? Staffing, Voting Rules, and Slack in the WHO and WTO" in Hawkins et al (eds), *Delegation and Agency in International Organizations* (2006) 255–257.

mechanisms in a dynamic feedback-loop, described by Tallberg as a "strategic adaptation to unintended consequences".[24] The initial delegation of authority is generally amenable to renegotiation, subject to voting rules in the context of multiple principals, folding the ramifications of unanticipated consequences into the organizational design.[25]

With some exceptions,[26] international relations scholarship has focused on how international organizations influence states, rather than examining the ways in which states as multiple principals might transcend their preference heterogeneity and circumscribe the autonomy of international organization agents. Principal-agent theory is capable of explaining variations in international organization autonomy, navigating between conclusive assertion or denial of those organizations' ability to follow independent preferences:[27]

> [F]or some observers, [international organizations] appear to be institutional Frankensteins terrorizing the global countryside. Created by their masters, they have slipped their restraints and now run amok.... But for others, [international organizations] seem to obey their masters all too well. Like the man behind the curtain in the *Wizard of Oz*, powerful Western countries use [international organizations] to impose their will on the world while hiding behind the façade of legitimizing multilateral processes.

In the vocabulary of principal-agent theory, states delegate authority to international organizations to help overcome the co-ordination problems that they would encounter by acting independently.[28] The decision to delegate is primarily motivated by an anticipated reduction in future transaction costs. State principals often delegate authority in order to reap the benefits of agency expertise and to enhance the credibility of policy commitments. This is especially so where such policies generate diffuse benefits and concentrated costs in their constituencies.[29] Delegation also enables states to evade electoral censure for unpopular decisions and the "siren-like" calls of pressure groups.[30] Another major rationale for delegation to a supranational agent is to resolve disputes between multiple state principals. When negotiating international agreements, state officials choose between treaty specification and empowering a dispute settlement agent to "complete the contract". Factors to consider include the costs of

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24 Tallberg, supra note 3, 37.

25 Williamson, "Transaction Cost Economics and Organization Theory" in Williamson (ed), *Organization Theory: From Chester Barnard to the Present and Beyond* (1995) 216.

26 See Barnett and Finnemore, "The Politics, Power, and Pathologies of International Organizations" (1999) 53 Int'l Org 699.

27 Hawkins et al, supra note 8, 4.

28 See Abbott and Snidal, "Why States Act Through Formal International Organizations" (1998) 42(1) J Conflict Resol 3.

29 Thatcher and Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions" in Thatcher and Sweet (eds), *The Politics of Delegation* (2003) 4.

30 Roessler, "The Scope, Limits and Function of the GATT Legal System" (1985) 8 World Econ 287, 298.

advance specification, the unpredictability of future conditions, and the value of diversity of compliance techniques.[31]

GATT and Embedded Liberalism

The General Agreement on Tariffs and Trade 1947 was a provisional treaty intended to be administered by an International Trade Organization ("ITO").[32] The ITO, along with the International Monetary Fund and World Bank, were conceived at the Bretton Woods Conference to facilitate economic reconstruction in the aftermath of World War II. The ITO's proposed mandate was to oversee the administration of a multilateral world trade regime that encouraged liberalization and prevented the unilateralism that had plagued the inter-war period, epitomized by the 1930 Smoot-Hawley tariff escalation in the United States.[33] Although the United States Congress refused to ratify the ITO Charter, multilateral trade negotiations were conducted under GATT until the creation of the WTO at the end of the Uruguay Round of negotiations in 1995.

Unlike the ITO Charter, GATT made little provision for adjudicative dispute resolution, favouring diplomatic conciliation to encourage settlement.[34] Under Article XXII of GATT, the chief mechanism for dealing with disagreement between the Contracting Parties, or signatory states, was consultation. Where this was unsuccessful, Article XXIII created a mechanism to correct alleged nullification and impairment of benefits conferred under GATT. Working parties, comprised of representatives from GATT Contracting Parties (including the disputants), were established to investigate disputes and formulate recommendations. After 1952, disputes were referred to ad hoc expert panels, evidencing a shift to a more objective form of dispute resolution. Panel recommendations were subject to the requirement that all disputes had to be settled by consensus of the GATT Council, consisting of representatives from all Contracting Parties. This requirement for consensus effectively gave the offending state a blocking veto, impeding implementation of GATT reports and compelling recourse to more informal modes of conciliation.[35]

The phrase "embedded liberalism" evokes the compromise between political authority and the market in the GATT international economic order. This accords well with a conception of the state as principal in a relationship of supranational delegation.[36] In his well-known discussion of

31 Trachtman, "The Domain of WTO Dispute Resolution" (1999) 40(2) Harv Int'l LJ 333, 344–350. See also Hadfield, "Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law" (1994) 82 CLR 541.

32 See generally Hudec, *The GATT Legal System and World Trade Diplomacy* (2 ed, 1990).

33 See Bhagwati, *Protectionism* (1988) 20–23.

34 See Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" (2001) 35(2) JWTL 191.

35 Bhala, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade* (2005) 1159–1161.

36 See Steffek, *Embedded Liberalism and Its Critics: Justifying Global Governance in the American Century* (2006).

embedded liberalism, political economist John Ruggie sought to uncover the "generative grammar" of the post-war economic institutions, meaning the "underlying principles of order and meaning that shape the manner of their formation and transformation".[37] His argument was premised on the notion that international regimes represent a "concrete manifestation of the internationalisation of political authority".[38]

Ruggie distinguished the structure of political authority in GATT from earlier examples of liberalism, primarily the nineteenth century laissez-faire British economy.[39] In *The Great Transformation* (1944), Karl Polanyi contended that "*[l]aissez-faire* was planned" in nineteenth century Britain,[40] meaning that the ostensibly unregulated market economy was, in fact, sustained by recurrent political intervention. Polanyi described a "double movement" in the shift to a laissez-faire economy, where the attempt to disembed the economy from society and liberalize the market was countered by increased protectionism and state regulation.[41]

Unlike the failed "utopian endeavour" to create a self-regulating market in nineteenth century Britain,[42] Polanyi predicted that the post-war order would promote economic liberalization but reflect the understanding that "international automaticity stands in fundamental and potentially explosive contradiction to an active state domestically".[43] In identifying the "generative grammar" of post-war economic governance as embedded liberalism, Ruggie similarly recognized the new balance that had been struck between market and political authority:[44]

> The task of postwar institutional reconstruction ... was to ... devise a framework which would safeguard and even aid the quest for domestic stability without, at the same time, triggering the mutually destructive external consequences that had plagued the interwar period. This was the essence of the embedded liberalism compromise: unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism.

While the reciprocal reduction of tariffs, subject to "Most Favoured Nation" (Article I GATT) and "National Treatment" (Article III GATT)

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37 Ruggie, "International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36 Int'l Org 379, 380.

38 Ibid.

39 Ibid 381.

40 Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (2 ed, 2001) 147.

41 Ibid 136–140.

42 Ibid 31.

43 Polanyi, cited in Ruggie, supra note 37, 387.

44 Ibid 393. The major criticism of "embedded liberalism" is that it only worked for well-resourced industrialized countries that could finance adjustment policies to mitigate the disruptive effects of market liberalization. See Ruggie, "Taking Embedded Liberalism Global: The Corporate Connection" in Held and Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (2003) 94.

rules, indicated the multilateral mandate of the GATT regime, GATT also included extensive provisions permitting domestic interventionism. This tension has been described as "Smith abroad, Keynes at home".[45] For instance, Article XIX GATT allowed Contracting Parties to temporarily suspend concessions where increases in imports caused serious injury or threat of injury to domestic industries that produced like or competitive products. The "consensus rule", which gave the "respondent" Contracting Party a blocking veto at the panel establishment and implementation stages, evidenced an ability to avoid liberalization when required by domestic prerogatives.

The compromise of embedded liberalism can be understood as the fundamental qualification on delegation to supranational governance in the GATT era. One of Ruggie's crucial insights is that the conception of GATT as a liberal regime, destabilized by recurrent domestic "cheating" in the form of non-tariff trade barriers and voluntary export restraints, fails to address both dimensions of the embedded liberalism compromise: "the new protectionism is not an aberration from the norm of postwar liberalization, but an integral feature of it".[46]

WTO Dispute Settlement: Towards Disembedded Liberalism

While embedded liberalism was an instructive description of the trade-off between market and political authority under GATT, the interventionist Keynesian economic policy that underpinned it was challenged by the resurgence of neo-liberal capitalism and its emphasis on efficiency and market rule. The Washington Consensus policy triumvirate in the 1980s — privatization, deregulation, and cuts in social spending — reflected a growing belief that government intervention in the economy was inherently problematic.[47] "New Right" public choice theorists purported to expose the "public interest" prerogative of the welfare state as illusory, advocating the market as a means to promote the interests of rational, utility-maximizing individuals, and impede bureaucratic "rent-seeking".[48] Implementation of Washington Consensus policies resulted in the divestment of public functions from state control and an emphasis on managerial rather than electoral accountability. In a neo-liberal variation of Polanyi's "double movement", the rolling back of state frontiers and the redistribution of power to private market actors paradoxically resulted in a new arsenal of governance techniques, evidencing a shift from "command and control" strategies to regulation and government by contract.

The compromise of embedded liberalism has been further challenged

45 Mortensen, "The WTO and the Governance of Globalization: Dismantling the Compromise of Embedded Liberalism?" in Stubbs and Underhill (eds), *Political Economy and the Changing Global Order* (2006) 172.

46 Ruggie, supra note 37, 410.

47 Taggart, "The Nature and Functions of the State" in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 107.

48 See generally McAuslan, "Public Law and Public Choice" (1988) 51 MLR 681.

by the rapidity of economic globalization, and its rhetorical emphasis on market hegemony and diminishing state importance. However, there are good reasons to doubt those who argue that an "eclipse of place" has resulted,[49] and that the state "represents no genuine, shared community of economic interest".[50] A problematic tendency in the globalization literature is to cite examples of internationalization of discrete economic sectors as evidence of state diminution and wider rule by autonomous market forces.[51] Globalization is more accurately understood as a tenet of state transformation, rather than a process signifying the ultimate demise or retreat of the state.[52]

Near the end of his article, Ruggie predicted that the future trajectory of dispute settlement in an embedded liberalism paradigm would veer towards bilateral diplomatic outcomes rather than legal solutions: "it requires an extremely optimistic view of the possibilities for international law and conciliation to expect interventionist governments to behave otherwise".[53] Yet early in the Uruguay Round, the United States demanded a more legalistic model of dispute resolution, to enhance the prompt settlement of disputes and "lower the 'risk premium'" for engagement in international transactions.[54] The completion of the Uruguay Round saw the introduction of binding dispute settlement procedures to be enforced by a Dispute Settlement Body ("DSB") in the incipient WTO. The Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")[55] manifested a shift from the conciliatory GATT approach to a more judicialized, rule-oriented paradigm.[56] There remains a residual ambivalence in the DSU between legalism and diplomacy, given that the optimal outcome is the adoption of solutions "mutually acceptable" to the disputants.[57] WTO Member States are entitled to request consultations over disputed measures (Article 4 DSU). If consultations fail to resolve the dispute, only then can the complainant state request the establishment of a panel (Article 6 DSU). To facilitate compliance with WTO law, a sanctions regime is provided in the DSU for when DSB recommendations

49 Spiro, "Globalization, International Law, and the Academy" (2000) 32 NYUJ Int'l Law & Pol 567, 569.

50 Ohmae, "The Rise of the Region State" (1993) 72 Foreign Aff 78, 78.

51 Hirst and Thompson, *Globalization in Question* (1 ed, 1996) 2.

52 Clark, "Globalization and the Post-Cold War Order" in Baylis and Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (2 ed, 2001) 646. For a contrary view, see Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (1996).

53 Ruggie, supra note 37, 412.

54 Jackson, *Sovereignty*, supra note 1, 15.

55 Agreement Establishing the World Trade Organisation, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 2, opened for signature 15 April 1994, 33 ILM 1125 (entered into force 1 January 1995), 1226 ["DSU"].

56 See generally Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997); Sweet, "The New GATT: Dispute Resolution and the Judicialization of the Trade Regime" in Volcansek (ed), *Law Above Nations: Supranational Courts and the Legalization of Politics* (1997) 118–142; Wilson, "Can the WTO Dispute Settlement Body Be a Judicial Tribunal Rather Than a Diplomatic Club?" (2000) 31 Law & Pol Int Bus 779.

57 DSU, supra note 55, arts 3.2 and 3.7. See also art 3.1, which affirms adherence to GATT dispute management principles.

and rulings are not implemented within a reasonable period. There are two types of sanctions: compensation (Article 22.2 DSU), and if no satisfactory compensation is agreed upon, DSB-authorized retaliation or suspension of concessions (Article 22.9 DSU).

Despite the avoidance of judicial nomenclature in the DSU, the creation of a two-tiered appellate structure demonstrates a shift to adjudication of disputes. First instance ad hoc panels are composed of three "well-qualified governmental and/or non-governmental individuals" (Article 8.1 DSU), whose task is to issue an independent report determining whether a Member State's action conforms to the relevant WTO rules. Although many prospective panelists represent particular Member States, Article 8.9 DSU requires them to serve in their individual capacity and not as government representatives. The Appellate Body is a permanently constituted organ. Its jurisdiction is limited to issues of law covered in the panel report (Article 17.6 DSU); it is only entitled to uphold, modify or reverse a panel's legal findings and conclusions (Article 17.13 DSU). Comprised of seven persons, three of whom serve on each case (Article 17.1 DSU), the Appellate Body consists of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" (Article 17.3 DSU). These individuals serve four-year terms, renewable once (Article 17.2 DSU), and are required to be broadly representative of the WTO membership rather than affiliated with any government (Article 17.3 DSU).

The standing Appellate Body and, to a lesser degree, the ad hoc panels constituted for individual disputes, can be characterized as supranational agents exercising adjudicative authority on behalf of multiple Member State principals who have delegated significant discretionary authority to the two-tiered dispute settlement mechanism. Effective supranational adjudication requires agents with a degree of independence from their Member State principals. Given the large membership of the WTO, (153 members as at 1 August 2008),[58] WTO dispute settlement is an extreme example of an agent serving many masters. Member State preference heterogeneity, in relation to the operation of particular agreements, was virtually guaranteed, because the Uruguay Round agreements had to be accepted or rejected as a "single undertaking", with limited plurilateral exceptions. The "single undertaking" required states to engage in a holistic assessment of whether accession to the WTO was in their best interests, forgoing first preferences on particular issues in order to participate in multilateral trade negotiations. As a broad generalization, developing countries made trade-offs in agriculture and textiles, while developed countries made concessions in relation to services and intellectual property rights.[59]

58 "Understanding the WTO: Members and Observers" The World Trade Organization <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (at 1 August 2008).

59 Levy, "Do We Need an Undertaker for the Single Undertaking? Considering the Angles of Variable Geometry" in Evenett and Hoekman (eds), *Economic Development and Multilateral Trade Cooperation* (2006) 417.

Principal-agent theory predicts that multiple principals with preference heterogeneity will increase the ability of agents to engage in slack, understood here as unwanted independent action by the permanently constituted Appellate Body. While accusations of shirking would require knowledge of the individual preferences of Appellate Body members,[60] slippage focuses on whether the constraints provided by the Member States in the DSU induce them to act in different ways to those preferred by the Member State principals. Article 3.2 DSU articulates the purposive and interpretative constraints on the acceptable margin of manoeuvre by the panels and Appellate Body:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Agency slack in WTO dispute settlement can be regarded as conduct by the Appellate Body that contravenes the textual grant of authority in Article 3.2 DSU.[61] The Appellate Body's propensity for slack is increased by the lack of an effective institutional check on the DSB's adoption of reports. Unlike the consensus rule for adoption of panel reports under GATT, adoption of panel and Appellate Body reports in the WTO is governed by a negative consensus rule. Negative consensus means that a panel or Appellate Body report will be adopted by the DSB unless there is a consensus decision not to adopt it (Article 16.4 and 17.14 DSU). This ensures the virtually automatic adoption of reports because the "winning" state will almost always favour adoption. The only institutional check on the adoption of reports is set out in Article IX:2 of the Marrakesh Agreement Establishing the WTO,[62] and is affirmed by Article 3.9 DSU. These sections provide that the Member State driven Ministerial Conference and General Council

60 According to James Bacchus, an original member of the Appellate Body, the "shared goal from the very start was the establishment of an independent, quasi-judicial institution that would serve all the Members of the WTO equally and effectively". See Bacchus, "Leeky's Circle: Thoughts from the Frontier of International Law" (Paper presented to the Institute of Advanced Legal Studies, The University of London, 10 April 2003) 7.

61 Barnett and Finnemore challenge the assumption made by principal-agent theory that agents' preferences will necessarily conflict with the principals', as international organizations "are often created by the principals (states) and given mission statements written by the principals. How, then, can we impute independent preferences a priori?" See Barnett and Finnemore, supra note 26, 705–706.

62 Agreement Establishing the World Trade Organisation, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, opened for signature 15 April 1994, 33 ILM 1125, 1148 (entered into force 1 January 1995) ["WTO Agreement"].

have the "exclusive authority" to adopt interpretations of WTO rules.[63] This accords with the Article 3.2 DSU constraint that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

The effectiveness of this exclusive interpretative authority as a check on Appellate Body rulings is eroded by the consensus voting rule. While the decision to adopt an interpretation must be taken by a three-fourths majority of the members under Article IX:2 of the Marrakesh Agreement, the standard practice has been to reach these decisions by consensus.[64] The ease of adoption of reports, as a consequence of the negative consensus rule, compounded by the consensus voting required to adopt an authoritative interpretation of the WTO agreements, is a "major structural deficiency [which fails to] provide a flexible 'legislative response' to Appellate Body's decisions".[65] This ineffective institutional check "creates pressure to 'legislate' new rules through adjudication and thereby flout the mandate" of Article 3.2.[66]

The autonomy of the Appellate Body can be described as its residual range of discretion, taking into account the institutional control mechanisms instituted by Member States. Given that the purpose of delegation to dispute settlement is to provide "security and predictability" in the multilateral trading system (Article 3.2 DSU), Member State principals must accept some Appellate Body autonomy for this purpose to be realized.[67] Unlike the panels and their prescribed terms of reference (Article 7 DSU), the Appellate Body is delegated the discretion to generate its own working procedures (Article 17.9 DSU). Claus-Dieter Ehlermann, one of the original Appellate Body members, has described this procedural autonomy as "contribut[ing] to the independence of the Appellate Body, both in an objective and a subjective sense".[68]

A controversial example of the Appellate Body determining its own procedure, resulting in action contrary to the desires of a majority of Member States, is *United States — Import Prohibition of Certain Shrimp and Shrimp Products*.[69] In that case, the Appellate Body held that the DSU granted it, and panels, the discretion to accept amicus curiae briefs, as an incident of the right to "seek information and technical advice from any

63 Robert Howse has argued that Article IX:2 of the Marrakesh Agreement denotes "true finality [and] strict *Kompetenz-Kompetenz*". See Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power" in Cottier and Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003) 32.

64 Matsushita, Schoenbaum and Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2 ed, 2006) 132.

65 Joergens, "True Appellate Procedure or Only a Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding" (1999) 30 Law & Pol Int Bus 193, 213.

66 Thompson and Snidal, "Guarding the Equilibrium: Regime Management and the WTO" (Paper presented to the Annual Meeting of the American Political Science Association, Washington DC, 1–4 September 2005) 30.

67 Alter, "Delegation to International Courts and the Limits of Re-Contracting Political Power" in Hawkins et al (eds), *Delegation and Agency in International Organizations* (2006) 315.

68 Ehlermann, "Experiences from the WTO Appellate Body" (2003) 38 Tex Int'l LJ 469, 478.

69 WTO Doc WT/DS58/AB/R, AB-2001-1 (1998), paras 88–91 (Report of the Appellate Body).

individual or body which it deems appropriate" (Article 13.1 DSU). The Appellate Body's interpretation was made in the context of "North-South deadlock" over whether to permit amicus briefs and against a background of increased involvement of non-state actors in the dispute settlement process.[70] Despite lack of textual support in the DSU and strong opposition from some Member States, the Appellate Body's decision was adopted due to the consensus voting rule.

In the substantive area, the Appellate Body's examination of national measures for consistency with WTO law often requires them to adjudicate on competing values, striking a balance between free trade objectives and non-trade concerns such as the environment and labour standards.[71] Allegations of judicial lawmaking and activism, indicative of agency autonomy, draw attention to the way that the Appellate Body fills gaps and clarifies ambiguities in the WTO rules.[72] One example of judicial lawmaking was *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia.*[73] In that case, the Appellate Body ruled that national authorities imposing a safeguard measure must demonstrate the existence of "unforeseen developments". While this requirement was part of Article XIX GATT, the WTO Agreement on Safeguards had no such requirement, and the negotiating history suggested that the inclusion of this provision had been expressly considered and rejected.[74] In "completing the contract", the Appellate Body can narrow the scope of acceptable national regulatory action and limit the range of compliance techniques open to a Member State. Such decisions are likely to engender a negative political reception from Member States that instituted national measures on the understanding that a range of alternative practices was permitted by ambiguous treaty text. In giving specific meaning to language that was intentionally vague or optimally incomplete, the Appellate Body has moved far from the compromise of embedded liberalism, which was consonant with domestic regulatory diversity, arguably adding to or diminishing the rights and obligations that Article 3.2 DSU requires them to preserve.

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70 See generally Charnovitz, "Opening the WTO to Nongovernmental Interests" (2000) 24 Fordham Int'l LJ 173; Dunoff, "The Misguided Debate over NGO Participation at the WTO" (1998) 1 J Int'l Econ L 433.

71 See generally Gerstetter, "The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation" in Joerges and Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006).

72 Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints" (2004) 98 AJIL 247, 250–254.

73 WTO Doc WT/DS177/AB/R, WT/DS178/AB/R, AB-2001-1 (2001) paras 65–75 (Report of the Appellate Body).

74 For critical discussion, see Horn and Mavroidis, "United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia: What Should be Required of a Safeguard Investigation?" in Horn and Mavroidis (eds), *The WTO Case Law of 2001* (2003).

Democratic Deficit as Consequence of Delegation

For Member State principals, the chief agency loss in delegation to WTO dispute settlement may be characterized as a democratic deficit. The concept of democracy has a contested meaning in international law.[75] There is considerable debate about whether democracy should be an indicator of legitimacy in international organizations, or whether it is possible to export national democratic practices to the regional or global level.[76] Trachtman's description of the democratic deficit in international organizations, as a "combined question of the degree of distance from parliamentary accountability, and subsidiarity",[77] is a useful way to consider the consequences of delegation, provided that equivalent non-parliamentary accountability mechanisms are also considered.

Accountability in the Commonwealth democratic tradition is typically understood in relation to the Diceyan balanced constitution, based on ministerial responsibility to Parliament on one hand and the personal liability of executive officials before the "ordinary courts" on the other.[78] Under the classic triad of Parliamentary sovereignty, rule of law, and separation of powers, an accountable administrative state is one where Parliament controls the executive, and is itself controlled by the spectre of the electoral ballot box, the chief manifestation of public will. The role of the judiciary is to give effect to legislative intent by ensuring that the executive does not transgress its delegated authority.[79] Rather than view accountability through the "distorted optic" of judicial review,[80] American administrative law deals with accountability and its ex ante proxies, transparency and participation, through an emphasis on agency rule-making under the federal and state Administrative Procedure Acts.[81] While American administrative law historically focused on the relationship between regulatory agencies and the courts, Commonwealth administrative law has usually been "more preoccupied with the legitimacy of government as [service] provider than as regulator".[82]

The control that Member State principals wield over supranational agents is far more attenuated than in domestic principal-agent relationships.

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75 Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000) 5. For a general discussion of democracy in the WTO context, see Bronckers, "'Better Rules for a New Millenium': A Warning against Undemocratic Developments in the WTO" (1999) 2 J Int'l Econ L 547.

76 See e.g. Dahl, "Can International Organizations Be Democratic? A Skeptic's View" in Shapiro and Hacker-Cordón (eds), *Democracy's Edges* (1999).

77 Trachtman, "The Constitutions of the WTO" (2006) 17 EJIL 623, 637.

78 See generally Strøm, "Parliamentary Democracy and Delegation" in Strøm, Müller and Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (2006).

79 Craig, *Administrative Law* (5 ed, 2003) 32.

80 Arthurs, "The Administrative State Goes to Market (and Cries 'Wee, Wee, Wee' All the Way Home)" (2005) 55(3) UTLJ 797, 807.

81 See Beerman, "The Reach of Administrative Law in the United States" in Taggart (ed), *The Province of Administrative Law* (1997).

82 Cane, "Review of Executive Action" in Cane and Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 151.

Accountability techniques developed at the domestic level are undermined by global governance's lack of institutional constraints through electoral responsibility, a formal separation of powers, or an effective system of checks and balances.[83] While domestic legislative enactment is intended to counterbalance the executive's treaty-making prerogative in a dualist system, the executive's accession to international treaties with independent dispute settlement potentially binds future domestic directives without national legislative input, perpetuating the democratic deficit.

Rather than seeking the extension of domestic judicial oversight to supranational dispute settlement,[84] contemporary administrative law scholarship has sought to ameliorate accountability concerns by formulating "good governance" principles for the operation of international institutions.[85] Accountability has emerged as a prescriptive administrative value in international organizations, partly due to unease with the applicability of democratic rhetoric beyond state boundaries.[86] The language of accountability, limited to financial accountancy and audit procedures in the past, now "crops up everywhere performing all manner of analytical and rhetorical tasks and carrying most of the burdens of democratic 'governance'".[87]

The WTO has been at the forefront of debates about how to effect supranational institutional reform to further accountability to Member States.[88] Esty has argued that the infusion of administrative "good governance" values in the WTO can help overcome weak democratic foundations and lead to greater institutional legitimacy.[89] Although he locates it under the rubric of democratic legitimacy,[90] accountability is not the exclusive province of the democratic state and its electoral process. Grant and Keohane distinguish "participation" and "delegation" models of accountability in relation to supranational policy making.[91] In the participation model, power-holders are evaluated by those affected by their decisions; in the delegation model, power-holders are measured by those who entrust them with powers. In the WTO setting, it is Member States who both entrust WTO panels and the Appellate Body with powers and are affected by their decisions. Therefore, how might WTO dispute settlement be made more accountable to reduce the democratic deficit?

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83 Grant and Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99 APSR 29, 30.

84 See Reinisch, *International Organizations Before National Courts* (2000) chs 2, 4.

85 The New York University Global Administrative Law (GAL) Project delineates a "nascent field" of global administrative law characterized by an accountability deficit in relation to the exercise of transnational regulatory power. See Kingsbury, Krisch and Stewart, "The Emergence of Global Administrative Law" (2005) 68 LCP 15, 18.

86 See generally Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (2005) ch 5.

87 Mulgan, "'Accountability': An Ever Expanding Concept?" (2000) 78(3) Pub Admin 555, 555.

88 See generally Bellmann and Gerster, "Accountability in the World Trade Organization" (1996) 30(6) JWT 31.

89 Esty, "Good Governance at the World Trade Organization: Building a Foundation of Administrative Law" (2007) 10 J Int'l Econ L 509, 510–512.

90 Ibid 513–514.

91 Grant and Keohane, supra note 83, 31.

Subsidiarity as Institutional Control Mechanism

If a democratic deficit is the consequence of supranational delegation, subsidiarity might function as an institutional control mechanism to bridge the accountability gap, increasing the Member State principals' control of WTO dispute settlement and reducing the extent of agency autonomy and propensity for slack. In its well known manifestation in the European Union, the principle of subsidiarity has been derided as a "definition to suit any vision" due to its inherent vagueness and interpretative flexibility.[92] While limited attempts have been made to apply subsidiarity to the WTO, there is scant literature examining subsidiarity in relation to WTO dispute settlement and none in relation to standard of review.[93] Jackson has broadly defined subsidiarity as the principle that authority or competences should be allocated between Member States and the WTO, "to those as near as possible to the most concerned constituents, usually down the hierarchical scale".[94] Although subsidiarity expresses a preference for decentralized governance, its aim is not localism per se, but the pursuit of accountability and democratic legitimacy, values that receive clear expression in national political systems.[95]

Howse and Nicolaidis' Global Subsidiarity model is the most comprehensive theoretical treatment of subsidiarity in relation to the WTO.[96] Rather than perceiving the WTO as an incipient global economic constitution, Howse and Nicolaidis argue that Global Subsidiarity is a better model for the development of the WTO. Significantly, Global Subsidiarity "vindicate[s] the original ideals of the GATT founders" and "recover[s] the spirit of 'embedded liberalism'" in the context of globalization, increasing accountability to Member States and the legitimacy of the WTO as a whole, as well as reducing the democratic deficit.[97]

The Global Subsidiarity model incorporates three basic principles throughout the workings of the WTO: political inclusiveness, top-down empowerment, and institutional sensitivity.[98] First, political inclusiveness seeks to encourage greater participation in trade policy-making at both national and WTO levels.[99] Secondly, top-down empowerment requires

92 Peterson, "Subsidiarity: A Definition to Suit Any Vision?" (1994) 47(1) Parl Aff 116.

93 See Trachtman, "International Regulatory Competition, Externalisation and Jurisdiction" (1993) 34 Harv Int'l LJ 47, 98–101; Bourgeois, "'Subsidiarity' in the WTO Context from a Legal Perspective" in Bronckers and Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000) 43–46.

94 Jackson, "Sovereignty, Subsidiarity and Separation of Powers: The High-Wire Balancing Act of Globalization" in Kennedy and Southwick (eds), *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (2002) 17.

95 Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Colum L Rev 331, 339–342.

96 Howse and Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" (2003) 16(1) Gov 73.

97 Ibid 76. For a discussion of the global subsidiarity model in relation to democratic deficit, see Schofield, "Global Subsidiarity and the WTO: An Analysis Using Dworkin's Conception of Democracy" (2005) 24(3) Policy and Society 45.

98 Howse and Nicolaidis, supra note 96, 86.

99 Ibid 88–89.

the global community to take greater responsibility in assisting developing countries to adjust to shifting comparative advantage, in recognition that embedded liberalism historically favoured the interests of developed countries.[100] Thirdly, institutional sensitivity means that WTO dispute settlement bodies must be responsive to the regulatory policies of national authorities and to other international governance institutions with "superior credentials" in areas such as health, the environment, human rights, and labour standards:[101]

> Institutional sensitivity is not *mere* deference: it is consistent with strict scrutiny of national compliance with general trade-regime norms, such as nondiscrimination, and especially procedural norms, such as transparency and due process in the formulation and implementation of policies. Here, the WTO dispute settlement organs *are* the institutions of superior competence.

Principal-agent theory provides a useful construct by which to examine the relationship of control between states and international organizations, and views the power exercised by those international organizations as delegated authority. Embedded liberalism under GATT, which preserved domestic regulatory diversity while also encouraging trade liberalization, has been curtailed by the rise of a more adjudicative form of dispute settlement in the WTO. In particular, the Appellate Body shows signs of agency autonomy and the ability to engage in slack, deviating from the preferences of its Member State principals. The resulting democratic deficit, understood as the distance from parliamentary accountability, requires Member State principals to formulate institutional control mechanisms that align the preferences of the agent with its own. Subsidiarity, as a potential institutional control mechanism, requires the Appellate Body to be responsive to the regulatory preferences of Member States, reflecting the compromise of embedded liberalism. While Global Subsidiarity provides a general model for enhancing accountability and legitimacy in the WTO, the remainder of this article advocates the development of a subsidiarity standard of review principle in WTO dispute settlement.

III STANDARDS OF REVIEW IN WTO DISPUTE SETTLEMENT

Standards of review in WTO dispute settlement function as ex ante administrative control mechanisms in the supranational delegation of adjudicative authority.[102] The current approach to standards of review

100 Ibid 89–90.

101 Ibid 86–87.

102 See generally McBride, "Dispute Settlement in the WTO: Backbone of the Global Trading System or Delegation of Awesome Power?" (2001) 32 Law & Pol Int Bus 643.

— the "objective assessment" standard for panels (Article 11 DSU) and the Appellate Body's approach to its procedural autonomy (Article 17.9 DSU) — operate as weak control mechanisms, failing to accord deference to the policy preferences of Member States and veering close to a correctness standard of review. Like correctness standards of review in domestic administrative law systems, the "objective assessment" standard in fact masks a contestable normative judgment on the appropriate balance between administrative autonomy and judicial control. It is argued that a more deferential standard of review would decrease agency losses, lowering the risk of slack and opportunism by the panels and the Appellate Body, and enhancing accountability to Member States.

Standards of review allocate institutional power between Member States and WTO panels and the Appellate Body in terms of jurisdictional competence to determine factual and legal matters.[103] The standard of review issue arises in two different situations in WTO dispute settlement: first, in review of government measures generally, and second, in review of national authority decisions on trade remedies, which are required under the WTO rules.[104] The inevitable contraction of Member State regulatory capacity as a result of WTO dispute settlement places standards of review at the "potentially inflammatory" crossroads of international interdependence and national sovereignty.[105] Despite the deceptively "genteel language of standards of review",[106] the extent of deference accorded to Member State fact-finding and interpretations of WTO law is an ongoing exercise in "line-drawing". It has ramifications for the legitimation or critique of WTO dispute settlement as a whole.[107]

EC — Hormones

The Appellate Body first considered the standard of review issue in *European Communities — Measures Concerning Meat and Meat Products (Hormones) (EC — Hormones)*.[108] The Panel in that case held that a European Communities' ban on the importation of meat produced with

103 Oesch, *Standards of Review in WTO Dispute Resolution* (2003) 22.

104 Davey, "Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques" (2001) 4 J Int'l Econ L 79, 80.

105 Presley, "Sovereignty and Delegation Issues Regarding US Commitment to the World Trade Organization's Dispute Settlement Process" (1998) 8 J Transnat'l L & Pol'y 173, 184.

106 Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005) 189 ["*Constitutionalization of the WTO*"].

107 See Croley and Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments" (1996) 90 AJIL 193, 211–212. Horlick questions whether the link between standards of review and WTO legitimacy is "logically necessary": "[O]ne can imagine an illegitimate organization with a properly deferential dispute settlement mechanism and the reverse". See Horlick, "Deference – and Responsibility – by WTO 'Judges'" in Cottier and Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003) 133.

108 WTO Doc WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (1998), (Report of the Appellate Body) ["*EC – Hormones*"]. For critical discussion, see Sykes, "Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View" (2002) 3 Chi J Int'l L 353.

growth hormones was inconsistent with provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures. On appeal, the European Community argued that the Panel had applied an inappropriate standard of review in their report, in not applying either a "deferential reasonableness standard" or the more deferential standard set out in Article 17.6 of the Antidumping Agreement. In rejecting the EC's contention, the Appellate Body held that the proper standard of review was neither total deference nor de novo review but the "objective assessment" provided in Article 11 DSU:[109]

> Article 11 ... articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.

Article 11 DSU stipulates that a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of, and conformity with, the relevant covered agreements. The Appellate Body in *EC — Hormones* explicitly acknowledged the need for "balance" between jurisdictional competences ceded to the WTO and those retained by Member States,[110] while endeavouring to articulate the standards of review applicable to both fact-finding and legal determinations.

In relation to fact-finding, the required "objective assessment" was posited as somewhere between de novo review and total deference.[111] De novo review permits panels to totally substitute their own findings for those of a national authority. Under a total deference standard, judicial review is restricted to the examination of whether relevant procedural requirements for the implementation of a contested measure were complied with.[112] Article 11 offers little guidance as to where on the scale between de novo review and total deference the standard of review for fact-finding should be calibrated.[113] Howse contends that, in the factual context, review should be predicated on sensitivity to the relative competence and credibility of fact-finding institutions.[114]

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109 *EC – Hormones*, ibid para 116. The Appellate Body has not upheld appeals on the grounds that panels have failed to comply with the duty to make an "objective assessment". In *European Communities – Measures Affecting Importation of Certain Poultry Products* WTO Doc WT/DS69/AB/R, AB-1998-3 (1998), para 133 (Report of the Appellate Body), the Appellate Body described this allegation as "very serious" and one "which goes to the very core of the integrity of the WTO dispute settlement process itself".

110 Ibid para 115.

111 Ibid para 117.

112 Oesch, supra note 103, 233.

113 Trebilcock and Howse, *The Regulation of International Trade* (3 ed, 2005) 130.

114 Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: Early Years of WTO Jurisprudence" in Weiler (ed), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (2000) 64.

In relation to legal determinations, the Appellate Body, following the requirements of Article 3.2 DSU, affirmed the application of the customary rules of interpretation of public international law found in the Vienna Convention on the Law of Treaties ("VCLT").[115] Reference to the relatively inflexible VCLT rules as an interpretative tool implies a de novo standard of review in relation to legal interpretations made by Member States.[116] Read together, Articles 31 and 32 of the VCLT inevitably lead to one "correct" interpretation, implying that WTO panels and the Appellate Body can construe a "correct" interpretation of the WTO agreements without recourse to the interpretative submissions of national authorities. There are no examples in the WTO case law of a panel or the Appellate Body accepting an interpretative conclusion of a national authority, while preferring a different reading of the WTO provision in question.[117] Trade remedies cases are particularly notorious for the unwillingness of panels and the Appellate Body to accept national authority legal determinations. Greenwald has explained this phenomenon by arguing that trade remedy cases are an "exercise in policy-making" where the Appellate Body reads language in and out of agreements in order to reach a pro-complainant outcome.[118]

Notwithstanding the VCLT method of treaty interpretation preferred by the Appellate Body, the customary public international law doctrines of *in dubio mitius* and *non liquet* counsel restraint in the interpretation of treaty obligations.[119] These deferential canons of interpretation accord with the spirit of embedded liberalism and the Article 3.2 DSU requirement that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

In dubio mitius promotes deference to state sovereignty where a rule is ambiguous; in the presence of two or more plausible legal interpretations, the one that is less onerous to the state assuming the obligation should be adopted.[120] The VCLT interpretative method, compounded by the mandate that WTO dispute settlement provide "security and predictability to the multilateral trading system", appears to disallow the interpretative ambiguity that is a prerequisite for the operation of *in dubio mitius*.

In situations where there is no determinable or applicable law, the *non liquet* principle holds that international courts should declare the lacuna, rather than attempt to clarify it, because it is the role of legislative organs

115 *EC – Hormones*, supra note 108, para 118.

116 Ehlermann and Lockhart, "Standard of Review in WTO Law" (2004) 7 J Int'l Econ L 491, 498.

117 Oesch, supra note 103, 174.

118 Greenwald, "WTO Dispute Settlement: An Exercise in Trade Law Legislation?" (2003) 6 J Int'l Econ L 113, 115.

119 See generally Steinberg, supra note 72, 258–262.

120 Cameron and Gray, "Principles of International Law in the WTO Dispute Settlement Body" (2001) 50 ICLQ 248, 258.

to fill gaps in treaty texts.[121] The Appellate Body has readily sought to fill gaps and clarify ambiguities in the WTO rules and has referred to *non liquet* unfavourably.[122] The absence of a DSU requirement for the consistent and uniform application of customary principles enables selective application and rejection of these sovereignty-conscious interpretative doctrines.[123]

The different standards of review for questions of fact and law established in *EC — Hormones* are difficult to sustain. The fragile dichotomy between fact and law is broken down by the prevalence of mixed questions of fact and law in WTO dispute settlement, such as conclusions as to legal effect drawn from factual records by national authorities in trade remedies cases. Given the more exacting de novo standard of review for legal determinations, a temptation exists for the Appellate Body to manipulate the characterization of particular issues as factual or legal, in order to achieve its desired allocation of power.[124] The contestability of such characterization is masked by the lack of dissent in WTO dispute settlement.[125] While the DSU does not prevent Appellate Body members from offering dissenting opinions, albeit requiring anonymity (Article 14.3 and Article 17.11),[126] the Appellate Body has overwhelmingly issued unanimous reports in an institutional culture where dissent is discouraged.[127] Although there is no official precedent system in WTO dispute settlement,[128] past panel and Appellate Body reports provide a strong reference point for future disputants. The inclusion of dissenting opinions might discourage "collegial concurrence" with its connotations of compromise,[129] and expose a plurality of perspectives on issues such as the fact–law characterization.

Correctness Review: A Comedy of Errors (of Law)

The de novo standard of review of Member States' interpretations of law in WTO dispute settlement is broadly comparable to standards of review

121 Ragosta, "Unmasking the WTO – Access to the DSB System: Can the WTO DSB Live Up to the Moniker 'World Trade Court'?" (2000) 31 Law & Pol Int Bus 739, 745. See generally Weil, "'The Court Cannot Conclude Definitively ...' *Non Liquet* Revisited" (1998) 36 Colum J Transnat'l L 109.

122 *India – Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, WTO Doc WT/DS90/AB/R, AB-1999-3 (1999), para 119 (Report of the Appellate Body).

123 See generally Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) ch 8.

124 Bilder, "The Fact/Law Distinction in International Adjudication" in Lillich (ed), *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium* (1992) 95–98; Stuart, "'I Tell Ya I Don't Get No Respect!': The Policies Underlying Standard of Review in US Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals" (1992) 23 Law & Pol Int Bus 749, 760.

125 Lewis, "The Lack of Dissent in WTO Dispute Settlement" (2006) 9 J Int'l Econ L 895.

126 Lockhart and Voon, "Reviewing Appellate Review in the WTO Dispute Settlement System" (2005) 6 Melb J Int'l L 474, 478–482.

127 Ehlermann states that "[t]he determination to gain credibility, acceptability, and legitimacy, combined with the paramount concern for independence, explains the Appellate Body's attitude towards consensus, as opposed to voting and individual opinions, be they dissenting or concurrent". See Ehlermann, "Reflections on the Appellate Body of the WTO" (2003) 6 J Int'l Econ L 695, 695.

128 For a critical discussion, see Bhala, "The Myth about *Stare Decisis* and International Trade Law (Part One of a Trilogy)" (1999) 14 Am U Int'l L Rev 845.

129 Lewis, supra note 125, 912.

of questions of law in Commonwealth administrative law systems. Both make contestable normative judgments on the appropriate balance between administrative autonomy and judicial control.[130]

The shift from a jurisdictional error test to an error of law standard of review in the United Kingdom and New Zealand, and retention of a doctrine of jurisdictional fact in Australia, have impeded the articulation of a nuanced theory of deference, comparing unfavourably with the latitude ceded to regulatory agencies in Canada and the United States. The error of law standard can be regarded as a correctness standard of review, where courts assert a centralizing interpretative monopoly over first-instance administrative decision-makers. Correctness methodology is underpinned by a set of contested assumptions: first, that there is only one right answer for questions of statutory interpretation; secondly, that the judiciary are the best qualified to provide that answer; and thirdly, that legal questions can be distinguished from policy, discretion, and fact-finding.[131] The historic cleavage between correctness review on questions of law and reasonableness review of discretionary decision-making has been surpassed by a contextual continuum of approaches to judicial review. This continuum has high-scrutiny correctness review and non-justiciability as its outer borders. Normative grounds for deference, however, "with fine calibrations of democratic legitimacy, expertise and comparative competence" remain distinctly underdeveloped.[132]

The failure of Commonwealth administrative law to view its standard of review on questions of law through a deferential optic can result in error of law and jurisdictional fact functioning as "conclusory term[s]",[133] concealing political equivocation behind the fig-leaf of formalism. If regarded as largely synonymous with a de novo standard of review, the "objective assessment" standard of review also seems redolent of a formalist conclusory label, inhibiting the evolution of a principled theory of deference in WTO dispute settlement:[134]

130 See generally Craig, "Jurisdiction, Judicial Control and Agency Autonomy" in Loveland (ed), *A Special Relationship?: American Influences on Public Law in the UK* (1995).

131 Taggart, "The Contribution of Lord Cooke to the Scope of Review Doctrine in Administrative Law: A Comparative Common Law Perspective" in Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997) 203. For a discussion of the nebulous distinction between fact and law in domestic administrative law systems, see Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3 ed, 2004) 184–187.

132 Taggart, "Reinventing Administrative Law" in Bamforth and Leyland (eds), *Public Law in a Multi-Layered Constitution* (2003) 332.

133 Aronson, "Jurisdictional Error without the Tears" in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 330.

134 Oesch, supra note 103, 241 (emphasis in original). Picciotto argues that "it is not surprising that the [Appellate Body] should deploy legalistic language and a formalist emphasis on the objective application of the words of the agreements to placate the broader public, while hoping to convince the specialists in trade and economic regulation through shared understandings of the interpretations which are desirable to achieve the goals of free trade". See Picciotto, "The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance" (2005) 18(3) Gov 477, 495.

> To date, not many statements can be found in panel and Appellate Body reports which would *in explicit terms* link the issue of standard of review to the delicate balance of powers between the judiciary of the WTO and its members.... [The current] institutional framework is not adequate for the evolution of nuanced standard-of-review principles based on considerations of whether a panel report affects the delicate relationship between international interdependence and national sovereignty....

It is this fundamental concern that the introduction of a subsidiarity standard of review principle in WTO dispute settlement, functioning as a deference proxy, seeks to address.

IV SUBSIDIARITY AND DEFERENCE IN THE MARKETPLACE OF IDEAS

The current "objective assessment" standard of review operates as a weak control mechanism. The challenge for Member States, then, is to formulate a standard of review principle for WTO dispute settlement that better captures the trade-off between international interdependence and national sovereignty. In this and the following section, the creation of a subsidiarity standard of review principle is suggested. This draws on the United States approach to judicial review of agency statutory interpretation and on the European Union principle of subsidiarity. While it is argued that the standard of review in WTO dispute settlement should be more deferential, total deference to Member States' interpretations of WTO rules would result in the emergence of a "tower of Babel",[135] damaging the security and predictability of the multilateral trading system. A subsidiarity standard of review principle would seek to forge a middle ground between the antipodean total deference and de novo standards of review, operating as an appropriately non-conclusory label in the allocation of competences between Member States and WTO dispute settlement.

Lost in Translation? Subsidiarity as Standard of Review Bricolage[136]

A preliminary note of caution must be sounded regarding the uncritical transplantation of doctrines from the national and regional level to international organizations. Oesch commences his text on standards of review in WTO dispute settlement by proclaiming the "irrelevance" of

135 Petersmann, supra note 56, 227.

136 Coined by Claude Lévi-Strauss, *bricolage* means borrowing from what is readily at hand. See Lévi-Strauss, *The Savage Mind* (1966) 17–36. Mark Tushnet suggests that "constitutional *bricolage*" reflects a modern tendency whereby "existing legal materials are co-opted and transformed to address a problem at hand". See Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale LJ 1225, 1301.

domestic standard of review approaches to the inquiry.[137] However, while domestic approaches to standard of review reflect idiosyncratic political and cultural traditions, it is inevitable that "borrowings" will take place.[138] To avoid unintentional caricatures of domestic administrative doctrine, comparative administrative law scholarship places increasing emphasis on the methodology underpinning such borrowing.[139] The pursuit of sameness underpinning "common core" and functionalist methodologies has been challenged by critical comparativists who focus attention on the significance of difference. Legrand argues that "the specification of sameness can only be achieved if the historico-socio-cultural dimensions are artificially excluded from the analytical framework".[140]

The allocation of competences in domestic standard of review doctrines represents culturally contingent calibrations that have evolved over time. The intimate link between domestic standards of review and the separation of powers does not have a clear international analogue, where power is vertically allocated between states and international organizations. Although WTO dispute settlement has an adjudicative function, the consensus-marred rule-making of the WTO "legislature", the Ministerial Conference and General Council, and the lack of a centralized executive, exposes the tenuousness of a comparison with a constitutional separation of powers.[141] Doctrinal transplantation becomes increasingly feasible if judicial review is understood, not as exclusively wedded to orthodox tripartite governmental traditions, but rather as a mechanism to ensure the legitimacy of administrative decision-making. The perennial need for balance between domestic administrative autonomy and judicial control in ensuring legitimacy can be easily extended to the relationship between Member States and WTO dispute settlement.[142]

The remainder of this section explores the way the balance is struck in the United States and the European Union and suggests where the right balance between Member States and WTO dispute settlement should

137 Oesch, supra note 103, 7. Oesch points to the resistance of GATT 1947 panels to the *mutatis mutandis* application of domestic administrative jurisprudence, and to *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* WTO Doc WT/DS192/R (2001) para 7.35 n 193 (Report of the Panel): "[domestic administrative doctrine is avoided because it] inevitably carr[ied] ... the connotations from th[o]se national legal systems".

138 Taggart, "The Province of Administrative Law Determined?" in Taggart (ed), *The Province of Administrative Law* (1997) 18.

139 Saunders, "Apples, Oranges and Comparative Administrative Law" [2006] Acta Juridica (RSA) 423, 426. See also Bell, "Comparative Administrative Law" in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006).

140 Legrand, "The Same and the Different" in Legrand and Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 262. For a critical discussion of Legrand's perspective, see Walker, "Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism" in Beaumont, Lyons and Walker (eds), *Convergence and Divergence in European Public Law* (2002).

141 Cottier and Oesch, "The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework" in Cottier and Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003) 299.

142 Mashaw, "Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise" (2005) 55(3) UTLJ 497, 521.

lie. While this comparative borrowing can be criticized for employing a myopic "common core" methodology, it is preferable to view the creation of a subsidiarity standard of review principle as a normatively desirable *bricolage*.

United States: Much Ado About *Chevron*

The benchmark decision in *Chevron U.S.A. Inc v National Resources Defense Council Inc*,[143] regarding the generally applicable scope of review for regulatory agencies' interpretations of statutory law, has been hailed as "one of the very few defining cases in the last twenty years of American public law".[144] *Chevron* continues to command the adherence of a plurality of the United States Supreme Court and has engendered a dauntingly voluminous academic response.[145] The test set out in *Chevron* provides that where a statutory provision is ambiguous and the implementing agency's construction is reasonable, a federal court is required to accept the agency's statutory interpretation, regardless of whether the agency's construction differs from the reviewing court's preferred interpretation.

The perception that *Chevron* operates as a "counter-*Marbury*, for the administrative state"[146] threatens to overshadow competing precedent on the allocation of interpretative authority. The competing precedent is represented by *Skidmore v Swift & Co*,[147] which posits the judiciary as the final arbiter of legal interpretation. Operating within a "nuanced, context-sensitive rubric",[148] Justice Jackson in *Skidmore* evinced an intention to regularly defer to agency expertise, whilst retaining the discretion to ultimately review their legal interpretations:[149]

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Tense interplay between the *Chevron* and *Skidmore* approaches vitiates a reductive correlation between United States scope of review doctrine and deferential "surrender" to agency interpretation. Indeed, under the federal

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143 467 US 837 (1984) ["*Chevron*"].

144 Sunstein, "Law and Administration After *Chevron*" (1990) 90 Colum L Rev 2071, 2075.

145 See Merrill, "The Story of *Chevron*: The Making of an Accidental Landmark" in Strauss (ed), *Administrative Law Stories* (2006); Reese, "Bursting the *Chevron* Bubble: Clarifying the Scope of Judicial Review in Troubled Times" (2004) 73 Fordham L Rev 1103; Weaver, "Some Realism About *Chevron*" (1993) 58 Mo L Rev 129.

146 Sunstein, supra note 144, 2075. In *Marbury v Madison* 5 US 137 (1803), Marshall CJ stated at p 177 that "it is emphatically the province and duty of the judicial department to say what the law is".

147 323 US 134 (1944) ["*Skidmore*"].

148 Merrill and Hickman, "Chevron's Domain" (2001) 89 Geo LJ 833, 836.

149 *Skidmore*, supra note 147, 140. See also Aman Jr, "The Importance of Being Contextual: Deference South of the Border" in Huscroft and Taggart (eds), *Inside and Outside Canadian Administrative Law: Essays in Honor of David Mullan* (2006) 354–357.

Administrative Procedure Act 1946 ("APA"), the extent of deference shown by courts to administrative agencies was dependent on factors such as the type of agency action concerned (rule-making and adjudication were bifurcated); the characterization of the rule being interpreted as substantive, procedural or interpretative; and the triumvirate of United States administrative governance values: expertise, accountability, and administrative efficiency.[150] Rather than hiding behind the Byzantine jurisdictional concepts that bedevil Commonwealth standard of review jurisprudence, American administrative law directly faces the issue of whether regulatory agencies or courts should decide the meaning of statutory terms. While there has been a recent tendency to accord less deference to agencies and to rely more heavily on the plain meaning of statutory language in the United States,[151] a consistent approach for balancing judicial control with agency autonomy has not emerged.

Ostensibly contravening the APA provision that a reviewing court "shall decide all questions of law",[152] Justice Stevens, in *Chevron*, offered the following two-step approach to scope of review:[153]

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of the Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Despite the real potential for courts to become "captives of administrative caprice",[154] the expansion of deference to agency interpretation in the second step of the *Chevron* test was rationalized as giving effect to inferred Congressional intent. Statutory ambiguity implied delegation of policy-making authority to specialist agencies, and a deferential posture was more attuned with political accountability concerns in the separation of powers, given that agencies were responsible to Congress rather than the judiciary:[155]

150 Tolley, "Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective" (2003) 31(3) Policy Studies Journal 421, 424.

151 Breyer et al, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* (5 ed, 2002) 359–361.

152 5 USC 706 (2000).

153 *Chevron*, supra note 143, 842–843.

154 Woodward and Levin, "In Defense of Deference: Judicial Review of Agency Action" (1979) 31 Admin L Rev 329, 342.

155 Farina, "The 'Chief Executive' and the Quiet Constitutional Revolution" (1997) 49 Admin L Rev 179, 181–183 (emphasis in original).

> [*Chevron*] deference is right not because it yields *better* answers, more *efficient* answers, or even the answers Congress *would have wanted*, but because it yields more *legitimate* answers. The *Chevron* mystique flows from this promise that the ordinary act of statutory interpretation can advance the larger process of reconciling agencies with constitutional democracy.

The Supreme Court revisited scope of review in *United States v Mead Corporation*,[156] holding that agency action having the "force of law",[157] determined pursuant to Congressional intent, would be the "litmus test" for whether the *Chevron* doctrine or the context-cognizant approach of *Skidmore* would apply.[158] Weaver vigorously criticizes the determinative nature of Congressional intent in this "dual deference" standard paradigm, arguing that Congress never explicitly gives an agency the power to interpret with the "force of law".[159] Further, he contends that the establishment of dual deference standards produces an unsatisfactory regulatory system by "creating incentives for litigation, depriving regulated entities of needed administrative guidance, disallowing agencies the power to interpret their regulatory schemes, and encouraging agencies to engage in undesirable behaviour".[160] In a characteristically passionate dissent, Scalia J prophesized the rigidification of the administrative process, where "[a]gencies will now have high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect."[161]

Drawing on his criticism that "deference is not abdication",[162] Scalia J emphatically dissented again in *National Cable & Telecommunications Association v Brand X Internet Services*.[163] Describing the majority holding as a "breathtaking novelty [where] judicial decisions [are] subject to reversal by executive officers",[164] Scalia J resisted according *Chevron* deference to the Federal Communication Commission ("FCC"), an independent regulatory agency, in determining the meaning of statutory terms previously construed differently by an appellate court. Before *Brand X*, it was unclear whether administrative agencies had interpretative autonomy once a court had construed an ambiguous statutory provision.[165]

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156 530 US 218 (2001) ["*Mead Corporation*"].

157 Ibid 227.

158 Tolley, supra note 150, 425.

159 Weaver, "The Emperor Has No Clothes: *Christensen, Mead* and Dual Deference Standards" (2002) 54 Admin L Rev 173, 181.

160 Ibid 202.

161 *Mead Corporation*, supra note 156, 246.

162 Scalia J's concurring judgment in *Equal Employment Opportunity Commission v Arabian American Oil Co* 499 US 244, 259–260 (1991). See also Scalia, "Judicial Deference to Administrative Interpretations of Law" [1989] Duke LJ 511.

163 545 US 967 (2005).

164 Ibid 1016.

165 See generally Bamberger, "Provisional Precedent: Protecting Flexibility in Administrative Policymaking" (2002) 77 NYUL Rev 1272.

The effective override of stare decisis by *Chevron* deference in *Brand X* provoked one commentator to argue that independent regulatory agencies such as the FCC should be accorded a lesser degree of judicial deference than the *Skidmore* level of scrutiny accorded to executive branch agencies:[166]

> It is odd to premise judicial deference to agency interpretations on separation of powers principles, as *Chevron* does, and not to question the soundness of the doctrine's applicability to agencies that, by their very nature, present constitutional difficulties on separation of powers grounds. And it is odd in a constitutional system with three defined branches for courts to give controlling deference to agencies that, not without reason, are commonly referred to as the "headless fourth branch".

Although the different constitutional and institutional conditions in the United States make appropriate comparison challenging, *Chevron* was considered as a potential model for the standard of review in WTO dispute settlement during the Uruguay Round negotiations. The majority of GATT Contracting Parties resisted the widespread application of a deferential standard of review to all WTO agreements, perhaps due to the fear of privileging rent-seeking interventionist national regulatory choices over multilateral imperatives. In the final days of the Uruguay Round, a diplomatic compromise was reached, whereby a more deferential standard of review would apply only to the anti-dumping text.[167] While the drafting of Article 17.6 of the Antidumping Agreement was influenced by *Chevron*, the text used the word "permissible" rather than "reasonable" as justification for national interpretations, limiting the uncritical transposition of *Chevron* to WTO dispute settlement.

Croley and Jackson have considered the applicability of *Chevron* to WTO dispute settlement, concluding that "[i]f Article 17.6 is to be applied in a *Chevron*-like way, its justification must come from outside the *Chevron* paradigm."[168] They base their argument on the ground that common rationales for deference under *Chevron* are not applicable in the WTO. The "expertise" argument, according to which agencies have

166 May, "Defining Deference Down: Independent Agencies and *Chevron* Deference" (2006) 58 Admin L Rev 429, 451.

167 The Appellate Body has made it clear that Article 17.6 is supplementary to Article 11 DSU and should not be interpreted as superseding it. See *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WTO Doc WT/DS184/AB/R, AB-2001-2 (2001), paras 53–55 (Report of the Appellate Body). A Ministerial Declaration, which required WTO Members to review Article 17.6 after three years "with a view to considering the question of whether it is capable of general application", did not result in an expansion of doctrinal scope. See *Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Decision adopted by WTO Trade Negotiations Committee, Uruguay, 15 December 1993) <http://www.wto.org/english/docs_e/legal_e/40-dadp2_e.htm> (at 4 August 2008).

168 Croley and Jackson, "WTO Dispute Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine" in Petersmann (ed), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997) 207.

more specialist expertise in interpreting their controlling statutes than courts, is reversed in the WTO context: the dispute settlement bodies are likely to have more technocratic experience with WTO law than national authorities. The "democracy" argument, where agencies rather than courts are answerable to both the President and Congress, is ill-suited to the WTO architecture. The "administrative efficiency" argument, where one agency rather than many federal courts resolves statutory ambiguity, does not apply in the WTO context, where recourse to dispute settlement interpretation rather than national authority interpretations optimizes consistency and predictability.[169] However, Croley and Jackson conclude by acknowledging the need for some form of deference to national regulatory decisions:[170]

> [I]f one is willing to recognize that nation states ought still to retain powers for effective governing of national (or local) democratic constituencies in a variety of contexts and cultures - perhaps using theories of "subsidiarity" - then a case can be made for at least some international deference to national decisions, even decisions regarding interpretations of international agreements.

The European Union: Subsidiarity's Labour's Lost?

This section examines the European Union principle of subsidiarity. Subsidiarity has a transnational pedigree in the allocation of competences between centralized and decentralized entities. However, its interpretation by the European Court of Justice to further integration demonstrates that deployment of a subsidiarity principle in WTO dispute settlement would not necessarily result in deference to Member State regulatory decisions.

The allocation of governmental functions and delineation of competences between states and centralized organs is a central concern of federalism.[171] It is dealt with in the European Union under the moniker of subsidiarity.[172] Introduced as a response to the "creeping competence" of the European Community beyond the establishment of a common market,[173] the inclusion of a codified subsidiarity principle in the Maastricht Treaty 1992, and subsequent interpretation by the European Court of Justice ("ECJ"), has diluted the intended normative effect of the principle.

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169 Ibid 203–207.

170 Ibid 208.

171 Compare the Tenth Amendment to the US Constitution, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

172 See generally Arnull et al (eds), *Wyatt and Dashwood's European Union Law* (5 ed, 2006) 97–110; Craig and De Búrca, *EU Law: Text, Cases and Materials* (4 ed, 2008) 100–107; Duff (ed), *Subsidiarity Within The European Community: A Federal Trust Report* (1993); Centre for Economic Policy Research, *Making Sense of Subsidiarity: How Much Centralization for Europe?* (1993).

173 Pollack, "Creeping Competence: The Expanding Agenda of the European Community" (1994) 14 Jnl Publ Pol 95.

Described by Margaret Thatcher as "gobbledegook",[174] subsidiarity has had a chequered track record, mainly due to the way in which the ECJ has aligned the principle with an integrationist *telos*.

The subsidiarity principle is intended to function as a brake on the exercise of lawmaking powers in the European Union.[175] It is not regarded as a standard of review principle in European Union administrative law. The ECJ has adopted a variable test for intensity of review of Member State measures, ranging from correctness to rationality standards, depending on the nature of the subject matter, the expertise of the first-instance decision maker, and the specificity of the jurisdictional condition.[176] There is no *Chevron*-like theory of deference in ECJ jurisprudence.

Subsidiarity is a potential regional model for reform of the current approach to standard of review in the WTO. Both the European Union principle of subsidiarity and WTO dispute settlement are concerned with the allocation of power between states and supranational institutions. Unlike the structural dissimilarities between the United States political system and the WTO architecture that impede transposition of *Chevron* deference, the European Union and WTO are both mixed administrations, where interpretive authority is balanced between states and centralized organs. Unlike the tacit integrationist mandate of European Union institutions,[177] international co-ordination rather than integration is the objective of the multilateral trading system. Indeed, European Union-like integration of WTO Member States would impair the development of the comparative advantage that is a precondition for welfare-enhancing reciprocal exchange. Once the integrationist connotations are stripped away, subsidiarity is revealed as predicated on the irrevocable proposition that no single level of organization is appropriate for all social functions.[178] It is this recognition of the need for balance between domestic political authority and the "incoming tide" of European Union law[179] that makes subsidiarity, rather than deference, a normatively desirable label for standard of review in WTO dispute settlement.

The origins of subsidiarity terminology can be traced to nineteenth century Germany, specifically Bishop Wilhelm von Ketteler's *droit*

174 Thatcher, cited in Bermann, supra note 95, 333. See also Robinson, "Constitutional Shifts in Europe and the US: Learning From Each Other" (1996) 32 Stanford J Int'l L 1, 10: "[T]he chief advantage of [subsidiarity] ... seems to be its capacity to mean all things to all interested parties – simultaneously".

175 Wyatt, "Subsidiarity: Is it Too Vague to be Effective as a Legal Principle?" in Nicolaidis and Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (2003) 86.

176 Craig, "Judicial Review, Intensity and Deference in EU Law" in Dyzenhaus (ed), *The Unity of Public Law* (2004) 339–340.

177 Shaw, "European Union Legal Studies in Crisis? Towards a New Dynamic" (1996) 16 Oxford J Legal Studies 231, 237.

178 Trachtman, "L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity" (1992) 33 Harv Int'l LJ 459, 461.

179 *Bulmer Ltd v Bollinger SA* [1974] Ch 401, 418 (CA), per Lord Denning MR.

subsidiare theory concerning the relationship between state and society.[180] Based on the view that excessive state intervention inhibited societal potential, Ketteler contended that such intervention could be limited through "intermediate groups" such as the Catholic Church.[181] Sensing the legitimating tenor of *droit subsidiare* for its institutional influence as an "intermediate group" between state and subject, the "social doctrine" of the Catholic Church purported to limit state intervention on the grounds of social autonomy and individual dignity:[182]

> Just as it is wrong to withdraw from the individual and commit to a group what private industry and enterprise can accomplish, so too it is an injustice, a grave evil and a disturbance of the right order, for a larger and a higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature, the true aim of all social activity should be to help members of the social body, but never to destroy them or absorb them.

Subsidiarity, a philosophical precept that was appropriated by the Social Catholicism movement, was appropriated in turn by European Community Member States and incorporated as a legal principle in the Maastricht Treaty.[183] This necessitated a conceptual extension from state–society relations to the interaction between states and supranational institutions. The renaming of the European Economic Community as the European Community at Maastricht signified a constitutional evolution, where convergence had transcended the common market objectives enshrined in the Treaty of Rome 1957 to encompass a plethora of additional federal functions. Subsidiarity emerged to counter what was perceived as a federal legitimacy deficit, where every treaty amendment resulted in a more pronounced centralization of regulatory authority in Brussels.[184] This federal legitimacy deficit was exacerbated by the shift from unanimity in decision making to majority voting instituted by the Single European Act 1987. In "curing" the Eurosclerosis of political co-ordination that existed under the unanimity rule, majority voting meant that Member States no longer possessed an effective veto power over the Community's legislative output.[185]

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180 On the historic origins of subsidiarity, see generally Wilke and Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community* (1990); Føllesdal, "Survey Article: Subsidiarity" (1998) 6 Journal of Political Philosophy 190.

181 Estella, *The EU Principle of Subsidiarity and Its Critique* (2002) 78–79.

182 Pius XI, *Quadragessimo Anno* (1936), cited in ibid 80.

183 Treaty Establishing the European Community, opened for signature 7 February 1992, 31 ILM 247 (entered into force 1 November 1993).

184 Koch, "Judicial Review and Global Federalism" (2001) 54 Admin L Rev 491, 493.

185 For a discussion of the "veto culture" that existed prior to the Single European Act 1987, see Teasdale, "The Life and Death of the Luxembourg Compromise" (1993) 31 J Common Mkt Studies 567.

The codified formulation of subsidiarity in Article 3b amending the Treaty Establishing the European Economic Community was the result of lengthy negotiations at Maastricht. It encompassed a "comparative efficiency" analysis,[186] and was restricted to the exercise, rather than the existence, of Community competences shared with Member States:[187]

> In the areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

In other words, if the Community has competence in a given area, is it appropriate that it adopts a particular act belonging to that area? The comparative efficiency approach attempts to answer an essentially political question with the language of technique, sacrificing the "political space for discussion ... on the altar of technocracy".[188] This involves a functionalist assessment of the respective capabilities of Member States and the European Union institution in question.[189] Estella condemns the reduction of the determination to *either* action by the Member States *or* Community institutions as perpetuating "old logic under a new label", rather than seeking to establish a trade-off between integration and diversity.[190] The fact that Article 5, paragraph 2 can be relied on to permit new transfers of competences to the Community demonstrates how entwined the European Union principle of subsidiarity is with centralist integration rather than democratically mandated diversity:[191]

> "Maastricht, The Musical" had ended with the EC heads of government singing "I'm Gonna Wash That Man Right Out of My Hair": "The man is [then European Commission President] Jacques Delors.... The shampoo is a fashionable brand known as subsidiarity. The dramatic irony is that Mr Delors himself invented this shampoo, and is seen singing happily with the leaders.

The principle of subsidiarity in the Maastricht Treaty was supplemented by Protocol No. 30, introduced by the Amsterdam Treaty 1997, which aimed to guarantee the "strict observance" of the principle and

186 Craig, *EU Administrative Law* (2006) 422 ["*EU Administrative Law*"].

187 See generally Cass, "The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community" (1992) 29 CML Rev 1107; Emiliou, "Subsidiarity: Panacea or Fig Leaf?" in O'Keeffe and Twomey (eds), *Legal Issues of the Maastricht Treaty* (1994).

188 Estella, supra note 181, 134.

189 See generally Marquardt, "Subsidiarity and Sovereignty in the European Union" (1994) 18 Fordham Int'l LJ 616.

190 Estella, supra note 181, 135.

191 The Economist, cited in Peterson, supra note 92, 116.

to ensure "consistent implementation by all Community institutions".[192] In addition to establishing procedural requirements, the Protocol included criteria, such as "transnational dimension" and "market distortion", to assist in considering the appropriateness of Community intervention.[193] More promisingly, Article 4 of the Protocol on Subsidiarity attached to the draft European Union Constitution provided for closer monitoring of the principle by national parliaments. The article required the European Commission to send all legislative proposals to national parliaments at the same time as to other Union institutions.[194]

Perhaps the most critical yardstick of the success of subsidiarity in combating a federal legitimacy deficit lies in the interpretation of the principle by the ECJ.[195] Although the primary responsibility for ensuring effective application of the subsidiarity principle lies with the "legislative" organs of the European Union — the Commission, the Council, and the European Parliament — the result of making subsidiarity a legal principle was that it is justiciable before the ECJ:[196]

> The "binding commitment" of subsidiarity worked as follows: if the Community succumbed to the siren songs of intervention, then the Court would strike down those measures considered to be unacceptable. Delegation by the ECJ of the power to review legislative measures on grounds of subsidiarity was therefore the essential mechanism for making a credible commitment to subsidiarity.

Yet the leading ECJ cases regarding subsidiarity have not delivered on this credible commitment, and rather are notable for their cursory treatment of the principle.[197] Discerning a "Janus-like quality" of review, where the powers of the Community are often extended rather than controlled, Craig recognizes that the ECJ has the unenviable task of adjudicating on the "complex socio-economic calculus" that a comparative efficiency analysis

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192 See generally de Búrca, "Reappraising Subsidiarity's Significance After Amsterdam" (Working Paper No 7, Jean Monnet Center, NYU School of Law, 1999).

193 Estella argues that the Amsterdam Protocol's attempt to "define *ex ante* criteria of a general and abstract character for the purpose of limiting central intervention stands little hope of success.... Even in those areas in which there seem to be clear reasons in favor of national, or even regional or local, regulation ... it will always be possible to argue that due to the close relationship between these areas and the development of the single market, some Community intervention will always be necessary". See Estella, supra note 181, 113–114.

194 See von Bogdandy and Bast, "The Union's Powers: A Question of Competence. The Vertical Order of Competences and Proposals for its Reform" (2002) 39 CML Rev 277.

195 See Swaine, "Subsidiarity and Self-Interest: Federalism at the European Court of Justice" (2000) 41 Harv Int'l LJ 1; de Búrca, "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 J Common Mkt Stud 214; Weiler, "Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration" (1993) 31 J Common Mkt Stud 417.

196 Estella, supra note 181, 179. For discussion of subsidiarity and justiciability, see Toth, "Is Subsidiarity Justiciable?" (1994) 19 EL Rev 268; Harrison, "Subsidiarity in Article 3b of the EC Treaty: Gobbledegook or Justiciable Principle?" (1996) 45 ICLQ 431.

197 See *United Kingdom v Council* (Case C-84/94) [1996] ECR I-5755; *Federal Republic of Germany v European Parliament and Council* (Case C-233/94) [1997] ECR I-2405.

demands.[198] One potential panacea, according to Craig, would be to promote a greater "culture of justification" in European Union institutions by requiring them to justify their exercise of competences in procedural terms.[199]

The ECJ's ineffectual treatment of subsidiarity also reflects a broader structural bias.[200] Given that the ECJ is one of the Community institutions, entrusted with the tasks of the Community (Article 7 ECT), the ECJ's independence in adjudicating on competence cases can be questioned. The ECJ's approach to subsidiarity can also be linked to its institutional legitimacy concerns, in implementing a politicized principle that potentially impedes integration.[201] From a principal-agent perspective, the delegation of review powers to the ECJ as an adjudicative agent with considerable autonomy illustrates how "the effectiveness of binding commitments is highly contingent on the nature of the commitment concerned and on the fact that independent agencies develop agendas that are not always in line with the principal's objectives".[202] Despite an apparent commitment to subsidiarity as a legal principle, the convergence agenda of European Union institutions threatens to steamroll, rather than show deference to, the democratic imperatives and regulatory diversity of Member States.

V TOWARDS A SUBSIDIARITY STANDARD OF REVIEW PRINCIPLE

The flawed implementation of subsidiarity in the European Union and the intimate link between *Chevron* deference and the constitutional separation of powers in the United States would seem to be weak bases from which to advance the creation of a more deferential subsidiarity standard of review principle in WTO dispute settlement. Croley and Jackson have clearly elucidated the structural dissimilarities between the United States political system and the WTO architecture that make doctrinal transposition problematic. Similarly, the way in which the European Union principle of subsidiarity has been harnessed to the ECJ's integration agenda is a cautionary tale in agency slack, rather than an exemplar of balanced power between states and international organizations. This article rejects the "bottom-up" transposition of either approach to WTO dispute settlement as normatively and politically undesirable. Direct inclusion of either

198 Craig, *EU Administrative Law*, supra note 186, 428–427.

199 Ibid 427. See also Bermann, supra note 95, 332, who recommends recasting subsidiarity as a procedural rather than a jurisdictional principle.

200 Davies, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time" (2006) 43 CML Rev 63, 64.

201 See Burley and Mattli, "Europe Before the Court: A Political Theory of Legal Integration" (1993) 47 Int'l Org 41, 70.

202 Estella, supra note 181, 7. To the extent that Member States want to reverse the ECJ's treaty interpretations, the only option is a revision of the treaties, requiring the unanimous agreement of Member States at an intergovernmental conference ("IGC") and ratification in all Member States.

administrative doctrine in multilateral dispute settlement would likely be met with widespread antipathy, and be perceived as privileging the approaches of powerful Member States to the detriment of the rule-based WTO system.[203] However, a consideration of both approaches in relation to principal-agent theory yields crucial insights in to how reform should be instituted in WTO dispute settlement.

Chevron deference is premised on the United States' separation of powers, where Congress and the elected president, not the federal courts, are the democratically legitimate political principals. Judicial intervention is not required to ensure the political accountability of executive regulatory agencies, given that those agencies are delegated power by Congress and are subject to presidential oversight and appointment: "[*Chevron*] deference places great weight on the legitimacy to be derived by linking agency decisions to an elected official – namely, the president".[204]

Lindseth draws *Chevron* deference and the European Union principle of subsidiarity together under the rubric of principal-agent theory and democratic legitimacy. He argues that European Union institutions can be likened to American independent, not executive, regulatory agencies because both exercise delegated normative power whilst evading democratically legitimate hierarchical supervision:[205]

> The ECJ and the national courts must begin with the premise that the locus of democratic legitimacy in the European Community remains with the Member States, and that the courts must construct public law doctrines – especially those relating to the interpretation of the extent of Community competences under the EC Treaty – in light of this fact.

Chevron draws attention to the importance of democratically legitimate hierarchical supervision as a precondition for deference. It is the absence of such supervision in the European Union that creates a democratic deficit and leads to European Union institutions being likened to an independent "fourth branch of government".[206] In the recent *Brand X* litigation in the United States, *Chevron* deference was applied to the FCC, an independent regulatory agency. The political accountability rationale for *Chevron* deference, where Congressional oversight vitiates the need for curial

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203 With reference to the implementation of democracy as a normative basis for global administrative law, Chimni discusses the potential for the privileging of current powerholders and the entrenchment of Western good governance ideals. See Chimni, "Co-option and Resistance: Two Faces of Global Administrative Law" (2005) 37 NYUJ Int'l Law & Pol 799.

204 Aman Jr, supra note 149, 352–353. See also Kagan, "Presidential Administration" (2001) 114 Harv L Rev 2245, 2248, who argues that the post-Reagan US administrative state has undergone a dramatic transformation, "making the regulatory activity of the executive branch agencies more and more an extension of the President's own policy and political agenda".

205 Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community" (1999) 99 Colum L Rev 628, 699.

206 See Majone, "The European Community as a Fourth Branch of Government" in Brüggemeir (ed), *Verfassung für ein Ziviles Europa* (1994).

intervention, was largely absent in this case. One commentator has subsequently argued that deference should be "defined down" to a *Skidmore* level of scrutiny in the case of independent regulatory agencies.[207]

For Lindseth, the absence of democratically legitimate hierarchical supervision favours a *less* deferential standard of review in relation to independent regulatory agencies and a *more* deferential standard of review in relation to the ECJ:[208]

> Where the "legislative" intent of the Treaty is ambiguous on a particular point, the European courts should, in effect, apply a *Chevron*-type interpretative presumption in favor of national institutions and against the Community qua supranational administrative agency, in order to restrict the scope of the latter's normative autonomy relative to the more democratically legitimate Member States.

A persuasive analogy can be drawn between the Appellate Body, United States independent regulatory agencies, and the ECJ. Common to all is the lack of effective democratically legitimate hierarchical oversight. If the democratic deficit is a combined question of the distance from Parliamentary accountability and subsidiarity, then subsidiarity at least has the normative potential to regain some of the accountability and legitimacy that is lost in supranational delegation. Standards of review in WTO dispute settlement, as ex ante control mechanisms, navigate the terrain between national regulatory priorities and multilateral co-ordination imperatives, and can either function to widen the accountability gap or to bridge it. The concept of subsidiarity acknowledges the need for balance between states and international organizations, and evidences the "profound cultural desire for democratically legitimate political control".[209] It is invaluable to consider in relation to standards of review.

Is it possible to emancipate subsidiarity from its integrationist shackles in the European Union context, realigning it along a more deferential trajectory so that decisions are taken as closely as possible to concerned constituents? According to Davies, the central flaw of the European Union principle of subsidiarity was that it failed to institute an effective balance between Member States and Community interests:[210]

> [I]t assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work.... How often the choir practices may be left to the priest to decide.

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207 May, supra note 166, 453. Gossett has also argued that the political accountability rationale in *Chevron* "would imply that independent agencies might not deserve *Chevron* deference". See Gossett, "*Chevron*, Take Two: Deference to Revised Agency Interpretations of Statutes" (1997) 64 U Chi L Rev 681, 689 n 40.

208 Lindseth, supra note 205, 699–700.

209 Ibid 737.

210 Davies, supra note 200, 67–68, 78.

Schilling attributes the problems with the Maastricht conception of subsidiarity to its expression as a rule rather than a principle, in the Dworkinian sense.[211] While rules operate in an "all-or-nothing fashion",[212] a principle is taken into account as a consideration "inclining in one direction or another".[213] Principles cannot lead to a determinative result because their relative weight must be balanced against conflicting principles.[214] Although often described as a principle, Article 5, paragraph 2 of the ECT is technically a rule that allows the Community to legislate within its concurrent competences, when the "comparative efficiency" analysis comes out in its favour. This framework does not lend itself to a weighing of intersecting principles. Given the ECJ's interpretation of the Maastricht formulation, it would be preferable for subsidiarity to operate as a principle by which to interpret rules in WTO dispute settlement, rather than be codified as a formal rule and become susceptible to agency slack.[215] Moreover, it is highly likely that Member State preference heterogeneity and consensus voting rules for textual amendments to the DSU would prevent the creation of such a rule.

The formulation of subsidiarity as a standard of review principle, rather than rule, in the WTO dispute settlement context, does not remove the risk of agency slack: it arguably exacerbates it. The implementation of such a principle currently remains in the Appellate Body's procedural discretion (Article 17.9 DSU). For a subsidiarity standard of review principle to operate as an effective control mechanism, there would have to be some agency incentives for the Appellate Body to implement it. In terms of incentives, it is useful to recall the way in which European Union institutions, and earlier the Catholic Church, recognized that subsidiarity could operate as a tacit legitimating device. Howse and Nicolaidis' Global Subsidiarity Model confronts this tendency directly, but views subsidiarity optimistically as a democratically legitimate mechanism by which to constitutionalize the WTO.[216] By iteratively applying a subsidiarity standard of review principle when interpreting WTO law, the Appellate Body would "stoop to conquer", understanding that short-term decentralization is the trade-off for legitimate centralized authority in the long-term.

Implementation of a subsidiarity standard of review principle would inevitably lead to the criticism that WTO dispute settlement had become

211 Schilling, "Subsidiarity as a Rule and a Principle, or: Taking Subsidiarity Seriously" (Working Paper No 10, Jean Monnet Center, NYU School of Law, 1995) 5–7.

212 Dworkin, *Taking Rights Seriously* (1977) 24.

213 Ibid 26.

214 Ibid 24–28.

215 Bourgeois, supra note 93, 46. For a useful framework of analysis for the use of principles in WTO dispute settlement, see Mitchell, "The Legal Basis for Using Principles in WTO Disputes" (2007) 10 J Int'l Econ L 795.

216 Howse and Nicolaidis, supra note 96, 91. Pollack argues that constitutionalization holds out the greatest promise for reconciling the benefits of delegation with the normative desirability of democratic accountability. See Pollack, *Engines of European Integration*, supra note 2, 407–414. For a comprehensive overview of WTO constitutionalization scholarship, see Cass, *Constitutionalization of the WTO*, supra note 106.

a "tower of Babel" in deferring to Member States' legal interpretations. This objection should not be dismissed lightly, given that Article 3.2 DSU entrusts the dispute settlement system with the task of providing security and predictability to the multilateral trading system. On this view, deference is potentially synonymous with cession to protectionism, meaning regulatory capture at the national level by rent-seeking producer collectives and NGOs. Tumlir has described protectionism as a constitutional failure in states where governments take market-distorting action for the purpose of conferring economic advantages upon particular sectors of the community, to the detriment of collective welfare gains from trade liberalization.[217] Given that those who desire participation rights in dispute settlement are often experts and enthusiasts,[218] opening the WTO to a wider array of interests under the rhetoric of increased accountability could result in outcomes that are less representative of the interests of the wider electorate.[219]

If subsidiarity is about privileging the politics of the local, the implementation of a more deferential standard of review in WTO dispute settlement would have to be met by increased procedural vigilance at the national level in order to avoid protectionism. The agency cost for Member State principals is the need for adequate domestic institutional capacity, expertise, and representativeness in the execution of government measures and trade remedy national investigations. Pauwelyn contends that WTO dispute settlement organs can filter protectionist concerns by placing strict procedural obligations, such as risk analysis procedures, on Member States.[220] Provided that domestic importers and consumers, as well as producers, are involved in such analyses, he argues that this is where the WTO "could and should stop", rather than adjudicating on the substantive merits of a measure.[221] This recalls the institutional sensitivity tenet of the Global Subsidiarity Model, which recognizes the superior competence of WTO dispute settlement organs in relation to procedural norms, but at the same time mandates responsiveness to national regulatory measures.

Dyzenhaus' notion of "deference as respect" is also instructive here, requiring "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision".[222] Placing a justificatory premium on the reasons advanced in favour of an administrative outcome, Dyzenhaus promotes a "legal culture of justification",[223] where the strength

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217 Tumlir, cited in Hudec, *Essays on the Nature of International Trade Law* (1999) 133.

218 Shapiro, "Administrative Law Unbounded: Reflections on Government and Governance" (2001) 8 Ind J Global Legal Stud 369, 374.

219 Kahler, "Defining Accountability Up: the Global Economic Multilaterals" (2004) 39 Gov't & Oppos 132, 142.

220 Pauwelyn, "Does the WTO Stand for 'Deference to' or 'Interference with' National Health Authorities When Applying the Agreement on Sanitary and Phytosanitary Measures?" in Cottier and Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (2003) 186.

221 Ibid.

222 Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Taggart (ed) *The Province of Administrative Law* (1997) 286.

223 Ibid 302. For an approach to deference based on reason-giving and a "legal culture of justification" in relation to the national treatment obligation in the WTO, see Trujillo, "Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO" (2007) 40 Cornell Int'l LJ 201.

of an agency's reasoning is instrumental to the level of deference accorded. The challenge for WTO dispute settlement organs in a "deference as respect" paradigm is to not be seduced from legality to merits review in evaluating the reasons proffered for a national authority decision.[224] The utility of "deference as respect" for WTO dispute settlement is that it acknowledges the need for "judicial sensitivity to particular tribunals' own sense of how best they can respond to their mandates".[225] Such sensitivity to national authorities and their democratic prerogatives would affirm accountability and operate as an salutary reminder that it is Member State principals who ultimately "guard the guardians" in multilateral trade governance.[226]

It is argued that subsidiarity, and the flexibility it permits, constitutes a normatively desirable foundation from which to reconstruct the relations between Member States and the Appellate Body.[227] This is with the proviso that adequate procedural standards must be observed at the Member State level to ensure representativeness. Detractors of a subsidiarity standard of review may well opine that a principle that purports to increase accountability to Member States whilst at the same time legitimating the centralized dispute settlement institutions is devoid of fixed content. It is suggested that accountability and legitimacy should not be seen as competing aims, but as complementary objectives in reforming the standard of review in WTO dispute settlement. Even if subsidiarity is just a label, masking the *realpolitik* of what "really" goes on in the Appellate Body, it improves on the current "objective assessment" textual grant of authority by functioning as a mediating principle that is sensitive to the need for balance between Member States and WTO dispute settlement.

VI CONCLUSION

Carol Harlow, Emeritus Professor of Law at the London School of Economics, concludes her text on accountability in the European Union thus:[228]

> Some readers, gripped by the strange magic of globalization, transnational governance, and integration, will inevitably see [a] decentralized solution as a move back into national trenches and

224 Fox-Decent, "The Internal Morality of Administration: The Form and Structure of Reasonableness" in Dyzenhaus (ed), *The Unity of Public Law* (2004) 156.

225 Dyzenhaus, supra note 222, 307.

226 See Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (1988).

227 In the European Union context, see MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (1999) ch 9. Contrast Føllesdal, who argues that the refusal of national governments to extend subsidiarity below the level of the state apparatus demonstrates how states are "institutionally entrenched in ways difficult to justify by any theory of subsidiarity". See Føllesdal, "Subsidiarity and Democratic Deliberation" in Eriksen and Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?* (2000) 106.

228 Harlow, *Accountability in the European Union* (2002) 191–192.

> even a retrograde step back towards the perceived factionalism of national systems of government. This is emphatically not the intention. Until the political accountability to which we have, in the course of the twentieth century, become used to in the nation state, is replicated at transnational level, we would be wise not to entrust transnational organizms with too much power. We should remain in a state of 'provisional suprastatism' from which it is still possible to step back. A pluralist, decentralized, confederal solution, based firmly on the principles of subsidiarity and agency, will hasten the evolution of a union of nations firmly grounded in collaboration and consensus. 'Back to the Future', in other words.

The author agrees with the sentiments expressed by Harlow, albeit in the context of the WTO. The principles of subsidiarity and agency have been discussed here in relation to the issue of standards of review in WTO dispute settlement. It has been argued that the creation of a subsidiarity standard of review principle has the potential to enhance accountability to Member States and to increase the legitimacy of the WTO. A subsidiarity standard of review is more sensitive to the need for institutional balance between national authorities in Member States and the Appellate Body than the current "objective assessment" approach. A subsidiarity standard of review would help to recover the spirit of embedded liberalism in trade governance. Fundamentally, a subsidiarity standard of review accords with the notion that Member States are the democratically legitimate principals in a relationship of supranational delegation with WTO dispute settlement.