A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law

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A. Introduction

Lawmaking by judicial institutions requires legitimation. As international courts gradually play an ever more significant part in the shaping of international law,[1] they share with any other lawmaker the need for a

* LL.M. (Cambridge), LL.M. (Heidelberg). The author would like to thank Armin von Bogdandy, Ingo Venzke and Isabel Feichtner for their invaluable comments as well as the members of the *Dienstagsrunde* at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, for discussion on earlier drafts. This article develops ideas that are part of the author's ongoing Ph.D. project.

1 Participation in the process of international lawmaking can take two forms. First, international adjudicators may exercise discretion in specifying a general rule of international law when applying it to a specific dispute. The part of the final decision that is left to their discretion constitutes lawmaking. Second, pronouncements of international adjudicators do not confine to the settlement of specific disputes, but may also exert normative influence beyond the disputing parties. For the normative effects of judicial decisions beyond the settlement of specific disputes, *see* Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue 986-989; Marc Jacob, *Precedents: Lawmaking Through International Adjudication,* in this issue 1014-1018; Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy*, in this issue 1124.

A. von Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking*,
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 236,
DOI 10.1007/978-3-642-29587-4_7,

convincing basis of legitimacy.[2] In the case of international courts, however, this need has to be addressed by taking into account their special function: that is, to review decisions made by other lawmakers (mainly domestic). The question of the legitimacy of judicial institutions is thus crucially connected with the standard they apply in reviewing such decisions.

In the following, it will be examined whether a meaningful response to this question can be offered through the development of procedural standards of international adjudication. *Procedural*, as described here, is a standard of review that focuses on the procedure that was followed for the adoption of the challenged decision. The court does not, therefore, (in contrast to *substantive* review) second-guess the substance of the reviewed decision, but rather examines whether the respective process meets certain basic standards. Among these standards, especially important are those securing the participation of the parties affected by the decision. Accordingly, this approach views judicial lawmaking that sets procedural standards as less problematic than substantive lawmaking and invites courts to develop their case law accordingly.

To support the thesis that such a procedural understanding would enhance the legitimacy of international adjudication, arguments will be drawn from democratic deliberative theory. From this perspective, it will be argued that international adjudicators meet better democratic standards when they engage in the control of the lawmaking *processes* of other institutions, rather than pronouncing on the *substantive* merits of their outcome. International courts are here perceived as better placed to shape the conditions of procedural legitimacy by assuming a process-perfecting task of regulation with international repercussions.[3] This procedurally oriented standard of review could be a convincing alternative for the cases where adjudicators are called to apply particularly vague provisions. Instead of developing their own substantive rules through the concretization of open-ended clauses, courts could defer to the decisions of other lawmakers, under the condition that they are adopted through legitimate procedures.

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[2] *See* von Bogdandy & Venzke (note 1), 992. On the exercise of authority by international organizations, *see* Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities,* 9 GERMAN LAW JOURNAL 1375 (2008).

[3] Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE LAW JOURNAL 1063, 1064 (1980).

The immediate background of this procedural approach forms a challenge central for contemporary international law in general: the question of the extraterritorial effects of domestic lawmaking. One of the major features of globalization is the aggravation of an old deficiency of a world organized along territorial lines: domestic decisions can affect interests[4] that have no standing in the process of their adoption. This incongruity between the actual reach of a polity's public authority and participation opportunities goes directly into the heart of authority and legitimacy questions.[5] It will be argued that judicial lawmaking in this procedural-participatory direction has the potential to bridge a part of the gap between authority and participation. In this way, it not only enhances the legitimacy of international adjudication, but also that of domestic decision-making.

Of the potential mechanisms that can be utilized by courts in this direction, this article will focus on the judicial development of participation rights. That is, rights that allow affected interests to have their views considered in the making of a norm with the potential to affect them. This mechanism has been utilized in order to address legitimacy concerns in the field of administrative law, from which interesting lessons can be learnt for the relevant discussions at the international level.

These general assumptions will be investigated in the case of WTO law and its adjudicating bodies. There are mainly three reasons for this choice. The first has to do with the ambit of international trade rules incorporated into the WTO agreements. These touch upon regulatory issues from environmental to health standards for 153 countries.[6] Second, the WTO regime disposes of an outstanding dispute resolution system that has proven both prolific and effective. This part of the institutional architecture of the WTO is not however paralleled by the most important part of a "usual" collective decision-making system: the WTO cru-

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[4] Persons, but also collectively organized interests, like those represented by states.

[5] *See* Armin von Bogdandy, *Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization,* in: INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, 103, 126 (Stefan Griller ed., 2003).

[6] As of 23 July 2010, *see* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

cially lacks an institutionalized legislating process.[7] These two characteristics make the WTO a striking case in which the balance of international authority decisively tilts to the adjudicating end rather than the legislating one. Third, WTO rules and case law exist that provide actual examples of the procedural understanding of international adjudication described above.

This article will proceed by outlining a general procedural understanding of judicial review, with special focus on the potential role of participation rights (Section B). In Section C, the validity of the legitimacy concerns raised by the lawmaking function of the WTO adjudicating institutions will be shortly addressed. Lastly, Section D will investigate whether these concerns can be met by the application of a procedural approach with special reference to the relevant WTO treaty provisions and the procedural repercussions of the *U.S. – Shrimp* decisions.

B. Judicial Lawmaking and the Quest for (Procedural) Legitimacy: The Example of Administrative Law

Judicial lawmaking has long been a difficult question for domestic public law. Although a creative moment inheres in the tasks of every adjudicating institution,[8] under some conditions it has the potential to upset the arrangements of a structure based on the separation of powers. In the following, the conditions under which judicial lawmaking can raise significant legitimacy concerns will be shortly presented (subsection I). Then, the potential of addressing these concerns through a procedural approach based on participation rights will be investigated (subsection II).

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[7] Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship*, 5 MAX PLANCK UNITED NATIONS YEARBOOK 609, 617 (2001).

[8] Defining is here of course the analysis of Kelsen, according to whom "[a]pplication of law is at the same time creation of law," HANS KELSEN, PURE THEORY OF LAW 234–37 (1960, transl. by Max Knight, 1967). In the words of Lauterpacht, "judicial law-making is a permanent feature of administration of justice in every society," HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 155 (1982). To that extent, the question of courts as lawmakers centres around the linguistic truism that there is a creative moment inherent in any form of interpretation.

I. Judicial Lawmaking as a Question of Legitimacy

The lawmaking potential of judicial institutions particularly appears when a court competes with another decision-maker for the ultimate interpretation of a norm. For example, the judicial review of an administrative decision interpreting the clause "public interest" in a certain way (e.g. by promulgating a specific secondary rule) means that the court has the chance to influence the content of this rule. If it is different, the interpretation given by the court takes precedence over that given by the administrative authority.

Such judicial lawmaking has a greater potential, the vaguer the relevant clauses are. Open-ended provisions confer to the body entrusted with their interpretation respectively broad discretion.[9] Although this kind of uncertainty is "the price to be paid for the use of general classifying terms,"[10] the judicial "sovereign prerogative of choice"[11] can be substantially wider when the court is called to decide upon clauses or concepts like "necessary," "equal," "reasonable," "least restrictive," or "adequate." These norms establish to a significant extent the adjudicator as the arbiter of what the law *should be*.[12] This observation allows the contours of judicial institutions as lawmakers to become clearer and courts to become visible as instances of lawmaking authority. The picture beyond the frame of a supposedly mechanical, cognitive function of courts may, however, create uneasiness.

Seen as lawmakers, courts can no longer divert the question of their legitimacy to the decisions of other lawmakers. Their legitimacy becomes an issue of separate concern,[13] and their discretion emerges as delegation

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[9] Martin Shapiro, *Judicial Delegation Doctrines: The US, Britain and France*, 25 WEST EUROPEAN POLITICS 173, 175 (2002).

[10] HERBERT L.A. HART, THE CONCEPT OF LAW 125 (1961).

[11] OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 239 (1920). Hart also refers to "choice," HART (note 10), 124.

[12] As they actually defer to the adjudicator the assessment on proportionality, the question of which lies in the heart of the concept of justice, Aristotle, *Nicomachean Ethics*, in: 19 ARISTOTLE IN 23 VOLUMES, 1131a (transl. by Harris Rackham, 1934).

[13] Regarding lawmaking at the level of constitutional adjudication, *see* from different perspectives JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 293 & 295 (1994); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 & 23

of authority to institutions beyond the reach of democratic constituencies. The existence of such authority challenges, however, one of the central premises of democratic government: namely, that public authority should be traced back to processes to which the affected individuals can (directly or indirectly) participate and influence.[14] Institutions exercising public authority without an adequate connection to the affected subjects could be understood as frustrating a central premise of democratic decision-making[15] and an understanding of legitimacy based on the process conditions of the democratic genesis of law.[16]

To say that *some* connection is needed between the lawmaker and the addressee of the respective norm is, of course, one thing. What *actually* qualifies as an adequate connection in this sense has been the long-disputed object of democratic theory. Although neither a survey of democratic theories nor their relevance for decision-making at the international level fall within the scope of this investigation, the following argument needs an indicator against which the function of international adjudicating bodies – and of the WTO in particular – is to be assessed.

The basic premise of this understanding is that lawmaking fulfills better democracy-based standards of legitimacy, when the law emerges from procedures that allow for the effective consideration of the largest possible number of the subjects it affects.[17] From this claim follows the notion that lawmaking is more legitimate, the more open it is to the consideration of affected interests and their participation in the relevant processes.[18] That is to say, that all subjects whose freedom is restricted

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(1986); ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, VERFASSUNG, DEMOKRATIE 189 *et seq.* (1991); MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 149 (1988).

[14] Aristotle, *Politics*, in: 21 ARISTOTLE IN 23 VOLUMES, 6.1317b (transl. by Harris Rackham, 1944).

[15] To that extent Bickel's remark that "[constitutional] review is a deviant institution in American democracy" is apt, BICKEL (note 13), 16–18.

[16] HABERMAS (note 13), 321.

[17] Furthermore, such a procedure is considered more effective when it allows for the reason-responsive exchange of normative arguments, Jürgen Habermas, *Law and Morality*, in: 8 THE TANNER LECTURES ON HUMAN VALUES, 219 & 243 (Sterling M. McMurrin ed., 1988).

[18] ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 127 (1989).

by a collective decision enjoy in principle a categorical right[19] to be considered before its adoption.

From this line of argumentation two points are most relevant for the following. First, in cases where a collective decision affects subjects beyond the membership of the association producing it (external effects), a coherent democratic theory would postulate that the respective lawmaking process is open to the effective consideration of these "external" interests as well. For example, in the case of a community organizing its decision-making processes along territorial or citizenship lines,[20] but making a decision that affects subjects beyond these lines,[21] the latter would enjoy a democracy-based claim to have their views considered in the respective procedure.

Second, an institution entrusted with the power to review collective decisions would be exercising its authority in conformity with this concept of legitimacy when defining the – procedural – conditions of adequate consideration.[22] Thus, when the applicable law uses vague clauses that leave substantial discretion to the adjudicator, and a lawmaker with a better capacity to consider the affected interests exists (for example, a parliament or an administrative authority), it is more legitimate to defer the decision to him, rather than have a court decide the substance of the issue.

Adjudicating mechanisms are perceived here as generally not meeting the requirements to function as the proper fora for substantive collective lawmaking.[23] Neither is their political unaccountability sufficient to

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[19] *Id.*, 122 & 127.

[20] The most prominent example in Western-type democracies is the legitimacy chain based on regular elections.

[21] This can be for example a decision with external environmental or security repercussions.

[22] DAHL (note 18), 188 & 191. Very influential to this "participation-oriented, representation reinforcing approach to judicial review" has been Ely's theory, JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Although arguing for an "antitrust approach" to constitutional adjudication, which "intervenes only when the … political market is systematically malfunctioning" (*id.*, 87), rather than from a deliberative point of view, Ely's theory meets many of the concerns regarding the establishment of constitutional adjudication.

[23] From another perspective argue MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 101 (1982); and RONALD

elevate them to the level of perfectly impartial moral reasoners,[24] as sometimes argued, nor do they possess the superior epistemic qualities to discharge an overwhelming task of platonic guardianship.[25] Beyond that, the essentially bipolar character of adjudication allows for the consideration of only a limited number of different views, and that in an environment of already entrenched positions. Moreover, as in many occasions, the importance of judicial decisions goes beyond the disputing parties and stabilizes the normative expectations of other actors as well,[26] interests can be affected that could not have their views considered during the relevant judicial process.

Especially when courts review parliamentary decisions, judicial lawmaking can raise much more substantial concerns than in other cases. What characterizes ordinary statutory adjudication is that the court offers an interpretation of the relevant norm open to rebuttal by the legislature enacting a subsequent rule.[27] In the case of courts, however, effectively applying norms that circumscribe the powers of an ordinary representative assembly – as is the case with constitutional or some international courts – the pronouncements of the judiciary share the (higher) rung of the law that constitutes the respective legal community.

Under these circumstances, the due function of review mechanisms seems to be closer to the development of the procedural conditions under which substantive norms are produced; their elaboration in a way

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DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 344 (1996) (disconnecting "matters of principle" from "ordinary politics" and assigning them to courts "whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence").

[24] *See* Jeremy Waldron, *Judges as moral reasoners,* 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 2 (2009) (investigating the question of whether judges have superior skills when it comes to addressing moral issues).

[25] The analogy of courts (especially constitutional or international) enjoying the power to overrule majoritarian decisions on the basis of superior moral qualities with the platonic institution of guardianship is often made, *see* LEARNED HAND, THE BILL OF RIGHTS 73–74 (1958).

[26] *See* the contributions in this issue referred to above (note 1). For the stabilization of normative expectations as a central function of law, *see* NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 151 (1995) and for the application of this concept in addressing the lawmaking function of international courts, *see* von Bogdandy & Venzke (note 1), 987 & 998.

[27] CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 249 (2007).

that excludes no (or at least less) affected interest(s) from meaningful structures of deliberative consideration. What emerges as the proper standard of review in this sense is procedural: it ensures the deliberative and inclusive character of the will-formation that ultimately becomes the reviewed norm.[28] As the objective of such review is to ensure reason-responsive participation, violations of a broad spectrum of rights ensuring the adequate consideration of affected subjects fall within the ambit of judicial review.[29] Beyond this procedural infrastructure however, decisions on substantive issues of the polity should be at the sole disposal of the respective, deliberative, collective institutions[30] and fall within the realm of politics.[31]

II. Procedural Judicial Lawmaking Is Still Lawmaking

Of course, the task of judicial institutions in securing the procedural conditions of lawmaking is neither automatic nor free from discretionary assessments. The approach presented here should not be understood as an effort to conceal the inherently creative task of adjudication under a procedural guise. It does not seek to replace the fallacious picture of a court allegedly mechanically arriving at predetermined decisions, with its procedural version. Such an understanding would simply reduce the inaccurate description of the adjudicator as *bouche de la loi* to an equally misleading construct of *bouche de la loi procédurale*.

Judicial application of procedural law also includes elements of discretion. The identification of the parties that should enjoy access to a particular decision-making process and the enforcement of the relevant rights entail an exercise of choice. The procedural orientated adjudica-

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[28] *See* HABERMAS (note 13), 340.

[29] Including all rights necessary for the free, informed and effective participation of the individual, *see* DAHL (note 18), 178.

[30] According to Habermas, "[t]he democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy. But what provides this procedure with its legitimizing force? … [D]emocratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable," JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 448 (1997).

[31] DAHL (note 18), 182.

tor continues thus to be a lawmaker. First, he makes the particular norm that settles the specific dispute before him, in the form of the individual decision that sets the appropriate procedural standards. Beyond that, in the cases where the persuasive function of its decision is such as to shape the normative expectations of parties beyond the disputing ones, he can even make general procedural law. In any case, the exercise of discretion remains a structural characteristic of adjudication also under this procedural understanding.

Nevertheless, this "minimum" discretion is here understood to be in many cases the best alternative: procedural review imposes fewer demands on the courts' institutional capacities than substantive review. Deciding under a procedural-oriented standard, the court is not expected to determine whether the reviewed decision-maker reached *the correct decision*, but only that he made *a procedurally correct decision*. Where the applicable law leaves broad discretion to an adjudicator, it is more in conformity with deliberative-democratic standards to exercise the procedural aspect of this discretion than the substantive one. This enhanced legitimacy does not derive from the fact that, allegedly in this case, the court abstains from lawmaking altogether (it only abstains from *substantive* lawmaking), but from the legitimacy we ascribe to decision-making that fulfills better deliberative-participatory standards.

Summing up, the claim made here, and used as the normative backdrop for the assessment of the function of the WTO adjudicating mechanism, is that courts shaping the conditions of deliberative participatory decision-making yield results that better conform to the concept of democratic government adopted here than courts second-guessing substantive collective decision-making.

III. The Potential of Participation Rights: Judicial Lawmaking and Administrative Law

From the different possible strategies for addressing the question of legitimacy from a procedural perspective, the following will focus on the potential role of a legal institution developed at the level of administrative law: participation rights. That is, rights that allow an interested party to participate directly in the process of adopting an administrative

determination that affects him. This approach draws upon insights from the function of this legal institution at the administrative law level.[32]

Administrative law can indeed offer invaluable bearings regarding the questions of legitimate decision-making and judicial review for two reasons. First, it is a discipline paradigmatically engaged with the balance between judicial review and a form of decision-making which itself raises legitimacy concerns, as administrative decision-making does on occasion. Second, it offers a concept of participation beyond the parliamentary and electoral-orientated one; and this is an approach particularly appealing for governance at the international level.

1. Balancing Between Judicial Lawmaking and Administrative Discretion

The delegation of discretionary decision-making powers to administrative agencies has always presented a formidable challenge to democratic constitutional systems.[33] The exercise of coercive authority by unelected officials that is not adequately circumscribed by parliamentary general law brings majoritarian and electoral-based concepts of legitimacy to their limits. An administrator exercising discretion does not only administrate or execute the law, but effectively creates it. In short, administrative discretion challenges the continuity of the "chain of le-

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[32] An approach with a history going back to the creation of the International Trade Organization (ITO), *see* Seymour J. Rubin, *The Judicial Review Problem in the International Trade Organization*, 63 HARVARD LAW REVIEW 78, 97 (1949). From the literature adopting this perspective analyzing WTO law, path breaking is the work of Richard Stewart, *see* Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?* 68 LAW AND CONTEMPORARY PROBLEMS 63 (2005); Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, NEW YORK UNIVERSITY SCHOOL OF LAW, PUBLIC LAW & LEGAL THEORY RESEARCH PAPERS SERIES No. 09–71, 1 (2009). Regarding participation rights in particular, an important part of the recent literature addresses legitimacy concerns focusing on their function, *see*, *e.g.*, Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues,* 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW 751 (2008).

[33] *See* RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 35 *et seq.* (2009).

gitimacy" connecting coercion (through the relevant administrative action) to democratic participation (through parliamentary lawmaking).[34]

Judicial review of this discretion presents then the additional complication of either replacing a democratically problematic decision-maker (administration) with a potentially even more problematic one (court), or leaving administrative discretion completely uncontrolled.[35] To the extent that both institutions enjoy discretion, such decisions are authoritative in the classical sense,[36] and both present comparable legitimacy questions. Reviewing courts, having to cope with the existence of authority beyond majoritarian-representative institutions in this sense, developed a series of strategies to provide for a response and ease the tension with the principles of democratic self-governance.[37]

2. The Judicial Development of (More) Legitimate Procedures

In the event that a parliament decides to delegate substantial parts of decision-making authority to the administration through broadly drafted statutes, the reviewing courts are left with essentially two options. First, they can review the decisions of administrative authorities on substantive grounds, basing their own perception of proper social regulation on the relevant broadly drafted clauses. Second, they can defer this task to the administration, ensuring however that it decides after the due consideration of the interests it affects. Under this second op-

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[34] *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARVARD LAW REVIEW 1667, 1676 (1975).

[35] *See* Shapiro (note 9), 175 ("… when the legislature as principal chooses to police its delegation of law making authority to its administrative agent through the institution of judicial review, unavoidably it has also chosen to delegate law making authority to courts. And so it must confront the problem of policing them as well."). For a comparative approach of the problem, *see* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 19–21 (1989). For only an introduction to the discussion in the U.S., *see* PIERCE, SHAPIRO & VERKUIL (note 33), 364 *et seq*.

[36] In the sense that they restrict the freedom of their addressee as the decision-maker thinks expedient, THOMAS HOBBES, LEVIATHAN ch. XVII, para. 13 (Edwin Curley ed., 1994).

[37] *See* the seminal analysis of Stewart (note 34); MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1998); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARVARD LAW REVIEW 1511 (1992).

tion, the reviewing courts are thought to assume the role of defining the conditions for a more open, deliberative and thus legitimate process.[38] Administrative procedure itself is thus seen as having a role beyond the simple execution of the legislative intention or the protection of private autonomy. Courts are called to investigate its potential as a "surrogate political process"[39] and shape it accordingly. A characteristic picture of this understanding can be given by the example of the reformation of U.S. administrative law, plastically described by Professor Stewart.[40]

Facing the vast expansion of administrative discretion after the New Deal, U.S. courts had to address the crisis of legitimacy created by the transference of an important part of lawmaking power to the competence of administrative agencies. One of the strategies they adopted in addressing this challenge was to shape administrative procedure in a way that could afford affected interests with the opportunity to influence its outcome. In order to ensure such an opportunity, U.S. courts expanded due process protection (at the level of individualized decision-making), liberalized standing requirements and demanded procedural devices beyond those explicitly provided for in the respective statutes.[41] From the rather sparse relevant statutory requirements, U.S. courts[42] thus developed a series of elaborate procedural conditions[43] significantly contributing to the broadening of participation in administrative decision-making.[44]

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[38] *See* Stewart (note 34), 1723 (explaining the role of hearing rights to the transformation of U.S. administrative law into a model of interest representation); SHAPIRO (note 37), 128.

[39] Stewart (note 34), 1670.

[40] *Id*. *See* also SHAPIRO (note 37).

[41] *See* Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARVARD LAW REVIEW 505, 529 (1985).

[42] An especially important role to this direction played the judges sitting on the bench of the United States Court of Appeals for the District of Columbia (D.C. Circuit), which reviews more administrative rules and orders that any other federal court, *see* Michael Asimow, *Delegated Legislation: United States and United Kingdom*, 3 OXFORD JOURNAL OF LEGAL STUDIES 253, 256 (1983); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 THE SUPREME COURT REVIEW 345, 348 (1978).

[43] Asimow (note 42), 256; Shapiro (note 9), 182-183.

[44] *See* Scalia (note 42), 348 ("The history of the APA's informal rulemaking provisions, at least since the mid-1960s, has been characterized by the imposition of additional procedural requirements mandated neither by statute nor by

By expanding the opportunities of the interested parties to present their case and influence the exercise of administrative discretion,[45] courts claimed to offer a means to supplement its legitimacy. That is, to substitute a part of what was lost by the weakening of the legislature-executive chain. In this context, courts increasingly understood the main role of judicial review not as "the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies."[46] Participation in the administrative process could thus confer on the final administrative determination the legitimacy produced by the fair and adequate consideration of competing interests. In this sense, administrative procedure could be deemed to offer on many occasions a forum for the deliberative exchange of views regarding the content of a sector-specific rule.[47] The direct influence by those affected can in turn endow the respective administrative determinations with a quality worthy of deference by other decision-making instances, like courts.

3. Lessons for the International Level

Administrative law can give a good example of an institutional equilibrium where first, the adjudicator reviews norms (administrative decisions) on the basis of broadly drafted superior law (statutory law); and, second, the reviewed decision itself raises legitimacy concerns. Within this framework, courts can be seen as responsible for guaranteeing that administrative decision-making meets conditions of effective participation, rather than substituting their judgment to that of the reviewed authority.[48] Administrative discretion, informed by the consideration of

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the Constitution, but crafted by the courts, with greater or lesser reliance upon the substantive statutes involved.").

[45] *See* Garland (note 41), 525.

[46] Stewart (note 34), 1712.

[47] For an overview of some of the literature on the deliberative qualities of administrative decision-making, *see* Seidenfeld (note 37); David Barron, *Note, Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARVARD LAW REVIEW 1401 (1994).

[48] From the rich relevant discussion in the context of U.S. administrative law, *see* the development of the so-called *Chevron* doctrine and *United States v. Mead Corp*, 533 U.S. 218, 230 (2001) (courts should accord deference to the statutory interpretations given by administrative agencies when the relevant

the interests it affects, is understood from this paradigm to be a better alternative to substantive judicial lawmaking.

Of course, decision-making at the administrative level is not always sufficient to alleviate legitimacy concerns. In the case of the United States, to refer again to this example, substantial criticism levied at the deficiencies of the procedure-perfecting role of the courts with the Supreme Court drawing limits to "judicial procedural activism."[49] The functioning of this administrative "interest representation" model has been especially targeted as leading to a bargaining-type decision-making that promotes power-based compromises over the genuine exchange of positions.[50] Moreover, the procedural standard of reviewing an administrative decision was often used as a façade under which substantive judicial lawmaking was only masked. And in any case, administrative courts, and U.S. courts in particular, did not always or consistently pursue the procedural approach. They have also been active in directly applying substantive, and in some cases very intruding, standards of review. Nevertheless, the alternative presented here offers a response to substantive judicial lawmaking that can gain additional support from convincing arguments of deliberative theory. Although the expressed concerns have substantial weight, this approach of decision-making bears a significant potential in offering an institutional model also at the international level.

First, as in the case of administrative law, courts review decisions that present legitimacy deficiencies. At the administrative level, this is due to the withdrawal of the parliament from vast territories of social regulation and the delegation of broad powers to unelected officials. At the international level, the problematic point is the disregard of legitimate international interests (of states or private actors) by domestic lawmakers. This latter deficit, it must be made absolutely clear here, only refers to specific decisions, namely those affecting external interests. Not all domestic decisions have such an effect, but an increasing number of them do.

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statute "provides for a relatively formal administrative procedure tending to foster … fairness and deliberation").

[49] *See Vermont Yankee Nuclear Power Corp. v Natural Resources Defense Council*, 435 U.S. 519 (1978).

[50] In the context of U.S. administrative law, *see* Stewart (note 34), 1779; JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 23 (1985).

Second, these legitimacy deficiencies cannot be rectified only with recourse to *parliamentary* deliberation. At the administrative level, the reasons for granting administrative discretion are connected with the need for expertise and the actual capacities of parliaments. At the international level, the merits of establishing a parliament-like institution are questionable in more fundamental terms. Exactly this function of administrative law in governing authoritative phenomena beyond the immediate control of majoritarian democracy can prove useful in addressing the question of authority at the international level.[51] As in the case of administrative discretion and its judicial review, decision-making beyond the state requires an approach that seeks legitimacy beyond majoritarian-representative institutions.[52]

The role of courts in developing this understanding at the international level will be investigated in the case of the WTO. In this example, mechanisms will be examined by which the adjudicating bodies could assume a role of reviewing and shaping decision-making procedures, rather than engaging in substantive lawmaking themselves. Before that, a short presentation of the conditions that reinforce the legitimacy concerns about WTO adjudication is necessary.

C. Adjudication at the Level of the WTO

The WTO is a paradigmatic case of an international regime facing the challenge of balancing adjudicatory and political decision-making. The success of the WTO adjudicatory system gradually revealed its poten-

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[51] *See* Daniel C. Esty, *Good Governance at the Supranational Scale*, 115 YALE LAW JOURNAL 1490, 1494 (2006); Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS LAW REVIEW 927, 942 (2003–04).

[52] *See* David Held, *The Transformation of Political Community: Rethinking Democracy in the Context of Globalization,* in: DEMOCRACY'S EDGES, 84, 104 (Ian Shapiro & Casiano Hacker-Cordón eds, 2001); DAHL (note 18), 319 *et seq*.; Stewart (note 32), 75. For only an example of the discussion at the European level, *see* Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Policy*, in: EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 135 (Joseph H.H. Weiler & Marlene Wind eds, 2003).

tial in shaping the rules of international trade and covering the need for regulation that the legislative process cannot meet.[53]

I. Institutional Imbalance and Judicial Lawmaking in the WTO

If in the case of administrative law legitimacy concerns are raised by the delegation of significant lawmaking powers to administrative authorities, in the case of the WTO there is no effective legislature whatsoever. Although the institutional architecture of the WTO broadly resembles a domestic constitutional system based on the separation of powers,[54] the actual division of decision-making power does not follow the same pattern. The most decisive difference from a domestic legal system is the lack of an efficient legislator.[55] No WTO body effectively exercises the task of general lawmaking on behalf of an international trade community.[56] In addition to that, the administrative-like organs of the

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53 On the role of the WTO adjudicating bodies in creating new normativity in world trade law, *see* Venzke (note 1).

54 Stewart & Ratton Sanchez Badin (note 32), 1.

55 By efficient legislator I mean here a body that is competent to make decisions of a general and abstract nature responding to the evolving needs of a collectivity.

56 Although it is debatable whether the WTO has a general lawmaking power, the WTO Agreement does confer to the Ministerial Conference the competence to adopt amendments (Art. X:1 WTO Agreement) and authoritative interpretations (Art. IX:2 WTO Agreement) on the basis of majority voting. Both procedures, however, have not evolved to functional instruments for the promulgation of general international rules on trade. Moreover, amendments to the WTO Agreement that alter the rights and obligations of the members either require a decision of the Ministerial Conference taken by consensus or produce results only for the members that have accepted them (Art. X:1 read together with :4 and Art. X:3 and :5 WTO Agreement). Beyond these instruments, waivers, although indeed utilized as general lawmaking instruments, are also adopted on the basis of consensus and have not yet been elevated at the level of a legislative surrogate. On the function and potential of waiver as a means of lawmaking within WTO, *see* Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests,* 20 European Journal of International Law 615 (2009).

WTO, despite their growing significance,[57] have not yet been developed so as to produce secondary norms to which an adjudicating instance could defer.[58]

In contrast to this weak legislative function, the WTO disposes of a paradigmatically well-developed third party dispute resolution system. The abolishment of the consensus rule regarding the adoption of the decisions of the adjudicating bodies created a de facto compulsory, binding, and exclusive international trade jurisdiction.[59] The result is that the adjudicating bodies are decisively disassociated from the consensus-based "political forum model," which is applied to the rest of the WTO institutions and their function comes closer to that of an independent organ making authoritative decisions on behalf of an international trade community.[60]

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[57] The WTO does indeed dispose of an administrative infrastructure which carries out significant functions, like consulting member states and offering a forum for information exchange and the dissemination of technical knowledge. On the function of the WTO administrative law bodies, *see* Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 575 (2009).

[58] As it is the case with the delegated legislation of domestic administrative agencies or the secondary rules promulgated by organs of other international organizations. But *see also* the tendencies towards a more "legislative like" decision-making on the example of the "equivalence decision" of the SPS Committee (Committee on Sanitary and Phytosanitary Measures, *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc. G/SPS/19/Rev. 2, 23 July 2004); Lang & Scott (note 57), 599. Particularly interesting are here the findings in Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, 25 October 2010, paras 7.134–7.136. The Panel, called to interpret Art. 4 SPS Agreement, referred to the above mentioned "equivalence decision" of the SPS Committee, noting that "while this decision (sic) is not binding and does not determine the scope of Art. 4, we do consider that this Decision expands on the Members' own understanding of how Art. 4 relates to the rest of the *SPS* Agreement and how it is to be implemented."

[59] As well as regarding the establishment of a panel and the recourse to the Appellate Body, Arts 1, 16.4, 17.4 and 23 DSU. On the exclusive character of the WTO DSM, *see* Panel Report, *US – Section 301 Trade Act,* WT/DS152/R, 27 January 2000, para. 7.43.

[60] *See* Cass arguing in a similar vein that "the only power possessed by the central body is the power of treaty interpretation vested in the WTO central adjudicatory system," Deborah Z. Cass, *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional*

Moreover, the WTO adjudicating mechanism is provided with a set of norms that has, in many cases, afforded their interpreter a paradigmatically wide "sovereign prerogative of choice." The language of core WTO provisions establishes skeletal guidelines of permissible conduct, rather than giving details of what constitutes an infringement of WTO law. That is to say, that the provision applicable in a given case may cover types of conduct significantly different from each other. In such cases, it is the task of the adjudicator to distinguish which difference is relevant for the application of the rule and which is not.

This is arguably the case for the most important WTO rules[61] such as Articles I and III GATT[62] or the norms seeking to accommodate freedom of trade with other policy choices, such as Articles XX and XXI GATT, which enshrine the possible exceptions from the WTO free-trade obligations. Central here are the notions of "necessity"[63] and "arbitrariness,"[64] which invite the Appellate Body to engage in a propor-

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Development in International Trade, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 39, 56 (2001). As Cass further explains, the Appellate Body resorted to this lawmaking potential to redefine the limits of its competence and the boundaries of the WTO regime in general, *id*., 51 & 57 *et seq.*

61 *See also* Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constrains,* 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 247, 252 (2004).

62 The wording of these provisions makes the application of the cornerstones of the world trade regime, namely the MFN and the National Treatment principles, contingent upon the establishment of the "likeness" of the relevant products, *see also* Art. II and XVII GATS. The phrase "like product" appears in many different provisions of the covered agreements, for example, in Arts I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1 of the GATT 1994, *see* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001, para. 88. The Appellate Body made furthermore clear that "there can be no one precise and absolute definition of what is 'like.' The concept of 'likeness' is a relative one that evokes the image of an accordion. The accordion of 'likeness' stretches and squeezes indifferent places as different provisions of the WTO Agreement are applied," Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, 21.

63 *See* Arts XX (a), (c), (d) and XXI (b) GATT, 2.2, 5.6 SPS Agreement, 2.2, 2.5 TBT Agreement and XIV, VI:4 GATS.

64 Chapeau of Art. XX GATT.

tionality-type balancing test.[65] The function of the "less restrictive means" standard can be similar,[66] also leaving to the discretion of the adjudicator the identification of the *tertium comparationis* upon which the "restrictiveness" of the relevant means will be assessed.[67]

II. The Importance of Substantive Lawmaking by the WTO Adjudicating Bodies

The broad wording of the covered agreements makes thus in many cases proportionality-like tests and policy assessments unavoidable for the settlement of specific cases. In this way, a "discretionary judgment" by the adjudicating bodies on substantive issues of regulation often occurs, as the Appellate Body has itself recognized.[68] And where such discretionary power exists, it has the potential to interfere with domestic regulation at almost every level,[69] as there can hardly be any matter that

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[65] *See* Axel Desmedt, *Proportionality in WTO Law,* 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW 441 (2001); Gisele Kapterian, *A Critique of the WTO Jurisprudence on "Necessity,"* 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 89 (2010); Robert Howse & Elisabeth Türk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in: THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES, 283 (Gráinne de Búrca & Joanne Scott eds, 2001). Beyond the balancing of environmental, health, public morals protection *vis à vis* the distortion of the free movement of goods and services, proportionality assessments might inhere in all cases where the adjudicating mechanism is concerned with the relationship between a regulatory aim and the means to its attainment, *see* Mads Andenas & Stefan Zleptnig, *The Rule of Law and Proportionality in WTO Law*, in: REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW, 180 (Wenhua Shan, Penelope Simons & Dalvinder Singh eds, 2008).

[66] *See* Arts 2.2 TBT Agreement and 5.6 SPS Agreement.

[67] The *tertium comparationis* in the case of the "less restrictive means" test would be the capability to achieve a particular objective (*e.g.,* protection of human health) taking into account the effects on trade. Against this composite denominator are the potential alternatives to be assessed.

[68] In the case of "likeness," *see* Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/R and WT/DS48/R, 16 January 1998, para. 101; and Appellate Body Report, *Japan – Alcoholic Beverages* (note 62), para. 114.

[69] This power is in turn not confined to the generation of individual norms settling a particular dispute, although this would be already sufficient for the af-

cannot be subsumed under the rubric of potential trade impediment.[70] National decisions on a broad series of issues are thus subject to substantive lawmaking by the WTO adjudicating bodies, the decisions of which are in effect and from the perspective of the WTO, superior in the case of conflict.

Taking into consideration the lack of an effective legislating mechanism, the interpretation of international trade rules by the adjudicating bodies may thus be addressed as a fairly "cemented" set of norms, which is little adaptive to the developing interests of those it affects or the differing choices of subsequent domestic parliamentary majorities.[71] In the case that the latter are dissatisfied with international trade regulation as administered by the Appellate Body, they are left with little more than the option to withdraw from the WTO altogether. However, although the option to exit the WTO regime is indeed provided for in Article XV:1 of the WTO Agreement, it should be considered under the actual costs of making it. In cases like the WTO, with an indispensable role in the reduction of trade barriers and almost universal membership, the costs of disassociation form a substantial deterrent in exercising the respective legal right, if not totally foreclosing this course of action.[72] The current level of globalized economic interactions and the importance of an effective international trade regime for the enmeshed world economies, make withdrawal from WTO little more a viable option than the alternative of an individual to exit the social contract establishing a political

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firmation of its nature as an instance of authority. For the reasons described above, and developed by other authors in this issue, the substantive lawmaking potential of the DSM stretches well beyond the particular disputes at issue and plays an important role in stabilizing the normative expectations of parties other than the disputing ones. *See* Venzke (note 1); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 JOURNAL OF TRANSNATIONAL LAW & POLICY 1 (1999).

[70] Cass (note 60), 74.

[71] The "single undertaking" approach, adopted after the Uruguay Round, makes compulsory the adoption as a whole of a body of law which incorporates twenty-nine Agreements and Understandings and extends to almost 25,000 pages. Furthermore, as the progress of the Doha Development Round of negotiations demonstrates, a "correction" of a potentially unsatisfactory judicial interpretation through treaty-change is a Sisyphean task to undertake.

[72] Tom Ginsburg, *International Judicial Lawmaking*, UNIVERSITY OF ILLINOIS LAW AND ECONOMICS WORKING PAPER NO. 26, 51–53 (2005). For the case of the European Union, *see* JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 18 *et seq.* (1999).

community. Although this option theoretically exists in a consistent contractual theory, the benefits of association are so vital, that, in both cases, the alternative of exit is hardly an affordable one.

In terms of exit and voice,[73] the WTO offers both a narrow option to withdraw[74] and an institutional structure bringing general lawmaking of a "legislative type" close to stalemate.[75] Substantive judicial lawmaking has then the opportunity to fill this void. In this way, judicial pronouncements emerge as part of an effective legal order[76] with the potential of setting vital economic decisions beyond the reach of the subjects whose conduct is ultimately regulated.

D. The Potential of Participation Rights: A Procedural Alternative of Judicial Lawmaking

Having identified the legitimacy concerns raised by the lawmaking potential of the WTO adjudicating bodies, this part will turn to the poten-

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[73] Classic remains here the analysis of ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970). For the application of this concept in the context of WTO, *see* Joost Pauwelyn, *The Transformation of World Trade*, 104 MICHIGAN LAW REVIEW 1 (2005).

[74] This limited option to withdraw is reinforced by the development of the WTO dispute settlement process in a way that has effectively diminished "selective" exit options. After the Uruguay Round changes, diplomatic safeguards to the enforcement of WTO law are not any more available, *see* Pauwelyn (note 73), 24.

[75] Beyond its ineffectiveness in the case of WTO, the general deficiencies of a diplomacy-based "legislative" structure are well explored. It suffices here to refer to the inherent gaps and discontinuities of the chain connecting individuals to international rules. *See* von Bogdandy (note 7), 617; Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations,* 17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 398, 408 (1996–97) (discussing in extent the problems connected with the exercise of discretion at the field of foreign policy); Robert O. Keohane & Joseph S. Nye Jr., *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy,* in: EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, 264, 276 (Roger B. Porter, Pierre Sauvé, Arvind Subramanian & Americo Beviglia Zampetti eds, 2001).

[76] The concept of effectiveness is here used in the sense of Kelsen, KELSEN (note 8), 46.

tial of addressing them by utilizing concepts of participation in a way similar to the administrative law paradigm presented in Section B. As administrative law sought to compensate through participation mechanisms some of the legitimacy lost by the delegation of rulemaking powers to administrative agencies, the potential of a similar approach in the WTO context could be investigated. In both cases, it is characteristic that significant law is made beyond the parliament. In administrative law, this is done through the delegation of rulemaking powers to administrative agencies; in WTO law, because of the absence of an effective international trade legislator. At the same time, courts are entrusted to review decisions on the basis of broadly drafted norms. That gives them a substantial opportunity to engage in lawmaking themselves. The fact that, in the case of the WTO, not only decisions of administrative authorities are reviewed, but even those of democratically elected parliaments, merely aggravates the question of the legitimacy of judicial lawmaking.

In this sense, it will be suggested that the adjudicating bodies could develop parts of WTO law as *international procedural administrative trade law* in order to reinforce participation of foreign interests in the lawmaking procedures that affect them. This understanding enhances the legitimacy of both domestic lawmakers[77] (which are called to decide after considering the foreign interests they affect) and the adjudicating bodies (which guarantee that trade-related decisions are made in a procedurally fair way, rather than making the substantive decisions themselves).

I. Participation as Standard of Review: Developing International Standards for More Legitimate Procedures

This subsection will investigate the potential of the development of procedural standards requiring the participation of international interests (both state and private) in domestic processes.[78] The WTO Covered

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[77] And international in the occasions that this is relevant, *see* the case of international standards *infra* section D.I.1.

[78] On cases thus where WTO law imposes specific participatory standards to be met by domestic law as a response to the externalities that national regulation can produce. Comparable procedural-deliberative requirements can however also be relevant to WTO decision-making processes themselves as well as

Agreements offer a broad spectrum of specific provisions on which the adjudicating bodies can base the development of such mechanisms. Beyond that, one could speak of the gradual emergence of a general principle of procedural due process. The *U.S. – Shrimp* decisions deserve particular attention in this context.[79] Their importance is not restricted to the theoretical questions they touch upon, but also concerns their practical effects. The implementation stage of *U.S. – Shrimp* reveals, indeed, much of the actual potential of the approach presented here.

1. Sector-Specific Rules of WTO Law

The WTO Covered Agreements contain a number of special provisions that can offer the adjudicating bodies a starting point in developing standards that enhance the participation of otherwise excluded interests in the processes that affect them.

Relevant here are the rules that require domestic authorities to afford adequate hearing opportunities to affected parties that are outside the jurisdiction of the regulator. This is the case, for example, in the process of establishing whether a product is being unlawfully dumped for the purposes of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)[80] or subsidized according to the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[81] Similar rights are also grounded to the agreements regulating non-tariff barriers to trade. Both the Agreement on the Application of Sanitary and Phytosanitary Mea-

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to other international bodies producing WTO-relevant law, like the Codex Alimentarius Commission.

[79] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998; Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/RW, 15 June 2001; and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products. Recourse to Article 21.5 of the DSU by Malaysia,* WT/DS58/AB/RW, 21 November 2001.

[80] Arts 6.1, 6.2, and 6.11 Anti-Dumping Agreement. The Appellate Body understands these provisions as guaranteeing "fundamental due process rights" to all "interested parties", *see* Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, 17 December 2004, para. 250.

[81] Arts 12 and 13 SCM Agreement.

sures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement) require member states intending to enact a technical regulation to provide adequate notice, to allow other states to make comments on it, to discuss these comments upon request, and to take the comments and the resulting discussion into account when eventually deciding on the measure at hand.[82] These requirements are further refined by the respective WTO organs.[83] Regarding SPS measures for example, the regulating country shall explain, within a reasonable period of time, to any member from which it has received comments, how it will take these comments into account.[84] Notice and comment opportunities shall also be afforded to interested private parties.[85] The Agreement on Safeguards (Safeguards Agreement)[86] and the General Agreement on Trade in Services (GATS)[87] include similar guarantees.

Procedural conditions requiring notice and comment opportunities are also directed to international bodies that produce norms with relevance to WTO law, such as international standards.[88] Taking into account the actual importance of these standards for the application of WTO law,[89]

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82 Arts 2.9.4 TBT Agreement and 5(d) Annex B SPS Agreement. *See* also Arts 2.10.3 TBT Agreement and 6(c) Annex B SPS Agreement. "One stop" access to relevant documents and records is possible through the SPS and TBT Information Management Systems (SPS IMS and TBT IMS), *see* http://spsims.wto.org and http://tbtims.wto.org.

83 *See* Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7),* WTO Doc. G/SPS/7/Rev. 3, 20 June 2008; and Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat,* WTO Doc. G/TBT/1/Rev. 9, 8 September 2008.

84 *See* Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)* (note 83), 5.

85 Arts L and N of Annex 3 to the TBT Agreement.

86 Arts 3 and 12.3 Safeguards Agreement.

87 Arts XXII and VII 4(b) GATS.

88 *See* Art. 2.4 TBT Agreement, Arts 3.1, 3.2 SPS Agreement, Art. 3 of the Annex A thereof, and Art. 2.4 PSI Agreement.

89 *See*, *e.g.*, Art. 3.2 SPS Agreement (measures that are in conformity with standards promulgated by specific international organizations are presumed to be consistent with WTO law).

the procedure of their adoption becomes crucially connected to the legitimacy of WTO law itself. Beyond their own procedural requirements, these bodies are called by the WTO to award "meaningful opportunities to participate at all stages of standard development"[90] to any of their interested members.

The construction of these provisions by the WTO dispute settlement organs in such a way as to enhance the participation of international actors can offer an alternative to substantive judicial lawmaking. The decision, for example, on whether a TBT measure is "necessary to fulfill a legitimate objective,"[91] could accord substantial deference to the assessments of the national decision-maker when the latter can argue persuasively that a decision has been reached after effectively considering the relevant positions. That can be a convincing alternative to the substitution of the opinion of the adjudicator for that of the reviewed authority on what is actually "necessary to fulfill a legitimate objective." If a domestic measure is taken after the due consideration of the interests it affects, it should be addressed as having good chances to meet such broadly drafted WTO law requirements. Following the same rationale, the deference to standards promulgated by other international organizations could be made contingent upon them fulfilling minimum procedural safeties.[92] This would answer some of the legitimacy concerns raised by the judicial review of such rules on substantive grounds or their totally unchallenged adoption by the WTO organs.

Procedural requirements thus, like those presented above, can be construed by the adjudicating bodies in a manner that ensures that countries or private parties affected by technical or other rules are given an effective voice. If such procedural rights are duly respected by the respective decision-making authorities, the adjudicator could opt for greater deference to their decision, instead of engaging in substantive lawmaking through second-guessing them under the light of open-worded clauses.

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[90] Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat* (note 83), 38. The Decision extends to international bodies the standards developed for domestic authorities in Annex 3 to the TBT Agreement.

[91] Art. 2.2 TBT Agreement.

[92] Stewart & Ratton Sanchez Badin (note 32), 23–25.

2. The Procedural Reading of the U.S. – Shrimp Decisions: A General Principle of Due Process?

Beyond the development of standards of consideration based on specific WTO provisions, significant has been the elaboration of a general participation-based standard of review by the adjudicating bodies.[93] Particularly relevant in this context are the findings of the panels and the Appellate Body in their seminal *U.S. – Shrimp* decisions. In these cases, the adjudicating bodies gave an example of how an open-ended clause like the prohibition of "arbitrary and unjustifiable discrimination" can be given a procedural reading. Furthermore, this procedural reading was based on a language that could suggest that a general principle of procedural due process exists in WTO law.[94] As the relevant case law has indeed been widely investigated, the focus in the following will be on the due process and participatory facets of these decisions. Most interesting from this perspective, and maybe not adequately elaborated upon, is the implementation of these rulings and their actual effects in the restructuring of the respective domestic procedures.

The initially contested measure in these cases was a now famous U.S. prohibition on the importation of shrimp products. This prohibition was directed to shrimp products harvested in a way that did not meet the U.S. criteria for the protection of endangered sea turtles from accidental by-catch.[95] The conformity of foreign production with U.S. standards had to be assessed and certified by the U.S. administration.

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[93] On the development of a general principle of participation at the international level utilizing insights from administrative law, *see* GIACINTO DELLA CANANEA, AL DI LÀ DEI CONFINI STATUALI: PRINCIPI GENERALI DEL DIRITTO PUBBLICO GLOBALE 37 *et seq.* (2009). The Director-General of WTO, Pascal Lamy has also recently referred to procedural fairness as a "fundamental principle" of WTO law, Symposium on the Agreement on Government Procurement, Geneva 11 February 2010, available at: http://www.wto.org/english/news_e/sppl_e/sppl147_e.html.

[94] Della Cananea locates the source of the principles pronounced by the Appellate Body in *U.S. – Shrimp* in the national legal orders from which the Appellate Body "subsumed … some general or 'global' principles of administrative law," Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law,* 9 EUROPEAN PUBLIC LAW 563, 575 (2003).

[95] Section 609 of U.S. Public Law 101–62, 16 United States Code 1537 (21 November 1989) and associate guidelines and judicial rulings. For a full de-

The Appellate Body, in its first decision on the issue, decided that, although this measure provisionally qualified for an environmental-based exception under Article XX (g) GATT,[96] it failed to meet the additional requirements set out in the chapeau of the same Article. Despite the fact that it advanced a legitimate objective (namely, environmental protection), it was applied in an arbitrary and discriminatory way. One of the reasons why U.S. practice was found to be unjustifiably discriminatory in this sense was its "inflexibility" and the lack of due process standards in the application of the prohibition. The assessment of the U.S. authorities on the comparability of foreign environment protection mechanisms to those of the United States was first, absolutely orientated to the U.S. methods of protection[97] and second, not respectful of the due process rights of foreign interests.[98]

The Appellate Body, concerning this aspect, held that the "singularly informal and casual"[99] and *ex parte* processes followed for the application of the substantive provisions fell short of being "transparent and predictable."[100] U.S. procedures neither afforded the complainants with a "formal opportunity … to be heard, or to respond to any arguments that maybe made against it," nor did they provide for a formal written, reasoned decision, prior notification, and a procedure for review.[101] The Appellate Body concluded that "exporting Members applying for certification whose applications are rejected are *denied basic fairness and due process*, and are discriminated against, *vis-à-vis* those Members which are granted certification."[102] In sum, the Appellate Body found a violation of WTO law first, because the domestic authorities competent to assess the adequacy of foreign harvesting methods did not enjoy sufficient discretion and second, because they did not have to follow due process and participation standards.

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scription of the relevant domestic law and practice, *see* Appellate Body Report, *U.S. – Shrimp* (note 79), paras 2 *et seq*.

96 The U.S. measure was *prima facie* WTO-law inconsistent as contrary to the prohibition of quantitative import restrictions, Art. XI GATT.

97 Appellate Body Report, *U.S. – Shrimp* (note 79), part C.

98 Stewart & Ratton Sanchez Badin (note 32), 15.

99 Appellate Body Report, *U.S. – Shrimp* (note 79), para. 181.

100 *Id*., para. 180.

101 *Id*.

102 *Id*., para. 181, emphasis added.

To better understand the potential of this argument in terms of procedural/substantive judicial lawmaking, one might need to consider the alternative way in which the Appellate Body could proceed. That would be to assess whether the decision of the U.S. authorities on the environmental adequacy of foreign methods was *substantively* correct, engaging in an analysis of the merits of the domestic decision and second-guessing whether foreign measures were correctly assessed, from a WTO perspective, as (in)comparable to those of the United States. Thus, the Appellate Body could itself establish whether the measure in question unjustifiably treats differently countries where the same conditions prevail – an assessment that would presuppose a substantive decision on the similarity of the conditions and the suitability of the measure.

Instead of this, the Appellate Body focused on the failure of the United States to inquire into the appropriateness of the measure for the conditions prevailing in the exporting countries.[103] It condemned both the absence of discretion of the competent U.S. authorities in assessing this "comparability" and the absence of procedural safeties that could allow foreign interests to inform the exercise of this discretion with their views. In so doing, the Appellate Body effectively disciplined its own lawmaking potential and relocated the decision-making power back to the domestic level, under the condition that it is exercised after the meaningful consideration of foreign interests.

This understanding becomes clearer by following the implementation stage of the decision and the way it ultimately affected the structuring of the relevant domestic procedures. To the implementation of this ruling, the United States adopted a new set of administrative guidelines (1999 Revised Guidelines)[104] which introduced to the relevant U.S. law two major changes. First, they conferred substantial discretion to the respective domestic authorities when assessing the "comparability" of foreign turtle-protection measures with U.S. standards. Second, this discretion has now to be exercised under strict due process requirements that afford significant participation rights to external interests.

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[103] *Id.*, para. 177.

[104] These guidelines were directed to change the practice of U.S. authorities found to be incompatible with WTO law without amending the text of the relevant import prohibition as such, U.S. Department of State, 64 Federal Register No. 130 (8 July 1999), Public Notice 3086, 36946–36952. The 1999 Revised Guidelines are also attached to the Panel Report, *U.S. – Shrimp (Article 21.5)* (note 79).

Regarding the first change, not only the use of a particular turtle-protecting device (as under the prior regime) can now be identified as "environmental friendly," but also other regulatory programs,[105] as harvesting in sea environments where no actual danger for turtles exists.[106] Furthermore, and beyond the environmental program that a harvesting nation adopts, each individual foreign importer can assert that the particular harvesting means he uses do not pose a threat to sea turtles.[107]

This discretion is supplemented by broad due process safeties. The 1999 Revised Guidelines provide for visits of U.S. officials in the interested countries which should be concluded by a meeting with the government officials of the harvesting nation.[108] Countries that do not appear to qualify for certification, are given a written and reasoned notification, which can be followed by "face to face meetings" between relevant U.S. officials and officials of the harvesting nation to discuss the situation.[109] Within a period of one and a half months, harvesting countries are invited to submit all relevant information which U.S. authorities must "actively consider"[110] together with information made available by other sources,[111] while the final decision again needs to be reasoned and in writing.[112] The possibility of administrative review of this decision is also provided for,[113] whereas judicial remedies are available under the general conditions of U.S. administrative law.[114] This process seems to have been followed in a way so as to respond to the require-

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105 II.B of the 1999 Revised Guidelines.

106 *E.g.,* where only artisan means of harvesting are used, *id.*, II.A.

107 Because shrimps are harvested in an aquaculture facility, TED devices are used, the retrieval of fishing nets do not involve mechanical devices or shrimp is harvested in any other manner not posing threat to the incidental taking of sea turtles, *id*. I.B.

108 *Id.*, II.A, para. 26.

109 *Id.,* II.A, para. 27.

110 *Id.,* II.A, para. 28. *See also* I.E. para. 12.

111 *Id.,* I.E., para. 13 ("[t]he Department … will also take into consideration information on the same subjects that may be available from other sources, including but not limited to academic and scientific organizations, intergovernmental organizations and non-governmental organizations with recognized expertise in the subject matter.").

112 *Id.,* II.A., para. 29.

113 *Id.,* II.A., para. 30.

114 As set out in the Administrative Procedure Act (APA).

ments set by the Appellate Body in the certification of Australia and Pakistan.

Moreover, this change of U.S. law and practice was found by the panel and the Appellate Body to meet WTO requirements when challenged as insufficient by Malaysia under Article 21.5 DSU.[115] Both the initial Panel and the Appellate Body concluded that the discretion afforded by the 1999 Revised Guidelines to the respective authorities did rectify the "rigidity and inflexibility" of the initial measures that were condemned by the Appellate Body in the *U.S. – Shrimp* first decision.[116] The due process standards presented above were also found to adequately respond to the Appellate Body's ruling.[117]

In sum, the *U.S. – Shrimp* decisions seem to read into WTO law a right of foreign interests to be considered by the decision-making authority as part of a general duty to secure due process rights.[118] In this way, a functional instrument is offered which guarantees that extraterritorial interests should enjoy fair hearing and participation rights in domestic procedures, a requirement that is furthermore over-sighted by an international adjudicator. This instrument cannot, of course, substitute international substantive regulation. It might however offer an alternative precisely for these cases where the absence of intentional rules offers wide discretion to the adjudicative bodies. Deference to other decision-making instances under procedural conditions of adequate consideration might provide in such cases a more legitimate option than substantive lawmaking by the adjudicating bodies.

II. The Potential of a Procedural Standard of Review in WTO Law and Beyond

The existence of a broad spectrum of positive rights ensuring participatory decision-making and the development of the relevant jurispru-

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[115] Panel Report, *U.S. – Shrimp (Article 21.5)* (note 79), para. 6.1, *see*, *in particular*, paras 5.121-5.137.

[116] *Id.*, para. 5.104.

[117] *Id.*, para. 5.136.

[118] Even if they should not be any more interpreted as recognizing a self-standing duty to negotiate before the enactment of a domestic measure affecting foreign state-represented interests, after the clarifications the Appellate Body offered in *U.S. – Shrimp (Article 21.5)* (note 79).

dence allow the WTO adjudicating bodies to further shape the conditions of international procedural legitimacy. This understanding has the potential to address legitimacy concerns better than the function of the adjudicating bodies as ultimate arbiters of the substance of trade-related domestic and international decisions. Procedural rights and structures that allow for the consideration of interests otherwise inadequately represented in a decision-making process affecting them,[119] bear a significant potential in remedying a traditional deficiency of the nation-state model; namely, to internalize its interdependence with foreign interests. This understanding is in turn in line with the conception of WTO law as a system coordinating the factual interdependence of its actors,[120] rather than a regime directed to the harmonization of trade-related policies.

Under this approach, the WTO adjudicating bodies should consider deferring the decision to domestic authorities when applying open-textured standards like "necessity" or "less restrictive means." Such deference should however be made contingent upon the fulfillment of minimum due process requirements by the respective decision-maker, which would guarantee the inclusion and consideration of external interests.

In the case of domestic decisions for example, deference could be allowed to national authorities when assessing the "necessity" or "reasonableness" of an environmental, but trade-restrictive measure. This deference should be afforded under the condition that the domestic authority offered adequate opportunities for the consideration of potentially affected state or private actors. Regarding standards promulgated by other international bodies, but relevant to the application of WTO law, the adjudicating bodies could make their judgment on their "ap-

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[119] Andrew Guzman refers to this problem as being "inherent in the system of interdependent nation states," Andrew T. Guzman, *Global Governance and the WTO*, UC BERKELEY PUBLIC LAW AND LEGAL THEORY RESEARCH PAPERS No. 89, 74–75 (2002). To address this question is a postulate of the "very idea of democratic constitutionalism," *see* Christian Joerges & Jürgen Neyer, *Transforming Strategic Interaction into Deliberative Problem-Solving: European Comitology in the Foodstuffs Sector,* 4 JOURNAL OF EUROPEAN PUBLIC POLICY 609, 611 (1997).

[120] For the arguments advocating for a model of coordinated interdependence regarding the understanding of the nature and objectives of WTO law, *see* von Bogdandy (note 7), 647.

propriateness," "effectiveness," or "relevance"[121] contingent upon the adherence to consideration standards.[122] Even in cases where standards are inserted in the WTO regime by direct reference to the respective standardizing body,[123] the development of a general principle of consideration could take precedent over the automatic deference to the harmonizing standard. Such procedural assessments better meet the role of the adjudicating bodies as guardians of the deliberative quality of international decision-making than a *de novo* review of the substance of the respective decisions.

The development of such a standard of review[124] should not be understood as some kind of deference to national sovereignty as such, but rather as deference to procedurally legitimate decision-making. Ultimately, it can serve to demarcate competences in the international trade regime and has the potential of infusing elements of deliberative participation through procedures beyond electoral representation.[125] Such legitimacy strategies that go beyond transmission or chain models seem particularly appealing to a level of authority where the electoral-based source of legitimacy is highly problematic.

Again it should be made clear, however, that this approach has well-defined limits. It is, of course, not relevant in the cases were WTO law clearly imposes substantive conditions on domestic decision-making, such as under Article II GATT. The legitimacy of a DSM decision ap-

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[121] *See* Arts 2.4 TBT Agreement, 3(d) Annex A to the SPS Agreement, and 2.4 PSI Agreement.

[122] *See* Bonzon (note 32), 775; Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 NEW YORK UNIVERSITY LAW REVIEW 766, 790; Stewart & Ratton Sanchez Badin (note 32), 23–24.

[123] As is the case with Arts 3.1 SPS Agreement and 3(a), (b), (c) Annex A to the SPS Agreement.

[124] The role judicial standards of review play in this allocation is well known in domestic administrative and constitutional settings, *see* PIERCE, SHAPIRO & VERKUIL (note 33), 55 *et seq*. Compare the famous footnote 4 in *United States v. Carolene Products Company*, 304 U.S. 144 (1938) and the case *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1962) declaring that "whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of us," which signified the rise of administrative law as the proper domain of economic regulation rather than a constitutional "superlegislature" weighting "the wisdom of legislation."

[125] Stewart (note 32), 75.

plying such a provision can only be traced back to the agreement of the member states and its function in prohibiting origin-based discrimination. For these cases, however, that the wording of WTO law leaves the adjudicating institutions substantial discretion, a procedural approach may offer a convincing alternative.

Similar considerations might also favor a procedural understanding in other contexts where adjudicating institutions face legitimacy challenges, taking of course account of their specific characteristics. For example, international investment law could be a very interesting candidate.[126] Procedural elements have been here identified in some cases by tribunals as part of the "fair and equitable treatment" standard.[127] In any case, striking the balance between a procedural understanding of judicial review and the opposite direction of judicial development of particular economic models seems to be one of the major future challenges in establishing the frameworks of authority beyond the state.

E. Conclusion

This article presented a critique of the evolution of the role that the WTO adjudicating bodies have gradually assumed and a potential response that focuses on the development of procedural standards and participation institutions, which are already functional within WTO law.

This approach proceeds from the premise that one of the major challenges the world trade order faces is to address the legitimacy concerns resulting from the role that the adjudicating institutions have gradually assumed in shaping this order. This challenge needs to be read in conjunction with an understanding of the international trade regime as

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[126] For certain procedural elements of the concept of "fair and equitable treatment," *see* Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 151, 158 & 171 (Stephan Schill ed., 2010).

[127] *See Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award of 30 August 2000, paras 92 & 99; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 162.

aiming at the correction of the illegitimate pretensions of domestic jurisdictions.[128]

Regarding the role of the adjudicating mechanism in the WTO system, and in the absence of an effective political counterpart, the adjudicating bodies enjoy the opportunity to appropriate a large share of the competences that are claimed by the international trade regime as a whole.

Occupying the void left by the underdevelopment of political lawmakers, the adjudicating bodies will be increasingly often called to engage in substantive lawmaking. Considering the importance of WTO law in general however, this development raises serious concerns. Arguing from a concept of authority based on the deliberative consideration of affected interests and drawing from concepts developed in domestic settings, adjudicating instances are better placed to shape the conditions of the lawmaking process, than engaging in substantive lawmaking. At the WTO level, this could mean that the adjudicating bodies should move towards the development of international standards of adequate consideration and afford a higher degree of deference to domestic or international regulators that honor them.

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[128] *See* Anand Menon & Stephen Weatherill, *Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union,* LSE LAW, SOCIETY AND ECONOMY WORKING PAPER NO. 13, 9 (2007). Ultimately, this is an understanding orientated to the identification of the "appropriate locus for the articulation of the democratic political good," Held (note 52), 100; *see also* DAHL (note 18), 4.