The Multilateral Standard of Review: Export Restrictions, GATT Exceptions and Exemptions

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ABSTRACT

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This dissertation argues for the adoption of a new interpretative standard that urges the WTO adjudicator to explicitly take account of the economic heterogeneity of the WTO Membership when construing exemption provisions in the GATT 1994. In particular, the judicial decision maker should construe and interpret exemption provisions using the embedded standard of review, such that the Member States' economic conditions enlighten the contextual interpretation of the language of the provision. This multilateral standard of review compels the adjudicator to accord conditional deference to developmental policies, as applied by a Member State in expression of its preferred economic strategy to expand the trade and production of goods and services. This dissertation examines the history of the standard of review in the GATT 1947 and GATT 1994 in order to critically examine its application to the construction and interpretation of the exemption provision of Article XI:2(a) GATT 1994. The proposed multilateral standard of review overcomes the post-modern critique of judicial practice by emphasizing the collaborative intent of the Membership, as revealed through the adjudicator's understanding of the object and purpose of the agreement.

TABLE OF CONTENTS

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Introduction

Introduction

Following the inauguration of Donald Trump as 45th President of the United States of America, the rhetoric around international trade has been intensely negative. The Administration, and others, have inflamed existing doubts whether international trade really creates shared gains for all involved, or whether trade is a zero-sum game centered on bilateral trade deficits. The pressure on the international trading system not only targets the mega-regionals, TPP and TTIP, but also extends to threaten the multilateral regime of the World Trade Organization – a pivotal set of multilateral agreements anchoring China, the US and the EU, together with most of the world, to a single regime on international trade.

In July, 2016, the EU and the US filed another complaint against China on its use of export restrictive duties and quotas: their third against China, covering different raw materials at each complaint. Maintaining export restrictive taxes, duties and other charges is not a recent policy innovation, in fact it has an old history tied closely to the UK and the US[1] – better-known for their endorsements of international trade, at least until recently.

Whereas export restrictions can certainly have Mercantilist effects (and intent), Stiglitz stressed a competing analytical narrative.[2] Not only can trade restrictive policies serve to build up sufficient reserves to stabilize financial pressures or ease fluctuations in earnings by commodity exporters, a well-targeted industrial policy can reinforce learning by exporting effects (in global value chains or independently), or dynamically propel an economy to a skill-dependent tipping point. Lastly, demographic reasons might also necessitate a measure of trade restrictiveness – particularly when considering shortages in staple foodstuffs.[3]

[1] Ha-Joon Chang has reminded economists and policy makers alike that the relatively recent discovery by the West of the virtues of efficient resource allocation and strong intellectual property protection through international markets goes preceded in the development history of many OECD member countries by a plethora of "catch up" policies (at one time these policies were even known as the *American* system). These economies now seem to be in the process of "kicking away" this very development ladder under the guise of rational and efficient allocation doctrines that work to reinforce static comparative advantages while relegating questions of economic growth and development to the practical and conceptual constraints of (historically constructed) market failures, externalities and "extractive" institutions; see Ha-Joong Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002); and Daron Acemoglu and James Robinson, Why Nations Fail (MIT Press, 2012).

[2] Joseph Stiglitz, "Is Mercantilism Doomed to Fail?," Keynote Address at INET 2012 Plenary Conference: Paradigm Lost Rethinking Economics and Politics (2012), available at: http://www.cigionline.org/videos/joseph-stiglitz-mercantilism-doomed-fail.

[3] See for example the WTO's Bali package agreement on foodstuffs; available at: http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm

The verdict on these policies by the WTO's dispute settlement system relies on the judicial labor of dispassionate adjudicators fitting the disputed policy to the text of the agreement in Panel and Appellate Body proceedings. In the summer of 2016, the United States challenged the re-appointment of an adjudicator from South Korea to the Appellate Body. The United States cited their dissatisfaction with the performance of the adjudicator and his alleged failings not to "add to or diminish the rights and obligations provided in the covered agreements."

In this dissertation I develop a multilateral standard of review, which offers a method of "open" construction and contextual interpretation suited for the adjudication of exemption provisions in multilateral agreements, such as Article XI:2(a) of the GATT 1994. I posit that the judicial decision maker should construe and interpret exemption provisions using the embedded standard of review, such that the Member States' economic conditions enlighten the contextual interpretation of the language of the provision. Application of the multilateral standard of review to the construction and interpretation of exemption provisions compels the adjudicator to accord conditional deference to developmental policies as a method to limit prejudicial reliance on the adjudicator's preconceptions.

Central to my argument are three observations. First, the Membership of the WTO is not homogeneous, but instead characterized by a measure of rational heterogeneity in economic preferences. It is furthermore time-inconsistent. Second, the covered agreements – most importantly the GATT 1994 – are multilateral agreements and are an expression of the collaborative intent of Parties to selectively cooperate on and coordinate their domestic trade policies. Third, the adjudicator can accomplish her judicial task without relying on the concepts of power and Utopia. The adjudicator instead derives her perspective from Parties' collaborative desire as expressed through the covered agreements.

My constructive critique of the method of interpretation of GATT exemption provisions on export restrictions adopted by the Panel and Appellate Body has two sides. First, I question the assumption that the equilibrium conditions derived from mature growth models determine the optimal structure and growth path for all open economies. I argue that, in the absence of full convergence, economic models of specialization and diversification exist in parallel. This bifurcation in economic models in turn describes the possibility and desirability of viable industrial policies in both types of economies.

Second, I criticize the international economic regulatory structure of the GATT/WTO that is too often interpreted on the (implicit) assumption of normative homogeneity in the Membership with respect to optimal economic models. Furthermore, I reject the notion that the ideal structure to dispute resolution mirrors a unique and immovable "line of equilibrium." Instead, I argue the adjudicator should adopt an interpretative stance that is characterized by constrained interpretative deference when fitting domestic policies to the provisions of the GATT.

In particular, I argue that the Appellate Body incorrectly construes Article XI:2(a) GATT 1994. As a result of a linguistic extension of certain words, the Appellate Body effectively collapses the exemption provision of Article XI:2(a) into a "critical shortage"-test. The Appellate Body then proceeds to read its "critical shortage"-test in relation to the exception provision Article XX(j) GATT and narrows the scope of Article XI:2(a) GATT 1994 accordingly. This is a contextualization of the exemption provision I object to. Moreover, I contend that it that damages the prospects of countries to temporarily adopt export restrictive measures as an overt industrial policy.

Instead I argue that the appropriate interpretative context of Article XI:2(a) is determined by its scope and character, as found by the application of the appropriate standard of review (Chapter 1) and derived from Article XI:1 GATT (Chapter 5). As such, Article XI:2(a) accepts the possibility of "viable" industrial policies (Chapter 2), conditional on an interpretation that rejects the premises of Textualism (Chapter 3) and allows for an "open" construction of exemption provisions in the GATT 1994 (Chapter 4). More specifically:

Chapter 1 sets out the history of the standard of review in the GATT and frames the relevance thereof to the coming argument. The applicable standard of review is one of the central mechanisms the Appellate Body and Panels have employed to move toward greater judicialization of the dispute settlement system in the GATT/WTO. From the Uruguay Round on, with the adoption of the Dispute Settlement Understanding and the establishment of the Appellate Body, the adjudicator more formally engages in judicial decision making instead of moderating disagreement between Contracting Parties. This development however centers attention on the preconceptions and prejudices, including economic theory, of the adjudicator as judicial decision maker within a multilateral agreement.

Chapter 2 examines the static and dynamic economic effects of imposing export restrictive trade policies. The first part of the chapter offers an overview of the various static reasons for restricting exports. In addition to the classic argument on maximizing market power ("strong theorem"), four other static arguments are put forward for using export restrictive policies: consumption and investment smoothing, revenue and redistribution, market rationalization (each an aspect of the "weak theorem"), and as a counter to import tariffs.

The subsequent dynamic assessment of export restrictive measures clearly shows normative differentiation between models of mature and catch up growth. The main difference between the two type of models is found in the emphasis they place on economic specialization and frontier growth (mature growth), and economic diversification and the pattern of skill relatedness (nested) in economic production (catch up growth). Specifically, the skill component that explains the nested structure of the Product Space is unobservable to the households and centrally justifies industrial policy as coordination and developmental policy at the central level.

Chapter 3 sets the analytical stage for the legal analysis by according emphasis to the role of the adjudicator. In addition to describing the role of the adjudicator in GATT/WTO disputes, this chapter introduces the central query driving the dissertation's legal analysis: "by which method are Member States' economic conditions positively recognized, such that they enlighten the contextual interpretation of the language of the provisions of the GATT/WTO in a manner that furthers both the security and predictability of the multilateral trading system."

In its application of the customary rules of international law, codified in Articles 31-33 VCLT, the Appellate Body has favored adherence to a Textualist interpretation of the covered agreements. This approach is intended to bolster the security and predictability of the multilateral trading system. A Textualist reading of a multilateral agreement that governs the collaborative intent of a heterogeneous Membership however unwittingly favors the innate biases of the adjudicator.

Chapter 4 critiques the application of Textualism to the GATT/WTO and offers a competing method of "open" construction and interpretation – the multilateral standard of review. In a critical examination of the post-modern critique on the judicial decision making process in international law, powerfully voiced by Koskenniemi, I find that

the adjudicator's understanding of the collaborative intent of Parties maintains her ability to come to a coherent judicial decision. Her ability to accomplish this task is however constrained by applicable teleologies: doctrinal, normative, and sociological.

An open-ended construction of the exemption provision of Article XI:2(a) GATT 1994, by applying the appropriate standard of review, allows the adjudicator to actively recognize the heterogeneous preferences of the Membership, balanced by the doctrinal and normative constraints the GATT/WTO places on her decision-making. The extend of deference that the multilateral standard of review compels the adjudicator to apply is furthermore limited by the formal demands of the Oats Decentralization Theorem.

Chapter 5 applies the multilateral standard of review to the adjudication of Article XI:2(a) GATT 1994, commenting on the governing case law *China – Raw Materials* and *China – Rare Earths*. After having defined the scope of Article XI:1 GATT, I construe Article XI:2(a) as a hierarchical dependent exemption provision. As the exemption provision adopts its scope from Article XI:1 GATT 1994, I argue that by applying the appropriate standard of review in her construction and interpretation of the provision, the adjudicator can incorporate industrial policies within the ambit of Article XI:2(a) GATT 1994.

I subsequently resist a construction of Article XI:2(a) that effectively collapses it into a "critical shortage"-test, which the Appellate Body then reads against the "short supply" element in Article XX(j) GATT. Instead, I critique this reasoning on doctrinal, economic, and, ultimately, normative grounds.

The arc of argumentation in Chapters 1-5 offers a complete and encompassing answer to this dissertation's central query. The open construction and interpretation of exemption provisions in the GATT 1994, following application of the multilateral standard of review, offers a superior method of contextual interpretation; such that the economic conditions and preferences of Member States are positively recognized in a manner that furthers both the security and predictability of the multilateral trading system.

The Epilogue restates the argument of the dissertation and confronts some of the central challenges to the application of the multilateral standard of review as a judicial method of construction and interpretation of exemption provisions in a multilateral agreement.

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Chapter 1: GATT Exemptions and the Multilateral Standard of Review

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With the collapse of the Doha Development Round, questions on the proper scope for and the international regulation of diverging national policies on optimal economic growth fall back onto the established frameworks of the WTO covered agreements. The interpretation of the provisions of these multilateral agreements is likely to continue to guide and constrain the adoption of economic policies in both mature and catch-up markets alike – despite the growing tendency to seek pluri-lateral, regional and even bilateral deals on such topics.

This work centrally questions, critiques and (re)constructs the breadth and character accorded to the exemption provision on quantitative restrictions in the General Agreement on Tariffs and Trade 1994 (GATT 1994). I will argue that judicial decision makers should accord a higher measure of deference to developmental policies when constructing the breadth of exemption provisions in the GATT, relative to the standard of review used when according meaning to regulatory exceptions. The sensitivity of the judicial decision maker to the three-part test following Article 11 of the Dispute Settlement Understanding (DSU) - namely a standard of review particular to the construction of rules (objective assessment), the facts (qualified intrusiveness[4]), and the application of these facts to the rules (through a case-by-case analysis[5]) – will be pivotal and shape the favored approach to exemption provisions, such as Article XI:2(a) GATT 1994.

In this work I argue and theorize that an objective assessment of exemption provisions in the GATT 1994 is guided by a standard of review that is embedded in the covered agreements and subject to its declared object and purpose. Moreover, that the WTO adjudicator, in the presence of (macro-)economic preference heterogeneity, should interpret the terms of exemption provisions in an "open," i.e. minimally constrained, manner to maximize for true "developmental" policies.[6] When fitting "economic facts" to the terms of exemption provision, decision makers

[4] See Section A, *infra*. Also, Chapter 4, *infra*.

[5] See, for example, WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.279.

[6] In this work, I argue for a theoretical framework that facilitates a minimally constricted reading of exemptions in the GATT 1994 and, possibly, in other covered agreements. This approach is not without precedent in the practice of the WTO Panels and Appellate Body (however unstructured, erratic, and under-theorized); Howse, for example, notes "[w]here a substantive norm is ambiguous, seemingly not coherent or based on a delicate but elusive historical compromise, the Appellate Body has favoured, selectively, judicial minimalism" in, Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 66. As will be argued in Chapter 3, *infra*, I do not find a procedural or formal approach to legal interpretation and construction fundamentally helpful; and as such do not find common ground with Ioannadis writing on procedural approaches to adjudicative legitimacy in the WTO. See Michael Ioannadis, "Deference Criteria in WTO Law and the Case for a Procedural Approach," in Lukasz Gruszczynski and Woutwer Werner, eds., *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (New York: Oxford University Press, 2014).

maintain conformity with their interpretative mandate, to safeguard the predictability and security of the multilateral trading system, by applying a measure of deference that satisfies the conditionality of the modified Oates' Decentralization Theorem. Such reading of exemption provisions does justice to legitimate macro-economic preference heterogeneity among Member States, while putting a premium on the demands of persuasive reasoning.

I consciously adopt the perspective of the adjudicator to emphasize the hermeneutical aspects of construing provisions within the established multilateral framework of the covered agreements, in particular the GATT 1994. I have found the standard of review, as it pertains to both the construction of the provisions of covered agreements and the "fitting" of established facts thereto, a valuable lens. By adopting the position of the adjudicator, I accord center-place to the directional or teleological component of collaboration by the multilateral WTO Membership under the GATT 1994. In this way, attention switches from the mechanics to achieve collaboration, to the focal point thereof – the provisions and terms of the covered agreement.[7]

As Mavroidis points out, most of the edifice around the standard of review is "judge made law,"[8] around limited statutory anchor language. Mavroidis criticizes the Appellate Body for failing to "develop[] its own understanding of the rationale for, and the objective function of the agreements that it is called to interpret." Rather, the Appellate Body "behaved as a political body reacting to signs of times." As a consequence, "[t]he quest for contextual understanding of the key terms remains […] elusive."[9]

In this work I argue for such contextual understanding of exemption provisions in the covered agreements, and in the GATT 1994 in particular. In response to Mavroidis' critique, I postulate that the adjudicator's presumptions and pre-judgments come to the fore strongest in her consideration of policy flexibility provisions; as her assessment thereof is directly reflective of her understanding of the regulatory structure of the GATT and of the collaborative intent of the multilateral Membership. The favored higher measure of deference in the construction and interpretation of exemptions in the GATT 1994 is however not to be based in perceptions of power or political

[7] See for the role of international law in support of collaboration between sovereigns generally, Eyal Benvenisti and Moshe Hirsch, *The Impact of International Law on International Cooperation* (Cambridge: Cambridge University Press, 2004).

[8] Petros C. Mavroidis, "The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body," EUI Working Paper RSCAS 2016/31.

[9] Petros C. Mavroidis, "The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body," EUI Working Paper RSCAS 2016/31, p. 1.

choices by decision makers. Rather, the appropriate measure of deference is anchored in the decision maker's understanding of the agreement's object and purpose.

Without doing away with the ultimate case-by-case analysis preferred by the Appellate Body, I argue for the adoption of an "open" construction of exemption provisions to do justice to the Hobbesian ethos of avoiding the *summum malum* of a free fall into beggar-thy-neighbor protective discrimination,[10] while allowing the rational macro-economic (or directional) preference heterogeneity of the Membership to find full expression.

In Section A, I introduce the standard of review as it features and pertains to the GATT and establish the importance of the standard of review as a lens through which the adjudicator construes the provisions of the covered agreement. The standard of review guides the adjudicator in constructing the provision within the framework of the covered agreement. In this process, the character of the provision is revealed (rule, exception, or exemption) and accorded an appropriate scope, in accordance with the adjudicator's understanding of its object and purpose.

Section B submits that the GATT is an economically directional agreement between Member States (as apparent from the preamble to GATT 1947 and the WTO Agreement), but observes that there is considerable heterogeneity among the Membership as to optimal local policies (industrial policies). I consequently focus the hermeneutical framework on Member States' economic preference heterogeneity. Consequently, a successful interpretation of the provisions of the GATT 1994, such that the judicial assessment maximally comports to Member State economic preferences, first clarifies the perspectives on economic growth maintained by the adjudicator.

Section C argues that instead of mechanically applying the customary rules of international law of interpretation, seeking the "ordinary meaning" of the terms in accordance with Article 31 VCLT, the adjudicator is engaged in a decision-making process. The adjudicator's adoption of one economic theory (sociological teleology) over another in her construction of terms and provisions is, or so Koskenniemi argues, driven by her ultimate reliance on the external concepts of Power or Utopia.

[10] Paraphrasing Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 45.

In Section D, I formulate an alternative method of constructing the meaning and scope of exemptions in the GATT 1994. By emphasizing the collaborative desire by Parties, captured in the preamble of the GATT 1947 and the WTO Agreement, the adjudicator can resist Koskenniemi's deconstructive technique. Her understanding of the collaborative intent of Parties allows her to maintain an object and purpose analysis of the terms and provisions of the covered agreement. The judicial decision maker is thereby not liberated however, but remains constrained in her construction of the covered agreement. Kantorowicz' triptych details these constraints on the decision-making process of the adjudicator: any adjudication remains subject to normative, sociological and doctrinal teleology.

In Chapter 5, *infra*, I apply this framework to the construction and interpretation of Article XI:2(a) GATT 1994. There, I explore how the adjudicator of the multilateral agreement can, in her construction of the exemption provision and interpretation of its terms, be sensitive to the preference heterogeneity of Parties, while simultaneously be constrained by the normative and doctrinal aspects of adjudication within the framework of the GATT/WTO.

A. The GATT Standard of Review

The judicialization of international economic law has been one of the more pronounced developments in the relationship between countries in contemporary history, especially regarding international trade law.[11] The General Agreement on Tariffs and Trade (GATT) embodies this development in its historical transition from a diplomacy-led to a rules-based judicial system of governance.[12] The postwar trade order aims to balance the rights of Member States to manage their domestic economies optimally with the imperative to prevent protectionist measures to set off a race to the bottom.[13] The legal structure of the GATT is designed to make tariff concessions binding and enforce

[11] While this observation is historic in nature, it expresses the hope of the author that the international trading system will continue to function judiciously, regardless of the sometimes fraught relationship with some of its most powerful Member States – such as the United States. I believe that the argument offered in this work can aid the legitimacy and expediency of the dispute settlement system at the WTO.

[12] See, for instance, Robert Howse, "From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System," 96 *American Journal of International Law* 94 (2002); and Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (New York: Oxford University Press, 2011).

[13] Robert Howse, "From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System," 96 *American Journal of International Law* 94 (2002), p. 95.

non-discriminatory application,[14] while allowing for a variety of exceptions and exemptions to facilitate individual Member States to responses to opportunity or crisis.

At the outset of the GATT (1947), a diplomatic outlook and framework bolstered the effectiveness of the legal structure of the GATT.[15] Diplomacy however gave way to full judicialization at the Uruguay Round with, among other agreements, the adoption of the Dispute Settlement Understanding (DSU). Some of the key changes the DSU introduced include the near-automatic adoption of Panel reports (Articles 6.1, 16.4, 17.14, and 22.6 DSU) and the establishment of the Appellate Body, charged solely with addressing "issues of law covered in the panel report and legal interpretations developed by the panel" (Article 17.6 DSU). In contrast, "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, […]" (Article 11 DSU).

The key assumption remains unchanged however, such that "one should be able to protect domestic social and political stability, using means that avoid exporting domestic social economic difficulties and threatening global stability - in other words, to avoid destructive forms of *interdependent* behavior."[16] That is to say, the dispute settlement system should support "the security and predictability to the multilateral trading system, […] [such as] to preserve the rights and obligations of Members under the covered agreements [….] [and neither] add to or diminish the rights and obligations provided in the covered agreements." (Article 3.2 DSU)

Article 11 DSU makes clear that the Panel is supposed to accomplish its mission through "an objective assessment of the matter before it" – in both law and fact. This "standard of review" was the subject of intense negotiations during the Uruguay Round (see Section A.1, *infra*) as it moderates between the object and purpose of the GATT, the

[14] See general the literature around Article III GATT 1994; see also, Alan O. Sykes, "Regulatory Consistency Requirements in International Trade," Stanford Law School, John M. Olin Program in Law and Economics, Working Paper No. 502 (2017).

[15] As Mavroidis notes, "[e]conomists often describe GATT as a "relational contract," with like-minded countries brough in by invitation only, and they managed to proceed with consensus decisions." [i.e. "GATT-think" operated by a close(d) network of diplomats] in Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 60. See also, Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflection on WTO Dispute Settlement," in Roger B. Porter, et al., eds., *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Brooking Institutions, 2001). See also, Thomas J. Bollyky and Petros C. Mavroidis, "Trade, Social Preferences and Regulatory Cooperation: The New WTO-Think," EUI Working Paper RSCAS 2016/47 (2016).

[16] Robert Howse, "From Politics to Technocracy and Back Again: The Fate of the Multilateral Trading System," 96 *American Journal of International Law* 94 (2002), p. 95.

language of its provisions, and the policy space Member States have to optimally respond to opportunities and challenges.[17]

In response to political and economic divisions in the WTO Membership, the Appellate Body developed an approach by which to review domestic measures against the text of the multilateral agreement that – at the best of times – aided it to decide "controversial questions in balanced or deferential ways that indicate neutrality or even caution in regard to the neo-liberal 'deep integration' trade agenda reflected in the Uruguay Round [...]."[18] In this work I press for such balance and argue that the moderating position of the standard of review should instruct the Appellate Body to construct exemptions broadly when they pertain to "developmental" (see for a definition Chapter 2, *infra*) challenges, but likewise should demand a high level of specificity in the argumentation of "economic facts" before the Panel.

The standard of review WTO Panels and the Appellate Body apply to their respective weighing and "fitting" of domestic policy measures against the text of the appropriate agreements affects both the vertical as the horizontal allocation of competency.[19] The standard of review establishes the measure of intrusiveness or deference[20] with which national policy measures are read against the structure and rules of the WTO Agreements (both in questions of law and fact).[21]

The determination of the appropriate standard of review not only informs the proper scope of the rules, including their exceptions and exemptions, it also provides the lens by which the Panel and Appellate Body should accord

[17] For examples of other standards of review in domestic law (Australia, the United States, and France, for example) or international law (European Court of Justice, or select international dispute settlement bodies) see, Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Cheltenham, UK, Edward Elgar, 2012), pp. 12-26. Note however that most arguments that arise in the domestic context (such as an emphasis on expertise, democratic rule, and efficiency of governance) do not easily or convincingly translate into the WTO context; see Stephen Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review and Deference to National Governments," 90(2) *American Journal of International Law* 193 (1996), pp. 208-212.

[18] Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *The European Journal of International Law* 1 (2016), p. 12.

[19] Which is to say, the applicable standard of review may affect the allocation of competency between WTO Panels and the Membership (vertical), as well as affect the relationship between the Panel/Appellate Body and other parts of the WTO institutional structure such as the Ministerial Conference (horizontal). See Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 38; See also, John H. Jackson, "Sovereignty, Subsidiarity, and Separation of Powers: The High-Wire Balancing Act of Globalization," in Daniel L. M. Kennedy and James D. Southwick, eds., *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002).

[20] Jan Bohanes and Nicolas Lockhart, "Standard of Review in WTO Law," in Daniel Bethlehem, Donald McRae, Rodney Neufeld and Isabelle van Damme, eds., *The Oxford Handbook of International Trade Law* (New York: Oxford University Press, 2010), p. 379.

[21] See, among others, Andrew Stoler, "The WTO Dispute Settlement Process: Did the Negotiators Get What They Wanted?," 3(1) *World Trade Review* 99 (2004), p. 113.

meaning to these provisions. The method by which the rules are constructed in relation to national measures automatically delineates the universe from which the judicial decision maker accords appropriate meaning to the provisions.[22]

As the jurisprudential acquis grows and the approach of the Appellate Body remains notoriously fluid, subject to rapid changes and strongly case specific,[23] critics question whether some kind of political or diplomatic control over the Panel and Appellate Body decisions needs to be reasserted.[24] Such critics, perhaps surprisingly, recently include the United States of America – both on judicial independence[25] as on the nature of the dispute settlement system[26] -- one of the voices that has historically shaped the contours of the multilateral trading system and sought to minimize the political influence of "the state."

With the collapse of the Doha Development Round in December 2015, "vertical" issues pertaining to the proper scope and construction of (developmental) exceptions and exemptions have returned to the sole ambit of the Panels and Appellate Body. Ehlermann, who served as member and Chairman of the Appellate Body to 2002, noted at the end of his term that "during the last months, the question of standard of review has […] become one of the most controversial aspects of the Appellate Body's jurisprudence."[27] Little has changed.

In the Section A.1, I set out the historical development of the standard of review in the GATT to situate the discussion in Section A.2, on the current interpretation thereof, as well as to provide additional context when

[22] The review process is further determined by various issues, including the allocation of the burden of proof, adoptionby the decision maker of a judicial method of interpretation (see Chapters 3 and 4 *infra*), requirements for standing, and certain issue avoidance techniques such as judicial restraint and efficiency.

[23] See Michael Ioannidis, "Beyond the Standard of Review Deference Criteria in WTO Law and the Case for a Procedural Approach," Chapter 6, in Lukasz Gruszczynski and Wouter Werner, eds. *Deference in International Courts and Tribunals* (New York: Oxford University Press, 2014), p. 95. See Frieder Roessler, "Changes in the Jurisprudence of the WTO Appellate Body During the Past Twenty Years," (2015), RSCAS 2015/72 Robert Schuman Centre for Advanced Studies Global Governance. See also, Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, (2006), ¶93.

[24] See, for instance, Claude E. Barfield, *Free Trade, Democracy, Sovereignty: The Future of the World Trade Organization* (Washington D.C.: The AEI Press, 2001).

[25] Obama administration publically criticized (and blocked) the appointment of a Korean member of the Appellate Body on account of unwelcome judicial activism. See, for an overview, Simon Lester, "What's at Stake with the Appellate Body Reappointment Controversy," *International Economic Law and Policy Blog* (June 7, 2016); "More on the U.S. Objections to Certain Appellate Body Practice," (June 6, 2016); "The U.S. Justification for its Appellate Body Reappointment Actions," (May 28, 2016).

[26] The Trump administration has formulated a generally combative tone on the framework of multilateral trade regulation; including a rather extreme interpretation of Article 3.2 DSU's clarification that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[27] Claus-Dieter Ehlermann, "Some Personal Experiences as Member of the Appellate Body of the WTO," Policy Paper RSC No. 02/9 (2002), ¶64; in Matthias Oesch, "Standards of Review in WTO Dispute Resolution," 6(3) *Journal of International Economic Law* 635 (2003), p. 636.

considering the drafting history of Article XI GATT and associated exemption provision (Article XI.2(a) GATT) in Chapter 5, *infra*.

1. Historic Standard of Review: GATT 1947-1994

To determine the contours of the standard of review in the GATT 1994, it's important to consider its progression and development since the inception of the GATT in 1947, through several rounds of negotiations, and finally as subject of a rigorous debate during the Uruguay Round (1986-1994). The next Section (A.2) will address the interpretation, application, and critique of the standard of review since the Uruguay Round. Generally, two trends emerge from the application of the standard of review: (i) adoption of a standard of review depending on the type of obligation under review; (ii) an increasingly more unilateral, or *de novo*, type of review (i.e. less deferential to Member State arguments and constructions[28]).

The GATT 1947 emerged, through a Protocol of Provisional Application, from the failed process to adopt and ratify the Charter for the International Trade Organization.[29] Accordingly, the GATT 1947 failed to acquire administrative and institutional features to fully take its place next to the International Monetary Fund (IMF) and World Bank. The early GATT 1947 was instead administered through collective decision making of its "Contracting Parties." These Contracting Parties at first "simply gave themselves the power to make whatever decisions were necessary to implement the agreement."[30]

[28] Especially under the GATT 1947, before the introduction of DSU and the associated emergence of a strong judiciary function in the Panels and Appellate Body, the international trade system can be described as more "power" rather than "rule" orientated; see Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Law International, 1997), p. 66. Under the GATT 1994, the members of the Appellate Body and Panels have, more strongly, adopted the position of judicial decision maker – rather than powerbroker.

[29] John H. Jackson, *The World Trading System – Law and Policy of International Economic Relations* (Boston: MIT Press, 1997).

[30] Such by means of a broad interpretation of Articles XXII and XXIII GATT 1947; quote from Robert E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Butterworths legal Publishers, 1993), p. 30; see also, T.N. Srinivasan, "The Dispute Settlement Mechanism of the WTO: A Brief History and an Evolution from Economic, Contractarian, and Legal Perspectives," Stanford Law and Economics Olin Working Paper No. 320 (2005).

As a high degree of policy cohesion existed between the early Contracting Parties,[31] disputes could be referred to informal working parties that functioned as "ad hoc negotiating bodies."[32] In 1952 however a panel system was introduced and staffed by diplomats from neutral Contracting Parties. In the 1960s, this system of diplomatic dispute settlement came more politicized with the admission of quite a few developing countries[33] to the GATT 1947 – the Membership became more heterogeneous in terms of policy preferences, economic needs, and political power; effectively grinding diplomatic forms of dispute settlement to a halt.[34]

In a series of negotiating rounds, tariffs were lowered and a host of associated issues clarified. From the perspective of the development of the standard of review, the seventh negotiating round (1973-1979) or the Tokyo Round, is especially significant. In the Tokyo Round a number of "codes" were adopted dealing with non-tariff issues; made possible, in part, by the United States negotiating team recently being invigorated by "fast-track" authority (US Trade Act 1974) to negotiate on matters ordinarily under the purview of the US Congress.

In order to effectively address non-tariff barriers to trade, more detailed legal rules are necessary as many non-tariff barriers are more nuanced (and more opaque) than straight tariffs. Hudec notes that "the new codes required a strong dispute settlement procedure to make them credible" as "unlike tariffs, NTBs [non-tariff barriers] could not simply be bargained away, one against the other."[35]

The 1979 Understanding on Dispute Settlement offers the first legal guidance on how Panels are to approach domestic measures,[36] brought before them ex Article XXIII:2 GATT 1947. Article 16 prescribes:

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[31] In *US – Fur Felt Hats* (1951), it was held that the question of "serious injury" was "essentially a matter of economic and social judgment involving a considerable subjective element" (¶30). See further, WTO Panel Report, *US – Underwear* (1996), ¶¶ 5.32, et seq.

[32] Robert E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Butterworths legal Publishers, 1993), p. 30; These ad hoc working parties generally showed great deference to the Contracting Parties, noting in *US – Fur Felt Hats* (1951) that "It would not be proper to regard the consequent withdrawal of a tariff concession as *ipso facto* contrary to Article XIX unless the weight attached by the government concerned to such factors was clearly unreasonably great" (¶48).

[33] Among them: Argentina (1967), a host of African countries, Jamaica (1963), Republic of Korea (1967), Poland (1967), Portugal (1962), Spain (1963), Yugoslavia (1966), and Israel (1962).

[34] See, Terence P. Stewart and Christopher Callahan, "Dispute Settlement Mechanisms," in Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History* (1986-1992), Vol-II, 2680.

[35] Robert E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Butterworths legal Publishers, 1993), p. 40.

[36] An important detail is that a number of the Tokyo Round Codes had separate dispute resolution mechanism imbedded; see, for example, Article 18.1 of the Subsidies Code. See, David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge: Cambridge University Press, 2004), p. 7-11.

> Accordingly, 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 General Agreement […][37]

Despite the standard of review being an explicit "discussion topic,"[38] no GATT dispute panels explicitly referred to or identified this Article as describing the appropriate general standard of review.[39] Nevertheless, some panels did address the standard of review. Although somewhat erratic in their decisions (ranging from very deferential to rather intrusive), the Panel in *New Zealand – Finnish Transformers* (1985) marked the high-point for intrusiveness of review. The Panel noted that to be fully deferential to domestic findings on material injury (in anti-dumping cases), "would give governments complete freedom and unrestricted discretion in deciding antidumping cases without any possibility to review the action taken in the GATT."[40]

In *US – Swedish Steel*, a Panel Report on the cusp of the Uruguay Round, the United States argued for a "systemic analysis" in its determination and assessment of the facts. Such systemic analysis would guard against a domestic authority "deliberately act[ing] in a way which would prejudice the outcome of an investigation in favour of one party or [being] seriously negligent in the manner in which it conducted the investigation […]."[41] The Swedes on the other hand, argued that a "detailed analysis of certain factual aspects of these determinations"[42] was necessary to appropriately analyze whether the challenged determinations had been made in accordance with the provisions of

[37] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, L/4907, adopted November 28, 1979, BISD 26S/210, quoted in relevant part only (Article 16). Furthermore, an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2), BISD 26S/215 (1980) was attached to the Understanding on Dispute Settlement (1979).

[38] See, 1976 Report of the Consultative Group of Eighteen, BISD 23S/42 (1977).

[39] See, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), pp.61-62, noting "[…] panels were under no explicit obligation to defer to factual findings as established and evaluated by domestic authorities […]"; See also Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Cheltenham, UK, Edward Elgar, 2012), noting that the 1979 Anti-Dumping Code did however "cast some limitations on the fact reviewing task of panels," (p. 41).

[40] GATT Panel Report, *New Zealand – Finnish Transformers (1985),* ¶4.4. Oesch suggests that the panels intrusive review can be equated to a de novo assessment the facts (p. 65), in Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003); while Hudec observes that the "case clearly served as another solid building block in the GATT's legal reputation, in retrospect it might have been wiser to spend more time defining the degree of review GATT panels were to conduct in antidumping and countervailing cases." (p.174) in Robert E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Butterworths legal Publishers, 1993).

[41] GATT Panel Report, *US – Swedish Steel* (1990), ¶3.11.

[42] GATT Panel Report, *US – Swedish Steel* (1990), ¶3.12.

the GATT 1947. The Panel, declining to formulate a general standard of review, emphasized that a case-by-case approach was more appropriate.[43] The diplomatic tradition suggested a need for "flexible rules."[44]

This set the analytical stage[45] for the most important negotiating round to shape the standard of review as applied in the GATT 1994; the Uruguay Round (1986-1994). The entire agenda of the Uruguay Round was extraordinarily ambitious (and successful), expanding the substantive coverage of the newly instituted World Trade Organization considerably. In the present context it is especially noteworthy that one negotiating group was dedicated to strengthening the rules of dispute settlement proceedings and shore up the surveillance of implementation.[46]

Until late in the negotiations the standard of review did not feature prominently,[47] toward the end however the issue became a "deal-breaker."[48] Despite what may have been the legal practice of panels under the GATT 1947, there was a perception – most notably voiced by the United States -- that panels had set a too intrusive standard of review in general and regarding the evaluation of facts in anti-dumping and countervailing measure cases in particular.[49] The United States criticized "the perceived willingness of certain panels to overturn the actions of investigating authorities that were reasonable."[50]

In the final phases of the Uruguay Round several proposals were tabled to ensure for a more deferential standard of review in the traditional categories of factual and legal findings pertaining to the provisions of the covered

[43] GATT Panel Report, *US – Swedish Steel* (1990), ¶5.3; see similarly GATT Panel Report, *Korea – Resins* (1993); and GATT Panel Report, *US – Norwegian Salmon AD* (1994), ¶494, GATT Panel Report, *US – Norwegian Salmon CVD* (1994), ¶258. Also, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p.62. In antidumping and countervailing duties the applicable standard of review was discussed more often though. Vermulst and Komuro hold that broadly in the GATT 1947 case law, "[w]hile most panels established to determine GATT-compatibility of importing countries' anti-dumping laws and/or measures have held against the importing countries' positions, generally after a painstaking review of all the details […], GATT panels have not re-done factual determinations." Edwin Vermulst, Norio Komuro, "Anti-Dumping Disputes in the GATT/WTO – Navigating Dire Straits," 31(1) *Journal of World Trade* 5 (1997), pp. 7, 15-19.

[44] Robert E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Butterworths legal Publishers, 1993), p. 266. Such flexible rules lead to a deferential standard of interpretation and accords national authorities a certain margin of appreciation in interpreting and applying the provisions of the GATT 1947. How much is too much remains difficult to verify and substantiate, according to Hudec.

[45] See broadly, Stephen Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review and Deference to National Governments," 90(2) *American Journal of International Law* 193 (1996).

[46] See broadly, Terence P. Stewart and Christopher Callahan, "Dispute Settlement Mechanisms," in Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History* (1986-1992), Vol-II, 2724-2812.

[47] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. No. MTN.TNC/W/FA (December 20, 1991) – the "Dunkel Draft".

[48] John H. Jackson, American Society of International Law (ASIL), Proceedings of the Annual Meeting (1994), p. 139.

[49] Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 72.

[50] Stephen Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review and Deference to National Governments," 90(2) *American Journal of International Law* 193 (1996), p. 190.

agreements (treatment of domestic international law by Panels and the Appellate Body were never considered).[51] The United States offered the standard of review developed in its domestic administrative law jurisprudence (the "Chevron"-doctrine[52]) as a useful and adequate model of judicial restraint under the GATT/WTO.[53]

In 1989, the US suggested, before the Subsidies and Countervailing Measures Group, that "a GATT dispute settlement panel must not substitute its own judgement for that of the investigating authorities (i.e., a panel may not conduct an independent *de novo* investigation)."[54] Again in 1992, the US pushed a narrow standard of review that was to be included in the Anti-Dumping Agreement,[55] but failed to convince other delegates. In 1993 the US yet again attempted to insert language limiting the applicable standard of review in GATT/WTO dispute settlement; this time as an *Interpretative Note* to the draft Article 11 DSU.[56]

Despite having milder language, this limit to the standard of review was rejected as well, on two accounts. First, countries worried that a narrow standard of review would allow governments from applying GATT rules illegitimately to protect domestic industries. Second, intellectual property circles desired an intrusive review by Panels to review Member State implementation of the provisions of the TRIPs Agreement.

The resulting standoff, with the United States (at times supported by the European Communities) pushing for deference and the majority of the Membership opposing this,[57] resulted in a tense compromise: formal incorporation of a deferential standard of review into the Antidumping Agreement, centered on the standard of "permissible" instead of "reasonable." The door to more general application of the "permissible" standard beyond Article 17.6

[51] Stephen Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review and Deference to National Governments," 90(2) *American Journal of International Law* 193 (1996), pp. 194-197; and Stefan Zleptnig, "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority," 6 *European Integration Online Paper* (2002), pp. 429-431.

[52] *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); putting forward a general deferential standard of review for Federal Court reviewing agencies' interpretations of law if Congress has not directly spoken to the precise issue in question. In the absence of Congressional guidance, Federal Courts should test whether an agencies' interpretation was "reasonable."

[53] See for a critical review of the parallel between the Chevron-doctrine and the standard of review in the GATT/WTO, Stephen Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review and Deference to National Governments," 90(2) *American Journal of International Law* 193 (1996), pp. 197-203; Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 96 et seq. See also, Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989(3) *Duke Law Journal* 511 (1989).

[54] Cited from Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 74.

[55] See, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 74; see also Gary N. Horlick and Peggy A. Clarke, "Standard for Panels Reviewing Anti-Dumping Determinations under the GATT," in Ernst-Ulrich Petersmann, ed., International Trade Law and the GATT and WTO Dispute Settlement System (The Hague: Kluwer Law International, 1997), p. 298.

[56] See, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 74

[57] "Ending the Uruguay Round: An Interview with GATT Chief Sutherland," *Inside US Trade* (December 2,3 1993).

Antidumping Agreement was left open.[58] In practical terms, setting the appropriate level of intrusiveness or deference in specific circumstances has been part of the work of the WTO dispute settlement body since 1994. The Appellate Body, in *EC – Hormones*, found that Article 11 DSU "articulates with great succinctness but with sufficient clarity the appropriate standard of review."[59]

2. The GATT 1994: An "Objective Assessment"

The Uruguay Round, a defining marker against which subsequent case law and jurisprudence on the GATT 1994 needs to be understood, left the question of the appropriate standard of review relatively open. The close relationship between Article 16 of the 1979 Understanding on Dispute Settlement and Article 11 DSU obviously suggests a measure of continuity between dispute settlement under the GATT 1947 and GATT 1994.[60] While the relevance of the negotiating history to post-Uruguay Round decisions is limited by Article 32 VCLT,[61] practice has also established some continuity of thought between GATT 1947 and GATT 1994. As Roessler notes: "in short, in dubio pro GATT 1947."[62] The Appellate Body, in *Japan – Alcoholic Beverages*, similarly finds adopted reports[63] "an important part of the GATT acquis."[64]

Whereas Panels and the Appellate Body have observed that the DSU does not contain an explicit reference to the standard of review as such,[65] Article 11 DSU has been deemed to serve as locus for the applicable standard of

[58] See Ministerial Decision on the Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; made part of the Results of the Uruguay Round Final Act, The Legal Texts, p. 397. Subsequent case-law however has interpreted Article 17.6 AD Agreement as containing a separate, though related, standard of review: see WTO Appellate Body Report, *US – Hot Rolled Steel from Japan* (2001); see WTO Appellate Body Report, *Thailand – Iron, Steel and H-Beams* (2001); and WTO Appellate Body Report, *US –Offset Act* (2003).

[59] WTO Appellate Body Report, *EC – Hormones* (1998), ¶116.

[60] See, for instance, Gary N. Horlick and Peggy A. Clarke, "Standard for Panels Reviewing Anti-Dumping Determinations under the GATT," in Ernst-Ulrich Petersmann, ed., *International Trade Law and the GATT and WTO Dispute Settlement System* (The Hague: Kluwer Law International, 1997), p. 317.

[61] See WTO Appellate Body Report, *EC –Computer Equipment* (1998), where the AB limited the use of negotiating history to a supplementary source of interpretation. Under the GATT 1947, negotiating history had often been regarded as controlling; see Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 32.

[62] Frieder Roessler, "The Institutional Balance Between the Judicial and Political Organs of the WTO" in Marco Bronckers and Reinhard Quick, eds., *New Directions in International Economic law: essays in honor of John H. Jackson* (Hague/London/Boston, Kluwer Law International, 2001), p. 343.

[63] Unadopted reports under the GATT 1947 can still provide "useful guidance" to GATT 1994 Panels and the Appellate Body; see WTO Panel Report, *Japan – Alcoholic Beverages* (1996), ¶6.10; confirmed by the Appellate Body in WTO Appellate Body Report, *Japan – Alcoholic Beverages* (1996), p. 15.

[64] WTO Appellate Body Report, *Japan – Alcoholic Beverages* (1996), p. 14 et seq., while reversing the Panel on its finding of adopted reports as "subsequent practice" according to Article 31(3)(b) VCLT. See also, WTO Panel Report, *US – Woven Wool Shirts and Blouses* (1997), ¶7.15.

[65] WTO Panel Report, *US – Woven Wool Shirts and Blouses* (1997), ¶7.16; and WTO Appellate Body Report, *EC – Hormones* (1998), ¶114.

review to the GATT/WTO. In *US – Underwear*, the Panel held that "the main relevant provision of the DSU in this respect [standard of review] is Article 11."[66] The Panel went on to note that "a policy of total deference to the findings of national authorities could not ensure an 'objective assessment' as foreseen by Article 11 DSU," while stressing that it does not "see our review as a substitute for the proceedings conducted by national investigating authorities […]."[67] The Appellate Body, reversing the Panel in *Canada – Periodicals*, noted that the Panel is held to an "adequate" analysis of the facts.[68]

In its report *EC – Hormones*, the Appellate Body eventually made Article 11 DSU its cornerstone provision; informing standard of review questions in all disputes where the relevant agreement contains no clear individual language on the appropriate standard.[69] With respect to the standard of review pertaining to legal interpretations, the Appellate Body held:

> "—that is, consistency or inconsistency of a Member's measure with the provisions of the applicable agreement – a standard not found in the text of the SPS Agreement itself cannot absolve the panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law. […] It is appropriate to stress that here again Article 11 of the DSU is directly on point, requiring a panel to 'make an objective assessment of the matter before it'."[70]

With regard to the standard of review in factual matters, the Appellate Body noted:

> "So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither de novo review as such, nor 'total deference,' but rather the objective assessment of the facts'."[71]

Accordingly, Article 11 of the DSU demands an objective assessment of the matter before it in (i) the facts, (ii) the applicability of the relevant rules, and (iii) the conformity of the facts with the relevant rules.[72] This three-part test is not much enlightened by the instruction to pursue an "objective" construction thereof,[73] although the Appellate Body has provided some guidance as to the framework within which these aspects are to be positively applied. In an

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[66] WTO Panel Report, *US – Underwear* (1997), ¶¶7.9-7.10.

[67] WTO Panel Report, *US – Underwear* (1997), ¶¶7.13, 7.16.

[68] WTO Appellate Body Report, *Canada – Periodicals* (1997), p. 22.

[69] See, for instance, *Argentina – Footwear Safeguard Measures* (2000), ¶¶117-118; "We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels."

[70] WTO Appellate Body Report, *EC – Hormones* (1998), ¶117.

[71] WTO Appellate Body Report, *EC – Hormones* (1998), ¶118 (footnotes omitted).

[72] See Article 11 DSU; also, for example, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 86, referencing Pierre Pescatore, *Handbook of GATT (WTO) Dispute Settlement* (Springer, 1996), p. 37.

[73] See, for instance, Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995), p. 70. See also, Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Cheltenham, UK, Edward Elgar, 2012), section 2.4, where he notes: "the mayor difficulty with this type of definition is that an objective assessment does not really signify any particular degree of deference or intrusion for panels to adopt in examining measures. There is therefore an absence of conceptual sophistication that would provide guidance to panels in their review of measures" (p. 51).

early comment on *EC – Hormones* and the "objective assessment"-test, Desmedt rightly points out that "[t]he notion of objectivity rather assumes an alternative to the [defendant's] proposals for the development of an appropriate standard of review. The question is if the Appellate Body will further develop the confines of this review through the principle of objectivity rather than vacillating between total deference and de novo review."[74]

In *Argentina – Footwear Safeguard Measures*, the Appellate Body makes clear it requires the Panel to "correctly interpret[] and [apply] the substantive provisions of [the relevant agreement]."[75] This formulation confirms that the interpretation of a covered agreement at the substantive level of the provisions is governed by the standard of review of Article 11 DSU and narrows any deference a panel generally has to accord Member States in its interpretation of the applicable agreement. The judicial decision maker is thus compelled to approach the construction of the applicable agreement as a matter of an "objective assessment" governed by the rules of interpretation of public international law.[76] (for a comparative analysis between the amount of deference accorded to Member States in provisions stipulating exceptions and exemptions to the GATT/WTO, see Chapter 4, *infra*)

The Panel's "objective assessment" is tied to "the matter before it," thus anchoring a possibly general standard in the agreement, provision and, possibly, substance before it. The Appellate Body in its report in *US –Lamb* noted that the precise nature of the objective assessment is determined by Article 11 DSU in combination with the obligations imposed by the provision under investigation (i.e. Article 4.2 Safeguards Agreement).[77] Such approach could be interpreted as an attempt by the Appellate Body to give effect to the character of the various measures and

[74] G. Alex Desmedt, "Hormones: Objective Assessment and (or as) Standard of Review," 1 *Journal of International Economic Law* 695 (1998), p. 697.

[75] WTO Appellate Body Report, *Argentina – Footwear Safeguard Measures* (2000), ¶122; see also WTO Appellate Body Report, *EC – Certain Computer Equipment* (1998), ¶89.

[76] An understanding further confirmed by the WTO Panel Report, *US – Sections 301-310* (2000), which notes: "Of course, when it comes to deciding on the correct interpretation of the covered agreements, a panel will be aided by the arguments of the parties but not bound by them; its decisions on such matters must be in accord with the rules of treaty interpretation applicable to the WTO" (¶7.16); see also WTO Panel Report, *US – Antidumping Act of 1916* (2000), ¶6.26; and WTO Panel Report, *EC – Asbestos* (2001), ¶8.82. See furthermore, Thomas Cottier, "Risk Management Experience in WTO Dispute Settlement," Chapter 4 in David Robertson and Aynsley Kellow, ed., *Globalization and the Environmental Risk Assessment and the WTO* (Edward Elgar Online, 2001); and especially, Thomas Cottier and Matthias Oesch, "The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework," in Thomas Cottier and Petros C. Mavroidis, eds., *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003).

[77] WTO Appellate Body Report, *US – Lamb Safeguards* (2001), ¶105.

provisions governed by the standard of review set in Article 11 DSU.[78] Similarly, the Appellate Body in its report *US – Countervailing Duty Investigation on DRAMS* held that:

> "[W]e recall that an 'objective assessment' under Article 11 of the DSU must be considered in the light of the obligations of the particular covered agreements at issue in order to derive the more specific contours of the appropriate standard of review."[79]

The Appellate Body then went on to note that its embedded standard of review is instructive as an agreement-specific expression of a broader rule.[80] There remains a high onus on Panels to review factual matters thoroughly, without entering into a *de novo* review, while construing the provision "in the light of the obligations of the particular covered agreements."

This embedded standard of review has gained particular salience in the context of the general exception to the GATT, Article XX, which has been found to localize the "right to regulate." The Appellate Body in its report *China – Publications* clarifies the relationship between headline rules and exceptions from the perspective of the adjudicator that:[81]

> [W]e see the 'right to regulate', in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the *WTO Agreement*. With respect to trade, the *WTO Agreement* and its Annexes instead operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder. [...] We observe, in this regard, that WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception.

The scope accorded to provisions detailing exemptions to WTO Members' regulatory requirements are the (unobserved) third defining element in a balanced construction of the GATT and other covered agreements. Examination of the relationship between exemptions and applicable regulatory requirements ("headline rules"), as well as the relationship between these exemptions and related exceptions, demands an "objective assessment" as

[78] See Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law," 7(3) Journal of International Economic Law 491 (2004); and Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Cheltenham, UK, Edward Elgar, 2012), p. 57.

[79] WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), ¶184. See further WTO Appellate Body Report, *US – Continued Hormones Suspension* (2008), ¶¶590-593; and WTO Appellate Body Report, *Australia – Apples* (2010), ¶¶356-359.

[80] WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), ¶184; notes that its standard of review is "instructive for cases under the SCM Agreement that also involve agency determinations."

[81] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222-223; building on WTO Appellate Body Report, *US – Gasoline* (1996), p. 30, where it held that "so far as concerns the WTO, [Member State legislative autonomy] is circumscribed only by the need to respect the requirement of the *General Agreement* and the other covered agreements."

much as the construction between exceptions and headline rules does. This unobserved third element of a balanced understanding of the GATT (and other covered agreements) is centrally addressed by the WTO Appellate Body report in *China – Raw Materials* (critically examined in Chapter 5, *infra*).

A thorough reflection on the character of the embeddedness of the standard of review can prevent violations of the principle of equality (similar cases treated differently), as well as support the predictability of the construction of provisions across their legal and factual ambit. Application of the standard of review in a manner more sensitive to the obligation under investigation – that is construed with regard to the object and purpose of the agreement and provision under review – can lead to a more nuanced and sophisticated practice in WTO dispute settlement procedures.

The most convincing argument against anything less than full *de novo* review by Panels and the Appellate Body in the construction of covered agreements is the imminent threat of what Palmeter and Spak describe as a "legal tower of Babel."[82] Such loss in uniformity in the language and meaning of each provision could (indeed would) result in legal chaos. Furthermore, such loss in uniformity of interpretation might very well be considered in contravention of the customary rules of interpretation of public international law which demand from the adjudicatory interpreter that she find the "ordinary meaning" (singular) of the words of a provision.[83]

This is not to say that the objective assessment of the meaning of a provision in covered agreements cannot be mindful of the diverging preferences within the multilateral Membership on the desired level of policy space.[84] Indeed, when constructing an objective assessment of the scope and meaning of exceptions and exemptions to the rules of the GATT 1994, the adjudicator *has* to make a *conscious* decision on the appropriate scope of the exception

[82] David Palmeter and Gregory J. Spak, "Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Ear of Increasing Conflict," 24 *Law and Policy in International Business* 1145 (1993), 1158. See also, Jan Bohanes and Nicolas Lockhart, "The Standard of Review in WTO Law," in Daniel L. Bethlehem, Donald McRae, Rodney Neufeld, and Isabelle van Damme, eds., *The Oxford Handbook of International Trade Law* (New York: Oxford University Press, 2009).

[83] Interestingly, a similar "singular" standard seems to be adopted in the practice of applying the "permissible" standard of review in Article 17.4 AD Agreement; see, Thomas Cottier and Matthias Oesch, "The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework," in Thomas Cottier and Petros C. Mavroidis, eds., *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003).

[84] See, for instance, Robert Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power," in Thomas Cottier and Petros C. Mavroidis, *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: The University of Michigan Press, 2003); Also, Gary N. Horlick, "Deference –and Responsibility – by WTO 'Judges'," in *idem*.

and exemption in light of the object and purpose of both the article and the agreement as a whole. This decision as to the legal construction of the article does not therewith resolve the issue however. The decision maker can (and must) balance the degree of "openness" which she accorded to the interpreted provision, with corresponding demands on the persuasive reasoning necessary to fit facts (recognized according to its own standard of review) to the interpreted provision's scope.

If, as a reading of *EC – Hormones* might suggest,[85] the principle *in dubio mitius* were to be considered an applicable principle of international law (as, for example, a "supplementary means of interpretation" governed by Article 32 VCLT),[86] it cannot resolve the issue of deliberate determination of the scope of any provision as it presumes an understanding of the boundaries of the provision in first instance.[87] In absence of clear delineation, such boundaries are shaped through (a combination of) subsequent interpretative practice, scholarly commentary,[88] and through the decision makers' hermeneutic approach more generally.

Article 3.2 DSU sets some boundaries to the contours of the standard of review from the perspective of the adjudicator. The dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements […], [such that] [r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Furthermore, the adjudicator's sense of the appropriate deference, the leeway afforded to the right to regulate in exception provisions, and the general construction of the GATT/WTO-edifice needs to be mindful that "the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."

[85] WTO Appellate Body Report, *EC – Hormones* (1998), ¶12.

[86] See for an overview of the concept, Christophe J. Larouer, "In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts," Cornell Student Conference Papers (2009). The principle of *in dubio mitius*, capturing the obligation to prefer the interpretation that legally constrains the sovereign the least, naturally finds expression as part of a conception of international law that starts its analysis from the concept of absolute and unrestrained sovereignty of the state in its relations with other states. I, in Chapter 3, *infra*, reject this notion and prefer an approach to interpretation that ultimately resides in the adjudicator's understanding of the object and purpose of any collaborative agreement.

[87] Michael Ioannidis, "Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach," in Lukasz Gruszczynski and Wouter Werner, eds., *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (New York: Oxford University Press, 2014), observing that "most of the time […] the in dubio mitius principle will not be conclusive for deciding how much deference the WTO adjudicating bodies need to show to domestic assessments." (p. 101).

[88] See, for an early overview of academic citations, David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge: Cambridge University Press, 2004), p. 49-50.

Within these limitations, the adjudicator needs to come to a dispositive judicial decision in an "objective" manner (as Article 11 DSU instructs). She is thus compelled to positively determine the conceptual borders of the terms and provisions under consideration in a manner that comports to the demands of Article 3.2 of the DSU. The adjudicator ultimately achieves this by becoming aware of the teleologies that constrain her meaning attribution through application of the appropriate standard of review. In other words, she determines the boundaries of the provisions and terms before her with reference to her understanding of the object and purpose of the terms and provision under consideration.

B. GATT 1994: Law and Economics

The GATT 1994 is a collaborative[89] multilateral agreement that, according to its 1947 preamble, establishes "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce […]." Such arrangements are however to be understood as expressions of Member States' desire to, in relevant part, conduct "their relations in the field of trade and economic endeavour […] with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, […] in a manner consistent with their respective needs and concerns at different levels of economic development […]" (preamble WTO Agreement, GATT 1994).

The GATT 1994 is thus, with only the smallest (hegemonic) doubt,[90] an economically directional document in the field of international trade and economic endeavor. Accordingly, many economists and political scientists have put forward various theories about the underlying rationale for trade agreements – ranging from a focus on bargaining

[89] The choice for "collaborate" is deliberate and intended to denote a document capable of being known and interpreted on its own, not in conjunction with the trade "cooperation" that is part of the political process preceding conclusion of the collaborative treaty. The GATT allows the interpreter to understand Member States' cooperation and policy coordination as a multilateral collaborative exercise between Member States with heterogeneous economic preferences. A multilateral interpretation of the GATT/WTO should thus be capable of substantiating a collaborative equilibrium; see WTO Appellate Body Report, *US – Shrimp* (1998), ¶¶158-159; see also WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 325.

[90] See, Charles P. Kindleberger, *The World in Depression, 1929–1939* (Berkeley: University of California Press, 1973); Charles P. Kindleberger, "Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides," 25 *International Studies Quarterly* 242 (1981).

power[91] and the stabilization of the relevant terms of trade[92] to securing the pure[93] gains from trade against domestic interests.[94] As Horn and Mavroidis however observe, the negotiating record of the GATT 1947 seems to initially resist relying on the commitment theory (mainly because domestic instruments are not disciplined by the GATT beyond the principle of non-discrimination).[95] (see for a more in-depth review of static trade theory, with emphasis on export restrictions, Chapter 2.A, *infra*)

To more fully understand the process of translating the descriptions of the economic effects of trade restrictive and discriminatory trade policies into the realm of the GATT 1994, the interpreter needs to consider static economic "facts" against the directional proclamations of the preamble of the GATT 1947 and WTO Agreement and the prescriptions in the provisions that follow. To successfully construct and interpret the provisions of the GATT 1994, such that the judicial assessment comports with both static and directional components, it is important to clarify the adopted perspectives on economic growth.

It is in economic growth theory that the favorite notions of economists, such as allocative efficiency and the informational content of prices, find meaningful expression. Indeed, without an understanding of the dynamic aspects of economic theory, it is impossible to accord directional meaning to economic provisions – especially in the light of the aspirational preambles to GATT 1947 and to the WTO Agreement.

In other words, a description of static trade theory does not fundamentally enlighten the construction of the GATT 1994, as envisioned in its preamble and justified by its multilateral Membership. This multilateral Membership furthermore rationally holds different normative convictions on its needs and concerns in terms of economic development and growth – as explicitly recognized by the WTO (not least in the – now defunct – Doha Development Round).

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[91] See, Gene M. Grossman, "The Purpose of Trade Agreements," CEPR Discussion Paper No. DP11151 (2016); For a multilateral perspective see, Kyle Bagwell, Robert W. Staiger, and Ali Yurukoglu, "Multilateral Trade Bargaining: A First Look at the GATT Bargaining Records," NBER Working Paper No. 21488 (2015, version to March 2017).

[92] See, for instance, World Trade Organization, *World Trade Report 2010: Trade in Natural Resources* (Geneva: WTO, 2010); see also Chapter 2, *infra*.

[93] "Pure" in this context refers to the absence of monetary theory.

[94] See for an overview, Kyle Bagwell and Robert W. Staiger, "Economic Theory and the Interpretation of GATT/WTO," (August 2003); and Kyle Bagwell and Robert W. Staiger, *The Economics of the World Trading System* (Cambridge: The MIT Press, 2002).

[95] Petros Mavroidis, "The Genesis of the GATT Summary," in Hendrik Horn and Petros C. Mavroidis, eds., *Legal and Economic Principles of World Trade Law* (Cambridge: Cambridge University Press, 2013), p. 7. See for a broader examination of the negotiating history of the GATT, Douglas A. Irwin, Petros C. Mavroidis, Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008).

In Chapter 2, *infra*, I formulate two alternative theories of economic growth, one applicable to developed countries (a "mature" growth model) and the other designed to describe "catch-up" growth for developing and emerging markets. Both models normatively describe the process of economic growth of its set of countries, but by emphasizing different aspects. Whereas the "mature" model relies on effective resource allocation and lets household consumption patterns steer innovation at the technological frontier, the "catch-up" model concentrates on capacity accumulation and production diversification to drive its growth path.

Policies directed at "catch-up" growth can purposefully aim to get *some* prices temporarily "wrong" in order to entice entrepreneurial activity to embark on production diversification. While world prices are assumed to be unaffected, domestic prices are largely assumed to be sticky and only over the long run responsive to a specific and temporary price distortion. In this approach, market-driven rationalization of resource allocation consequently occurs *after* the acquisition of the necessary productive skills, or when the entry into new product markets has proven viable; *i.e.* at the moment when capital deepening occurs.[96] The formulation of the "catch-up" growth theory in Chapter 2, *infra*, allows for the weighing and balancing of economic "facts" and the efficacy of "Developmental" policies in a no-less rigorous way as its mature cousin allows for the judicial interpretation of "Commercial" policies.[97]

The Membership of the WTO consists of developed and developing countries, in both a legal and economic sense, and both approaches to economic growth thus rationally co-exist within the Membership at any time. The adjudicator of the multilateral agreement is, in the presence of this normative preference heterogeneity, compelled to positively consider the prevalence she accords to any economic theory in an "objective assessment" of the provision under consideration. Rather, without clarifying her relationship to economic theory, it is not possible for the adjudicator to sensibly complete the three steps required by Article 11 DSU: (i) to interpret the provision within the agreement, (ii) to assess the facts, and (iii) to fit the facts to the provision.

[96] See Akbar Noman and Joseph E. Stiglitz, eds., *Efficiency, Finance, and Varieties of Industrial Policy: Guiding Resources, Learning, and Technology for Sustained Growth* (New York: Columbia University Press, 2017).

[97] The terms "Developmental" and "Commercial" are defined in Chapter 2, *infra*.

C. GATT 1994: Power and Hermeneutics

Following adoption of the DSU and the associated transition of the GATT 1947 into the GATT 1994, the Appellate Body sought to establish itself in partial opposition to the diplomatic – and thus power-centric - "WTO institution."[98] The Appellate Body proceeded to give weight to the increased judicialization of the international trading system[99] by emphasizing the formal and semantic aspects of an interpretation of the GATT guided by the VCLT (note that Article 3.2 DSU prescribes merely the "customary rules of interpretation" of public international law).

By replacing a functional, consensus directed, approach to dispute settlement with textualism and formalism, the Appellate Body ostentatiously introduced a measure of distance between its reading of the GATT 1994 and the specific values of free trade that arguably reigned supreme at the Uruguay Round.[100] Whereas both the VCLT and the GATT/WTO recognize the role of an "object and purpose" analysis in its framing of the interpretative exercise, adjudicatory practice has deliberately dethroned a "general purpose" analysis of the treaty as primary analytical step.

Instead, the adjudicator is tasked to adhere to the "ordinary meaning" of the text. The provisions of the GATT 1994 are however neither self-evident (or self-interpreting[101]), nor is their ordinary meaning immediately accessible to an able adjudicator. Instead, the adjudicator must, inevitably, rely on her understanding of the declared intent of the Parties, accessible both in the text of the regulating provisions and in the preambles to the GATT 1947 and WTO Agreement, to accorded meaning to the words of the agreement.

To come to a dispositive declaration on the meaning of the provisions in the multilateral agreement, I argue that the interpreter needs to critically examine her original assumptions as to the character of the treaty and its constituent

[98] See, Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 31.

[99] Acknowledging increasingly loud protests aimed at the legitimacy of the world trading system, the Appellate Body not only sought to distance itself from the "GATT 1947"-ethos but also from the legacy of the Uruguay Round, which marked a high-point in belief in the Washington Consensus.

[100] See, Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) European Journal of International Law 9 (2016), p. 31. But see also, Petros C. Mavroidis, "No Outsourcing of Law? WTO Law As Practiced by WTO Courts," 102 *The American Journal of International Law* 421 (2008).

[101] Petros C. Mavroidis, "No Outsourcing of Law? WTO Law As Practiced by WTO Courts," 102 *The American Journal of International Law* 421 (2008), p. 423.

provisions. She cannot suffice with, indeed cannot positive rely on her finding of "ordinary meaning" without a thorough assessment of the provision's context, legally as well as factually, and object and purpose. The adjudicator, to fulfil the obligations laid out in Articles 11 and 3.2 DSU, must consider the ambit and character of the provision under consideration against her understanding of the object and purpose of the covered agreement. (see for an in-depth consideration and critique of the interpretative elements of the VCLT, as applied by the Appellate Body and Panels, Chapter 3, *infra*)

The artifice of mechanical application of the VCLT, with as totem first recourse to a dictionary to assess the meaning of a term, further softened in the *EC – Chicken Cuts*.[102] In its report, the Appellate Body clarifies that the ordinary meaning is to serve as first step in a "holistic" application of Article 31 VCLT. Abi-Saad observes that "[i]n practice [despite the appearance of strict constructivism] much of the reasoning in interpretation is informed by the object and purpose, either consciously or subconsciously, ... even though they may not figure explicitly as such in the analysis."[103]

From the perspective of the adjudicator, this statement by Abi-Saad is as troubling as it is true. In her "objective assessment" of hard cases,[104] those where genuine differences in directional economic preferences among the Membership acutely surface, the adjudicator must actively confront and explicate her understanding of the object and purpose of the provision and agreement. The economic theories laid out in Section B, *supra*, and Chapter 2, *infra*, can however not be accepted as singularly dominating her hermeneutic exercise. If the adjudicator were to postulate a single blanket explanation, she would be interpreting the collaborative agreement toward a pre-selected Truth (the "origin-becoming" or historicism fallacy).[105] In the absence of preference homogeneity in the Membership (quod non), her acceptance of such pre-selected truth in turn reveals her prejudice and subjects her to power-dynamics identified by Mavroidis.[106]

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[102] See, WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶186; WTO Appellate Body Report, *US - Continued Zeroing* (2009), ¶268; See also Georges Abi-Saab, "The Appellate Body and Treaty Interpretation," in Fitz-Maurice Malgosia, Olufemi Elias, and Panos Merkouris, eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff, 2010), pp. 99–109; and see Chapter 3, *infra*.

[103] Georges Abi-Saab, "The Appellate Body and Treaty Interpretation," in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes, eds., *The WTO at Ten: The Contribution of the Dispute Settlement System* (New York: Oxford University Press, 2006), p. 453.

[104] For a complete definition of "hard cases" and the case *China – Raw Materials* as a hard case, see Chapter 3, *infra*, and Chapter 5, *infra*.

[105] See Michel Foucault, "Nietzsche, Genealogy, History," in *Hommage a Jean Hyppolite* (Paris: Presses Universitaires de France, 1971); see also Michel Foucault, "What is Critique?" in Sylvère Lotringer, ed., *The Politics of Truth* (New York: Semiotext(e), 2007).

[106] Petros C. Mavroidis, "The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body," EUI Working Paper RSCAS 2016/31; See also Chapter 4, *infra*.

Koskenniemi, in a powerful post-modern critique of the ability of the interpreter to accomplish her task deductively argues that an adjudicator ultimately needs recourse to extra-legal concepts in support of her conclusion. The adjudicator partakes in an international legal discourse, determined by structural elements such as power dynamics or external values, in a historically contingent manner. According to Koskenniemi, the international legal discourse thus oscillates interminably and necessarily between two poles of argumentation that ultimately force recourse to an external source of validity: abstract utopianism and power apologism. (see Chapter 4, *infra*, for a fuller exposition)

In Koskenniemi's approach to international law, the aporia of law to satisfactorily complete and positively attain meaning attribution is limited through "cultures of formalism." In his execution of the deconstructionist technique, and ultimate introduction of cultures of formalism, I argue Koskenniemi overlooked a fundamental, non-reducible, element internal to the legal universe of the GATT 1994: Member States' desire to collaborate. While Koskenniemi only retains an immediate sense of power from his deconstruction, he, arguably, accords insufficient weight to the decisive role that practical reason and inter-subjectivity play in the adjudicator's effort to achieve coherent meaning attribution.

To positively resolve adjudication in hard cases, those where Parties' directional economic preferences genuinely clash and adjudicatory coordination substitutes for cooperation,[107] the interpretative exercise should not merely reveal the adjudicator's biases. Instead, an adjudicative construction of exemption provisions in hard cases should be guided by the preference heterogeneity of the multilateral Membership (inter-subjectivity). Exemption provisions should be construed broadly or in an open fashion to, ipso facto, capture a broad range of Developmental policies. In accordance with the demands of Article 11 DSU, this open construction of the legal provision can (and indeed should) be balanced by a strict or intrusive assessment (practical, or persuasive, reason) when fitting the economic facts to ambit of the provision.

[107] The notion of "coordination" indicates enforcement of a *particular* normative equilibrium by an adjudicator, whereas "cooperation" references a more natural progression toward a stable optimal equilibrium solution (such as through the clarification of boundary conditions or the resolution of relevant information deficits).

In this manner, I shift the conditions of the interpretative framework laid out by Article 11 and 3.2 DSU from implicit *contractual cooperation* (as Schropp argues[108]) to an explicit consideration of both integral and distributive components of *multilateral collaboration*. In her "objective assessment" of matters concerning headline and exception provisions, the adjudicator should, in accordance with the object and purpose of the agreement, construe such provisions with emphasis on the "integral" component of Parties' collaboration.[109] However, when a matter implicates an exemption provision, the adjudicator is called to acknowledge the diversity of Member State's directional preferences as part of the "distributive" component of the collaborative intent of Parties.

To fully frame the ensuing confrontation between the "right to regulate," governed by the general exception of Article XX GATT 1994, and the proper scope of Member States to pursue catch-up strategies under exemption provisions, such as Article XI:2(a) GATT 1994, it is useful to be reminded of Kantorowicz' triptych.[110] Kantorowicz insightfully distinguishes between normative, sociological and doctrinal sources of teleologies – an approach that is particularly useful when seeking to parse out an interpretative method of codified, or rule-based, international law that incorporates notions from economic theory into a normative and doctrinal science.

The three sources of teleology identified by Kantorowicz are each reflected in GATT/WTO theory and practice: (i) normative teleology is expressed in the obligation to rule in good faith ("bona fides") and respect the objective expectations of the Membership; (ii) doctrinal teleology is captured by the power of persuasive precedent[111] (no stare decisis); and (iii) sociological teleology is captured in the economic object and purpose of the covered agreements and their provisions. Together these points in the triptych set limits to the embedded standard of review and color the interpretational space within which the adjudicator confronts exemption provisions with the headline rule and exceptions thereto.

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[108] Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009).

[109] In international economic law collaboration among sovereigns occurs to pursue beneficial outcomes that cannot be realized in autarky and always consists of "a distributive as well as an integrative aspect […]," see I. William Zartman and Saadia Touval, "Introduction: Return to the Theories of Cooperation," in I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), p. 7.

[110] Hermann Kantorowicz, *Rechtswissenschaft und Soziologie* (Karlsruhe: C. F. Müller, 1962 [1911]), cited in Anne van Aaken and Joel P. Trachtman, "Political Economy of International Law: Towards a Holistic Model of State Behavior," University of St. Gallen Law School, Law and Economics Research Paper Series No. 2015---08 (July 2015), p. 3, fn. 6. See also Andrew Jeffrey Spadafora, *Freedom from Value Judgments: Value-Free Social Science and Objectivity in Germany, 1880-1914*, Doctoral dissertation, Harvard University (2013).

[111] See, for instance, Bernadette Meyler, "The Rhetoric of Precedent," in Austin Sarat, ed., *Rhetorical Processes and Legal Judgements: How Language and Arguments Shape Struggles for Rights and Power* (Cambridge: Cambridge University Press, 2016).

D. Exemption Provisions: "De Novo" Contextualization

As the Appellate Body clarified in its report in *US –Lamb* and in its report *US – Countervailing Duty Investigation on DRAMS*, an "objective assessment" under Article 11 of the DSU must be considered "in the light of the obligations of the particular covered agreements at issue in order to derive the more specific contours of the appropriate standard of review."[112] This approach, referred to as the embedded standard of review in the above, in combination with the demands of Article 3.2 DSU and the declared collaborative intention of the Membership (in the preamble) guides the interpretation of the provisions of the covered agreements.

The embedded standard of review works to shape the conceptual boundaries wherein the adjudicatory labor is to be completed. This space, within which the customary rules of interpretation of public international law find application, is normatively colored. As Kantorowicz' triptych points out, any adjudication is subject to normative, sociological and doctrinal sources of teleology. Whereas doctrinal constraints and the obligation of the adjudicator to preserve and promote the "security and predictability of the international trading system" inform two of the three points of the triptych, the adjudicator's understanding of the economic teleology of the GATT 1994 anchors the third point of the triptych.

An explicated understanding of the economic objective and purpose of the covered agreement is thus necessary to add the sociology-inspired directional component to an "objective assessment" of the relevant provisions under consideration. The Appellate Body has recognized as much when it clarified that the object and purpose of covered agreements provides "colour, texture and shading"[113] to the construction and interpretation of the provisions of the covered agreement.

[112] WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), ¶184. See further WTO Appellate Body Report, *US – Continued Hormones Suspension* (2008), ¶¶590-593; and WTO Appellate Body Report, *Australia – Apples* (2010), ¶¶356-359.

[113] WTO Appellate Body, *US –Shrimp* (1998), ¶153.

The preamble to the WTO Agreement comes to the aid of the adjudicator to indicate that the provisions of the GATT 1994 are primarily understood as "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations." Simultaneously, the provisions of the covered agreements, including the GATT 1994, seek to enhance the means of the Membership to "expand[] the production of and trade in goods and services" in a manner "consistent with their respective needs and concerns at different levels of economic development" (WTO Agreement, preamble).

Adjudicating the appropriate balance of concessions has been envisioned by the Appellate Body as akin to an equilibrium exercise[114] within a "rule-exception"-framework.[115] The "right to regulate" of Article XX GATT 1994, operating as an exception to the headline rule, necessarily shares the directional understanding governing the headline rules of GATT 1994.[116] In *China – Publications* the Appellate Body stated accordingly: "With respect to trade, the *WTO Agreement* and its Annexes [] operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder."

Exemptions to these obligations, such as Article XI:2(a) GATT 1994, do not necessarily share the normative direction of the headline rules or their exceptions (to lower tariffs and other barriers to trade). These provisions are instead envisioned in direct confrontation and therefore well-placed to be interpreted in a manner that allows the rules and obligations of GATT 1994 to be applied in a manner "consistent with [Member States'] respective needs and concerns at different levels of economic development."

[114] WTO Appellate Body Report, *US – Shrimp* (1998), ¶¶158-159; see also WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 325.

[115] As the Appellate Body clarified in *China – Publications* (2010), ¶¶222-223, in relation to the general exception of Article XX GATT: "WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be *justified under an applicable exception*." (stress added)

[116] This necessity is both dictated by the hierarchical relationship between rule and exception (especially in the presence of exemptions to these same rules), as well as by the chapeau language of Article XX GATT (which maintain the demands that exclude measures which would "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade […]."). See further Chapters 4 and 5, *infra*.

As a result of various negotiations during the life of the GATT 1947, the GATT 1994 also incorporates a hybrid "developmental exception" in Article XVIII. This Article sets out to provide temporary relief for "economies in the early stages of development." The Appellate Body examined the relationship between Article XVIII and Article XI:1 GATT in its report *India – Quantitative Restrictions*.[117] The relationship of Article XVIII with the exemption provision of Article XI:2(a) GATT 1994 is examined in more detail in Chapter 4, *infra*.

In line with an embedded approach to the standard of review, I reiterate that the adjudicator is called upon to construe the ambit of provisions with respect to her understanding of their object and purpose. I argue that a broad, or "open," construction of exemption provisions in the GATT 1994 does justice to the declared collaborative intent of the Membership in the preamble of the WTO Agreement and actively recognizes the existing preference heterogeneity among the Membership in terms of the applicable sociological teleology.

After the embedded standard of review establishes the appropriate ambit for exemption provisions, a contextualized interpretation of the language of the exemption provision – in accordance with the customary rules of interpretation of public international law, determined as the VCLT – completes the adjudicatory "objective assessment" of the matter before the Panels and Appellate Body. A contextual interpretation of the language of the GATT is, as recognized by the Appellate Body,[118] both "textual" as well as "contextual," *i.e.* related to the factual context of the matter.

When fitting economic facts to the language of the provision, the adjudicator is again subject to Kantorowicz' triptych of teleological elements. With regard to the sociological component, the adjudicator needs to be mindful of her preconceptions and present a reasoned assessment according to the appropriate standard of review.[119] The adopted standard of review in turn needs to be both mindful of the preference heterogeneity among the Membership, as well as ensure that the adjudicatory decision does not undo the balance of concessions.

[117] WTO Appellate Body Report, *India –Quantitative Restrictions* (1999).

[118] See, for example, WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶¶148, 175; see similarly WTO Panel Report, *US – Shrimp (Article 21.5 – Malaysia)* (2001), ¶5.51

[119] The Appellate Body similarly held that when making a determination as to what would happen in the "marketplace," it expects that the "panel would at least explain the economic rationale or theory that supports its intuition." WTO Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (2012), ¶643.

Some[120] have expressed concern that decisions may become more unpredictable were Panels to adopt a standard of review that is value or objective-specific, such as a blanket determination of whether a measure is "reasonable" or "least trade restrictive." Such increased uncertainty would specifically run counter to the obligations that Article 3.2 DSU lays out for the adjudicator: to maintain the security and predictability of the international trading system and not to add to or diminish the obligations provided in covered agreements.

The argued for "developmental" or open construction of exemption provisions does, in combination with a appropriate standard of review when fitting economic facts thereto, guard against this risk. Were the adjudicator to construe exemption provisions accordingly, she must be mindful of the two other balancing elements of the triptych: the obligation to decide and interpret in good faith (normative) and with an eye to established doctrine.

The obligation to interpret the provisions of the GATT 1994 in good faith has long been determined to include the protection of legitimate expectations as to the "conditions of competition."[121] An "effective" interpretation of the provisions of covered agreements seems to suggest recourse to the objective expectations of Member States.[122] If the contested measure safeguards the objective expectation of the Membership related to the conditions of competition, the adjudicator should be unconstrained to adopt a developmental interpretation of exemption provisions over a Member's disappointed expectations of realizing a particular benefit.

The constraints set by the teleology of doctrine in the GATT/WTO pertain mostly to the power of persuasive reasoning - the GATT/WTO does not recognize the doctrine of "stare decisis." In the words of the WTO website: "Even if adopted, the reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise. […] This means that a panel is not obliged to follow previous Appellate Body reports even if they

[120] See Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Cheltenham, UK, Edward Elgar, 2012), p. 29.

[121] See, GATT Panel Report, *Italy–Agricultural Machinery* (1958); GATT Panel Report, *US–Taxes on Petroleum* (1987), ¶5.1.9; and the WTO Appellate Body Report, *Japan – Alcohol* (1996), p 32 (see also WTO Panel Report, *Japan – Alcohol* (1996), ¶¶7.1-7.2). The WTO Panel Report, *India – Patents* (1998), ¶¶7.20-7.22 and fn. 81-84, declared the condition of competition a "well-established GATT principle."

[122] See, Robert Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power," in Thomas Cottier and Petros C. Mavroidis, eds., The *Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003), p. 11.

have developed a certain interpretation of exactly the provisions which are now at issue before the panel. Nor is the Appellate Body obliged to maintain the legal interpretations it has developed in past cases."[123]

However, the Appellate Body in its report in *Japan – Alcoholic Beverages II* recognizes that previous reports "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[124] The adjudicator is thus free to deviate from previous doctrine, but is bound to provide a fully reasoned explanation thereof.[125] This work offers such reasoned defense as it critiques and proposes a deviation from the decision of the Appellate Body in its report *China – Raw Materials*, the governing precedent on the scope and applicability of the exemption provision of Article XI:2(a) GATT 1994.

[123] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm (last accessed, March 19, 2017).

[124] WTO Appellate Body Report, *Japan — Alcoholic Beverages II* (1996), pp. 107-108.

[125] See critically, Raj Bhala, "The Myth About Stare Decisis and International Trade Law (Trilogy)," 14(4) *American University International Law Review* 845 (1999); and "The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Trilogy)," 33(3) *The George Washington International Law Review* 873 (2001); See also, Joost Pauwelyn, "The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO," 8(2) *Journal of International Economic Law* 329 (2005).

The Multilateral Standard of Review: Export Restrictions, Policy Flexibility and GATT Exemptions

Chapter 2:
Economics: Static and Dynamic Teleology

Chapter 2: Economics: Static and Dynamic Teleology

In a pure theory of international trade, divorced from the concerns of monetary theory,[126] countries exchange a (large) number of (final) goods on the international market at relative or world prices. Gains from trade are, under (neo)classic assumptions, maximized by exploiting a country's comparative advantage in the production of some products over others, as determined by the domestic marginal rate of substitution. By specializing in line with its comparative advantage, an open economy realizes the best possible outcome over autarky by virtue of its access to a larger total opportunity set of production and consumption choices. In an open economy, consumers generally receive a surplus from importing against lower world prices (hurting domestic producers, but to a lesser extent). Likewise, competitive producers can export toward a larger market at a higher price (hurting domestic consumers, but also to a lesser extent).[127]

The (neo)classic theory of trade consequently posits, under strong assumptions, that attempts to (re-)engineer or modify the domestic marginal rate of production substitution through the introduction of taxes and subsidies (or import tariffs and export restraints) works only to dampen efficiency and distort price signals (see Analytical Annex and Section 2.B.1, *infra*). Restricting the export of certain products, especially in the face of a viable export demand, puts a break on openness and offends clear maximization logic. Such a policy thus damages the economic prospects of the majority of producers and consumers in favor of a small(er) group of beneficiaries.[128]

Before examining the static and dynamic properties of export restrictions in international trade in detail, we would be amiss not to remark upon the considerable number of assumptions underlying equilibrium models of international

[126] See Jagdish Bhagwati, "The Pure Theory of International Trade: A Survey," 74(293) *The Economic Journal* 1 (1964).
[127] This creation of "losers" through international trade, both through exports and imports, gives rise to "adjustment costs," which can be fairly large and painful, even destructive to the political process itself. Most countries therefore have adjustment programs in place to smooth the domestic reallocation of resources (especially of labor). See for the treatment of "adjustment costs" in the context of the GATT/WTO, Michael J. Trebilcock, *Dealing with Losers* (New York: Oxford University Press, 2014) .
[128] These beneficiaries can either be established industrial players with a lobby capacity or infant industries (or some combination of both, considering some infants never grow up). The pre-eminent model for the former is provided by Gene Grossman and Elhanan Helpman, "Protection for Sale," 84(4) *The American Economic Review* 833 (1994), while for the latter see, among an enormous literature, Anne O. Krueger and Baran Tuncer, "An Empirical Test of the Infant Industry Argument," 72(5) *The American Economic Review* 1142 (1982). For a modern political economy application see, for instance, Daron Acemoglu and James Robinson, "Persistence of Power, Elites, and Institutions," 98(1) *The American Economic Review* 267 (2008).

trade. These assumptions have been recognized and criticized in the literature; including those associated with welfare economics, as highlighted in Arrow's Impossibility Theorem[129] and, more recently, those challenged by the non-equilibrium models of the economy.[130]

As a consequence of necessary, but limiting, assumptions most theoretical models of international trade are condemned to making only modest (but powerful) normative arguments.[131] Accordingly, the ambitions of this Section align with that of the scholarship on the welfare effects of international free trade more broadly. I subsequently note that the Arrow-DeBreu conditions for an equilibrium assessment of perfectly competitive trade, under full information, of a complete basket of goods under stable conditions are rarely (if ever) observed.[132]

Rather, to borrow a phrase of Krugman,[133] the analysis presented hereunder is an exercise in map-making. This work's argument builds on the third[134] wave of thinking on the relationship between economic growth, international trade, and the optimal international regulatory framework to govern it: New Development Economics (NDE). In line with NDE, my argument is critical of an international economic regulatory framework that emphasizes the normative prescriptions of the mature growth model over those of competing (catch up) models of economic growth.[135] As will be argued, the assumption of preference homogeneity among the Membership of the WTO and

[129] See, recently, Eric Maskin and Amartya Sen, *The Arrow Impossibility Theorem* (New York: Columbia University Press, 2014). For a considerable older review, see Jacob L. Mosak, *General-Equilibrium Theory in International Trade* (Bloomington: The Principia Press, 1944).
[130] Non-equilibrium economic approaches are especially advanced in game theory; see, for instance, Vincent P. Crawford, Miguel A. Costa-Gomes, and Nafore Irinerri, "Structural Models of Nonequilibrium Strategic Thinking: Theory, Evidence, and Applications," 51(1) *Journal of Economic Literature* 5 (2013); see also, W. Brian Arthur, *Complexity and the Economy* (Oxford University Press, 2014).
[131] The assumptions underlying modern equilibrium models of trade have been remarked upon broadly in the (international trade) literature and have given rise to many insightful comments; see broadly, Frank Ackerman, et al., eds., *The Flawed Foundations of General Equilibrium: Critical Essays on Economic Theory* (London: Routledge, 2004) and Murray C. Kemp, *The Gains from Trade and the Gains from Aid: Essays in International Trade Theory* (London: Routledge, 1995).
[132] See, for an examination of the various applications of and assumptions behind the Arrow-Debreu theorem; Daniel Bernhofen, et al., eds., *Palgrave Handbook of International Trade* (New York: Palgrave Mamillan, 2011). See also, Murray C. Kemp, *International Trade and National Welfare* (London: Routledge, 2001). As Stiglitz notes in his Nobel Lecture, "[m]odels of perfect markets, badly flawed as they might seem for Europe or America, seemed truly inappropriate for [the developing world]." Joseph E. Stiglitz, "Information and the Change in the Paradigm in Economics," Nobel Prize Lecture (December 8, 2001).
[133] Paul Krugman, Development, *Geography, and Economic Theory* (Cambridge: The MIT Press, 1997), pp. 2-3.
[134] The literature on international trade and economic growth generally identifies two previous waves of thinking: associated with Solow and endogenous growth models respectfully. While the principal variable of interest in theoretical and empirical 'second generation' literature is the level of output or long-run growth rate of per capita output, NDE envisions economic growth as transitions across growth phases. In its emphasis on the structural transition of the economy toward maturity (i.e. the dynamic process of "catch up"), NDE draws from the proud "structuralist" tradition and constitutes therefore a fourth rather than a third wave of thought. See, Sabyasachi Kar and Lant Pritchett, et. al, *The Dynamics of Economic Growth: A Visual Handbook of Growth Rates, Regimes, Transitions and Volatility*, Effective States and Inclusive Development (ESID) Research Centre (June 2013), p. 4.
[135] NDE's criticism of overextending the prescriptions of the mature growth model resembles Plato's "Noble Lie." The "Noble Lie" in the *Republic* is, famously, "devoted to the belief that renders possible the best city as distinguished from the best human being." Similarly, the prescriptions of the mature growth model are based on assumptions that are not borne out in *man* with all his vagaries and imperfections, but are postulated as optimal to govern the (homogenous) collective. See, Plato, *The Republic*, Book 3, 414e–15c; and Leo Strauss, *The Argument and Action of Plato's Laws* (Chicago: University of Chicago Press, 1975), p. 31.

the universal application of the normative prescriptions of the mature growth model is false in a collection of heterogeneous countries with incomplete capacity sets (technological as well as institutional).

My critique thus has two sides. First, I am critical of the neo-classic normative assumption that its equilibrium conditions determine the optimal structure and growth path for *all* (open) economies – absent market failures and imperfections. In particular, I challenge the prescription of production specialization as an expression of statically optimal resource allocation in an open economy. Consequently, I disagree with the theory of "mature" growth when it universally emphasizes the normative inter-temporal bootstrapping of static allocation efficiency to maximize the "true" (non-distorted) information content of prices.

I argue that the difference between bootstrapped static efficiency and true dynamic efficiency lies in the accumulation of ever-increasing productive skills or capacities (learning). While the traded widgets in Sections 2.A and 2.B.1, *infra*, are devoid of production-skill or capacity information, Section 2.B.2, *infra*, (re)introduces this skill-information to products. These product-specific skills consequently give shape to a networked growth model that takes export diversity as its central measure of economic development (catch up growth).

This argument gives rise to my central axiom: in the absence of complete convergence, mature and developmental theories of economic growth will co-exist in the global economy. The threshold for economic "maturity" is reached when a particular sector or industry is at its frontier; *i.e.* when there is no more "capability information" available to strategically direct industrial policies. An economy is at the capability frontier when, in terms of the Product Space (Section 2.B.2. *infra*), there are no more viable edges for it to acquire within a technological region or product branch. At that point technological innovation, instead of product diversification, is the only remaining driver of long-term economic growth. "Development" is therefore defined as a process of "catch up" with the frontier, measured as distance to "maturity" or to completion of an economy's footprint in the Product Space.

While both mature and catch up models are fundamentally respectful of the macro-economic identities and find agreement on many aspects of the micro-foundations thereof, their major difference lies at the sectoral and product-levels of the economy. It is here that the mature growth model fails to provide a convincing description of and

guidance for the process of economic convergence[136] (instead postulating frontier or innovation-led growth). Catch up models of economic growth provide a more persuasive description of and guide to the process of economic convergence as they explicitly draw on skill-proximity measures and make use of the nested structure of the Product Space to reveal strategically valuable information to guide industrial policy and efforts at emulation.

Second, I criticize an international economic regulatory structure that is built on the assumption of normative homogeneity. In fact, so I argue, countries can rationally prefer a theory of "catch-up" growth to a mature growth theory with strong neoclassic characteristics. This preference heterogeneity needs to be more fully recognized and incorporated in WTO adjudication; as will be argued theoretically in Chapter 3 and 4, *infra*, and applied, in Chapter 5, *infra*, to the judicial construction of the exemption provision to Article XI:1 GATT 1994, which regulates the use and maintenance of export restrictions for the near-universal WTO Membership.

Section 1.A, *infra*, explores the traditional arguments for and against export restrictive interventions and highlights macro-economic stabilization motives in addition to terms-of-trade concerns. Section I.B, *infra*, will first present and thereafter challenge the mature growth model and its relevance to export restrictive measures. At the core of my challenge to the hegemony of the mature growth model lies the fundamental insight that "markets, by themselves, do not necessarily, or in general, lead to overall dynamic efficiency; and that there are often trade-offs between static inefficiencies […] and long-term growth."[137]

Section 1.C, *infra*, summarizes and concludes this Chapter. In particular, it will recall that the (inter-temporal) equilibrium of static efficiently allocated resources is not a uniquely optimal approach to economic growth. Countries with incomplete skill sets may instead prefer to target "nearby" or "viable" industries to strategically complement their existing production basket. In pursuit hereof, emerging markets might want to temporarily enact industrial policies. As will be argued throughout this does not mean that these countries intent to defect from the international regulatory framework wholesale. Rather, international adjudicatory forums, such as the WTO, are

[136] Full convergence was an essential postulate in early growth models, where technology was deemed to be "freely" available; see for example the AK-models of economic growth.
[137] Bruce C. Greenwald and Joseph E. Stiglitz, "Helping Infant Economies Grow: Foundations of Trade Policies for Developing Countries," 96(2) *AEA Papers and Proceedings* 141 (May 2006), p. 141; See also, Joseph E. Stiglitz and Bruce C. Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress* (New York: Columbia University Press, 2014).

called upon to weigh and balance conditionally conflicting trade policy preferences in order to moderate between them.

A. Export Restrictions and Static Allocative Efficiency

Compared to a statically efficient resource allocation, the introduction of ad valorem export taxes or import tariffs is generally considered distortionary in the absence of externalities and under perfect competition. The resulting realignment of the use of factor endowments over productive activities is detrimental and costly in aggregate, as it incentivizes over-production and over–consumption of one good in relation to others. This leads to general welfare losses.

Abba Lerner is commonly heralded as laying the foundation for the analysis of export taxes in relation to import tariffs in his 1936 seminal article, where he explicitly recognizes both instruments as potentially equivalent means of protecting domestic production.[138] It was John Stuart Mill though,[139] who, as early as 1844, formulated the understanding that export taxes can work to improve the terms-of-trade of a country in ways similar to import tariffs, depending on demand or supply elasticity respectfully.[140]

The Lerner Symmetry theorem (1) – as it has become known - holds that, under strict conditions,[141] there is a functional equivalence between across-the-board ad valorem[142] import tariffs and similar export taxes. The symmetry between import tariffs and export taxes quickly becomes apparent from the below notation of domestic

[138] Abba Lerner, "The Symmetry Between Import and Export Taxes," 3(11) *Economica* 306 (1936).
[139] Many have observed that both Mill and Lerner are British. Abba Lerner was born in Bessarabia, Russian Empire, in 1903, but in 1906 emigrated to the U.K. to grow up and study in London and Cambridge. Lerner later emigrated once more, to the U.S.
[140] John Stuart Mill, *Essays on Some Unsettled Questions of Political Economy* (1844), 2nd ed. (London: Longmans, Green, Reader, and Dyer, 1874), first essay, "Of the Laws of Interchange between Nations; and the Distribution of the Gains of Commerce among the Countries of the Commercial World," available at: http://www.econlib.org/library/Mill/mlUQP.html (last visited April, 7, 2018).
[141] These original 1936 conditions include zero transportation costs, full employment, balanced trade, and perfect competition. See for objections to the applicability of the Lerner symmetry: Jagdish Bhagwati, Arvind Panagariya, T. N. Srinivasan, *Lectures on International Trade* (Cambridge: MIT Press, 1998), p. 218; see also Jagdish Bhagwati and T.N. Srinivasan, "Revenue Seeking: A Generalization of the Theory of Tariffs," 88 *Journal of Political Economy* (1980), pp. 1069-1087.
[142] A specific tariff system, instead of an ad valorem one, is constantly eroded by inflation, while deflation raises the protection afforded to domestic industry. This results in a counter-cyclical trend in protectionism, which can compound the countercyclical trend of floating exchange rates; see Luis Bertola and Jose-Antonio Ocampo, *The Economic Development of Latin America Since Independence* (New York: Oxford University Press, 2012), p. 133.

(d) and world (w) price levels, with import (m) and export (x) tariffs - assuming all original restrictive conditions apply, in particular including the necessity to balance trade but in the absence of transportation costs:[143]

(1) Without tariffs: $\frac{P_m^w}{P_x^w} = \frac{P_m^d}{P_x^d}$ (1)

(2) With import tariff: $\frac{P_m^w(1+t_m)}{P_x^w} = \frac{P_m^d}{P_x^d}$

(3) With export tax: $\frac{P_m^w}{P_x^w} = \frac{P_m^d}{P_x^d(1+t_x)}$

(4) Equivalence (2) & (3): $\frac{P_m^w(1+t_m)}{P_x^w} = \frac{P_m^d}{P_x^d}$, $\frac{P_m^w}{P_x^w} = \frac{P_m^d}{P_x^d(1+t_x)}$, where

(a) Free trade: $\frac{P_m^w}{P_x^w} = \frac{P_m^d}{P_x^d}$

(b) Lerner theorem: $\frac{P_m^w(1+t_m)}{P_x^w} : \frac{P_m^d}{P_x^d(1+t_x)}$

The Lerner Symmetry thus enlightens the static relationship between import tariffs and export taxes. For a small country, with no market power, with perfect competition and complete price equalization (no stickiness), the change in one set of prices (world price plus/minus tariff) is reflected by a move along the demand and supply curves (Figure 1). These demand and supply responses drive the country to reallocate resources accordingly, leaving the world price unaffected. Therefore, in accordance with the Lerner Symmetry, there is no axiomatic difference between export restrictions and import tariffs on the domestic level, under strict conditions.

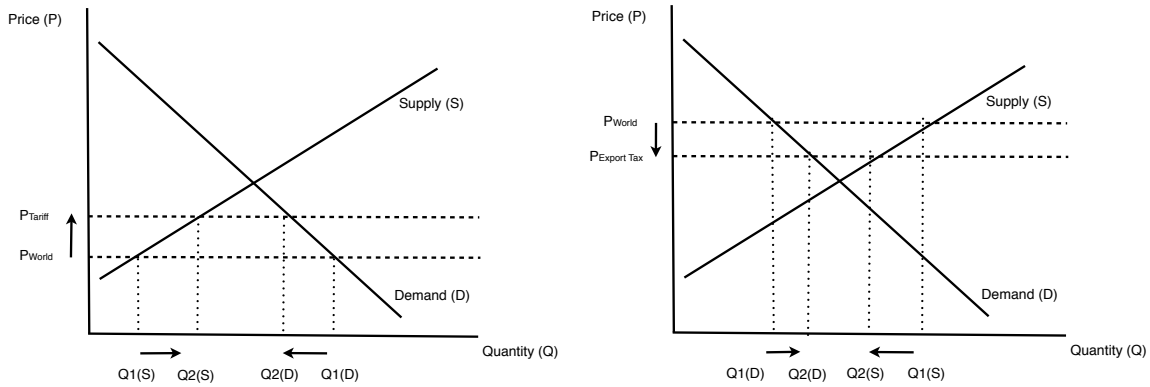
This, for the mercantilist counter-intuitive result, carries strong implications for policymakers, as it suggests that import-competing industries can be equally supported by the introduction of export taxes as by the imposition of an import tariff. Export sectors gain equally from import tariffs as from export taxes, as long as these taxes are permanent,[144] applied ad valorem and across the board, and the resultant government revenue is spent in a similar

[143] I am grateful to Prof. Bhagwati for suggesting this insightful notation. The condition of balanced trade is pivotal in the analysis as it ensures that the imported and exported values move symmetrically (introducing an across-the-board ad valorem import tax contracts imports, and under the condition of balanced trade, export values necessarily mirror this contraction). See Blanchard for an extension of the Lerner symmetry with a relaxed balanced trade constraint; Emily Blanchard, "Trade Imbalances, International Investment, and a Limitation of Lerner's Symmetry Theorem," Paper (2005). For an alternative proof using the excess expenditure function, see Jagdish Bhagwati, Arvind Panagariya, and T. N. Srinivasan, *Lectures on International Trade* (Cambridge: MIT Press, 1998), p. 215-216.

[144] Indonesia's attempt at domestic price control through the banning of exports of palm- and cooking oils in December 1997 was severely curtailed by the anticipation of an end to the ban (and led to widespread smuggling); see S. Marks, F. Larson and J. Pomeroy, "Economic Effects of Taxes on Exports of Palm Oil Products," 34(3) *Bulletin of Indonesian Economic Studies* 37 (1998); see also Mohamad F. Hasan, Michael R. Reed and Mary A. Marchant, "Effects of an Export Tax on Competitiveness: The Case of the Indonesian Palm Oil Industry," 26(2) *Journal of Economic Development* 77 (2001).

way.[145] Although the Lerner Symmetry was initially formulated to apply to a two-country model (domestic and foreign), it can be extended to include multiple countries as long as the trade balance is fixed exogenously.[146]

Figure 1: Domestic Equivalence Import Tariff and Export Taxes (Small Country)



A further extension of the Lerner Symmetry notes that the rate of tariff protection (or tax) need not be uniform across products. A ranking can be obtained for the optimal tariff on differentiated products when cross-substitution effects between such products are defined for the (foreign) country.[147] Of course, the optimal tariff rate still depends inversely on the relevant elasticity,[148] as explored in the context of market power in Section 1.A.1, *infra*.

Despite its limitations, the Lerner Symmetry allows for a formal entry point into the analysis of export taxes and directs attention to those conditions that potentially offer redemption for this "dottiest tax."[149] Four conditions are most commonly identified and briefly commented on below: (i) the existence of market power; (ii) high external

[145] Note that in the absence of transportation costs the equivalence does not hold for negative taxes (or subsidies), despite the symmetry implications of the equivalency theorem; see Francois Casas, "Lerner's Symmetry Theorem Revisited," 28(1) *Keio Economic Studies* 15 (1991).
[146] Lopez and Panagariya have extended the equivalence to include multi-period permanent across-the-board tariffs, noting though that the equivalence does not hold when the across-the-board tariffs and export taxes are applied to a subset of periods only, in Ramon López and Arvind Panagariya, "Temporary Trade Taxes, Welfare and the Current Account," 33 *Economics Letters* 335 (1990); and in Ramon López and Arvind Panagariya, "Temporary Import and Export Quotas and the Current Account," 31 *Journal of International Economics* 371 (1991). They further generalized the Lerner Symmetry to include non-traded goods and quotas; see Ramon Lopez and Arvind Panagariya, "The Lerner Symmetry and Other Results in the Presence of Quotas and Nontraded Goods." University of Maryland at College Park Working Paper 11 (1995), where the authors show that if a subset of goods is non-traded (or subject to a quota) the Lerner equivalence holds with respect to the remaining set only. Application of a quota thus excludes a good from the general equivalence of across-the-board ad valorem import tariffs and export taxes.
[147] Note that when a country is part of the WTO, such uniform cross-substitution becomes exponentially more difficult to assess as one (bound) tariff applies to all "MFN"-countries (with potentially different market shares and cross-substitution values), while downward exceptions to the tariff can be made through trade instruments such as Preferential Trade Agreements (PTAs).
[148] See, for example, Yoshitomo Ogawa, "The Structure of Optimal Tariff Rates in a Large Country with Market Power," 33 *Economic Theory* 273 (2007).
[149] Leader, "Killing the Pampas's Golden Calf," *The Economist* available at: http://www.economist.com/node/10925509. Calling export taxes "A contender for the dottiest tax around."

price volatility; (iii) voluntary restrictions in face of external tariff threat; and (iv) domestic redistribution under uncertainty.

1. Strong Theorem: Market Power

In his 1940 article,[150] Kaldor notes that a country always benefits from imposing a tariff or tax, provided it is well measured, the country has some market power (partial or complete monopsony or monopoly)[151] and there is no retaliation by other countries. The importance of this argument should be understood in relation to the stern opposition of unilateral free traders, who, at the time, favored a general zero-tariff prescription. By taxing its imports, or exports respectfully, the imposing country takes advantage of imperfectly elastic foreign supply or demand. The implied terms of trade gain, of course, comes at the price of lower trade volumes and possible domestic consumption and production distortions. A tariff or export tax is hence only optimal when it maximizes the implementing country's utility[152] by extending the degree of gain over its loss.[153]

Analytically, the domestic response to the introduction of the tariff (the first part of Equation 2), has to balance the terms-of-trade effect (the second part of Equation 2). That is, when the world price is determined under market clearing conditions and the domestic demand function (M_g)[154] is written as a function of the domestic price,[155] a country maximizes its welfare under a tariff (T) considering[156]:

$$T_g p_g^* \frac{dM_g}{dT_g} - M_g \frac{(dP_g^*)}{dT_g} = 0 \qquad (2)$$

[150] Nicolas Kaldor, "A Note on Tariffs and the Terms of Trade," 7(28) *Economica* 377 (1940).
[151] Note that in addition to a border measure, countries can take advantage of similar monopsony or monopoly power through their competition or antitrust policies.
[152] Social welfare, the object of a country's utility, is assumed to be the sum of individual utilities; expressed to include income and consumer surplus (determined by the marginal product of labor), goods are produced with one good-specific factor and under constant returns to scale, while tariff revenue is uniformly redistributed among individuals. With normalized population and wages set to unity, this simple model of national welfare (NW) reads: $NW = 1 + \sum_g [\pi_g(p_g) + r_g(p_g) + \psi_g(p_g)]$); Optimal tariff formula derived from Christian Broda, Nuno Limão and David E. Weinstein, "Optimal Tariffs and Market Power: The Evidence," 98(5) *The American Economic Review* 2032 (2008), p. 2035.
[153] Whereas Kaldor's model focuses on the foreign country offer or demand curve, Lerner shows how to arrive at the same result using conventional supply and demand analytics, in *The Economics of Control* (New York: Macmillan, 1944), pp. 357-59.
[154] And (M_g^*) at the world export supply with (P_g^*) at world clearing price.
[155] Domestic demand as function of domestic price; $p_g = (1 + T)p_g^*$.
[156] I assume standard assumption to hold such as, for example, in Gene Grossman and Elhanan Helpman, "Protection for Sale," 84(4) *American Economic Review* (1994), pp. 833-50; including, importantly the assumption of perfect competition. Under imperfect competition, the optimal tariff becomes smaller and thus more sensitive, see R. de Santis, "Optimal Export Tax, Welfare, Industry Concentration, and Firm Size: A General Equilibrium Analysis," 8(2) *Review of International Economics* 319 (2000).

If the country has no market power, the elasticity it faces is infinite and the second part of the second term ($\frac{dP_g^*}{dT_g}$) will be zero; *i.e.* the optimal tariff level is zero.

In addition to taking advantage of market power, an optimal tax policy can also be set to combat "immiserizing growth,"[157] a concept introduced by Bhagwati in 1958. Immiserizing growth occurs when a country with market power experiences a growth-induced deterioration in its terms of trade sufficiently large to outweigh the primary welfare gain from output growth.[158] Application of a well-measured optimum tariff (or a suitable tax-cum-subsidy targeted to the distorted factor-use) either pre- *and* post-, or post-growth alone has the potential to address the (trade) distortion that gives rise to the loss. In order for a trade measure to be a first-best response, the source of the immiseration needs to be endogenous or policy induced,[159] not the result of exogenous shifts in the foreign offer- or demand-curve.[160]

Due to the likelihood of retaliation and considering the complexity of ascertaining the precise degree of a country's market power,[161] Krugman, Obstfeld and Melitz argue that the terms of trade argument is of little practical

[157] Jagdish Bhagwati, "Immiserizing Growth: A Geometrical Note," 25(3) *The Review of Economic Studies* 201 (1958).

[158] The economic growth that gives rise to immiserization is classically understood as an exogenous expansion of the production possibility frontier in a standard 2x2 static framework. To a neoclassical mind, this setting conjures up images of steady state growth and confines the analysis of immiserization to the structural impact of deadweight losses in transitional phases from autarky to free trade; See for example Alan Deardorff, "The Gains from Trade in and Out of Steady-State Growth", 25 *Oxford Economic Papers* 173 (1973); and Elias Dinopoulos, "Immiserizing Growth in Expanding Economies," University of Florida Working Paper (2005), p. 2. Similarly Srinivasan and Bhagwati analyze the transition from a fixed (akin to a domestic distortion) to an optimal savings rate to conclude that the move to free trade from autarky is dynamically efficient, in Jagdish Bhagwati and T. N. Srinivasan, "Revenue Seeking: A Generalization of the Theory of Tariffs. " 88 *Journal of Political Economy* 1069 (1980). The advent of endogenous growth theory however brings the structural components of growth into central focus and with it the fundamental conditions behind immiserizing growth. Dinopoulos, for example, finds in a Grossman/Helpman quality-ladder approach (infused with a Schumpeterian growth model) the possibility that the market rate of expansion of any of the production factors exceeds the social welfare optimum and, if sufficiently large, creates an immiserization-effect; Dinopoulos 2005, *op. cit.*, p. 8.

[159] I do not here consider the effects of possible tariff jumping foreign direct investment. Early optimal tariff-studies reached knife-edge results when considering the presence of foreign (tariff jumping) investment: all foreign firms were either exporters or multinationals – a result that strongly depends on the homogeneity of firms. More recent studies, with heterogeneous firms, find though that the presence of tariff jumping lowers the optimal (Nash) tariff. In a Stackelberg scenario though, one country has the lead and can visibly commit – by setting its tax rate or building surplus capacity – before the follower countries contemplate their Nash-moves simultaneously. The difference in setting optimal policy for the Stackelberg leader vis-à-vis a full Nash-equilibrium depends on its ability to set a higher tax rate for itself without adversely effecting residual demand – normally a function of the leader's market share; see Kamil Yilmaz, "How Much Should Primary Commodity Exports be Taxed? Nash and Stackelberg Equilibria in the Global Cocoa Market," 15(1) *Journal of Trade and International Development* 1 (2006), p. 7. See generally, Matthew T. Cole and Ronald B. Davies, "Optimal Tariffs, Tariff Jumping, and Heterogeneous Firms," IIIS Discussion Paper (2009), where the Melitz-model is used with increasing returns to scale and a monopolistically competitive market with free entry. Further discussion of such optimal tariff models goes beyond the scope of the present work, particularly as products in these models are inherently devoid of the type of pairwise skill-proximity information that is central to the growth and development mechanics this work examines – they are true widgets.

[160] Immiserizing growth can occur under any kind of distortion, be it endogenous or policy-imposed: "(1) first, where the endogenous distortion involves an imperfect factor market, taking the shape of a distortionary wage differential; and (2) second, where the endogenous distortion is foreign, involving monopoly power in trade, and where the country has an optimal tariff in the pre-growth situation but this (unchanged) tariff becomes sub-optimal in the post-growth situation." See Jagdish Bhagwati, "Optimal Policies and Immiserizing Growth," MIT Working Paper (1968), p. 2.

[161] Such complexities include identifying with any confidence the relevant product elasticity of demand or supply, correctly anticipating the implementation delay of the policy, and the accounting for the various costs associated with misapplication of the correct tariff-band.

importance. They observe that "[t]he terms of trade argument against free trade, [...], is intellectually impeccable but of doubtful usefulness. In practice, it is more often emphasized by economists as a theoretical proposition than actually used by governments as a justification for trade policy."[162] Bagwell and Staiger however find the underlying motive for the useful existence of the world trade system in the coordination of tariff policy and in the (frequent) existence of (some) market power.[163]

In recent work,[164] Broda, Limao and Weinstein report robust evidence in favor of a strong tendency for countries with market power to set high(er) tariffs when unconstraint by the WTO.[165] Market power, or the product elasticity facing the exporting economy,[166] is determinative in shaping tariff policy when it is set unilaterally and uncooperatively. Market power should, according to Broda, Limao and Weinstein, be seen as "at least as important as the lobbying motive, both in terms of the magnitude and the fraction of tariff variation explained."[167]

In addition to economic considerations, such as explored in this chapter, trade policy cooperation has been the subject of political economy analysis. The political economy literature extends the theory of methodological individualism to the realm of political decision-making to analyze cooperation as a means of achieving reciprocal rents (lobbying) rather than realizing macro-economic welfare gains.[168] It brushes aside the perspective of the benevolent social planner as naïve thinking.[169]

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[162] Krugman, Obstfeld and Melitz more fully observe that "[t]he terms of trade argument against free trade, then, is intellectually impeccable but of doubtful usefulness. In practice, it is more often emphasized by economists as a theoretical proposition than actually used by governments as a justification for trade policy" in Paul R. Krugman, Maurice Obstfeld and Marc J. Melitz, *International Economics: Theory and Policy* 9th ed. (Boston: Addison-Wesley, 2011), p. 226.

[163] See, among other work by the same authors, Kyle Bagwell and Robert W. Staiger, "An Economic Theory of GATT," 89(1) *American Economic Review* (1999): 215-48; further corroborated by evidence presented in Kyle Bagwell and Robert W. Staiger, "What Do Trade Negotiators Negotiate About? Empirical Evidence from the World Trade Organization," National Bureau of Economic Research, Working Paper 12727 (2006).

[164] Christian Broda, Nuno Limão, and David E. Weinstein, "Optimal Tariffs and Market Power: The Evidence," 98(5) *American Economic Review* 2032 (2008).

[165] Some say that market power was also the primary driver behind China's export restrictions on certain raw materials and rare earths, where it controls over 90 percent of global supply capacity; leading to the WTO cases *China – Raw Materials* and *China – Rare Earth*. China rather argued its need to caution against negative environmental spillovers from extraction and its desire to develop a "clean" industrial capacity.

[166] For more insight into calculations or derivations of the elasticity in international trade see Jean Imbs and Isabelle Mejean, "Trade Elasticities - A Final Report for the European Commission," European Commission, Directorate-General for Economic and Financial Affairs (2010); and Stephen Tokarick, "A Method for Calculating Export Supply and Import Demand Elasticities," IMF Working Paper, WP/10/180 (2010).

[167] Christian Broda, Nuno Limão, and David E. Weinstein, "Optimal Tariffs and Market Power: The Evidence," 98(5) *American Economic Review* 2032 (2008), p. 2033.

[168] See, for instance, Gene M. Grossman and Elhanan Helpman, "Protection for Sale," 84(4) *American Economic Review* 833 (1994); and Gene M. Grossman and Elhanan Helpman, *Special Interest Politics* (Cambridge: MIT Press, 2001). See also, Dani Rodrik, "Political Economy of Trade Policy," in Gene M. Grossman and Kenneth Rogoff, eds., *Handbook of International Economics* (Amsterdam: New Holland, 1995)

[169] Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009), p. 135, fn. 5.

It is undisputed that the political economy analysis of trade cooperation offers a powerful explanation of the bargaining process, which gives shape to the realized trade commitments. However, due to the theory's emphasis on political decision-making and rent-seeking, rather than describing the normative conditions for optimal economic growth, this political economy approach fails to provide a persuasive normative context for the adjudicator beyond an apologist for existing power imbalances (see Chapter 4, *infra*). In the late 20th and early 21st Century there has been consistent attention for "institutional economics" in an effort to integrate the political economy effects of domestic (and international) institutions into economic growth theory.[170] Due to the adjudicative perspective adopted by this work, in depth consideration of this promising field of law and economics research falls beyond the scope.

In addition to the situations examined above, involving terms of trade pliability and the threat of immiserizing growth, excessive international price volatility of exported commodities poses an independent threat to national welfare. Section 1.A.2, *infra*, examines such volatility for which export restraints in the form of taxes, or commodity boards, offers a second-best remedy in the absence of well developed (financial) markets.

2. Weak Theorem: Stabilization and Redistribution

Short- to mid-term commodity price volatility and associated uncertainty of export earnings is generally recognized as an obstacle to sustained(-able) economic development. High revenue volatility exacerbates poverty,[171] in particular in the least developed countries (LDCs) and ill-diversified emerging economies with under-developed financial markets.[172] In response, border measures in the form of export restrictions have been used to (i) smooth domestic consumption and investment patterns through revenue stabilization; and (ii) generate government revenue with redistribution effects.[173] In addition (iii), a domestic competition policy in restraint of exports has the potential to rationalize markets and address overcapacity issues in an orderly fashion. Conversely, the imposition of "beggar-

[170] The effort to systematically and formally include the political economy effects of institutions into growth theory stands central to the work of Daron Acemoglu; see, for instance, *Introduction to Modern Economic Growth* (Princeton: Princeton University Press, 2009), chapters 22 and 23.
[171] Daniel Lederman Guido Porto, "The Price Is Not Always Right: On the Impacts of (Commodity) Prices on Households (and Countries)," World Bank Policy Research Working Paper No. 6858 (2014).
[172] See for example Michael Gavin and Ricardo Hausmann, "Securing Stability and Growth in a Shock Prone Region: The Policy Challenge for Latin America," InterAmerican Development Bank Working Paper 315 (1996); and Gary Ramey and Valerie Ramey, "Cross-Country Evidence on the Link Between Volatility and Growth," 85 *American Economic Review* 1138 (1995).
[173] World Trade Organization, *World Trade Report 2010: Trade in Natural Resources* (Geneva: WTO, 2010), p. 127.

thy-neighbor" border measures has been identified as a contributing factor to international commodity price shocks.[174]

When considering the implementation of measures to shield domestic producers and consumers from excessive world price volatility, it is imperative that the policy does not end up fighting long-term trends, based on shifting fundamentals. Distinguishing shifts in "fundamental" aspects from damaging "volatility" can be difficult, and in the short-run very murky. Their respective roots in the structural elements of market conditions and the determinants of (global) supply and demand, corrected for business cycles, axiomatically determine the difference between them.

World commodity price changes tend to overshoot underlying supply- and demand-shocks, due to innately low elasticities of localized demand and supply in the short term. The barter terms-of-trade, as well as the current account and the macro-economic growth prospects of commodity-dependent developing countries, could suffer amplified shocks as a result. Such concerns grow proportionally more pressing the more concentrated (less diversified) an economy is. Piermartini shows that the average export earnings variability for LDCs is significantly higher than the world average (when going through the same shock or cycle); and that this variability is even higher for the most concentrated economies such as Nigeria and Venezuela.[175]

Failing a positive identification of fundamental trends, the protective policy could dampen (or even distort) market signals to such an extent as to cause significant long-term resource misallocation and loss of competitiveness within the favored industry and across the economy as a whole. Efforts to distinguish long-term trends in commodity prices from shorter-term volatility, find original inspiration in the work by Singer and Prebisch. In the 1950s, Singer and Prebisch postulated a logarithmic function[176] from observing the net barter terms of the United Kingdom over the period 1876-1947. This function exhibited a linear downward trend suggesting a secular decrease in the price of

[174] Hans G. Jensen and Kym Anderson, "Grain Price Spikes and Beggar-Thy-Neighbor Policy Responses: A Global Economy-wide Analysis," World Bank Policy Research Paper 7007 (2014); Jensen and Anderson offer a more precise assessment of the impact of export restrictions on price spikes and argue for better control, while providing a brief survey of recent literature.
[175] Roberta Piermartini, "The Role of Export Taxes in the Field of Primary Commodities," WTO Study Paper (2004), table 3, page 9.
[176] The Singer-Prebisch logarithmic function is functionally equivalent to: $Y(t) = \Gamma + \Theta(t) + \vartheta(t)$, where t, [1,2,…T], is a linear trend and the random variable "ϑ_t" is stationary with a zero mean. The slope is therefore determined by "Θ," which the Singer-Prebisch hypothesis predicts will be negative. For this and alternative functions and an instructive exegesis, see David I. Harvey, et al., "The Prebisch-Singer Hypothesis: Four Centuries of Evidence," 92(2) *The Review of Economics and Statistics* 367 (2010).

commodities relative to manufactured products. The Singer-Prebisch thesis thus suggests and explains a secular deterioration in the terms-of-trade of primary-commodity exporting economies over time.

Later authors soon criticized the employed method of data gathering as incomplete and inaccurate, summarized by Spraos in 1980.[177] Work to corroborate or disprove the Singer-Prebisch thesis has however continued and in 1988 Grilli and Yang published their landmark study,[178] offering some support for the original thesis.[179] In a recent advance, Erten and Ocampo[180] argue the presence of commodity super-cycles over the traditional approach of identifying trends and structural breaks (as for example Grilli and Yang do in their 1988 contribution). They re-interpret and find corroboration (for non-oil commodities) of the Singer-Prebisch thesis, pointing to a sequential decline in the mean prices of such super-cycles.[181]

Whereas developed financial markets can blunt a liquidity squeeze that follows a negative export shock, most commodity export-dependent economies cannot offer this service to their exporters. In these countries, only firms with enough (accumulated) profits have sufficient access to finance to mitigate a liquidity squeeze – putting the cart before the horse. Earnings volatility combined with imperfect financial markets thus deprives an economy, especially an emerging market, of potentially productive investments.[182] In addition, the gradual accumulation of knowledge and the emergence of innovation are seriously hindered by the pro-cyclicality of capital flows.[183] The resulting economic instability is, again, particularly severe for insufficiently diversified developing countries.

[177] The data used by Prebish and Singer focus on the British terms of trade which are arguably not representative of the developed world as a whole over the covered period; Both developed and developing countries have mixed export bags that included manufactured goods as well as commodities; Transportation costs were not specifically accounted for (in particular no harmonization was made for f.o.b. and c.i.f. prices); and differences in quality were not accounted for – see John Spraos, "The Statistical Debate on the Net Barter Terms of Trade," 90 *Economic Journal* 107 (1980).
[178] Enzo R. Grilli and Maw C. Yang, "Commodity Prices, Manufactured Goods Prices, and the Terms of Trade of Developing Countries," 2 *World Bank Economic Review* 1 (1988).
[179] Grilli and Yang find a 0.6 percent annual downward trend, allowing for a 1921 structural break.
[180] Bilge Erten and Jose Antonio Ocampo, "Super Cycles of Commodity Prices Since the Mid-Nineteenth Century," 44 *World Development* 14 (2013).
[181] Figure 4 shows super-cycle components for metals, tropical and non-tropical agricultural, as extracted by Erten and Ocampo from the original real price series by applying the asymmetric Christiano–Fitzgerald band-pass filter. See Bilge Erten and Jose Antonio Ocampo, "Super Cycles of Commodity Prices Since the Mid-Nineteenth Century," 44 *World Development* 14 (2013), p. 22.
[182] Philippe Aghion and Abhijit Banerjee, *Volatility and Growth* (New York: Oxford University Press, 2005), Ch. 2.
[183] Luis Bertola and Jose-Antonio Ocampo, *The Economic Development of Latin America Since Independence* (New York: Oxford University Press, 2012), p. 18.

Although the negative impact of earnings volatility on economic growth has been widely recognized, some related economic dynamics are more ambiguous. For example, households may increase the all-important savings rate[184] for precautionary reasons.[185] In a "store-or-sow" model of precautionary savings, "an increase in [income shock] variance implies not only a higher saving rate but also a change in the portfolio allocation of saving between risky capital and a safe asset."[186] When confronted with high volatility of permanent income, households increase their precautionary saving and limit their investment,[187] negatively affecting output/income in the next period and leading to a "volatility trap." When variance is moderate however, an increase in the rate of saving might work to bring down the risk-adjusted return on capital, which in turn might ultimately work to raise consumption again.[188] This type of income variance is well known for commodity export dependent economies, when transmitting external shocks unmitigated into household income.

The effects of excessive world price volatility[189] are, traditionally, especially hard felt in Latin America's resource-export dependent economies, as these are generally less able to efficiently reallocate labor inter-sectorally (with subsequent effects on the real exchange rate and, probably, interest rates)[190].[191] A trade measure, such as export restrictions, could be considered as a second-best policy alternative, possibly in combination with sovereign funds or other buffers.

[184] The savings-rate is a key variable in early AK-growth models, which retained their popularity for a long time due to their innate tractability (easy to understand and derive policy prescriptions from), see William Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (Cambridge: The MIT Press, 2002).
[185] For a model of precautionary savings, see Christopher D. Carroll, "A Theory of the Consumption Function, With and Without Liquidity Constraints (Expanded Version)," NBER Working Paper 8387 (2001).
[186] Reda Cherif and Fuad Hasanov, "The Volatility Trap: Precautionary Saving, Investment, and Aggregate Risk," IMF Working Paper WP/12/134 (May 2012), p. 3.
[187] See for a detailed treatment of the problem with serially uncorrelated returns: Michael Rothschild and Joseph E. Stiglitz, "Increasing Risk II: Its Economic Consequences," 3 *Journal of Economic Theory* 66 (1971).
[188] Philippe Aghion and Abhijit Banerjee, *Volatility and Growth* (New York: Oxford University Press, 2005), pp. 10-11.
[189] Excessive volatility is a concept narrowly described as higher than average variance for countries with similar per capita GDP in Jose M. Fanelli, "Argentina," in Jose M. Fanelli, ed., *Macroeconomic Volatility, Institutions and Financial Architectures. The Developing World Experience* (New York: Palgrave Macmillan, 2008), p. 236.
[190] Jose Antonio Ocampo, "A Broad View of Macroeconomic Stability," in Narcis Serra and Joseph Stiglitz, *The Washington Consensus Reconsidered* (New York: Oxford University Press, 2008).
[191] Ricardo Hausmann and Roberto Rigobon, "An Alternative Interpretation of the 'Resource Curse': Theory and Policy Implications," NBER Working Paper 9424 (2002); see also Ricardo Hausmann, Ugo Panizza, and Roberto Rigobon, "The long-run volatility puzzle of the real exchange rate," 25(1) *Journal of International Money and Finance* 93 (2006); see also Francisco Costa, Jason Garred, and João Paulo Pessoa, "Winners and Losers from a Commodities-for-Manufactures Trade Boom," London School of Economics Working Paper (2014).

a. Consumption and Investment Smoothing

The first-best policy for addressing excessive volatility of earnings is to allow producers and consumers to take a position in negatively correlated, or at least neutral-correlated, financial instruments. Whereas many commodity-importing countries have the ability to offer their producers and consumers investments in independent revenue streams,[192] the bulk of poorly-diversified and commodity-export dependent countries do not.[193] In fact, the very instability of investable earnings creates uncertainty about the viability of future investments, constraining rational investment choices and raising the cost of such risk-abating investments.

As noted, this first-best solution is to allow risk to be shifted onto financial markets and away from the spot markets through financial engineering and a variety of hedging-operations.[194] This policy however simultaneously opens the economy up to waves of speculation and the boom-bust cycles of future beliefs.[195] Whether or not speculation on future markets by non-traditional investors, looking for alternative asset classes, was at the root of recent price volatility in commodities cannot here be discussed. It is nonetheless sensible to introduce a word of caution against unguardedly advocating opening financial markets as a prima facie first-best solution to earnings volatility (often advocated on principle because of their supposed neutral impact on production factors).[196]

Starting in the 1960s (and generally through to the 1980s) international commodity agreements (ICAs) operated with the aim of creating price stabilization through direct market intervention. This market intervention took the form of operating actively managed buffer stocks (price stabilization) supported by export quotas (price support).[197] Maintaining sufficient buffer stocks proved expensive though, while free riding, cheating and rent-seeking were

[192] Many commodity-importing economies alternatively allow for the re-distribution of risk by means of swaps, options, and futures, through their deep financial markets (and possibly open capital accounts). China might be a marked exception to this observation, but it has in turn intersected the state between world markets and its consumers in different and pervasive ways.
[193] For a deep insight into the role of the capital account and deep financial markets in developing economies, see the twin volumes Jose-Antonio Ocampo and Joseph E. Stiglitz, eds., *Capital Market Liberalization and Development* (New York: Oxford University Press, 2008) and Joseph E. Stiglitz, et al., eds., *Stability with Growth – Macroeconomics, Liberalization, and Development* (New York: Oxford University Press, 2006).
[194] Eduardo Borensztein, Olivier Jeanne and Damiano Sandri, "Macro-Hedging for Commodity Exporters," IMF Working Paper (2009).
[195] Joseph Stiglitz, "Symposium on Bubbles," 4(2) *Journal of Economic Perspectives* 13 (1990).
[196] See for a larger discussion of financial speculation in commodities and its impact on price volatility, World Trade Organization, *World Trade Report 2010: Trade in Natural Resources* (Geneva: WTO, 2010), pp. 98-103.
[197] Note that both the Havana and Uruguay Rounds dealt with the question of ICAs, which are current addressed under GATT Article XX(h). This importantly qualifies them as exceptions to the free trade paradigm enshrined in the GATT 1994 and under the auspices of the chapeau to Article XX, which crucially makes the very exception "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or *a disguised restriction on international trade* […]" (emphasis added). For a negotiation history of ICAs within the GATT/WTO framework, see GATT Secretariat, "Trade Provisions Contained in Existing Multilateral Environmental Agreements Vis-à-vis GATT Principles and Provisions: Article XX(h)," WTO Document TRE/W/17 (1993), available at: http://www.wto.org/gatt_docs/English/SULPDF/91720248.pdf.

hard to control across the different stakeholders. Additionally, preferred price- and volatility-levels differed among the parties to these agreements, leading to collective action problems. Ultimately, most ICAs collapsed under their own, insufficiently supported, weight.[198]

On the national level, marketing boards without international pricing power continued to provide a buffer well into the 1990's, operating in parallel to international compensatory financial schemes such as STABEX and the IMF's Compensatory Financing Facility. These international financing tools were prone to disbursement time-lags however; transforming countercyclical policies into a pro-cyclical reality. They furthermore proved cumbersome to operate in developing countries due to the imposition of strict conditionalities on their use.[199] In general, the scope and resources allocated to the ICAs, marketing boards, and international financial compensation schemes were too small and their policy responses too slow to mitigate the impact of price shocks effectively.[200]

A second best solution consists of a policy of a progressive export-restrictions-cum-reserve[201] – possibly in the form of a (strategic) commodity stockpile and/or a cash amount managed by a dedicated Sovereign Stabilization or Wealth Fund (SWF).[202] Such a SWF could then provide national self-insurance[203] and provide direct insurance to the producers, without immediately running afoul of WTO restrictions on subsidies and restrictions on the use of border measures. In this regard, Brazil's win over the U.S. on its upland cotton protection program[204] is highly significant.

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[198] UNCTAD, *Trade and Development Report 2008: Commodity Prices, Capital Flows and the Financing of Investment* (New York and Geneva: UNCTAD, 2008), pp. 41-44.
[199] *Idem*, p. 43.
[200] Stephany Griffith-Jones and José Antonio Ocampo, "Compensatory Financing for Shocks: What Changes Are Needed?," Columbia University, Initiative for Policy Dialogue (2008); José Antonio Ocampo and Stephany Griffith-Jones, "A Counter-Cyclical Framework for a Development-Friendly International Financial Architecture," DESA Working Paper No. 39, ST/ESA/2007/DWP/39 (2007); Stephany Griffith-Jones and José Antonio Ocampo, "Global Governance for Financial Stability and Development," Columbia University, Initiative for Policy Dialogue (2011).
[201] As a flat export tax ultimately fails to smooth the transmission of price shocks, a progressive tax would be needed that recognizes trends while responding to excessive volatility. See Alexander H. Sarris, "Export Taxes Versus Buffer Stocks As Optimal Export Policies Under Uncertainty," 11 *Journal of Development Economics* 195 (1982). Papua New Guinea, for example, established an export tax/subsidy rate for cocoa, coffee, copra and palm oil equal to half the difference between the reference price - calculated as the average world price over the previous decade - and the actual annual price; see R.M. Bautista, "Export Tax as Income Stabiliser under Alternative Policy Regimes: The Case of Philippine Copra," in E. de Dios and R.V. Fabella, eds., *Choice, Growth and Development: Emerging and Enduring Issues* (Quezon City: University of Philippine Press, 1996).
[202] See for more on the structure and logic of commodity based Sovereign Wealth Funds, Macartan Humphreys, Jeffrey D. Sachs, and Joseph E. Stiglitz, eds., *Escaping the Resource Curse* (New York: Columbia Univeristy Press, 2007).
[203] Such a stabilization fund provides a "mechanism designed to reduce the impact of volatile fiscal revenues and/or foreign exchange receipts, linked to the pro-cyclical pattern of export prices or volumes." (p.62) Ocampo and Griffith-Jones give the example of the National Coffee Fund of Colombia to illustrate boom-bust taxation and retention policies, while reserving strict self-insurance for responses to volatile capital flows (here applied in different form, but with similar logic), in Stephany Griffith-Jones and Jose Antonio Ocampo, "Sovereign Wealth Funds: A Developing Country Perspective," in Karl P. Sauvant, Lisa E. Sachs and Wouter P.F. Schmit Jongbloed, eds., *Sovereign Investment: Concerns and Policy Reactions* (New York: Oxford University Press, 2012), pp. 73-74. See for Brazil's management of the world coffee market Luis Bertola and Jose-Antonio Ocampo, *The Economic Development of Latin America Since Independence* (New York: Oxford University Press, 2012), p. 142.
[204] WTO dispute settlement case *US – Upland Cotton* (DS267); WTO Panel Report (2004) and Appellate Body Report (2005) provided authorization for Brazil to retaliate against the US; confirmed Recourse to Article 22.6 Arbitration Report (2009).

This holding invites more thought on the use financial support systems such as dedicated SWFs (or competition policy) to achieve a modicum of protection against violent commodity price shocks, without exercising market power internationally and "distorting" or "restricting" international trade.[205]

b. Revenue and Redistribution

The second reason to impose border measures in response to price volatility pertains to the government's ability to raise revenue and perceived need for domestic redistribution, toward or away from exporters. In economies dominated by the export of agricultural or mining products, landowners often resist direct taxation of land or wealth, leaving the central government to indirectly tax the export activities themselves. Applying such customs duties though has a distributional impact that is different from direct taxation. Taxing export flows instead of land ownership further gives shape to the political economy and potentially retards the emergence of a vibrant primary export sector.

When foreign investors hold significant ownership shares in export companies, export taxes can also serve to capture some of the foreign-owned company rents; especially when such are thought to be exorbitant following an international demand boom. In practice, the protectionist implications of raising export taxes on primary produce (benefitting downstream industries) are often considered a corollary and entirely complementary to the main concern of raising revenue - contrary to most orthodox economic thought.[206]

A progressive export tax system, used to generate disposable income and administered at the border, might offer a measure of price stabilization to producers, but can simultaneous work to highlight the fragility of government revenue. With such a revenue-raising export tax, the government budget is the first to experience the revenue effects of international price fluctuations, supply shocks, and real exchange rate volatility.[207] Although the collective power

[205] See also US Supreme Court, *Marvin D. Horne v. US Department of Agriculture* (June 22, 2015), 750 F. 3d 1128, reversed.
[206] Luis Bertola and Jose-Antonio Ocampo, *The Economic Development of Latin America Since Independence* (New York: Oxford University Press, 2012), p. 132. A clear counter-example can be found in the WTO Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (2000), where a tanners' representatives during customs procedures was clearly meant to incentivize domestic downstream production over exportation of unprocessed bovine hides. The EC however failed to meet the standard of proof necessary to have this policy be classified as a trade restrictive export measure.
[207] Roberta Piermartini, "The Role of Export Taxes in the Field of Primary Commodities," WTO Working Paper (2004).

of the state might be better positioned to handle fluctuations in income, deep and persistent revenue uncertainty weakens its ability to drive growth and innovation. The ability of the state to augment, support, and police markets is after all crucially dependent on its power to raise revenue consistently.[208]

The optimal tariff (or export tax) is normally determined non-cooperatively, or as a Nash optimum (in a two country, one period model). In reality however there is a high degree of policy interdependence between exporting economies in a conscious effort to set appropriate welfare or revenue maximizing rates. Note though that the optimum welfare-maximizing rate is classically set lower than a revenue-maximizing tariff, as the latter considers domestic monopsony power[209] in addition to international monopoly power.

However, when economies sell into the same or connected markets (including insulated markets that are connected financially), a higher export tax in country A generates a positive externality for country B through the increase of international prices. A cooperatively set revenue-maximizing rate can thus result in an increase in welfare levels beyond the original welfare-maximum-tariff.[210] This insight carries obvious implications for possible cooperation among ill-diversified countries, resembling an oligarchic international market structure where consumers are not likely to retaliate. It is important to note though that the very cooperation that could lead to national welfare increases does nothing to halt the transmission of exogenous shocks while raising considerable collective action problems when export restrictions are used to stabilize domestic prices.[211]

The political case for the introduction of export taxes is particularly pressing after rapid and substantial currency depreciation, as exporters receive temporary windfall gains and the government most often experiences a fall in

[208] Timothy Besley and Torsten Persson, "The Causes and Consequences of Development Clusters: State Capacity, Peace, and Income," 6 *Annual Review of Economics* 927 (2014), p. 932. A country's tax-collection capacity comes into question even further when a significant part of the economy is informal. A considerable informal economy hampers the effective substitution-interplay between VAT and border measures and, in this way, possibly hurts aggregate welfare; see M. Shahe Emran and Joseph Stiglitz, "On Selective Indirect Tax Reform in Developing Countries," 89 *Journal of Public Economics* 599 (2005).

[209] Domestic monopsony power serves as a clear distortion from a welfare perspective; hence the welfare-maximizing tariff is always lower than the revenue maximizing tariff.

[210] This intuitive result is proved formally in Arvind Panagariya and Maurice Schiff, "Can Revenue Maximizing Export Taxes Yield Higher Welfare Than Welfare Maximizing Export Taxes?," 45 *Economic Letters* 79 (1994). However, the game that ensues might be characterized as a prisoner's dilemma where both countries are better off maximizing revenue, but both will maximize welfare in the Nash equilibrium; Roger Clarke and David R. Collie, "Maximum- Revenue versus Optimum-Welfare Export Taxes," Cardiff Business School Working Paper (2006).

[211] See, for agricultural staples, Will Marin and Kym Anderson, "Export Restrictions and Price Insulation During Commodity Price Booms," 94(2) *American Journal of Agricultural Economics* 422 (2012).

revenues. An across-the-board, temporary export tax,[212] could serve to transfer parts of the exporter's rents to the government. The pattern of outgoing international remittances,[213] in the presence of a stock of foreign (direct) investment, will further influence government's preferences over trade policy instruments as well as their appropriate levels. This application suggests however a temporary and general, instead of permanent and specific, structure to export taxes, which runs against the premises of the Lerner Symmetry.

An interesting historical example of such political economic pressure can be found in the Argentine depression of 1998-2002. A strong currency devaluation and recession deprived the Argentine government of much needed foreign exchange while, as Setser and Gelpern point out, "[f]armers did particularly well: their dollar debts were pesified just before the harvest brought in an influx of dollar revenue."[214] The Argentinean government raised export taxes to, in part, "redistribute[] gains from devaluation to help those hurting the most."[215] In a waive of "export populism," President Nestor Kirchner (2003-2007) continued a policy of active devaluation and export taxation on soybeans to fund social programs without harming the balance of payments directly or deprive households of purchasing power as soybeans were assumed to have no domestic consumption demand at the household level.[216]

c. Market Rationalization

The trade effects of export restrictions, administered through border measures, can similarly be accomplished by condoning corporate collusion or through the establishment of export cartels. In general, firm-level collusion seeks to take advantage of the same elasticity arguments and pressures that hold for terms-of-trade enhancing border measures. Commodity export cartels are therefore often analyzed in conjunction with similar border measures.

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[212] As the windfall generates rents to exporters in general, the export tax should be broadly applied. The longer the export tax is kept in effect though, the stronger it will interfere with the purposes of the depreciation; frustrating the realignment of production factors, distorting their returns and potentially translating in household purchasing power effects (in the absence of government subsidies and in light of the initial domestic price-dampening effect due to rigidities of supply). The burden associated with the necessary restoration of the balance of payments could then be shifted on the import side more completely, risking a contraction or a recession.

[213] Note that in the face of international remittances a direct tax on such flows is necessary to restore the Lerner Equivalence; see Emily J. Blanchard, "Trade Taxes and International Investment," 42(3) *Canadian Journal of Economics* 882 (2009).

[214] Brad Setser and Anna Gelpern, "Pathways through Financial Crisis: Argentina," 12 *Global Governance* 465 (2006), p. 480.

[215] *Idem*, p. 481.

[216] Neal P. Richardson, "Export-Oriented Populism: Commodities and Coalitions in Argentina," 44 *Studies in Comparative International Development* 228 (2009).

Export collusion can achieve much the same trade effects as export restrictions, but without the immediate domestic distortions, if the repercussions of the collusion can be contained to the targeted export markets.[217] Instead of introducing a border measure (raising a tariff), the colluding industry raises its export prices. Successful market intervention by a cartel therefore requires that the value of the price elasticity of marginal consumer demand is less than unity. This, in turn, implies that the marginal revenue function of the cartel's aggregate supply is negative and that curtailing sales will thus raise the cartel's aggregate revenue.[218]

Incentivizing the accumulation of additional revenue at the firm level, rather than stimulating inter-firm competition to diminish this surplus, could be part of a larger industrial policy aimed at market rationalization; preparation for foreign market entry; combatting resource depletion; or part of a government plan to stimulate innovation. Government sanctioned or condoned collusion can furthermore be beneficial in markets that are in need of controlled rationalization due to an overcapacity in production - developed in response to mistaken beliefs about the future or in response to policy-induced overproduction.

Alternatively, export cartels can be useful in markets that suffer from underutilization due to economic recessions or shifting fundamentals. In addition to attempting to shift costs internationally, recession-cartels in declining industries can help to limit production and wind the industrial overcapacity down without triggering a financial cascade of failing loans. The recent U.S. antitrust case against Chinese producers of vitamin C, for government-induced export price fixing, could be interpreted in light of a national policy aimed at addressing industrial overcapacity.[219] In a related U.S. antitrust enforcement procedure, Chinese bauxite producers are accused of similar anti-competitive price-fixing schemes as directed by the Chinese Government, only this time with a more overt aim of stimulating domestic downstream production.[220]

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[217] Clearly, containing the effects of collusion to external target markets invites large-scale efforts at evasion through distribution on the secondary markets. Note that some forms of price-discrimination are clearly anticompetitive, while others are tolerated under antitrust enforcement: see, for example, the divergence between European and US approaches to loyalty rebates; Hans Zenger, "Loyalty Rebates and the Competitive Process," 8(4) *Journal of Competition Law and Economics* 717 (2012).

[218] Marian Radetzki, "The Potential for Monopolistic Commodity Pricing by Developing Countries," in G.K. Helleiner, ed., *A World Divided: The Less Developed Countries in the International Economy* (London: Cambridge University Press, 1976); Marian Radetzki, *A Handbook of Primary Commodities in the Global Economy* (Cambridge: Cambridge University Press, 2008), p. 146.

[219] *In re Vitamin C Antitrust Litig*., 810 F. Supp. 2d 522 (E.D.N.Y. 2011); see also Wouter P.F. Schmit Jongbloed and Tilahun Kassahun, "A Vitamin C Deficiency? Balancing Economic Transition in China with U.S. Competition Policy – A WTO Perspective," DISSETTLE Working Paper, Graduate Institute (Geneva, *forthcoming*).

[220] *Resco Prods., Inc. v. Bosai Minerals Grp*., No. 06-235, 2010 WL 2331069 (W.D. Pa. June 4, 2010); *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp*., 702 F. Supp. 2d 320 (D.N.J. 2010), vacated sub nom. *Animal Sci. Prods., Inc. v. China Minmetals Corp*., 654 F.3d 462 (3d Cir. 2011).

In addition to questions of cartelization, a lot of attention has been paid in the literature to the corporate and strategic implications of stimulating vertical consolidation and the emergence of national champions[221] - be they state-owned, state-influenced or market-driven.[222] An assessment of the interaction of the broad concept of "competitive neutrality"[223] and the economic growth impacts of export restrictions thereon go however beyond the scope of the present work.

As monopolies tend to restrict production volume in a bid to command higher revenue, the use of cartels has also been suggested to combat (too) rapid resource depletion. The resource depletion itself could be considered deleterious to long-term economic health or the process of depletion could be generating environmental degradation that is not properly reflected in the international price (resulting in underpricing and overconsumption with domestic, but not international, negative welfare effects). Collusion among producers could, as a clear second best, serve to "naturally" slow the pace of extraction– such in the absence of direct regulation or governmental standard setting (with oversight).

Finally, government induced collusion could have a direct affect on the pace and direction of firms' efforts at product innovation. Aghion et al. find an inverted-U-shaped relationship between product-market competition and innovation, showing that innovation incentives depend upon the difference between post-innovation and pre-innovation rents of incumbent firms.[224] In particular, vigorous competition enhances innovation more in more advanced sectors where competition is global and companies are prone to innovate in order to "escape" the competition. This work by Aghion et al., could be read so as to compliment Rodrik and Hausmann's observation

[221] Among a broad literature, see recently, Oliver Falck, Christian Gollier and Ludger Woessmann, eds., *Industrial Policy for National Champions* (Boston: MIT Press, 2011); see also Emmanuelle Maincent and Lluis Navarro, "A Policy for Industrial Champions: From Picking Winners to Fostering Excellence and the Growth of Firms," Industrial Policy and Economic Reforms Papers No. 2, European Commission (2006).
[222] Milhaupt and Zheng argue that "state capture" might more accurately describe modern forms of state influence – at least in China – see Curtis J. Milhaupt and Wentong Zheng, "Beyond Ownership: State Capitalism and the Chinese Firm," ECGI Working Paper Series in Law No. 251/2014 (2014).
[223] See among many others; OECD, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practices* (OECD 2012); see also Karl P. Sauvant, Persephone Economou, et. al., "Trends in FDI, Home Country Measures, and Competitive Neutrality," in Andrea Bjorklund, ed., *Yearbook on International Investment Law and Policy 2012-2013* (New York: Oxford University Press, 2014). The concept of competitive neutrality is central to understanding the prolonged discussions on the status of state-owned enterprises in the Trans-Pacific Partnership (TPP) agreement, including the negative-list approach taken to them.
[224] Philippe Aghion, et al., "Competition and Innovation: An Inverted-U Relationship," 120(2) *The Quarterly Journal of Economics* 701 (2005).

that, in technologically lagging transition and emerging markets, government induced rents may be "needed to stimulate the cost discovery process."[225]

3. Counter to Tariff Threats: VERs

Economies have, at times, semi-voluntarily restricted their exports in response to tariff threats from important import markets, either pre-emptively (voluntary export restraints) or post-facto (to counter tariff escalation for example). While the post-facto restrictions mostly take the form of export taxes, pre-emptively undertaken export restraints generally take the shape of quotas or directed (minimum export) price measures (VERs).

The raising of taxes on exports can be an appropriate response for commodity exporters in the face of tariff escalation. Import tariffs facing exporting countries are said to be escalating when they are higher on processed than on unprocessed goods.[226] Tariff escalation in developed countries disincentives economic diversification in upstream markets and keeps commodity dependent economies captured in (extractive) industries where lower learning and productivity spillovers are prevalent. As tariff wedges have diminished in most up-/down-stream product pairs, the second best policy instrument of introducing an export tax is no longer as relevant as it was at the time of and before the Uruguay Round – with the possible exception of tropical agricultural produce, such as coffee or cocoa.[227]

In response to tariff threats from important import markets, exporting economies at times agree to voluntarily limit their exported volumes (though, importantly, not their export value).[228] By agreeing to VERs, the economy that exercises restraint retains the generated premium/rents to allocate domestically. As the rents accrue to the export

[225] Rodrik and Hausmann simultaneous warn that "[…] rents can backfire if governments do not complement them with policies that rationalize industries and discipline firms that end up with high costs. We would hypothesize that the absence of such discipline was a hallmark of import substitution policies (ISI) in Latin America," in Ricardo Hausmann and Dani Rodrik, "Economic Development as Self-Discovery," NBER Working Paper No. 8952 (May 2002), pp. 7-8.
[226] For a rent-extraction model of escalating tariffs, see Hong Hwang, Chao-Cheng Mai, and Shih-Jye Wu, "Tariff Escalation: A Theoretical Foundation," Working Paper (2011).
[227] Coffee has the biggest differential in the U.S. (7-8 percent), while the EU has a similar wedge for cocoa; Mexico and Turkey have strong differentials in their applied rates to coffee, of 120 and 40 percent respectfully – see Piermartini, *op.cit*, p. 13. For tariff escalation in agricultural produce, see Ramesh Sharma, "The Doha Round Agricultural Tariff-Cutting Formulae and Tariff Escalation," FAO Working Paper (2006).
[228] A famous example involves auto exports from Japan to the U.S. in the 1980s, but use was widespread before the GATT Uruguay Round; in 1991 nearly 300 agreed VERs were in effect (Alan O. Sykes, *The WTO Agreement on Safeguards: A Commentary* (New York: Oxford University Press, 2006), p. 24). Other examples include EU-China textile exports in the first decade of the 21st century. See for a recent overview work, Sabina Nüesch, *Voluntary Export Restraints in WTO and EU Law: Consumers, Trade Regulation and Competition Policy*, Studies in Global Economic Law Vol. 13 (Berlin: Peter Lang, 2010).

restricting economy under VERs, the welfare loss to the importing economy that results from the voluntary export restriction is larger than would have occurred under an import tariff or equivalent quota. So, although VERs could serve as a preferred second-best response to a tariff threat, the country making such threat is considerably worse off.

While the voluntary limiting of export volumes on certain products offers a measure of protection to the import-competing domestic industry, limiting export volumes usually induces quality upgrades to existing export-lines in order to escape the targeted product designation or to maximize revenue under the quota. Feenstra, for example, finds that "about two-thirds of the import price rise following the VER is due to quality improvement, with the remaining one-third a de facto price increase."[229]

Bhagwati, early on, demonstrated the equivalence between quotas and taxes under perfect competition,[230] in the sense that both instruments can reduce trade volumes equally.[231] Panagariya has explored the possibility of welfare rankings under the non-equivalence of tariffs and quotas as result of imperfect competition,[232] showing the superiority of tariffs as they force the monopolist to compete instead of receive quota rents. In the presence of smuggling however, the dominance of the ad valorem tariff over quotas becomes unhinged.[233] A further non-equivalence between tariffs and quotas emerges under conditions of uncertainty[234] and in the face of tariff jumping foreign direct investment.[235]

This result on smuggling is particularly interesting in light of China's export restriction cases, *China – Raw Materials* and *China – Rare Earth* (examined in detail in Chapter 5, *infra*). China argued in these cases that its

[229] Robert C. Feenstra, "Voluntary Export Restraint in U.S. Autos, 1980-81: Quality, Employment, and Welfare Effects," Robert E. Baldwin and Anne O. Krueger, eds., *The Structure and Evolution of Recent U.S. Trade Policy* (Chicago: University of Chicago Press, 1984), p.36.
[230] Jagdish Bhagwati, "On the Equivalence of Tariffs and Quotas," in Richard E. Baldwin, Jagdish Bhagwati, R.E. Caves and H.G. Johnson, *Trade, Growth and the Balance of Payments: Essays in Honor of G. Haberler* (Chicago: Rand McNally, 1965).
[231] Note that the equivalence holds statically as its values do not automatically adjust for changing comparative and competitive advantages; see Petros C. Mavroidis, *Trade in Goods* (New York: Oxford University Press, 2008), pp. 71-72.
[232] Arvind Panagariya, "Import Targets and the Equivalence of Optimal Tariff and Quota Structures," 13 *Canadian Journal of Economics* 711 (1980); Arvind Panagariya, "Quantitative Restrictions in International Trade Under Monopoly," 11 *Journal of International Economics* 15 (1981); Arvind Panagariya, "Tariff Policy Under Monopoly in General Equilibrium," 23 *International Economic Review* 143 (1982).
[233] Bruno Larue and Harvey E. Lapan, "Smuggling and Bhagwati's Non-Equivalence Between Tariffs and Quotas," 10(4) *Review of International Economics* 729 (2002).
[234] See, for instance, Partha Dasgupta and Joseph Stiglitz, "Tariffs vs. Quotas as Revenue Raising Devices under Uncertainty," 67(5) *The American Economic Review* 975 (1977).
[235] See, for instance, Peter Neary, "Tarrifs, Quotas, and Voluntary Export Restraints with and without Internationally Mobile Capital," 21(4) *The Canadian Journal of Economics* 714 (1988); An important incidence of such tariff jumping by foreign investment can be found in the establishment of US domestic production capacity by Japanese auto-makers in the 1980s, examined in Jagdish Bhagwati, "VERs, Quid Pro Quo DFI and VIEs: Political Economy Theoretic Analyses," 1(1) *International Economic Journal* 1 (1987).

policy measures were aimed at, among other objectives, the reorganization of the domestic (extractive) industry to prevent large-scale smuggling.

It should be noted that the GATT Uruguay Round outlawed the use of VERs and arranged for a controlled phase-out of existing agreements by 1999,[236] mostly under pressure of developing economies.[237] By disavowing the use of VERs, protection against potentially damaging import surges was brought back into the fold of WTO-consistent contingent protection.[238] "Unfair" pricing practices can, in this way, be addressed in a WTO-consistent manner by introducing a variety of contingent duties and charges. Wholesale protection from "serious injury" is accounted for in the WTO by so-called safeguard measures, while state-subsidy questions are under the purview of countervailing duties.

B. Normative Models of Mature and Catch Up Growth

The high pace and impressive trajectory at which developing economies approach economic maturity, particularly in East Asia and Latin America (assuming they successfully avoid the middle income trap), has re-fueled the debate on whether, to which level and in what structure openness to trade best fosters national development goals in the long run. Commenting on the success of heterodox policies in kick-starting industrial growth Panagariya notes that "these critics fail to distinguish between initial catalysts to growth and policies necessary to *sustain* it. Even if growth is initially stimulated by increased investment demand or innovation, growth is unlikely to be sustained if the trading environment is autarkic and continues to be autarkic."[239]

[236] While Article XI of GATT banned import quotas, it took until 1999 to permanently deal with VERs; Article 11.1(b) of the 1994 Agreement on Safeguards prohibits new voluntary export restraints, while Article 11.2 provides that all pre-existing VERs should be phased out by 1999. A separate agreement on textiles and clothing postpones such date until 2005 for apparel; Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods-Results of the Uruguay Round, 33 I.L.M. 28.

[237] In 1988 Brazil, India and Mexico in particular opposed legalization of VERs, fearing the targeting of developing countries while being concerned about their relatively weak bargaining position and limited opportunities to retaliate against developed economies – see GATT Secretariat, *Synopsis of Proposals*, MTN.GNG/NG9/W/2 1, at 14-15 (1988); David P. Stewart, The GATT Uruguay Round: A Negotiating History – Volume 2 (Alphen: Kluwer Law International, 1993), p. 1771. These concerns have, of course, somewhat lessened with the meteoric rise of the BRICS and other emerging markets.

[238] See Kyle Bagwell, George Bermann and Petros Mavroidis, eds., *Law and Economics of Contingent Protection in International Trade* (London: Cambridge University Press, 2010); Petros Mavroidis, Patrick Messerlin, and Jasper Wauters, *The Law and Economics of Contingent Protection in the WTO* (Cheltenham: Edward Elgar, 2008).

[239] Arvind Panagariya, "Miracles & Debacles: In Defense of Trade Openness," 27(8) *The World Economy* 1149 (2004), p. 1150.

While certainly true, the issue then seems to be at what time "initial catalysts" should give way to "sustained" or mature growth policies and whether such opening up should be across the board or differentiated between products.[240] As I will argue in this Section, the process of mature growth is directed at pushing the capability frontier through innovation; "catch up" growth instead operates behind the frontier and draws on available emulation opportunities to strategically direct industrial policies toward viable diversification of the production basket.

Conditions of "mature" and "catch-up" growth can, and will, therefore coexist between and within economies in the absence of full convergence. Until such time, industrial policies will remain a significant and indeed necessary marker in the economic landscape, across countries and industries. Industrial policies, including trade measures, can work to direct economic development and provide guidance in the transition period of high- or transformative growth that gives shape and profile to an economy's structural outlook and defines its (weakly path-dependent[241]) development.

It may be pertinent to clarify at this point that when this work envisions "mature" and "catch-up" growth operating in parallel, it does so with the aim of clarifying their different policy objectives: efficient resource allocation v. production diversification. The distinction is therefore not meant to be reminiscent of a supply side argument, where, as Acemoglu reminds us, the "factor proportion differences across sectors, combined with capital deepening, lead to nonbalanced economic growth."[242]

Rather, policies directed at "catch-up" growth within a network structure of product relatedness purposefully aim to get *some* prices temporarily "wrong" in order to entice entrepreneurial activity to embark on production diversification. While world prices are assumed to be unaffected, domestic prices are assumed to be sticky and only over the long run responsive to a specific and temporary price distortion. Market-driven rationalization of resource

[240] Studies that differentiate the pace of growth between sectors and products ultimately owe a debt to Baumol's seminal paper "Macroeconomics of Unbalanced Growth: The Anatomy of Urban Crisis," 57(3) *American Economic Review* 415 (1967).
[241] Most percolation models of economic development assume path dependence; see for example Cristiano Antonelli, ed., *Handbook on the Economic Complexity of Technological Change* (Cheltenham: Edgar Elgar, 2011) and Gerd Schienstock, "Path Dependency and Path Creation: Continuity vs. Fundamental Change in National Economies," 15(4) *Journal of Futures Studies* 63 (2011). Weak path dependence in the form of product space growth stands central in Section II.
[242] Daron Acemoglu, *Introduction to Modern Economic Growth* (Princeton: Princeton University Press, 2009) p. 703. For an excellent exposé on "primitive accumulation" and unbalanced growth – in the sense not argued for in this paper – see Paul Krugman, "Trade, Accumulation, and Uneven Development," 8 *Journal of Development Economics* 149 (1981).

allocation consequently occurs *after* the acquisition of the necessary productive skills, or when the entry into new product markets has proven viable; i.e. at the moment when capital deepening occurs.[243]

While it is clear that export restrictions can warp domestic[244] resource allocation on at least two levels – under-incentivizing upstream production and investments, while (over-)stimulating downstream processing industries – the policy's capacity to spur economic development stands or falls with the implementation objective. Bhagwati and Srinivasan note that, "one cannot in general compute the pattern of 'prices' of value added from the knowledge of the *tariff structure alone* - one needs information on the production functions."[245]

This crucial observation emphasizes the importance of both the static and dynamic responses of the disaggregated constituents of an economy's total production function. In order to fully address the dynamic effects of a trade measure on an economy's industrial transformation, one would have to acknowledge the prevailing entry conditions, the potential viability of the targeted industry and indeed its proximity to existing export products. A process of dynamic emulation[246] could then – and only then - have the potential to overwhelm the static efficiency loss (assuming transition costs are overcome and realignment happens smoothly).

The theoretical underpinnings of why increased openness to trade is said to lead to enhanced growth performance depend in large measure on the growth model employed. A simple neoclassical growth model will, for example,

[243] The viability of an industry can be assessed through the level of profits it generates or its continued dependence on the mispricing of the production factors – governments thus play "an active role in coordinating investments for industrial upgrading and diversification and in compensating for externalities generated by first-movers in the dynamic growth process" (Lin 2012). Such externalities can include free-rider problems and demand temporary monopoly profits or subsidies for first movers. See Justin Y. Lin, *New Structural Economics: A Framework for Rethinking Development and Policy* (Washington DC: World Bank, 2012), p. 5. For a historical example of a successful market rationalization in a post-industrial policy context, see Santiago Mingo and Tarun Khanna, "Industrial Policy and the Creation of New Industries: Evidence from Brazil's Bioethanol Industry," 23(5) *Industrial and Corporate Change* 1229 (2013).

[244] Note that in the presence of international market power, tariffs and export restrictions also affect the benchmark international prices; and in turn shape resource allocation through its enhanced, respectfully "corrected," terms of trade.

[245] Jagdish Bhagwati and T. N. Srinivasan, "The General Equilibrium Theory of Effective Protection and Resource Allocation," 3(3) *Journal of International Economics* 259 (1973), p. 278 (emphasis in the original). They go on to note that this stands in contrast to "the traditional model where one can predict that, ceteris paribus, the equilibrium output of a commodity will got up consequent on an in-crease in the tariff on this commodity without drawing upon any knowledge of its production function."

[246] Economic emulation is used here in the sense of Justin Lin, *New Structural Economics: A Framework for Rethinking Development and Policy* (Washington DC: World Bank, 2012); Erik Reneirt, "Emulation Versus Comparative Advantage: Competing and Complementary Principles in the History of Economic Policy," in Mario Cimoli, Giovanni Dosi, and Joseph Stiglitz, eds., *Industrial Policy and Development: The Political Economy of Capabilities Accumulation* (New York: Oxford University Press, 2009); and Ha-Joon Chang, Kicking Away the Ladder: Development Strategy in Historical Perspective (London: Anthem Press, 2003).

emphasize the effect that trade openness has on factor prices,[247] while learning-by-doing[248] and more advanced endogenous growth[249] models will emphasize the level of available technology to show that (asymmetrical) specialization patterns directly effect the growth rate.[250] It is however furthermore conceivable, or even probable as I argue, that the very nature of the tradable output – or, similarly, the economy's revealed comparative advantage - determines to a large extend which growth model (and trade policy) should be considered most appropriate.[251]

Section 1.B.1, *infra*, will concentrate on a version of the dominant mature growth model that places the terms of trade central. This model could, in some form, be said to be tangent to and implicitly applied by the WTO as it works to get prices "right" in a terms of trade conscious environment.[252]

1. Mature Growth and Export Restrictions

The main argument in classic mature growth models is predicated on notions of shared technology, or of technological spillovers, affecting the productivity (or available product varieties) of an economy producing under diminishing returns. The resulting interplay of diminishing returns to accumulation (of capital) and technological progress determines the growth rate in, for instance, the Solow-Ramsey growth model (extended models of the AK-type)[253]. In such models, differences in available technology,[254] institutional quality[255] and household saving

[247] Factor prices stand central to the argument in Jaume Ventura, "Growth and Interdependence," 112(1) *Quarterly Journal of Economics* 57 (1997) and Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117 *Quarterly Journal of Economics* 659 (2002). Both papers show how trade's effect on factor prices can transform a closed economy with diminishing marginal returns on capital into one with constant marginal returns and vice-versa – thus switching the growth engine from capital/labor ratios to differential discount factors (neoclassical AK-model).
[248] In Kenneth Arrow, "The Economic Implication of Learning by Doing," 29 *Review of Economic Studies* 155 (1962) learning by doing was modeled as increases to cumulative investment, whereas Robert Lucas, "On the Mechanics of Economic Development," 22 *Journal of Monetary Economics* 3 (1988) takes the approach to human capital formation directly.
[249] The two canonical models are the expanding product variety model in Paul Romer, "Endogenous Technological Change," 98(5) *Journal of Political Economy* 71 (1990), and the quality ladder model in Gene Grossman and Elhanan Helpman, *Innovation and Growth in the Global Economy* (Cambridge: MIT Press, 1991) and Philippe Aghion and Peter Howitt, "A Model of Growth Through Creative Destruction," 60(2) *Econometrica* 323 (1992).
[250] Pietro Peretto and Simone Valente, "Resources, Innovation and Growth in the Global Economy," 58 *Journal of Monetary Economics* 387 (2011); The benchmark two country model with different productivity levels was set in Gene M. Grossman and Elhanan Helpman, *Innovation and Growth in the Global Economy* (Cambridge: MIT Press, 1991).
[251] Such in contrast to the multi-regional Dynamic Stochastic General Equilibrium model employed by the IMF, see for a cursory description Michael Andrle, et al., "The Flexible System of Global Models – FSGM," IMF Working Paper WP/15/64 (April 2015).
[252] See, Kyle Bagwell and Robert W. Staiger, "Economic Theory and the Interpretation of GATT/WTO," 46(2) *The American Economist* 3 (2002).
[253] The most simple expression of an "AK" growth model is as follows: $Y = A(K)^{\alpha}L^{1-\alpha}$
[254] For a model emphasizing the power of technological spillovers, see, for instance, Robert Barro and Xavier Sala-i-Martin, "Technological Diffusion, Convergence, and Growth," 2 *Journal of Economic Growth* 1 (1997); and Daron Acemoglu and Fabrizio Zilibotti, "Productivity Differences," 116 *Quarterly Journal of Economics* 563 (2001).
[255] Institutional quality is a multi-faceted concept that has been the object of much study. Its inputs range from measures of trade openness, to easy of doing business indicators, and examination of the prevalence of corruption or extend of elite capture.

propensity[256] do not lead to long term differences in growth rates, but to differences in capital/labor ratios and international wage-differentials.

Under conditions of specialized international trade, Acemoglu and Ventura show,[257] for instance, how the terms of trade equilibrate several economic variables in an extended AK-model of growth. This approach is exquisitely suitable for a description of the (frictionless) dynamics of international trade under the mature growth model. The model presented by Acemoglu and Ventura further offers direct normative implications for setting desirable trade policies at the international level. In fact, Acemoglu and Ventura hint at the importance of international institutions to resolve cooperative and coordination questions among trading partners.[258] A formal description of their argument is included in the Analytical Annex hereunder.

Some element of specialization[259] in international trade is essential to mature growth models, as without it products would be perfect substitutes and exports would face a flat international demand, returning the analysis to a state of autarky. In a simplified steady state model, I will emphasize the equilibrating effects of the (international or relative) terms of trade; assuming that growth happens as a result of capital accumulation only. Scarcity of capital then, relative to the world average, serves as a primary expression of the terms of trade in an economy. This domestic return to capital is, at the same time, balanced by the household saving rate or "effective rate of time preference."[260]

Economies that are capital poor, relative to their available technology and saving rate, consequently accumulate capital at a faster pace than the world average. Deteriorating terms of trade effects to some extend offset this element of convergence however.[261] This dynamic between capital accumulation and the gradual deterioration of the terms of

[256] In the Solow growth model a uniform and constant saving rate is assumed, whereas in neoclassical growth models this assumption is re-written to allow for the saving rate to be determined by the preference ordering of household consumption and saving decisions (ultimately allowing for a discussion on the optimality of an achieved equilibrium or steady state).
[257] Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002).
[258] Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), pp. 667, fn. 9.
[259] Although trade specialization is essential, some growth models employ a product variety approach to explain trade between similarly endowed economies and overcome the seemingly perfect substitution between, for example, high-end German and US cars.
[260] Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), p. 662, explain that "[i]n the steady state, countries with lower rates of time preference and lower price of investment goods (those with fewer distortions affecting investment) will have lower rental rates, hence higher relative capital and income. Countries with better technologies will be richer, in turn, because they have higher rental rates for a given level of relative capital and income."
[261] Acemoglu and Ventura find a 0.6 deterioration for each percentage of faster growth; Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), p. 662.

trade can explain some of the persistent income differentials in the global steady state. Conditional convergence thus depends on the strength of the terms of trade effects and not on the capital share of output as in the Solow-Ramsey models. The insight that the quality of institutions (including trade openness) and the household saving rate are determinative of income differentials, rather than of fundamental influence on the pace of growth, is also corroborated by Howitt in a model that relies on spillovers from "leading-edge technology."[262]

Note that in order to highlight the (dynamic) path of the terms of trade, as driven by international trade and capital accumulation, factor price equalization (FPE) is assumed to be absent. With FPE, the return to capital is independent of the relative abundance of domestic capital and countries can accumulate without experiencing diminishing returns. The FPE-mechanism thus has important implications for economic development policies under any endowment model of international trade.[263] Under the presently favored terms of trade-centered approach to mature growth, cross-country divergences in technology, saving propensities, and institutions translate into differences in income levels, not growth rates. The mature growth terms-of-trade model thus showcases that "[c]ountries that accumulate capital faster than average experience declining export prices, reducing the rate of return to capital and discouraging further accumulation."[264]

The strong, and at time virulent, resistance to the use of tariffs and export restrictions as industrial policy tools in international trade finds clear expression in equilibrium theories of trade and growth that presume world wide, uniform, steady state growth paths. In an optimal steady state, trade measures are "shown" to be at best futile (as the terms of trade adjust) and at worst distortionary as the domestic growth rate is anchored to the world (or regional) equilibrium rate. Although the diversity of the tradable widgets is determined by the state of technology, the widgets themselves are homogenous and carry no additional information and have no notion of peer-wise proximity – technological progress is, additionally, made exogenous.

[262] Peter Howitt, "Endogenous Growth and Cross-Country Income Differences," 90 *American Economic Review* 829 (2000).
[263] In fact, this is how Ventura analyses the rapid and sustained growth in East Asia, in Jaume Ventura, "Growth and Interdependence," 112(1) *The Quarterly Journal of Economics* 57 (1997).
[264] Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), p. 664.

Under these conditions "inflating the macro-economic balloon," a phrase borrowed from Ocampo,[265] requires growing the economy through the accumulation of production factors in a steady state. Introduction of industrial policies that do not perfect the steady-state condition are therefore considered mainly harmful as they distort domestic production, stimulate institutional degradation (rent-seeking) and invite retaliation to make everyone worse off.

Let it be noted though that this approach to economic growth leaves under-addressed the development conundrum that stands central to this work. Whereas no sophisticated theory of trade and development beyond a basic understanding of Heckscher-Ohlin-Samuelson (HOS)[266] is needed to explain why Kuwait exports oil, there *is* an interesting puzzle in explaining why Kuwait for years exported crude oil instead of developing a refining capacity to diversify its export basket. In other words, why are some economies at a sector's innovative edge without relevant natural endowment, while others export unprocessed raw materials?[267] The exhaustibility of natural resources, their supply volatility and stock uncertainty all surely contribute to production allocation and development paths, in addition to historical and institutional reasons. However, economies that find themselves with a comparative advantage in the mere extraction of raw materials are (and should be) loathed to acquiesce. Their path toward "catch up" is argued for and explored in Section 1.B.2, *infra*.

2. Catch Up Growth and Export Restrictions

In the theory of mature economic growth, the concepts of market failures and externalities stand central as either the boogiemen or good-ferries of growth. Although these concepts are crucial to all models of economic growth and development, both market failures and economic externalities are ultimately employed to explain retardations or accelerations in the pace of production factor accumulation; in large part through efficiency and productivity

[265] Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005), p.8.
[266] Preference is given to a HOS model of trade over a Ricardian one to allow the interplay between country- and product-characteristics to come to the fore more intuitively, particularly when considering a multi-factor, multi-good simulation with friction.
[267] Germany, for example, is the second largest grinder of cocoa beans in the EU while, for climate reasons, no cocoa beans are grown in Germany; see http://www.cbi.eu/system/files/marketintel/2011_Cocoa_beans_in_Germany.pdf.

gains.[268] This understanding crucially fails to account for a more fundamental insight: "that markets, by themselves, do not necessarily, or in general, lead to overall dynamic efficiency; and that there are often trade-offs between static inefficiencies […] and long-term growth."[269]

As Ocampo points out,[270] dynamic efficiency is best understood to comprise of three parts: the first is the ability of the economy to generate new economic activities (to innovate or diversify), the second concerns the process by which the newly acquired economic activities generate complementarities, linkages, or networks that result in an integrated production fabric. "These two forces are closely interlinked with a third, which is the capacity to reduce the dualism or structural heterogeneity that characterizes production structures in developing countries—that is, the coexistence of high-productivity and low-productivity economic activities."[271] Together, these three forces instruct institutions and associated policy interventions to concentrate on a growth and development strategy aimed at the transformation of national production structures.

The dynamics and innate complementarities of production structures and institutions, rather than a sovereign notion of market efficiency, are thus the root cause of changes in the momentum of economic growth. "In this sense, growth is essentially a meso-economic process, determined by the dynamics of production structures, a concept that summarizes the evolution of the sectoral composition of production, intra- and inter-sectoral linkages, market structures, the functioning of factor markets, and the institutions that support all of them."[272] A typology of structural change that distinguishes between strong (and weak) learning and strong (and weak) complementarities thus follows naturally and is insightfully provided by Ocampo.[273]

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[268] Cimoli, Dosi and Stiglitz additionally point out that "the 'market failure' language tends to be quite misleading in that, in order to evaluate the necessity and efficacy of any policy, it takes as a yardstick those conditions under which standard normative ('welfare') theorems hold. The problem with such a framework is not that 'market failures' are not relevant. Quite the contrary: the problem is that hardly any empirical set-up bears a significant resemblance with the "yardstick" […]," Mario Cimoli, Giovanni Dosi and Joseph Stiglitz, "Industrial Policies in Learning Economies," IPD Working Paper (February 5, 2015).

[269] Bruce C. Greenwald and Joseph E. Stiglitz, "Helping Infant Economies Grow: Foundations of Trade Policies for Developing Countries," 96(2) *AEA Papers and Proceedings* 141 (May 2006), p. 141; See also, Joseph E. Stiglitz and Bruce C. Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress* (New York: Columbia University Press, 2014).

[270] Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005).

[271] Jose Antonio Ocampo, "Introduction," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005), p. xii.

[272] Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005), p. 12.

[273] For the purposes of our interest in export restrictions as a developmental policy, we defer the question of industrial embeddedness to a discussion of "nestedness" in Section II.B where we will integrate the question of industrial "embeddedness" with a discussion of Justin Y. Lin and Pengfei

The argument presented in this Section consequently emphasizes the nature of skill relatedness and capability accumulation in order to shed light on the use of industrial policies as first best tools in growth models of strong dynamic learning and product diversification. Useful industrial policies will be said to offer least-invasive guidance to the processes of technological learning and innovation, economic coordination, and development. This type of pro-active market making should not only occur at the technological frontier, through (infra-structural) R&D subsidies, energy feed-in-tariffs, and international intellectual property protection, but should instead be recognized as an essential property of economic growth at any stage of development.

Since Solow, technological progress has been recognized as the engine that drives *productivity* increases.[274] The "structuralist" tradition, originating in earnest with Schumpeter,[275] has rather stressed the *diversification* potential of technological progress. In 1969, Atkinson and Stiglitz recognize that productive capacity and knowledge are essentially local and examine the effects of the localization of knowledge on the decisions of firms and governments as the production function shifts outward.[276] Forty-five years later, Acemoglu extends this insight and offers some micro-foundations, connecting the induced-innovation literature to directed-technological change models.[277]

As a consequence, drivers of innovation and technological adoption are best envisioned relative to the market they engage, *i.e.* creative destruction is a localized process with potentially global consequences.[278] Technological adoption and innovation is a direct result of profit maximization decisions by firms in light of their present capacity set,[279] associated (diversification) costs,[280] relevant consumer demand and international trade opportunities.

Zhang, "Industrial Structure, Appropriate Technology and Economic Growth in Less Developed Countries," World Bank Policy Research Working Paper No. 4905 (2009). For now, we proceed to assume that an economic anchor develops organically if the diversification target is chosen properly.

[274] Note that the causal link between productivity growth and dynamic economic performance has also been insightfully argued to run in the reverse; know as the Kaldor-Verdoorn law – see José Antonio Ocampo, Codrina Rada, and Lance Taylor, "Growth and Sectoral Policy," in *Growth and Policy in Developing Countries: A Structuralist Approach* (New York: Columbia University Press, 2009), Chapter 8, p. 121 et seq.

[275] Joseph Schumpeter, *The Theory of Economic Development* (New York: Oxford University Press, 1961).

[276] Anthony Atkinson and Joseph Stiglitz, "A New View of Technological Change," 79(315) *The Economic Journal* 573 (1969).

[277] Daron Acemoglu, "Localized and Bias Technologies: Atkinson and Stiglitz' New View, Induced Innovations, and Directed Technological Change," NBER Working Paper 20060 (2014).

[278] A proposition that is hotly debated in the context of the Digital Economy, in terms of participation, content creation, and hardware development.

[279] Note that a considerable amount of heterogeneity exists between frontier and lagging firms which translates into long and differentiate penetration rates of the adopted or discovered technology; see Diego Comin and Marti Mestieri, "If Technology Has Arrived Everywhere, Why Has Income Diverged?," CEPR Discussion Paper 9466 (2013).

[280] Compare for different approaches to "costs" Ricardo Hausmann and Dani Rodrik "Economic Development As Self- Discovery," 72(2) *Journal of Development Economics* 603 (2003); with Eric Verhoogen, David Atkin, Azam Chaudhry, Shamyla Chaudry, and Amit Khandelwal, "Organizational Barriers to Technology Adoption: Evidence from Soccer-Ball Producers in Pakistan," NBER Working Paper No. 21417 (July 2015).

However, this is not a static assessment as the decision to invest in new technology (be it through adoption or by frontier development) takes account of present as well as expected demand and future factor prices.[281] This is especially so when, as Acemoglu has shown (broadly in line with Heckscher-Ohlin predictions), technological progress is endogenously biased against a scarce factor of production.[282]

The government can thus play a crucial role in "guiding" entrepreneurial innovation by (wisely) influencing the expectation structure of future profits and factor prices[283] – through subsidies, regulatory rents[284] or through trade measures such as export restrictions. As similarly argued by Noman,[285] it is this form of pro-active coordination and encouragement of appropriate learning and innovation that should drive a modern industrial policy to "get prices wrong" and, in terms of the growth model specified below, aim to maximize the probabilities of product diversity growth at the technological frontier and behind it.

a. Production Sets: Innovation and Diversification

Vanek, in 1968,[286] abstracted from the particular skill-information inherent in the production of specific goods and commodities in favor of trade in factor proportions.[287] Ever since, the structuralist tradition - that focused attention on skill complementarities and linkages in production - has gradually been snowed under or simply bypassed.[288] Not withstanding the persuasiveness of the mature growth models' view of economic growth as a smooth process of production factor accumulation and incremental technological growth – a process not unlike inflating a balloon, to

[281] Atkinson and Stiglitz note that firms cannot be myopic and must "take account of future as well as present factor prices." Anthony Atkinson and Joseph Stiglitz, "A New View of Technological Change," 79(315) *The Economic Journal* 573 (1969), p. 575.
[282] Daron Acemoglu, "Equilibrium Bias of Technology" 75(5) *Econometrica* 1371 (2007).
[283] Atkins and Stiglitz note: "where technical progress is localised, the Government should be concerned not merely with the level of investment or output, but must make sure that firms are directed towards the "right" technique on long-run consideration." Anthony Atkinson and Joseph Stiglitz, "A New View of Technological Change," 79(315) *The Economic Journal* 573 (1969), p. 575.
[284] For a recent case, see Anupam Chander, "How Law Made Silicon Valley," 63(3) Emory Law Journal 639 (2014).
[285] Akbar Noman, "Industrial and Trade Policies in Africa: From Unproductive Rents to Learning and Accumulation," in JICA/IPD Africa Task Force Working Papers (IPD and JICA, 2013), notes: "A carefully crafted system of protection can help to divert rents to productive activities and learning that are the basis for sustained growth" on pages 277-278.
[286] See Jaroslav Vanek, "The Factor Proportions Theory: The N-Factor Case," 4 *Kyklos* 749 (1968); see for important extensions emphasizing implicit trade in factor services also Elhanan Helpman, "International Trade in the Presence of Product Differentiation, Economies of Scale and Monopolistic Competition: A Chamberlin-Heckscher-Ohlin Approach," 11(3) *Journal of International Economics* 305 (1981) and Paul Krugman, "But For, As If, and So What? Thought Experiments on Trade and Factor Prices," mimeo, MIT (1996).
[287] For an insightful extension and explanation, see Ronald Findlay, *Factor Proportions, Trade and Growth* (Cambridge: MIT Press, 1995). Work by Dani Rodrik, Ricardo Hausmann and Cesar Hidalgo, among others, are now (re)creating the product-space by emphasizing cross-relationships between products.
[288] Krugman notes that the demise of "high-development" growth theory was, at least in part, due to an inability at the time to analytically reconcile economies of scale with a competitive market structure. This difficulty, as well as trying to model circular causation, meant "high development theory was not so much rejected as simply bypassed." Paul Krugman, Development, Geography and Economic Theory (Cambridge: MIT Press, 1997), pp. 25-27.

again borrow Ocampo's apt use of imagery[289] - economic growth happens in leaps and bounds and goes accompanied by large discontinuities.[290]

According to the balloon-view, structural changes, *i.e.* changes to the sectoral composition of output and in the patterns of international specialization, appear as a by-product of smooth growth in per capita GDP. To stay viable in an open economy, producers will move to adjust their production methods to favor the economy's evolving comparative (and their competitive) advantage,[291] in line with the predictions of a Heckscher-Ohlin-Samuelson (HOS) model of international trade.[292] Whereas it is undeniable that factor proportions theory is a cornerstone to any HOS explanation of international trade patterns, its prescriptions remain confined to allowing endowments to determine optimal trade patterns.[293,294] The inter-temporal bootstrapping of comparative advantage-driven static equilibriums thus reigns supreme in mature growth models.

As Rodrik correctly stresses though, almost all factor markets are characterized by spillovers and externalities, which make it impossible to confidently detect a natural optimal equilibrium. This impossibility is further exacerbated in the presence of subsidies. Instead, decentralized price-formation[295] combined with demands of efficiency maximization, as identified by local profit maximizing entrepreneurs, should direct the organic

[289] Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005), p.8.
[290] See, for instance, Carlotta Perez, Technological Revolutions and Financial Capital. The Dynamics of Bubbles and Golden Ages (Cheltenham: Edward Elgar, 2002); and Ricardo Hausmann, Fancisco Rodriquez, and Rodrigo Wagner, "Growth Collapses," Harvard Kennedy School Working Paper RWP06/046 (October 2006).
[291] Note that traditional comparative advantage augmenting social technologies will be considered as acting across sectors as the term ζ_j applies universally, favoring all industries equally.
[292] Andrew Bernard et al., "Survival of the Best Fit: Exposure to Low-Wage Countries and the (Uneven) Growth of U.S. Manufacturing Plants," LSE CEP Working Paper (2003), find a reallocation of U.S. import competing manufacturing away from labor intensive plants toward capital intensive production.
[293] See Anne O. Krueger and David W. H. Orsmond, "Impact of Government of Growth and Trade," in Wilfred Ethier, Elhanan Helpman and J. Peter Neary, Theory, *Policy and Dynamics in International Trade* (Cambridge: Cambridge University Press, 1993); who, unsurprisingly see the role of trade policies such as to maximize "the opportunities that trade provides for a developing country to use its abundant factors of production effectively" (p. 239). HOS models of international trade are known for their ability to produce quasi-robust structural predictions, making the model verifiable.
[294] Including through the maximization of savings that are then recycled as research and development expenditures or contribute directly to capital formation. See, for example, Gene M. Grossman and Elhanan Helpman, "Hysteresis in the Trade Pattern," in Wilfred Ethier, Elhanan Helpman and J. Peter Neary, Theory, *Policy and Dynamics in International Trade* (Cambridge: Cambridge University Press, 1993).
[295] As Charles Sabel notes, "economic actors must almost always make decisions by combining prices with highly detailed, local, or idiosyncratic information regarding inputs, production processes, or products" in "Self-Discovery as a Coordination Problem," in Charles Sabel, et al., eds., *Export Pioneers in Latin America* (Washington DC: Inter-American Development Bank, 2012). See also F.A. Hayek, "Competition as a Discovery Procedure," 5(3) *The Quarterly Journal of Austrian Economics* 9 (2002).

development path Rodrik argues.[296] This decentralized process does however allow for, indeed demands, active government intervention to shape incentives and to "protect" certain first mover advantages over other interests.

In the alternate view it is the very success of structural change, hereunder approached through progression in the "Product Space," that ultimately drives economic growth and determines the pace of development. An economy's "ability to constantly generate new dynamic activities" — be it through innovations at the technological frontier or export diversification as part of catch up growth — "is, in this sense, the essential determinant of rapid economic growth. In this view, structural transformations are not automatic or costless. There are always entry costs for new activities. The inability to generate new economic activities— that is, to cover entry costs—may thus block the development process."[297]

Hausmann, Hwang and Rodrik[298] similarly recognize that the range of goods an economy viably produces is not only determined by such fundamentals as factor proportions and institutions, but that the process of "cost discovery"[299] by which entrepreneurs - be they foreign or domestic - explore their dynamic competitive advantage is at least of equal importance. The importance of the process of cost discovery in economic diversification and structural change thus creates a natural space for industrial policies in addition to those policies that correct for market failures and interact with externalities.

Another element of the structure and process of economic growth is sometimes found in increases in product quality. When considering the role of goods and production in economic growth, some "natural" heterogeneity in the form of quality differences remains even when disaggregating Vanek-style homogenous goods to a very fine level. Movements along this quality dimension can be seen as "upgrades" arising from investments and production factor accumulation. In line with the predictions of the neoclassic growth model, Lederman and Maloney find a convergence dynamic, "that is, within a good, countries further from the frontier will, all things being equal,

[296] See Dani Rodrik, *One Economics, Many Recipes* (Princeton: Princeton University Press, 2007); see also Ricardo Hausmann and Dani Rodrik, "Economic Development as Self-Discovery," Harvard University Working Paper (2003).
[297] Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005), p.8.
[298] Ricardo Hausmann, Jason Hwang, and Dani Rodrik, "What You Export Matters," Harvard University Working Paper (2005).
[299] Ricardo Hausmann and Dani Rodrik, "Economic Development as Self-Discovery," Harvard University Working Paper (2003).

experience faster growth rates of their export unit values."[300] Such movements are however not intrinsic to the (learning-) characteristics of the goods themselves, they rather reflect the ease of production factor accumulation and decisions of producers as to where along the quality ladder they produce.

Under the assumption that, at the macro-level, the factor proportion theory for firm-level maximization generally holds, trade data at a deeply disaggregated level[301] seem to indeed betray a quality-type H-O-type specialization in the face of a strong heterogeneity of in-product quality-ladders.[302] A burgeoning product-embedded capital/labor-ratio (K/L) can, with reference to work by Peter Schott,[303] indicate the presence of product quality differentiation. In fact, per-unit values express the different economy's relative factor endowments and production techniques quite convincingly.[304] Note that while increases in labor productivity can thus find ultimate expression in the pace of product quality improvements, such quality upgrading is not considered an export diversification for the purposes of this work (see Equations 21 and 22 in the Analytical Annex Part B, *infra*). No sufficiently new productive capabilities are acquired in the process of quality upgrading. For if new productive capabilities were acquired, product diversification instead of quality upgrading would have occurred.

Whereas the balloon-view and structuralist tradition aim to describe the process and drivers of structural change or across-product growth at the margin (be it at the technological frontier or through catch up growth), the quality-view presents an account of in-product differences. In the below, and throughout this work, emphasis is placed on the importance of skills and productive capacities to direct the process of across-product economic growth. In fact, Section 1.B.3, *infra*, exploits the postulates of the "Product Space" to stress the importance of economic diversification over specialization. The relatedness of products (and skills) allows the social planner to map the

[300] Daniel Lederman William F. Maloney, *Does What You Export Matter? In Search of Empirical Guidance for Industrial Policies* (Washington DC: The World Bank, 2012), p. 75.
[301] Such disaggregated trade statistics can be found at the NBER Trade Database, following work by Feenstra (1996), available at: http://www.nber.org/data/, based on the universal ten digit Harmonized System (adopted in the U.S. in 1989, which supplanted the U.S.-only seven digit Tariff Schedule).
[302] A recent study by Amit Khandewal, "The Long and Short (of) Quality Ladders," 77(4) *Review of Economic Studies* 1450 (2010), finds substantial heterogeneity in a product market's scope for quality differentiation.
[303] Peter K. Schott, "One Size Fits All? Heckscher-Ohlin Specialization in Global Production," 93(3) *The American Economic Review* 686 (2003); Peter K. Schott, "Do Countries Specialize?," Yale School School of Management Working Paper (2001); Peter K. Schott, "Across-Product versus Within-Product Specialization in International Trade," 119(2) T*he Quarterly Journal of Economics* 647 (2004).
[304] Peter K. Schott, "Across-Product versus Within-Product Specialization in International Trade," 119(2) *The Quarterly Journal of Economics* 647 (2004); but see critically examined in Mukerji and Panagariya, "Within- and Across-Product Specialization Revisited," (2009).

proximity-structure of his economy's footprint. This ability in turn informs the normative prescriptions of the catch-up process.

Industrial policies will be normatively optimal when they aid in the identification of viable diversification opportunities and stimulate the dynamic process of cost discovery. In this way export restrictions can be employed to stabilize relevant macro-economic conditions[305] as well as work to shape factor prices in such a way as to incentivize "entry" and enable economic catch up.

It is worth emphasizing here that knowledge, embodied in human capital and best practices, is multidimensional – while a country can be said to be at the product diversity frontier in one aspect, a large differentiation in productivity and competitiveness might pervade across its sectors and between its corporations (what Ocampo termed "dualism").[306] Economies are likely to occupy a spectrum rather than a single point on a technological and competitiveness continuum.

Whereas this, prima facie somewhat innocent, observation is rather innocuous in mature markets (giving rise to the capitalist dynamics of creative destruction in the form of continuous resource realignments), it has controversial implications for the multispectral differentiation of and between developing countries. Such not only in terms of the embeddedness (or economic depth) of macro-economic dynamics, but also in relation to the way developmental exceptions and exemptions are structured in the regulatory framework governing international trade (Chapter 4, *infra*).

b. Product Relatedness and the Product Space

Traditional theories of modern economic growth (mature or unbalanced) assume either the production of relatively homogenous products (widgets), such as inhabit a continuously positive sloping and equidistant capital-labor

[305] Macro-economic (in)stabilization is understood broadly here as including "not only high inflation and unsustainable fiscal imbalances, but also sharp business cycles, volatile relative prices, unsustainable current account disequilibria, and risky private sector balance sheets – see Jose Antonio Ocampo, "Developing Countries' Anti-Cyclical Policies in a Globalized World," in Amitava Dutt and Jaime Ros, eds., *Development Economics and Structuralist Macroeconomics: Essays in Honour of Lance Taylor* (Aldershot: Edward Elgar, 2003).
[306] See for the importance of elements of structural heterogeneity, Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005).

quadrant (K/L space), or postulate the existence of industrial linkages that are external to the production of the goods themselves, such as global value chains[307] in a recent incarnation. Economic advancement is thus approached as either growing an ever-increasing product-embedded K/L ratio (where specialization occurs in the production of frontier varieties, possibly with inverse v-type switching[308]), or by the continuous diversification of production structures through import-substitution, while retaining as much of the value chain as industrial linkages allow (outsourcing least rewarding elements in vertical specialization[309]).

Alternatively, Hausmann and Hidalgo find, in seeming opposition to Ricardian (or HOS) prescriptions of specialization and homogenously linear progress, a systematically inverse relationship between the diversification of a country's exports and the ubiquity of those products. The more ubiquitous part a product is of the global export basket, the less broadly diversified a country will be and, conversely, the more countries will be competent to export the product.[310] Obstacles to increased diversification arise from *product specific* skill-coordination problems; the more capabilities are missing or failing, the more constrained an economy's production basket will be. The distance between an economy's current competitive production output and the next available set of capabilities will thus determine an economy's development path and speed.[311]

Hausmann and Klinger argue that changes to the revealed comparative advantage of economies are "governed by the pattern of relatedness of products at the global level."[312] Relatedness, or proximity, of products is subsequently

[307] The presence of global value chains has shifted focus from trade in (final) goods to transforming an economy's productive capabilities in order to be part of an existing value chain or to further regional economic integration; see Bernard Hoekman, *Supply Chains, Mega-Regionals and Multilaterism – A Road Map for the WTO* (CEPR Press, 2014).
[308] Lin, Ju and Wang provide such a development model with inverse-v switching for a closed backward economy that borrows technology freely, where "the economic development process in a developing country is characterized by the continuous upgrading of its endowment structure from relatively scarce in capital and relatively abundant in labor or natural resources to relatively abundant in capital and relative scarce in labor/natural resources. […] The household's capital allocation determines the evolution of capital endowment and the intertemporal use of capital in production. Then, along the cross-section dimension, the capital allocated for production determines the production structures (industrial choices) as if it were a static model. Ultimately, the mathematical problem is reduced to dynamic optimization with switching state equations." Justin Yifu Lin, Jiandon Ju and Yong Wang, "Endowment Structures, Industrial Dynamics, and Economic Growth," World Bank Policy Research Working Paper 5055 (2009), pp. 4-5.
[309] Richard Baldwin, "WTO 2.0: Global Governance of Supply-Chain Trade," 5(2) *Review of International Organizations* (2014); Bamber, Fernandez-Stark, Gereffi, and Quinn, "Connecting Local Producers in Developing Countries to Regional and Global Value Chains – Update," OECD Trade Policy Paper 160 (2013).
[310] Ricardo Hausmann and Cesar Hildalgo, "Country Diversification, Product Ubiquity, and Economic Divergence," Harvard Kennedy School (2010).
[311] Cesar Hildago, Bailly Klinger, A-L Barabási and Ricardo Hausmann, "The Product Space Conditions the Development of Nations" 317:5837 *Science* 482 (2007).
[312] Ricardo Hausmann and Bailey Klinger, "The Structure of the Product Space and the Evolution of Comparative Advantage," Harvard Kennedy School (February 2007), p. 1.

defined as the minimum of pairwise conditional probability of exporting one product,[313] given that another is exported. Connections between countries and products signal the availability of relevant productive capabilities in a country (method of reflections)[314]. The main information about the skill-content of any one product is thus determined in relation to the "worst" competitive exporter of the product; presumably the economy for which the particular product represents the cutting structural edge of endowments and productive capacities.[315]

As Pietronero similarly observes, "from a mathematical point of view, the nested structure [of export diversification and country characteristics] calls for a strongly non-linear and extremal coupling between the level of sophistication of products […] and the competitiveness of countries […]."[316] Pietronero, however, notes critically that "while it is reasonable to measure the competitiveness and adaptability of a country through the sum of the quality and complexity of its products, it is not possible to adopt the same approach to measure the quality and complexity of products. In particular the complexity of a product *cannot be defined as the average* of the fitness of the countries producing it."[317]

The complexity of a product (as opposed to the direct relationship between the fitness of an economy and the complexity of the products it exports), should be inversely proportional to its ubiquity. The relationship between country fitness and product complexity should, additionally, be non-linearly bounded, emphasizing the contribution of less complex economies in the construction of product complexity. This brings Pietronero to express country fitness characteristics (F_c) and product complexity (Q_p) over (n) iterations as follows:[318]

[313] Cesar A. Hidalgo and Ricardo Hausmann, "The building blocks of economic complexity," 106(26) *Proceedings of the National Academy of Sciences (PNAS)* 10570 (2009).
[314] Insightfully criticized by Luciano Pietronero, et al., in "A Network Analysis of Countries' Export Flows: Firm Grounds for the Building Blocks of the Economy," 7(10) *PLoS One* (2012). This point is also made in Guido Caldarelli, et al., "A Network Analysis of Countries' Export Flows: Firm Grounds for the Building Blocks of the Economy," 7(10) *PLoS One* e47278 (2012), offering a solution built on Markov chains.
[315] Note that this conception of product-skill relatedness abstracts from quality differences, which are re-introduced in our production function (1) as the growth of the K/L ratio, bounded by the product specific quality ladder. Such growth is limited in its contribution to GDP growth due to the decreasing returns structure of production.
[316] Luciano Pietronero, et al., *Economic Complexity: Measuring the Intangibles – A Consumers' Guide* (March 2014), p. 8.
[317] Luciano Pietronero, et al., "A New Metrics for Countries' Fitness and Products' Complexity," *Nature (Scientific Reports)* (2012), p. 1 (italics added), available at: http://www.nature.com/srep/2012/121010/srep00723/full/srep00723.html.
[318] Luciano Pietronero, et al., "A New Metrics for Countries' Fitness and Products' Complexity," *Nature (Scientific Reports)* (2012), p. 2, available at: http://www.nature.com/srep/2012/121010/srep00723/full/srep00723.html.

(3)

$$\begin{cases} \tilde{F}_c^{(n)} = \sum_p M_{cp} Q_p^{(n-1)} \\ \tilde{Q}_p^{(n)} = \dfrac{1}{\sum_c M_{cp} \dfrac{1}{F_c^{(n-1)}}} \end{cases} \rightarrow \begin{cases} F_c^{(n)} = \dfrac{\tilde{F}_c^{(n)}}{\left\langle \tilde{F}_c^{(n)} \right\rangle_c} \\ Q_p^{(n)} = \dfrac{\tilde{Q}_p^{(n)}}{\left\langle \tilde{Q}_p^{(n)} \right\rangle_p} \end{cases}$$

First the intermediate variables $F'^{(n)}_c$ and $Q'^{(n)}_p$ are computed, while M_{cp} is the weighted country(c)-product(p) matrix, these variables are then normalized to come to the standard measure of country fitness $F_c^{(n)}$ and product complexity $Q_p^{(n)}$. The values associated with country (c) fitness and product (p) complexity are expressions of fundamental, non-tradable endowments (capabilities) sufficient to produce a country-product pair. The necessary capability set is directly derived from the revealed comparative advantage (theory of reflections) of the weakest exporting economy, which includes (but is not limited to) the prevailing institutions, the stock of viable technology, physical and human capital.[319] Crucially, any capability set is approached as both complex and evolving.[320]

Economies thus face a non-monotonic relationship between the time-variant aggregate proximity measures of their export basket and the probability of developing a revealed comparative advantage in another product. The Product Space discourse, despite obvious limitations,[321] holds the promise of analytically framing a probabilistic approach to the path that economies might take toward full economic development and convergence with the frontier. Economic growth thus adheres to a certain measure of path dependence, probabilistically described.

The connected or nested structure of a network informs the path that economies are likely to take while dynamically shedding and adding exports. If we assume a large global stock of heterogeneous productive capabilities (a relatively

[319] See, for instance, Martha C. Nussbaum, *Creating Capabilities – The Human Development Approach* (Cambridge: Belkap Press, 2011).
[320] The theory of reflections and capabilities is fundamentally agnostic to the choice of micro-economic model, holding out explicitly the possibility that non-equilibrium, evolving or complexity approaches to technology and productive societal interaction might trump classical notions of balanced growth; see, generally, W. Brian Arthur, *Complexity and the Economy* (New York: Oxford University Press, 2015); W. Brian Arthur, "Complexity Economics: A Different Framework for Economic Thought," Santa Fe Institute Working Paper 2013-04-012 (2013); and W. Brian Arthur, *The Nature of Technology: What It Is and How It Evolves* (London: Allen Lane, 2009).
[321] As the product space and theory of reflections relies conceptually on the theory of revealed comparative advantages and draws it data from trade databases to form an opinion about the structure of an economy's total GDP and productive capabilities, problems abound: it accounts too little for trade openness, domestic market size, and other related factors; it excludes services altogether; and the actual capability value goes in part obscured by the existence of global value chains.

sparsely populated product field), the progress of an economy's nested economic structure or dynamic fit can be described with a probit model:[322]

$$A_{c,p,t} = \alpha k_{c,t} + \beta k_{p,t} + \gamma\left(k_{c,t} \cdot k_{p,t}\right) + \epsilon_{c,p,t} \quad (4)$$

Where $A_{c,p,t}$ denotes the economy's adjacency matrix, $k_{c,t}$ refers to the economy's footprint in the network and $k_{p,t}$ refers to the products' ubiquity. The term $\left(k_{c,t} \cdot k_{p,t}\right)$ depicts the interaction between the diversity and ubiquity measures, whereas $\epsilon_{c,p,t}$ represents the error term. Bustos, et al., find all coefficients highly significant, "meaning that a model that would only consider diversity or ubiquity, or both of them without an interaction term, would not be as accurate."[323]

The central growth equations of the "catch-up" model (23-24), described in the Analytical Annex Part B, capture this insight by postulating a time, product and economy specific probabilistic relationship ($\varpi_{t,n,j}$) between exporting an additional product (n), given an economy's current export basket (N_j). This pairwise probability is informed by an economy's existing footprint in the product space, the targeted product's ubiquity and the relationship between these diversity and ubiquity measures. The effective probability of diversification is constrained by country specific institutional characteristics and societal learning aspects (ζ_j).

The familiar concepts of path dependence and pre-structured technological progress have long stood central to the notion of technological progress and development, as explored and argued by New Development Economics.[324] Recent developments in network theory, stressing the nestedness of (and thus structural relatedness between) nodes

[322] Sebastian Bustos, Charles Gomez, Ricardo Hausmann, and Cesar Hildalgo, "The Dynamics of Nestedness Predicts the Evolution of Industrial Ecosystems," 7(1) *PLoS One* (2012), p. 3.
[323] Sebastian Bustos, Charles Gomez, Ricardo Hausmann, and Cesar Hildalgo, "The Dynamics of Nestedness Predicts the Evolution of Industrial Ecosystems," 7(1) *PLoS One* (2012), p 4.
[324] See, for instance, Richard Nelson and Sidney Winter, *An Evolutionary Theory of Economic Change* (Cambridge: Belknap Press, 1977); Giovanni Dosi, "Technological Paradigms and Technological Trajectories: A Suggested Interpretation of the Determinants and Directions of Technical Change," 11(3) *Research Policy* 147 (1982); Giovanni Dosi, "Sources, Procedures and Micro-Economic Effects of Innovation," 26(3) *Journal of Economic Literature* 1126 (1988).

(products), allow for an intuitive grasp of (micro- and structural macro-)economic optimization dynamics, subject to societal learning[325] and institutional constraints.[326]

Nestedness is in fact a cornerstone concept of New Development Economics as it connects some defining aspects thereof, such as a networked theory of growth, societal learning, and institutional constraints, to Hirschman's earlier analysis of "linkages." Hirschman emphasized that moving from an (underdevelopment-) equilibrium to a superior one required a "minimum critical effort"[327] to establish and anchor productive processes through newly realized backward and forward linkages. This process of development consequently "depends not so much on finding optimal combinations for given resources and factors of production as on calling forth and enlisting for development purposes resources and abilities that are hidden, scattered, or badly utilized."[328] Nestedness, as applied to a techno-industrial Product Space, allows industrial policies to positively identify some of these missing, suppressed or hidden resources and abilities, and to target them accordingly.

In a partial counter-counterrevolution (or as a word of caution), the endogenous growth model by Ju, Lin and Wang,[329] insightfully captures how an optimal industrial structure, in a world with "free" or "non-descript" technology, is endogenously determined by the available factor endowments. This effectively limits the opportunities for countries to "defy their comparative advantage."[330]

In Ju, Lin and Wang's model, switching or industrial upgrading occurs naturally in an inverse-v pattern through a continuous process of capital deepening that brings down the rental cost of capital and increases the K/L-ratio. If a "new" product is targeted prematurely - that is a product that requires a too high K/L-ratio - the economy can be

[325] Entrepreneurship and industrial learning are properly thought of as a societal undertaking, where broad collective trends and accommodative action are essential; see Joseph Stiglitz and Bruce Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress* (Columbia University Press, 2014); and Claudia Schoonhoven and Elaine Romanelli, "Emergent Themes and The Next Wave of Entrepreneurial Research," in Claudia Schoonhoven and Elaine Romanelli, eds., *The Entrepreneurship Dynamic: Origins of Entrepreneurship and the Evolution of Industries* (Stanford: Stanford Business Books, 2001).
[326] See, for instance, Daron Acemoglu, Simon Johnson and James A. Robinson, "Institutions as A Fundamental Cause of Long-Run Growth," in Philippe Aghion and Steven Durlauf, ed., *Handbook of Economic Growth: Volume 1A* (Amsterdam: Elsevier Publishing, 2005).
[327] Albert O. Hirschman, "A Dissenter's Confession: Revisiting the Strategy of Economic Development," in Gerald M. Meier, and Dudley Seers, eds., *Pioneers in Development* (Washington DC: The World Bank, 1984), p. 105; cited and contextualized in Michele Alacevich, "Early Development Economics Debates Revisited," World Bank Policy Research Working Paper 4441 (2007), p. 4.
[328] Albert O. Hirschman, *The Strategy of Economic Development* (New Haven: Yale University Press, 1963 [1958]), p. 5.
[329] Justin Yifu Lin, Jiandon Ju and Yong Wang, "Endowment Structures, Industrial Dynamics, and Economic Growth," World Bank Policy Research Working Paper 5055 (2009).
[330] Ha-Joong Chang, in in Justin Y. Lin and Ha-Joong Chang, "Should Industrial Policy in Developing Countries Conform to Comparative Advantage or Defy it? A Debate Between Justin Lin and Ha-Joon Chang," 27(5) *Development Policy Review* 483 (2009).

pushed to exhaust its complete capital stock and fall into a permanent poverty trap.[331] Within the present context, I interpret the work of Ju, Lin and Wang to show the perils of disregarding equilibrium conditions in active market making. Their work underscores that however powerful the concept of nestedness can be heuristically, an integrated industrial policy aimed at spurring catch up growth cannot disregard the implementing economy's particular set of macro- and micro-economic conditions.

Although universal, the Product Space is not characterized by homogenous proximity measures. Instead, the Product Space is modular; some products are highly interconnected while others are far removed. Despite this modularity, there appears to be a core to the network formed by metal products, machinery, and chemicals, whereas the rest of the product classes forms the periphery with strong peripheral clusters in garments, textiles, and animal agriculture.[332] Similarly, lack of external product connectedness within the existing export basket (leading to a low probability of diversification ($\varpi_{t,n,j}$)) may explain persistent poverty and lack of transformation in LDCs and certain middle income economies.

An economy's progress toward less-ubiquitous, rarified and more highly connected products is thus path dependent and highly concentrated around certain vertices (or central nodes).[333] Jankowska, Nagengast and Perea note that "[t]he average clustering coefficient provides a network-motivated measure of the similarity and hence specialisation of an export profile. It gives some indication of how diversified a country's exports really are, which is not apparent by looking solely at the number of products that are effectively exported."[334] According to this measure the clustering coefficient of Bangladesh was 0.77 in 2002, whereas Korea stood at 0.36 in 1968 (the entire product space network has a clustering coefficient of 0.36).[335] This networked approach to economic growth and development has strong implications for the strategic accumulation of productive capabilities.[336]

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[331] Essentially, the poverty trap reality emerges when the economy can't abandon its production of the capital-intensive good while maintaining full employment and under rigidity conditions; see Justin Yifu Lin, Jiandon Ju and Yong Wang, "Endowment Structures, Industrial Dynamics, and Economic Growth," World Bank Policy Research Working Paper 5055 (2009), p. 25-26.

[332] Cesar Hildago, Bailly Klinger, A-L Barabási and Ricardo Hausmann, "The Product Space Conditions the Development of Nations" 317:5837 *Science* 482 (2007), p. 484.

[333] For clustering in weighted networks (such as the product space), see, Tore Opsahl and Pietro Panzarasa, "Clustering in weighted networks," 31(2) *Social Networks* 155 (2009).

[334] Anna Jankowska, Arne Nagengast and José Ramón Perea, "The Product Space and the Middle Income Trap: Comparing Asian and Latin American Experiences," OECD Working Paper No. 311 (2012), p 25.

[335] *Idem*, p. 25.

[336] Jankowska, Nagengast and Perea call these strategic industrial policies "Product Development Policies"; in Anna Jankowska, Arne Nagengast and José Ramón Perea, "The Product Space and the Middle Income Trap: Comparing Asian and Latin American Experiences," OECD Working Paper No. 311 (2012), p. 28; See also Gustavo Crespi, Eduardo Fernandez-Arias, Ernesto Stein, *Rethinking Productive Development: Sound*

The modular structure of pairwise probabilities in the Product Space allows economic policies to dynamically address and potentially overcome some of the central problems of path-dependent economic growth. Through targeted "Product Development Policies," better known as industrial policies, a normative alternative to perfecting the steady state conditions in mature growth models can be offered and implemented. At the same time, this fundamental path dependence of economic development (catch up growth) exposes economies to the risk of inefficient product or process lock-ins. Such lock-ins can be the result of resource absorption difficulties, can be due to the existence or emergence of vested political economy interests, or due to cognitive rigidities that result in a loss of competitiveness and retard economic growth.[337]

The crucial difference between "neutral"[338] and "distortive" policies in shaping the optimal product diversification path comes into clear focus when considering the different characteristics of frontier innovation (ω_j) and catch up diversification ($\varpi_{t,n,j}$). If production factor accumulation and frontier innovation growth are said to be best described by a mature process of equilibrium growth, than its (normatively) optimal institutions are mindful to facilitate (global) optimal resource allocation in light of market externalities and failures. A full-information, frictionless (global) economy, where "the household's capital allocation determines the evolution of capital endowment and the intertemporal use of capital in production,"[339] is then naturally postulated as the normative optimum. The steady state growth process is thus fully represented by an economy-wide equilibrium innovation notion. Under conditions of a globalized free market, the previously geographically contained normative optimum quickly becomes universal in scope and assumes a mantle of authority.

A measure of nestedness, however, makes targeted interventions possible by virtue of the non-homogeneity of the Product Space where distances are related to an economy's productive capacity rather than its capital stock. Many

Policies and Institutions for Economic Transformation (Washington: IADB, 2014). Note that the clustered nature of products and productive capabilities gives rise to a new network-notion of specialization, different from the original Ricardian or HOS-type specialization.

[337] Gernot Grabher, "The Weakness of Strong Ties: The Look-in of Regional Development in the Ruhr Area," in Gernot Grabher, ed., *The Embedded Firm: On the Socio-economics of Industrial Networks* (London: Routledge, 1993); Granovetter stresses, in a similar vein, the institutional embeddedness of techno-organizational change, see Mark Granovetter, "Economic Action and Social Structure: The Problem of Embeddedness," 91(3) *American Journal of Sociology* 481 (1985).

[338] Note that very few policies are truly neutral. See, for instance, Dani Rodrik and Ricardo Hausmann, "Doomed to Choose: Industrial Policy As Predicament," Harvard University Working Paper (2006); and Dani Rodrik, "Normalizing Industrial Policy," World Bank, Commission on Growth and Development, Working Paper No. 3 (2008).

[339] Justin Yifu Lin, Jiandon Ju and Yong Wang, "Endowment Structures, Industrial Dynamics, and Economic Growth," World Bank Policy Research Working Paper 5055 (2009), p. 5.

equilibrium models of growth often postulate some form of continuous (or free) industrial innovation/diversification (ω_j), which immediately condemns industrial policies to instruments that either induce distortions or correct market failures. Integration of a capacity proximity or skill relatedness component however allows diversification efforts to be targeted probabilistically ($\varpi_{t,n,j}$). As a consequence, the process of structural transformation demands different optimal institutional bonds – ones that emphasize the trajectory of productive capacity accumulation rather than the bootstrapping of periods of static allocative efficiency.

The process of catch-up growth thus allows for, in fact demands, a broader leeway for industrial policy initiatives than would be optimal for frontier growth: national and global governing structures are caught between two broad paradigms of what it means to "get institutions right" - an observation that finds reflection in work by Acemoglu, Aghion and Zilibotti.[340] Policy induced factor price distortions might operate detrimentally at the frontier (misguiding consumers and producers), but in the presence of pairwise diversification opportunities industrial policies work to incentivize firms to enter the targeted product-industry. A government can thus implement industrial policies not simply to allow entrepreneurs to better listen to market signals, but to entice them to hear Athena's counsel over Lorelei's song.

C. Implications of Static and Dynamic Normative Perspectives

The importance of "catch up" growth, the theory of how the accumulation of physical and human capital contributes to economic convergence, is undisputed and indeed central to the observed world economy. Productive technology is not universally available (or applicable) and human capacities are not equally (nor equitably) distributed. The catch up theory of economic growth, as presented in Section I.B.2, *supra*, builds on this varied and, at times, daunting geography of skills and productive abilities to argue a more suitable approach to industrial policies and economic convergence.

[340] Daron Acemoglu, Philippe Aghion, and Fabrizio Zilibotti, "Distance to Frontier, Selection, and Economic Growth," 4 *Journal of the European Economic Association* 37 (2006). See also, Philippe Aghion and Alexandra Roulet, "Growth and the Smart State," 6 *Annual Review of Economics* 913 (2014).

Instead of postulating a straight-line "distance to the frontier" that is susceptible to (locally) linear predictions of accumulation and economic expansion (the balloon model), the Product Space emphasizes the inter-dependencies and nestedness of skills and productive capacities. The resulting "complexity" of economic dynamics is however eminently susceptible to prediction and manipulation, more so than the classical model of allocative efficiency. In particular, the model of economic complexity at the heart of the catch up models presented (both Hausmann and Pietronero) allows for a precise description of the opportunities for dynamic emulation. Forecasting of the evolution of a dynamical system along non-monetary metrics allows country capacities to determine its unrealized growth potential, due to the nested properties thereof.[341]

Under limited and positively identifiable conditions, industrial policies thus work so as to guide the economy toward beatificiation (the completion of its capacity set). In this way, modern complexity-inspired notions of industrial policies, such as those rooted in the Learning Society and Product Space geography, have come a long way from beneficiation to favor targeted "learning" and "capacity growth" over consumption-based output performance (such as ISI, strategic trade policy, or even export-led growth when animated by a Mercantilist spirit).

Whereas the mature growth model and the catch model differ tremendously in their approach to and modeling of the pattern (and likelihood) of skill accumulation, there are also similarities between the models. Both are fundamentally respectful of the macro-economic identities and find agreement on many aspects of the micro-foundations thereof, such as the sub-optimality of discriminatory policies and the applicability of static economic analyses (as presented in relevant part in Section 1.A, *supra*).

The major difference between the models occurs at the sectoral and product-levels of the economy – it is here that catch up models of economic growth provide a more persuasive description of and guide to the process of economic convergence. For the purposes of rapid convergence, catch up models thus provide a superior "map" to the prescripts of mature growth models. In addition, catch up models are normatively satisfying as they let emerging markets regain mastery over (elements of) their catch-up development.

[341] Matthieu Cristelli, Andrea Tacchella, and Luciano Pietronero, "The Heterogeneous Dynamics of Economic Complexity," 10(2) *PLoS One* e0117174 (2015).

In line herewith, Section, 1.B, *supra*, argued that industrial policies, properly envisioned, should attempt to increase an economy's across-product diversity and spur the accumulation of productive capabilities. An industrial policy aimed at increasing the viable diversification of an economy, by (dynamically) maximizing the number of viably occupied nodes within the Product Space, I denote as "developmental."

Importantly, such developmental policies should not be concerned with, or amount to, the picking of "winners" or the grooming of national champions. Instead, a developmental policy is aimed at creating and shaping entrepreneurial opportunities in the domestic economy at large. Developmental polices are in particular successful if they work to incentivize entrepreneurs – whether domestic or international – to steer the economy toward an optimal diversification path (one that dynamically optimizes the economy's footprint in the Product Space and thus overtime leads to convergence with the frontier economies).

Industrial policies that are, however, mainly directed at stimulating or strengthening an economy's position within product nodes that are already part of its static footprint – having effects beyond correcting for existing market distortions - I denote as "commercial." Such commercial policies would be presumed to be terms-of-trade driven, beggar-thy-neighbor policies and conducive to unproductive rent-seeking that ultimately leads to institutional degradation.

This distinction between "developmental" and "commercial" policies draws directly on elements of both static allocative efficiency and dynamic growth within a Product Space. To encourage product diversification and stimulate economic development it is essential for the industrial policy to encourage certain investments *ex ante*, while allowing for the rationalizing of production *ex post*.[342] Any attempt to get prices and incentives "right" therefore depends strongly on what coordination problem the economy is confronted with, both statically (within product) and dynamically (across products).

[342] Ricardo Hausmann and Dani Rodrik, "Economic Development as Self-Discovery," Harvard Kennedy School (2003).

Economic policy directed at beatification, or the acquisition (or discovery) of additional productive capabilities, should be regulated differently from a policy that tries to expand market share or grow industrial output within a product-class or network node. In other words, diversification or developmental efforts should be thought of as fundamentally distinct from commercial policies – even though some local factor distorting policies might be suboptimal from the frontier economy perspective, especially under the normative conditions of global free trade. The international economic regulatory framework should, more explicitly and convincingly, account for this preference heterogeneity.

In the absence of complete convergence, neither the mature nor the catch up growth model describes a uniquely optimal approach to economic growth. Both theories emphasize the benefit of collaborative trade policy and a fundamental openness to trade over autarky and opportunistic defection though. The essential difference, from a law and economics perspective, emerges from consideration of the character of and opportunity for multilateral collaboration, given the rational policy implementation preference heterogeneity of Member States.

Analytical Annex
Analytical Annex - Part A

Part A of this Annex analytically describes a version of the mature growth model that illustrates how the terms of trade work to equilibrate several economic variables under international trade. International trade binds economies together in a steady state equilibrium growth rate and determines the terms of trade. The model, based on Acemoglu and Ventura (2002), holds that, in theories of mature growth, the redeeming features export restrictions need to be found in correcting for negative trade externalities or in perfecting the steady state.

This Annex will analytically describe a mature growth model with international trade in intermediary goods (but not in final products or assets).[343] It shows how the terms of trade, regulated by the domestic rental rate of capital and the world price of tradable intermediaries, leads to a world steady state in absence of diminishing returns in production and technological spillovers. The dynamics will be such that an initial positive shock to the terms of trade (through, for example, export restrictions) will be balanced by changes in the domestic return to capital, negatively effecting the pace of capital accumulation and ultimately forcing convergence to the steady state equilibrium. As institutions, savings, and technologies determine the world growth rate, this mature growth model thus showcases the dangerous futility of imposing trade restrictive measures beyond those that narrowly address market failures.

This continuous time model assumes a continuum of equal mass countries (J) that are different in technology, savings propensity and/or time preference (ρ_j) and institutions (ζ_j). Production happens with capital only, subject to some elasticity of substitution (ε). The model allows for two final non-tradable products used for consumption (C_j) and investment (accumulation) (I_j) respectfully, and a continuum of freely tradable intermediate products (v).[344] Strong Ricardian specialization in trade is expressed through the introduction of Armington preferences,[345] such that tradables are differentiated according to their origin and can only be produced by one country. This ensures that

[343] The model is derived from Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002) and highlighted in Daron Acemoglu, *Introduction to Modern Economic Growth* (Princeton: Princeton University Press, 2009), chapter 19.4.
[344] For the importance of trade in intermediaries, see, for instance, Robert C. Feenstra and Gary Hamilton, *Emergent Economies, Divergent Paths: Economic Organization and International Trade in South Korea and Taiwan* (Cambridge: Cambridge University Press, 2006); compare Byung-Kook Kim and Ezra F. Vogel, *The Park Chung Hee Era: The Transformation of South Korea* (Cambridge: Harvard University Press, 2011) and Alice H. Amsden and Wan-Wen Chu, *Beyond Late Development: Taiwan's Upgrading Policies* (Cambridge: The MIT Press, 2003).
[345] Paul S. Armington, "A Theory of Demand for Products Distinguished by Place and Production," 16 *International Monetary Fund Stuff Papers* 159 (1969). Also defined as "substitution between goods from different countries" (Feenstra 2014) and here set to an extreme; Robert C. Feenstra, Philip Luck, Maurice Obstfeld, and Katheryn N. Russ, "In Search of the Armington Elasticity," NBER Working Paper 20063 (2014); see also Mika Saito, "Armington Elasticities in Intermediate Inputs Trade: A Problem in Using Multilateral Trade Data," IMF Working Paper (2004).

countries are small on the import side, while retaining the potential to influence their terms of trade on the export side.[346] The level of technology is reflected in the fraction (V_j) of the total amount of intermediaries (N) that are exclusively produced by a country ($V_j \in [0, \mathrm{N}]$).

The national production function reflects the fraction to which the domestic rental rate of capital (r_j) in combination with the state of domestic technology, partakes in the global economy (ε denotes the elasticity of substitution). National production is alternatively constituted by the price and amount of total final investment and consumption, which are afforded out of the rental rate in relation to the total capital stock ($K_j(t)$).

$$Y_j(t) = V_j r_j(t)^{1-\varepsilon} Y(t) = p_j^I(t) I_j(t) + p_j^C C_j(t) = r_j(t) K_j(t) \quad (5a)$$

Where the world is a collection of economies: $Y(t) = \sum_{j=1}^{J} Y_j(t)$ (5b)

The total capital stock is, at any time, divided over non-tradable and tradable inputs:

$$[K_j^C(t) + K_j^I(t)] + K_j^v(t) \leq K_j(t) \quad (6)$$

The infinitely lived representative household has the following utility function:

$$U_j^h(t) = \int_0^\infty \exp(-\rho_j(t)) \operatorname{Log} C_j(t) dt \quad (7)$$

This representative household is subject to a budget constraint given by (5a).

[346] While Armington preferences are consistent with the literature on the use and efficacy of export restrictions, stressing market power on the export side, note that the Armington preferences work too restrictively when considering development, defined as the growth in viable export product diversity. In fact, when considering technological advances in a product space, the Armington preferences have to be discarded to allow each country to export the entire basket of viable products.

In order to produce the final goods (C_j , I_j), an amount of non-tradable domestic capital[347] (K_j^C , K_j^I) and a bundle of tradable intermediate inputs (x_v) are necessary at time (t). It is important to note here that each intermediate output is produced with one unit of capital (K_j^v). As the number of produced intermediate input varieties is determined by the state of technology (V_j) at time (t) the production function for the final goods look like:

$$C_j(t) = K_j^C(t)^{1-\tau}\left[\int_0^{V_j} x_j^C(t,v)^{\frac{[\varepsilon-1]}{\varepsilon}}\,dv\right]^{\frac{\tau\varepsilon}{\varepsilon-1}} \tag{8}$$

$$I_j(t) = \zeta_j^{-1}\, K_j^I(t)^{1-\tau}\left[\int_0^{V_j} x_j^I(t,v)^{\frac{[\varepsilon-1]}{\varepsilon}}\,dv\right]^{\frac{\tau\varepsilon}{\varepsilon-1}}$$

Although these equations look menacing, they in fact merely describe (i) the level of domestic non-tradable input in the production, at the rate 1-τ, where τ relates to the level of openness to trade (τ = 0 signaling autarky); and (ii) the bundle of intermediate tradable good *v* needed as input with fraction τ and under the substitution term ε, where ε ≥ 1 to avoid immiserating growth.[348] Different levels of productivity, due to institutional quality, are accounted for in the production of investment goods, through the term ζ_j, as these, rather than consumption goods, are the building blocks for capital accumulation or growth.[349]

From (5a) and (8) it follows that the unit price of these final goods is determined by the domestic rental rate of capital and the price of intermediaries, which is set on the world market as a result of their free tradability:

$$P_j^C\left(r_j, p(x_v)\right) = r_j{}^{1-\tau}\left[\int_0^{V_j} p(x^C(v))^{1-\varepsilon}\,dv\right]^{\frac{\tau}{1-\varepsilon}}$$

[347] Intuitively representing non-tradable services consumed in the production process. Since no international trade in assets is allowed, domestic capital stock must be used. If a country is relatively poor in terms of capital stock, its rate of return will be high and less of it will be used in the production of consumption good (C_j).

[348] This substitution term is not to be confused with the earlier Arminton preferences; whereas the former pertains to the production inputs for final goods, the latter determines ubiquity of production between trading economies. In the present model the substitution term can also serve as elasticity measure facing exports.

[349] The term ζ_j is limited to the production of investment goods to reflect the outsized role that "distortions" or suboptimal market characteristics often have in the production of investment goods and should not be taken to reflect discretely on labor or capital productivity.

(9)

$$P_j^I\left(r_j, p(x_v)\right) = \zeta_{\mathrm{j}}^{-1}\, r_j^{1-\tau}\left[\int_0^{V_j} p(x^I(v))^{1-\varepsilon}\, dv\right]^{\frac{\tau}{1-\varepsilon}}$$

A world equilibrium is defined by paths of prices, capital stock levels, and consumption levels for each country such that all markets clear and the representative household in each country maximizes its utility, given the path for prices[350]:

$$\left[\left\{p_j^C(t), p_j^I(t), r_j(t), K_j(t), C_j(t)\right\}_{j=1}^{J}[p(t,v)]_{v\in[0,N]}\right]_{t\geq 0} \tag{10}$$

The world's equilibrium steady state consequently requires that all prices are constant (*).

Consumer maximization of (7) subject to (5a) follows the Euler equation, with shifting relative prices between final consumption and investment goods, to state that the rate of return to capital must equal the rate of time preference plus a correction factor that depends on the slope of the consumption path:[351]

$$\frac{r_j(t)+p_j^{I,*}(t)}{p_j^I(t)} - \frac{p_j^{C,*}(t)}{p_j^C(t)} = \rho_{\mathrm{j}} + \frac{C_j^*(t)}{C_j(t)} \tag{11}$$

The transversality condition for an optimal consumption path reads:

$$\lim_{t\to\infty}\left[\exp\left(-\rho_{\mathrm{j}}\, t\right)\frac{p_j^I(t)K_j(t)}{p_j^C(t)C_j(t)}\right] = 0 \tag{12}$$

Combining (11) with (12), one finds that the optimal rule is to consume a fixed fraction of wealth, subject to one's time preference or saving propensity:

[350] Definition from Daron Acemoglu, *Introduction to Modern Economic Growth* (Princeton: Princeton University Press, 2009), p 667.
[351] See, Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), pp. 666-667.

$$p_j^C(t)\, C_j(t) = \rho_j\, p_j^I(t)\, K_j(t) \qquad (13)$$

Since firms produce all intermediates competitively in equilibrium, they are assumed to set their price to marginal cost (domestic rental rate of capital):

$$p_j(t,v) = r_j(t) \qquad (14)$$

Under the strong assumption that a country is small and exporting most of its production of intermediaries to the world market in exchange for a complete basket of tradables, the price equivalence of (14) doubles also as the country's terms of trade.[352]

Under an ideal price index for all intermediates, we set the joint baskets to unity:

$$\left(\int_0^N p(t,v)^{1-\varepsilon}\, dv\right)^{\frac{1}{1-\varepsilon}} = 1 = \sum_{j=1}^{J} V_j p_j(t)^{1-\varepsilon} \qquad (15)$$

Integrating the price normalization of (15) with the unit price function of (10) implies that the equilibrium prices of the final consumption and investment goods for country j are:

$$p_j^C(t) = r_j(t)^{1-\tau} \quad \text{and, similarly,} \quad p_j^I(t) = \zeta_j\, r_j(t)^{1-\tau} \qquad (16)$$

The trade balance condition, subject to (5b), can be written as:

$$Y_j(t) = V_j\, r_j(t)^{1-\varepsilon}\, Y(t) \qquad (17)$$

[352] This assumes that the country does not seek to take advantage of its market power (as sole producer of a certain variation of intermediary), nor that it engages in any form of industrial policy through border measures (export restrictions) – in other words, it does not engage at all with the analysis of Section I.A, *supra*. We nonetheless defend this assumption here in order to highlight the convergence dynamics behind the mature growth model. Interestingly, Acemoglu and Ventura implicitly hint at the role of the WTO when they note that "[i]n any case, a cooperative equilibrium with free trade policies is superior to a noncooperative equilibrium in which all countries actively use trade policy, so we may think that countries have solved this coordination problem and have committed not to use trade policy" in Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), pp. 667, fn. 9.

The law of motion for the capital stock in each country j at time t in a global steady state equilibrium can be obtained from a combination of the conditions (5), (13), (16), and (17):

$$\Delta K_j^*(t) = \frac{K_j^*(t)}{K_j(t)} = \frac{r_j(t)^{\tau}}{\zeta_j} - \rho_j \qquad (18)$$

The interdependencies of international trade thus binds the world together in a steady state equilibrium growth rate and determine the terms of trade; building of (14) and (18):

$$r_j(t)K_j(t) = V_j\, r_j(t)^{1-\varepsilon} \sum_{j=1}^{J} r_j(t)\, K_j(t) \quad \text{so,} \quad r_j^* = \left(\frac{\rho_j + \Delta K_j^*}{\zeta_j}\right)^{\frac{1}{\tau}} \qquad (19)$$

Acemoglu and Ventura rightly point out that "in [a] steady state [the] terms of trade and rental rates are constant. This highlights that the world income distribution is stable not because of continuously changing terms of trade, but because countries that accumulate more face lower terms of trade, reducing the interest rate and the incentives for further accumulation."[353]

As (16) and (17) make clear, the world economy will growth faster in its steady state when consumers are patient (ρ_j), institutions are good (ζ_j), and a high technological level is attained (V_j). Importantly, both international trade and specialization are crucial to this model as autarky brings τ to zero and shuts the dynamic elements of the model down – see the world income distribution in the steady state ($Y_{id,j}^*$) (combing (12), (13), (15), and (17)):

$$Y_{id,j}^* = V_j \left(\frac{\zeta_j}{\rho_j + \Delta K_j^*}\right)^{\frac{\varepsilon-1}{\tau}} \qquad (20)$$

A measure of openness to trade is thus central and, intuitively, the terms of trade, for a given state of technology V_j, are decreasing in an economy's relative income (20):

[353] Daron Acemoglu and Jaume Ventura, "The World Income Distribution," 117(2) *The Quarterly Journal of Economics* 659 (2002), pp. 669.

$$p_j = \left(\frac{V_j}{Y^*_{id,j}}\right)^{\frac{1}{\varepsilon-1}} \qquad (21)$$

So, as long as all intermediates are produced competitively (14), a higher obtained price for an economy's intermediate exports (v) raises the value of the marginal product of capital and hence the rate of return to capital (22); the price of the final investment good then moves to compensate:

$$\left(\frac{r_j}{p^I_j} + \frac{p^{I,*}_j}{p^I_j}\right) - \frac{p^{C,*}_j}{p^C_j} = \left(p_j\right)^{\tau} \zeta_j \qquad \text{(all else equal}^{354}\text{: } p_j \uparrow,\ r_j \uparrow;\ p^I_j \uparrow) \qquad (22)$$

Not only are there stronger diminishing returns when the volume of trade and the extent of specialization are greater (high τ and low ε), when τ is low, the rate of return to capital is less sensitive to changes in the terms of trade. Conversely, when ε is infinitely large the model operates as an endogenous growth model without the convergence brought about by international trade (21). The mature model of growth thus illustrates the basic premise of what Krugman called the "homeostatic" view of international trade, when properly adjusted for comparative advantages.[355]

Lets postulate the introduction of an export restriction and draw on the Armington preferences to translate the entire tariff into higher international prices for the traded intermediate. With this elevation in the international price, the economy will, temporarily, attract more capital. But as we have seen, the long run terms of trade respond to dampen the effect and restore the steady state balance.

The key implication of this model is thus that each country's terms of trade are endogenous and depend on the rate of capital accumulation. The export restriction acts as a temporary accumulation incentive (a temporary boost in its

[354] It might be useful to point out here, as obiter dictum, that, had the model included a monetary component, currency manipulation is one of the policies available to let the growth in the economy continue by depreciating against the price rise.

[355] Paul Krugman, "The Narrow Moving Band, Dutch Disease, and the Competitive Consequences of Mrs. Thatcher – Notes on Trade in the Presence of Dynamic Scale Economies," 27 *Journal of Development Economics* 41 (1987), pp. 41-42; the 'homeostatic' view of international trade posits that there is a natural pattern of specialization and trade, determined by the underlying country characteristics, and that automatic forces tend to restore this natural pattern.

terms of trade), but as domestic factor prices adjust to the increased capital accumulation the trade policy measure has little long run effects[356] beyond taking advantage of unused market power or correcting for trade distortions – both of which are absent in the model.[357]

More generally, by raising the international price of the traded intermediary, country j may well come to face detrimental structural demand effects through an increased elasticity of substitution, ε, as other production methods come online depending on the structure of the (under-utilized) market power of country j. The introduction of trade restrictions might additionally spur domestic misallocation effects and possibly awake political economy forces, both of which will negatively affect the policy value ζ.

The above model is especially useful in illustrating that the redeeming features of introducing a restriction on exports in theories of mature growth need either be found in correcting for negative trade externalities, perfecting the steady state, or in the interaction with specific market features. In order for a trade measure to have a lasting impact on the growth performance of an economy it has to have a structural effect on the production function of the implementing economy – the quintessential development concern of "catch-up" models of economic growth.

* * *

[356] See also for a detailed analysis of why trade restrictions fail to effect the long run steady state rate of growth in neoclassical production functions, T.N. Srinivasan, "As the Century Turns: Analytics, Empirics, and Politics of Development," Economic Growth Center, Yale University (1997); see also Robert C. Feenstra, *Advanced International Trade: Theory and Evidence* (Princeton: Princeton University Press, 2003), p. 9-1. Note that while in learning-by-doing and non-diminishing return models trade liberalization boosts global output growth, the LDCs or economies with specific initial endowment structures might suffer or experience long term retarded growth – a liberalization policy therefore cannot be said to be universally first-best in these models.

[357] Bagwell and Staiger discuss the economic rationale for the GATT 1994 and the WTO in similar light, stressing its core reciprocity demand as an important tool in the face of domestic political economy pressures; Kyle Bagwell and Robert W. Staiger, "Economic Theory and the Interpretation of GATT/WTO,"46(2) *The American Economist* 3 (2002).

Analytical Annex - Part B

Part B of this Annex presents a simplified model of economic growth that highlights the structural properties of product diversification and innovation growth. Although both "catch up" and "mature"-growth are approached probabilistically, the two differ significantly in structure. Whereas mature growth occurs as the result of technological innovations at the frontier, catch up growth can benefit from the known pair-wise connections between products. This pair-wise connection reflects that the skills needed to produce certain products are related to those required for other products. In this way, catch up growth allows for growth-path emulation, or targeted diversification. The pace at which a developing economy diversifies is dependent on the nature of their current production set and pair-wise diversification opportunities.

As with the mature growth model of Part A of the Analytical Annex, *supra*, we postulate a continuum of equal mass countries (j) that are different in technology (H_j) and institutions (ζ_j). Production rather occurs with product-specific labor and capital inputs ($L_{n,j,t}^{1-\alpha}$) ($K_{n,j,t}^{\alpha}$). These are subject to diminishing returns so that technological progress is the ultimate driver of (product variety) growth. Advances in available technologies result in *either* product-dependent labor productivity gains ($\beta_{t,n}$) or as increases in the domestic production set (N_j), *i.e.* the production of more, more complex and more highly connected products. Discrete time is preferred over continuous time to allow for the clear expression of technological gains as they result in the production of additional products $[1 \rightarrow \check{N}_t]$, where ($\check{N}_t$) represents the product diversity frontier ($N_j \in [0, \check{N}_t]$).

The country specific production function is given by:

$$Y_{j,t} = \zeta_j \sum_{n=1}^{N_j} (K_{n,j,t}^{\alpha}, \beta_{t,n} L_{n,j,t}^{1-\alpha}) \quad (23)$$

Whereas the labor stock is assumed static, the capital stock grows as a function of labor productivity (incorporated in Y_j), household savings (s_n) and capital depreciation (δ_n):

$$\Delta K_{n,j} = s_n Y_j - \delta_n K_{n,j} \quad (24)$$

This simplified depiction of a product variety production model (21, 22) does not show the maximization decisions of economic agents in order to direct attention to the structural properties of product diversification and innovation

growth. The employed technological growth equation (25) finds its ground in a product variety[358] conception of Schumpeterian growth as formalized by Aghion and Howitt.[359] Technological gains are subsequently disaggregated into (i) labor productivity gains, (ii) innovation that extends the world's product frontier, and (iii) catch-up[360] diversification that closes the distance to the frontier, and assigned a dedicated probability ($\hat{w}_j$, ω_j, $\varpi_{t,n,j}$):

$$\Delta H_j = \Delta\beta_j + \Delta N_j = \left[\hat{w}_j(\beta_{t,j})\right] + \left[\omega_j(\dot{z} - 1)\check{N}t_t\right] + \left[\varpi_{t,n,j}(\check{N}_t - N_{t,j})\right] \quad (25)$$

Note that whereas this growth model focuses on the structure of product innovation and diversification, such as expands the viable domestic production set (ΔN_j), innovations that "shock" the Kaldor-Verdoorn function[361] ($\Delta\beta_j$) might have a direct impact on the link between productivity and production growth that can be equally instructive to consider under a "product space"-approach.

The pace of growth in (25) is thus set by the value of the probabilities and the impact thereof:

$$g_{t,j} = \hat{w}_j + [\omega_j(\dot{z} - 1)] + [\varpi_{t,n,j}(\check{N}_{t,j}^{-1} - 1)] \quad (26)$$

where $\check{n}_{t,j} = \frac{N_{t,j}}{\check{N}_t}$ indicates the distance to the frontier, the structure of which is dictated by the product space (Section II.B.2), and ($\dot{z}$) refers to the multiple[362] of the innovation's power in relation to the preexisting value of the frontier ($\check{N}$).

[358] Avinash Dixit and Joseph Stiglitz, "Monopolistic Competition and Optimum Product Diversity," 67(3) *American Economic Review* 297 (1977).
[359] Philippe Aghion and Peter Howitt, *The Economics of Growth* (Cambridge: MIT Press, 2009); Philippe Aghion and Peter Howitt, *Endogenous Growth Theory* (Cambridge: MIT Press, 1998); Philippe Aghion and Peter Howitt, "A Model of Growth Through Creative Destruction," 60 *Econometrica* 323 (1992).
[360] Preference is given to the term "catch up" or "completion" innovation over the more generally used "imitation" innovation to stress that every technology demands some measure of implementation and adaption before it can be successfully embedded in the production structure of the economy. The term "imitation" could entice unsuspecting readers to infer conclusions about such imitation-driven economic growth (i.e. "stolen" technology, "lazy" imitators, or look for "market failures" prematurely).
[361] Jose Antonio Ocampo, "The Quest for Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Jose Antonio Ocampo, ed., *Beyond Reforms: Structural Dynamics and Macroeconomic Vulnerability* (Palo Alto: Stanford University Press, 2005), p.25 et seq. Ocampo notes that "Indeed, innovations may be seen as 'spurts' that shift the technical progress function, but tend to weaken through time as innovations spread" (p. 28). This weakening effect over time need not disappoint in the aggregate, under the assumption of multiple equilibriums, where "[a]ny displacement from saddle point A will lead the economy to a new, higher stable equilibrium at B or, alternatively, to a low-growth trap" (p. 27).
[362] The frontier innovation multiple needs to reflect $\dot{z} > 1$.

Whereas the pace of innovations that enhance labor productivity ($\hat{w}_j$) and those that expand the product diversity frontier (ω_j) are assumed to dictate the mature growth path,[363] the innovation probability of "catch up" growth ($\varpi_{t,n,j}$) is made dependent on the time-sensitive progression of the acquired product diversity set ($N_{j,t}$) for each country engaged in developmental growth. Convergence is therefore ultimately made conditional on the difference between the non-monotonic probability of "catch up" growth, as determined by country characteristics and the structure of the product space, in relation to the pace of frontier innovation.

Note that I treat the two forms of diversity-inducing technological change (ω_j, $\varpi_{t,n,j}$) in (25) as different in character and uncorrelated to each other. Although this is partly reflective of the empirical properties of the product space (future technology cannot be observed and therefore cannot be accorded a pairwise proximity value), a more theoretically rich approach stresses that corporate innovation strategies are directly related to the competitive needs and conditions of specific product-lines.[364]

As innovation and diversification incentives are subject to inter-firm productivity differentials and determined by meso-economic pressures, the catch up and frontier growth probabilities are variably susceptible to policy measures. Additionally, knowledge and know-how spillovers will give rise to (marginally) different interactions (linkages[365]) in catch up industrial ecosystems[366] than in those of frontier economies. Obviously, this bifurcated approach is a potentially contested description of the actual process of innovation and diversification at the level of national innovation/learning systems[367] and related entrepreneurial activity,[368] running the risk of under-appreciating possible spill-over effects between innovation and diversification.[369]

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[363] This assumption draws on work by Aghion and Howitt that formalizes the rate of technological progress as determined by forces that are internal to the economic system. However, this assumption is not fundamental here, as (i) our focus is on catch-up growth or development, and (ii) the key concept of this work, the shape and value of the proximity of products and production technology, is obscured for the future; necessitating the (re)introduction of a measure of homogeneity in light of more precise insights into the implication and likelihood for future technological developments. See Philippe Aghion and Peter Howitt, "A Model of Growth through Creative Destruction," 60 *Econometrica* 323 (1992).

[364] Michael Hobday, Howard Rush and John Bessant, "Approaching the Innovation Frontier in Korea: The Transition Phase to Leadership," 33 *Research Policy* 1433 (2004).

[365] See, Joseph Stiglitz and Bruce Greenwald, *Creating a Learning Society: A New Approach to Growth, Development, and Social Progress* (Columbia University Press, 2014).

[366] See on the interaction between agglomeration externalities and technical relatedness, for instance, Frank M.H. Neffke, "Productive Places: The Influence of Technical Change and Relatedness on Agglomeration Externalities," Ph.D. Thesis University of Utrecht (2009).

[367] See for a comparative institutional analysis, Joseph E. Stiglitz, "Leaders and Followers: Perspectives on the Nordic Model and the Economics of Innovation," NBER Working Paper No 20493 (September 2014).

[368] In the context of Latin America, see, for instance, Jorge Mario Martínez-Piva, ed., *Knowledge Generation and Protection: Intellectual Property, Innovation and Economic Development* (New York: ECLAC & Springer, 2009); see also, Charles Sabel, et al., eds., *Export Pioneers in Latin America* (Washington DC: IADB, 2012).

[369] See, Piere Mohnen and Lars-Hendrik Roller, "Complementarities in Innovation Policy," 49 *European Economic Review* 1431 (2005).

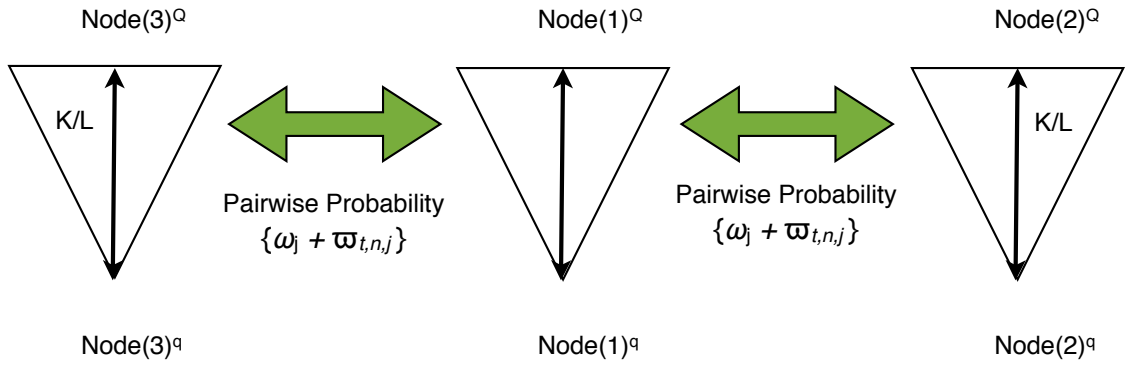
However, strong differentiation between innovation and diversification growth is validated by historical experience and exemplified by the considerable differences between these two processes of technological structural change.[370] The benefits of this separation are not limited to descriptive and dogmatic clarity though, but work to highlight the differences in the process of product variety growth as it affects the nature of appropriate institutions and policies between frontier economies/sectors and those engaged in catch up growth. While frontier economies are by definition pursuing (ω_j)-type innovation, developing economies can, relative to the extent of their economic dualism, engage in either form of innovation and diversification growth. The dominant process of expanding the economy's portfolio of exported product varieties might thus differ between one sector and another.

While the pairwise probability structure of each separate product is of concern for directing industrial policies, the shape of the complete product space, as envisioned by Hidalgo and Hausmann,[371] and the series of nodes each economy occupies therein, calibrates the long-run catch-up dynamics of the production function (21). The pace of mature growth, which rather happens at the technological frontier is given by the steady state probability of innovation (ω_j). This condition of dual non-homogeneity, first in the character of growth and second the density of product space diversification field, demands different optimal (industrial) policies.

Growth that happens in accordance with (24), i.e. raw capital accumulation, rather expands the economy through growth in the product quality while also increasing the value of (ω_j) in the steady state. Figure A illustrates both capital accumulation-driven economic growth (inflating the balloon), by showing how an expanding K/L-ratio can result in quality upgrading: $q \rightarrow Q$, and pair-wise diversification following mature and catch-up growth probabilities.

[370] Viotti for example differentiates National Learning Systems from National Innovation Systems and argues that while the latter type is relevant to the technological change at the frontier, the former is best suited for late-industrializing economies; see Eduardo B. Viotti, "National Learning Systems: A New Approach on Technological Change in Late Industrializing Economies and Evidences from the Cases of Brazil and South Korea," 69 *Technological Forecasting & Social Change* 653 (2002).
[371] Cesar A. Hidalgo, Barry Klinger, Albert-Laszlo Barabási, Ricardo Hausmann, "The Product Space Conditions the Development of Nations," 317 *Science* 482 (2007); Cesar A. Hidalgo and Ricardo Hausmann, "The Building Blocks of Economic Complexity," 106(26) *PNAS* 10570 (2009).

Figure A: In- and Across-Product Growth



The Multilateral Standard of Review: Export Restrictions, Policy Flexibility and GATT Exemptions

Chapter 3:

Textualism in the WTO

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Within the framework of the GATT 1994 the concerns of emerging markets and developing country Member States have traditionally been addressed either through the Enabling Clause, granting Special and Differential Treatment (SDT) to developing countries, or through the height of (negotiated) tariff levels. This understanding however leaves a third, crucial, avenue un-examined: the construction and interpretation of existing provisions and commitments in the GATT/WTO. The central reason for leaving interpretative methods outside of the traditional scope of discussion is the conviction that the provisions of the GATT are both self-evident, their ordinary meaning accessible to an able adjudicator, and that such ordinary meaning is reflective of the bargain struck by the Parties.

Both presumptions are, however, not accurate. The language of any document, legal or otherwise, is always incomplete and open to different interpretations and although the "spirit" of the GATT 1994 might be largely undetermined, its adjudicators are not. Furthermore, the Membership of the GATT is time-inconsistent and holds heterogeneous economic policy preferences. It is therefore difficult to assume fundamental homogeneity in contracting intent and of implementation preferences among Member States. What is left to the adjudicator is the declared intent of the Parties, accessible both in the text of the regulating provisions and in the preambles to the GATT 1947 and WTO Agreement. It is the interpretative practice of the WTO adjudicator, assigning meaning to the language of the GATT, that I wish to examine and criticize in this Chapter. I take a theoretical approach to the study hereof and bracket the empirical consideration of adjudicator's biases.[372]

Of course, both the Vienna Convention on the Law of Treaties (VCLT) and the GATT/WTO explicitly recognize the role of an "object and purpose" analysis in its framing of the interpretative exercise. These treaties however,

[372] See, Cass R. Sunstein, David Schkade, Lisa M. Ellman, and Andres Sawicki, *Are Judges Political? An Empirical Analyssi of the Federal Judiciary* (Washington DC: Brookings Institution, 2006); See also for an application to investment arbitration, Gus van Harten, "The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration," and, in response, Susan D. Franck, Clavin P. Garbin and Jenna M. Perkins, "Response: Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law," Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2010-2011* (New York: Oxford University Press, 2012); also Gus van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Examination of Hypotheses of Bias in Investment Treaty Arbitration," 53(2) *Osgoode Hall Law School* (2016, *forthcoming*).

amplified by adjudicatory practice, have deliberately dethroned a "general purpose" analysis of the treaty as primary analytical step and replaced it with the adjudicator's adherence to the "ordinary meaning" of the text.

In order to come to a dispositive declaration on the meaning of the provisions in an international agreement, I will argue that the interpreter needs to critically examine her original assumptions as to the character of the communicative instrument and its constituent provisions. In this Chapter, I wish to challenge the presumptions of a Textualist interpretation of the GATT/WTO and show how a greater understanding of and appreciation for the economic "context" in combination with the "object and purpose" of the GATT and its provisions can help the adjudicator reach a less biased and more appropriate decision in "hard cases."[373]

The query central to this work and much practical reasoning by WTO dispute resolution bodies thus becomes: by which method are Member States' economic conditions positively recognized, such that they enlighten the contextual interpretation of the language of the provisions of the GATT/WTO in a manner that furthers both the security and predictability of the multilateral trading system. This question guides the critical examination of the current state of affairs on the interpretation of terms in covered agreements in the present Chapter, and will instruct the discussion on the possibility for the embedded standard of review to drive an "open" construction of exemption provisions in the GATT 1994 in Chapter 4, *infra*.

In keeping with Chapter 2, *supra*, genuine differences between Member States in fitting a trade policy measure to the provisions of the treaty are deemed to be reflective of their different normative preferences as to economic policy. Hard cases therefore raise fundamental questions of justification and legitimacy[374] in the adjudication of

[373] The notion of a "hard case" is related to, but differently constructed from, the notion of "development disputes" in international law as put forward by Tomer Broude, "Development Disputes in International Trade," in Yong Shik-Lee, Gary N. Horlick, Won-Mog Choi, and Tomer Broude, eds., *Law and Development Perspective on International Trade Law* (Cambridge: Cambridge University Press, 2011); Broude suggests the following definition: "international development disputes can be understood as a discrete category of international disputes that, in terms of jurisdiction and applicable law, arise under fairly 'hard' rules of international law, such as trade and investment treaties, but in a more practical sense are actually concerned with reviewing the development policies of states, which are regulated on the international level only in very 'soft' terms, if at all." (p. 30) He observes that "[m]ost development-related international dispute settlement avoids frontally engaging with development dilemmas by resorting to legal tools, rules, and doctrines that are formally and teleologically exogenous to development." (p. 31). This chapter's argument engages Broude's excellent piece and explores the role of diverging economic growth preferences (mature v. catch up) with direct reference to WTO adjudicatory principles and practice.

[374] Direct confrontation with questions of regime legitimacy and coherence occurs when the DRB decision affects a Party's industrial or developmental policy. Indirect confrontation occurs in the presence of secondary preference conflicts, such as those over "culture." For discussion of the "legitimacy gap" in the context of the difference between mature and industrializing countries, see Rubens Ricupero, "Rebuilding Confidence in the Multilateral Trading System: Closing the Legitimacy Gap," in Gary Sampson, ed., *The Role of the World Trade Organization in Global Governance* (Geneva: United Nations University Press, 2001). In the context of international trade and culture, Howse and Langille note that "when we turn to today's WTO […] it becomes evident that narrowing the kind of rationale permitted as basis for justified regulation under WTO

disputes between signatories with competing preferences.[375] Such genuine differences will, moreover, often involve the construction and interpretation of exception and exemption provisions in combination with a headline rule – an insight that stands central throughout this work.

The adjudicator's normative presumptions and pre-judgments will come to the fore strongest in her consideration of policy flexibility provisions as her assessment thereof is directly reflective of her understanding of the regulatory structure of the GATT and collaborative intent of the multilateral Membership. In this work I argue that, all-too-often, the adjudicator's presumptions of the GATT/WTO as a "free trade" agreement hinder her to fully acknowledge the object and purpose of the GATT, which features non-discrimination principles as central organizational features around a macro-economically indeterminate core. The recent cases around the GATT provisions on export restrictions, centrally querying the relationships between Articles XI:1 GATT, XI:2(a) and Article XX GATT, are prime examples hereof.[376]

The resulting coordination exercise is unique in international law to the extent that the WTO adjudicator has to systematically interpret a multilateral international economic agreement with a time-inconsistent and economically heterogeneous Membership. It is therefore crucial for the interpreter to be aware of her preconceptions and prior understanding of the regulatory structure of the GATT and the interpretative leeway available to the adjudicator to impose an "economic structure" on the provisions of the GATT/WTO.

While the joint Membership has a shared interest in the continued "security and predictability" of the multilateral trading system, the way in which this rule-based system is constructed and interpreted determines the scope of the available policy flexibility of Member States in pursuit of their preferred macro-economic goals. International

law, while the WTO's diversity broadens and deepens, would be setting the scene for a significant legitimacy crisis." Robert Howse and Joanna Langille, "Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Non-instrumental Moral Values," 37 *The Yale Journal of International Law* 367 (2012), p. 428; See for a survey of the legitimacy debate in the WTO, Tomer Broude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (Folkestone: Cameron May, 2004) (J.S.D. Dissertation, University of Toronto).

[375] Ronald Dworkin, in his famous article "Hard Cases," 88 *Harvard Law Review* 1057 (1975), differentiates the interpretative work of the judge between "fit" and "justification." Note that our argument does not seek to reintroduce hegemonic power and the projection of "norms" to serve such power, although we acknowledge elements of "normative persuasion" - see G. John Ikenberry and Charles A. Kupchan, "Socialization and Hegemonic Power," 44 *International Organization* 283 (1990); and Christopher J. Borgen, "Whose Public, Whose Order? Imperium, Region, and Normative Friction," 32 *The Yale Journal of International Law* 331 (2007).

[376] In 2011, Article XI:2(a) was interpreted for the first time in the WTO cases *China – Raw Materials*, and again in *China – Rare Earth*, as will be discussed in Chapter 4, *infra*. In these cases, the WTO adjudicator has also been called upon to consider this and other provisions in relation to China's WTO Accession Protocol.

economic law, as the study of the legal dimensions of (non-)cooperative relationships between states, shapes and constraints the limits and depths of the agreement between Parties to further a secure and predictable trading system that is "consistent with their respective needs and concerns at different levels of economic development."[377]

The task of the adjudicator, as a stabilizing element within the multilateral trading system, is therefore to fit the contested policy implementation preferences of Member States to the treaty language in a coherent manner. In other words, when confronted with a hard case, the adjudicator needs to strike a balance between the various preferences of the Member States and her understanding of the language of the regulating provisions, read against its object and purpose and that of the instrument as a whole.

In my argument, I am mindful to not replace one bias with another, *i.e.* a preference for "mature" growth with one that is friendly to "development" – although this may be the (desired) effect. Instead I will come to argue for an approach to interpreting exemption provisions that relies on the object and purpose of the GATT 1994, read against the preamble of the GATT 1947 and the WTO Agreement. In order to facilitate such interpretation, I will, in this chapter set out and criticize the prevalent method of interpretation of the provisions of the GATT: Textualism (as aided by a measure of contextualism). The critique will demonstrate how an approach that over-emphasizes the "ordinary meaning" of words and provisions falls short theoretically and is inconsistently applied by the Appellate Body as it finds contextual support for its decisions on a "case-by-case" basis.

Section A will situate the WTO Panels and Appellate Body in the framework of the multilateral trading regime and describe its form and function. In framing the role of the WTO dispute settlement system, I will establish the GATT/WTO as a system of law and explicate my assumptions as to the WTO adjudicator therein. Hereby, I identify the specific international legal character of the GATT/WTO and stress the collaborative contractual intent of Parties. The GATT 1994 and the WTO Agreement are of course highly complex, multilayered instruments that are not fully captured or reflected by the parameterization of my argument. Nonetheless, I believe these assumptions reflective of the dominant characteristics of these agreements.

[377] WTO Agreement, Preamble.

Section B will identify and discuss each of the legal interpretative elements of customary international law, first, as applicable to all treaties on a theoretical level and, second, showcase their application in the context of the GATT/WTO adjudication of hard cases. As is a familiar insight, the customary international law on treaty interpretation, available as Article 31 Vienna Convention on the Law of Treaties (VCLT), disfavors a teleological approach to treaty interpretation and instead urges the interpreter to find Parties' joint intention in the words of the agreement. To parse these words, the adjudicator construes them against her understanding of Parties' effective intent as available through a good faith textual, contextual, directional, and ultimately historical analysis. It is through the adjudicator's application of this somewhat tautological statement that her biases are revealed.

A. The WTO Dispute Settlement System

The Dispute Settlement Understanding ("DSU") in Article 2(1) grants authority to the dispute settlement body of the WTO to "establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements." The substantive coverage of Panels and the Appellate Body encompasses, in addition to the Agreement Establishing the World Trade Organization ("WTO Agreement") and the DSU, the agreements annexed in Appendix 1 to the DSU ("covered agreements"), which includes the GATT 1994.[378]

Panels, in accordance with Article 11 of the DSU, 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 […]." As noted in Chapter 1, *supra*, this article establishes the appropriate standard of review whereby Panels are to approach the matter before them in law, in fact, and when fitting the facts to the terms of the agreement.

The Panels are expected to achieve its goals by "preserv[ing] the rights and obligations of Members under the covered agreements, and [by] clarify[ing] the existing provisions of those agreements *in accordance with customary*

[378] Mavroidis discusses the various sources of WTO law to also include subsequent state practice, the secondary law as emerges from Articles IX and X WTO Agreement, and law that emerges through the exercise of implied powers by WTO adjudicating bodies; see Petros C. Mavroidis, "No Outsourcing of Law? WTO Law as Practised by WTO Courts," 102 *American Journal of International Law* 421 (2008), p. 422.

rules of interpretation of public international law."[379] The appropriate standard of review on interpretation thus finds application in accordance with the customary rules of interpretation of public international law.

An objective construction of the law, and when fitting facts the terms of the agreement, is limited such that it "cannot add to or diminish the rights and obligations provided in the covered agreements." In international relations sovereigns are assumed to be master over and have the ability to agree on both common ends and the means to pursue them.[380] The resulting collaborative instrument thus has to be assumed to completely capture both ends and means in the context of the negotiated equilibrium: as reflected in the treaty's terms and its object and purpose.[381] Article 3(2) DSU thus stresses the agent-principle[382] relationship between Panels and the WTO Members.[383]

In Article 3(2) DSU the Panels and Appellate Body are furthermore tasked to provide "security and predictability to the multilateral trading system."[384] As argued in Chapter 4, *infra*, this is an important normative constraint on the judicial decision maker, circumscribing her ability to adopt teleologies that threaten the objective expectations of the Member States in objectively construing the provisions of a covered agreement as well as when interpreting the terms thereof.

Article IX:2 of the WTO Agreement reserves the right to "authentically interpret" the covered agreements for the Ministerial Conference and the General Council. This is not a unique feature of the GATT/WTO as the power to issue an authentic interpretation of a treaty remains with the State Parties themselves as "[i]t follows naturally from

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[379] Article 3(2) WTO Dispute Settlement Understanding, emphasis added.

[380] See, for instance, Joshua Meltzer, "State Sovereignty and the Legitimacy of the WTO," 26(4) *University of Pennsylvania Journal of International Economic Law* 693 (2005). The consent of Member States to the covered agreements of the WTO is clarified, with respect to the operation of the WTO dispute resolution body in Article 3.2 DSU. Its aim is to preserve the balance of rights and obligations in pursuit of the security and predictability of the international trading system; as explored in Section 3.B, *infra*.

[381] As Brotons points out, "[o]bject and ends make up an interpretation criterion in which the first element – *the object* – plays a role of realism and moderation, and the second element – *the end* – the role of idealism and progress." Antonio Remiro Brotons, *Derecho Internacional Público; Vol. 2 Derecho de los Tratados* (Madrid: Tecnos, 1987), p. 313, quoted in Evandro Menezes de Carvalho, *Semiotics of International Law: Trade and Translation* (Heidelberg: Springer Verlag, 2011), p. 163, fn. 8.

[382] See for an agent-based system with a focus on monitoring compliance, Gillian K. Hadfield and Barry R. Weingast, "What is Law? A Coordination Model of the Characteristics of Legal Order," 4(2) *Journal of Legal Analysis* 471 (2012).

[383] See Petros C. Mavroidis, "No Outsourcing of Law? WTO Law as Practised by WTO Courts," 102 *American Journal of International Law* 421 (2008), pp. 421-422, noting that "the WTO members (principals) have provided WTO "courts" (agents) with the authority to interpret those sources of law. And agents must, in turn, perform their tasks *without undoing the balance of rights and obligations as struck by the principals*" (emphasis in original; footnotes omitted). A different approach emphasizes the constructivist explanation of international law; see Jutta Brunnee and Stephen J. Toope, "Constructivism and International Law," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (Cambridge: Cambridge University Press, 2013). It is also in this sense that a system's supreme court is a regulator; see Frank H. Easterbrook, "The Supreme Court 1983 Term – Foreword: The Court and the Economic System," 98 *Harvard Law Review* 4 (1984).

[384] Contrast this "system's view," with the Article 38 of the Statute of the International Court of Justice (ICJ Statute) that limits the role of the court "to decide in accordance with international law such disputes as are submitted to it."

the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it [as] they are empowered to interpret it."[385] In this way, the WTO Agreement has limited the authority of the dicta of the WTO dispute settlement bodies to the confines of "judicial" interpretation of the rules, provisions and commitments of the covered agreements.[386]

On such and other grounds, Hart, infamously, characterized the modern incarnation of international law as a primitive system consisting mostly of an unstructured collection of primary rules that lack the centrality of an accepted rule of recognition.[387] Waldron laments this brusque treatment of international law, "because in recent decades the nature and status of international law has emerged as one of the issues in jurisprudence with greatest importance for real-world political debates."[388] Similarly, Alvarez has voiced his annoyance that "we are still discussing this 1960s chestnut of a question."[389]

Alternatively, d'Aspremont argues that Hart's central theory on the concept of law is "germane to the extent that it helps international legal scholars to restrict international legal positivism to a mechanism for determining the mode of existence of norms; that is, their validity." An important implication hereof is that "international legal positivism is [no longer] about determining the right content of norms and the right adjudicative truth." Instead, it is "confined to a thesis about the validity-condition of legal norms."[390] International legal positivism is therefore concerned with the identification and delineation of which sources generate the legal norms of international law and under which

[385] See Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester: Manchester University Press, 1984), at 136. See also Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit International Public*, 7th ed. (Paris: L.G.D.J., 2002), at 256, holding "L'interprétation réellement authentique est celle qui est fournie par un accord intervenu entre tous les États parties au traité." (The truly authentic interpretation is that provided by agreement among all State parties to the treaty.) See further Anthony Carty, "Conservative and Progressive Visions in French International Legal Doctrine," 16(3) *European Journal of International Law* 525 (2005). Also successfully argued by the United States in their submission in *Chemtura Corporation v. Canada*, NAFTA/UNCITRAL, (2009).

[386] Given the lack of practice under Article IX:2 WTO Agreement, Howse notes that Appellate Body decisions "are likely to have a kind of *de facto* finality as interpretations of law, even if they lack *de jure* finality ," in Robert Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power," in Thomas Cottier and Petros C. Mavroidis, eds., *The Role of the Judge in International Trade Regulation – Experience and Lessons for the WTO*, World Trade Forum (2003), IV, at 11, 15.

[387] See H.L.A. Hart, *The Concept of Law* 2nd ed. (New York: Oxford University Press, 1994 [1961]), Chapter 10.

[388] Jeremy Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?," New York University Public Law and Legal Theory Working Papers No. 427 (2013), calling Chapter X of HLA Hart's Concept of Law an "embarrassing" chapter.

[389] Jose Alvarez, "But Is It Law?," Comments, in 103 *American Society of International Law Proceedings* 163 (2009). See also, Aaron Fichtelberg, *Law at the Vanishing Point: A Philosophical Analysis of International Law* (Delaware: Ashgate, 2008), who stresses that "international law can stand on its own as a field of law and as a field of political analysis" (at xiii).

[390] Jean d'Aspremont, "Herbert Hart in Today's International Legal Scholarship," in Jorg Kammerhofer and Jean d'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), p. 115 (footnote omitted). See also Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (New York: Oxford University Press, 2011).

conditions these are applied. As such, legal positivism in international law seeks to positively identify the legal norms and rules reflecting the - rather Euro-centrically approached - common interest of "civilized nations."[391]

As the validity condition of the provisions and commitments of the GATT 1994 and the WTO Agreement are not truly in doubt, there is no need at present to further deepen the discussion of whether GATT/WTO law is in fact "law" at all. The establishment of the DRB, an important development when set against the backdrop of the diplomatically oriented[392] system of trade policy coordination under the GATT 1947,[393] crucially strengthened this understanding. Its establishment further allayed concerns that the WTO system does not provide "law" on account of the limited possibility of enforcement in the form of (measured) retaliation[394] - valid questions as to its efficiency in realizing compliance with its dicta notwithstanding.[395]

From this perspective, it is generally accepted that the regime of the WTO offers a legal system[396] of rules and obligations that centers on a normative economic core[397] that is defined, but not uniformly interpreted or applied by its Member States. This leaves undisputed that the pre-contractual rationale for joining the GATT/WTO is dominated by domestic political economy concerns, including the level and character of trade divergence for those still outside the collaborative block.[398]

Some have argued political economy approaches that are critical of presuming any normative core to international economic agreements: they dismiss the tenet of policy setting by high-minded, welfare-maximizing decision-makers

[391] As Emanuel von Ullman put it in his *Völkerrecht* (Freiburg i. B. [etc.]: J.C.B. Mohr, 1898): "Die meisten Interessen, welche den Gegenstand staatlicher Verwaltung bilden, haven sich innerhalb der Gemeinschaft civilisirter Staaten geradezu zu solidarischen und sohin zu internationalen Interessen ausgebildet." (pp. 252-253) A position that is, to some extent, also regretfully reflected in the expression of Article 38 of the ICJ Statute, which sets out the "sources of international law." For critical assessment of the role of imperialism in the making of international law, see Antony Anghie, *Imperalism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

[392] Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Some Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement," 35 *Journal of World Trade* 191 (2001).

[393] In particular, the condemned Member State had the ability under the GATT 1947 to politically block adoption of a Panel Report, preventing it from having legal effect.

[394] See, among a broad literature, Chad P. Bown and Joost Pauwelyn, eds., *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge: Cambridge University Press, 2010).

[395] See for the limits on retaliation in trade disputes, among a broad literature, Chad P. Bown and Kara M. Reynolds. "Trade Agreements and Enforcement: Evidence from WTO Dispute Settlement," American University Working Paper (Economics), April 2015.

[396] Such in conscious opposition to Hart who observes that international law consists of rules, which "constitute not a system but a set of rules" (H.L.A. Hart, *Concept of Law* 2nd ed., p. 236).

[397] Buchanan, for example, identifies "free trade" as the non-rival club good enjoyed and nourished by the Member States of the GATT/WTO, in James Buchanan, "An Economic Theory of Clubs," 32(125) *Economica* 1 (1965).

[398] The *locus classicus* for this argument is Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (New York: Oxford University Press, 2008).

("benevolent dictators" or "social planners") as naïve thinking. Schropp, for instance, extends the premise of methodological individualism to hold that "policy is drafted by self-interested government officials who care predominantly about maximizing their personal wellbeing, be it in the form of political support, re-election endeavors, receiving important information, or maximizing their budgetary discretion."[399]

By adopting the position of the adjudicator however, attention switches from the mechanics of achieving collaboration to the focal point of such collaboration; the provision, commitment, or entitlement, around which there is conflict and is in need of interpretation. Accordingly, while Parties' outlook and behavior undoubtedly adhere to an inherently self-oriented conception of collaboration "for me,"[400] with particular reference to appropriating the gains of collaboration or defection (acquisition), the adjudicator safeguards the established collaborative object and purpose of the instrument.

The adjudicator emphasizes the systemic collaboration "in me" and derives her understanding of the structure of the instrument, vital to her adjudicative decision, from her assessment of the substantive goals[401] and object and purpose of the instrument.[402] In this way we subscribe to Judge Simma's critique of a strong consensualist approach to international law, such as apparent in the ICJ's *Lotus* decision,[403] as "an old, tired view of international law."[404] Political economy explanations that center on the dynamics of the contractual formation and the compliance[405] stage are thus of limited relevance.

[399] Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009), p. 135, fn. 5.

[400] For the distinction between cooperation "for me" and "in me," see I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), Part I.

[401] Alan Schwartz, "Relational Contracts in the Courts: an Analysis of Incomplete Agreements and Judicial Strategies," 21(2) *Journal of Legal Studies* 271 (1992).

[402] Mavroidis, argues complimentarily that a theory of disputes is best derived from a consideration of (i) the reasons for contracting, i.e. the "primary law" (entitlements) that signatories have given themselves, (ii) the protection accorded to those entitlements, and (iii) the degree of contractual completeness; Petros C. Mavroidis, "Remedies in the WTO: a Framework of Analysis," Mimeo (2006), quoted in Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009).

[403] Permanent Court of International Justice, "Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 18.

[404] International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, *I.C.J. Reports* (2010), p. 403, July 22, 2010, Declaration of Judge Simma, ¶ 2 at p. 478.

[405] In a recent paper, Van Aaken and Trachtman develop a method "that integrates [public international law] more holistically in a [political economy] model" – viewing public international law both "as *explanans* as well as *explanandum*." (p. 11) Their central unit of analysis however remains domestic interests, examined through the dual-layered ability of states to form international law and comply therewith. See Anne van Aaken and Joel P. Trachtman, "Political Economy of International Law: Towards a Holistic Model of State Behavior," University of St. Gallen Law School, Law and Economics Research Paper Series No. 2015-08 (July 2015).

Collaboration in the WTO is, from the perspective of the adjudicatory decision-maker, goal-oriented to the extent that all Members are assumed to be reasonably rational[406] and have agreed to a limited cooperation on and coordination of their trade policies in order to enhance the outcome (maximize welfare) of the "trade game." The international trade regime is thus one of multilaterism, not in the sense of collaboration driven by shared empathy between the actors,[407] but one of rational commitment on particular substantive issues (*i.e.* domestic measures affecting trade policy, including export restrictions).[408]

Consequently, the DRB is understood to pursue a systemic "internal" view of coherence and legitimacy in the GATT, in order to provide security and predictability to the multilateral trading system. Within these adjudicatory goals, the collaborative intent of Parties to the WTO is available to the adjudicator through and delineated by the treaty's object and purpose in its preamble. The WTO Agreement clarifies Parties' common intent and specifies that they recognize:

> […] that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, *and expanding the production of and trade in goods and services*, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns *at different levels of economic development*,
>
> Recognizing further that there is need for *positive efforts* designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,
>
> Being desirous of contributing to these objectives by entering into *reciprocal and mutually advantageous arrangements* directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations […] (emphasis added)

[406] Reasonably rational parties are guided by rational choice, but are aware of transaction costs: they have complete, transitive, and continuous sets of individual preferences and engage in thorough cost-benefit analyses, but are not complete utility maximizers. We wish to side step the discussion on bounded rationality, as, for some, bounded rationality is equivalent to irrationality (*e.g.* Daniel Kahnemann, "Maps of Bounded Rationality: Psychology for Behavioral Economics," 93(5) *American Economic Review* 1449 (2003)), while for others it is related to the Bayesian updating of otherwise perfectly rational actors (*e.g.* Ariel Rubinstein, "Perfect Equilibrium in a Bargaining Model," 59(4) *Econometrica* 777 (1982)). See generally, Herbert A. Simon, "A Behavioral Model of Rational Choice," 69(1) *Quarterly Journal of Economics* 99 (1955).

[407] A sense of solidarity among the rational actors can work to further stabilize equilibrium behavior and provide additional legitimacy to the regulatory framework. As such, the principle of solidarity may be integrated with the contractual obligation to perform and adjudicate in good faith. Solidarity among states is however not a sufficient, although to a certain extent necessary, reason for stable international cooperation among players with non-homogenous preferences. See, Rudiger Wolfrum and Chie Kojima, eds., *Solidarity: A Structural Principle of International Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 213 (Heidelberg: Springer Verlag, 2010); and Herbert Gintis and Samuel Bowles, eds., *A Cooperative Species: Human Reciprocity and Its Evolution* (Princeton: Princeton University Press, 2011).

[408] I do not here differentiate between "multilateral" and "multilateralism" as is sometimes done in the literature to denote the difference between cooperation and coordination respectfully. The character of international trade, properly envisioned not as fundamentally antagonistic but rather as compliance and outcome-oriented, supports this broader use as pertaining to the commitment between Member States. See, I. William Zartman and Saadia Touval, "Introduction: Return to the Theories of Cooperation," in I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), p. 2.

As emphasized, the WTO Agreement declares it should be read so as to recognize Parties' understanding that they conduct their economic relations with an eye to "expanding the production of and trade in goods and services" in a manner respective of the Membership's "different levels of economic development." The Parties' further stress the need for "positive efforts" to ensure the equitable participation of developing countries. Barriers to trade shall thus be brought down through "reciprocal and mutually advantageous arrangements."

For the purposes of adjudicating hard cases, those cases where implementation preferences genuinely conflict between Member States, the guidance provided by the preamble as to the character of the communicative instrument, its purposes and normative context, is crucial. Whereas the conviction holds common ground among WTO treaty interpreters that direct reliance on the preamble is generally the least persuasive argument, this rests on the central fallacy this work seeks to address. In fact, as will be argued in Section B, *infra*, the interpretative constraints under which the adjudicator imposes a normative "structure" on the language of the GATT/WTO is determined by the contours of the means and ends as provided by the signatories in the provisions, their contextual framing, *as well as* anteriorly in the preamble of the GATT 1947 and the WTO Agreement.

Section II.B, hereunder, proceeds to discuss the interpretative elements relevant to treaty interpretation and to the GATT 1994 in particular. In so doing the baseline methodology for reading the GATT is established and, subsequently criticized. The analysis is focused on Textual and contextual readings of the GATT, while the Mercurial role of good faith is over-emphasized in comparison to GATT interpretative practice.

The central methodological innovation argued for in Chapter 4, *infra*, is the introduction of a conditional deference to Member State economic policy when fitting a disputed policy measure to a GATT exemption provision (such as Article XI:2(a)) as opposed to a headline rule (such as Article XI:1) or exception provision (such as Article XX). This conditional deference works to re-energize the effectiveness of "catch up" strategies of economic growth (as discussed in Chapter 1, *supra*), and, *ex ante*, problematize the construction of a Textualist reading of the covered agreements, while enforcing the balance of the rights and obligations conceded and maintained by Member States.

B. Benchmark Interpretation of the GATT 1994 and WTO Agreement

It is generally accepted in public international law that treaty texts are incomplete, even more so than domestic legal instruments. This distance to the contractual ideal of (neo-)classic economics, the Arrow-DeBreu Pareto-efficient complete contingent contract (CCC), is driven in large part by the considerable transaction costs associated with reaching an international consensus (resulting in a rigidity of the language chosen) and uncertainty as to future dynamics.[409] When a treaty is concluded between Parties with highly diverse interests and economic backgrounds – as in the present multilateral context of the GATT 1994 – their understanding of how their respective preferred policy responses to these uncertainties fit the contractual language is, in the strongest sense, not homogenous.

These differences between Parties can either be addressed through intra- or extra-contractual ways. As this work adopts the perspective of the adjudicator, only intra-contractual solutions are examined.[410] Traditionally, policy flexibility mechanisms are understood so as to address contractual "regret" and enhance Parties' ex ante willingness to sign up to stronger and broader provisions in the agreement.[411] Disagreement between the Parties on the meaning of such policy flexibility mechanisms is, according to Schropp,[412] largely the result of contractual incompleteness and can be either benign (driven by sincere language ambiguity or accidental contract gaps) or more asinine.

The fundamental incompleteness of the treaty and preference heterogeneity among the Parties both creates and delineates the interpretative space of the adjudicator. The adjudicator's understanding of the instrument's structure colors her interpretation, both in the presence or absence of "authoritative" interpretations issued by the Parties to the agreement.[413] Interpretive decisions in "hard cases" are taken in full face of the spectrum of tensions between the "ordinary meaning" of the treaty language and the, conditionally conflicting, preferred implementation policies of Parties.

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[409] Philip Allott, "The Concept of International Law," 10(1) *European Journal of International Law* 31 (1999).

[410] For consideration of extra-contractual dynamics, I refer to the international relations (IR) literature and the respective intersections with GATT/WTO law explored there.

[411] See, for instance, Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009).

[412] Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009), p. 69 et seq, identifying six types of contractual incompleteness.

[413] Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (Cambridge: Cambridge University Press, 2013), p. 461.

The VCLT is the central document in the modern understanding of the law of treaties and presents a benchmark to the interpretation thereof. This holds equally for the GATT 1994 and WTO Agreement, both on their character as international treaties and because Article 3(2) DSU instructs the dispute settlement system to "preserv[e] the rights and obligations of Members under the covered agreements, and clarify[] the existing provisions of those agreements *in accordance with customary rules of interpretation of public international law*."[414]

In its first report, *US – Gasoline*, the WTO Appellate Body established its interpretative method with reference to the "fundamental rule of treaty interpretation."[415] The Appellate Body further observed that "[t]his rule has received its most authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* […], which provides in relevant part:

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. "

The following interpretative elements circumscribe, pursuant to Article 31.1 VCLT, any method of attributing meaning to the text of the covered agreements: (1) the ordinary meaning of terms; (2) read in their context; (3) in light of the treaty's object and purpose; and in (4) good faith. Article 31.2 VCLT further notes that the context comprises the treaty text, pre-amble and annexes, together with any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Article 31.3 adds subsequent practice, subsequent agreements, and any relevant rules of public international law applicable in the relations between the parties.

[414] Article 3(2) WTO Dispute Settlement Understanding, emphasis added.
[415] WTO Appellate Body Report, *US – Gasoline* (1996), at 16-17.

1. Ordinary Meaning

The International Law Commission (ILC), established by the United Nation's General Assembly to encourage the progressive development of international law and its codification, drafted the document that was to become the VCLT between 1949 and 1969, when the text was adopted at the Vienna Conference. The preamble to the 1969 VCLT reaffirms the belief that the law of treaties should promote "the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations."[416]

The ILC's Introductory Commentary to its Draft Articles 27 and 28, which comprise, together with Article 29, the section on treaty interpretation, stresses that its interpretative principles and maxims should be read as "principles of logic and good sense." Which principles are "valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expression that they employed in a document."[417] The ILC points out that "the process of interpretation is a unity and that the provisions of the article [31 VCLT] form a single, closely integrated rule"[418] which, "when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties."[419]

As further guide to appreciating the meaning that parties may have intended to express through their choice of terms,[420] the ILC accords significant weight to the object and purpose of the treaty to more fully enlighten the cooperative, positive intention of the parties. At the same time it emphasizes "the primacy of the text as the basis for

[416] United Nations, Vienna Convention on the Law of Treaties, No. 18232, Vol. 1155, I-18232, *Treaty Series / Recueil des Traites* (1980), p. 333.

[417] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 218, ¶4.

[418] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, ¶8.

[419] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, ¶9. A hierarchy is established though between the supplementary means of interpretation of Article 32 VCLT and the rule formulated in Article 31 VCLT. The ILC notes that "the elements of interpretation in article [31] all relate to the agreement between the parties *at the time when or after it received authentic expression in the text. Ex hypothesi* this is not the case with preparatory work […]" *id.*, ¶10 (stress in original).

[420] Importantly, and as Gardiner points out, the interpretative rule of the VCLT implies that the true meaning that is to be ascertained through treaty interpretation is not that of the parties subjectively, but rather their intention as distilled in and expressed by the treaty text, read as a whole. In Richard K. Gardiner, *International Law* (Harlow: Pearson, 2003), pp. 80-81; see also Richard K. Gardiner, *Treaty Interpretation*, 2nd ed. (New York: Oxford University Press, 2015).

the interpretation of a treaty" and cautions that teleological interpretations should be careful to respect "the original intentions of the parties as expressed in the text."[421]

In the words of the ILC, "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[422] Parties in turn are "presumed to have that intention which appears from the ordinary meaning of the terms used by them." Good faith and common sense however demand "the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in light of its object and purpose."[423]

In stressing that interpretation according to the general rule of the VCLT needs to be directed at the elucidation of the meaning of the text, instead of a reconstruction of what wise negotiators should have intended, the ILC rejected McDougal's policy centered approach to treaty interpretation.[424]

In this way, the principles of logic and good sense behind Articles 31-33 VCLT guide the purposeful interpretation of treaties, which exercise the ILC acknowledges to be "to some extent an art, not an exact science."[425] It is important to note that the interpretative principle *ut res magis valeat quam pereat* (effectiveness principle) was not incorporated separately in the VCLT interpretative principles for fear of inviting "extensive" or "liberal" approaches

[421] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 218, ¶2. The International Court of Justice has similarly emphasized that any interpretation needs to be based "above all upon the text of the treaty" – ICJ, *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections), *I.C.J. Reports* (2004), p. 279, ¶100.

[422] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, ¶11.

[423] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, ¶12. See also, International Court of Justice, *United States Nationals in Morocco*, *I.C.J. Reports* (1952), pp. 183-184, 197, and 198.

[424] McDougal is an epitome of the New Haven School, an approach to international law that stresses the policy effects of decision alternatives; see, for instance, Myres S. MacDougal, "International Law and the Future," 50 *Mississippi Law Journal* 259 (1979). In conscious pursuit of McDougal, and in the tradition of the New Haven School, I reject the impression of a norm-neutral interpretation of a text and instead postulate an idealized public meaning in Chapter 3, *infra*, that is strengthened by the "realistic" approach of the law and economics strand of critical legal theory. The so-argued "idealized" approach to the text is "public": Not based in popular sovereignty such as the US Constitution's "We the People" however, but on its multilateral character. See also, Jack N. Rakove, "Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism," 48 *San Diego Law Review* 575 (2011).

[425] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 218, ¶4. Note however Jennings' quip: "Certainly the interpretation of treaties is an art rather than a science, though it is part of

the art that it should have the appearance of a science" in Robert Y. Jennings, "General Course on Principles of International Law," 121 *Recuel des Cours* (1967/II) p. 544, quoted in Jan Klabbers, "On Rationalism in Politics: Interpretation of Treaties and the World Trade Organization," 74 *Nordic Journal of International Law* 405 (2005), p. 406, fn. 2.

that go beyond what the terms of any treaty can reasonably be said to express.[426] Instead, the ILC held that a good faith reading of the treaty's text within its normative object and purpose sufficiently captures this maxim without exceeding the four-corners of the treaty itself.

The WTO Appellate Body, according to its holding in *US – Gasoline*, asserts that the rule of Article 31 VCLT "has attained the status of a rule of customary or general international law"[427] and can, as such, be applied to the treaty texts of the covered agreements.[428] Moreover, this "direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law."[429]

The Appellate Body in *Japan – Alcoholic Beverages II* confirms[430] that Article 32 VCLT should be read in addition to Article 31 VCLT to fully capture the customary rules of interpretation as it incorporates supplementary means of interpretation.[431] These supplementary means include the *travaux preparatoires* of the treaty and the circumstances of its conclusion, and can be employed in order to confirm a meaning resulting from the application of Article 31 VCLT, or to determine meaning when the interpretation according to Article 31 (a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable.

WTO dispute adjudication bodies have not relied exclusively on the VCLT in interpreting the covered agreements. In addition to the interpretative elements mentioned in Articles 31 and 32 VCLT, the doctrine of *lex specialis derogate lex generalis* has been privileged.[432] Mavroidis notes that although the *lex specialis* doctrine "is not

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[426] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 219, ¶6. The ILC intended no reference to Emer de Vattel's famous, although circular, dictum: "La premiere maxime generale sur l'interpretation est qu'il n'est pas permis d'interpreter ce qui n'a pas besoin d'interpretation" – in Emer de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle*, Vol II (1758), p. 263. In the context of the WTO, this interpretative maxim is generally taken to prohibit a reading of the covered commitments "that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" – see, for example, WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (1996), at 21; WTO Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (2002), ¶7.71.

[427] WTO Appellate Body Report, *US – Gasoline* (1996), at 17 [footnote omitted]. See also, International Court of Justice, *Arbitral Award of 31 July 1989 (Judgment) (Guinea Bissau v. Senegal)*, *ICJ Reports* (1991) p. 53, ¶48.

[428] Note that Article 17.6(ii) of the Anti-Dumping Agreement has fallen in somewhat disuse by the WTO DRB as its additional prescription that "the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations," because, as van Damme puts it, "[t]he Appellate Body seeks the 'proper' or 'correct' interpretation, not any 'permissible' interpretation" in Isabelle van Damme, "Treaty Interpretation by the WTO Appellate Body," 21 *European Journal of International Law* 605 (2010), 610.

[429] WTO Appellate Body Report, *US – Gasoline* (1996), at 17.

[430] WTO Appellate Body Report, *Japan – Alcoholic Beverages II* (1996), at 9. See also WTO Appellate Body Report, *US – Carbon Steel* (2003), ¶ 61-62; and WTO Appellate Body Report, *EC –Computer Equipment* (1998), ¶¶ 86, 92-93.

[431] Note that Article 33 VCLT has also found application in the WTO dispute settlement practice. See for instance the WTO Appellate Body Report, *US - Softwood Lumber IV* (2005).

[432] See, for instance, the Panel and Appellate Body Reports in *EC-Trade Description of Sardines* (2002).

explicitly included as such in the VCLT, [] it is consonant with the principle of effective treaty interpretation (*ut regis valeat quam paereat*), which provides the cornerstone of the VCLT."[433] In this respect, the doctrine of an "evolving interpretation"[434] is a necessary correlate to an interpretation of the GATT under conditions of an ever-shifting technology/capacity frontier.

In fulfillment of the DRB's dual mission to preserve "the rights and obligations of Members under the covered agreements" and to "clarify the existing provisions of those agreements" the Appellate Body prefers a Textualist approach where "the words of a treaty […] are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose [….]."[435] It observed in *US – Continued Zeroing* though that:

> "The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. […] [A] treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis."[436]

The "security and predictability [of] the multilateral trading system" is, according to the Appellate Body, thus best safeguarded when the wording of the covered agreements are given their "ordinary meaning" while read in their context and in light of the treaty's object and purpose. Whereas the Appellate Body acknowledges that "[a] word or term may have more than one meaning or shade of meaning," its primary effort at "the identification of such meanings" commences by interpreting the word "in isolation." Abi-Saad, a former Appellate Body member who also served as a judge for the International Court of Justice, describes the Appellate Body's preference for a strong Textualist interpretation as bordering on the obsessive.[437]

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[433] Petros C. Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by the WTO Courts," 102 *The American Journal of International Law* 421 (2008), p. 444.

[434] See the WTO Appellate Body Report, *US – Shrimp* (1998).

[435] WTO Appellate Body Report, *US – Gasoline* (1996), at 17. Similarly, the Appellate Body observes in its report in *EC - Hormones* (1998) that "[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not words the interpreter may feel should have been used" (¶ 181).

[436] WTO Appellate Body Report, *US — Continued Zeroing* (2009), ¶ 268 (emphasis added). See also Georges Abi-Saab, "The Appellate Body and Treaty Interpretation," in Fitz-Maurice Malgosia, Olufemi Elias, and Panos Merkouris, eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Leiden: Martinus Nijhoff, 2010), pp. 99–109.

[437] Abi-Saad notes that the Appellate Body is "obsédé textuel" (attributing the term to Professor René-Jean Dupuy) in Georges Abi-Saab, "The Appellate Body and Treaty Interpretation," in Fitz-Maurice Malgosia, Olufemi Elias, and Panos Merkouris, eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff, 2010), p. 106. See also, Dongsheng Zang, "Textualism in GATT/WTO Jurisprudence: Lessons for the Constitutionalization Debate," 33(2) *Syracuse Journal of International Law and Com*merce 393 (2006); and Douglas A. Irwin and Joseph H. H. Weiler, "Measures Affecting the Cross-border Supply of Gambling and Betting Services (DS285)," 7(1) *World Trade Review* 71 (2008), p. 94, fn. 45.

As first step in its hermeneutic exercise, the WTO Appellate Body professes adherence to a rather strong form of Textualism;[438] in its report *US – Gambling* the Appellate Body held that "[i]n order to identify the ordinary meaning, a panel may start with the dictionary definitions of the terms to be interpreted."[439,440] Despite a tepid trend to broaden its hermeneutic analysis beyond a reliance on dictionaries, Ortino signals a continued mechanistic, compartmentalized and hierarchical approach to the interpretation of the covered agreements by the WTO Appellate Body.[441]

While the Appellate Body has often expressed its conviction that dictionaries are a useful starting point for the analysis of the "ordinary meaning" of a treaty term, it does not consider their use "necessarily dispositive." Instead, "[t]he ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties 'as expressed in the words used by them against the light of the surrounding circumstances'."

Dörr explains that, "except where the parties have used a generic term, interpretation must look for the ordinary meaning at the time the treaty was concluded."[442] The very indeterminacy of terms, especially when referencing concepts that are perceived as general, such as "bay" or "territorial waters," however allows for a forward-leaning meaning attribution that goes beyond what could have been envisioned at the time of drafting.[443] Forward-leaning

[438] As broadly lamented in the literature, see for instance, Henrik Horn and Joseph H. Weiler, "*European Communities – Trade Description of Sardines*: Textualism and its Discontent," in Henrik Horn and Petros C. Mavroidis eds., *The WTO Case Law of 2002* (Cambridge: Cambridge University Press, 2005), p. 253.

[439] WTO Appellate Body Report, *US — Gambling* (2005), ¶164; the Appellate Body further nuanced this stance by its next sentence in that paragraph: "But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized."

[440] Note that the linguistic and grammatical analysis of the WTO Appellate Body further extends to encompass consideration of the tense in which the provision has been drafted; see, for instance, WTO Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (2002), ¶ 206 (footnote omitted); where it held that "[i]n general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present."

[441] Federico Ortino, "Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling* (2005): A Critique," 9(1) *Journal of International Economic Law* 117 (2006), p. 131 – noting that the Appellate Body's lack of consideration for "context" and "object and purpose" shows "an unusual disregard for certain policy considerations surrounding the interpretation of a fundamental and sensitive provision of the GATS. (p. 145); See also Michael Lennard, "Navigating by the Stars: Interpreting the WTO Agreements," 5 *Journal of International Economic Law* 17 (2002).

[442] Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 543; See also Lon L. Fuller, "American Legal Realism," 82 *University of Pennsylvania Law Review* 429 (1934), pp. 445-446, pointing out that generic or broad terms can (and should) be interpreted toward contemporary relevance and often technologically neutral or forward leaning. See for the use of period dictionaries to establish "meaning," Gregory E. Maggs, "A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution," 82 *The George Washington Law Review* 358 (2014).

[443] *Namibia (Legal Consequences)*, Advisory Opinion, ICJ Reports (1971), 31: "the concepts embodied in Article 22 of the Covenant […] were not static, but were by definition evolutionary […]. The parties to the Covenant must consequently be deemed to have accepted them as such."

interpretation of terms is of course not boundless, nor is it a-historical: it is in fact grounded in the historically contingent animating spirit of the agreement.[444]

As contemporary epitome of the Textualist tradition, the late US Supreme Court Justice Scalia holds that judges must do their best to figure out, first, the original meaning of laws and, second, the practical implications given new contexts for those original meanings.[445] An obvious complication for any Textualist exercise emerges from the temporal aspect of "ordinary meaning," which forces the interpreter to translate their best understanding of the historic[446] meaning into the present.[447]

When considering an inter-temporal interpretation of the provisions of the covered agreements in accordance with Article 31(3)(c) VCLT,[448] attention is not only paid to contemporaneous agreements (all relevant rules of international law that existed on April 15, 1994), but extends to those rules of international law[449] as "applicable in the relations between the parties" at the time of interpretation. Waldock further confirms this understanding in his draft Article 73.[450] The ICJ rather grounds an evolutionary approach to reading treaty texts in the "effectiveness

[444] It should, of course, be noted that the use of open-ended terms may be a deliberate drafting strategy, referencing technological neutral concepts such as "transmission" and "information" to allow an effective interpretation of their "ordinary meaning" to adjust over time. An interpretative inclination that is shared by the proponents of the "living constitution," who advocate a reading of the constitution where "provisions suggest[] restraints on the government in the name of basic rights, yet [are] sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over time." (p.57) See, Dennis Goldford, *The American Constitution and the Debate Over Originalism* (Cambridge: Cambridge University Press, 2005). In this light Pauwelyn observes: "it could [similarly] be submitted that the use of broad, unspecified terms - such as 'exhaustible natural resources', 'public morals' or 'essential security interests' in GATT Arts. XX and XXI - is an indication that the drafters intended these terms to be interpreted in an 'evolutionary' manner" in Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003), p. 267.

[445] Antonin Scalia, "Response," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1999). See for a recent overview, Gary Lawson, "Did Justice Scalia Have a Theory of Interpretation," 92 *Notre Dame Law Review* (2017), *forthcoming*.

[446] See for a fascinating exercise in meaning attribution, the construction of the word "recess" in the US Constitution based on the historical translations thereof (contemporary translations into Dutch and German describe the word as "gedurende de afweezenthyd van de Senaat" and "da der Senat nicht sitzt" respectfully), US Supreme Court, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); see Jack M. Balkin, "The Construction of Original Public Meaning," Draft on file with author (August 31, 2015).

[447] See, Paul Brest, "The Misconceived Quest for the Original Understanding," 60 *Boston University Law Review* 204 (1980); and H. Jefferson Powell, "The Original Understanding of Original Intent," 98(5) *Harvard Law Review* 885 (1985). See also, Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2012), pp. 452 et seq.

[448] Note that Article 31(3)(c) originally included a temporal limitation, referring to the rules of international law "at the time of conclusion of the treaty," see WTO Panel Report, *Chile - Price Band System* (2002), ¶ 7.85.

[449] As pointed out in Section II.A.2, *supra*, note that "rules" are indicative of a broader legal category than "agreements" (mentioned in Articles 31(3)(a) and 31(2)(a) VCLT).

[450] *Third Report of the Special Rapporteur, Sir Humphrey Waldock* (16th Session of the ILC (1964)), Doc. A/CN.4/167, ILC Yearbook (1964/II), at 61.

principle," which was ultimately subsumed in the workings of (objective) good faith in the VCLT rule of interpretation.[451]

Balkin stresses that "articulating the original public meaning is not a simple job of reporting what happened at a certain magical moment in time. It is a theoretical and selective reconstruction of elements of the past, brought to the present and employed in the present for present-day purposes."[452] Dworkin similarly points out that even a perfectly expressed (and understood) historic intent cannot be successfully applied to a contemporary factual matrix without fresh judgment.[453]

The US Supreme Court, in its efforts to accord a public meaning to the provisions of the US Constitution, increasingly relies on dictionaries in its determination of meaning.[454, 455] Rubin notes that whereas "in the past the [US Supreme Court] would 'employ[] dictionaries to refresh the Justices' memory about the meaning of words, or to provide potential meanings from which the Court would select based on statutory purpose, legislative intent,

[451] Note furthermore that the ICJ stressed that the effectiveness principle and evolutionary interpretation of terms should not lead to treaty interpretations that are "contrary to their letter and spirit" – see International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949) 174. See further Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (New York: Oxford University Press, 2009), pp. 40-41, Chapter 7. As an example, the Panel in its report, *US – Gambling* (2004), stressed that "it was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied." WTO Panel Report, *US –Gambling* (2004), ¶6.285 (citing an interim progress report of the E-Commerce Work Program group (1999)). Whereas China argued that the meaning of "sound recording distribution service" needs to be based on the ordinary meaning of the terms at the time of its accession to the WTO (2001), the WTO Appellate Body, in its report *China – Publications and Audiovisual Products* (2009), confirmed the technological neutral understanding of GATS commitments, as it held that "the term 'product' is used to refer to both tangible and intangible goods, as well as services" (¶364). China thus advanced a version of the originalist approach to the "ordinary meaning" of a text. A position that is, in some sense stricter than, but related to, Scalia and Garner's assertion that "[i]n their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations. Hence a 2012 statute referring to *aircraft*, if still in effect in 2112, would embrace whatever inventions the label fairly embraces, even inventions that could not have been dreamed of in 2012" (p. 42) in Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, Mn.: Thomson/West, 2012). But see, Richard A. Posner, "The Incoherence of Antonin Scalia," *New Republic* (August 24, 2012).

[452] Jack M. Balkin, "The Construction of Original Public Meaning," Draft on file with author (August 31, 2015), p. 9.

[453] Ronald Dworkin, "Comment," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1999), "It is a matter of complex and subtle philosophical argument what such translations consist in, and how they are possible—how, for example, we weave assumptions about what the speaker believes and wants, and about what it would be rational for him to believe and want, into decisions about what he meant to say." (p. 117).

[454] See, Samuel A. Thumma and Jeffrey L. Kirchmeier, "The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries," 47 *Buffalo Law Review* 227 (1999); Samuel A. Thumma & Jeffrey L. Kirchmeier, "The Lexicon Remains a Fortress: An Update," 5 *Green Bag* 51 (2001); and Samuel A. Thumma and Jeffrey L. Kirchmeier, Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century," 94 *Marquette Law Review* 77 (2010).

[455] In addition to the US Supreme Court, international courts exhibit a textualist bend as well; these include the WTO Appellate Body, the ICJ and the ICC. The latter is, however, constrained in its interpretational freedom by Article 22.2 of the ICC Statute, which – understandably - provides that the definition of a crime "shall be strictly construed." See Joost Pauwelyn and Manfred Elsig, "The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals," in Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (Cambridge: Cambridge University Press, 2013), p. 452; and Leena Grover, "A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court," 21 *European Journal of International Law* 543 (2010).

common sense, or some other contextual argument,' more recent cases have placed dictionaries—rather than policy, context, or structure—at the center of the case."[456]

The use of dictionaries as gatekeepers and as primary arbiters of meaning demands that the interpreter explicate the selection of dictionary and speak to its qualification to resolve the inquiry.[457] Dictionaries are, by their very nature, not impartial windows into a universally accepted lexicon and "less helpful when the inquiry properly extends beyond the word level."[458] The lexicographic analysis that compiles and orders dictionaries aims to accord "word senses"[459] to each entry, rather than predict (let alone prescribe) its operation within the full sentence or in relation to the object and purpose of the communicative instrument the term is part of.

In his dissent in *Ali v. Federal Bureau of Prisons* US Supreme Court Justice Kennedy made note of the "longstanding recognition that a single word must not be read in isolation but instead defined by reference to its statutory context." In *Ali* the majority's broad interpretation of the word "any" in "any other law enforcement officer" relied on *Webster's Third New International Dictionary*. The dissent continued to observe that "[t]he word 'any' can mean 'different things depending upon the setting'."[460]

US Supreme Court Justice Scalia tirelessly stresses that Textualism need not be pedestrian and unimaginative, but rather brings much-needed rigor to the analytical and interpretative process.[461] Textualism and Originalism are close philosophical companions that guide an interpretative exercise in the recognition that "[a] government of laws, not of men, means that the *unexpressed* intent of legislators must not bind citizens."[462]

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[456] Philip A. Rubin, "War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles," 60 *Duke Law Journal* 167 (2010), p. 169 (footnote and reference omitted).

[457] See, Jason Weinstein, Note, "Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism," 38 *University of Michigan Journal of Law Reform* 649 (2005). See also Philip A. Rubin, "War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles," 60 *Duke Law Journal* 167 (2010).

[458] Craig Hoffman, "Parse the Sentence First: Curbing the Urge to Resort to the Dictionary when Interpreting Legal Texts," 6 *New York University Journal of Legislation and Public Policy* 401 (2003), p. 406.

[459] Sue Atkins and Michael Rundell, *The Oxford Guide to Practical Lexigraphy* (New York: Oxford University Press, 2008), p. 264; Atkins and Rundell also point out that dictionaries are often viewed as prescriptive texts, something they note lexicographers are generally uncomfortable with (*Id.*, p. 2).

[460] 552 U.S. 214 (2008), at 234 (Kennedy, J. dissenting) (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004)).

[461] See for example Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, Princeton University Press, 1997); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson, 2012); and, controversially, in his dissent in U.S. Supreme Court, *James Obergefell, et al., v. Richard Hodges*, 576 US __ (2015), June 26, 2015.

[462] Amy Gutmann, "Preface," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, Princeton University Press, 1997), p. vii (emphasis in original).

According to the Textualist then, the words chosen in any treaty or statute satisfactorily express their authors' intent and have "a limited range of meaning, and no interpretation that goes beyond that range is permissible."[463] This rule presumes that a "thoroughly fluent reader can reliably tell in the vast majority of instances from contextual and idiomatic clues which of several possible senses a word or phrase bears."[464] Intervention by the interpreter in determining the "appropriate" content for this set of likely word-senses would necessarily detract from the weighing and balancing constitutive of Parties' earlier agreement – the interpreter would substitute her own normative preference for those *expressed* by the Parties.

In retort, Fish takes the position that lexical items and grammatical structures do not, by themselves, yield any meaning.[465] In fact, the text is a "nonentity" when devoid of an "informing or animating spirit" and can, as such, "neither produce nor constrain anything".[466] Therefore, at least theoretically,[467] "nothing stands in the way of any string of words becoming the vehicle of any intention."[468] The interpretative exercise does however have its rules, and a text is not entirely at the "scorer's discretion."[469] What the treaty or statute interpreter has to clarify, or ideally consciously adopt, is a set of assumptions and normative notions with which he or she reads the text. "It is [thus] the specification or assumption of intention that comes first; the fact of a text with meaning comes second."[470]

Instead of postulating a "faithful agent" that struggles between Textualism and statutory equity in a search to accord true meaning to the text at hand,[471] Fish emphasizes the primacy of interpretation over any kind of embedded "truth" that lies hidden in plain sight. Consequently, Fish concludes that "the plain meaning rule cannot be followed, [for] there is no meaning apart from purpose, and purpose cannot be inferred from the words alone […]."[472]

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[463] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, Princeton University Press, 1997), p. 24.

[464] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson, 2012), p. 93.

[465] A position loudly decried by Justice Scalia in his dissent in US Supreme Court, *King v. Burwell*, 135 S. Ct. 2480 (2015), warning that "words no longer have meaning" should a non-textualist approach find application (at 2497).

[466] Stanley Fish, "There Is No Textualist Position," 42 *San Diego Law Review* 629 (2005), p. 635.

[467] Fish distinguishes between the interpretative, philosophical, search for and construction of meaning and the "splendid labor" of adjudication or legal interpretation. Whereas the former is a theoretical investigation, the latter is an application and has to be concluded in the positive within a limited time. For a pluralist and synthetic approach to legal interpretation see, respectfully, Kent Greenwalt, "A Pluralist Approach to Interpretation: Wills and Contracts," 42 *San Diego Law Review* 533 (2005) and see Samuel C. Rickless, "A Synthetic Approach to Legal Adjudication," 42 *San Diego Law Review* 519 (2005).

[468] Stanley Fish, "There Is No Textualist Position," 42 *San Diego Law Review* 629 (2005), p. 634. Fish goes on to answer Wittgenstein's (no doubt rhetorical) question "Can I say 'bububu' and mean 'If it doesn't rain I shall go for a walk?'," in the affirmative. See Ludwig Wittgenstein, *Philosophical Investigations*, G.E.M. Anscobe, trans. (Oxford: Basil Blackwell, 1986 [1953]), part I at 38.

[469] H.L.A. Hart, *The Concept of Law* 2nd ed. (New York: Oxford University Press, 1994 [1961]) – metaphor used throughout.

[470] Stanley Fish, "There Is No Textualist Position," 42 *San Diego Law Review* 629 (2005), p. 635.

[471] John H. Manning, "Textualism and the Equity of the Statute," 101(1) *Columbia Law Review* 1 (2001).

[472] Stanley Fish, "There Is No Textualist Position," 42 *San Diego Law Review* 629 (2005), p. 646.

The art of adjudicative legal interpretation is therefore, even in most modern guises of positivist formalism,[473] primarily concerned with persuasion[474] through acceptable forms of reason and argument.[475] Certainly, multilateral treaties are never perfect expressions of subjective intent,[476] as no communicative instrument ever could be,[477] and always contain purposeful elements of rational, dogmatic constraint.[478]

It is in the approach to these structural or purposive elements that the preconceptions and initial understanding[479] of the interpreter show most clearly and have the greatest effect on the construction of a term's "ordinary meaning." The linguistic and grammatical context in which words are used thus only provides a source of secondary meaning attribution.

[473] See, for instance, Jorg Kammerhofer and Jean d'Aspremont, eds., *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), where they note that "[m]odern forms of international legal positivism, instead, celebrate the role of politics in international reality and, indeed, international legal practice even where they separate the realms of politics and scholarship." (pp. 6-7). As pointed out earlier, this work does not embrace the deconstruction of the experience of international law, but instead grounds its interpretative framework in the rational, cooperative realization of the shared norm of social welfare optimization.

[474] Fish emphasizes that validation hinges on the recipient epistemic community, in Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press 1989), pp. 488–491.

[475] See, for example, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); see also Joseph Raz, "Engaging Reason: On the Theory of Value and Action," in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge, eds., *Rights, Culture and the Law – Themes from the Legal and Political Philosophy of Joseph Raz* (New York: Oxford University Press, 2003).

[476] The WTO Appellate Body in its report in *US – Gambling* (2005) correctly differentiates between unilateral and pluri- or multilateral terms (¶160). The latter after all involves identifying the meaning common to all Members or to the instrument (as we argue).

[477] Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (Stuttgart: Reclam Verlag, 1992 [1960]), Peter Christian Lang, ed., Hauptwerke der Philosophie. 20. Jahrhundert. See for an application to international law, Alexandra Kemmerer, "Sources in the Meta-Theory of International Law: Hermeneutical Conversations," Max Planck Institute, MPIL Research Paper Series, No. 2017-02 (2017).

[478] Jean Koh Peters, "Reservations to Multilateral Treaties: How International Legal Treaties Reflect World Vision," 23 *Harvard International Law Journal* 71 (1982), p. 74, fn. 14 and 15.

[479] Gadamer successfully employs the term "Vorurteil" to clarify the inevitable pre-judgments we all bring to any epistemic process; Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (Stuttgart: Reclam Verlag, 1992 [1960]), Peter Christian Lang, ed., Hauptwerke der Philosophie. 20. Jahrhundert. Gadamer, a student of Heidegger, explores the hermeneutical notion of "understanding" ("Verstehen"). Gadamer's intention is not, as Heidegger's is, to develop an understanding of human actuality. He rather concentrates on the notion of understanding in the human sciences. In the human sciences the interpretative relationship of the text and the interpreter is always a directional discourse aimed at the application of the subject matter. Gadamer rejects the notion that to understand is to reconstruct, in a disinterested fashion, the meaning of the text according to its author. Instead, the interpreter's understanding of the text is mediated through a shared basic understanding about the subject matter of the text with its author(s). The very existence of the agreement thus presupposes a shared understanding about its object and purpose. The interpreter cannot however establish this insight conscientiously without becoming aware of her anterior influences and how they distance herself from a genuine approach to the subject matter of the text – and hence its meaning. See for an accessible introduction into Gadamer's analysis of "understanding," Jean Grondin, "Gadamer's Basic Understanding of Understanding," in Robert J. Dostal, *The Cambridge Companion to Gadamer* (Cambridge: Cambridge University Press, 2002).

2. Context

"Words communicate their meaning from the circumstances in which they are used. In a written instrument their meaning primarily is to be ascertained from the *context*, the setting, in which they are found."[480] As Judge Spender eloquently highlights, words are essentially social; that is, they are relational,[481] to each other and to the audience.

Article 31(1) VCLT likewise directs the interpreter to seek "the ordinary meaning [that is] to be given to the terms of the treaty in *their* context and in the light of *its* object and purpose" (emphasis added). While the context – broadly conceived – can serve as a "steering spirit"[482] to any reading of a text, Article 31(2) narrows its scope to those "elements [that] form part of or are intimately related to the text."[483] The general rule of interpretation thus clearly distinguishes between the immediate context of the "terms of the treaty" - as "their" grammatically refers to "the terms" - and the object and purpose of the "treaty," by virtue of the preceding reference "its."[484]

The ILC elucidates that once the starting point of the textual analysis is the (plain) meaning of the words this suggests that examination of the context and its elements (Article 31(2) VCLT) follow next. Examination of relevant extrinsic elements to the text (Article 31(3) VCLT), such as a subsequent agreement on interpretation or subsequent practice, logically follows thereafter. This is not to say there is a hierarchy between them however, as "by their very nature [they] could not be considered to be norms of interpretation in any way inferior to those which precede them."[485]

Whereas context relevant to the terms of the treaty will often be found in its vicinity, the Permanent Court correctly stresses that "meaning is not to be determined merely upon particular phrases which, if detached from the context,

[480] International Court of Justice, *Certain Expenses of the UN (Article 17, Paragraph 2, of the Charter)*, Separate Opinion Judge Spender, *ICJ Reports* (1962) 182, at 184 (emphasis added).
[481] See, Section II.A.2 above; Martii Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 9; but see contra, Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (New York: Oxford University Press, 2008), p. 340.
[482] Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (New York: Oxford University Press, 2009), p. 213.
[483] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, ¶9.
[484] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶238.
[485] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 220, ¶9.

may be interpreted in more than one sense."[486] The proper approach to framing relevant "context," ex Article 31 VCLT, is thus textual as well as con-textual.

Within the immediate treaty context, "[i]nterpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure or scheme of the treaty."[487] Whether, for example, the tense of a related verb is integral to the term under examination, or merely provides relevant context thereto, fully depends on the interpreter and consequently on the understanding of the commitment's object and purpose in relation to that of the treaty as a whole.[488]

Article 31(2) VCLT makes clear that in additional to the treaty text, including its preamble and annexes, (a) any agreement relating to the treaty, made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made between one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty, can serve as interpretative context to the rule laid down in Article 31(1) VCLT.

In case of unilateral declarations, the ILC makes clear that whether these are captured by either of the two types of context mentioned in Article 31(2) VCLT or form an integral part of the treaty, depends on the joined intention of the parties.[489] Whether they should be read as part of the context is in the hands of the interpreter and depends on the specific elements of each particular case. Van Damme notes that there is considerable doubt as to whether the description of the context in Article 31(2) VCLT is correctly read as exhaustive. She finds room in the underlying objectives of the article and its preparatory work for a broader, more open-ended interpretation.[490]

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[486] Permanent Court of International Justice, *Competence of the ILO to Regulate Agricultural Labour*, P.C.I.J. (1922), Series B, No. 2-3, p. 23.

[487] Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 543. This includes the practice of cross-referencing the meaning of terms within (and at times across) treaty texts; see Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (New York: Oxford University Press, 2009), pp. 235-253.

[488] See, for instance, WTO Appellate Body Report, *Korea – Alcoholic Beverages* (1999), ¶117; WTO Appellate Body Report, *Chile – Price Band System* (2002), ¶206; WTO Appellate Body Report, *Japan – Apples* (2003), ¶208.

[489] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, ¶13. The formalities of Article 31(2)(a) and (b) VCLT need, of course, to be fulfilled in full.

[490] Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (New York: Oxford University Press, 2009), pp. 215-216; She notes "It is doubtful whether the ILC intended to exclude other elements from possibly qualifying as context." (*Id.*, p. 218)

Relevant context can therefore also be found outside the four-corners of the treaty: in certain extrinsic agreements and instruments, as long as these fulfill the conditions of application. Note that "agreements" signify a broader notion than "treaties" and may encompass "understandings, commentaries or explanatory reports, which are agreed upon by the governmental experts drawing up the text of the treaty and adopted simultaneously with that text."[491] The term "instruments" may likewise include interpretative declarations.[492]

Moderated through the application of objective good faith, Article 31(3)(c) VCLT allows for the incorporation of non-WTO international law in the interpretation of WTO covered agreements, but in a limited fashion.[493] The application of non-WTO international law cannot undermine the collaborative structure of provisions and commitments Parties agreed upon. The application of non-WTO international law to the multilateral commitments of the WTO covered agreements needs to be supportive of or complimentary to the multilateral object and purpose of the treaty and not be limited to the general network of expectations and commitments that is effective between the parties to the present conflict alone.[494] This is further confirmed by the understanding that Parties to the WTO Agreement are assumed to have, to the extent relevant, "contracted out"[495] of the principles of customary international law. Of course, Article 3.2 DSU makes explicit reference to the "customary rules of interpretation of public international law" – somewhat limiting this exclusionary effect.[496]

Incorporation of general principles of (international) law into the adjudicatory process, ex Article 31(3)(c) VCLT, is therefore limited.[497] At the same time however, the Article makes reference to other treaties possible in the partially

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[491] Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 551.

[492] Unlike a reservation, an interpretative declaration simply states that the declarant considers or understands provision X to mean Y. It is, strictly speaking, not an object of interpretation itself, but merely provides context thereto. Of course, this presupposes complete intentional clarity in the declaration itself, something that is most unlikely as I argue in Section II.A.1.

[493] See, for example, WTO Appellate Body Report, *EC – Tariff Preferences* (2004), ¶163; and WTO Appellate Body Report, *European Communities – Export Subsidies on Sugar* (2005), ¶¶310, 312.

[494] As the Appellate Body Report, *EC - Computer Equipment* (1998) notes "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty" (¶ 84) (emphasis in original).

[495] WTO Panel Report, *Korea – Procurement* (2000), ¶ 7.96: "[…] Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."

[496] See Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge: Cambridge University Press, 2005), p. 57; see also Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?," 95 *The American Journal of International Law* 535 (2001).

[497] Assuming the adjudicator positively identifies relevant obligations of customary international law beyond those of *jus cogens*. In addition to the VCLT, the General Assembly of the United Nations' resolution on State Responsibility and the 1982 Convention on the Law of the Sea can readily be considered customary international law. However, the arbitrator's report in *US –FSC (Article 22.6-U.S.)* (2002) rather referred to resolution on State Responsibility as a supplementary means of interpretation (in accordance with Article 32 VCLT); UN GA, Resolution 56/83,

self-contained[498] WTO regulatory framework – as long as these are applicable in the relations between the Parties jointly.[499] The role of external norms as interpretative tools or as sources of law for the WTO system thus remains disputed.[500, 501]

As held early on by the Appellate Body in its report in *US – Gasoline*, "the General Agreement is not to be read in clinical isolation from public international law."[502] Weil, the Rapporteur for the Société Française pour le Droit International, similarly concluded that "[s]ur le plan scientifique, le droit international économique ne constitue qu'un chapitre parmi d'autres du droit international général."[503] The Panel further clarified the relation between WTO law and international law in general in an outlier report in *Korea – Procurement*, to hold that "international law applies to the extent that the WTO treaty agreements do not 'contract out' from it."[504]

The Panel and Appellate Body thus differentiate between con-textual interpretation of provisions and a contextual reading limited to their direct language: *i.e.* the application of the regulatory framework of the GATT/WTO to the dispute by grace of the commitments of the covered agreements and application of those regulatory elements contained in non-WTO international law. These main categories, plus a WTO-specific third category, offer potentially relevant context when construing the GATT/WTO's contractual language.

International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts; UN Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 UNTS 397, reprinted in 21 ILM 1261 (1982). Similarly the WTO Appellate Body Report in *EC – Hormones* (1998) the noted that the status of the precautionary principle in international law is still unsettled, while stressing its importance for the interpretation of WTO law.

[498] See, for example, Joel P. Trachtman, "The Domain of W TO Dispute Resolution," 40 *Harvard International Law Journal* 333 (1999); but contrast with Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003); see also Joel P. Trachtman, "Book Review," 98 American Journal of International Law 855 (2002) (reviewing Pauwelyn, *Conflict of Norms in Public International Law*).

[499] Merkouris' analysis of Article 31(3)(c) points to the adoption of a proximity criterion for proper application of the article, raising questions of conflict resolution and of the interpretation of customary international law; see Panos Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill, 2015).

[500] Petros C. Mavroidis, George A. Bermann and Mark Wu, *The Law of the World Trade Organization: Documents, Cases & Analysis* (St.Paul: West Publishing, 2010), p. 936; and Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003), pp. 257-263; noting that "it could be submitted that the criterion is rather that the rule can be said to be at least implicitly accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means" (p. 261).

[501] See also Robert Howse, "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate," 27 *Columbia Journal of Environmental Law* 491 (2002).

[502] WTO Appellate Body Report, *US – Gasoline* (1996), at 17.

[503] Prosper Weil, Rapporteur, Société Française pour le Droit International, Colloque d'Orléans, *Aspects du Droit International Economique* (1972), quoted in Joost Pauwelyn, "The Case Study: The Law of the World Trade Organization," in *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003), p. 25 (fn. 2). That the WTO Agreement, together with its covered agreements, is embedded in and part of the body of international law is an uncontroversial position that is only sporadically questioned; Judith Bello, "The WTO Dispute Settlement Understanding: Less is More," 90 *American Journal of International Law* 416 (1996).

[504] WTO Panel Report, *Korea- Procurement* (2000), ¶ 7.96. The Panel further elucidated this statement by noting: "to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."

As Mavroidis observes with regard to WTO sources of law, "[t]he supplementary means [of interpretation, ex Article 32 VCLT,] [stand] in a *vertical* relationship [to] the final agreement […]. By contrast, context points to a *horizontal* relationship." Which instruments precisely constitute the horizontal environment of the WTO Agreement is left largely to the interpreter, whose "only legislative guidance is of a temporal nature: the context, however defined, must be in connection with the conclusion of the treaty."[505]

Thus, one should not, in the case of the WTO Agreement, regard as a contextual source of law any legal instruments that were signed after April 1994, when the Uruguay round package was concluded at Marrakesh. These post-1994 treaties can nonetheless be of relevance to the multilateral Membership if they are found to be subject-relevant, or implicate the entire Membership. A comprehensive study of the fragmentation of international law is however outside the scope of the present argument.

In *EC – Chicken Cuts*, the WTO Appellate Body for example found that the Harmonized Description and Coding System (HS) was an agreement that related to the treaty and was made between all the parties in connection with the conclusion of the treaty – even though the HS pre-dates the WTO covered agreements and was not concluded at the time of the Uruguay Round negotiations.[506] A distinction between this method of invoking treaties as relevant context in the sense of Article 31(2) and their usage as interpretative guidance to establish the "ordinary meaning" of generic terms is both logical and obvious.[507]

Sands observes that Article 31(3)(c) VCLT reflects a principle of integration, stressing that rules of international law should not be considered in isolation from each other.[508] In considering the application of outside treaty norms when according meaning to the provisions of WTO covered agreements, it is however essential to note that these outside

[505] Petros C. Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts," 102 *American Journal of International Law* 421 (2008), p. 450.

[506] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶199; see also Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (New York: Oxford University Press, 2009), p. 254 and 338 et seq.

[507] Note Lon L. Fuller, "American Legal Realism," 82 *University of Pennsylvania Law Review* 429 (1934), pp. 445-446, pointing out that generic or broad terms can (and should) be interpreted toward contemporary relevance. In reference to present discussions on the regulation of cross-border trade in the digital economy, this can mean that words should often be interpreted technologically neutral or forward leaning, see Alice Enders and Amy Porges, "Cross-border Dataflows and their Governance," E-15 Think Piece (July 30, 2015), on file with author.

[508] Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law," 10 *Yale Human Rights and Development Law Journal* 3 (1998), p. 8.

norms cannot work to fundamentally add to or diminish the rights and obligations provided in the covered agreements – on principle and following Article 3.2 DSU.

For the purposes of the present study on the interpretation of the GATT/WTO provisions on export restrictive measures, the proper scope and effect of countries' permanent sovereignty over natural resources is particularly relevant. Set against its historical background,[509] the 1962 resolution[510] on the permanent sovereignty over natural resources by the United Nations' General Assembly demands particular attention as "appropriate context" for the interpretation of the GATT 1994 obligations.

In the cases *China – Raw Materials* and *China - Rare Earth* the WTO Panel and Appellate bodies were invited to consider Article XX(g) GATT 1994 in the context of a WTO Member's "sovereign rights over their own natural resources." In particular, permanent sovereignty over natural resources was argued by China[511] to provide relevant context for the interpretation of the conservation term in Article XX(g), especially in light of the object and purpose of the GATT to spur "sustainable development," as mentioned in the Preamble thereof. Complainants rather argued that "Article XX(g) GATT does not permit WTO Members to deviate from WTO rules in order to promote and realize their own self-interested economic goals."[512]

In these "hard cases" the complainants, among whom the US and EU, argued strongly that the measures taken by China to restrict the export of certain raw materials had to be considered primarily Mercantilist in character and effect. China rather invited the Panel and Appellate Body to an objective good faith reading of the object and purpose of the GATT 1994 as directed toward their "sustainable development." Due to the particularities of the case, China is consequently forced to defend their export restrictive measures by invoking Article XX(g) GATT 1994, set in the context of each Member's permanent sovereignty over natural resources. A crucial complication further examined in Chapter 5, *infra*.

[509] Declaration on the Establishment of a New International Economic Order, May 1 1974, A/RES/3201 (S-VI), paragraph (e). See also the Charter of Economic Rights and Duties of States, December 12, 1974, A/RES/3281 (XXIX), Article 2.1.

[510] UNGA Resolution, Permanent Sovereignty over Natural Resources, 1803 (XVII), New York, December 14, 1962. See also, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).

[511] WTO Panel Report, *China – Raw Materials* (2011), ¶7.364.

[512] WTO Panel Report, *China – Raw Materials* (2011), ¶7.366.

The interpretational dispute was, according to the Panel in *China – Raw Materials*, resolved by a "reading of Article XX(g) in the context of the GATT 1994 [to] take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development. As the Appellate Body explained, to do so may require 'a comprehensive policy comprising a multiplicity of interacting measures'[513]."[514]

Resource-endowed WTO Members thus find expression of their (horizontal) right to sovereignty over natural resources in Article XX(g) GATT 1994 "precisely by designing and implementing conservation policies based on their own assessment of various, sometimes competing, policy considerations, and in a way that responds to their own concerns and priorities."[515] For good measure, the Panel goes on to emphasize that it "considers that measures the objective of which is to promote economic development are not 'measures relating to conservation' but measures relating to industrial policy."[516]

Had China been able to rely on a GATT commitment with a more overtly developmental objective (such as, perhaps, Article XI:2 GATT 1994 – which was interpreted differently by the Appellate Body – or, conditionally, Article XX(i)(j) or Article XVIII:3), or been able to invoke the national (economic) security clause (Article XXI GATT 1994), this might have given the WTO dispute resolution bodies the opportunity to more directly weigh one normative economic preference against another.[517]

The Appellate Body further draws on the factual context of an interpretative question to elucidate the meaning of terms. In *EC – Chicken Cuts* factual context was posited as a midway category, between Article 31(2) and 31(1) VCLT, to examine the ordinary meaning of the term "salted" in the EC's schedule.[518] The Appellate Body seems to have relied on McNair's somewhat confused distinction between the absolute and relative meaning of terms. He holds that "while a term may be 'plain' *absolutely*, what a tribunal adjudicating upon the meaning of a treaty wants

[513] Referencing the WTO Appellate Body Report, *Brazil – Retreaded Tyres* (2007), ¶151.
[514] WTO Panel Report, *China – Raw Materials* (2011), ¶7.375.
[515] WTO Panel Report, *China – Rare Earth* (2014), ¶7.459.
[516] WTO Panel Report, *China – Rare Earth* (2014), ¶ 7.460.
[517] Some of these elements are discussed in Chapter IV, *infra*.
[518] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶148.

to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made, and in which the language was used."[519]

In its search for the ordinary meaning of a term, the Appellate Body, more than once, held that such "must be ascertained according to the particular circumstances of each case."[520] For example, in *US – Wheat Gluten*,[521] the Appellate Body held that the dictionary meaning of "immediate" could only be assessed on a case-by-case basis, relying on factual context such as the burdens of administration, the translation process, the complexity of notification, and the type of information submitted, to further clarify its plain meaning. It is important to note that the factual context has, in these cases, been employed as an interpretative element – not as part of questions pertaining to the application of law.[522]

A contentious factual element of interpreting WTO law is the weighing and balancing of the respective economic conditions under which Member States implement trade restrictive policies and how they operate these. The Appellate Body, for instance, held in *Japan – Alcoholic Beverages*, that "[…] it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; [GATT] Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[523]

The strong stance by the Appellate Body against discrimination between imported products and between imports and domestic equivalents cannot however obscure the fact that the GATT is an economic contract, concluded for the explicit aim of pursuing (sustainable/economic) development through increased trade volumes and economic production. It is, in short, an economic treaty and, as such, replete with references to economic theory, assumptions and, indeed, factual observations.

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[519] Arnold D. McNair, *The Law of Treaties*, 2nd ed. (Oxford: Clarendon Press, 1961), p. 366 (emphasis in original). See further Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (New York: Oxford University Press, 2009), p. 269.

[520] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶175; see similarly WTO Panel Report, *US – Shrimp (Article 21.5 – Malaysia)* (2001), ¶5.51.

[521] WTO Appellate Body Report, *US – Wheat Gluten* (2000), ¶105.

[522] As in WTO Appellate Body Report, *US – Shrimp* (1998), ¶¶168-171.

[523] WTO Appellate Body Report, *Japan – Taxes on Certain Alcoholic Beverages* (1996), at p. 16.

Whereas the "spirit" of the GATT shapes and governs the non-discrimination and competitive equality provisions in the GATT, it does not contest the fundamentally normative interplay between law's hermeneutical (or doctrinal) and economics' social science methodological approaches to construction and interpretation.[524] As such, use of economic "facts" and "observations" in the interpretation of provisions in the GATT/WTO is not limited to establishing cross-price-elasticity of substitution to decide whether products are indeed "like products."[525] In fact, as Keynes pointed out: "practical men, who believe themselves to bet quite exempt from any intellectual influence, are usually the slaves of some defunct economist."[526]

Developing country Member States have, in this light rather unsurprisingly perhaps, "expressed dissatisfaction with the record of interpretation thus far in the jurisprudence of the WTO."[527] This dissatisfaction has focused not only on the results of the interpretation, but also on the approach thereto and the methodology employed. Developing country Member States have often remarked upon the fact that socio-economic analysis always has bearing on the interpretation of a regulatory text – especially when engaging an agreement of international economic law.

In at least partial agreement with this critique, the Appellate Body reversed the Panel in *US – Large Aircraft (Second Complaint)*, emphasizing that:

> "We do not believe that panels can base determinations as to what would occur in the marketplace only on their own intuition of what rational economic actors would do. We recognize that a panel confronted with a measure of the kind at issue here may have intuitions as to the consistency of the measure with the market, based on economic theory. *However, we would expect that in such circumstances the panel would at least explain the economic rationale or theory that supports its intuition*."[528]

[524] See Kantorowicz, Chapter 3, *infra*.

[525] Pauwelyn considers four possible "uses" of economics in international economic law: 1. As *ex ante* inspiration; 2. As *ex post* check; 3. As interpretative tool; 4. As empirical data or "facts" - in Joost Pauwelyn, "The Use, Non-Use and Abuse of Economics in WTO and Investor-State Dispute Settlement," in Jorge A. Huerta-Goldman, Antoine Romanetti and Franz X. Stirnimann, eds., *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2013).

[526] The well-known quote by John Maynard Keynes reads more fully: "The ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist" – John Maynard Keynes, *The General Theory of Employment, Interest and Money* (Project Gutenberg, 2003 [Palgrave Macmillan, 1936]), Book VI, Chapter 24, Section V. See further, for instance, Ronald A. Cass, "Economic Perspectives on International Economic Law," in Asif H. Qureshi, ed., *Perspectives in International Economic Law* (Alphen aan den Rijn: Kluwer Law International, 2002).

[527] Asif H. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 2nd ed. (Cambridge: Cambridge University Press, 2015), p. 181.

[528] WTO Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (2012), ¶643 (emphasis added).

The Appellate Body similarly held that to determine whether there is a "detrimental impact" on imports, a Panel "must examine the operation of the particular technical regulation at issue in the particular market in which it is applied."[529] In doing so, a Panel must account for all the relevant features of the market, including the particular characteristics of the industry at issue, relevant market shares, consumer preferences and historical trade patterns.[530]

When, however, the African, Caribbean and Pacific (ACP) countries, together with India, sought to include their economic conditions as relevant context for interpreting the Agreement on Agriculture (a covered agreement), the Appellate Body readily declined to do so.[531] Although the Appellate Body noted the importance of sugar exports to the complainants, this economic reality was not regarded as relevant context to inform the consideration of the consent or acquiescence at the time of the Uruguay Round negotiations.

Positive examples of the weighing of developmental economic context by the Appellate Body are rare as the existence of market imperfections or imbalances are generally not considered relevant context for the interpretation of liberalization commitments in WTO covered agreements.[532] As Judge Ehrlich pointed out in his dissent in *Chorzow Factory* however, any "interpretation […] must take into account the economic conditions of which legal forms are merely an outward expression. Legal forms […] must serve the objects of economic life, but they must not obscure economic facts."[533]

However, the objects and facts of economic life have, through GATT practice and by Member State consent, been brought outside the reciprocal realm of the communicative instrument; but only in so far as these pertain to questions of development and "catch up." This view also permeates the "Functional/Aspirational" perspective of the GATT/WTO' object and purpose, as examined in Section 3.B.3, *infra*. The establishment of special and differential treatment and the workings of the Enabling Clause (examined in Chapter 4, *infra*) have entrenched a normative view of "mature growth"-enabled allocative efficiency in the operation of the GATT 1994.

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[529] WTO Appellate Body Report, *US – Certain Country of Origin Labeling (COOL) Requirements*, (2012), ¶325.
[530] *Id.*
[531] WTO Appellate Body Report, *EC – Export Subsidies on Sugar* (2005), ¶223, fn 346.
[532] Note for example that when private prices are considered "too distorted due to the predominant participation of the government as supplier in the market" to base a subsidy benchmark on, recourse can be had to a third country benchmark (!) – in WTO Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (2011), ¶446.
[533] PCIJ, *The Factory At Chorzow (Claim for Indemnity), Germany v. Poland* (1928) P.C.I.J. (ser. A) No. 17 (Sept. 13) (dissenting opinion Ehrlich), ¶263.

I argue that the interpreter's understanding of economic facts and theories has in fact never left the realm of GATT. An insightful exception hereto may be found in the Appellate Body Report in *Canada – FIT*, where governmental support is welcomed to create a market:

> "a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it."[534]

As noted before, the query central to this work and much practical reasoning by WTO Panels thus becomes: "by which method are Member States' economic conditions positively recognized, such that they enlighten the contextual interpretation of the language of the provisions of the GATT/WTO in a manner that furthers both the security and predictability of the multilateral trading system."

As will be argued in Chapter 4, *infra*, this methodological question necessarily precedes any understanding of the "ordinary meaning" of the words used by the Parties – instead informing the construction of the provisions of covered agreements in accordance with appropriate embedded standard of review applicable thereto. The sequencing of the different interpretative elements of 31 VCLT, as preferred and applied by the Appellate Body, is thus upset to the extent that the "ordinary meaning" of words is logically considered after the determination of the character of the provision, set within the covered agreement, and envisioned against the object and purpose of the instrument.

The interplay between the relevant factual context and the normative assessment of words needs itself to satisfy the criteria of Article 3.2 DSU and support the "security and predictability of the multilateral trading system." Hard cases, those juxtaposing the implementation preferences of developing and developed markets, force the interpreter to explicate her understanding of the relevant teleological framework in order to more transparently delineate legal

[534] WTO Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*; *Canada – Measures Relating to the Feed-In Tariff Program* (2013), ¶ 5.188. The Appellate Body continues to note that while "the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries." (emphasis in original).

doctrine from the sociological object and purpose of the covered agreement. The conditions upon which a direct consideration of the economic conditions of Member States rests need themselves to be supportive of the collaborative "object and purpose" of the treaty and its provisions, see Section 3.B.3, *infra*, while safeguarding the predictability and security of the multilateral trading system.

It is furthermore important to note that, in addition to intrinsic and extrinsic context, a third, WTO-specific, contextual element can be considered by WTO Panels, as "[d]iscussions in committees and other WTO institutional fora can inform the Appellate Body that the meaning of a treaty text is particularly sensitive."[535] Advice from an institutional body, such as the Monitoring Mechanism,[536] could thus be taken into account by the Panels and the Appellate Body to informing their understanding of the "developmental context" of certain terms without being bound by its dicta. In so far as the *travaux preparatoires* of the GATT/WTO could have provided such contextualization, these have been relegated to supplemental means of interpretation, ex Article 32 VCLT.[537]

3. Object and Purpose

Whereas the plain or ordinary meaning of treaty terms might not be instructive without a thorough contextual reading of the words and expressions used by the parties, their intent is what ultimately "animates" the communicative instrument. Historically, Hugo Grotius, Emeric de Vattel, and Christian Wolff, all referred to versions of the "object and purpose" in combination with (natural) "reason" to construct and enlighten the meaning of treaties.[538]

In this tradition, Judge Higgins, former President of the International Court of Justice, held that the goal of treaty interpretation "is not to discover a mythical 'ordinary meaning' within the Treaty," but rather "to give flesh to the

[535] See, e.g., Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products (Turkey – Textiles)* (1999), ¶48.

[536] The Monitoring Mechanism currently is to provide a forum for monitoring S&D issues, with the objective of improving beneficiaries' ability to utilize them. In particular, it will provide for regular reviews of existing S&D provisions in multilateral WTO agreements and the making of recommendations; see the WTO website: https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_monit_mecha_e.htm.

[537] But see Julian Davis Mortenson, "The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?," 107(4) *The American Journal of International Law* 780 (2013), holding that "The modern view that Article 32 relegated travaux to an inferior position is simply wrong. The VCLT drafters were not hostile to travaux. They meant for treaty interpreters to assess drafting history for what it is worth in each case: no more, but certainly no less." (*Id.*, p. 781)

[538] Hugo Grotius, *On the Law of War and Peace,* Kelsey trans., Book II (1925[1625]), p. 411-431; Emeric de Vattel, *The Law of Nations*, Chittey trans., , pp. 255-257, available: http://lonang.com/library/reference/vattel-law-of-nations/; Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, Duke University trans. (1934 [1764]), available: http://fama2.us.es/fde/ocr/2010/jusGentium_Introduction.pdf.

intention of the parties, […] [and] to decide what general idea the parties had in mind, and then make reality of that general idea."[539]

Similarly, while the ILC points out that "the parties are to be presumed to have that intention which appears form the ordinary meaning of the terms used by them,"[540] Judge Anzilotti of the Permanent Court for International Justice notes:

> I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import[ance] in this convention and in relation[] thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.[541]

Nevertheless, to many the primary guideline of the general rule of interpretation centers on according "ordinary meaning" to the terms of a treaty.[542] A Textualist approach, as favored by the ILC and some international adjudicatory bodies, stresses that "it seems quite natural that the 'terms' to which meaning is to be given refer to what has been written down by the parties, *i.e.* the words and phrases used in the treaty, rather than the bargain struck by the parties."[543]

As Parties' true intent is, of course, inaccessible to the adjudicator, a faithful interpreter needs a more rigid framework than his understanding of the "real" intention of the Parties to construct the "ordinary" meaning of terms

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[539] Declaration of Judge Higgins in *Kasikili/Sedudu Island* (Botswana/Namibia) (Judgment) (1999) ICJ Rep 1045, 1114. See also: Rosalynn Higgins, "Some Observations on the Inter-Temporal Rule in International Law," in Jerzy Makarczyk, ed., *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski* (The Hague: Kluwer Law International, 1996), p. 181. Further: H Waldock, United Nations Conference on the Law of Treaties: Official Records, First Session, Vienna, 1968: Summary Records 184 at [70].

[540] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, ¶12.

[541] PCIJ, *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night,* PCIJ, Series A/B, No. 50 (1932), Dissenting Opinion of Judge Anzilotti, at 383. Judge Anzilotti continued to, correctly, find the object and purpose of the Part XIII of the Treaty of Versailles mostly in its Preamble (at 384-387).

[542] Similarly observed by Detlev F. Vagts, "Treaty Interpretation and the New American Ways of Law Reading," 4 *European Journal of International Law* 472 (1993), p. 484.

[543] Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 541 at 40; see also, Richard K. Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008), pp. 163–164. See further, Richard A. Posner, "The Law and Economics of Contract Interpretation,"82 *Texas Law Review* 1581 (2004); see also Alan Schwartz and Robert E. Scott, "Contract Theory and the Limits of Contract Law," 113 *Yale Law Journal* 541 (2003).

as a matter of legal adjudication.[544] A more "objective" or "dispassionate" approach is thus needed to ascertain the subject matter and aim, or "object and purpose," of the agreement and its terms.[545]

The contemporary composite "object and purpose" finds it roots in the French language opinion of the International Court of Justice in *Reservations to the Genocide Convention*.[546] There, the ICJ ruled on the admissibility of reservations to treaties according to "l'objet et le but" of the latter, which appears in the English language ruling as "object and purpose." Taken literally, "l'objet" refers to the substantive content of a treaty, *i.e.* the rights and obligations created by it, whereas "le but" refers to the general result that the parties want to realize with the treaty.[547] The "object" is therefore immediate, whereas the "purpose" is somewhat more distant.[548]

The VCLT uses the singular form "object and purpose" in Article 31, paragraph 1, thereby referring to the unity of the overarching goal of the treaty and its provisions – jointly and separately. This understanding is further confirmed by use of the singular form in Article 41 paragraph 1, lit b cl. ii VCLT. While the object and purpose of the treaty and its provisions can be established through contrast with comparable treaties,[549] it is more common that the treaty lists the object and purpose Parties wish to pursue through their agreement either in the preamble thereof or in the first articles.[550]

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[544] I propose this is what Howse points to when he holds that "in emphasizing the importance of the exact words, the [Appellate Body] is not endorsing narrow literalism and eschewing teleological interpretation; rather it is taking the words as the necessary beginning point for an interpretative exercise that includes teleological dimensions. Most importantly, it is rejecting the tendency of the panels to assume a certain purpose prior to careful textual interpretation, thereby taking a shortcut to the establishment of treaty meaning that bypasses the exact text." See Robert Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence," in Joseph H.H. Weiler, ed., *The EU, The WTO and the NAFTA* (New York: Oxford University Press, 2000) chapter 2.

[545] A task the Appellate Body has identified as involving "identifying the common intention of Members" - WTO Appellate Body Report, *China — Publications and Audiovisual Products*, (2009), ¶405, quoting itself approvingly in *US –Gambling* (2005), ¶160.

[546] International Court of Justice, *Reservation to the Convention on the Prevention and Punishment of Genocide* (Advisory Opinion) (1951) ICJ Reports 15, at 24. Dorr furthermore notes that "[o]n the previous page of the opinion, however, the English 'objects' is used to translate the French 'fins,' which could imply that 'object' was meant to have a purely teleological meaning" in Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 545, fn. 145. See for further variations in the early language, Isabelle Buffard Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?," 3 *Austrian Review of International & European Law* 311 (1998), pp. 315-316.

[547] See Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 546 at 54; see further, Isabelle Buffard Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?," 3 *Austrian Review of International & European Law* 311 (1998); See also, P. Weckel, *La Concurrence des Traite's Internationaux*, These Strasbourg III (1989), p. 26, where he notes "Le but est la raison de l'objet, la situation en vue de laquelle l'objet est donné; L'objet est l'instrument du but." Our use of the French differentiation is further supported by the International Court of Justice, *Case Concerning Oil Platforms (Islamic Republic of Iran v. USA)* (1996) ICJ Reports 803–821, *passim*; see also Isabelle Buffard Karl Zemanek, "The 'Object and Purpose' of a Treaty: An Enigma?," 3 *Austrian Review of International & European Law* 311 (1998), pp. 318-319.

[548] See Elizabeth Zoller, *Le Bonne Foi en Droit International Public* (Paris: A. Pédone, 1977), p. 74; quoted approvingly in Jan Klabbers, "Some Problems Regarding the Object and Purpose of Treaties," 8 *The Finnish Yearbook of International Law* 138 (1997), p. 145.

[549] The International Court of Justice in its ruling in *Oil Platform*, contrasted the Treaty of Friendship, Commerce and Navigation (FCN) between Iran and the United States with other similar types of treaties; ICJ, *Oil Platforms* (Preliminary Objection) (1996), ¶27 (n 131).

[550] Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 544 at 50.

Dworkin[551] distinguishes between different levels of abstraction in determining the intention of Parties (strikingly he takes the example of restraints on trade). He differentiates between "abstract" and "concrete" intentions, or between "concepts" and "conceptions." In doing so, Dworkin, perhaps unintentially, partially mirrors the interpretative element of "object" and "purpose" in the VCLT.[552] An interpreter should thus be aware of the interplay of concept and conception, such that she finds that meaning, "which fit[s] the text, […] ennobles [it], [and] makes it the best it can be."[553]

The WTO Appellate Body set out its approach to the "object and purpose" of covered agreements incrementally, finding common ground with the ICJ's Opinion in *Reservations to the Genocide Convention* and the ILC's comments, in its report *US – Shrimp*:

> A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[554]

The Appellate Body thus establishes a hierarchy of proximity in its application of the "object and purpose," looking at the construction and purported aim of the commitment first ("l'objet"), with the general result ("le but") elucidating that construction. The Appellate Body, in *EC — Chicken Cuts*,[555] further clarified that:

> [T]he term 'its object and purpose' makes it clear that the starting point for ascertaining 'object and purpose' is the treaty itself, in its entirety. At the same time, we do not believe that Article 31(1) [VCLT] excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa. To the extent that one can speak of the 'object and purpose of a treaty provision,' it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.
>
> Having said this, we caution against interpreting WTO law in the light of the purported 'object and purpose' of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole.

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[551] Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985), pp. 48-49.

[552] See further Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (New York: Oxford University Press, 2014), p. 62 et seq; and George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (New York: Oxford University Press, 2007), 70.

[553] Ronald Dworkin, "On Gaps in the Law," in Paul Amselek and Neil MacCormick, eds., *Controversies about Law's Ontology* (Edinburgh: Edinburgh University Press, 1991), p. 86.

[554] WTO Appellate Body Report, *US – Shrimp* (1998), ¶114.

[555] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶¶238–240.

According to the Appellate Body then, the "l'object" and "le but" of the covered agreements need to be in consonance and should not be divorced from a reading of the treaty as a whole.[556]

At the same time, the Appellate Body does allow a reading of the object and purpose of particular instruments and commitments that could be said to operate as a temporary exception to the dominant theme of the main agreement;[557] for in *US — Tyres (China)* it considered that:

> [...] the object and purpose of [China's Accession] Protocol, as reflected in Section 16 thereof, is to afford temporary relief to domestic industries that are exposed to market disruption as a result of a rapid increase in Chinese imports of like or directly competitive products, subject to the conditions and requirements provided therein.[558]

In *US – Shrimp*, the Appellate Body found the preamble of the GATT 1994 on sustainable development relevant to its reading of Article XX(g) GATT 1994:

> As th[e] preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.[559]

In its Report in *EC – Chicken Cuts* the Panel similarly deduced the object and purpose of the WTO Agreement and the GATT 1994 from those treaties' preambles and from Appellate Body statements in *EC – Computer Equipment* - where it held that:

> [t]he security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994.[560]

The Panel in *EC – Chicken Cuts* thus determined that:

> [t]aken together, the relevant aspects of the WTO Agreement and the GATT 1994 indicate that *concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs*. [...] In other words, the

[556] A notion further supported in the Appellate Body Report, *Korea — Dairy* (1999) ¶81, where it held that "[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."

[557] In this respect, note the three interpretative approaches to "object and purpose" identified by Jonas and Saunders: (1) Requiring a process of interpretation that oscillates between individual provisions and the treaty as a whole; (2) In case of reservations, as a measure of rule coherence; and (3) As a yardstick from *extra*-contractual defection (non-violation complaints) – see David S. Jonas and Thomas N. Saunders, "The Object and Purpose of a Treaty: Three Interpretative Methods," 43(3) *Vanderbilt Journal of Transnational Law* 565 (2010). Our attention goes out to the first of these three possible interpretative methods.

[558] WTO Appellate Body Report, *US — Tyres (China)* (2011), ¶184.

[559] WTO Appellate Body Report, *US – Shrimp* (1998), ¶153.

[560] WTO Appellate Body Report, *EC – Computer Equipment* (1998), ¶82.

> terms of a concession should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties. Finally, the interpretation must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions.[561]

The European Communities however objected, arguing "the Panel erred in finding that 'concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs'."[562] The Appellate Body in its Report rather noted that the Panel did not in fact endorse an expansive interpretation of concessions, but qualified the challenged statement by its following sentence, which clarified that "such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous."[563]

The WTO Appellate Body in *EC – Chicken Cuts* thus calls attention to their assessment that "[t]his sentence underscores the Panel's view that trade liberalization is achieved through negotiations for mutual benefit. Indeed, the Panel concluded that its interpretation should be governed by the object and purpose of maintaining the security and predictability of reciprocal market access arrangements manifested in tariff concessions, […]."[564]

The WTO Appellate Body in *Argentina – Textiles and Apparel* similarly reflects that "a basic object and purpose of the GATT 1994, as reflected in Article II, *is to preserve the value of tariff concessions* negotiated by a Member with its trading partners, and bound in that Member's Schedule."[565] The Appellate Body thus emphasizes a reading of the GATT's object and purpose that focuses on the raising of the national income through the non-discriminatory lowering of tariffs and other barriers to trade in order to maximize market access under national treatment.[566]

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[561] WTO Panel Reports, *EC – Chicken Cuts* (2005), ¶7.320, cited by WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶241 (emphasis in the Appellate Body Report). See also WTO Appellate Body Report, *EC — Bananas III (Article 21.5 — Ecuador II)/EC — Bananas III (Article 21.5/US)* (1999), ¶432, where it held that: "concessions made by WTO Members should be interpreted so as to further the general objective of expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements." See similarly the WTO Appellate Body Report in *Argentina – Textiles and Apparel* (1998) where it held that "a basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule." (¶47).

[562] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶242, citing WTO Panel Reports, *EC – Chicken Cuts* (2005), ¶7.320.

[563] WTO Panel Reports, *EC – Chicken Cuts* (2005), ¶7.320, cited by WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶243.

[564] WTO Panel Reports, *EC – Chicken Cuts* (2005), ¶7.320, cited by WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶243

[565] WTO Appellate Body Report, *Argentina – Textiles and Apparel* (1998), ¶47. As is immediately obvious from the extensive Accession Protocols being negotiated in relation to recent additions to the WTO membership, the value of concessions can only be appreciated in the context of the larger WTO-acquis. For an examination of the terms of Accession Protocols in the context of Article XI GATT 1994, see Chapter 4, *infra*.

[566] Other approaches have however been suggested. See for an alternative theory of WTO negotiations, designed at overcoming domestic commitment issues, for instance, Giovanni Maggi and Andres Rodriguez-Clare, "The Value of Trade Agreements in the Presence of Political Pressures." 106(3) *Journal of Political Economy* 574 (1998). Robert Baldwin rather stresses that, in his view, "maximizing the collective economic welfare of individuals making up either a country or the world is, however, not the main policy objective of the GATT." Rather, "the broad objective is to help to maintain international political stability by establishing rules of 'good behavior' as well as mechanisms for settling disputes," cited in Douglas A. Irwin, Petros C. Mavroidis, and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), pp. 188-189. For my focus on the interpretation of the GATT commitments, Baldwin's rejection of the GATT's economic premise is problematic only if

As Jones recalls, and as was emphasized in Chapter 2.A, *supra*, the (static efficiency) gains from trade generally consist in an optimal combination of terms of trade movements and a growing real volume of trade (for a given tariff).[567] Irwin, Mavroidis and Sykes observe similarly: "[a]lthough some aspects of the GATT […] cast doubt on the terms-of-trade theory, the most central motivation […] seems to be along the lines of unwinding the retaliatory trade policies and other protectionist measures that had built up during the 1930s. In other words, terms of trade are useful in understanding the tariff bargain struck, but does not help us understand each and every provision of the GATT."[568]

These authors[569] however also note that, a frequent criticism of the terms-of-trade rationale for the GATT commitments is its failure to effectively constrain the use of export restrictions in Article XI GATT.[570] Bagwell and Staiger further examine the economic rationale for the GATT 1994 and the WTO and accord central place to its reciprocity demand,[571] celebrating it as an important liberalization tool in the face of domestic political economy pressures.[572]

As is characteristic of a regime focused on maintaining the security and predictability of the multilateral trade system, "both the GATT of 1947 and the WTO Agreement of 1994 lack any reference to […] peace and human rights; that is, the core themes of the UN-inspired order of international law. Instead, the issue is the functionality of the specific regime to secure international trade."[573, 574]

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one were to believe that relevant economic reasoning has no part in construing "good behavior." In fact, whatever economic norms such rules do contain, their application will entail an elucidation of the adjudicator's economic preconceptions – the central point in our analysis.

[567] Ronald W. Jones, "Tariffs and Trade in General Equilibrium: Comment," 59 *The American Economic Review* 418 (1969).

[568] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 198. This functionalist understanding of the GATT's rationale finds support in Section III.A.3, *supra*, where the argument was made that "object and purpose" consist of two elements, "l'objet" and "le but," read in consonants with each other and with the words of the treaty.

[569] Douglas A. Irwin, Petros C. Mavroidis, and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 179.

[570] This proposition is examined in detail in Chapter 4, *infra*, highlighting both functionalist cooperation and developmental coordination approaches to the text and context of Article XI GATT 1994.

[571] Kyle Bagwell and Robert W. Staiger, "Economic Theory and the Interpretation of GATT/WTO," 46(2) *The American Economist* 3 (2002).

[572] For a similar domestic theory of political economy drivers of international trade commitments see Wilfred Ethier, "Trade Policies Based on Political Externalities: An Exploration," PIER Working Paper No. 04-006 (2004).

[573] Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (New York: Oxford University Press, 2014), p. 85-87.

[574] Howse and Nicolaidis in contrast seek to broaden the interpretative context for the object and purpose of the WTO/GATT by "emphasiz[ing] the importance of non-WTO institutions and norms in treaty interpretation that represent values other than free or freer trade," instead of "presupposing that the treaty text is animated by a constitutional telos of freer trade or looking primarily within the WTO for the relevant structural principles." Robert Howse and Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?," 16(1) *Governance* 73 (2003), p. 75.

A reading of the object and purpose of the WTO/GATT 1947 and 1994 directed at the "functionality" of the regime consequently finds the underlying motive for the world trade system in reciprocal cooperation on lowering tariff levels, elimination of discriminatory treatment and in constraining abuse of market power.[575] The Appellate Body, in its report *EC – Tariff Preferences*, similarly explicates with reference to the GATT 1947 that:

> [w]hen the GATT 1947 entered into force, the Contracting Parties stated that one of its objectives was to 'rais[e] standards of living'. However, this objective was to be achieved in countries *at all stages of economic development* through the *universally-applied* commitments embodied in the GATT provisions.[576]

A particular understanding of the "object and purpose" of the GATT/WTO, constructed as uniformly functionalist by the Appellate Body, therefore determines, at least in part, what is considered relevant (factual) context in an economic sense (as examined in Section 3.B.2, *supra*, and critiqued in Chapter 4, *infra*). Idiosyncratic issues of development, those associated with the "catch up" model of economic growth and highlighting the heterogeneity of the economic conditions of and optimal policy responses by Member States, can thus fall by the wayside of reciprocal "mature growth"-cooperation as either market- or institutional failures.[577]

The WTO, in its Panel and Appellate Body findings against China in *China – Raw Materials* and *China – Rare Earth*, in line with the functionalist reading of the covered agreements' object and purpose,[578] has been quite clear when considering the appropriateness of restricting exports as a natural resource conservation measure[579]:

> "the Panel notes that markets respond to signals which are 'broadcast', as it were, through the price which a commodity commands in a given market. It is precisely through price that signals can be sent to and through a market.

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[575] See, Kyle Bagwell and Robert W. Staiger, "An Economic Theory of GATT," 89(1) *American Economic Review* 215 (1999); further corroborated by evidence presented in Kyle Bagwell and Robert W. Staiger, "What Do Trade Negotiators Negotiate About? Empirical Evidence from the World Trade Organization," National Bureau of Economic Research, Working Paper 12727 (2006).

[576] WTO Appellate Body Report, *EC — Tariff Preferences* (2004), ¶107 (emphasis added).

[577] See for a survey of the development-related provisions of the GATT. In the later years of the GATT 1947 development-specific provisions where certainly incorporated, most notably the balance-of-payments exception (Article XVIII:*b* GATT 1994) and infant industry protection (Article XVIII:*c* GATT 1994), but these never attained centrality and were overtaken by economic events and theory.

[578] See for an example of objectives and principles in WTO covered agreements Articles 7 and 8 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and paragraph 4 and 5 of the Doha Declaration on the TRIPS Agreement and Public Health. See also Henning Grosse Ruse-Kahn, "The (non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO," Max Planck Intellectual Property & Competition Law Research Paper, No. 11-15 (2011); and Marco M. Slotboom, "Do Different Treaty Purposes Matter for Treaty Interpretation?," Proefschrift (Dissertation) University Leiden (2005) (on file with author).

[579] China has consistently argued that its export restrictions can serve to conserve natural resources and mitigate environmental damage caused by the toxic process of extraction, such in pursuit of the exemption in Article XX(g) GATT which would then have to apply to its obligations under its Accession Protocol (quod non). China even framed its infant industry argument to ultimately benefit the environment, see as related by the Panel Reports in *China - Raw Materials* (2011), ¶7.514.

> […]
>
> [T]he Panel considers that export quotas are liable to send a *perverse signal* to *domestic consumers*. Whereas export quotas may reduce foreign demand for Chinese rare earths, it seems likely to the Panel that they will also *stimulate* domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic downstream industries. They may also encourage relocation of rare earth- consuming industries to China."[580]
>
> "The difficulty with China's contention is that export restrictions generally do not internalize the social environmental costs of EPRs' [Energy-intensive, highly polluting, resource-based products] production in the domestic economy. This is because export restrictions reduce the domestic price of EPRs and therefore they stimulate, instead of reducing, further consumption of polluting EPR products."[581]

While I agree with the Panel and Appellate Body in their implicit assumption that China's policies in fact worked to further "commercial" or beggar-thy-neighbor ends, the emphasis the Panel places on the power of prices to transmit or "broadcast" market signals of cost, supply, and demand (information) is revealing. It is precisely the veracity of the price signal that stands central to the EU, Japan, and the US' political economy goals (and policy implementation preferences) of global static allocative efficiency growth; underpinned by theories of mature growth, frontier innovation and efficient resource allocation (as examined in Chapter 2, *supra*).

The legitimate expectations that are thus protected by a functionalist reading of the covered agreements are those of certain "competitive" or liberal market conditions; not, as we have seen, expectations of actual economic outcomes or trade flows. By adopting an interpretation of the covered agreements that ultimately accords central place to expectations of price signal veracity, these legitimate expectations as to market conditions also immediately circumscribe the appropriateness of certain developmental exceptions and the construction of exemption provisions – that is, the adjudicator's assessment of Member State's legitimate expectations co-determine policy "fit."

Broude finds a dissonance in the WTO between the rules of international trade, as interpreted within the liberal or functionalist paradigm, and the rhetos of economic development.[582] He argues that the reflexive interaction between the functioning of the world trade system and the legitimate (equilibrium) expectations thereof among a

[580] Panel Reports, *China – Rare Earth* (2014), ¶¶7.442-7.444; further cited in approval in Appellate Body Reports, *China – Rare Earth* (2014), ¶¶5.186, 5.189.

[581] Panel Reports, *China – Raw Materials* (2011), ¶7.586 (footnotes omitted).

[582] Broude proceeds in a conscious parallel to a seminal article by Weiler on the dissonance between increased legalization of the GATT/WTO and its diplomatic historical core – see Joseph Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Some Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement," 35 *Journal of World Trade* 191 (2001). Whereas Broude distinguishes function and aspiration, the original work by Weiler drew on the dichotomy between external and internal legitimacy.

heterogeneous Membership gives rise to a legitimacy a-synchronicity. Broude argues that "much of the rhetos of development […] is at odds with the rule(s) of trade."

He observes that "[i]t is as if the WTO is not at all a trade organization designed to promote the reciprocal reduction of trade barriers with the aim of increasing economic efficiency. […] [For] [t]he untrained eye no longer captures the goals of wealth *creation* advanced through the harnessing of mercantilist self-interest, but rather the more idealized goal of global wealth *distribution*, or, more nakedly, of "north-south" wealth *transfer*."[583] In line with a functionalist approach to the WTO covered agreements, Broude postulates a "zero-sum game […] between the functional and aspirational legitimacies related to the evolving relationship between trade and development in the substantive law and governance of the WTO."[584]

The legitimacy of the integrative aspect of collaboration is, of course, intimately connected with its distributional counterpart. Broude's approach is however informed by the very dichotomy that Chapter 2, *supra*, challenged; between industrial policy and free trade and the universal normative appeal emanating therefrom. He supports trade liberalization as "in itself an unqualified progressive agent of development" contrasting it with a conception of development as "a non- (or supra-) trade interest."[585] The appropriate institutional and adjudicative approach, within this liberal or functionalist paradigm of international trade cooperation, thus naturally leads to a conceptual split between "the rule(s) of trade and the rhetos of development."[586]

Considerations of "effectiveness" play a large role in the assessment of a treaty's object and purpose; both in the construction of the treaty as a whole against its external normative goals and with regard to internal coherence of the provisions set against the preamble and the agreement's immediate object and purpose. Effectiveness of interpretation, the coherence of the treaty text and its application to the factual/policy matrix under dispute, are determined and inspired by the adjudicator's understanding of the object and purpose of the communicative instrument.

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[583] Tomer Broude, "The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO," 45 *Columbia Journal of Transnational Law* 221 (2006), pp. 238-239 (emphasis in original).
[584] *Id*., p. 247.
[585] *Id*., p. 22
[586] *Id*. p. 22.

Whereas Dorr holds that "the consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty"[587], I argue that the ordinary meaning of the text cannot be established without prior understanding of the instruments' object and purpose. The limits set by the "ordinary meaning" of the words Parties chose to express their good faith collaborative intent are themselves delineated by the interpreter's conceptualization thereof.

This realization opens the door to the consideration of power, be it political or economic, and idealized norms in the decision making of the interpreter. Chapter 4, *infra*, will engage these arguments and show how the collaborative intent of Parties is fundamentally irreducible and finds expression through the interpretation of the adjudicator as she operationalizes Parties' collaboration "in me" instead of "for me".

4. Good Faith

The collaborative nature of international law has changed since the end of the Cold War, according to many scholars in the field,[588] from a set of norms directed at "co-existence" to a normative framework aimed at deeper "co-operation."[589] This change in collaborative character of international law is visible at bilateral, plurilateral and multilateral levels and reflected in the explosive growth of the number of treaties governing the behavior of the international community internationally (and increasingly domestically).

Across these different bilateral and multilateral constellations, Franck rightly notes that "[i]n the interstate community, the belief that *pacta sunt servanda* – that treaties, all treaties, are binding, and not just when they are convenient or advantageous – is what keeps the bumblebee of international law aloft."[590] Gardiner, more broadly,

[587] See Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 547 at 56.

[588] Some scholars however find international law unchanged, either as an expression of raw power emanating from the political (economy) realm, or as historically determined expressions of imperialist norms and values.

[589] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge: Cambridge University Press, 2003), p.17.

[590] Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium," 100 *American Journal of International Law* 88 (2006), p. 92. His contention however that "realists" mis-understand this *Grundnorm* (p. 91) of international law, (incorrectly) presupposes a strong myopia in "Professors Jack Goldsmith and Eric Posner [sweeping observation] that 'international law does not pull states toward compliance contrary to their interests, and the possibilities for what international law can achieve are limited by the configurations of state interests and the distribution of state power'." Read through the lens of Realistic Idealism (Chapter III, *infra*),

remarks that the term "treaty relations" embraces both the content of the obligations and the legal commitment of one party toward another party to observe the particular obligations in their relationship.[591] Interpretation and performance are in this way central to the determination of the content of the contractual bonds ("pacta") in relation to the obligation to honor them faithfully.

Faithful adherence to the provisions of a treaty is first of all borne out of the disposition of each of the Parties so bound.[592] However, when confronted with a dispute between Parties, the adjudicator is rather compelled to have recourse to an objective measure of "good faith," which incorporates systemic notions such as fairness and reasonableness. The adjudicator thus construes the meaning of the provisions of the treaty both in (personal) good faith and with an eye to safeguarding the systemic collaboration between Parties (emphasizing the systemic collaboration "in" me, instead of Parties' perception of collaboration "for" me).

In contrast to a strong Textualist view of legal interpretation, where a faithful interpreter seeks to "discover" the ordinary meaning of a word, a modern theoretical perspective elucidates adjudicatory interpretation as a process of continuous norm-application; dictated by the language of the treaty and determined by the collaborative intent of Parties. I note that the substantive aspects of the doctrine of good faith, such as *abus de droit,*[593] are relevant to the interpretation of WTO law only in so far as they have been codified (and serve as horizontal "context") or directly support the collaborative intent of Parties.[594] Extensive consideration is therefore not accorded to substantive aspects of good faith and attention is directed at its Mercurial task.

Goldsmith and Posner instead make the point that compliance is dependent on the ability of the common norm to overcome a low-level equilibrium – which is necessary a long-term strategy, due to the risk of strategic unraveling (but see, p. 93, fn. 16, where Franck qualifies his argument to short-term defection).

[591] Richard K. Gardiner, "Treaties and Treaty Materials: Role, Relevance and Accessibility," 46 *ICLQ* 643 (1997).

[592] The ILC report on the fragmentation of international law, notes in parentheses the definition of Parties' good faith at the contracting moment, namely "the presumption that States do not enter agreements with the view of breaching obligations" (paragraph 447, p. 226); Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682, April 13, 2006. The Appellate Body has similarly observed that: "according to Article 31 of the Vienna Convention, a treaty is to be interpreted in good faith. That means, inter alia, that terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party." WTO Appellate Body, *US – Anti-dumping and Countervailing Measures (China)* (2011), ¶¶326–327.

[593] See Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2006), especially chapters 1-6. For an application of the doctrine of good faith and "abuse de process" in the context of investment arbitration, see Eric de Brabandere, "'Good Faith,' 'Abuse de Process' and the Initiation of Investment Treaty Claims,"3(3) *Journal of International Dispute Settlement* 609 (2012).

[594] WTO Panel Report, *Korea- Procurement* (2000), ¶ 7.96. The Panel further elucidated this statement by noting: "to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."

The obligation to act in good faith rests both on the Parties in their fulfillment of the treaty's provisions, as on the adjudicator in her interpretation thereof. The principle of good faith is thus central to the interpretation of international communicative instruments and inherent to the process of adjudicatory decision-making. The notion of good faith derives relevance to adjudicators' interpretative exercise in three ways: as a general principle of law, as a principle of customary international law, and as a principle of WTO law.

Powerfully, Judge Lauterpracht held that "[u]nquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."[595] Similarly, the general principle of good faith was recognized as of fundamental importance during the drafting of the Statute to the Permanent Court of International Justice.[596, 597] The principle of good faith, so O'Connor suggests, is derived from "the necessity for a minimum of human co-operation and tolerance if group living is to emerge and survive."[598]

The principle of good faith is subsequently also a cornerstone concept of customary international law, with a long history. Grotius recognized that "good faith should be preserved, not only for other reasons but also in order that the hope of peace may not be done away with. For not only is every state sustained by good faith, as Cicero declares, but also that greater society of states."[599] Schwarzenberger and Brown furthermore list good faith as one of the seven fundamental principles of (customary) international law.[600]

In its commentary to Article 3 of the Draft Articles of State Responsibility the ILC observes that "[e]very State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[601]

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[595] International Court of Justice, *Certain Norwegian Loans (France v. Norway)* (Jurisdiction) [1957] ICJ Rep 9, 53 (Judge Hersch Lauterpacht).

[596] Lord Phillimore, Advisory Committee of Jurists, Proces-verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920, with Annexes (1920) 335; see also Andrew D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge: Cambridge University Press, 2008), p. 108.

[597] Note however that Brownlie holds that "good faith is not part of the 'overriding principles of international law […] forming a body of ius cogens'" - Ian Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press), p. 515.

[598] John O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991), p. 6; See also Robert Kolb, "Principles as Sources of International Law (with Special Reference to Good Faith)," 53 *Netherlands International Law Review* 1 (2006), pp. 17–20.

[599] Hugo Grotius, *De Jure Belli ac Pacis* Libri Tres (1625), Chapter 25.

[600] Georg Schwarzenberger and Edward D. Brown, *A Manual of International Law* 6th ed. (Milton: Professional Books, 1976), p. 7.

[601] International Law Committee, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 3, Commentary (5), p. 37.

Article 26 VCLT similarly observes: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The International Court of Justice emphasized that good faith in the context of Article 26 VCLT should be read so as to allow:

> … the purpose of the Treaty, and the intentions of the Parties in concluding it, [to] prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.[602]

When discussing this cornerstone article, the Soviet Union however observed that "the strict application of treaties was essential to stable international relations; the violation of treaty obligations undermined the foundations of peace and trust between States, and generated disputes which could lead to military action."[603] Of course, what a "strict application" of treaties in the interest of "stable international relations [… and] peace and trust between States" precisely involves is ultimately left to the adjudicator's discretion.[604]

Moreover, the adjudicator's understanding of the nature of that discretion, in the interest of international collaboration, stands central in the interpretative exercise. Whereas international customary law – based on state practice and *opinio iuris* – tends to follow reality (in degrees of mimicry), treaty language stands in permanent tension to the passing of time and changing (economic) circumstances.[605]

It is in recognition of this bridging function between the dynamism of (economic) reality and the intractable nature of treaty language that the ILC stresses the roots of *bona fides* in effective treaty interpretation.[606] Note that this connection between economic reality and the interpretation of treaty language is central to the good faith selection of relevant "economic context" as examined in Section 3.B.2, *supra*.

The obligation to peruse the language of a treaty in good faith ex Article 31 VCLT can, perhaps, best be described as "a fundamental requirement of reasonableness qualifying the dogmatism that can result from purely verbal or […]

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[602] International Court of Justice, *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* (Merits)[1997] ICJ Rep 7, 79.

[603] United Nations Conference on the Law of Treaties, First Session, Twenty-Ninth Meeting (April 18, 1968), Doc. A/CONF.39/C.1/SR.29, p. 152 at ¶7.

[604] Compare with Justice Scalia's insistence that a "text should be construed strictly and should not be construed leniently" in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), p. 23; see Section II.A.1, *supra*.

[605] See, Christina Binder, "Die Grenzen der Vertragstreue im Volkerrecht," in *Beitrage zum auslandischen offentlichten Recht und Volkerrecht*, Band 245, Max Planck Institut (Berlin: Springer Verlag, 2013), p. 617, where she refers in particular to the "legalization" (Verrechtlichung) of the necessity defense: shifting from "necessity knows no law" to a strictly construed "law of necessity."

[606] As noted before, the ILC favors a Textualist approach to according meaning to the terms of an international agreement; ILC, pp. 220-221, ¶¶11-12.

excessively teleological analysis."[607] What qualifies as "reasonable" is however in itself a function of what is deemed persuasive. In this view (legal) reasoning operates as the handmaiden to normativity,[608] while good faith operates as its wet-nurse, reconciling the terms of a treaty with their object and purpose as an expression of such practical reasoning[609].

This capacity of good faith is showcased most clearly in the general reluctance to accept "non-liquet" rulings in a system of law directed toward international peace and collaboration (as reflected in Article 3.7 DSU's direction to achieve a positive solution to each case).[610] Good faith and "legitimate expectations [thus] 'maintain the integrity of WTO law in the overall system of international law' generally and 'increase the linkages' to non-WTO treaties specifically."[611] Koskenniemi and Leino are however reluctant to interpret international law as "complete" system.[612] They hold that "[t]he Cold War pragmatic consensus was that if international law had not become [a] 'complete system' […] this was due to a hostile political environment."[613]

Rosenne reminds that "good faith" directs attention to the close link that is deemed to exist between the obligation and its performance: "for […] interpretation […] is not an exercise in abstraction but has an essential functional role in the decision-making process of a party or of a court or tribunal as regards the performance of the obligation." He further notes that the essential function of good faith in this context is "to give a broad interpretation of the scope of

[607] Oliver Dorr, "Article 31," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 548, ¶61 (stress removed); Richard K. Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008), pp. 151, 157.

[608] Where normativity is defined as "the phenomenon of features of the world making certain responses, emotional, cognitive or active, appropriate, in conditions in which we have the capacity to respond to them through recognizing that fact." See Joseph Raz, "Normativity: The Place of Reasoning," King's College London Dickson Poon School of Law Legal Studies Research Paper Series No. 8 (2015), p. 28; and Joseph Raz, *From Normativity to Responsibility* (New York: Oxford University Press, 2011), chapter 5.

[609] See, Joseph Raz, *Practical Reason and Norms* (New York: Oxford University Press, 1999).

[610] See, for instance, Lauterpracht, where he explains: "Under the normal rule of law it is inconceivable that a court should pronounce a non-liquet because of the absence of law. This is certainly not so because the positive law has provided a solution for all possible emergencies. The reason for it is that law conceived as a means of ordering human life—cannot without abdicating its function concede that there are situations admitting of no answer" – in Hersch Lauterpracht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933), pp. 64-65. The flexibility of the doctrine of objective good faith to facilitate the application of relevant legal principles to covered "emergencies," inside and outside trade policy flexibility mechanisms, is thus emphasized. I am likewise mindful to avoid the law and economics paradox behind an overly-rigid application of legal rules in a "complete" system; see Katharina Pistor, "A Legal Theory of Finance," 41(2) *Journal of Comparative Economics* 315 (2013).

[611] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2006), p. 184 (reference omitted).

[612] Interpretation of any system of law as a complete system necessarily emancipates its understanding, to an important extent, from exogenous (or rather pre-contractual) power dynamics between the Parties and limits attention to the interaction of the adjudicator with the complete system (in this approach, the adjudicator is, of course, not immune to the pressures of real power and normative ideals).

[613] Martii Koskenniemi and Paivi Leino, "Fragmentation of International Law, Postmodern Anxieties," 15 *Leiden Journal of International Law* 553 (2002), pp. 559, 561.

equitable principles, provided that in so doing the treaty is not revised; and in turn to emphasize the flexibility by appropriate language in the treaty."[614]

Although the Appellate Body, in its report in *US – Gasoline*,[615] partially overlooks the importance of good faith as an interpretative element ex Article 31 VCLT, the doctrine certainly serves as a cornerstone principle of the covered agreements and of the system of WTO trade law as a whole; substantively,[616] interpretational (Article 3.2 DSU) and with regard to dispute settlement (Article 3.10 DSU[617]). The Appellate Body in fact recognizes the principle of good faith as "at once a general principle of law and a general principle of international law, [that] controls the exercise of rights by states."[618]

The Appellate Body has, since its report in *US–Shrimp*,[619] often sought "interpretative guidance" from good faith as a "general principle of law and general principle of international law," rather than as an element of the VCLT's customary rule of interpretation (Article 31).[620] In fact, it found the chapeau of Article XX GATT was "but one expression of the principle of good faith."[621] Cottier and Schefer,[622] as well as Lennard,[623] consider that the notion of "good faith" as applied by the Appellate Body in its interpretation of the covered agreements does originate in Article 31 VCLT, but has become imbued with notions that are potentially broader than those identified by the ILC's Textualist approach.

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[614] Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), pp. 175, 178-179 – cited in Andrew D. Mitchell, "Good Faith in WTO Dispute Settlement," 7 *Melbourne Journal of International Law* 339 (2006), p. 347. See further Andrew D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge: Cambridge University Press, 2008).

[615] Appellate Body Report, *US – Gasoline* (1996), p. 17; where it holds: "Applying the basic principle of interpretation that the words of a treaty, like the General Agreement, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose, […]." In its report, reference to "good faith" is only made when citing the rule of interpretation of Article 31 VCLT.

[616] The doctrine of good faith can easily be said to be a general principle of (international) law, and is recognized as such by the Appellate Body when it referred to the "general principle of good faith that underlies all treaties" in its Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (2001), at ¶81.

[617] See further Appellate Body Report, *US- FSC* (2000), at ¶166; and Appellate Body Report, *Mexico- Corn Syrup (Article 21.5- US)* (2001), at ¶ ¶73-74.

[618] Appellate Body Report, *US – Shrimp* (1998), at ¶158.

[619] The WTO Appellate Body reminds us in its Report, *US–Offset ('Byrd Amendment')* (2003), ¶297, that it has recognized the relevance of the principle of good faith in a number of cases, including *US –Shrimp* (1998),at ¶158, *US- FSC* (2000), at ¶166, and *US – Hot-Rolled Steel* (2014), at ¶101.

[620] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2006), p. 200.

[621] WTO Appellate Body Report, *US – Shrimp* (1998), ¶ 158.

[622] Thomas Cottier and N. Krista Schefer "Good Faith and the Protection of Legitimate Expectations in the WTO," in Marco Bronckers and Reinhard Quick, eds., *New Directions in International Economic Law: Essays in Honor of John H Jackson* (The Hague: Kluwer Law International, 2000), p 64.

[623] Michael Lennard, "Navigating by the Stars: Interpreting the WTO Agreements," 5 *Journal of International Economic Law* 17 (2002), p. 55.

In its report *US–Offset ('Byrd Amendment')* the Appellate Body observes that "Article 31(1) of the Vienna Convention directs a treaty interpreter to interpret a treaty in good faith […]."[624] Panizzon however finds that "the AB has not in addition to text, context, object and purpose, recognised good faith as an interpretative tool, specifically not if it is intended to protect the legitimate expectations that a member may claim."[625] She notes that "[t]oday, the 'precept' reaches beyond the traditional meaning *of* conditions of competition under Article III GATT/Article XVII:3 GATS to more elusive protection of legal security and predictability to plan as the preconditions *for* competition […]."[626]

Panizzon further clarifies that the doctrine of legitimate expectations, as an expression of good faith, functions to "protect the 'value' of exchanged trade concessions."[627] This value consists however not in the protection of trade volumes, but rather in the "price effect" of concessions[628] - that is, "whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset."[629]

The Appellate Body offers further support for an "objective" interpretation by a reading of the liberalization and non-discrimination commitments of the GATT 1994 to include a WTO-specific expression of good faith: the protection of legitimate expectations as to the "conditions of [or rather for] competition."[630] Good faith, as employed in Article 31 VCLT and as applied by the WTO, therefore is correctly approached by means of an objective rather than subjective standard of interpretation.

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[624] WTO Appellate Body Report, *US–Offset ('Byrd Amendment')* (2003), ¶296.

[625] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2006), p. 366.

[626] *Id.*, p. 129, continues with some examples "such as trade, non-foreseeable changes both as to a member's tariff schedule or as to competitive bidding opportunities assured in the negotiations to the plurilateral GPA but subsequently changed as of the actual schedule of concession."

[627] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2006), p. 131; see also the WTO Panel Report, *EC–Computer Equipment* (1998), ¶¶8.69, 8.71; and the GATT Panel Report, *EEC–Oilseeds I* (1990), ¶148.

[628] See, GATT Panel Report, *EEC–Oilseeds I*, (1990), ¶¶147-148, 151; see also, WTO Appellate Body Report, *India–Patents* (1997), ¶40, for a list of cases on the issue. The doctrine of good faith is furthermore fundamental to WTO-specific non-violation complaints, which we will not examine here.

[629] WTO Panel Report, *Japan–Film* (1998), ¶10.86.

[630] See, GATT Panel Report, *Italy–Agricultural Machinery* (1958); GATT Panel Report *US–Taxes on Petroleum (Superfund)* (1987), ¶5.1.9; and the WTO Appellate Body Report, *Japan–Alcohol* (1996), p 32 (see also WTO Panel Report, *Japan–Alcohol* (1996),¶¶7.1-7.2). The WTO Panel Report, *India–Patents* (1997), ¶¶7.20-7.22 and fn. 81-84, declared it is a "well-established GATT principle" and provides a list of cases using legitimate expectations as a GATT-specific substantive principle protecting the conditions of competition.

In this light, and when read in combination with the various of Sections 3.B, *supra*, it is instructive to note that the International Tribunal in *Diverted Cargoes* determined that "the principle of good faith, which governs both the interpretation and the execution of treaties, leads to the search for the common intention of the parties."[631] Lauterpacht rendered this line of reasoning as meaning that "the principle of good faith impels the assumption of a common purpose" and that "good faith and consideration of the general purpose of the treaty may legitimately provide a substitute for any lack of common intention."[632]

It is subsequently clear from Lauterpacht's choice of words that Parties' intention, by necessity, would have to be construed as an objective intention. As similarly argued by Lowe, "in international law literal interpretations and applications of legal instruments must not be allowed to defeat the evident intentions of those who made them"[633] as mitigated by "good faith" and determined by the adjudicator's understanding of the communicative instrument's object and purpose, read against the appropriate context.

[631] International Tribunal, *Diverted Cargoes* (Greece v United Kingdom) (1955) 12 RIAA 53, 70 ('le principe fondamental de la bonne foi qui régit, soit l'interprétation, soit l'exécution des conventions et incite à rechercher la commune intention des États contractants'); quoted in Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (New York: Oxford University Press, 2014), pp. 69-70.

[632] Hersch Lauterpacht, *International Law—Collected Papers* IV (Cambridge: Cambridge University Press, 1978), pp. 437–438.

[633] Vaughn Lowe, *International Law* (New York: Oxford University Press, 2007), p. 117.

The Multilateral Standard of Review: Export Restrictions, GATT Exceptions and Exemptions

Chapter 4:

An Open-Ended Construction of Exemption Provisions in the GATT 1994

Chapter 4: An Open-Ended Construction of Exemption Provisions in the GATT 1994

The WTO and its covered agreements, including the GATT 1994, are expressions of Parties' united collaborative intent. This collaborative intent will be argued, theoretically in this chapter and applied to the regulation of export restrictions in the next, to be directional – that is imbued with an accessible object and purpose. Whereas it might be tempting to understand the entirety of the GATT 1994 against its declared 1947 objective – namely, the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce – the WTO Agreement provides a broader context: "to enhance the means for doing so in a manner consistent with [Member States'] respective needs and concerns at different levels of economic development."

In the wake of the Uruguay Round and the adoption of the WTO Agreement, the newly created Appellate Body actively pursued the judicialization of the international trading system. The increased legalization of dispute settlement under the Appellate Body's reading of the Dispute Settlement Understanding (DSU) found expression in several ways, some regarding legal interpretation others concerning institutional relationships. Three aspects are of express salience for the present argument: (i) the adoption of textualism and formalism (rejecting teleological and functional interpretation), (ii) the adoption of normative benchmarks (integrating, by reference, certain aspects and benchmarks anchored outside the immediate GATT/WTO treaties), and (iii) the rejection of an institutional balance between the Appellate Body and other parts of the WTO institution.[634]

Simultaneously, reflecting Uruguay Round negotiations,[635] questions on the scope and character of the standard of review applied by the Panels and Appellate Body gained markedly in significance. The Appellate Body found Article 11 DSU "directly on point," where it prescribes "an objective assessment" in matters of legal construction – this includes both legal interpretation as well as the fitting of facts to the language of a provision. The standard of review when assessing facts was determined to be somewhat more deferential, "neither de novo review as such, nor 'total deference,' […]."[636]

[634] See for a fuller list, Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 31.
[635] See Chapter 1, *supra*.
[636] WTO Appellate Body Report, *EC – Hormones* (1998), ¶¶117-118 (footnotes omitted). See also Chapter 1, *supra*.

In subsequent reports,[637] the Appellate Body clarified that the standard of review should be understood in light of the obligations of the covered agreement under consideration ("embedded standard of review"). The "objective assessment" of Article 11 DSU thus receives further color and texture from the provisions of the agreement (i.e. the GATT 1994). Application of the embedded standard of review is further informed by the demands of Article 3.2 DSU – which notes that security and predictability of the international trading system are central values in any dispute settlement and that construction and interpretation of the covered agreement cannot add to or diminish the rights and obligations of Member States.

Moreover, Article 3.2 DSU provides the instruments by which an objective assessment of the matter under adjudication is to be achieved: the customary rules of interpretation of public international law. The Appellate Body, as Chapter 3, *supra*, shows, has identified the VCLT as reflective thereof and adopted the treaty's Textualist bend as central interpretative framework. The ordinary meaning of the language of the provisions of the GATT is however not plainly accessible (in theory and in practice), even with the aid of a dictionary. Instead, the adjudicator necessarily draws on her understanding of the object and purpose of the instrument (and provision) to accord its words appropriate meaning.

In accordance with Article 11 and 3.2 DSU the WTO adjudicator is directed to find the ordinary meaning of the provisions governing the matter before her in an objective manner. In *China – Publications*, the Appellate Body clarifies the basic structure of the WTO covered agreements by focusing on rules and exceptions: "[Member State regulatory requirements] may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception." In her construction of the scope of the provisions of the GATT 1994, in accordance with the applicable standard of review, the adjudicator thus needs to be mindful of this structural feature of the GATT.[638]

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[637] See in particular, WTO Appellate Body Report, *EC –Computer Equipment* (1998), ¶89; *Argentina – Footwear Safeguard Measures* (2000), ¶122; WTO Appellate Body Report, *US – Lamb Safeguards* (2001), ¶105; WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), ¶184. See further WTO Appellate Body Report, *US – Continued Hormones Suspension* (2008), ¶¶590-593; and WTO Appellate Body Report, *Australia – Apples* (2010), ¶¶356-359. See Chapter 1, *supra*.

[638] Exceptions to the GATT 1994 come, largely, in four forms: General Exceptions (Article XX GATT), National Security Exception (Article XXI GATT), Nonapplication (Article XXXV GATT, and Article XIII WTO Agreement), and Waivers (Article XXXV GATT and Article IX WTO Agreement); see, for instance, Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 556.

The balance the adjudicator finds between rule and exception is however furthermore conditioned by a constructive third element: exemptions to the "rule-exception" framework. Mavroidis notes that "[e]xemptions" should not be confused with "exceptions": the former term covers transactions that do not come at all under the ambit of the relevant legal discipline, the consequence being that parties remain free to act on their own volition (unless, of course, if they are bound by another legal discipline)." In contrast to exemptions, "an exception is an agreed deviation from an established discipline and signals a shift in the allocation of burden of proof if a WTO member wants to avail itself of this possibility."[639]

In this three-point balancing act the adjudicator receives instruction from and is circumscribed by her understanding of applicable normative, doctrinal and sociological teleologies.[640] In relevant part, these three teleologies are reflected in GATT/WTO adjudicatory theory and practice by the obligation to rule in good faith (including respecting the objective expectations of the Membership), by the power of persuasive precedent (in the absence of stare decisis), and by the economic object and purpose of the covered agreements and their provisions.

With respect to the sociological teleology coloring the construction of the GATT's exceptions and exemptions to headline rules, the WTO Agreement is instructive. In its preamble, the Membership declares that the provisions of the covered agreements are to be understood so as "to enhance the means for [economic cooperation] in a manner consistent with [Member States'] respective needs and concerns at different levels of economic development." In her "objective assessment" of matters concerning headline and exception provisions, the adjudicator should, in accordance with the object and purpose of the agreement, construe such provisions with emphasis on the "integral" component of Parties' collaboration.[641] However, when a matter implicates an exemption provision, the adjudicator

[639] Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 140.

[640] See Section A, *infra*; Hermann Kantorowicz, *Rechtswissenschaft und Soziologie* (Karlsruhe: C. F. Müller, 1962 [1911]), cited in Anne van Aaken and Joel P. Trachtman, "Political Economy of International Law: Towards a Holistic Model of State Behavior," University of St. Gallen Law School, Law and Economics Research Paper Series No. 2015---08 (July 2015), p. 3, fn. 6. See also Andrew Jeffrey Spadafora, *Freedom from Value Judgments: Value-Free Social Science and Objectivity in Germany, 1880-1914*, Doctoral dissertation, Harvard University (2013).

[641] In international economic law collaboration among sovereigns occurs to pursue beneficial outcomes that cannot be realized in autarky and always consists of "a distributive as well as an integrative aspect […]," see I. William Zartman and Saadia Touval, "Introduction: Return to the Theories of Cooperation," in I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), p. 7.

is called to explicitly acknowledge the diversity of Member State's directional preferences as part of the "distributive" component of the collaborative intent of Parties.

In her construction of exemption provisions – notably Article XI:2(a) GATT 1994 – the adjudicator should accordingly be actively mindful of existing preference heterogeneity among the Membership as to appropriate economic policies, while avoiding the "*summum malum* of a free fall into beggar-thy-neighbor protective discrimination."[642] In crafting a positive decision implicating the distributive component of the collaborative document, the adjudicator can fall prey to behaving "as a political body reacting to signs of times."[643]

Instead of following a deconstructive reasoning that doesn't recognize the cooperative spirit of the GATT 1994 in the "regulated madness" of decision making, I argue for a contextualized rule of deference to guide the decision maker in her interpretation of key terms.[644] I find such contextualized rule of deferential interpretation in an application of the Oates' Decentralization Theorem to the GATT/WTO context. In applying this contextual rule of deference, the decision maker is however further constrained in her reasoning by the two other elements of the teleological triptych: (i) good faith (including objective expectations); and (ii) the force of persuasive reasoning emanating from past decisions.

The below Sections will address in (A) the importance of the standard of review to the adjudicator's understanding of the text and teleology of the GATT 1994, highlighting its function in the GATT 1994 (complementary to Chapter 1.A, *supra*). Against this framework, judicial decision making by the interpreter comes to stand central; juxtaposing the power of political preferences of the adjudicator with her understanding of the collaborative character of the multilateral treaty. This understanding is consequently framed as part of and circumscribed by an interpretative triptych introduced by Kantorowicz in 1911.

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[642] Paraphrasing Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 45.

[643] Petros C. Mavroidis, "The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body," EUI Working Paper RSCAS 2016/31, p. 1.

[644] Mavroidis criticizes the Appellate Body for failing to "develop[] its own understanding of the rationale for, and the objective function of the agreements that it is called to interpret." Rather, the Appellate Body "behaved as a political body reacting to signs of times." As a consequence, "[t]he quest for contextual understanding of the key terms remains […] elusive." Petros C. Mavroidis, "The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body," EUI Working Paper RSCAS 2016/31, p. 1.

Section (B) explores the interpreter's understanding of the object and purpose of the GATT 1994 and introduces a proposed rule of interpretative deference as part of the multilateral standard of review and its open construction of exemption provisions. This section then proceeds to anchor the rule of deference in its appropriate context (of law and when fitting facts), before arguing how the obligation of good faith – emanating from the VCLT – informs this interpretational exercise to find the ordinary meaning of the exemption of Article XI:2(a) GATT. Together, Section B forms the central expression of the open construction of exemption provisions in the GATT 1994 and WTO covered agreements and provides an anchor to the sociological pane of Kantorowicz' triptych.

Section (C) addresses the obligation of the WTO adjudicator to safeguard the security and predictability of the multilateral trading system. This normative demand of Article 11 DSU is envisioned as the operationalization of the second pane of Kantorowicz' triptych, constraining the constructive and interpretative labor of the adjudicator.

Section (D) examines the interpretation of the "developmental exception" of Article XVIII GATT. This article presents a possible mid-point between the exceptions of Article XX GATT and the exemption of Article XI:2(a) GATT. The interpretation of Article XVIII GATT is furthermore relevant for the Appellate Body's relationship to "political" bodies of the WTO (those anchored in the "WTO institution" and not in the adjudicative body). The Appellate Body's oppositional stance to such bodies limits the ability of the Doha Round "monitoring mechanism" to develop into a strong advisory body informing the Appellate Body on questions of economic growth and developmental policies.

Chapter 5 applies the multilateral standard of review – and subsequent "open" construction of exemption provisions -- to critique the Appellate Body's decision in its report in *China – Raw Materials*. The analysis in the following chapter completes the consideration of Kantorowicz' triptych by examination of the doctrinal constraint (third pane) on the WTO adjudicator when constructing and interpreting exemption provisions.

A. The GATT 1994 Standard of Review: Text and Teleology

When a domestic measure is successfully brought before the WTO Panels and Appellate Body for consideration, the applicable standard of review determines the intrusiveness of the adjudicatory review to follow. The standard of review not merely determines the scope of and relationship between provisions of the covered agreement, but also sets the boundaries to the extent that Panels and the Appellate Body can give preference to one interpretation over another.[645] In other words, the doctrine is broadly related to the "margin of appreciation."[646]

The appropriate standard of review is relevant to the interpretation and construction of the legal provisions of covered agreements,[647] as well as to the determination of facts.[648] As argued in Chapter 1, *supra*, the legal process of interpretation and meaning attribution also covers the fitting of "economic facts" to the letter of the provisions. Legal construction thus covers both the interpretation of the scope of provisions and terms, as well as the process of fitting facts thereto (such in line with the principle *iura novit curia*). As the present argument concentrates on the construction and legal interpretation of exemption provisions in the GATT, the appropriate standard of review for the assessment of raw "facts" falls outside the scope of immediate consideration.

The Appellate Body further clarified in *EC – Hormones* that it considers the application of the appropriate standard of review by the Panel also a matter of "law" and therefore within its purview. The Appellate Body held: "[w]hether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question, which, if properly raised on appeal, would fall within the scope of appellate review."[649] The

[645] See, for instance, Steve Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governance," 90 *American Journal of International Law* 193 (1996).

[646] See John H. Jackson, "Sovereignty, Subsidiarity, and Separation of Powers: The High-Wire Balancing Act of Globalization," in Daniel L. M. Kennedy and James D. Southwick, eds., *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002), p. 182.

[647] See, for instance, John H. Jackson, *The World Trade Organization, Constitution and Jurisprudence* (London: Routledge, 1998), p. 90.

[648] Whereas the difference between the assessment of facts and determination of the law is long standing in both international as well as domestic law, Stuart rightly observes that the distinction "is subject to manipulation in order to achieve what a reviewing court considers to be the proper substantive allocation" of decision making power; Andrew W Stuart, "'I Tell Ya I Don't Get No Respect!': The Policies Underlying Standards of Review in U.S. Courts as a Basis for Deference to Municipal Determinations in GATT Panel Appeals," 23 *Law & Policy in International Business* 749 (1992), p. 760.

[649] WTO Appellate Body Report, *EC – Hormones* (1998), ¶132; as confirmed in WTO Appellate Body Report, *Australia – Salmon* (1998), ¶264; and again in WTO Appellate Body Report, *EC – Poultry* (1998), ¶133.

Appellate Body thus retains mastery over all aspects of the standard of review as applied by both itself and the Panels.[650]

The standard of review is crucial in shaping the jurisdictional competence of WTO adjudicatory bodies[651] in relation to Member State measures. In *EC-Hormones* the Appellate Body clearly marked the two extremes of intrusiveness: *de novo* review and "total deference."[652] A de novo investigation into a domestic policy measure offers very little in terms of constraints on the Panel, while total deference limits the judicial review to a formal examination of procedural requirements for the adoption of any measure. Domestic legal systems have found different measures of balance on this scale, whereas dispute settlement in international law is still developing its tradition[653] – generally and particular to each treaty.[654]

1. Standard of Review and Deference

The concept of the standard of review is inevitably caught up with questions of legal activism and judicial constraint. In considering the appropriate amount of deference accorded by the WTO standard of "objective" review, some have looked to the Chevron-doctrine of US domestic administrative law.[655] The three central arguments presented in favor of adopting Chevron-style deference – namely increased expertise, efficiency and accountability at the lower level[656] - do not however translate very well to the level of the WTO.

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[650] In fact, the WTO Appellate Body will even "complete the analysis" when it considers the factual matrix either clear enough (but found the Panel erred in the law) or when it feels it can sufficiently efficiently complete the analysis of both law and fact; see, for instance, WTO Appellate Body Report, *Australia – Salmon* (1998); and WTO Appellate Body Report, *Canada – Periodicals* (1997). Howse finds support for this practice in Articles 3.3 and 3.2 of the DSU; in Robert Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power," in Thomas Cottier and Petros C. Mavroidis, *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: The University of Michigan Press, 2003), pp. 18-20.

[651] Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 14.

[652] WTO Appellate Body Report, *EC – Hormones* (1998), ¶117.

[653] See, for instance, Thomas Cottier and Matthias Oesch, "The Paradox of Judicial Review in International Trade Regulation: Towards a Comprehensive Framework," in Thomas Cottier and Petros C. Mavroidis, eds., *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003).

[654] See, among a burgeoning literature, Lukasz Gruszczynski and Valentina Vadi, "Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration Converging Parallels?," in Lukasz Gruszczynski and Wouter Werner, eds., *Deference in International Courts and Tribunals Standard of Review and Margin of Appreciation* (New York: Oxford University Press, 2014).

[655] *Chevron USA Inc. v. Natural Resources Defense Council Inc*, 467 US 837 (1984). As unsuccessfully argued by the United States in the Uruguay Round, see Chapter 1, *infra*, For a critical discussion see Steve Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governance," 90 *American Journal of International Law* 193 (1996); see also, Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Cheltenham: Edward Elgar, 2012), pp. 68-72.

[656] The three arguments in favor of adopting a Chevron-style review are: (i) a higher expertise in the application and interpretation of law at the lower level; (ii) democratic accountability is better assured at the lower level; and (iii) efficiency is dispute settlement is not promoted due to increased chances of a legal tower of babel (conflicting interpretations of the provisions of the covered agreements); see Steve Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governance," 90 *American Journal of International Law* 193 (1996).

Panels can readily be said to have more expertise than domestic authorities, both *de facto* and *de lege*, in interpreting and applying the provisions of the covered agreements. Furthermore, Panels do not restrict democratic accountability when considering arguments in full – especially, as argued in this work, when Panels explicitly acknowledge prevailing preference heterogeneity among the Membership when completing their construction of relevant provisions. In fact, by adopting a standard of review that is explicitly multilateral in character the Panel strengthens the connection between WTO dispute settlement and the Membership jointly.

A more procedural approach to identifying the line of deference and to set the appropriate standard of review is argued by Zleptnig. He argues for the introduction of a "deliberation test," such that Panels should inquire into the deliberative process of domestic authorities in order to calibrate the appropriate level of intrusiveness. This deliberation test will "lead to more deferential treatment of well founded, rational policy choices and less deference in the absence of suitable public deliberation."[657] This procedural approach to the standard of review implicates its operation in a rich and well defined normative field, akin in scope to the global administrative law project (or alternatively offering a venue for international review of the quality of domestic deliberative democracy).[658]

Spamann rather argues for a full *de novo* test,[659] which he narrows to the assessment of facts in trade remedy cases. In positioning the Panel for a *de novo* review, Spamann emphasizes the adversarial nature of Panel proceedings (instead of engaging a Panel's possible fact-finding powers). A full *de novo* test would empower the independence of Panels and concentrate the reasoning of the Panel on the interpretation of the provisions of WTO covered agreements instead of trying to second-guess the reasonableness of the administrative process followed by domestic authorities. Furthermore, Panels, so he argues, are tempted to let the grey-scale of the present standard of review slide into full review, despite the Appellate Body's warning in *US – Lamb* to not substitute their view for that of

[657] Stefan Zleptnig, "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority," 6(17) *European Integration Online Papers* (2002).

[658] Benedict Kingsburry, Nico Krisch and Richard B. Stewart, "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* 15 (2005); see also Carol Harlow, "Global Administrative Law: The Quest for Principles and Values," 17(1) *European Journal of International Law* 187 (2006).

[659] Holger Spamann, "Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis," 38(3) *Journal of World Trade* 509 (2004).

domestic authorities.[660] Spamann finally observes that despite implicating the sovereignty of Member States, this ultimate feature of states cannot much inform the debate around the appropriate standard of review as all obligations of WTO law have been voluntarily assumed by its Members.[661]

The focus on the sovereign ability of states to act and bind themselves finds ground in the tradition of international law expressed in the *Lotus* case (by the ICJ),[662] which reserves an absolute scope for the initial ability of the sovereign to act. On one hand, the concept of sovereignty in this framework operates as a resistance against legal activism and in support of the interpretative assumption of *in dubio mitius*.[663] On the other hand, it is unlikely from a contractual point of view[664] that the concept of national sovereignty instructs the adjudicator to adopt a generally deferential stance as consideration of the vertical separation and balance of power does not explicitly feature (unlike as in the domestic context).[665] In fact, this approach to contractual cooperation between states places a premium on the political reality shaping the cooperation initially and does little to aid the judicial decision maker in delineating the appropriate scope of each provision in the absence of her ultimate political sensibility (see Section B, *infra*).

As however noted, with the judicialization of the international trading system following the establishment of the WTO at the end of the Uruguay Round, the Appellate Body moved[666] to adopt strict textualism and a matter of formalism to distance itself from the political WTO institution (and, to some extent, the free trade teleology associated therewith). In this sense, the standard of review as applied by the Appellate Body, at both the level of the treaty and the provision, can be read as a conscious move away from *Lotus*-inspired notions of sovereignty and toward a de-politicization and further judicialization of decision making under the DSU.

[660] WTO Appellate Body Report, *US – Lamb Safeguards* (2001), ¶74; Holger Spamann, "Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis," 38(3) *Journal of World Trade* 509 (2004), p. 540.

[661] Holger Spamann, "Standard of Review for World Trade Organization Panels in Trade Remedy Cases: A Critical Analysis," 38(3) *Journal of World Trade* 509 (2004), p. 553.

[662] The Case of S.S. Lotus (France v. Turkey), Permanent Court of Int'l Justice, P.C.I.J. (ser. A) No. 10 (1927).

[663] See, for instance, John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006). See also, John H. Jackson, "The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results," 36 *Columbia Journal of Transnational Law* 204 (1997). See furthermore WTO Appellate Body Report, *EC – Hormones* (1998), ¶12.

[664] See WTO Appellate Body Report, *Japan – Alcoholic Beverages* (1996), Part F (p. 15), where it held that "The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain."

[665] See also Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p.29.

[666] The Appellate Body moved to adopt the textualism of the VCLT as early as its report in *US – Gasoline* (1996).

Ehlermann and Lockhart in turn point out that the standard of review has varied depending on the measures and WTO obligations under consideration.[667] This argument I have similarly made in Chapter 1, *supra*, and have referred to the resulting standard of review as "embedded" or dependent on the type of provision under review. Ehlermann and Lockhart accord special preference to the text of the relevant covered agreement[668] – an approach that seems to fit well with the practice of the Panels and Appellate Body, as well as with the emphasis placed on judicialization of WTO dispute settlement procedures. For example, Panels adjudicating disputes under Article III and XX GATT are relatively unconstrained in their adoption of an intrusive standard of review, whereas in trade remedy cases the treaty language points to a larger measure of deference.[669]

Ehlermann and Lockhart point, in addition to the structure and context of the treaty language, to the obligation of the adjudicator mandated by Article 3.2 of the DSU to maintain the security and predictability of the multilateral trading system. They furthermore stress that the dispute settlement system works to preserve the balance of Member State's rights and obligation under WTO covered agreements.[670] The authors note that the Appellate Body in *EC – Hormones* clarified that "the standard of review […] must reflect the balance established in [the particular WTO agreement] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves […]."[671]

Similar to Ehlermann and Lockhart, I do not start my inquiry into the construction of the provisions of covered agreements with the notion of sovereignty.[672] Instead, by adopting the perspective of the multilateral adjudicator, I argue that the bounds of legal provisions should be primarily established with full reference to the object and purpose of the collaborative multilateral instrument. That is, only with direct reference to the object and purpose of the provision and the agreement generally can the adjudicator adopt an embedded standard of review that reflects the balance of competences conceded and retained.

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[667] Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law," 7(3) *Journal of International Economic Law* 491 (2004); see also Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016).

[668] Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law," 7(3) *Journal of International Economic Law* 491 (2004).

[669] *Id.*, pp. 508, 520.

[670] *Id.*, pp. 493-494.

[671] WTO Appellate Body Report, *EC – Hormones* (1998), ¶115, cited in Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law," 7(3) *Journal of International Economic Law* 491 (2004), p. 494.

[672] See for a different approach, for instance, Joshua Meltzer, "State Sovereignty and the Legitimacy of the WTO," 26(4) *University of Pennsylvania Journal of International Economic Law* 693 (2005).

In *China – Publications* the Appellate Body articulated the structure of the GATT as entailing a "rule-exception" framework.[673] The appropriate standard of review, informed by this structural feature of the GATT and colored by the adjudicator's obligation to maintain the security and predictability of the multilateral trading system, is therefore integrative with respect to the construction of headline rules and exceptions thereto. The integrative aspect is further bolstered by the preamble to the GATT 1947, noting rather succinctly that the reciprocal and mutually advantageous arrangements of the GATT are "directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."

In line with this integrative view of the appropriate embedded standard of review is the Appellate Body's clarification, also in *China – Publications*, that it considers the "right to regulate" as an inherent power of each Member State which the provisions of the covered agreements operate to discipline.[674] The nature and scope of this discipline is provided by the standard of review, as applied by the Appellate Body with respect to the provision under consideration and with reference to the object and purpose thereof.

This rule-exception framework is however incomplete without consideration of exemption provisions, such as Article XI:2(a) GATT 1994. To properly construe the ambit of exception provisions, the adjudicator must account for the scope accorded to exemption provisions when finding an interpretation that appropriately balances those rights that have been conceded with those that were retained by the Member States.

Instead of relying on the negotiating history to determine the intended balance between rights conceded and retained, as supplementary means of interpretation of Article 32 VCLT, I seek to distance the interpretation of the GATT 1994 from the politics that dominated the GATT 1947 (and to a certain extent the WTO institution, see Chapter 1, *supra*). In turn, I rely on an object and purpose test, a primary means of interpretation ex Article 31 VCLT, to calibrate the scope of the embedded standard of review for exemption provisions.

[673] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222-223; building on WTO Appellate Body Report, *US – Gasoline* (1996), p. 30, where it held that "so far as concerns the WTO, [Member State legislative autonomy] is circumscribed only by the need to respect the requirement of the *General Agreement* and the other covered agreements."

[674] WTO Appellate Body Report, *China – Publications* (2010), ¶222.

The appropriate balance between rules-exceptions and pertinent exemption provisions of the GATT 1994, struck by application of the embedded standard of review, is informed by the object and purpose of the exemption provision. The preamble to the WTO Agreement is in turn clear in its emphasis – postulating that the reciprocal and mutual advantageous arrangements of the GATT are to be understood and applied "in a manner consistent with [Member States'] respective needs and concerns at different levels of economic development."

The judicial decision maker thus finds the preference heterogeneity among the Membership as to optimal growth policies circumscribed by two different standards of review. Exceptions are to be construed with emphasis on the integral aspect, whereas exemption provisions demand emphasis on the distributive aspect of multilateral collaboration on international trade policies. As such, the intrusiveness of the review should be lesser when the analysis concerns exemptions; i.e. a higher level of deference is required when construing the legal ambit of exemption provisions in relation to both headline rules and associated exceptions.

Were the adjudicator to adopt a blanket integrative perspective and interpret exemptions with an eye toward the lowering of barriers to trade, she would not merely violate the balance of rights and obligations but also interpret the collaborative agreement toward a pre-selected Truth (the "origin-becoming" or historicism fallacy).[675] In the absence of preference homogeneity in the Membership (quod non), her acceptance of such pre-selected truth in turn reveals her prejudice and subjects her to power-dynamics identified by Mavroidis.[676]

2. Judicial Decisions: From "Regulated Madness" to Balanced Multilateralism

For the adjudicator to initially attempt any reading of the GATT 1994, she needs to formulate a first conception of the multilateral agreement and its Membership. Only by according the constituent Member States with certain attributes can she positively determine the character of the multilateral collaboration set out in the pre-amble of the

[675] See Michel Foucault, "Nietzsche, Genealogy, History," in *Hommage a Jean Hyppolite* (Paris: Presses Universitaires de France, 1971); see also Michel Foucault, "What is Critique?" in Sylvère Lotringer, ed., *The Politics of Truth* (New York: Semiotext(e), 2007).

[676] Petros C. Mavroidis, "The Gang that Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body," EUI Working Paper RSCAS 2016/31.

WTO Agreement and in the provisions of the covered agreements. To successfully ground her "objective" construction of the agreement in an embedded standard of review that is sensitive to the object and purpose of the agreement, she needs to clarify her understanding of the "rationale for, and the objective function of the [covered] agreements."[677]

Not unlike the Appellate Body in *Japan – Alcoholic Beverages*,[678] I assume that Member States, in pursuing their policy preferences collaboratively, are guided by rational choice; that is they are aware of transaction costs, have complete, transitive, and continuous sets of individual preferences and engage in thorough cost-benefit analyses, but are not complete utility maximizers.[679] This assumption enables a weakly-Paretian view of collaboration; ensuring that signatories strive for maximization of their own welfare and avoid entering into agreements that are fundamentally harmful, abusive, or coercive to an individual actor in the short or long term.[680]

Political economy approaches are often critical of the central welfare assumption of classical and neoclassical economics: they dismiss the tenet of policy setting by high-minded, welfare-maximizing decision-makers ("benevolent dictators" or "social planners") as naïve thinking. Schropp, for instance, extends the premise of methodological individualism to hold that "policy is drafted by self-interested government officials who care predominantly about maximizing their personal wellbeing, be it in the form of political support, re-election endeavors, receiving important information, or maximizing their budgetary discretion."[681]

As this work adopts the perspective of the adjudicator, political economy explanations for the dynamics of contractual agreement at the formation and compliance[682] stage are of limited relevance. Such dynamics can only

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[677] *Id.*, p. 1.

[678] WTO Appellate Body Report, *Japan – Alcoholic Beverages* (1996), Part F (p. 15).

[679] I wish to side step the discussion on bounded rationality, as, for some, bounded rationality is equivalent to irrationality (*e.g.* Daniel Kahnemann, "Maps of Bounded Rationality: Psychology for Behavioral Economics," 93(5) *American Economic Review* 1449 (2003)), while for others it is related to the Bayesian updating of otherwise perfectly rational actors (*e.g.* Ariel Rubinstein, "Perfect Equilibrium in a Bargaining Model," 59(4) *Econometrica* 777 (1982)). See generally, Herbert A. Simon, "A Behavioral Model of Rational Choice," 69(1) *Quarterly Journal of Economics* 99 (1955).

[680] See also, Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009).

[681] *Id.*, p. 135, fn. 5.

[682] In a recent paper, Van Aaken and Trachtman develop a method "that integrates [public international law] more holistically in a [political economy] model" – viewing public international law both "as *explanans* as well as *explanandum*." (p. 11) Their central unit of analysis however remains domestic interests, examined through the dual-layered ability of states to form international law and comply therewith. See Anne van Aaken and Joel P. Trachtman, "Political Economy of International Law: Towards a Holistic Model of State Behavior," University of St. Gallen Law School, Law and Economics Research Paper Series No. 2015-08 (July 2015).

partially inform the judicial decision-maker of the true collaborative intent of Parties, especially in a multilateral context with time-inconsistent (expanding) membership. By adopting the position of the adjudicator, attention switches from the mechanics of achieving collaboration (or rather cooperation) to the focal point of such collaboration; the provision, commitment, or entitlement, presented to the adjudicator for interpretation.

Accordingly, while Parties operate an inherently self-oriented conception of collaboration "for me,"[683] with particular reference to appropriating the gains of collaboration or defection (acquisition), the adjudicator safeguards the targeted collaborative object and purpose of the multilateral communicative instrument. The adjudicator thus emphasizes the systemic collaboration "in me" and derives the interpretative (normative) vector for her decision from an understanding of goals and object and purpose of the instrument.[684]

Collaboration in the WTO is therefore, from the perspective of the judicial decision-maker, goal-oriented to the extent that all Members are assumed to be rational (although not perfectly so) and have agreed to a limited cooperation on and coordination of their trade policies to enhance the outcome of the "trade game." Collaboration in the WTO is however not unidirectional (or cooperative), but instead subject to conflicting normative or sociological preferences. Appropriately, the Appellate Body notes that "the line of equilibrium, […], is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[685]

Correspondingly, the appropriate standard of review is "embedded" in the provisions and capable of reflecting the different aspects of collaboration (integral and distributive) as the adjudicator seeks to balance the rights and obligations of Member States under the multilateral agreement. Note that the international trade regime is therefore one of multilaterism, not in the sense of collaboration driven by shared empathy between the actors,[686] but one of

[683] For the distinction between cooperation "for me" and "in me," see I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), Part I.

[684] Mavroidis, argues complimentarily that a theory of disputes is best derived from a consideration of (i) the reasons for contracting, i.e. the "primary law" (entitlements) that signatories have given themselves, (ii) the protection accorded to those entitlements, and (iii) the degree of contractual completeness; Petros C. Mavroidis, "Remedies in the WTO: a Framework of Analysis," Mimeo (2006), quoted in Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009).

[685] WTO Appellate Body Report, *US – Shrimp* (1998), ¶¶158-159.

[686] A sense of solidarity among the rational actors can work to further stabilize equilibrium behavior and provide additional legitimacy to the regulatory framework. As such, the principle of solidarity may be integrated with the contractual obligation to perform and adjudicate in good faith. Solidarity among states is however not a sufficient, although to a certain extent necessary, reason for stable international cooperation among players

rational commitment on substantive issues (i.e. domestic measures restricting exports).[687] Against this background, the adjudicator strives to achieve that interpretation of the provisions of the GATT 1994 "which fit the text, […] ennoble[] [it], [and] make[] it the best it can be."[688]

In a powerful post-modern critique of the ability of the interpreter to accomplish her task deductively, that is, with the pretense of logical necessity,[689] Koskenniemi argues that an adjudicator ultimately needs recourse to extra-legal concepts in support of her conclusion. The manner in which the adjudicator, but also the practitioner,[690] partakes in the international legal discourse is said to be determined by structural elements,[691] such as power dynamics or external values, and is historically contingent.[692]

According to Koskenniemi, the international legal discourse oscillates interminably and necessarily between two poles of argumentation that ultimately force recourse to an external source of validity: abstract utopianism and power apologism. These constraints are not "flaws" in reasoning, doctrinal or otherwise, but are constraints inherent to language and argument itself. A deconstructive perspective reveals how the apparently dominant term of a meaning pair depends in each opposition on a secondary term for its meaning or force.[693] Only a political choice can

with non-homogenous preferences. See, Rudiger Wolfrum and Chie Kojima, eds., *Solidarity: A Structural Principle of International Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 213 (Heidelberg: Springer Verlag, 2010); and Herbert Gintis and Samuel Bowles, eds., *A Cooperative Species: Human Reciprocity and Its Evolution* (Princeton: Princeton University Press, 2011).

[687] I do not here differentiate between "multilateral" and "multilateralism" as is sometimes done in the literature to denote the difference between cooperation and coordination respectfully. The character of international trade, properly envisioned not as fundamentally antagonistic but rather as compliance and outcome-oriented, supports this broader use as pertaining to the commitment between Member States. See, I. William Zartman and Saadia Touval, "Introduction: Return to the Theories of Cooperation," in I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), p. 2.

[688] Ronald Dworkin, "On Gaps in the Law," in Paul Amselek and Neil MacCormick, eds., *Controversies about Law's Ontology* (Edinburgh: Edinburgh University Press, 1991), p. 86.

[689] Deconstruction is a technique that aims to reveal structural – as opposed to a causal or logical – explanations for the incompleteness or indeterminacy of a (international legal) discourse.

[690] Koskenniemi takes care to emphasize, overly modest, that he does not seek to (re)establish a general theory of law, but rather that he aims to clarify the practice and discourse of international lawyers. Rather than grounding the validity of an international legal argument in *a priori* ideological self-justification, Koskenniemi maintains that "[i]nternational law is what international lawyers do and how they think." Martti Koskenniemi, "Between Commitment and Cynicism: Outline for a Theory of International Law as Practice," in Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011).

[691] Martti Koskenniemi, *From Apology to Utopia; the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005 [1989]). Note that "[a]lthough this work unquestionably reflects the influence of the Critical Legal Studies (CLS) movement in the United States, it draws, in doing so, directly on the source of French structuralism, borrowing its analytical method from the work of Levi-Strauss; it is thus less influenced by the 'Derridean' strands of CLS so popular in the United States." E Jouannet, "Koskenniemi: A Critical Introduction," in Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011), p. 2.

[692] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* Hersch Lauterpacht Memorial Lectures (Cambridge: Cambridge University Press, 2002). See also, Martti Koskenniemi, "International Law and Hegemony: A Reconfiguration," 17 *Cambridge Review of International Affairs* 197 (2004).

[693] A concept related to Wittgenstein's 'language games' and language as performance acts in Austin. See Ludwig Wittgenstein, *Philosophical Investigations*, G.E.M. Anscobe, trans. (Oxford: Basil Blackwell, 1986 [1953]); and John Langshaw Austin, *How To Do Things With Words*, 2nd ed. (New York: Oxford University Press, 1976).

determine a solution;[694] in this way "international law reproduces the paradoxes and ambivalences of a liberal theory of politics."[695]

As a result of Koskenniemi's deconstruction of the international legal argument, "the [adjudicatory] decision always comes about, […], as a kind of 'regulated madness', never reducible to any structure outside it."[696] The untamed decision maker thus engages in legal adjudication by making distinctions in much the same way as they are made between "kitsch and non-kitsch."[697] A good judge is therefore someone with good taste (gusto), a thoroughly contingent metric – and one that is highly susceptible to the political economy pressures of personal utility maximization (or advancement).

This deconstructive argument is quite separate from, although not hostile to, the realization that norms and words are indeterminate in themselves. While the struggle of sign-indeterminacy is part of the application of legal reasoning, examined in Chapter 3, *supra*, Koskenniemi's critique targets the structure of the international legal discourse. In Koskenniemi's approach to international law, the aporia of law to satisfactorily complete and positively attain meaning attribution is limited through "cultures of formalism." Such formalism is not positivistic, rather as "against the particularity of the ethical decision, formalism constitutes a *horizon* of universality, embedded in a *culture* of restraint, a *commitment* to listening to others' claims and seeking to take them into account."[698]

In his execution of the deconstructionist technique, and ultimate introduction of cultures of formalism, I posit Koskenniemi overlooked a fundamental, non-reducible, element internal to the legal universe: Parties' desire to

[694] See, for instance, Serio Dellavalle, "Law As a Linguistic Instrument Without Truth Content? On the Epistemology of Koskenniemi's Understanding of Law," Max Planck Insitute, MPIL Research Paper Series, No. 2016-08.

[695] Martti Koskenniemi, *From Apology to Utopia; the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005 [1989]), p. xiii. Note though that Koskenniemi does not simply invert the relationship between law and politics; in fact, "law and politics seem[]coherent and separate, yet [are] related to one single reality." Martti Koskenniemi, "The Place of Law in Collective Security," 17 *Michigan Journal of International Law* 455 (1996).

[696] In this sense Koskenniemi's "decisionism" comes closer to Carl Schmitt's conception of decisions in the legal discourse, than to Hannah Arendt's description of the "action" in public sphere; see Martti Koskenniemi, "International Law as Political Theology: How to Read the Nomos der Erde," 11 *Constellations: An International Journal for Critical and Democratic Theory* 492 (2004); and Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations," in Michael Byers, ed., *The Role of Law in International Politics* (New York: Oxford University Press, 2000), pp. 17–34; and Hannah Arendt, *The Human Condition*, 2nd ed. (Chicago: University of Chicago Press, 1998).

[697] Martti Koskenniemi, "International Law in Europe: Between Tradition and Renewal," 16(1) *European Journal of International Law* 113 (2005), p. 123.

[698] Martti Koskenniemi, "The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law," 65 *The Modern Law Review* 159 (2002); reproduced in *The Politics of International Law* (Oxford: Hart Publishing, 2011), p. 128.

collaborate.[699] As Descamps noted, "deconstruction is not destruction";[700] rather, as Jouanet puts it: "it is to bring to the surface meanings that the play of language and the structures of thought have hidden or forbidden."[701] While Koskenniemi only retains an immediate sense of power from his deconstruction, he, arguably, accords insufficient weight to the decisive role that practical reason and inter-subjectivity play in the adjudicator's effort to achieve coherent meaning attribution.

By sensitizing the standard of review with which the adjudicator approaches the provisions of covered agreements to the collaborative inter-subjectivity of the multilateral agreement, I allow the interpreter to partly avoid the deconstructive trap of reductionism. Certainly, multilateral treaties are never perfect expressions of subjective intent,[702] as no communicative instrument ever could be,[703] and always contains purposeful elements of rational, dogmatic constraint.[704] It is in the approach to these structural or purposive elements that the preconceptions and initial understanding, prejudices and biases,[705] of the adjudicator show most clearly and have the greatest effect on the construction of a term or provision's "ordinary meaning."

Gadamer rejects the notion that to understand is to reconstruct, in a disinterested fashion, the meaning of the text according to its author (*mens auctoris*).[706] Instead, the interpreter's understanding of the text is mediated through a shared basic understanding about the subject matter of the text with its author(s). The very existence of the agreement thus presupposes a shared understanding about its object and purpose (and consequently its integral and distributive aspects). The interpreter cannot however establish this insight conscientiously without becoming aware of her anterior influences and how they distance herself from a genuine approach to the subject matter of the text – and hence its meaning.

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[699] A full argumentation hereof goes beyond the scope of the present work. See however, Jacques Lacan, "The Function and Field of Speech and Language in Psychoanalysis" (1953) and also, Lewis Call, *Postmodern Anarchism* (Lanham: Lexington Books, 2002).

[700] Christian Descamps, *Quarante Ans de Philosophie Française* (Paris: Bordas, 2003), p. 150: "déconstruire n'est pas détruire".

[701] E Jouannet, "Koskenniemi: A Critical Introduction," in Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011), p. 6.

[702] The WTO Appellate Body in its report in *US – Gambling* (2005) correctly differentiates between unilateral and pluri- or multilateral terms (¶160). The latter after all involves identifying the meaning common to all Members or to the instrument (as I argue).

[703] Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (Stuttgart: Reclam Verlag, 1992 [1960]), Peter Christian Lang, ed., Hauptwerke der Philosophie. 20. Jahrhundert.

[704] Jean Koh Peters, "Reservations to Multilateral Treaties: How International Legal Treaties Reflect World Vision," 23 *Harvard International Law Journal* 71 (1982), p. 74, fn. 14 and 15.

[705] Gadamer successfully employs the term "Vorurteil" (prejudice) to clarify the inevitable pre-judgments all bring to any epistemic process; Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik* (Stuttgart: Reclam Verlag, 1992 [1960]), Peter Christian Lang, ed., Hauptwerke der Philosophie. 20. Jahrhundert.

[706] See for an accessible introduction into Gadamer's analysis of "understanding," Jean Grondin, "Gadamer's Basic Understanding of Understanding," in Robert J. Dostal, *The Cambridge Companion to Gadamer* (Cambridge: Cambridge University Press, 2002), p. 40.

Whenever the adjudicator is confronted with hard cases in multilateral treaties, those where Parties' preferences rationally clash, she should be mindful that, as coordination substitutes cooperation among the Parties, her interpretative exercise not merely works to reveal her biases. In determining the legal scope of both exception and exemption provisions in relation to each other and to the headline rule, she should consciously construct exemption provisions considering the agreement's distributive aspect and object and purpose. Likewise, exception provisions should be interpreted with reference to the integral aspect of Parties' collaboration. The adjudicator thus derives form and function from the collaborative experience of international law and its objectified desire: *i.e.* rational (multilateral) collaboration toward a common object and purpose – for *ubi societas, ibi ius*.[707]

Out of this ancient sociability of law and language, I extract the inter-subjectivity and anchor the adjudicative exercise of interpretation and decision making therein. Interpretation of a multilateral agreement by an adjudicator is concerned with safeguarding Parties' collaborative intent as available from the communicative instrument, set in the appropriate context of international law. The adjudicator thus pursues the systemic notion of collaboration "in" me, instead of Parties' collaboration "for" me (which remains mired in questions of power and, to a lesser extent, Utopia). This differentiation is consistent with the Appellate Body's description of the WTO Agreement, together with the covered agreements, as contractual instruments embedded in international law.

Note however that the characterization of law and language as sociable and relational does not therefore translate into a "constitutional" system,[708] nor does it form a broad platform of "public authority."[709] While adjudicators "generate and stabilize normative expectations"[710] – "not only those of the contending parties, but of all subjects under international law"[711] – they do so not under the guise of a Neo-Kantian cosmopolitan citizenship, but as a

[707] The longer maxim, attributed to Aristotle, reads: "Ubi homo, ibi societas. Ubi Societas, ibi ius. Ergo ubi homo, ibi ius." Aristotle, in his Nichomachaen Ethics, extracts from this sociability the virtue of deep normative ties between "friends." Aristotle, *Nichomachean Ethics* trans. Robert C. Bartlett and Susan D. Collins (Chicago: Chicago University Press, 2012 [350 BCE], Book 8.

[708] See, for example, the contributions in Christian Joerges and Ernst-Ulrich Petersmann, eds., *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Portland, OR: Hart Publishing, 2006). Obligations that work *erga omnes*, or are fundamental to the system (inviolable), might warrant capitalization in so far as they provide essential support to the international market. By their very nature though, I doubt these values and norms are suitable to support constitutionalization in the absence of a parliamentary body. See also, Jean D'Aspremont, "International Legal Constitutionalism, Legal Forms, and the Need for Villains," in Andrew Lang and Andrew Weiner, eds., *Handbook on Global Constitutionalism* (*Forthcoming*, Edward Elgar, 2017).

[709] Armin von Bogdandy and Ingo Venzke, "In Whose Name?: A Public Law Theory of International Adjudication," 23(1) *European Journal of International Law* 7 (2012).

[710] *Id.*, p. 101.

[711] *Id.*, p. 207.

result of precise, rational, goal-oriented cooperation and coordination of identified trade policies between Member States.[712] The stabilization of normative expectations, as generated by the adjudicator's decision, appears in light of her understanding and application of the treaty's object and purpose. As States are assumed to be master of both ends and means, it is, in that sense, that international law "can be binding and robust […][only] when it is rational for states to comply with it."[713]

Bogdandy and Venzke however postulate adjudication under international law as an exercise in public authority that cannot be "sufficiently justified [] on the traditional basis of state consent, nor by a functionalist narrative that exclusively clings to the goals or values courts are supposed to serve."[714] Instead, as autonomous actors wielding public authority, adjudicators need democratic justification. While it is tempting to situate collaboration in a value-rich international public sphere, akin to those constructed on popular sovereignty, I do not believe state practice in the international realm to be genuinely reflective hereof. Such a normatively homogenous, value rich, public realm is indeed an aspirational utopia.

This is however not to say that the adjudicator is unrestrained in her construction of exemption provisions. The description by the Appellate Body of the covered agreements as obligations of international law and as contractual expressions of collaborative intent,[715] demands that the adjudicator's perspective is sufficiently sensitized to the relevant teleologies of international law.[716] As teleologies can be generated externally as well as internally to public international law it is helpful to be reminded of Kantorowicz' triptych.[717] Kantorowicz insightfully distinguishes

[712] For a constitutional perspective on the moderating role of proportionality in international cooperation, see Anne Peters, "Proportionality as a Global Constitutional Principle," Max Planck Institute, MPIL Research Paper Series, No. 2016-10.

[713] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), p. 202. Of course, Goldsmith and Posner make a general point about international law with which we cannot agree, such that "states cannot bootstrap cooperation by creating rules and calling them 'law'," – In so far as this observation pertains to the status of international law, it is nowadays largely undisputed that international law is indeed law; the open question is to its substance and operation, not its formal validity condition; see, for instance, Jorg Kammerhofer and Jean d'Aspremont, eds., *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), where they note that "[m]odern forms of international legal positivism, instead, celebrate the role of politics in international reality and, indeed, international legal practice even where they separate the realms of politics and scholarship." (pp. 6-7)

[714] Armin von Bogdandy and Ingo Venzke, "In Whose Name?: A Public Law Theory of International Adjudication," 23(1) *European Journal of International Law* 7 (2012), p. 8.

[715] See Chapter 3, *supra*.

[716] See Martti Koskenniemi, "Between Commitment and Cynicism: Outline for a Theory of International Law as Practice," in Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011); Martti Koskenniemi's "A History of International Law Histories," in Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of The History of International Law* (New York: Oxford University Press, 2012), reminds us that the historic progression of theories of international law have all revolved around one teleology or another. Koskenniemi thus points out that, when adopting a historical perspective, one "cannot know international law […] without understanding it as the transformation of humankind's collective experience into a redemptive future." (p. 944) Note though that the historiography of international law fell victim to philosophical indeterminacy; each conviction can readily point to supportive aspects within legal history's determining force.

[717] Hermann Kantorowicz, *Rechtswissenschaft und Soziologie* (Karlsruhe: C. F. Müller, 1962 [1911]), cited in Anne van Aaken and Joel P. Trachtman, "Political Economy of International Law: Towards a Holistic Model of State Behavior," University of St. Gallen Law School, Law and

between normative (Wertwissenschaft), sociological (Realwissenschaft) and doctrinal (Normwissenschaft) sources of teleologies.

Kantorowicz' differentiation is particularly useful when seeking to parse out an interpretative method rooted in codified, or rule-based, international law that incorporates notions from economic theory into a normative and doctrinal science. The GATT/WTO is exemplary of a codified system of international economic rules, unified by an institutional dispute settlement mechanism. The interpreter of the regulatory structure of the GATT/WTO is thus compelled to consider applicable doctrinal, sociological/economic and normative teleologies as constructive, directional elements to her adjudicatory decision. These directional elements each circumscribe and inform her application of the embedded standard of review as she construes the provisions under consideration either narrowly or in an open manner.

For the decision of the adjudicator to be accepted as an authoritative expression of legal interpretation in the matter before her, it needs to supersede mere "regulated madness" and fit not merely the text of the provisions but primarily engage the prevailing teleologies as identified by Kantorowicz. Within this framework, the adjudicator works to achieve an objective assessment of the matter through application of the embedded standard of review, in accordance with Article 11 of the DSU. Article 3.2 of the DSU subsequently provides hermeneutic boundaries and points to the customary rules of interpretation of public international law as appropriate means to preserve the balance of rights and obligations of Members under the covered agreements.[718] The adjudicator thus comes to this balance not directly, through her presuppositions and prejudgements, but by applying the appropriate standard of review in a manner cognizant of prevailing teleologies.

In this sense, the notion of "applying the law" is not to be confused with the, almost diametrically opposed, notion of "finding the law."[719] Whereas the latter notion posits judicial decision-making as an act of pure deduction from external first values and principles, the former emphasizes the limited indeterminateness, or malleability, of the

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Economics Research Paper Series No. 2015---08 (July 2015), p. 3, fn. 6. See also Andrew Jeffrey Spadafora, *Freedom from Value Judgments: Value-Free Social Science and Objectivity in Germany, 1880-1914*, Doctoral dissertation, Harvard University (2013).

[718] Contrast this "system's view," with the Article 38 of the Statute of the International Court of Justice (ICJ Statute) that limits the role of the court "to decide in accordance with international law such disputes as are submitted to it."

[719] See Armin von Bogdandy and Ingo Venzke, "Key Elements of a Public Law Theory of Adjudication," in, *In Whose Name?: A Public Law Theory of International Adjudication* (New York: Oxford University Press, 2014), pp. 102 - 105.

interpretative exercise.[720] When the interpreter fits a contested domestic trade policy to the provisions of the GATT/WTO, she necessarily invokes her understanding of the object and purpose of the GATT/WTO to reconcile her application of the embedded standard of review with her (con)textual interpretation of the provisions of the treaty.

The three sources of teleology identified by Kantorowicz are each reflected in GATT/WTO theory and practice: (i) sociological teleology is captured in the economic object and purpose of the covered agreements and their provisions (See Section B, *infra*); (ii) normative teleology is expressed in the obligation to rule in good faith ("bona fides") and respect the objective expectations of the Membership (see Section C, *infra*); and (iii) doctrinal teleology is captured by the power of persuasive precedent (See Chapter 5, *infra*). Together these points in the triptych set limits to the embedded standard of review and color the interpretational space within which the adjudicator confronts exemption provisions with the headline rule and exceptions thereto.

B. Exemption Provisions: An Open Construction

Confronted with a hard case that references an exemption provision, the GATT/WTO adjudicator is compelled to apply the embedded standard of review such that she constructs the exemption provision in light of the distributive, instead of the integral, aspect of the collaborative intent of the Membership. In a time-inconsistent Membership of rational contracting states, the adjudicator finds, as noted, the collaborative intent of Parties in the preamble to the agreements[721] read against the demands of international law. This approach to the construction of exemption provisions receives added urgency in the presence of incomplete economic convergence between the Member States.[722]

Ethier however points out that each contracting party faces a reciprocal conflict problem: "Every country knows that it might turn out to be either the accuser or the accused. Thus it is in no country's best interest, *ex ante*, to agree that,

[720] This dichotomy is obviously not straightforward, with elements of each recurring in the other. Furthermore, a third approach to "finding" or "applying" the law might be said to be presented by the inductive reasoning offered by the common law; distinguishing case from precedent.

[721] The adjudicator thus avoids the historicist fallacy of imbuing the dynamic collaborative agreement with a singular purpose derived from a reading of the negotiating history.

[722] See Chapter 2, *supra*.

ex post, either the accuser should be unconstrained in its ability to punish or the accused should be unconstrained in its ability to proceed without punishment. This generates a role for a dispute settlement mechanism."[723] Ethier, referencing this puzzle, thus cautions against reading exception and exemption provisions broadly in the absence of express language or instruction to that extent.

Schropp, in response, examines intra-contractual policy flexibility mechanisms as they are designed by Parties to account for economic "shocks" that give rise to "regret" under incomplete contracts.[724] He distinguishes between primary, or headline, GATT/WTO rules, which include provisions on non-discrimination, national treatment, and tariffication; and policy flexibility, or secondary, rules.[725] He thus places a concept of "efficient intra-contractual breach" central in his analysis of the WTO as a "multi-issue, multi-entitlement contract of highest complexity."[726]

Correspondingly, Schropp differentiates between welfare-enhancing good faith trade disputes and those that are not, leading to a two-tier system of enforcement: one concerned with textual ambiguity, the other with opportunistic extra-contractual breach.[727] He considers that the former needs to be resolved "amicably," whereas the latter invites "punitive and collective punishment."[728] The present work is only concerned with the former, as hard cases are assumed to erupt from genuine preference heterogeneity among the Membership.[729]

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[723] Wilfred J. Ethier, "Punishments and Dispute Settlement in Trade Agreements," EPRU Working Paper No. 2001–14 (2001), p. 5.

[724] Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009). He finds that "when it comes to trade policy flexibility, an unconditional liability rule backed by expectation damages clearly Pareto-dominates both a rule of inalienability and a renegotiation requirement." (p. 19)

[725] *Id.*, pp. 2-3, 33-39.

[726] *Id.*, p. 18.

[727] "Tier one, an inner protective belt of contractual entitlements, is aimed at dealing with welfare-enhancing good faith trade disputes (that emerge due to contractual ambiguity, interpretative problems, or unintentional contract infringements), and at solving them in an amicable manner. Remedies at this stage are strictly commensurate to the damage caused. Tier two, the outer layer of protection, mandates punitive and collective punishment." *Id.*, p. 20.

[728] The classic cooperative trade game is given by an infinitely played Prisoner's Dilemma. Scholars of the GATT/WTO have used this formal approach to highlight the intrinsic relationship between (self-)enforcement and *ex ante* commitments. The assumptions behind this type of argument draw on efficient and complete contracting between reasonably rational Parties, such that commitments are Pareto-efficient and not – over the life of the contract - in need of renegotiation. Deviation, or defection, is therefore always assumed to be opportunistic and optimally punished by the "grim-tricker"-strategy of continued reciprocal defection. Schropp criticizes this approach to trade policy analysis as overly simplistic. He notes that the assumption of contractual (self-)enforcement in fact relies on a process rather than on a single act of punishment. Enforcement is conditioned by the adjudication and remediation phases. He centrally argues that previous literature in particular overlooked "the beneficial character of escape clauses in capturing contractual regret in incomplete contracts and how these provisions consequently shape the ex ante willingness of government to liberalize trade in the first place." (p. 24), Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009); Kyle Bagwell, Petros C. Mavroidis, and Robert W. Staiger, "The Case for Tradeable Remedies in the WTO," in Simon Evenett and Bernard Hoekman, eds., *Economic Development and Multilateral Trade Cooperation* (Washington, DC: Palgrave/Macmillan and World Bank, 2005); Kyle Bagwell and Robert W. Staiger, "Enforcement, Private Political Pressure, and the General Agreement on Tariffs and Trade/World Trade Organization Escape Clause," 34 *Journal of Legal Studies* 471 (2005).

[729] Also note that Chapter 2, *supra*, differentiates between "commercial" disputes involving opportunistic defection and those disputes reflective of genuine differences in implementation preferences, or which are "developmental."

Schropp's focus on intra-contractual policy flexibility provisions resonates with the analytical point made in the present work with regard to its under-recognized corollary: exemption provisions. The Appellate Body, in *China – Publications*, held that the WTO Agreement and its Annexes operate to discipline Member State's inherent power to regulate in a rule-exception manner.[730] The extent to which Member States retain "policy flexibility" to account for "regret" is determined by the interpretation of exception provisions. The appropriate ambit of these exception provisions is in turn provided by the adjudicator's understanding of the integrative aspect of Member State collaboration.

Exemption provisions however stand tangential to the rule-exception framework and derive their ambit and meaning from the application of the appropriate standard of review, interpreted with reference to the distributive elements of the object and purpose of the covered agreement and its provisions. As the WTO Agreement specifies, the relations between Member States in the field of trade and economic endeavor, and thus by extension the obligations of the GATT 1947, are to be understood "in a manner consistent with [Member State's] respective needs and concerns at different levels of economic development […]."

Whereas policy flexibility provisions, embodying the "right to regulate," are to be interpreted narrowly in line with the integral aspect of collaboration (directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce), exemptions invite a standard of review that construes them broadly. The "open" construction of exemption provisions against the rule-exception framework of the GATT 1994 consequently allows the adjudicator to more easily accord a high measure of deference to the defendant in fitting disputed policy measures to the terms of the provision – provided the Member State can reasonably show the developmental intent and effect of the disputed measure in its domestic economy.

In addition to satisfying the sociological/economic teleology of the GATT/WTO, the adjudicative interpretation of exemption provisions nevertheless simultaneously must satisfy the conditions set by applicable doctrinal and normative teleologies. Article 3.2 of the DSU specifies the normative teleology as directed toward providing "security and predictability to the multilateral trading system." Furthermore, the doctrinal teleology, emanating out

[730] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222-223;

of the power of persuasive precedent, instructs the adjudicator to be mindful not to "add to or diminish the rights and obligations provided in the covered agreements."

The rights and obligations expressed in the provisions of the GATT 1994 should thus be clarified, in accordance with customary rules of interpretation of public international law. To find the appropriate equilibrium the Appellate Body reminds that "the standard of review […] must reflect the balance established in [the particular WTO agreement] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves […]."[731] The open construction of exemption provisions in the GATT 1994, following application of the multilateral standard of review, reflects these aspects and facilitates application hereof through the different interpretative elements of the VCLT.

1. Object and Purpose

As recognized in the preamble of the WTO Agreement, the covered agreements should be read against the condition of a heterogeneous Membership – especially in terms sociological and economic conditions. The DSU in turn places emphasis on the continued legitimacy, security and predictability of the multilateral trading system that is to be provided through the WTO dispute settlement system. Hurrell captures this balance when he points out that "the rule-following that results from a sense of legitimacy is 'distinguishable from *purely* self-interested or instrumental behaviour on the one hand, and from straightforward imposed or coercive rule on the other'."[732]

The font of this legitimacy switched at the Uruguay Round, when the diplomacy- or power-oriented international trading system of the GATT[733] was replaced with a ruled-based system under auspices of the WTO. For the reasons explored in the above, reference to the original bargain of the GATT 1947 is to be eschewed when constructing exemption provisions (or even interpreting the GATT more broadly). Instead, positive identification of the object

[731] WTO Appellate Body Report, *EC – Hormones* (1998), ¶115, cited in Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law," 7(3) *Journal of International Economic Law* 491 (2004), p. 494.

[732] Andrew Hurrell, "Legitimacy and the Use of Force: Can the Circle Be Squared?" *Review of International Studies* 31 (special issue, December 2005), p. 16; cited in Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," in Rudiger Wolfrum and Volker Roben, *Legitimacy in International Law* (Berlin: Springer Verlag, 2008), p. 30 (emphasis added).

[733] Matsushita sees the diplomatic or power relationship of the GATT-years "exemplified by the voluntary export restraints that were common in the 1980s and also the unilateral application of Section 301 of the U.S. Trade Act of 1974" – see Mitsuo Matsushita in transcript of ASIL WTO Appellate Body Roundtable (2005), published as part of the ASIL Proceedings (2005), p. 180.

and purpose of covered agreements and associated forms of persuasive reasoning[734] come to stand central to the interpretative exercise of the GATT 1994 and other covered agreements. Increased attention for the object and purpose of rule-based international collaboration is rooted in the inter-subjectivity of the rights and obligations of the Membership. In the absence hereof, that many litigants may find themselves feeling bereft, standing as a stranger,[735] in face of the interpretation given to the provisions of the GATT 1994 by Panels and the Appellate Body.

The Appellate Body will, in almost all cases, seek to apply the revealed "common intention" of Parties. Crucially, it is in its assessment of the "colour, texture and shading"[736] of the object and purpose of covered agreements that the Appellate Body reveals its interpretative bias most strongly (in full view of the actual terms used[737]). As Lavoie points out however, "our prejudices need not imprison us or distort, and in fact [] are what enable us to see anything at all."[738]

To make practical use of these biases in her judicial decision making, the adjudicator consciously creates a barrier between Parties' direct experience of the international legal practice, fraught with power relations, and the legitimate interpretation of the multilateral treaty rooted in Parties' inter-subjectivity and declared collaborative aims. In this way the adjudicator directs her construction of the treaty's terms toward the systemic collaboration "in me" (as opposed to trying to assess Parties' sense of collaboration "for" me).[739] Parties to an agreement in international law can, after all, be said to have an inter-subjective desire to collaborate toward a certain goal and be able to pursue this objective in a reasonably rational manner.[740] In this way Parties' objectified (or Idealized) desire is accessible to an

[734] Fish emphasizes that validation hinges on the recipient epistemic community, in Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press 1989), pp. 488–491.

[735] See Plato, "Apology of Socrates," Louis Dyer, transl., (Gorgias Press, 1885), at 17 c-d; "*Atekhnoos oun xenos ekho tes enthade lexeos*" ("I stand utterly bereft as a stranger to the language here").

[736] WTO Appellate Body Report, *US – Shrimp* (1998), ¶153.

[737] As Lavoie points out: "It is one of the central points of hermeneutics to stress that we are always shaped by the intellectual traditions we come from, and that such 'prejudices' are not a contamination of an otherwise pure and objective view," in Don Lavoie, "Introduction," in Don Lavoie, ed., *Economics and Hermeneutics* (London: Routledge, 1991), p. 6.

[738] Don Lavoie, "Introduction," in Don Lavoie, ed., *Economics and Hermeneutics* (London: Routledge, 1991), p. 6.

[739] Similar to Lacan's critique on radical deconstruction, which focuses on theories of desire and subjectivity to rescue the individual experience of meaning attribution; see Jacques Lacan, "The Function and Field of Speech and Language in Psychoanalysis" (1953); see also, Lewis Call, *Postmodern Anarchism* (Lanham: Lexington Books, 2002).

[740] As touched upon in in the above, methodological individualism questions these assumption and points to the (self-interested and rather myopic) political economy drivers behind the decisions of and decision makers within States. In response Realistic Idealism does not postulate an idealized social planner or benevolent dictator, but argues the difference between cooperation *for me* and the systemic cooperation *in me*. From the position of the adjudicator, the individual (political economy) drivers of Parties are subsumed by the declared object and purpose of the cooperation/coordination.

adjudicator through her assessment of the treaty's object and purpose – perhaps despite Parties' best intentions to be entirely selfish and myopic.

The adjudicator's assessment of the instrument's object and purpose is, of course, part of the persuasive reasoning (logos)[741] fundamental to the adjudication of conflicts rooted in communicative instruments. The faithful preservation of the rights and obligations of a diverse Membership under the covered agreements, ex Article 3.2 DSU, demands a transparent discussion of the treaty's object and purpose. A rule-based approached, as proposed in this work, on the standard of review appropriate for the construction of exemption provisions in the GATT 1994 is both transparent and works in service of the security and predictability of the multilateral trading system.

As argued in Chapter 3, *supra*, the Appellate Body establishes a hierarchy of proximity in its application of the "object and purpose," looking at the construction and purported aim of the commitment first ("l'objet"), with the general result ("le but") elucidating that construction. The "object" is therefore immediate, whereas the "purpose" is somewhat more distant.[742] According to the Appellate Body, the object and purpose of the covered agreements need however to be read in consonance and should not be divorced from a reading of the treaty as a whole.[743, 744]

This hierarchical approach by the Appellate Body to the application of an "object and purpose" finds support in the "embedded" nature of the standard of review. Consequently, the standard of review and the object and purpose analysis work in tandem in a manner that is sensitive to the character of the exemption provision as tangential to the rule-exception framework of the GATT and subject to the distributive aspect of Parties' collaborative intent according to the WTO Agreement. An open construction of exemption provisions satisfies both elements and provides a measure of rule-based transparency to its operation in the GATT 1994.

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[741] Although one may be tempted to read the ancient distinction between "logos" and "nomoi" (or between "persuasive reason" and "the laws") in the application of the interpretative element "object and purpose" this is best resisted (in order to avoid Platonic Idealism altogether; see Karl Popper, *The Open Society and Its Enemies* (Princeton: Princeton University Press, 2013 [1945]).

[742] See Elizabeth Zoller, *Le Bonne Foi en Droit International Public* (Paris: A. Pédone, 1977), p. 74; quoted approvingly in Jan Klabbers, "Some Problems Regarding the Object and Purpose of Treaties," 8 *The Finnish Yearbook of International Law* 138 (1997), p. 145.

[743] A notion further supported in the Appellate Body Report, *Korea — Dairy* (1999), ¶81, where it held that "[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."

[744] Hermann Kantorowicz, *Rechtswissenschaft und Soziologie* (Karlsruhe: C. F. Müller, 1962 [1911]), cited in Anne van Aaken and Joel P. Trachtman, "Political Economy of International Law: Towards a Holistic Model of State Behavior," University of St. Gallen Law School, Law and Economics Research Paper Series No. 2015---08 (July 2015), p. 3, fn. 6. See also Andrew Jeffrey Spadafora, *Freedom from Value Judgments: Value-Free Social Science and Objectivity in Germany, 1880-1914*, Doctoral dissertation, Harvard University (2013).

In order for the exemption provision to provide a measure of rational deference to locally optimal industrial policies, its open construction has to exhibit sensitivity to the demands of judicial construction in accordance with the DSU, at both the syntax level as well as in relation to the rule-exception structure of the GATT. Note that the concept of deference employed is distinct from a measure of policy "flexibility," when envisioned as (sub-optimal) deviations from a uniform understanding of the cooperation in the GATT/WTO. Such policy flexibility deviations are traditionally understood in relation to ex post "contractual regret,"[745] whereas deference refers to the rational policy heterogeneity associated with the ex ante condition of incomplete economic convergence within the Membership.

Recognition of Member States' economic conditions is thus central to the adjudicator when pursuing an open construction of exemption provisions in the GATT 1994. The embedded standard of review should allow the contextual interpretation of the language of exemption provisions of the GATT/WTO to enlighten the multilateral collaborative intent of the Membership, without prescribing a single directional "truth" to its terms. Differences between Member State cultural and (non-economic) consumptive preferences however fall outside the present scope of consideration and are better dealt with under exception provisions (as they presently are).[746]

To facilitate a transparent and rule-based open construction of exemption provisions, I propose two distinct (though interrelated) methodological steps that aid the adjudicator to accomplish her task.

First, the adjudicator must verify that the matter before her is indeed a "hard case."[747] Verification hereof entails a judicial assessment whereby "developmental" or "genuine" policies are distinguished from "commercial" or "opportunistic" preference conflicts. Should the contested policy fail to qualify as developmental, then the defendant cannot avail himself of the protection offered by the exemption clause. Instead, the matter should be

[745] See, Simon A.B. Schropp, Trade Policy Flexibility and Enforcement in the WTO: A Law and Economics Approach (Cambridge: Cambridge University Press, 2009), p. 87 et seq. See also, C. Goetz and R. E. Scott, "Principles of Relational Contracts," 67(2) *Virginia Law Review* 1089 (1981).

[746] See, recently, the decision of the WTO Appellate Body, *EC – Seal Products* (2014); Among many comments in the literature, see recently, *American Journal of International Law*, Symposium on WTO EC – Seal Products Case (June 2015).

[747] This distinction, although different in character, is not unlike the one purposed by Schropp, whereby he separates those conflicts rooted in textual ambiguity from others pursuing an opportunistic extra-contractual breach. Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009); "Tier one, an inner protective belt of contractual entitlements, is aimed at dealing with welfare-enhancing good faith trade disputes (that emerge due to contractual ambiguity, interpretative problems, or unintentional contract infringements), and at solving them in an amicable manner. Remedies at this stage are strictly commensurate to the damage caused. Tier two, the outer layer of protection, mandates punitive and collective punishment." (p. 20).

addressed under the exception provisions, governed by the integrative aspect of the collaborative intent of the multilateral trade agreement.

Instead of entering into a fully subjective assessment of the regulatory intent of the disputed measure, the GATT, in Article III:1 for example, favors an approach concerned with the economic effects thereof ("so as to afford").[748] While the declared intent of the legislator can add color and shading,[749] the economic effects of the contested policy measure elucidate the protectionist or Mercantilist character thereof. This approach finds further ground in the contextualized interpretative practice of the GATT/WTO (see Section B.2, *infra*), that favors reading terms of provisions considering the circumstances of the case; envisioned on a case-by-case basis.

The Panel adjudicator cannot, furthermore, unilaterally opine on the applicable economic theory and effect, for the Appellate Body clarified it does "not believe that panels can base determinations as to what would occur in the marketplace only on their own intuition of what rational economic actors would do." Instead, it "would expect that in such circumstances the panel would at least explain the economic rationale or theory that supports its intuition."[750] Reliance on the use of the social sciences method of economics is however problematic, generally and when applied to exemption provisions specifically, if envisioned as capable of providing a fully neutral or "objective" response.

As argued by Stiglitz and Ocampo, and as examined in Chapter 2, *supra*: "for an understanding of macroeconomic systems, the[] [macro-economic] identities need to be combined with an economic analysis of [the] determinants of the behavior of firms, households, and governments. Here is where the differences arise [between mature and developing markets]. The nature of the relationships between variables and the direction of causation (what determines what) are both a function of the setting and context."[751] This localization of dynamic economic effects is

[748] The Appellate Body Report in *Japan – Alcoholic Beverages II* (1996), clarifies that: "it is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, 'applied to imported or domestic products so as to afford protection to domestic production.'" (at 29). Confirmed by WTO Appellate Body Report, *Chile – Alcoholic Beverages* (1999), ¶61 f, 71; and in WTO Appellate Body Report, *Korea – Alcoholic Beverages* (1999), ¶149.

[749] The Panel in Mexico – Taxes on Soft Drinks, noted that "the declared intention of legislators and regulators of the Member adopting the measure should not be totally disregarded." (8.91) Similar allowances for regulatory intent were made by the Appellate Body in *Chile – Alcoholic Beverages* (1999), ¶71; and the Panel in *Indonesia – Autos* (1998), ¶14.115.

[750] WTO Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (2012), ¶643 (emphasis added).

[751] Joseph Stiglitz, Jose Antonio Ocampo, et al., *Stability with Growth: Macroeconomics, Liberalization, and Development* (New York: Oxford University Press, 2006), p. 52.

important to fully appreciate the difference between policies directed at "catch up" growth or those that betray a "commercial" (beggar-thy-neighbor) bend.

The "developmental" component in question is anchored in the "nested" quality of the Product Space, which is at the center of "catch up" growth. Whereas the footprint of Member States in the Product Space is readily observable, its dynamic progress can be approached probabilistically for those lagging the technological frontier.[752] Under limited and positively identifiable conditions, industrial policies can work to guide the economy toward beatification (the completion of its capacity set).[753] In this way, modern complexity-inspired notions of industrial policies, such as those rooted in the Learning Society and Product Space geography, have come a long way from beneficiation to favor targeted "learning" and "capacity growth" over consumption-based output performance.

It is worth recalling that similar observations were voiced by developing countries at the genesis of the GATT 1947, in particular highlighting the intellectual differences between a trade liberalization regime directed toward the expansion of trade volumes (expressed in the current interpretation of the GATT 1994 as a dedicated "free trade" instrument) and one committed to the expansion of production and product variety.[754] (see Section D, *infra*).

Second, upon verification that the matter before her qualifies as a "hard case" that references an exemption provision, the open construction of the provision and its terms invites her to accord a measure of deference to the implementing Member State when fitting the measure to the terms of the provision. To facilitate this part of the adjudicatory exercise, I propose a method whereby the appropriate measure of interpretative deference can be paid to the implementing Member State's contested policy.

[752] For Member States at the technological frontier, the remaining viable growth technological growth paradigm is incorporated in mature growth which operates its own probabilistic metric.

[753] See, in addition to Chapter 2, *supra*, Jose-Antonio Ocampo, "Dynamic Efficiency: Structural Dynamics and Economic Growth in Developing Countries," in Akbar Noman and Joseph E. Stiglitz, eds., *Efficiency, Finance, and Varieties of Industrial Policy: Guiding Resources, Learning, and Technology for Sustained Growth* (New York: Columbia University Press, 2017).

[754] See, Nicolas Lamp, "The 'Development' Discourse in International Trade Lawmaking," Queens University Research Paper Series No. 2015-057 (2015).

In a coordination game between collaborative players with different preferences, it has been suggested in the literature that social norms,[755] more specifically fairness norms,[756] can act as focal points of the decision.[757] However, the problem in heterogeneous groups, at least in the short run, is that there may be multiple plausible fairness norms, which differ between the Parties in their primary salience (ex-ante normative disagreement), and this may lead to coordination failure.[758] Instead, the adjudicator can moderate the collaborative problem among Parties with heterogeneous preferences through use of a public (or private) expressive[759] signal or interpretative rule.[760]

The interpretative rule proposed is adopted from the Oates' Decentralization Theorem. Oates' Theorem on Decentralization holds that, in a Membership with heterogeneous preferences, the decentralization of certain functions increases welfare as a result of increased policy sensitivity and economic alignment at the lower level. "The basic point [of the Decentralization Theorem] is simply that the efficient level of output of a 'local' public good […] is likely to vary across jurisdictions as a result of both differences in preferences and cost differentials. To maximize overall social welfare thus requires that local outputs vary accordingly."[761] The Oates' Theorem furthermore assumes (a) the absence of cost savings from centralization (including those generated by environmental and "market-preserving" forces) and (b) no inter-jurisdictional spillovers.

The "functions" which the Oates' Decentralization Theorem considers, are reflected in the GATT/WTO structure by analogy in three inter-related ways. The first function is provided by the GATT 1947 preamble as the "substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international

[755] See for example, John N. Drobak, ed., *Norms and the Law* (Cambridge: Cambridge University Press, 2006); see also Herbert Gintis, *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (Princeton: Princeton University Press, 2009) and Samuel Bowles and Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (Princeton: Princeton University Press, 2011).

[756] See Mark Bernard, Ernesto Reuben, and Arno Riedl, "Fairness and Coordination: The Role of Fairness Principles in Coordination Failure and Success," Mimeo. Although inter-subjectivity is a fertile ground for normative theories, of fairness or otherwise, the argument here is not made dependent on such analysis and in fact abstracts from it in the international realm in favor theories of rational cooperation among sovereign states. See for a normative theory based on inter-subjectivity, Emmanuel Levinas, *Humanism of the Other*, trns. Nidra Poller (Urbana: University of Illinois Press, 2005 [1972]); see further Simon Critchley and Robert Bernasconi, eds., *The Cambridge Companion to Levinas* (Cambridge: Cambridge University Press, 2002).

[757] See, for example, Thomas C. Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960); and recently Therese Lindahl and Magnus Johannesson, "Bargaining Over a Common Good with Private Information," 111 *Scandinavian Journal of Economics*, 547 (2009).

[758] See, Mark Bernard, "Conflict, Cooperation and Coordination Essays in Game Theory and Experimental Economics," Stockholm School of Economics, Dissertation (2012), p. 4.

[759] See, Richard H. McAdams, "The Expressive Power of Adjudication," *University of Illinois Law Review* 1043 (2005); Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge: Harvard University Press, 2015).

[760] See, for example, Peer Zumbansen and Gralf-Peter Calliess, eds., *Law, Economics and Evolutionary Theory* (Cheltenham: Edward Elgar, 2011).

[761] Wallace E. Oates, "An Essay on Fiscal Federalism," 37(3) *Journal of Economic Literature* 1120 (1999), 1122.

commerce." The second function is given by the WTO Agreement, such that economic endeavor should be directed at "expanding the production of and trade in goods and services, […] in a manner consistent with their respective needs and concerns at different levels of economic development." Third, the DSU postulates that the dispute settlement system of the WTO should work to provide security and predictability to the multilateral trading system.

The embedded standard of review, as applicable to exemption provisions, should consider these three "functions" in calibrating the efficient level at which output is delivered. Or, in other words, the embedded standard of review for exemption provisions recognizes a considerable level of deference to the implementing Member State when fitting contested policies to the terms of the provision. In this way, the applicable standard of review implies the vertical allocation of power in a manner that finds the equilibrium between the rights and obligations conceded and retained by Member States in a way sensitive to local economic conditions.

Crucially, such deference is subject to the two validity conditions of the Oates' Decentralization Theorem:

(a) The absence of centralized cost-saving is a fundamental notion in the GATT, operationalized through its core provisions on non-discrimination, national treatment, and tariffication, in light of the exception provisions of the GATT. Other aspects of centralized "cost-saving" include environmental and market preserving (or legitimate expectations reinforcing) measures. Examples of centralized cooperation on such measures include the Environmental Goods Agreement[762] and the recent deliberations around the maintenance and security of international trade in the digital economy[763]. Cost–saving is furthermore supported by programs of technical assistance and the recent Trade Facilitation Agreement ("TFA") (concluded at the 2014 Ninth Ministerial Conference at Bali).[764]

(b) The "no jurisdictional spill-over" condition is central to the GATT/WTO. Spill-overs are however, logically, always present in an interconnected system of trade. As is often observed by Stiglitz, among others, "all trade policies have distributive impacts on the economy." This implies that every

[762] The Environmental Goods Agreement, will build on the commitment governmental leaders at the Asia-Pacific Economic Cooperation (APEC) made to reduce tariffs on a list of 54 environmental goods by the end of 2015, by taking the next step of eliminating tariffs on these 54 goods and expanding product coverage to include additional environmental technologies. See USTR, website: https://ustr.gov/trade-agreements/other-initiatives/environmental-goods-agreement and the E15-Initiative, Climate Change (James Bacchus, Theme Leader), available at: http://e15initiative.org/themes/climate-change/.

[763] See, for instance, E15-Initiative, Digital Economy (Merit Janow, Theme Leader), available at: http://e15initiative.org/themes/digital-economy/.

[764] WTO, Agreement on Trade Facilitation (15 July 2014), WT/L/931

interpretation given to the integral aspects – the rule-exception framework – of the GATT/WTO has distributional consequences in the economies of Member States. Consequently, the Oates' Theorem of Decentralization, as adapted here, tests for the presence of those spill-overs that are "excessive," carry beggar-thy-neighbor implications, or are zero-sum by design.

The DSU does not explicitly set out a rule specifying who carries the burden of proof in Panel proceedings. The Appellate Body however recognized that the concept of a burden of proof is implicit in the WTO dispute settlement system. The Appellate Body has endorsed the rule that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense.[765] Panels and Appellate Body have confirmed this practice in relation to Article XX, XI:2(c)(i),[766] and recently also in relation to Article XI:2(a) GATT 1994.

However, while the exemption provision of Article XI:2(a) GATT 1994 could be read as an affirmative defense, with the implication that the burden of proof lies with the defendant, alternatively, its character as an exemption provision would "suggest that the complainant would have to show that a measure is a QR, in the sense of Article XI.1 of GATT, and is not a measure featured in Article XI.2 of GATT."[767]

The open construction of Article XI:2(a) GATT 1994, pursuant to the appropriate (multilateral) embedded standard of review, and ensuing deferential interpretation according to the Oates' Decentralization Theorem formulate a yard stick against which to interpret the burden of proof.[768] The deference called for when fitting the contested policy to the terms of the provision switches the burden of proof to the complainant, in accordance with character of the provision as an exemption, but mitigates this switch by postulating two positive conditions that the defendant must meet to rely on Article XI:2(a) GATT 1994.

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[765] See, WTO Appellate Body Report, *US —- Wool Shirts and Blouses* (1997).

[766] See, WTO, Dispute Settlement System Training Module: Chapter 10, available at: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s6p1_e.htm (last visited, April 6, 2017).

[767] Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 140.

[768] Such "yard stick" is an expression of persuasive reasoning, rather than a strict "burden of proof" as familiar in civil and criminal cases in the domestic context; see, John Barcelo III, "Burden of Proof, Prima Facie Case, and Presumption in WTO Dispute Settlement," 42 *Cornell International Law Journal* 23 (2009); see also, David Unterhalter, "Allocating the Burden of Proof in WTO Dispute Settlement Proceedings," 42 *Cornell International Law Journal* 209 (2009); and Joost Pauwelyn, "Evidence, Proof and Persuasion in WTO Dispute Settlement," 1 *Journal of International Economic Law* 227 (1998).

2. Contextual Interpretation

When fitting contested policies to the terms of the exemption provision, the multilateral standard of review draws most heavily on the interpretative element of "context," ex Article 31(1) VCLT, for its application. The adjudicator needs to be continuously mindful of having reference to the VCLT and the associated doctrinal constraints, so as not to violate the two other teleologies of Kantorowicz' triptych (doctrine and normative, in addition to sociological). In this sense, the adjudicator can find refuge in the reports of the Appellate Body where it, more than once, held that the ordinary meaning of terms "must be ascertained according to the particular circumstances of each case."[769, 770]

Accordingly, the Permanent Court of International Justice confirmed that "meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense."[771] The proper approach to framing relevant "context," ex Article 31 VCLT, so it held is textual as well as con-textual. In the process of according meaning to the language of exemption provisions, I favor explicit recognition of the economic conditions of the challenged Member State, such that increased transparency can be brought to the construction of covered terms.

As Koskenniemi however notes, the fundamental unity of the interpretative labor means that any identification of the "ordinary meaning" is itself already contextualized.[772] Inclusion of the "context" as an interpretative element merely serves as positive reinforcement and validation of what is otherwise naturally done.[773] A hermeneutic preference[774] to have recourse first to internal inference before turning to interpretative elements that are technically

[769] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶175; see similarly WTO Panel Report, *US – Shrimp (Article 21.5 – Malaysia)* (2001), ¶5.51.

[770] Similarly, the Appellate Body drew on the factual context to elucidate the meaning of terms in *EC – Chicken Cuts;* WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶148.

[771] Permanent Court of International Justice, *Competence of the ILO to Regulate Agricultural Labour*, P.C.I.J. (1922), Series B, No. 2-3, p. 23.

Martii Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (Cambridge: Cambridge University Press, 2005), pp. 333-334, where he notes the ordinary meaning of term "assumes what has to be proved."

[773] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press 1989).

[774] See for substantiation of this preference for instance, Georges Abi-Saab, "The Appellate Body and Treaty Interpretation," in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris, eds., *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Leiden: Martinus Nijhoff, 2010).

external to the instrument is thus fatally pretentious.[775] This pretense in the methodology, which artfully separates "social theory" from "legal doctrine," is uncovered by the deconstructive exercise that shows that ultimate recourse to power (making law apologetic) or to norms (making law utopian) is necessary to complete the interpretative exercise.

As in the above, I resist this powerful critique by Koskenniemi by emphasizing the adjudicator's understanding of the irreducible desire of Parties to collaborate, as reflected in the preamble and provisions of the agreement. In fact, where Koskenniemi separates social theory from legal doctrine, Kantorowicz adds a third element of consideration in the normative obligation to construe the GATT/WTO in good faith to safeguard the security and predictability of the multilateral trading system. The relationship between the adjudicator and the collaborative intent, her "understanding" of the GATT 1994, requires of her to engage positively with the teleological demands of sociology/economics. Article 3.2 DSU consequently delivers her the means to do so in the customary rules of international law on interpretation – the VCLT.

As with any component of Kantorowicz' triptych, the adjudicator's engagement with the sociological/economic teleology of the GATT/WTO requires the contextual interpretation of the terms of the provision to adopt the breadth of the embedded standard of review. In other words, if the multilateral standard of review favors an open or broad construction of the provision in light of its object and purpose, then the contextual interpretation should initially be equally open or broad. This initial condition is of course further moderated by the other interpretative elements of Article 31 VCLT and share the stage with the doctrinal and normative constraints that rest on the interpreter.

The Appellate Body fruitfully obliges the adjudicator in reading the terms of any provision contextually. In its report in *US – Large Aircraft (Second Complaint)* the Appellate Body held, as noted, that when the Panel makes a determination as to what would happen in the "marketplace,"[776] it expects that the "panel would at least explain the

[775] Lauterpracht similarly recognized that a tribunal's interpretative method may have little more to offer than an *ex post* justification or facade for an interpretative outcome reached on other grounds, in Hersch Lauterpracht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," *British Yearbook of International Law*, Vol. 26 (1949), noting that "[a]s a rule ... [the rules of interpretation] are not the determining cause of judicial decisions, but the form in which the judge cloaks a result arrived at by other means." (p. 53)

[776] Note that the "marketplace" is a central notion in the application of the headline provisions of the GATT, such as Article III GATT on non-discrimination, that does not go uncontested; see Christian A. Melischek, *The Relevant Market in International Economic Law: A Comparative Antitrust and GATT Analysis* (Cambridge: Cambridge University Press, 2013).

economic rationale or theory that supports its intuition."[777] As one would expect from any legal decision, the choice of theory and fact cannot be led by intuition alone, but must be reasoned and argued. In line with the embedded standard of review applicable to the provision, I argue for conditional deference to the implementing Member State in construing exemption provisions.

Note that although the choice for the "marketplace" as an original focus of analysis is itself highly problematic, it is the reigning adjudicatory concept within the GATT for "real world" references.[778] Reference to the "real world," "market place," or other economic ontology derives its relevance to the interpretation of provisions under the GATT/WTO from the importance of "the particular circumstances of each case."[779]

As shown in Chapter 2, *supra*, and argued in the above, a developmental approach to fitting a contested policy to the terms of the provision need not result in degradation of regime predictability. A good faith application of the economic notion of "nestedness," which is at the core of the Product Space, allows the for a probabilistic assessment of the "commercial" or "developmental" nature of the policy.

3. Good Faith Construction

In the application of the object and purpose and context analysis, the WTO adjudicator is torn between the nature of international customary law, which tends to follow reality (in degrees of mimicry), and the treaty language, which stands in permanent tension to the passing of time and changing (economic) conditions.[780] It is in recognition of this bridging function between the dynamism of (economic) reality and the intractable nature of treaty language that the ILC stresses the roots of *bona fides* in effective treaty interpretation.[781]

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[777] WTO Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (2012), ¶643.

[778] See, Christian A. Melischek, *The Relevant Market in International Economic Law: A Comparative Antitrust and GATT Analysis* (Cambridge: Cambridge University Press, 2013).

[779] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶175; see similarly WTO Panel Report, *US – Shrimp (Article 21.5 – Malaysia)* (2001), ¶5.51.

[780] See, Christina Binder, "Die Grenzen der Vertragstreue im Volkerrecht," in *Beitrage zum auslandischen offentlichten Recht und Volkerrecht*, Band 245, Max Planck Institut (Berlin: Springer Verlag, 2013), p. 617, where she refers in particular to the "legalization" (Verrechtlichung) of the necessity defense: shifting from "necessity knows no law" to a strictly construed "law of necessity."

[781] As noted before, the ILC favors a Textualist approach to according meaning to the terms of an international agreement; ILC, pp. 220-221, ¶¶11-12.

The WTO adjudicator is tasked with the "objective" assessment of the matter before her, ex Article 11 of the DSU. This "objectivity" extends to and governs her use "good faith" as an interpretative element ex Article 3.2 DSU and Article 31 VCLT. Koskenniemi, however, finds that the interpreter's subjective intent trumps her understanding of any applicable notion of objective good faith, because: "[a]ppealing to principles which would pre-exist man and be discoverable only through faith or *recta ratio* [is] to appeal to abstract and unverifiable maxims which only camouflage[] the subjective preferences of the speaker."[782] The motivation to adopt any interpretation would, according to Koskenniemi, be found in the interpreter's appreciation of real world power balances or of a particular inspirational utopia.

Here again I resist Koskenniemi and subscribe to an objective approach to good faith put forward by the Appellate Body, in so far as the doctrine is rooted in the obligation to accord an "effective" interpretation to the provisions of the WTO covered agreements.[783] Objective good faith, as applied in the GATT 1994, allows the adjudicator to extend her understanding of the collaborative object and purpose beyond the language of the provision to inquire into the "effects" or economic reality to which the term refers in the matter before the adjudicator. Objective good faith, as an element of interpretation, thus serves to bridge the gap between letter and reality, as the ILC intended.

In her effort to discern the balance of the rights and obligations, the adjudicator is aided by objective good faith to maintain the systemic collaboration of Members States.[784] The inter-subjectivity of Parties' collaborative intent propagates the existence of the agreement and shapes the conditions for its meaning attribution, which objective good faith allows the interpreter to understand. The doctrine of good faith should objectively anchor Parties' desire to achieve mutually beneficial, rational collaboration through participation in a system of international (economic) law, based on full reciprocity. The interpreter's understanding of the treaty, set within an interpretational framework, gives weight and content to the (ordinary) meaning of the terms of the agreement – not her subjective interaction

[782] Martii Koskenniemi, "The Politics of International Law," 1 *European Journal of International Law* 4 (1990), p 5; see also Martii Koskenniemi, "The Politics of International Law – 20 Years Later," 20 *European Journal of International Law* 7 (2009).

[783] Howse argues that the WTO's institutional structure furthermore favors the construction of objective expectations over the parties' subjective intent, in Robert Howse, "The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power," in Thomas Cottier and Petros C. Mavroidis, eds., *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Ann Arbor: University of Michigan Press, 2003), p. 11.

[784] See similarly, Georg Schwarzenberger, 'The Fundamental Principles of International Law," in 87 *Recueil des Cours* 270 (1955, vol II).

with a Member's disappointed expectations of a particular benefit. Objective good faith thus also allows the adjudicator to adopt the systemic "cooperation in me" rather than the "cooperation for me."

Koskenniemi however argues, in the context of an international law that is perennially over- and under-legitimizing,[785] that a reconciliation of competing deep-axioms is ultimately impossible. Consequently, there does not emerge any one criterion for "legality" beyond the "political." In this sense, the political is properly conceived as "the principle which predictably resolves […] indeterminacy in legal practice"[786] and does so by "demonstrat[ing] the emergence and operation of structural bias."[787] Adjudicative bodies are empowered (and instructed) by the "politics of redefinition, that is, the strategic definition of a situation or problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias."[788]

While I take particular issue with any framing of preference heterogeneity in the Membership as external to the functionality and legitimacy of the GATT/WTO rules, I expect to agree with Koskenniemi if he were to point out that the provisions of the GATT/WTO and its jurisprudence are replete with structural biases. Problematically, this realization can point to a differentiation between function and aspiration in any approach to the WTO covered agreements, and seems to immediately invoke a political way of legitimizing or criticizing state behavior. This deductive structure and its apologist consequences are however not inescapable.

Sourgens points out though that instead of deductively organizing the discourse of international law, deriving validity from the battle of propositional syllogisms, the grammar of international law could operate inductively, taking full advantage of its very non-monotonicity[789] as it disrupts the deductive exercise. By positioning international law as an inductive process, Sourgens argues that persuasive reasoning relies upon overlap of multiple sources of validation.[790]

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[785] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), "it is overlegitimizing as it can be ultimately invoked to justify any behavior (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism)." (p. 67)

[786] Frederic Sourgens, "Reconstructing International Law as Common Law," 47 *The George Washington International Law Review* 101 (2015), p. 129.

[787] Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011), p. 65.

[788] *Id.*, p. 67.

[789] Non-monotonictiy is here understood as the nature of a system that is fundamentally open to diversity and context, rather than have conclusions proceed monotonically; i.e. without the ability to be influenced by external operators.

[790] Frederic Sourgens, "Reconstructing International Law as Common Law," 47 *The George Washington International Law Review* 101 (2015), p. 128.

Instead of offering a unitary truth, the core goal of international law conceived of inductively lies in the "protection of the legitimate differences in interest, experience, and perspective of the subjects international law intends to govern."[791] Sourgens protects his Mercurial "good faith"-principle from desolving back into the political by virtue of its ability to fundamentally recognize diversity and tolerate duality.[792] Deakin,[793] arguing similarly, highlights how a common law approach to adjudication and interpretation allows a system of law to retain its "cognitive openness," or its responsiveness to a variety of economic and political signals.

This inductive form of interpretative good faith operates much in line with the conceptualization of the ILC and operationalization by the Appellate Body, with the added – but crucial – ability to recognize the non-monotonicity of the "real world" or "market place" and allowing the interpreter to bring that duality to the text of the agreement.[794] By placing the notion of "viability"[795] central to the good faith application of object and purpose and contextual interpretation, the multilateral trading system can accommodate a diverse and heterogeneous Membership without recourse to concepts of "power" and "utopia" precisely *because* of its duality.[796]

4. The Ordinary Meaning of Exemptions

As argued throughout, words first receive the contours of their meaning from the interpreter's understanding of the object and purpose of the communicative instrument. The linguistic and grammatical context in which words are used provides an immediate control on meaning attribution. Article 3.2 of the DSU sets further hermeneutical

[791] *Id.*, p. 102.

[792] Whereas there is no single measure or method of establishing "good faith" this is not considered self-defeating, instead, this multiplicity of form prevents a trivialization of difference or the domestication of the "Other." "Instead of defining difference as "violation" of a pre-ordained normative order, international law takes the radically opposite approach of placing difference at the center of its normative process." See Frederic Sourgens, "Reconstructing International Law as Common Law," 47 *The George Washington International Law Review* 101 (2015), pp. 152-153; See also Emmanuel Levinas, *Humanism of the Other* (Illinois: University of Illinois Press, 2003), trans. Nidra Poller.

[793] Simon Deakin, "Law as Evolution, Evolution as Social Order: Common Law Method Reconsidered," Centre for Business Research, University of Cambridge, Working Paper N. 43/2015 (August 2015).

[794] Frederic Sourgens, "Reconstructing International Law as Common Law," 47 *The George Washington International Law Review* 101 (2015), p. 153.

[795] Justin Lin, *Economic Development and Transition: Thought, Strategy, and Viability* (Cambridge: Cambridge University Press, 2009); see for the impact of a "getting tough on trade" attitude, with which Alice Amsden credits the Second American Empire, Alice Amsden, *Escape From Empire: The Developing World's Journey Through Heaven and Hell* (Cambridge: The MIT Press, 2007), p. 11.

[796] See more generally, Ulf Linderfalk, "Good Faith and the Exercise of Treaty-Based Discretionary Powers," (2016), on file with author.

boundaries to the "objective" assessment by the adjudicatory of the matter before her (Article 11 DSU). The process by which the adjudicator applies the appropriate standard of review to the agreement and its provisions in turn receives its color and texture from the interpreter's approach to the three elements of Kantorowicz' triptych, set against her understanding of the collaborative intent of Parties.

Orwell famously implored the author/interpreter to "let the meaning choose the word, and not the other way about."[797] However, even in a "culture of formalism"[798] one cannot positively ascertain the meaning of a term without first examining the object and purpose of the commitment at hand, read in good faith and with reference to the context of the total agreement. Textualism, as a theory of judicial interpretation, can therefore be only one among many methodological topoi.[799] It is most usefully employed to constrain the range of possible meanings that can reasonably be attributed to the choice of words *ex post* – not, however, as a dispositive indexation mechanism of the range of *ex ante* possible meanings.[800]

The interpreter is however further constrained in her efforts at persuasive reasoning: first through her implied deference to genuine policy preference heterogeneity among the Membership (embedded standard of review), second through her understanding of the factual and legal context (contextual interpretation and good faith), and third by the doctrinal and normative demands of the treaty (Kantorowicz).

[797] George Orwell, "Politics and the English Language," in Sonia Orwell and Ian Angus, eds., *The Collected Essays, Journalism and Letters of George Orwell; In Front of Your Nose, 1945-1950* (Vol. 4) (London: Secker & Warburg, 1968), p. 138; in Petros C. Mavroidis, "No Outsourcing of Law? WTO Law as Practiced by WTO Courts," 102 *American Journal of International Law* 421 (2008), p. 447.

[798] Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), pp. 502–509; the culture of formalism serves as an interpretative safeguard to preserve the communicative audience, or epistemological body of international law, against the destructive effects of Koskenniemi's de-construction thereof; see Jason Beckett, "'Rebel Without a Cause?' Martti Koskenniemi and the Critical Legal Project," 7 *German Law Review* 1045 (2006), p. 1070.

[799] Herman Philipse, "Antonin Scalia's Textualism in Philosophy, Theology, and Judicial Interpretation of the Constitution," 3(2) *Utrecht Law Review* 169 (2007).

[800] As Scalia and Garner point out "it should not be forgotten that not all colloquial meanings appropriate to particular contexts are to be found in the dictionary," Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson, 2012), pp. 92, 32.

The art of adjudicative interpretation remains, even in most modern guises of positivist formalism,[801] primarily concerned with persuasion[802] through acceptable forms of reason and argument.[803] When Panels or the Appellate Body engage in a constructive exercise, fitting a contested domestic policy to the terms of a provision, its efforts at preserving the rights and obligations of the Member States are accordingly best envisioned as a function of the adjudicator's understanding of Parties' multilateral systemic collaboration, or her (objective) good faith understanding of collaboration "in" me.

C. Safeguarding Security and Predictability

The interpretational process of exemption provisions by the WTO adjudicator consists conceptually of two elements: (i) delineating exemption provisions from relevant headline rules and exceptions thereto according to the applicable standard of review (see Section A, *supra*); and (ii) according appropriate meaning to the terms of the exemption provision, in line with its object and purpose (see Section B, *supra*). This process of interpretation is, as I have argued in the above, only part of the adjudicatory exercise of construction.

As analyzed, Koskenniemi finds the contours of judicial construction in his conception of power and Utopia, which he constraints by the application of "cultures of formalism" in the judicial labor. I however argue that the contours of judicial construction instead emanate from the adjudicator's understanding of the collaborative intent of Parties. This understanding of the adjudicator is subsequently constrained in application to the judicial decision through each of the three elements of Kantorowicz' triptych of teleologies: normative, doctrinal and sociological.

Whereas in the previous sections I argue how the sociological element of the triptych should feature in the judicial construction and interpretation of exemption provisions in the GATT 1994, this section address the normative

[801] See, for instance, Jorg Kammerhofer and Jean d'Aspremont, eds., *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), where they note that "[m]odern forms of international legal positivism, instead, celebrate the role of politics in international reality and, indeed, international legal practice even where they separate the realms of politics and scholarship." (pp. 6-7). As pointed out earlier, this work does not embrace the deconstruction of the experience of international law, but instead grounds its interpretative framework in the rational, cooperative realization of the shared norm of social welfare optimization.

[802] Fish emphasizes that validation hinges on the recipient epistemic community, in Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press 1989), pp. 488–491.

[803] See, for example, Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); see also Joseph Raz, "Engaging Reason: On the Theory of Value and Action," in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge, eds., *Rights, Culture and the Law – Themes from the Legal and Political Philosophy of Joseph Raz* (New York: Oxford University Press, 2003).

teleological constraint on the adjudicator. Article 3.2 of the DSU instructs the adjudicator to acknowledge the dispute settlement system as a "central element in providing security and predictability to the multilateral trading system." The adjudicator is thus obliged to apply his judicial labor in a manner that (1) safeguards the predictability of the multilateral trading system; and (2) further its security.

1. Predictability

The relationship between the WTO adjudicator and the Membership is characterized by an agent-principle dynamic, where the adjudicator "cannot add to or diminish the rights and obligations provided in the covered agreements" (Article 3.2 DSU). In fact, by reserving the right of "authentic" interpretation to the Membership, the WTO Agreement squarely confines WTO dispute resolution bodies to the "judicial" interpretation of the covered agreements.

Predictability in WTO dispute resolution is a normative virtue of the adjudicator and works to legitimize the adjudicatory decision. It is therefore crucial for the adjudicator to provide the utmost transparency as she fits a contested domestic policy to the terms of the covered agreement. The predictability at the core of the judicial application of the rules and regulations of the WTO, as reserved for the WTO-adjudicator, is closely related to the formal aspects of the rule of law. Importantly, the rule of law dictates predictability of process in decision making and transparency of reasoning, not a predictability of outcome.[804] The World Bank similarly observes that "a judiciary independent from both government intervention and influence by the parties in a dispute provides the single greatest institutional support for the rule of law."[805, 806]

[804] Note that the Appellate Body in its Report in *US –Stainless Steel (Mexico)* (2008) concluded that ensuring security and predictability in the dispute settlement system, as contemplated in Article 3.2 DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case (¶160). That this does not guarantee (or even imply) a predictability of outcome is clear by the condition "absent cogent reasons" – instead, the AB emphasizes the importance of persuasive reasoning; a core aspect of the predictability of process in decision making.

[805] World Bank, *World Development Report 2002: Building Institutions for Markets* (Washington DC: The World Bank, 2002), p. 129. See also, Steve Charnovitz, "Judicial Independence in the World Trade Organization," in Laurence Boisson de Chazournes, Cesare Romano and Ruth Mackenzie, eds., *International Organizations and International Dispute Settlement: Trends and Prospects* (Leiden: Brill, 2002).

[806] The independence of the WTO judiciary has not seriously been challenged and is enshrined in the WTO Rules of Conduct. Although the expertise and ability of individual adjudicators has, at times, been criticized, the independence of the Appellate Body and Panels from political influence went broadly accepted. Note though that the judicial branch of the WTO is governed by the DRB, which adopts reports by (negative) consensus and upon which Member States sit. It is however only after the reports are circulated that review by the board allows Member States to express their view (Articles 16.4 and 17.14 DSU). In May 2016, the United States however moved to unilaterally block the reappointment of a South Korean Appellate Body member. In an open letter of May 31, 2016, 13 former Appellate Body members expressed grave concern about the US decision in relation to "upholding the rule of law in international trade." http://worldtradelaw.typepad.com/files/abletter.pdf.

The independence of the judiciary from political influence, irrespective of its manifestation (internal as well as external to her decision), and its commitment to the formal aspects of the rule of law are important to achieve predictability of process. I however caution against a wholesale adoption and application of the substantive aspects of the "rule of law"-concept as propagated by the World Bank as it remains susceptible to the arguments associated with critical legal studies (CLS).[807]

The constructive critique put forward in this work targets the methodology of applied reasoning in judicial decision making; the associated concept of predictability thus implicates the predictability of process. The Appellate Body, in *Japan – Alcoholic Beverages II*, describes the demands on the adjudicator set forth by Article 3.2 DSU in clear connection to the economic circumstances of each case:

> "WTO rules are not so rigid or so inflexible as not to leave room for *reasoned* judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They [the WTO rules] will serve the multilateral trading system best if they are interpreted with that [the circumstances of each case] in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system."[808]

In *US – Section 301 Trade Act* the Panel connects the protection of the security and predictability of the multilateral trading system to the functioning "of the market-place and its different operators."[809] This alignment of the multilateral trading system with the functioning of the marketplace focusses the attention of the adjudicator squarely on the economic theories and preferences she chooses to adopt and let inform her understanding of optimal cause and effect in the marketplace. The Appellate Body, from an interpretational perspective, also demanded as much from the Panel, noting it "would expect that in such circumstances the panel would […] explain the economic rationale or theory that supports its intuition."[810]

[807] See, for instance, Katharina Pistor, Antara Haldar, and Amrit Amirapu, "Social Norms, Rule of Law, and Gender Reality," in James J. Heckman, Robert L. Nelson, and Lee Cabatingan, *Global Perspectives on the Rule of Law* (London: Routledge, 2010).
[808] WTO Appellate Body Reports, *Japan — Alcoholic Beverages II* (1996), p. 31 (emphasis added).
[809] WTO Panel Report, *US – Section 301 Trade Act* (1999), ¶ 7.75.
[810] WTO Appellate Body Report, *US – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (2012), ¶643.

The choice for economic ontology to understand the working of the marketplace is,[811] as agued, a non-neutral choice when fitting domestic policies to the text of the multilateral agreement. It is a choice that must be supported by "basic" reasoning.[812] Appropriately, the obligations of Article 3.2 DSU have furthermore been read by the Appellate Body in consonance with those of Article 12.7 DSU. This combined reading clarifies the obligation of the adjudicator to provide "basic" reasoning, *i.e.* engage in persuasive reasoning, as a function of the predictability of multilateral trading regime.[813]

The Appellate Body further characterized the maintenance of the security and predictability of the multilateral trading system as an object and purpose of the WTO Agreement generally, as well as of the GATT in particular.[814] The "security and predictability" of the multilateral trading system is, according to the Appellate Body, clearly rooted in the circumstances of each case and serves the reasoned interpretation of the rules and regulation of the GATT as an expression of the "object and purpose" thereof.

The argued deference required of an adjudicator when fitting contested policies to the terms of an exemption provision, in light of the applicable standard of review, is therefore naturally constrained by the object and purpose thereof. As Oesch furthermore points out, "Panel deference in well-chosen circumstances and towards subject-matters which predominantly constitute national policy perogatives does not necessarily contradict the promotion of the rule of law. A deferential standard of review in certain circumstances can itself become part of the system, either

[811] Note that the adjudicator has to guard against automatically rooting her choice for economic ontology in the tradition of "embedded" (neo-)liberalism, where the power of the (international) price mechanism to universally achieve weak Pareto optimal market outcomes by inducing static allocative efficiency is expressed in the GATT/WTO through the protection of the legitimate expectations of Parties as to the conditions of competition. See, Panel Reports, *China – Rare Earth* (2014), ¶¶7.442-7.444; further cited in approval in Appellate Body Reports, *China – Rare Earth* (2014), ¶¶5.186, 5.189. Note also, that the legitimate expectations that are protected are those of certain "competitive" or liberal market conditions; not, as we have seen, expectations of actual economic outcomes or trade flows; See, John Ruggie, "Embedded Liberalism and the Postwar Economic Regimes," in *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998); see also, Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2006). See furthermore, Matthew Groves and Greg Weeks, eds., *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017).

[812] See, Peter-Tobias Stoll, "Article 3 DSU," in Rüdiger Wolfrum, Peter-Tobias Stoll, and Karen Kaiser, eds., *WTO – Institutions and Dispute Settlement – Max Planck Commentaries on World Trade Law* (Leiden: Martinus Nijhof Publishers, 2006); noting that "[a]t this point, it because clear that the multilateral trading system, although based on intergovernmental institutions and agreements, at least indirectly takes into consideration the real world of markets, traders and their needs and expectations." (p. 286)

[813] WTO Appellate Body Report, *Mexico — Corn Syrup (Article 21.5 — US)* (2001) noting that: "Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of promoting security and predictability in the multilateral trading system and of clarifying the existing provisions of the covered agreements, because the requirement to provide "basic" reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements." (¶ 107)

[814] WTO Appellate Body Report, *EC — Computer Equipment* (1998), ¶ 82. As such, application of the object and purpose to maintain the security and predictability of the multilateral trading system to domestic policies extends not only to present trade flows, but also incorporates concern for the system's "security and predictability needed to conduct future trade; see WTO Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review* (2003), ¶ 82.

by explicit stipulation in the legal texts or developed by case law. Then, it does not, if applied consistently and in a predictable manner, amount to legal uncertainty."[815]

2. Security

The Panel in *US – Section 301 Trade Act* explicitly recognized the provision of security and predictability to the multilateral trading system as a central object and purpose of the system and thus of the adjudicatory labor. While "predictability," in terms of meeting the demands set by rule of law, carries the most weight for the adjudicator, the implied focus of the system on the marketplace and its participants (firms) identifies the realm of "security" concerns in Article 3.2. DSU.

Providing "security" to the multilateral trading system at the level of market-participants is closely related to the exercise of "good faith" in recognizing the legitimate expectations as to the "conditions of competition"[816] – including the principle of non-discrimination. As Panizzon observes, "[t]he principle of protecting legitimate expectations ensures that the level of negotiated reductions of trade barriers is not offset by actions consistent with positive rights and obligations, but inconsistent with the overall level of multilaterally negotiated liberalization commitments."[817] In this way the "security" of the international trading system is enhanced.

At times, the Appellate Body has favored an understanding of the "legitimate expectations" inherent to the multilateral trading system that furthered trade liberalization over competing normative preferences.[818] This critique

[815] Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), pp. 32-33.

[816] See, GATT Panel Report, *Italy–Agricultural Machinery* (1958); GATT Panel Report *US–Taxes on Petroleum (Superfund)* (1987), ¶5.1.9; and the WTO Appellate Body Report, *Japan–Alcohol* (1996), p 32 (see also WTO Panel Report, *Japan–Alcohol* (1996), ¶¶7.1-7.2). The WTO Panel Report, *India–Patents* (1997), ¶¶7.20-7.22 and fn. 81-84, declared it is a "well-established GATT principle" and provides a list of cases using legitimate expectations as a GATT-specific substantive principle protecting the conditions of competition. See for the development of the concept of substantive legitimate expectations in the common law, Mark Elliott, "From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law," Cambridge Legal Studies Research Paper No. 5/2016 (January 2016).

[817] Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2008), p. 128.

[818] See, for example, WTO Appellate Body Report *Australia –Subsidy* (2005); the GATT Panel Report, *EEC – Oilseeds* (1990); the WTO Panel Report, *Korea – Procurement* (2000), and WTO Panel Report, *India – Patents* (1997), See further Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Oxford: Hart Publishing, 2008), pp. 370-371. See critical of that conclusion, Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *European Journal of International Law* 9 (2016), p. 33, where he observes that in the Appellate Body in its report in *EC – Computer Equipment* (1998) and *India – Patents* (1997) "rejected the pro-liberalizing doctrine that WTO commitments should be read in light of the legitimate or reasonable expectations of those seeking the benefit of liberalizing disciplines." Howse however concentrates on the use of legitimate expectations as an interpretation method, rather than as a constraining factor in the judicial construction as emphasized in this section.

however should not be construed so as to argue for discriminatory policies – the best industrial policies do not include picking winners – rather it stems from the realization that market supporting institutions (should) vary within the heterogeneous Membership and unilateral expectations of the conditions for/of competition need not be decisive.[819]

In providing "security" to the multilateral trading system, the decision maker should not find a back-door to implement her vision of the appropriate balance between "power" and "utopia". Market participants' legitimate expectations and the security of the multilateral trading system are inextricably linked, but should not work to frustrate the case-by-case analysis in hard cases.

The institutions that support market participants achieve a satisfactory equilibrium or enact a transaction are not singular, nor are they uniform or time-invariant.[820] The inductive reasoning that is central to the case-by-case analysis, and demanded from the adjudicator in "hard cases," instructs a measure of interpretative deference to the implemented policy. In the absence of normative homogeneity, excessive spill-over effects, and without centralization gains, the modified Oates' Theorem of Decentralization emphasizes the optimality of interpretative deference and policy devolution.

As the adjudicator provides "security" to the multilateral trading system, she balances her perception of the "legitimate expectations" of market participants with the structural preference heterogeneity of the Membership. This process of interpretative balancing should be subjugated to the demands of predictability of process and the discipline of providing cogent reasons. In light of the time-inconsistency and preference heterogeneity of the multilateral Membership, an approach to "security" that favors predictability of outcome should be avoided; on ethical and logical grounds.

In providing security and predictability to the multilateral trading system it is clear that multilateralism is a boon: providing legitimacy and the highest level of trade in and production of goods and services. The open construction

[819] See, Petros C. Mavroidis, "Come Together? Producer Welfare, Consumer Welfare, and WTO Rules," in Ernst-Ulrich Petersmann, ed., *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (New York: Oxford University Press, 2005).
[820] See Chapter 2, *supra*.

of exemption provisions provides a methodology to the adjudicator to support multilateralism, through a theory of contextual interpretation that emphasizes the adjudicator's ability to enforce Parties' systemic collaborative intent.

D. Developmental Exception

In the words of Keck and Low, "the battle to establish the principle that a set of uniform multilateral rights and obligations among a deeply diverse set of nations could not serve the best interests of all parties"[821] has been won a long time ago. In this sense, multilateral international economic collaboration implies, in the ideal, that policies are set and provisions interpreted in the understanding that "national efforts [at development] can fully succeed at the global level only if they are complemented by international [collaboration] designed at gradually overcoming the basic [economic] asymmetries of the global order."[822]

The open construction of exemption provisions, following application of the multilateral standard of review, aims to contribute to this goal by stressing the importance of rational sociological preference heterogeneity among the Membership. In the context of the GATT 1994, these sociological varieties have an explicit economic character, emanating from the preferred economic growth framework of Member States. I thus cannot agree with Hoekman where, in a discussion on "safety valves" in the WTO, he groups as "noneconomic objectives" policies serving such concerns as public health, national security, and the protection of vulnerable industries.[823] The classification of concerns for the industrial structure of an economy as "noneconomic" can only make sense in a strong version of the mature growth theory (see Chapter 2, *supra,* which explains that under the "inflating balloon"-theory of mature growth the structure of an economy is a resultant endogenous variable only).

[821] Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When and How?," in Simon Evenett and Bernard Hoekman, eds., *Economic Development and Multilateral Trade Cooperation* (Washington D.C.: The World Bank, 2006), p. 147.

[822] Jose Antonio Ocampo, "Rethinking Global Economic and Social Governance," 1:1 *Journal of Globalization and Development* 1 (2010), p. 9. See also, Jose Antonio Ocampo, "Globalisation and the Development Agenda," in Jan Joost Teunissen and Age Akkerman, *Diversity in Development Reconsidering the Washington Consensus* (The Hague: Fondad, 2004).

[823] Hoekman notes "[t]here are three types of provisions in this connection: (a) articles allowing for the use of trade measures to attain noneconomic objectives; […] category (a) includes provisions allowing for policies to protect public health or national security and to protect industries that are seriously injured by competition from imports." Bernard Hoekman, "The WTO: Functions and Basic Principles," in Bernard Hoekman, Aaditya Mattoo, and Philip English, eds., *Development, Trade and the WTO* (Washington DC: The World Bank, 2002), p. 44.

The protection of vulnerable industries has played a prominent role throughout the various negotiation rounds over the life of the GATT 1947 and again, in different ways, under the WTO covered agreements. This section will first summarily examine Special and Differential Treatment (SDT), a GATT/WTO program aimed at creating non-reciprocal policy space for developing countries.[824] At the collapse of the Doha-Round, the SDT-program was reincarnated in the Monitoring Mechanism. Thereafter, I will examine Article XVIII:C GATT 1994, as it provides a "developmental exception," which conceptually shares constructive similarities with exception provisions, while substantively gravitating toward the notion of an exemption for industrial policy. Examination of Article XVIII:C GATT 1994 is especially relevant in light of the Appellate Body's report in *India – Quantitative Restrictions*, where it distanced itself from political compromises concluded in WTO special committees (directly referencing balance of payment issues under Article XVIII:B GATT), implicating the role and function of the Monitoring Mechanism.

1. Special and Differential Treatment

The 1973 Ministerial Declaration explicates that the Tokyo Round negotiation's aim was to "secure additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings, the diversification of their exports, [and] the acceleration of the rate of growth of their trade, taking into account their development needs […]."[825]

Whereas the liberalization agreements that were the subject of negotiations during the Tokyo Round were held intentionally optional - and most developing countries decided against participation therein - the mood had turned at Uruguay. Indeed, the preamble to the WTO Agreement stresses Member State's desire to contribute to the growth of international trade and economic development "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."

[824] Note that the WTO distinguishes six categories of SDT. The Secretariat produced a number of studies relating to mandatory and non-mandatory SDT provisions (WT/COMTD/W/77/Rev.1/Add.1); a review of mandatory special and differential treatment provisions (WT/COMTD/W/77/Rev.1/Add.2), non-mandatory SDT provisions (WT/COMTD/W/77/Rev.1/Add.3), information on the utilization of SDT provisions (WT/COMTD/W/77/Rev.1/Add.4). See for an overview of the SDT and the general system of preferences, including discussion of the Appellate Body Report in *EC – Tariff Preferences* (2004), Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), Section 5.2 et seq.

[825] Tokyo Round Ministerial Declaration, September 14 1973, GATT/1134 (emphasis added), available at: https://docs.wto.org/gattdocs/q/.%5CGG%5CGATT%5C1134.PDF.

While in the 1980s and 1990s (international) economic law lost most of its active instrumental value under pressure of the (Modified) Washington Consensus,[826] during the 1950s and 1960s post-colonial economic development focused on the industrialization of "traditional" societies through active – and often invasive - management of the economy by the state.[827] At the time of pre-Uruguay Round tariff negotiations, developing countries were pre-occupied with the pursuit of import-substitution industrialization and (for some new found) sovereignty.

Under pressure of falling export earnings in relation to import demand,[828] import-substitution industrialization theory de-emphasized increased external market access through Most-Favored-Nation tariffs while stressing the need to exempt developing countries from offering reciprocal access on the import-side. Further allowances were made for infant industry and balance-of-payment restrictions.[829] This system of thought informed, to a large extent, the historic development of SDT (and the later Enabling Clause[830]) as integration mechanism for developing countries in the GATT and the global economy as a whole.

In line with the (neo-)liberal critique of import-substitution industrialization and strong governmental involvement in the economy, the Uruguay Round trade negotiations transformed the character of the SDT privileges.[831] Under pressure of the Single Undertaking-doctrine and the changing winds of economic orthodoxy, developing countries were urged to ultimately implement the entire "liberalization" package as a Single Undertaking while SDT provisions were reformulated to offer longer implementation periods and higher threshold values instead of exemptions to reciprocity.[832]

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[826] Signaling the shift away from state intervention toward the free operation of markets. Economic law became foundational to the efficient operation of markets, correcting for externalities and market failures, and to serve as a limit on state interference.

[827] Legal rules were used to operate broad and complex elements of society by means of state-owned enterprises and through import regulations and exchange controls; often as much with an eye to spurring development as to effectuate the newly gained rights to sovereign self-determination.

[828] See the 1958 authoritative "Habeler Report" – *Trends in International Trade* (October 1958, Sales No. GATT/1958/3).

[829] See for example, Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When and How?," in Simon J. Evenett and Bernard Hoekman, eds., *Economic Development and Multilateral Trade Cooperation* (Washington DC: World Bank, 2006).

[830] The Enabling Clause was introduced in 1979 to enable developed member states of the GATT/WTO to give differential and more favorable treatment to developing countries; officially called the "Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries."

[831] See Sylvia Ostry, "The Uruguay Round North--South Grand Bargain: Implications for Future Negotiations," in Daniel L. M. Kennedy and James D. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (Cambridge, Cambridge University Press, 2002).

[832] T. Ademola Oyejide, "Special and Differential Treatment," in Bernard Hoekman, Aaditya Mattoo, and Philip English, eds., *Development, Trade, and the WTO – A Handbook* (Washington DC: World Bank, 2002), p. 506. At the same time, the multilateral trading system was trying to confront the challenge of contingency protection as arranged bilaterally between Member States; especially the heavy use of voluntary export restraint arrangements were object of concern and led to their ban; see Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When and How?," in Simon J. Evenett and Bernard Hoekman, eds., *Economic Development and Multilateral Trade Cooperation*

In line with a functionalist approach to trade liberalization and related understanding of the object and purpose of the GATT/WTO, the special provisions granted to foster economic growth and development in the GATT/WTO thus radically changed character to be more fully supportive of the newly minted functional regime.

"In other words, when the trade agenda was basically confined to reduc[ing] border barriers, the [SDT] instruments provided some pro-active, positive measures designed to help the national development policies, such as preferences, policy spaces and non-reciprocity. When the trade agenda shifted towards trade rules that involve constraints to the national development policies, the [SDT] provisions tend to be concentrated on the adjustment to the new standards through negative measures such as temporary exceptions."[833]

Acceptance of the Single Undertaking meant the discontinuing of a previous style of development programming. As Low notes, "[t]his explosion in additional obligations has clearly been a problem for many developing countries. In retrospect (and doubtless at the time as well), many would argue that it was erroneous to impose the single undertaking on all countries, regardless of their development status."[834]

Special and Differential Treatment has, in this way, evolved from being a *development* tool (until the Uruguay Round) to being an *adjustment* tool (in the WTO legal framework).[835] In this context, the provision of technical assistance is certainly a positive, pro-development measure,[836] but it cannot provide changes in the economic structure, the supply constraints and the competitiveness of specific developing country industries, such as are needed to create an optimal environment for (targeted) economic diversification.[837]

(Washington DC: World Bank, 2006), p. 151. Article 11.1(b) of the 1994 Agreement on Safeguards prohibits new voluntary export restraints, while Article 11.2 provides that all pre-existing VERs should be phased out by 1999. A separate agreement on textiles and clothing postpones such date until 2005 for apparel; Agreement on Textiles and Clothing, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods-Results of the Uruguay Round, 33 I.L.M. 28.

[833] Manuela Tortora, "Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet," UNCTAD, No. WEB/CDP/BKGD/16 (2003), pp. 5-6.

[834] Patrick Low, "Is the WTO Doing Enough for Developing Countries?," in George A. Bermann and Petros C. Mavroidis, eds., *WTO Law and Developing Countries* (Cambridge: Cambridge University Press, 2007), p. 330.

[835] Manuela Tortora, "Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet," UNCTAD, No. WEB/CDP/BKGD/16 (2003), p. 6. See also Alexander Keck and Patrick Low, "Special and Differential Treatment in the WTO: Why, When, and How?," in Simon J. Evenett and Bernard M. Hoekman, eds., *Economic Development and Multilateral Trade Cooperation* (Washington DC: World Bank, 2006).

[836] See Robert Holler, et al., *A Comprehensive Approach to Trade Facilitation and Capacity Building: Connecting Developing Countries to Supply Chains* (USAID, March 2014).

[837] Note that the General Agreement on Trade in Services (GATS) does provide some pro-development accommodation in Articles IV (developing country participation) and XIX:2 GATS (market access conditions). See relatedly the WTO dispute between China and the United

Following the disastrous Third WTO Ministerial Conference in Seattle, the Doha Ministerial declaration was quick to reaffirm the importance of SDT as an integral part of the world trade system, calling for a review of all SDT provisions with the objective of "strengthening them and making them more precise, effective and operational."[838] The Doha declaration also reaffirmed the Marrakesh Agreement's pledge to "continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development." In that context the declaration notes that "enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play."[839]

Relatedly, the Special Session of the Committee of Trade and Development reached, in 2002, agreement on the need to establish a "Monitoring Mechanism" that would be mandated to evaluate the utilization and the effectiveness of the SDT provisions.[840] This Monitoring Mechanism would likewise be empowered to offer recommendations on how to ensure implementation of SDT provisions. No common ground could however be found on the terms of reference for this mechanism.[841] Another area where agreement fell short was on the development of appropriate benchmarks against which to assess the development impact of the very privileges the Monitoring Mechanism was supposed to evaluate and strengthen.[842]

States over Electronic Payment Systems (EPS), *China – Electronic Payment Systems* (2012). Rachel Block, "Market Access and National Treatment in China – Electronic Payment Services: An Illustration of the Structural and Interpretative Problems in GATS," 14 *Chicago Journal of International Law* 652 (2013-2014). Whether the Trade in Services Agreement (TiSA) will maintain these pro-development exceptions and facilitations is highly doubtful though, especially as the agreement is negotiated plurilaterally (with India and Brazil, among many others, not participating) and as China's economic power now far exceeds that of a "developing country" as classically understood.

[838] WTO Fourth Ministerial Declaration (Doha), adopted on November 14, 2001, paragraph 44. This language reflects concerns that are carried-over from pre-Seattle negotiations; the SDT obligations suffered from implementation issues on both developed and developing country side. The WTO distinguishes between the SDT clauses implying "obligations of result" and "obligations of conduct." The "best endeavor" category was and is of understandable concern to developing countries. For a list of "best endeavour" provisions as classified by the WTO, see inter alia: WT/COMTD/W/77/Rev.1/Add.2, WT/COMTD/W/77/Rev.1/Add.1/Corr.1.

[839] WTO Fourth Ministerial Declaration (Doha), adopted on November 14, 2001, paragraph 2. See also Krista Lucenti, "Trade Facilitation and the WTO," in Simon J. Evenett and Bernard M. Hoekman, eds., *Economic Development and Multilateral Trade Cooperation* (Washington DC: World Bank, 2006).

[840] See, Francis Mangeni, "Strengthening the Special and Differential Treatment in the WTO Agreements: Some Reflections on the Stakes for African Countries," ICTSD Resource Paper, No. 4 (February 2003).

[841] A US proposal (TN/CTD/W/19) concentrates the terms of reference of the Monitoring Mechanism on four main areas: (a) the implementation of WTO agreements by all Members; (b) developments in the Doha negotiations and working groups; (c) development and delivery of identified technical assistance needs; (d) relationship between the WTO and other international organizations contributing to the broader development agenda and supply-side interests. Of particular concern for developing countries was the possibility that the Monitoring Mechanism would be used to assess *their* utilization of the SDT privileges, rather than provide a forum for the strengthening thereof.

[842] The development of appropriate benchmarks is a vexing problem in most, if not all, social sciences. While graduation criteria in GSP schemes are mostly country and product specific, it is much harder to devise meaningful "behind-the-borders" assessment tools or reasonable measures of institutional capability. See, for example and with a focus on legal institutions, Katharina Pistor and Curtis Milhaupt, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World* (Chicago: University of Chicago Press, 2008).

In early December 2013, at the Ninth WTO Ministerial Meeting in Bali, the first multilateral trade deal was struck since the Uruguay Round. The main agreement concentrates on technical trade facilitation,[843] totaling an expected gain of about US$ 960bn.[844] Middle ground was furthermore found on how to best balance developed countries' aim of avoiding the creation of a permanent negotiating forum in the Monitoring Mechanism versus developing countries' desire for a forum that is empowered to go beyond transparency issues. The resulting Bali Round Monitoring Mechanism is, at present, a timid beast that analyzes and reviews the implementation of SDT provisions, with a view to facilitating the integration of developing and least-developed countries into the trading system.[845]

Although the Monitoring Mechanism is not precluded from making recommendations, it can only do so to other relevant WTO bodies, which are not bound or limited in their final conclusions by the recommendation. As such, the mechanism fits – *de minimis* – in the reigning system of the WTO institution, which emphasizes functional legitimacy and is guided in principle by the mature growth model's approach to "integrating" economies into the global economy.

2. Article XVIII:C GATT 1994 – A Developmental Exception

At the apex of WWII the UK and the US embarked on discussions toward the Atlantic Charter,[846] the forerunner of the GATT 1947. During negotiations, Keynes mounted an increasingly dire defense of the UK's imperial trading privileges[847] against the US' desire to ensure "access, on equal terms, to the trade and to the raw materials of the

[843] Trade facilitation was first added to the Doha Round agenda as part of the Single Undertaking, but was separated therefrom following the deadlock of negotiations on the Doha Round during the Eighth Ministerial Conference. Negotiations on trade facilitation aim to clarify and improve three articles of the GATT 1994: Article V (freedom of transit); Article VIII (limiting border fees and formalities); and Article X, (publication and administration of regulations).

[844] Gary Hufbauer and Jeffrey Schott, "Payoff from the World Trade Agenda 2013," Peterson Institute for International Economics, Report to the ICC Research Foundation (April 2013).

[845] Ministerial Decision, "Monitoring Mechanism on Special and Differential Treatment," WTO, Ninth Ministerial Conference, December 7, 2013, WT/MIN(13)/45.

[846] The Atlantic Charter is a declaration of an understanding between the UK and the US of August 14, 1941, that set the tone for a number of post-war international (economic) institutions and rules.

[847] Keynes was concerned with a harmful limiting of the policy freedom of the UK to achieve full employment in the post-war economy; in particular he was concerned with the UK's ability to retain the use of exchange controls or currency depreciation (should trade remedies be taken off the table entirely). Keynes, preferring trade policies, questioned the ability of depreciation to spur the total value of exports sufficiently to offset the associated deterioration in the terms-of-trade.

world […]."[848] Keynes, with characteristic flair, accused Meade and Fleming of having "*laissez-faire* appendicitis."[849] Fleming's reply is illustrative for the US position in these early modern trade negotiations:

> Perhaps I am just a relic of a by-gone age, but I certainly retain a strong attachment to the price system, not because I think it works perfectly, but because the alternative appalls me. In the past few years I have attended a good many meetings where people were engaged in allocating scarce resources between alternative uses; and no matter how high-minded and intelligent the allocators, I have always felt that the most imperfect of markets would have made a better and more sensitive job of it.[850]

After the WWII, the UK, still worried about its balance-of-payments, found common ground with developing countries in maintain recourse to quantitative restrictions to spur economic development, protect the wartime industrial base and relieve critical shortages.[851] India submitted an ultimately successful proposal for an amendment to the prohibition on quantitative restrictions for development reasons. This amendment is currently reflected in Article XVIII:*c* GATT 1994.[852]

Article XVIII:13 observes that "if a contracting party [which is in the early stages of development] finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section [C]." The requirements on developing countries according to Section C of Article XVIII GATT is to notify the Contracting Parties (Membership) and enter into consultations before expiration of certain time limits.

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[848] The fourth principle of the Atlantic Charter still includes a reference to the imperial preferences, and reads: "they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;" available at: http://avalon.law.yale.edu/wwii/atlantic.asp.

[849] In John M. Keynes, *The Collected Writings of John Maynard Keynes*, Donald Moggridge, ed. Vol. 26, *Activities 1941–1946 , Shaping the Post-War World: Bretton Woods and Reparations* (London: Macmillan, Cambridge University Press, for the Royal Economic Society, 1980), p. 289, quoted in Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 46, fn. 52.

[850] In John M. Keynes, *The Collected Writings of John Maynard Keynes*, Donald Moggridge, ed. Vol. 26, *Activities 1941–1946 , Shaping the Post-War World: Bretton Woods and Reparations* (London: Macmillan, Cambridge University Press, for the Royal Economic Society, 1980), p. 291, quoted in Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 46, fn. 52.

[851] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 121, fn. 82 and section 2.7.10, p. 151 et seq. See also Petros C. Mavroidis, *Trade in Goods: The GATT and the Other Agreements Regulating Trade in Goods*, 2nd ed. (Cambridge: Cambridge University Press, 2012), pp. 59-60; and Nico J. Schrijver, *Sovereignty over Natural Resources*, 2nd ed. (Cambridge: Cambridge University Press, 2008), pp. 4-5.

[852] See Summary Record of the Fifth Meeting - Held at Lake Success, New York, at 10:30 AM, on Friday, January 24 1947, Doc. E/PC/T/C.6/17, p. 2; available at: http://www.wto.org/gatt_docs/1946_50.htm. See also Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 153. Note that Pakistan successfully pushed for the consultation obligation of Article XVIII.5 GATT in case of strong terms-of-trade deterioration and the exception for intergovernmental commodity agreements in Article XX(h) GATT; see, Ninth Session - Report of Review Working Party IV on Organizational and Functional Questions, held on February 22, 1955, Document No. L/327, at p. 34.

The language of this provision has not been subject to interpretation by Panels or the Appellate Body. In fact, this Article has been invoked only three times thus far under the GATT 1994.[853] In all three cases, the issue turned on the relevant body that has jurisdiction over the notification and consultation process: either the Commission on Trade and Development (CTD), or the Commission for Trade in Goods (CTG). Issues concerning the Balance of Payments, under Article XVIII:B GATT 1994, find their exclusive forum in the Committee on Balance-of-Payments (BoP).

The relationship between these Committees, rooted in the WTO institution, and the dispute settlement system was the central topic in the Appellate Body report in *India – Quantitative Restrictions*.[854] In that case, the Appellate Body was faced with the demand that it should adopt a measure of deference to the (political) decision in the relevant WTO institutions as to the considerations of macro-economic and development policy. India had successfully obtained the agreement of many of its trading partners in the Committee on Balance-of-Payments to a delayed timeline for phasing out its BoP-based import restrictions. The US however disagreed, blocked consensus in the Committee and took India to dispute settlement.[855]

More specifically, this dispute is a result of the Uruguay Round Understanding on the Balance-of-Payments Provisions, which affirms the availability of dispute settlement challenges in the case of "application" of BoP-based restrictions to trade, while maintaining the Committee's jurisdiction for policing the phasing out of these restrictions. India argued that "application" should be read narrowly to implicate only those issues directly related to the application of the trade restrictive measure, but not broadly to extend to the underlying policy justifications thereof. These policy justifications, so India argued, were under purview of the Committee on Balance of Payments and not made subject to dispute settlement.[856]

[853] World Trade Organization, "Application of Article XVIII, Section C, of GATT 1994," WT/COMTD/39 (July 24, 2002), Committee on Trade and Development, identifies: *Malaysia – Polypropylene and Polyethylene* (1995), *Colombia – Imports of Salt* (1998), and *Bangladesh – Chicks, Eggs, Cartons and Salt* (2002).

[854] WTO Appellate Body Report, *India – Quantitative Restrictions* (1999).

[855] Uruguay Round "Understanding on the Balance-of-Payments Provisions in the General Agreement on Tariffs and Trade 1994" (WTO, 1995), affirming the availability of dispute settlement challenges in the case of "application" of BoP-based restrictions to trade, while the Committee's process for policing the phasing out of these restrictions was also maintained. See, Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *The European Journal of International Law* 1 (2016), p. 34.

[856] WTO Appellate Body Report, *India – Quantitative Restrictions* (1999), ¶80; "According to India, the Panel erred in law by failing to take into account that each organ of the WTO must exercise its power with due regard to the powers attributed to the other organs of the WTO."

The Appellate Body, in constructing Article XVIII:B GATT 1994, had to determine the appropriate nature of the horizontal relationship between it and the "political organs of the WTO."[857] These political organs generally have wide latitude to make determinations and issue recommendations as to the compliance of relevant Member State measures with WTO covered agreements, but lack enforceability (they function by consensus, an inherited feature from the GATT 1947; see Chapter 1, *supra*).[858] While this latitude to make recommendations does not prejudice Member States' ability to request the establishment of a Panel (invoke Article XXIII.2 GATT 1994), the Panel than needs to assess the matter before it "objectively" (Article 11 DSU). This, as argued, involves an assessment of the appropriate balance "established in [the particular WTO agreement] between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves […]."[859]

Despite the political and developmental nature of the assessment in the Committee's, the Appellate Body summarily rejected India's arguments. The Appellate Body categorically rejected the notion that institutional balance is a "principle of WTO law."[860] Neither did the Appellate Body find that the institutional balance of power dictated a measure of "judicial restraint" on part of the Panel and Appellate Body. In fact, "the Appellate Body suggested that, where the dispute settlement organs had competence, 'judicial restraint' would be inconsistent with the obligation to exercise this competence when requested to do so by a claimant."[861] The Appellate Body affirmed its understanding in its report in *Turkey – Textiles*.[862]

[857] Frieder Roessler, "The Institutional Balance Between the Judicial and Political Organs of the WTO" in Marco Bronckers and Reinhard Quick, eds., *New Directions in International Economic law: essays in honor of John H. Jackson* (Hague/London/Boston, Kluwer Law International, 2001), p. 325.

[858] See generally, Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), p. 37.

[859] WTO Appellate Body Report, *EC – Hormones* (1998), ¶115, cited in Claus-Dieter Ehlermann and Nicolas Lockhart, "Standard of Review in WTO Law," 7(3) *Journal of International Economic Law* 491 (2004), p. 494. See also, Petros C. Mavroidis, "Judicial Supremacy, Judicial Restraint and the Issue of Consistency of Preferential Trade Agreements with the WTO: The Apple in the Picture," in Dan Kennedy and James Southwick, eds., *The Political Economy of the International Trade Law: Essays in Honour of Robert E.* Hudec (Cambridge: Cambridge University Press, 2002).

[860] WTO Appellate Body Report, *India – Quantitative Restrictions* (1999), ¶¶99, 100-105.

[861] Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," 27(1) *The European Journal of International Law* 1 (2016), pp. 34-35.

[862] WTO Appellate Body Report, *Turkey – Textiles* (1999), at 22.

Note that both the language of Article XVIII:9 GATT 1994,[863] and Article XVIII:13-14 GATT 1994,[864] uses the conditional form "may" to describe the type of deviation from the headline rule contained in those provisions. This is indicative of its character of an *exception* provision, instead of an exemption. Also, despite the explicit reference to developmental concerns its drafting history, as well as reference to the Committee on Trade and Development (Article XVIII:C GATT), the Appellate Body approaches its construction of Article XVIII GATT 1994 in the course of its "normal" assessment. The standard of review applied by the Appellate Body is strict and does not allow for deference or judicial restraint – this is in line with the conceptualization of the standard of review for exception provisions I argued for in the above.

In contrast, Article XI:2 GATT 1994 uses imperative language, instructing the interpreter that the obligations of the Article XI:1 "shall not extend" beyond the limits set by Article XI:2 GATT 1994. As argued, application of the appropriate (multilateral) standard of review to exemption provisions such as Article XI:2(a) GATT 1994 leads to a construction that is both open and broad, ultimately allowing for a deferential interpretation of its terms. Further research might be required to postulate how an evolving Monitoring Mechanism could aid the Panels in their assessment of economic facts when fitting contested policy measures to the terms of the exemption provision. It is unclear whether the Appellate Body would, under an "open" standard of review, be more lenient in yielding to the recommendations of an extended Monitoring Mechanism sometime in the future. This however may be the logical continuation of the, now defunct, Doha Development Round.

[863] 9. "a contracting party […] *may*, subject to the provisions of paragraphs 10 to 12, control the general level of its imports by restricting the quantity or value of merchandise permitted to be imported; *Provided* that the import restrictions instituted, maintained or intensified shall not exceed those necessary," (emphasis added)

[864] 13. "If a contracting party […] finds that governmental assistance is required to promote the establishment of a particular industry […] it *may* have recourse to the provisions and procedures set out in this Section." (emphasis added) 14. "The contracting party concerned *shall* notify" (emphasis added).

The Multilateral Standard of Review: Export Restrictions, GATT Exceptions and Exemptions

Chapter 5:

Article XI:2(a) GATT 1994: An Open Construction

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In 1975, Dworkin introduced the concept of a "hard case" as a dispute where the adjudicator's discretional space is not univocally dictated by statute or precedent. The judicial labor in such a case is squarely focused on the adjudicatory interpretation of the text; the process of fitting the dispute to the letter of the text. Dworkin postulated that in these cases "a proper decision could be generated by either policy or principle."[865] In *Law' s Empire*, Dworkin clarified that judges must strive in hard cases to instantiate a "community of principle" in a society.[866] Critical Legal Studies however strongly contend that such "community of principle" is always and necessarily rife with conflict.

Waldron notes that "a certain critique from the Critical Legal Studies (CLS) movement pushes Dworkin to be a constructivist regarding the background elements of a legal system. Dworkin must argue that the legal background of a legal system is *constructively* coherent: it is capable of being made coherent at the hands of a sufficiently resourceful interpreter." [867] In an analysis of the "background elements" of international legal disputes, Broude finds a discrete category in "development disputes."

Broude postulates that "international development disputes can be understood as a discrete category of international disputes that, in terms of jurisdiction and applicable law, arise under fairly 'hard' rules of international law, such as trade and investment treaties, but in a more practical sense are actually concerned with reviewing the development policies of states, which are regulated on the international level only in very 'soft' terms, if at all." [868] He observes though that "[m]ost development related international dispute settlement avoids frontally engaging with

[865] Ronald Dworkin, 88(6) *Harvard Law Review* 1057 (1975), p. 1060.

[866] Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1988); see also, Frederic R. Kellogg, "What Precisely Is a "Hard" Case? Waldron, Dworkin, Critical Legal Studies, and Judicial Recourse to Principle," Discussion Paper for University of Edinburgh Legal Theory Research Group (April 2013).

[867] Jeremy Waldron, "Did Dworkin Ever Answer the Crits?," in Scott Hershovitz, ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (New York: Oxford University Press, 2008).

[868] Tomer Broude, "Development Disputes in International Trade," in Yong Shik Lee, Gary N. Horlick, Won Mog Choi, and Tomer Broude, eds., *Law and Development Perspective on International Trade Law* (Cambridge: Cambridge University Press, 2011), p. 30.

development dilemmas by resorting to legal tools, rules, and doctrines that are formally and teleologically exogenous to development."

The previous chapters aim to offer a theory whereby such developmental background elements can be made endogenous to the adjudicatory decision in a matter other than through an uncontrolled expression of power or Utopia. I have sought to argue that, within the framework of the GATT 1994, the adjudicator can overcome the "regulated madness"[869] of her judicial decision through her understanding of the collaborative nature of the treaty before her.

In her construction of the exemption provision of Article XI:2(a) GATT 1994, the adjudicator is guided by Article 11 of the DSU, that demands of her an "objective assessment" of the matter before her. This standard of review is, through the persuasive reasoning found in Appellate Body reports, made susceptible to the character of the agreement and the object and purpose of the provision under examination. The "embedded" standard of review applicable to the exemption provision of Article XI:2(a) GATT 1994, is not identical to the one guiding the construction of the exception provisions of Article XX GATT 1994, for example. In fact, the rule-exception framework the Appellate Body identified in its report *China – Publications*[870] militates against such uniformity.

It is in the application of the embedded standard of review that the adjudicator becomes aware of her teleological constraints. Kantorowicz identified these teleological constraints as sociological, doctrinal, and normative in nature. I argue that, based on the sociological preference heterogeneity that exists in the Membership of the WTO, the adjudicator must apply a standard of review to exemption provisions in the GATT 1994 that allows for an "open" or broad construction thereof. Such in accordance with the multilateral character of the GATT 1994.

The interpretation of the terms of the provision are an expression hereof, guided by their object and purpose. The adjudicator, when construing the terms of exemption provisions in accordance with the multilateral or "open"

[869] Martti Koskenniemi, "International Law as Political Theology: How to Read the Nomos der Erde," 11 *Constellations: An International Journal for Critical and Democratic Theory* 492 (2004); and Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations," in Michael Byers, ed., *The Role of Law in International Politics* (New York: Oxford University Press, 2000), pp. 17–34.

[870] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222-223; building on WTO Appellate Body Report, *US – Gasoline* (1996).

standard of review, creates interpretational space to fit a wider range of contested measures to the language of the provision. The implied measure of deference to developmental policies expressing domestic sociological/economic preferences is informed by application of the modified Oates' Theorem of Decentralization.

More broadly, the leeway of the adjudicator in constructing and interpreting exemption provisions broadly is circumscribed by the other two elements of Kantorowicz' Triptych: doctrinal and normative teleology. The latter element finds expression in the adjudicator's realization that the dispute settlement system serves to further the security and predictability of the multilateral trading system. The doctrinal element comes to expression in the present chapter through an examination of relevant cases and the persuasive reasoning of Panels and the Appellate Body as regards the construction of the exemption provision of Article XI:2(a) GATT 1994.

A. Export Restrictions in the GATT: A Concise History

In 1927, the World Economic Conference, sponsored by the League of Nations, called for multilateral negotiations in an effort to scale back then-existing tariff levels and other trade barriers.[871] The Convention aimed to "abolish within a period of six months […], all import and export prohibitions or restrictions and not thereafter to impose any such prohibitions or restrictions" (Article 2). The Convention however failed to deliver a permanent resolution and was superseded by world events (such as the Great Depression, the ensuing collapse of trade volumes, and the outbreak of WWII).

In the midst of WWII, US and UK embarked on discussions to revive the international trade architecture and agree on post-war import tariff cuts (including UK Imperial preferences). Instead of abolishing all import and export prohibitions, Contracting Parties followed a reciprocal, most-favored-nation (MFN) approach of across-the-board

[871] Convention for the Abolition of Import and Export Prohibitions and Restrictions, 25(3) *The American Journal of International Law* 121, Supplement: Official Documents (1931). The Convention sometimes features in dispute resolution pleadings to provide interpretation guidance, see, for instance, the WTO Panel Report, *US-Shrimp* (1998), ¶ 3.187 et seq. See also, Federico Ortino, *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Oxford: Hart Publishing, 2004), pp. 83, 84, 220. See for an assessment of existing and modified tariff-levels; Chad P. Bown and Douglas Irwin, "The urban legend: Pre-GATT tariffs of 40%," VOXEU, December 19, 2015.

incremental reductions.[872] On export taxes however, the US continued to prefer outright abolishment (similar to the approach favored in the Convention) to negotiated, and thus incremental, tariff cuts on MFN basis.[873]

In an apparent compromise, the section on the "Understanding on the Interpretation of Art. II:1(b) GATT" of the Interim Report of the (US) Special Committee on Relaxation of Trade Barriers (1943),[874] expresses the opinion that all *objectionable* export taxes should be abolished.[875] This US Special Committee seems to have carved out the use of export taxes for revenue purposes, in lieu of international agreements, to control military supplies, or imposed under conditions of famine – but, crucially, not for commercial purposes.

Article 25 of the "London Draft" of 1946, similarly limited its provision on the elimination of quantitative restrictions by excluding "prohibitions or restrictions on imports or exports imposed or maintained during the early post-war transitional period […]" for three circumscribed policy goals on shortages and pertaining to foodstuffs.[876] These two policy areas are reflected in Article XI:2 GATT 1947, likely as an exemption provision rather than as exception to Article XI:1 GATT 1947.[877] When Contracting Parties considered non-objectionable quantitative restrictions in the early post-war period of the London Draft, these categories would be deemed permissible.[878]

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[872] Instead of bilaterally negotiated, product-specific cuts, which would then be multilateralized through application of the MFN principle – an approach that was not administratively feasible for post-war European countries, but that has won the day as negotiation practice.

[873] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 70.

[874] Interim Report of the (US) Special Committee on Relaxation of Trade Barriers (December 8, 1943), International Trade Files, Lot File 57D-284, pp. 34, 35 et seq.

[875] See pp. 35ff of the report of the US Special Committee on Relaxation of Trade Barriers (Report of 8 December 1943, International Trade Files, Lot File 57D-284); as noted by Petros C. Mavroidis, George A. Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents, Cases & Analysis* (St. Paul, Mn: West Publishing, 2010), p. 98.

[876] The text of Article 25.2 London Draft reads in relevant part: "The provision of paragraph 1 shall not extend to the following: (a) prohibitions or restrictions on imports or exports imposed or maintained during the early post-war transitional period, which are essential to (i) The equitable distribution among the several consuming countries of products in short supply, where such products are owned by private interests or by the government of any member; (ii) the maintenance of wartime price control by a country undergoing shortages subsequent to the war; (iii) the orderly liquidation of temporary surpluses of stocks owned or controlled by the government of any Member or of industries developed in the territory of any Member owing to the exigencies of the war, which it would be uneconomic to maintain in normal conditions; […]." See, United Nations, Economic and Social Council, E/PC/T/C.5/14, January 24, 1947.

[877] See the early debate around the exclusions pertaining to the elimination of quantitative restrictions; https://docs.wto.org/gattdocs/q/1946_50.htm - for example, document E/PC/T/C.6/W/43 or E/PC/T/141. See also, Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 127.

[878] This included restrictions on the post-drought export of merino sheep from Australia, as discussed and agreed during the Geneva and Hanava meetings. The emphasis on foodstuffs is clear from the Havana Conference Sub-Committee on Articles 20 and 22, which ""was satisfied that the terms of paragraph 2(a) [...] are adequate to allow a country to impose temporary export restrictions to meet a considerable rise in domestic prices of foodstuffs due to a rise in prices in other countries." Similarly, the Report of the Review Working Party on "Quantitative Restrictions" recorded the view that "to the extent that the rise in prices was associated with acute shortages of the products in question, as it normally would be, [temporary export restrictions applied to meet a considerable rise in domestic prices of food-stuffs due to a rise in prices in other countries], whether affecting foodstuffs or other products, was clearly covered by that sub-paragraph [2(a)]" – see WTO, GATT Analytical Index, Article XI; available at: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art11_e.pdf (last accessed April 2, 2017).

The New York Conference of 1947, which produced a formal draft of the GATT, did not produce a major change to the language regulating the obligations,[879] but rearranged provisions dealing with the non-discriminatory administration of exceptionally permitted export quotas/quantitative restrictions. Member States meanwhile continued to propose limitations or extensions to this exclusion in early meetings.[880] Interestingly, the UK proved a useful interlocutor for developing country Member States in this process, as it continued to be worried about its balance-of-payments.[881]

This profound worry about the balance-of-payments (BoP) among central negotiation partners in part explains the focus of the language and structure of the eventual GATT 1947 on lowering import tariffs: from a Mercantilist or BoP point of view, export restrictions would be impractical tools to alleviate such stresses.[882] For such reasons, apart from the war-time economy and Imperial Privileges, experience with export restrictions was generally minimal in the "modern" economy. Mavroidis finds that "significant lack of practice in the field of export taxes […] is probably the single most important reason explaining why the founding fathers did not spend time and effort designing a mechanism for negotiation of export tariffs à la Article II of the GATT."[883] Although it should be noted that quantitative export restrictions have a long history as strategic policy to enforce hegemony or as industrial policy.[884]

India, concerned with its industrial development, tabled a proposal for an amendment to the prohibition on quantitative restrictions for development reasons.[885] Irwin, Mavroidis and Sykes observe that "in [India's] view,

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[879] See E/PC/T/C.6/14 of January 24, 1947, and E/PC/T/C.6/W.4 at pp. 3ff; see also Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 151.

[880] As Irwin, Mavroidis and Sykes point out, Belgium-Luxembourg unsuccessfully offered the following amendment: "Restrictions imposed under this exception should be strictly limited to the period during which the aforementioned circumstances occur, and should not be imposed on seasonal commodities at a time when like domestic products are not available." The authors opine that "[h]ad it been adopted, a serious proxy to detect protectionist behavior would have been added to the legislative arsenal." Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 152, fn. 242.

[881] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 121, fn. 82 and section 2.7.10, p. 151 et seq. See also Petros C. Mavroidis, *Trade in Goods: The GATT and the Other Agreements Regulating Trade in Goods*, 2nd ed. (Cambridge: Cambridge University Press, 2012), pp. 59-60; and Nico J. Schrijver, *Sovereignty over Natural Resources*, 2nd ed. (Cambridge: Cambridge University Press, 2008), pp. 4-5.

[882] See, Petros. C. Mavroidis, *Trade in Goods: The GATT and the Other Agreements Regulating Trade in Goods*, 2nd edn (Cambridge University Press, 2012), pp. 59–60, citing the Report of the US Committee on Relaxation of Trade Barriers of 8 December 1943, International Trade Files, Lot File 57D-284. Export duties were, however, used much more intensively during wartime. Ibid. See also N. J. Schrijiver, *Sovereignty Over Natural Resources: Balancing Rights and Duties*, 2nd edn (Cambridge University Press, 2008), pp. 4-5. See also, Ilaria Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge: Cambridge University Press, 2015), p. 128. See further, Richard Gardner, *Sterling-Dollar Diplomacy in Current Perspective* (New York: Columbia University Press, 1980).

[883] Petros C. Mavroidis, *Trade in Goods*, 2nd ed. (New York: Oxford University Press, 2012), p. 56.

[884] See, for instance, Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2003).

[885] See Summary Record of the Fifth Meeting - Held at Lake Success, New York, at 10:30 AM, on Friday, January 24 1947, Doc. E/PC/T/C.6/17, p. 2; available at: http://www.wto.org/gatt_docs/1946_50.htm. See also Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 153. Note that Pakistan successfully pushed for the consultation

Members should be free to choose any measure they thought was necessary for their development and, to that effect, they should not be constrained by the prohibition of import and export quantitative restrictions."[886] Especially developing countries, such as Cuba which offered support in the Geneva Conference for the Indian proposal on industrial policies, felt that a broader scope of exemptions would be appropriate, whereas mature markets sought limitations to such exemptions.

Discussion during the Geneva Conference suggests that domestic quotas were not meant to be captured by the prohibition on quantitative export or import restrictions[887] – as one would, perhaps, expect from a document that purports to regulate trade, products have to become part of the economy to be captured by its scope (i.e. yet-to-be-produced goods and unmined resources are beyond its scope).[888] Australia, furthermore, successfully proposed language to clarify and carve-out an exemption from the prohibition on quantitative restrictions to relieve critical shortages of foodstuffs (currently Article XI:2(a) GATT 1994).[889]

The Havana Round (1947) did not produce further changes in the language pertaining to the rule on export restrictions. The Havana Charter, meant as vehicle to incorporate negotiated policy constraints into the International Trade Organization (ITO), failed. It was only after this definitive failure of the ITO that the negotiated policy provisions role originally intended for the newly established organization was taken on by the GATT 1947.

In the Review Session of 1954, India continued to push the differentiation between quantitative restrictions maintained for industrial policy reasons and those with commercial or ordinary purpose. Ultimately, some of the

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obligation of Article XVIII.5 GATT in case of strong terms-of-trade deterioration and the exception for intergovernmental commodity agreements in Article XX(h) GATT; see, Ninth Session - Report of Review Working Party IV on Organizational and Functional Questions, held on February 22, 1955, Document No. L/327, at p. 34.

[886] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 152

[887] See, E/PC/T/174, at p. 8.

[888] The Panel in its report in *China – Rare Earth* (2014) observes that "once resources are extracted and have entered the market, it is neither China's nor any other Member's 'responsibility' or right to allocate the available stock between different users; once extracted and in commerce, rare earth's trade is subject to WTO law. Therefore, *a priori*, trade in natural resources should not be restricted without justification." WTO Panel Report, *China – Rare Earth* (2014), ¶7.462. In addition, Mavroidis notes that Article XI:1 GATT refers to restrictions on importation/exportation and does not broaden its scope to include measures "in connexion" with importation/exportation, as Article I GATT does. Mavroidis furthermore points to the production quotas maintained by OPEC; see Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 143, section 2.2.5.3.

[889] See, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of Fourteenth Meeting of Commission "A" (1) held 15 August 1947 Document E/PC/T/A/PV/40(1), p. 18; available at: http://www.wto.org/gatt_docs/1946_50.htm. See further Julia Y. Qin, "Reforming WTO Disciplines on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection," 46 *Journal of World Trade* 1147 (2012), p. 1152.

language of India's proposals was adopted during the negotiations on "Part IV" of the GATT in 1965.[890] This section is currently reflected in Article XVIII:*c* GATT 1994.

Note that around this time, the Panel system that was introduced in 1952 grounded to an effective halt under the stresses that surfaced between mature and developing countries. All the while, tariffs continued to be negotiated down through various rounds of negotiations. Particularly salient was the Tokyo Round (1979), where a number of "codes" were adopted, which the developing countries decided not to sign. Furthermore, a new Understanding on Dispute Settlement was introduced in 1979 and the appropriate standard of review in dispute settlement began being an explicit "discussion topic."[891] (see Chapter 1, *supra*)

The Contracting Parties to the GATT reached a momentous consensus on the shape and character of future collaboration on international trade policy in the Uruguay Round (1986-1994). There, the Membership decided to Annex several agreements, among which the reinvigorated GATT 1994, to the WTO Agreement. The WTO Agreement not only served as anchor vehicle to the new agreements, but also iterated the newly expressed collaborative intent of the Member States in its preamble.

Article XI of the GATT 1947 became the Article XI of the GATT 1994, the object and purpose of which agreement is reflected in both the preamble to the GATT 1994 (similar to the preamble in 1947) and the preamble to the WTO Agreement. The provisions of the GATT 1994, including Article XI, thus gained a new life, object, and purpose. The 1979 Understanding on Dispute Settlement was similarly supplanted by the DSU, reinforcing the different constructive and interpretational perspective of the Membership through the applicable standard of review.

Whereas Article XI has been subject to various disputes in the GATT/WTO, its exemption provision Article XI:2(a) GATT 1994 was constructed and interpreted for the first time by the Panel and Appellate Body in *China – Raw*

[890] Douglas A. Irwin, Petros C. Mavroidis and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 127.

[891] See, 1976 Report of the Consultative Group of Eighteen, BISD 23S/42 (1977).

Materials (2012). Since, the Appellate Body report in *China – Raw Materials* has been cited as persuasive authority in *China – Rare Earth* (2014) and will likely be central to the pending case *China – Raw Materials II*.[892]

In the below, I shall first explore the construction and interpretation of Article XI:1 GATT 1994 which presents the rule that prohibits quantitative restrictions. Thereafter, I examine the approach taken by the Panel and Appellate Body to the construction and interpretation of the exemption provision in Article XI:2(a) GATT 1994 and argue that it has wrongly construed it in direct opposition to the exception provision of Article XX GATT 1994. Instead, I will argue that application of the appropriate embedded standard of review should have led the Appellate Body to construct Article XI:2(a) broadly or "open" and not narrow its meaning in favor of the scope of the Article XX GATT 1994. In this way, India's long standing desire for a developmental exemption to quantitative restrictions may yet, but with a narrower scope, be vindicated in relation to Article XI:2(a) GATT 1994.

B. The Rule: Article XI:1 GATT 1994

The introduction and maintenance of custom duties, taxes and other charges on exports is not prohibited *per se* by the GATT. In the absence of applicable exception or exemption provisions, quantitative restrictions are however not allowed. Member States are encouraged to negotiate barriers to trade down, having declared themselves to be "desirous of […] entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."

While the ability of the Membership to negotiate down custom duties, taxes and other charges restricting exports is undisputed, the scope of the provisions providing legal effect to such negotiated reductions is somewhat ambiguous. Reductions in tariff ceilings are to be negotiated in accordance with Article XXVIII:1(bis) GATT, labeled "Tariff

[892] On 19 July 2016, the European Union requested consultations with China regarding China's duties and other alleged restrictions on the export of various forms of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin. A Panel was established as of November 23, 2016, jointly with Canada, Mexico and the United States.

Negotiations,"[893] but legal effect accrues to the outcome of such tariff negotiations by force of Article II GATT. It is however not immediately obvious that negotiated reductions in custom duties, taxes and other charges restricting exports are covered by Article II GATT as it fails to explicitly mention "exports" in conjunction with "imports."

Irrespective of whether reductions in the custom duties, taxes and other charges on exports can be negotiated down with legal effect, there remains some meaningful ambiguity in relation to the scope and nature of the prohibition on quantitative restrictions in Article XI:1 GATT 1994. According the proper ambit to the rule in Article XI:1 GATT 1994 is important to subsequently appropriately construe the exemption provision to Article XI:1 GATT in the next section.

1. Tariff Concessions: Article II GATT 1994

Article II:1 GATT 1994 -- Schedules of Concessions

(a) Each contracting party shall accord to the *commerce* of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, […], shall, on their *importation* into the territory to which the Schedule relates, […], be exempt from ordinary customs duties in excess of those set forth and provided therein […];

(c) The products described in Part II of the Schedule relating to any contracting party […] shall, on their *importation* into such territory,[…], be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. […]. (emphasis added)

While export tariffs are, in principle, legal (unless constrained), the language of Article II GATT only seems to mention tariff concessions on the import side, as included in Schedules 1 (MFN) and 2 (Preferential).[894] This imbalance seems limited to Article II GATT, as the before mentioned Article XXVIII*bis* GATT calls for negotiations "directed to the substantial reduction of the general level of tariffs and other charges on imports and exports." Practice furthermore seems to have sided with Article XXVIII*bis* GATT.[895] This seeming lacuna in the language of Article II GATT nonetheless brings some ambiguity to the interpretation of this provision.[896]

[893] Article XXVIII:1(bis) GATT reaffirms that Parties will engage in "negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports […]." Article XXVIII:2(a)(bis) further clarifies the modalities available to such negotiations, such as they "may be directed towards the reduction of duties, the binding of duties at the then existing levels or undertakings that individual duties or the average duties on specified categories of products shall not exceed specified levels."

[894] See, among others, Lothar Ehring and Gian Franco Chianale, "Export Restrictions in the Field of Energy," in Yulia Selivanova, ed., *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (The Hague: Kluwer Law International, 2012), pp. 113-114.

[895] See the Australian Uruguay round schedule of concessions. Furthermore, export restrictive policies have been the subject of negotiations in accession protocols to WTO; see §184 of the Working Party Report on the accession of Saudi Arabia to the WTO (WTO Document WT/ACC/SAU/61 of 1 November 2005).

[896] Mavroidis credits Bergsten for being one of the first who argued that the GATT post-Tokyo round need to complete its legislative arsenal by introducing disciplines not only on export taxes, but in general on export controls; see Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 141, fn. 19.

The GATT-era Panel in *US – Restrictions on Imports of Sugar* suggests a reading of Article II GATT that broadly enables "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." The Panel extends its reading further however to support the assumption that "Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement."[897]

A committed Textualist reading of Article II GATT would observe that commitments on the exportation of products cannot be considered "tariff" Concessions in the sense of Article II GATT. The article after all explicitly fails to mention measures relating to the exportation of products in consonance with the importation thereof. As such, so Jackson argues,[898] export concessions do not bind Member States ex Article II GATT. Jackson sees no reason to further "fill" this gap or read the text of Article II GATT extensively and supports this reasoning by claiming lack of Party practice to the contrary (in fact Australia has filed export concessions in its Uruguay Round schedule).

In contrast, Matsushita argues that the language of Article II:1(b) GATT is "merely indicative of the fact that the negotiators of the GATT 1947 were preoccupied with the elimination and reduction of import tariffs, and […] cannot be interpreted to necessarily imply that their intention was to exclude export duties altogether from the scope of Article II:1(b)."[899] Matsushita thus implicitly reads Article II GATT in the context of Article XXVIII*bis* and accords interpretative control thereto. This is a convincing possibility.

Matsushita's reading of the preoccupation of the early negotiating partners furthermore seems to be broadly in line with a 1943 report by the US, which notes that "[e]xcept during wartime, governmentally-imposed export duties, and prohibitions and quantitative restrictions on exports have had relatively little influence in limiting the overall

[897] GATT Panel Report, *United States – Restrictions on Imports of Sugar* (1989), ¶¶5.2-3.

[898] Jackson furthermore proceeded on the wrong assumption that no Member State had ever scheduled a Concession on the export side; see John Jackson, *World Trade and the Law of GATT* (Lexis Law Publications, 1969), p. 499. See also, Melaku G. Desta, "OPEC, the WTO, Regionalism and Unilateralism," 37 *Journal of World Trade* 523 (2003), p. 533.

[899] Mitsuo Matsushita, "Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources," 3 *Trade Law and Development* 267 (2011), pp. 273-274; see also Frieder Roessler, "GATT and Access to Supplies," 9(1) *Journal of World Trade* 25 (1975), pp. 33-35.

movement of commodities in world trade, although they have seriously affected the movement of specific products."[900]

A competing interpretation of Article II GATT, suggested by Ehring and Chianale, relates the term "commerce" in paragraph II:1(a) to the term "appropriate" to the effect of shifting the interpretative focal away from "importation" in paragraphs II:1(b) and II:1(c). By interpreting "commerce" broadly, they read Article II:1(a) to merely require a filing of negotiated concessions to an "appropriate" part of the Schedules. While the authors overcome the asymmetry of Article II:1(b) and (c) GATT by postulating a stand-alone legal effect for Article II:1(a) GATT, this reading does not satisfactorily resolve the recurring mention of only "importation" in Article II:2 and II:4 GATT.

Espa rather observes that scheduled export duty concessions are incorporated in the GATT as per Article II:7 GATT.[901] She argues however that this route limits the applicability of GATT-specific adjustment procedures (such as renegotiation or revocation under Article XXVIII GATT). In support of her conclusion that Concessions on export taxes should be effectuated under Article II:1(a), she subscribes to the independent normative character of Article II:1(a) – arguing for the explicit recognition of Schedule 3-type Concessions (non-tariff barrier), as is EU practice.

Mavroidis powerfully reflects the consensus interpretation of Article II GATT however where he holds that "[t]here should be no doubt […] that export duties are treated symmetrically with import duties in the GATT-system." He relies, in part, on a GATT Secretariat study during the Uruguay Round, which "states in clear language that GATT 'permits the imposition of charges on exports' and explains that, if imposed, export taxes must respect the MFN principle."[902]

[900] US, Report of December 8, 1943, International Trade Files, Lot File 57D-284, p. 34, cited in Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 141.

[901] See Ilaria Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge: Cambridge University Press, 2015), p. 134; such in agreement with Lothar Ehring and Gian Franco Chianale, "Export Restrictions in the Field of Energy," in Yulia Selivanova, ed., *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (The Hague: Kluwer Law International, 2012)..

[902] Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 141, fn. 20, citing GATT Document MTN.GNG/NG2/W/40 of August 8, 1989.

2. Prohibitions or Restrictions: Article XI:1 GATT

Article XI:1 General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions *other than duties, taxes or other charges*, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. (emphasis added)

The term "quantitative restrictions" lends its description to Article XI GATT only through the title and is replaced in paragraph 1 with "prohibitions or restrictions." These "restrictions" are qualified to include all measures "other than duties, taxes or other charges." It is informative that the Panel in *Colombia – Ports of Entry*, does "not consider the limited language appearing in the title of Article XI ("General Elimination of Quantitative Restrictions") as determinative in interpreting the ensuing specific provisions."[903] The Appellate Body in its report *China – Raw Materials* however notes the use of the word "quantitative" in the title of Article XI of the GATT 1994 does inform the interpretation of the words "restriction" and "prohibition" in Article XI:1; suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported.[904]

For completion, note that "quantitative restrictions" consist of quotas, import or export licenses, and other measures. "Quotas" and "QRs" are therefore not synonymous; import or export licenses rather condition trade upon the prior granting of a license. An Ad Note to the GATT furthermore clarifies that "the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations."[905]

Crucially, the scope attributed to prohibitions and restrictions in Article XI:1 determines also the ambit of the exemption provision of Article XI:2(a), as it immediately references paragraph 1. The terms "prohibitions or restrictions" are often used in conjunction, when consultations are requested (preceding the establishment of a Panel). Both terms point to the restrictive effect expressed in the title of article and Panels have, generally, understood the scope of these terms collectively. What follows is a brief overview of relevant reports indicates the broad scope accorded to these terms in Article XI:1 GATT 1994.

[903] WTO Panel Report, *Colombia – Ports of Entry* (2009), ¶7.243.
[904] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶320.
[905] WTO GATT, Note *Ad* Articles XI, XII, XIII, XIV and XVIII.

The GATT panel in *Japan – Trade in Semi-conductors* constructed the wording of Article XI:1 in a comprehensive fashion, noting it applies "to all measure instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges."[906]

The WTO Panel report in *India – Quantitative Restrictions* concurred and observed that "[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'." The Panel furthermore interpreted the scope of "restrictions" according to its ordinary meaning, noting that "the scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'."[907]

The WTO Panel report in *India – Autos* further endorsed this broad interpretation of the scope of Article XI:1 GATT, such that a measure which imposes a "limiting condition" or imposes a "limitation on action" constitutes a "restriction" within the meaning of Article XI:1. It observed:[908]

> On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both 'prohibition or restriction'. Furthermore, the Panel considers that the expression '*limiting condition*' used by the *India – Quantitative Restrictions* panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself.

The Panel in *India – Autos* furthermore stated that "it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit."[909]

Panels have furthermore considered the meaning of "restriction" against the protection of "competitive opportunities of imported products"[910] as opposed to actual trade flows.[911] This "no-effects-cum-no-intent" test is however

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[906] GATT Panel Report, *Japan – Trade in Semi-Conductors* (1988), ¶104.
[907] WTO Panel Report, *India – Quantitative Restrictions* (1999), ¶5.128.
[908] WTO Panel Report, *India – Autos* (2001), ¶¶7.269-7.270.
[909] WTO Panel Report, *India – Autos* (2001), ¶¶7.270.
[910] WTO Panel Report, *Argentina – Hides and Leather* (2000), ¶11.20.
[911] A GATT Panel made a similar holding in *Japan – Leather*, noting that "the existence of a quantitative restriction should be presumed to cause nullification or impairment not only because of any effect it had had on the volume of trade but also for other reasons, e.g. it would lead to

controversial, especially as the Panel in *Japan – Semiconductors* extended it from its original application scope of discriminatory taxation[912] and quota administration,[913] to encompass "other measures" as well.[914]

In *Argentina – Hides and Leather* a nexus was demanded between the challenged measure and the effective quantitative restriction. This nexus was found in the presence of a down-stream industry interests in customs controls was interpreted as *de facto* restrictive of exports. Similarly, the Panel in *Brazil – Retreaded Tyres* found a violation of Article XI:1 where fines did not impose a *per se* restriction on importation, but acted as an absolute disincentive to importation by penalizing it and making it "prohibitively costly."[915]

The Panel in *Colombia – Ports of Entry* summarized its understanding of the wide scope of Article XI:1 GATT as follows:[916]

> Thus, […], a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer. Moreover, it appears that findings in each of these cases were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.

In *China–Raw Materials*, the Appellate Body observed that the term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity."[917] Import bans were judged to be incompatible with Article XI:1 GATT in, for instance, *Canada–Periodicals*, *US–Shrimp* and *EC–Asbestos*.[918] The Panel in *Canada–Herring and Salmon* similarly struck down an export ban on unprocessed forms of salmon and herring.[919] The Appellate Body in *China – Raw Materials* referred to the term "restriction" as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation."[920]

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increased transaction costs and would create uncertainties which could affect investment plans." GATT Panel Report, *Japan – Leather II (US)* (1984), ¶ 55.

[912] GATT Panel Report, *US – Superfund* (1987).

[913] GATT Panel Report, *Japan – Leather II (US)* (1984).

[914] GATT Panel Report, *Japan – Semiconductors*(1988).

[915] WTO Panel Report, *Brazil – Retreaded Tyres* (2007), ¶¶ 7.370-7.372.

[916] WTO Panel Report, *Colombia – Ports of Entry* (2009), ¶7.240.

[917] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶319, finding support in the *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (New York: Oxford University Press, 2007), Vol. 2, p. 2363.

[918] See, WTO Appellate Body Report, *Canada–Periodicals* (1997), WTO Appellate Body Report, *US–Shrimp* (1998), and WTO Appellate Body Report, *EC–Asbestos* (2001).

[919] See, GATT Panel Report, *Canada–Herring and Salmon* (1988).

[920] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶319, finding support in the *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds.) (New York: Oxford University Press, 2007), Vol. 2, p. 2363.

In its report in *Argentina – Import Measures*, the Appellate Body summarizes that "in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. [footnote omitted] Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."[921]

The Panel in *Argentina – Import Measures* furthermore discussed the relationship between Article XI:1 and Article VIII of the GATT 1994. It held that "irrespective of whether the [challenged measure] is considered to be a customs or import formality subject to the obligations contained in Article VIII of the GATT 1994, this fact *per se* does not exclude the applicability of Article XI:1 to the examination of the measure. Therefore, there is no impediment that prevents the Panel from examining the complainants' claims against the [challenged measure] under Article XI:1 of the GATT 1994."[922] The Appellate Body upheld this part of the Panel's reasoning.[923]

Howse and Josling rather argued for a doctrinal approach to limiting the functional scope of export restrictive measures by introducing a "purpose and effect"-test rooted in Article VIII GATT.[924] In their view, Article XI:1, when read in combination with Article VIII GATT, "clarifies that the disciplines in Article VIIII on fees and charges do not prevent the use of export taxes as permitted by Article XI:1, but it also suggests that what was understood by an export tax was a measure imposed for fiscal (e.g. revenue-raising) purposes."[925]

These authors support their doctrinal reading of a narrow "purpose" of Article XI GATT, by a reading of *India – Autos*, such that "[t]he broad scope of Article XI as identified in the jurisprudence (*India–Autos*, report of the panel) and the application of purposive interpretation to Article XI (also endorsed in *India–Autos*) provides a basis for

[921] WTO Appellate Body Report, *Argentina – Import Measures* (2015), ¶5.217.
[922] WTO Panel Report, *Argentina – Import Measures* (2014), ¶6.444.
[923] WTO Appellate Body Report, *Argentina – Import Measures* (2015), ¶5.264.
[924] Robert Howse and Tim Josling, "Agricultural Export Restrictions and International Trade Law: A Way Forward," International Food and Agricultural Trade Policy Council (IPC) Position Paper, 2012.
[925] *Id.*, p. 17.

interpreting the meaning of export taxes narrowly, excluding those with predominantly trade-restricting as opposed to revenue-raising purposes."[926]

However, as Ehring and Chianale observe that "[n]othing in the negotiating history or practice of the GATT suggests that the words 'duties, taxes or other charges' in Article XI:1 of the GATT 1994 should be read narrowly."[927] Moreover, the introduction and maintenance of export taxes is legal, unless constraints by further bindings, as long as they satisfy the MFN condition – that is, they cannot operate discriminatory to confer an advantage to one party over another.

Espa furthermore adds that, even if such differentiation were practically possible,[928] "a purposive differentiation between permitted and non- permitted custom duties does arguably not exist for import tariffs, and Article XI:1 is structured entirely symmetrically on the import and export sides." She notes that "[a]s per Article II:1(b), WTO Members are free to impose import duties, irrespective of their rationale, insofar as they are not in excess of levels set forth in their GATT Schedules."[929]

I concur and argue that the embedded standard of review for the construction of Article XI:1 GATT 1994 should be mindful of its object and purpose to maximize the scope and effect of tariffication, such that trade nations can predominantly protect themselves through operation of tariffs only. The preamble to the GATT 1947 makes such sufficient clear, where it dictates that the arrangements of the GATT are "directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."

This integral reading of the scope of Article XI:1 GATT 1994 is furthermore supported by all three elements of Kantorowicz' triptych. Doctrinally, there seems broad support in both persuasive reasoning by the Appellate Body

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[926] *Id.*, p. 17.

[927] Lothar Ehring and Gian Franco Chianale, "Export Restrictions in the Field of Energy," in Yulia Selivanova, ed., *Regulation of Energy in International Trade Law: WTO, NAFTA and Energy Charter* (The Hague: Kluwer Law International, 2012), p. 120; see also, Ilaria Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge: Cambridge University Press, 2015), p. 142.

[928] Note that, in Chapter 2, *supra*, I argue that such differentiation is not only practical at the domestic level, but scientifically possible. I take advantage of the nested nature of the patterns of economic diversification ($\varpi_{t,n,j}$) and innovation (ω_{j_t}).

[929] Ilaria Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge: Cambridge University Press, 2015), p. 142, fn. 56. She further observes that "[m]oreover, on the import side, developing countries enjoy greater flexibility in the use of import duties in that they are not required to make concessions inconsistent with their 'development, financial and trade needs'." (fn. 56), see GATT Doc. L/4903, BISD 26S/203, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (The Enabling Clause), November 28, 1979, ¶5.

and Panels, as well as in the structure and object and purpose of the GATT 1947 and GATT 1994. Normatively, a broad construction of the scope and ambit of Article XI:1 GATT 1994 clearly supports the security and predictability of the multilateral trading system. And, while the interpretation is expansive, it is not clear that the Appellate Body has exceeded its mandate not to diminish or add to the rights and obligations of Members under the covered agreements.

Lastly, also economically, a broad interpretation of Article XI:1 GATT 1994 is sensible. Tariffs have marked economic benefits over quantitative restrictions, both in terms of the allocation and size of the surplus associated with trade (see Chapter 2, *supra*). Further support for interpreting Article XI:1 GATT broadly, aimed at purposive tariffication of trade restrictive policies, can be found in the labor of the Working Party to Article XI GATT; which concluded in 1950 that the GATT:

> […] does not permit the imposition of restrictions upon the export of a raw material in order to protect or promote a domestic industry, whether by affording a price advantage to that industry for the purchase of its materials, or by reducing the supply of such materials available to foreign competitors, or by other means. *However, it was agreed that the question of the objective of any given export restriction would have to be determined on the bases of the facts in each individual case.*[930]

This approach to the headline rule of Article XI:1 GATT 1994 corresponds to a contextualized rule/exception interpretation of the framework of the GATT 1994, as clarified by the Appellate Body in *China – Publications*. As Article XI:2(a) inherits the initial scope of Article XI:1, its characterization as an exemption provision (rather than an exception) in the GATT 1994 determines application of the appropriate standard of review. This embedded standard of review furthermore directs the adjudicator's understanding of the provision's object and purpose in the GATT 1994, which is informed by the preambles of both the GATT 1947 and the WTO Agreement.

C. Article XI:2(a) GATT 1994: Exception v. Exemption

Article XI:2 General Elimination of Quantitative Restrictions

1. […]

2.The provisions of paragraph 1 of this Article *shall not extend to* the following:
(*a*) Export prohibitions or restrictions *temporarily* applied to *prevent or relieve critical shortages* of foodstuffs or other products *essential to the exporting contracting party*; […]

[930] Report of the Working Party "D" on Quantitative Restrictions, GATT/CP.4/33, (March 28, 1950), pp. 1-2, 4. (emphasis added)

Pre-contractual or political collaboration among sovereigns occurs to pursue beneficial outcomes that cannot be realized in autarky. Once such collaboration is transformed into a multilateral treaty, such as the GATT 1994, the political imperatives for collaboration are transformed into legal obligations of collaboration (regardless of the strength or efficiency of the enforcement mechanism). As argued throughout, the adjudicator of the multilateral agreement is to construct the provisions and interpret the terms thereof in accordance with her understanding of the collaborative intent of Parties that is internal to the document: its object and purpose, informed by relevant declarations of intent in the preamble(s). Any other approach leaves the decision maker exposed to the vagaries of Power and Utopia, or, in the absence of homogeneity among the Membership, invites her to commit the historicism-fallacy of imposing an origin-becoming narrative on a multi-directional document.

Exception and exemption provisions ensure that the "reciprocal and mutually advantageous arrangements" of the GATT/WTO headline rules are given effect so as to contribute to the agreement's underlying collaborative objectives of "expanding the production of and trade in goods and services […] in a manner consistent with [Member States'] respective needs and concerns at different levels of economic development." The adjudicator, in her construction and interpretation of provisions such as Article XI:2(a) GATT, thus needs to be mindful of the "distributive as well as [the] integrative aspect […]"[931] of the multilateral treaty.

The language of Article XI:2(a) GATT was only recently interpreted by the WTO DRB, first in *China – Raw Materials* and thereafter in its delayed-twin, *China - Rare Earth*. Both cases concern export restrictive policies on raw materials and strategic commodities maintained by China. In July 2016, a third challenge to China's export restrictive regime, *China – Raw Materials II*, was initiated by the European Union and the United States in parallel.[932] In line with these cases and the argumentative focus in this work, I will only consider export restrictive policies impacting industrial products, or products other than foodstuffs.

[931] I. William Zartman and Saadia Touval, "Introduction: Return to the Theories of Cooperation," in I. William Zartman and Saadia Touval, eds., *International Cooperation: The Extents and Limits of Multilateralism* (Cambridge: Cambridge University Press, 2010), p. 7.

[932] Reuters, "EU Launches WTO Challenge to Chinese Raw Material Duties," July, 19, 2016; See, WTO, *China – Raw Materials II (US/EU)*, DS508/DS509, Panel established November 23, 2016, but yet composed (as of April 5, 2017).

In all three cases complaints challenged China's maintenance of export restrictive measures on different raw materials. The measures instituted by China run the gamut: (i) export duties; (ii) export quotas; (iii) export quotas management (iv) minimum export price requirements; (v) export licensing requirements; and (vi) administration and publication of trade regulations. The WTO challenge of these measures rely, in relevant part, on China's presumed violation of Article XI GATT 1994 and Paragraph 11.3 of its Accession Protocol. China defended against these challenges by invocation of Article XI:2(a) GATT 1994, the exemption provision to Article XI:1, and, in the alternative the general exception provision of Article XX(b) and XX(g) GATT 1994 – the latter in relation both to its alleged Article XI:1 GATT 1994 violation as well as its alleged violation of Paragraph 11.3 of its Accession Protocol.

In its interpretation of Article XI:2(a) GATT 1994, the Panel broke the language of the provision into three key elements: "essential products," "temporarily applied," and "critical shortage." Of course, the way any provision is broken down betrays, to some extent, a preference for the interaction, or lack thereof, between particular phrases or the sequence of the words chosen – nonetheless I will follow Panel's ordering as it does not materially prejudice the substantive interpretation thereof.

Accordingly, this section centrally examines the relationship between Article XI:1 and Article XI:2(a) GATT 1994. It will argue that the Panels and Appellate Body have misconstrued the exemption provision of Article XI:2(a) GATT 1994 by reading it in the context of the exception provision Article XX GATT. Furthermore, this section will seek to apply the construction-cum-interpretation theory argued in Chapter 4, *supra*, such as to read the scope of the terms of Article XI:2(a) GATT 1994 broadly. This section will furthermore include an observation on the contextual importance of Member State's permanent sovereignty to its natural resources,[933] as well as indicate the scope for a national security-based defense.

The next section explores the relationship of the Accession Protocol to the provisions of the covered agreements.

[933] WTO Panel Report, *China–Raw Materials* (2011), ¶¶7.377–7.381; WTO Panel Report, *China–Rare Earth* (2014), ¶¶7.262.

1. Article XI:2(a) GATT 1994: Essential Products

In its assessment of "essential products," the Panel embarks on a case by case analysis where "a product may be 'essential' within the meaning of Article XI:2(a) when it is 'important' or 'necessary' or 'indispensable' to a particular Member." Importantly, "[t]his may include a product that is an 'input' to an important product or industry."[934] While the Panel found comfort in its observation that "the phrase 'to the exporting' Member appears to have been added to the initial draft of Article XI:2(a) to clarify that 'the importance of any product should be judged in relation to the particular country concerned',"[935] it noted that a Member "may [not], on its own, determine whether a product is essential to it."[936]

In the Panel's view, "the determination of whether a product is 'essential' to that Member should take into consideration the particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a)."[937] If complete discretion was intended, so the Panel considered, the drafting would have included the "it considers"-language of the national security exception of Article XXI(b) GATT.[938]

In an attempt to further widen the scope of "essential products" in Article XI:2(a), China noted pro-development passages in the preamble of the GATT 1994. In particular, China argued that the preamble's emphasis on the optimal use of the world's resources in accordance with the objective of sustainable development and in a manner consistent with Members respective needs and concerns at different levels of economic development, was well placed to offer additional interpretative guidance. It offered additional support for a "pro-development" reading of "essential products" in Article XI:2(a) by pointing to the principles and objectives of Part IV GATT, in particular Article XXXVI:5 GATT.[939]

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[934] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.282.
[935] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.275.
[936] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.276.
[937] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.276.
[938] The "it considers" language has been examined in a slightly different context in relation to the international investment arbitration proceedings following the Argentine economic crisis of 1998-2002, see for example, Jose E. Alvarez, "The Return of the State," 20(2) Minnesota Journal of International Law 223 (2011); and Stephan Schill and Robyn Briese, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement," 13(1) *Max Planck Yearbook of United Nations Law Online*, 61 (2009); See Section IV.B.4, *infra*.
[939] Article XXXVI:5 GATT 1994 reads: "The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification* of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties." [*] The Note Ad on "diversification" in Article XXXVI:5 clarifies that "[a] diversification programme would generally include the intensification of activities for the processing of primary products and the

The Panel summarizes China's argument thus "that Article XXXVI:5 and its Ad Note support the view that Article XI:2(a) may be applied to address a product that is important to domestic processing industries. China submits that Article XXXVI:5 shows that the essential nature of a "primary product" for a developing country may derive from the product's role in securing economic diversification through the development of domestic processing industries."[940]

The Panel however, agreeing with the European Union, held that Article XXXVI:5 GATT should not be read such that it would create different obligations for developing and developed countries; especially as Article XXXVI:5 focuses on market access as opposed to the imposition of quantitative restrictions under consideration in Article XI:2(a) GATT.[941] The Panel held that "an assessment of whether a product is 'essential' under Article XI:2(a) would […] call for a case-by- case analysis."[942]

The complainants in *China – Raw Materials* furthermore put forth that the inclusion of "foodstuffs" in the scope of the provision is relevant to convey the level of importance of the other products that are contemplated by the provision, such that those products can be considered "indispensable to" or "pertaining to the essence of" the exporting Member. Complainants thus argue that a broad reading of the notion of "essential products" in Article XI:2(a) could exceed the confounds of Article XI GATT and make the general exception of Article XX(i) redundant.[943]

The Appellate Body summarily discusses the importance of "essential" in its Report *in China – Raw Materials*, by means of a Textualist examination of the word. It concludes that the term "essential" is defined as "[a]bsolutely

development of manufacturing industries, taking into account the situation of the particular contracting party and the world outlook for production and consumption of different commodities."

[940] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.265.

[941] WTO Panel Report, *China – Raw Materials* (2011), ¶¶ 7.271 and 7.280.

[942] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.279.

[943] Article XX(i), together with the Chapeau to Article XX GATT, observes that Members are otherwise free to adopt measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination."

indispensable or necessary."[944] Accordingly the Appellate Body observes that, "Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products." It however moderates this position by arguing that "by including, in particular, the word 'foodstuffs', Article XI:2(a) provides a measure of what might be considered a product 'essential to the exporting Member' but it does not limit the scope of other essential products to only foodstuffs."[945]

In its summary of China's argument, the Panel seems to have only acknowledged two of the three arguments China made: 1. Read Article XI:2(a) GATT 1994 against the preamble of the WTO Agreement; 2. This reading is supported by Part IV, in particular Article XXXVI:5 GATT 1994; and 3. Any assessment of "essential products" is subject to a case-by-case analysis. While the Panel accepted the necessity for a case-by-case reading, it rejected reliance on Part IV on grounds that it would infuse Article XI:2(a) GATT 1994 with different obligations for developing and mature markets. It however ignored the first element of China's argument, which points to relevant language in the preamble.

As argued in Chapters 1 and 4, *supra*, the first and central analytical step in constructing any provision is clarification of the embedded standard of review. I argue that the appropriate standard of review applicable to exemption provisions should be sensitive to the developmental (or distributive) components of the collaborative intent of Parties, as found in the preamble. China, correctly, started its argumentation here, which should have led the Panel to adopt the multilateral standard of review, leading to an "open" construction of the exemption provision. Furthermore, even a plain reading of the text of Article XI:2(a) GATT 1994 should lead to the conclusion that it inherits the broad scope attributed to Article XI:1 GATT 1994.

Note that such "open" construction does not, of itself, create separate obligations for developing or mature markets, but merely recognizes the sociological/economic preference heterogeneity that is inherent to the Membership. Both mature and developing countries should, under exemption provisions, be provided leeway to pursue locally optimal economic policies – fitted to the terms of the provision on a case-by-case basis. The Panel's rejection of an overt

[944] WTO Panel Report, *China – Raw Materials* (2011), ¶326; citing W.R. Trumble, A. Stevenson, eds, *Shorter Oxford English Dictionary*, 6th edn (New York: Oxford University Press, 2007), Vol. 1, p. 865.
[945] WTO Panel Report, *China – Raw Materials* (2011), ¶326.

development context and its insistence that a Member "may [not], on its own, determine whether a product is essential to it"[946] is therefore unproblematic.

The adjudicator in construing exemption provisions in an "open" manner, pursuant their assessment of the multilatreal standard of review, needs to be mindful of the additional doctrinal and normative constraints that guide her judicial decision.

The Appellate Body stresses the doctrinal constraints by reading "essential" in a Textualist manner. However constraining its reading is, both theoretically and in practice, it does not unequivocally close the door on inclusion of industrial products in the category of "essential products," but sets a high bar. The Appellate Body's doctrinal reading furthermore contents well with the possible meaning of "essential products" in the GATT 1947, but with the advent of the WTO Agreement and the establishment of the GATT 1994, such historical teleology is less compelling in the present case. Instead, I plead that the Appellate Body should have given more weight to the object and purpose analysis of Article XI:2(a) GATT 1994 when interpreting its terms. This would have led the Appellate Body to recognize the provision as providing an exemption to Article XI:1 GATT 1994 early on in its analysis.

Normatively, both the Panel and Appellate Body's reading of "essential products" can be considered in line with the objective expectations of the Membership, as determined by the language of the provisions, the object and purpose of the GATT 1994, and generally by the obligation to maintain the security and predictability of the multilateral trading system.

Adjudication of conflicting policy preferences occurring under exemption provisions should not turn on the decision maker's unidirectional socio/economic preference as applied to the factual matrix.[947] Instead, a considerable degree of deference is appropriate when fitting locally optimally policies to the terms of the exemption provision. In order to present a true "hard case" though, it is essential that the Member State's policy preference should itself be applied *temporarily* and be *particular* to the developmental coordination problem it addresses.[948]

[946] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.276.
[947] See Daniel Lovric, *Deference to the Legislature in WTO Challenges to Legislation* (The Hague: Wolters Kluwer, 2010).
[948] See Chapter 2.B.2, *supra*.

2. Article XI:2(a): "Restrictions temporarily applied to prevent or relieve critical shortages"

After delineating the meaning of "essential" products, the analytical emphasis falls on the construction of "temporarily" in relation to "applied," and of "temporarily" to "critical." The scope of these relationships needs, so I argue, to be construed with reference to the appropriate context, such that the object and purpose of the provision are clarified. Instead of reading the exemption provision of Article XI:2(a) in broad harmony with the GATT 1994, to which it does not apply generally, I argue that its appropriate understanding is tied to Article XI:1 GATT 1994 alone. By stressing this close relationship, the adjudicator maintains her flexibility to account for the sincere preference heterogeneity of the Membership when confronted with hard cases.

In line with the Appellate Body's favored interpretative method, Textualism, it examines the words "temporarily," "critical" and "shortages" with the aid of the *Shorter Oxford English Dictionary*.[949] When giving meaning to the language of Article XI:2(a), the Appellate Body considers however that words are not to be read in isolation and that in their context they "impart meaning to each other," in such a way as to "define the scope of Article XI:2(a)."

The Panel and Appellate Body both recognize, in their reports in *China – Raw Materials*, that "temporarily" is the pivotal term in the sentence "restrictions temporarily applied to prevent or relieve critical shortages." Within the syntax of the sentence, "temporarily" unambiguously informs the term "applied." The Appellate Body's Textualist analysis reveals that the phrase "temporarily applied" is indicative of "a measure applied for a limited time, a measure taken to bridge a 'passing need'." As the Appellate Body holds: "the definitional element of 'supply[ing] a passing need' suggests that Article XI:2(a) refers to measures that are applied in the interim."[950] This is a fairly uncontested reading of the phrase "temporarily applied."

[949] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶¶ 322-329; *Shorter Oxford English Dictionary*, 6th edn., W.R. Trumble, A. Stevenson, eds. (New York: Oxford University Press, 2007).
[950] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 323.

The Appellate Body however extends the interpretative range of "temporary" beyond "applied" to inform "critical" as well.[951] This linguistic extension is facilitated either through use of the words "relieve" and "prevent," as argued by the European Union, or to clarify the duration of the critical shortage, as argued by the Appellate Body.

China submits that the term "critical" relates to shortage and refers to "a deficiency in quantity that rises to the level of decisive importance or crisis, or that raises uncertainty or risk of the same."[952] Complainants rather argue that in so doing China conflates the "essentialness" and "critical shortage" questions, the effect of which is to read "critical shortage" out of Article XI:2(a) GATT. The complainants accept China's definition of "shortage" as referring to "a deficiency in quantity", but add that the term "critical" means "in the nature of or constituting a crisis or of decisive importance."[953]

Complainants subsequently argue that, for a shortage to be "critical", it must rise to "a level beyond mere 'relative scarcity'," and that the existence of "supply constraints," […], would not suffice to establish the existence of a "critical shortage" under Article XI:2(a).[954] The complainants point to a statement by a representative of the United Kingdom that, "if you take out the word 'critical', almost any product that is essential will be alleged to have a degree of shortage and could be brought within the scope of this approach."[955]

The European Union further argued that the words "critical shortage" must be read within the context of the entire provision of Article XI:2(a), such that a restriction must be "temporarily applied", and must be "relieving" the critical shortage, or "preventing" its occurrence. In other words, for a "shortage" to be "critical" in the sense of Article XI:2(a), that shortage must be, inter alia, temporary, i.e., limited in duration.[956] If there is no possibility for the shortage ever to cease to exist, the European Union submits that it would not be possible to "relieve or prevent" it through an export restriction applied only for a limited period of time.[957]

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[951] This extension of the interpretative realm of "temporarily applied" to include "critical" is driven in large part by the Appellate Body's perceived necessity to distinguish the exemption provision of Article XI:2(a)GATT from the General Exceptions of Article XX(g) and (j) (see Section V.A.4, *infra*).

[952] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.284

[953] WTO Panel Report, *China – Raw Materials* (2011), 289; fn. 481; Complainants' joint opening oral statement at the first substantive meeting, ¶ 140.

[954] WTO Panel Report, *China – Raw Materials* (2011), 289

[955] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.292, fn 486; Complainants' joint opening oral statement at the first substantive meeting, ¶ 143, referring to Exhibit CHN-181; United States' second written submission, ¶ 231; Mexico's second written submission, ¶ 236.

[956] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.290.

[957] WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.290.

The Appellate Body rather comes to the conclusion that "whether a shortage is 'critical' may be informed by how 'essential' a particular product is."[958] More importantly perhaps, the Appellate Body observes that "[i]n addition, the characteristics of the product as well as factors pertaining to a critical situation, may inform the duration for which a measure can be maintained in order to bridge a passing need in conformity with Article XI:2(a)."[959] Taken together the Appellate Body notes that "critical shortage" should be read so as to refer "to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point."[960]

The Appellate Body however proceeds to read its "critical shortage" in relation to Article XX(j) GATT to distinguish the exemption provision of Article XI:2(a)GATT from the General Exceptions of Article XX(g) and (j). When considering the provision of Article XI:2(a) in the framework of the entire agreement, the Appellate Body finds appropriate context to the construction of "critical shortage" in "the words 'general or local short supply' in Article XX(j) of the GATT 1994."[961] In fact, the Appellate Body relates Article XI:2(a) even more directly to Article XX(j) GATT, when it holds that "[c]ontrary to Article XI:2(a), however, Article XX(j) does not include the word 'critical', or another adjective further qualifying the short supply. *We must give meaning to this difference in the wording of these provisions*. To us, it suggests that the kinds of shortages that fall within Article XI:2(a) are *more narrowly* circumscribed than those falling within the scope of Article XX(j)."[962]

I disagree with the reasoning of the Appellate Body on two grounds: First, I submit that the Appellate Body effectively collapses the exemption provision of Article XI:2(a) into a "critical shortage"-test, which; second, the Appellate Body contextualizes with the exception provision Article XX(j) GATT. Instead, I will argue that the constructive context of Article XI:2(a) is determined by *its* scope and character alone, as appropriately determined by the embedded standard of review. The interpretative context is, as a result, limited to the Article XI GATT 1994

[958] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 328.
[959] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 328.
[960] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 324.
[961] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 325. In interpreting the use by WTO Members of policy preference provisions and General Exceptions in the GATT, the Panel furthermore found guidance "in marking out the line of equilibrium by the requirement that exceptional measures be 'applied temporarily' to address 'critical' shortages under Article XI:2(a)."
[962] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 325 (emphasis added).

alone. It is also here that the permanent sovereignty to natural resources can play an informative role as further context to this exemption provision in the GATT 1994.

The decision maker, in her construction and interpretation of Article XI:2(a) GATT 1994, must balance her open construction of the exemption provision with the constraints imposed on her by applicable doctrinal and normative teleologies. Hereunder I first examine the fit of an open construction of the analytical components examined in this section (note that construction of "essential" products in accordance with the multilateral standard of review was found to be beneficial). Thereafter I confront the construction with applicable doctrinal and normative constraints. Lastly, an alternative interpretation of the terms "restrictions temporarily applied to prevent or relieve critical shortages" is given.

An open construction of Article XI:2(a) GATT 1994 follows the multilateral standard of review, such that it recognizes both the object and purpose of provision set against the context of the GATT 1994 and accords meaning to the character of the provision as an exemption to the rule/exception framework of the GATT/WTO.[963] The character of Article XI:2(a) GATTT as an exemption provision is confirmed by a reading of its opening sentence: "The provisions of paragraph 1 of this Article shall not extend to the following." The scope of the provision is thus both determined by and limited to the provisions of "paragraph 1 of this Article." It is thus expressly tied to and contained by Article XI:1 GATT 1994. Furthermore, the language instructs in an imperative way that the provisions of paragraph 1 "*shall* not extend" to the provisions of the following paragraphs – these are "exempted" from coverage of the bindings of Article XI:1 GATT 1994.

As Mavroidis observes, "indeed, exemptions could in principle, be left out not only from the coverage of Article XI.1 GATT, but from the coverage of GATT altogether. […]It seems that panels have adopted two different solutions with respect to exemptions simply because some of them are disciplined in the body of Article XI of GATT (food shortages), whereas, some others in a different provision, namely in Article II of GATT (customs

[963] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222-223; building on WTO Appellate Body Report, *US – Gasoline* (1996), p. 30, where it held that "so far as concerns the WTO, [Member State legislative autonomy] is circumscribed only by the need to respect the requirement of the *General Agreement* and the other covered agreements."

duties). Case law has been treating the exemptions embedded in Article XI.2 of GATT as if they were exceptions."[964]

As noted above, the appropriate standard of review for exemption provisions emphasizes the distributive element of the preamble. This understanding of the appropriate character of the embedded standard of review is further reinforced by the Appellate Body's understanding that "With respect to trade, the *WTO Agreement* and its Annexes [] operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder."[965] Naturally, an exemption provision relieves the Member State of specific bindings upon its inherent powers to adopt locally optimal policies – it is by its very nature an exemption to the integral rule/exception framework.

Where the Appellate Body construes the scope of the exemption provision of Article XI:2(a) GATT 1994 in relation to the General Exceptions of Article XX, or, arguendo, the developmental exception provision in Article XVIII(c) GATT 1994, it first violates the scope of the exemption provision and, second, applies a uniform standard of review across provisions that have a different application structure and scope (for example Articles VIII and XX GATT 1994).[966] The Panel in *China – Raw Materials* similarly observes that "the reach of Article XI:2(a) would not be the same as that of Article XX(g); they are intended to address different situations and thus must mean different things."[967]

The adjudicator engages in an open construction of exemption provisions in the GATT 1994, not to favor one implementation preference over another, but to positively recognize the heterogeneity that exists in the Membership. In this way, the adjudicator seeks to do justice to sincere sociological/economic conflicts between the Member States in the matter before her. Her constructive and interpretational space is critically contained not merely by her desire to find a balanced outcome to the economic conflict, but also by the demands of normative and doctrinal teleology that circumscribe her ability to come to a judicial decision in the hard case before her.

[964] Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 140.
[965] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222
[966] WTO Appellate Body, *China–Rare Earth* (2014), ¶5.64.
[967] WTO Panel Reports, *China – Raw Materials* (2011), ¶7.300.

Doctrinally, Article XI:2(a) accepts its original scope from Article XI:1 GATT, to which it closely relates. I argued for a broad reading of this scope and will proceed on that basis here. Similarly, the concept of "essential" products was found to be fairly broad and within the purview of defendant. As Article XI:2(a) is an affirmative defense, the party that invokes it carries the initial burden of proof. Although this allocation of the burden of proof comports to the practice of the Panel and Appellate Body, it is nonetheless controversial. An exemption provision might be said to shift the burden of proof to complainant, as Mavroidis observes: "This would suggest that the complainant would have to show that a measure is a QR, in the sense of Article XI.1 of GATT, and is not a measure featured in Article XI.2 of GATT."[968]

As I argue in Chapter 4, *supra*, when the multilateral standard of review commands an open construction of Article XI:2(a) GATT 1994, the implied deference when fitting the contested policy measure to the terms of the provision has to satisfy the conditions of Oates' Decentralization Theorem: 1. no centralization gains; and 2. limited inter-jurisdictional spill-over. The Oates' Decentralization Theorem thus serves to yard stick to the burden of proof of the defended, or, to mitigate the deference suggested by the switching of the burden of proof to the complainant.

Rather uncontroversial however is the idea that "temporary measures" are those measures that are restricted in time and related to a "passing need." This "passing need" consequently has to reach the level of a "critical shortage." The disagreement that exists about the economics hereof I will address under the "economics" heading hereunder.

The European Union reads Article XI:2(a) to take the measures themselves as center of gravity. It tests whether the contested measures are capable of the prevention and relief of a "critical shortage" when temporarily applied. As such, this reasoning offers a contrast in the effective duration of measures that correctly fall under Article XI:2(a) and those that target conservation of resources, ex Article XX(g) GATT.

[968] Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 140.

The Panel agrees and concludes that "an interpretation that Article XI:2(a) permits the application of a measure for a limited time under limited circumstances would be in harmony with the protection that may be available to a Member under Article XX(g), […]."[969]

The Appellate Body however lets the characteristics of the products and the factual matrix directly inform the duration of the "critical shortage." It thus instructs "temporarily" to speak to "critical" without the facilitative benefit of the object and purpose of the measures (and indeed of the provision): to prevent or relieve such critical shortage.[970] This crucial and consequential difference in construction not only changes the character of the exemption provision, but also constricts the scope of the provision in relation to Article XI:1 GATT.

While the constructions of the EU and the Appellate Body are closely related, they crucially invite a different context: The EU reads the different elements of Article XI:2(a) within the provision as a whole and as a function of the object and purpose of the measure itself, whereas the Appellate Body's focus rests on the character of the critical shortage which compels it to read the provision in relation to the General Exception of short supply in Article XX(j) GATT. I resist extending the appropriate substantive context (the disputed measure, as applied to relieve or prevent a critical shortage) of Article XI:2(a) beyond its relationship with Article XI:1 GATT[971] and argue that the scope of the provision follows the context thereof (i.e. essential products).

In a subsequent case, *India – Solar Panels*, the WTO Panel is called on, for the first time, to interpret Article XX(j) GATT as a General Exception. In construing the term "in general or local short supply" the Panel revisits the Appellate Body holding in *China – Raw Materials*,[972] where it read the term "critical shortage" in Article XI:2(a) GATT in the context of Article XX(i).

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[969] WTO Panel Reports, *China – Raw Materials* (2011), ¶ 7.257.

[970] Against this background it is noteworthy that the Panel in *China – Raw Materials* considers the submissions from Brazil and Canada in its report. Brazil submits that situations "where the shortage of products [can] not be overcome, but only managed over time, [these] are better addressed under Article XX(g)." Similarly, Canada in her submission observes that "measures may not be applied under Article XI:2(a) for an indefinite period, but may only be applied for a fixed time." Canada further notes that, "while Article XI:2 is subject to the particular requirements set out in each paragraph, Article XX is subject to additional requirements, specifically, those contained in the chapeau to Article XX." See, WTO Panel Reports, *China – Raw Materials* (2011), ¶ 7.254; and see fn. 432 433 thereto: Brazil's third party oral statement, ¶ 9; Canada's third party oral submission, ¶17.

[971] Note that The Appellate Body, in its report *US – Shrimp*, explicated that Article XX GATT sets forth "limited and conditional exceptions from the obligations of the substantive provisions of the GATT." (WTO Appellate Body Report, *US – Shrimp* (1998), ¶157). The Panel, in *China – Raw Materials*, however explicitly acknowledges that "Article XI:2(a) operates as an exception, but only with respect to the obligations contained in Article XI:1, and not with respect to GATT obligations more broadly" (WTO Panel Report, *China – Raw Materials* (2011), ¶ 7.300).

[972] WTO Panel Report, *India – Solar Panels* (2016), ¶7.203; WTO Appellate Body Report, *China – Raw Materials* (2012), ¶325.

The Panel in *India - Solar Panels* considers that "the terms 'products in general or local short supply' refer to a situation in which the *quantity* of available supply of a product, *from all sources*, does not meet demand in a relevant geographical area or market."[973] This is in line with the Appellate Body's Textualist reading of "shortage" in Article XI:2(a) GATT to refer to a "deficiency in quantity."[974]

In determining the scope of the products considered by Article XX(j), the Panel notes "that in contrast to Article XI:2(a), which refers to 'essential products', Article XX(j) refers to 'products' without any such qualification. We therefore consider that the terms 'products in general or local short supply' includes not only any situation, but also any product, in respect of which the quantity of available supply, from all sources, does not meet demand."[975]

While I argue that, doctrinally, the appropriate substantive context of Article XI:2(a) is found in Article XI:1 GATT 1994 and its scope determined by a broad interpretation of "products essential" to the exporting Member State, I note that the determination of what constitutes a "critical shortage" requires economic conviction.

The *sociological/economic* argument, centers on the understanding of a "critical shortage" within the scope of Article XI:2(a) GATT (i.e. "products essential to the exporting contracting party"). While both complainants and defendants agree that a critical shortage refers to "a deficiency in quantity that rises to the level of decisive importance or crisis," complainants offer three additional perspectives.

First, complainants argue that an interpretation that emphasizes "quantitative deficiency" conflates the "critical shortage" and "essential product" elements. In so far as this argument depends on the doctrinal discussion above it is not applicable here. The remaining economic aspect of this argument suggests that while the designation of any product as "essential" is rooted in the domestic context, its limits should be provided by market signals. That is, the

[973] WTO Panel Report, *India – Solar Panels* (2016), ¶7.234 (emphasis added): "our view is that a product is "in general or local short supply" when the quantity of available supply of that product, from all sources, does not meet demand in the relevant geographical area or market in question. This includes all available sources of supply, including both foreign and domestic sources. Domestic manufacturing capacity is therefore one variable that must be taken into account to assess whether solar cells and modules are products in short supply in India. In other words, our view is that a lack of domestic production in the products at issue is a necessary, but not sufficient, condition for finding that supply of that product, from all sources, does not meet demand in the relevant geographical area or market in question."

[974] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 324.

[975] WTO Panel Report, *India – Solar Panels* (2016), ¶7.232.

affirmative arguments of the invoking Member State are conceptually bound by signals of the market place. As the underlying market mechanics similarly constrain the meaning of "essentialness" and "critical shortage," they are – essentially – similar concepts from an economic principles perspective.

This argument however reflects a mature growth perspective on markets and their operation. A Developmental or catch-up growth perspective rather emphasizes the importance of the non-unique mapping of markets to optimal policies (these categories rationally differ between markets and growth models). Most importantly however, adoption of a catch-up growth perspective re-introduces the additional skill information that was lost in the "inflating balloon" perspective on economic growth (see Chapter 1, *supra*). A "case-by-case" assessment of "essentialness" that is explicitly susceptible to the plight of downstream industries captures this difference and translates it elegantly to the text of Article XI:2(a).

Second, the complainants make a related argument based on the operation of the market and – implicitly – the operation of the price mechanism. Their argument to give enhanced meaning to the word "critical" draws on the operation of "supply and demand," such that "if you take out the word 'critical', almost any product that is essential will be alleged to have a degree of shortage and could be brought within the scope of this approach." As noted in the doctrinal discussion, the Panel in *India – Solar Panels* extends the meaning of Article XX(j) GATT to all products on precisely this ground in light of the omission of "critical" in that provision.

Reliance on the fundamentally limited nature of "supply" to narrow application of Article XI:2(a) to those situations of extreme misalignment between demand and supply on account of an external shock or calamity, crucially seeks to re-impose the limitations Howse and Josling argued in relation to Article XI:1 GATT, *supra*. It is not clear, economically nor doctrinally, that the object and purpose of Article XI GATT 1994 excludes export restrictive policies temporarily maintained as industrial policy (note that the relationship to Article XVIII(c) GATT 1994 is determined by the doctrinal analysis) – however much such intention might be part of the GATT 1947.

Indeed, a policy-induced temporary glut or shortage can have structural effects, provided firms shift their production accordingly. This, in fact, anchors the proposed difference between "commercial" and "developmental" policies, as argued for in Chapter 1, *supra*, and adopted throughout.

Third, the doctrinal construction put forth by the European Union has the benefit of directly addressing the possible effectiveness of the measure to prevent or relieve the "critical shortage." I agree with this approach as it closely follows the distinction between "commercial" and "developmental" policies. A policy incapable of bringing about the desired result is not suited and cannot find the protection of a policy flexibility provision – especially considering the object and purpose of Article XI and the GATT/WTO as a whole.

The adjudicator, when construing the exemption provision and fitting the contested domestic policy to the text of the multilateral agreement, is constrained by her *normative* teleology; namely to safeguard the security and predictability of the multilateral trading system (Article 3.2 DSU). As noted in Chapter 4, *supra*, the predictability demanded in 3.2 DSU points to a predictability of process, rather than a predictability of outcome. The concept of security in the GATT/WTO is closely related to the maintenance of the objective expectations of Member States and is informed by the adjudicator's understanding of the balance of rights and obligations that are conceded and retained by the Membership.

Recognition of Article XI:2(a) GATT 1994 as an exemption provision, limited in scope to Article XI:1 GATT 1994, adds to the predictability of the adjudicatory process. By according the exemption provision its proper place, the rule/exception structure of the GATT 1994 is reinforced. In fact, the scope accorded to the exemption provision calibrates, as a third element, the balanced construction of GATT and other covered agreements. An open construction of the exemption provision in Article XI:2(a) GATT 1994 furthermore shields the Panel from having to engage the economic preferences of Member States in an ad hoc fashion;[976] i.e. trying to positive determine when

[976] The Appellate Body in its Report, *US – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (2012), for example noted that it "would expect that in such circumstances the panel would […] explain the economic rationale or theory that supports its intuition" (¶643).

the integrity of the market-based[977] price mechanism is of central importance (such as in *China – Raw Materials* and *China - Rare Earth*)[978] and when not (such as in *Canada – FIT*).[979]

The security of the multilateral trading system at the level of market-participants is closely related to the exercise of "good faith" in recognizing the legitimate expectations as to the "conditions of competition"[980] – most prominently the principle of non-discrimination. Clearly, the construction of the exemption provision and the interpretation of its terms must abide by this fundamental principle of the GATT 1994 and the WTO. As Chapter 1, *supra*, illustrates though, the temporary manipulation of prices in the market place for developmental reasons can be accomplished in a non-discriminatory fashion. In fact, a variety of policy measures have been found to be GATT-consistent which involve non-discriminatory price effects.

The fitting of disputed policies to the terms of the provision is accomplished on a case-by-case basis. As argued, a good faith interpretation of the relationship between "temporarily applied" and "critical shortage" in Article XI:2(a) GATT needs be mindful of the heterogeneous implementation preferences among the Membership and shy away from favoring one economic policy outlook over another. Therefore, the bottleneck in the interpretation of the terms of Article XI:2(a) GATT 1994 is the appropriate assessment of "critical shortages," such that it limits inter-jurisdictional spill-overs and does not violate clear centralization gains.

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[977] In its Report in *US – Section 301 Trade Act* the Panel, for example, connects the protection of the security and predictability of the multilateral trading system to the functioning "of the market-place and its different operators." WTO Panel Report, *US – Section 301 Trade Act* (1999), ¶ 7.75.

[978] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.156; citing WTO Panel Report, *China–Rare Earth* (2014), ¶ 7.444; the Appellate Body concurred with the Panel in *China – Rare Earth* that the Chinese export restrictive regime under consideration might work to provide "perverse signals" to Chinese domestic consumers. It observed that "[w]hereas export quotas may reduce foreign demand […], they will also stimulate domestic consumption by effectively reserving a supply of low-price raw materials for use by domestic down- stream industries. They may also encourage relocation of rare earth-consuming industries to China."

[979] In its Report in *Canada – Feed-in Tariffs* (2013), the Appellate Body notes that "[f]inal consumers at the retail level may not distinguish between electricity on the basis of *generation technology*, because all electricity fed into the grid is blended regardless of the energy generation technology used. However, at the wholesale level, the government's purchase decisions are shaped by its definition of the energy supply-mix." In fact, so the Appellate Body observes, "[t]he decisions taken by the government on the energy supply-mix [...] necessarily dictate its electricity purchase decisions at the wholesale level. In this respect, where government decisions require a certain supply-mix, electricity from different generation technologies is not substitutable at the wholesale level." (¶7.176) In its decision the Appellate thus recognizes that there might be information content (such as capacity information or skills, see Chapter 2, *supra*) attached to a "product" that the household does not take into account when formulating its demand composition – a demand composition which in turn shapes the course of the economy according to mature market theories of equilibrium growth.

[980] See, GATT Panel Report, *Italy–Agricultural Machinery* (1958), GATT Panel Report *US–Taxes on Petroleum (Superfund)* (1987), ¶5.1.9; and the WTO Appellate Body Report, *Japan–Alcohol* (1996), p 32 (see also WTO Panel Report, *Japan–Alcohol* (1996), ¶¶7.1-7.2). The WTO Panel Report, *India–Patents* (1997), ¶¶7.20-7.22 and fn. 81-84, declared it is a "well-established GATT principle" and provides a list of cases using legitimate expectations as a GATT-specific substantive principle protecting the conditions of competition. See for the development of the concept of substantive legitimate expectations in the common law, Mark Elliott, "From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law," Cambridge Legal Studies Research Paper No. 5/2016 (January 2016).

The measure of deference I argue for preserves the predictability and security of the multilateral trading system, by introducing clear interpretative rules and reinforcing the legal structure of the GATT 1994. This method supporting the judicial decision maker further promotes the rule of law, where the "deferential standard of review [] itself become[s] part of the system, [] by explicit stipulation in the legal texts [and as] developed by case law. Then, it does not, if applied consistently and in a predictable manner, amount to legal uncertainty."[981]

3. Context to Exemption Provision: Permanent Sovereignty to Natural Resources

As emphasized by the Appellate Body in *US –Gasoline*, the provisions of the GATT should not be interpreted "in clinical isolation from public international law."[982] In the context of China's export restrictive policies on certain raw materials and rare earths the Panel and Appellate Body were invited to consider Article XX(g) GATT 1994 in the context of the GATT/WTO object and purpose of spurring "sustainable development" and a WTO Member's sovereign rights over their own natural resources.[983]

Although I challenge the constructive connection between the exemption provision of Article XI:2(a) GATT 1994 and the exception provision of Article XX(g) GATT 1994, the context provided by Member States' permanent sovereignty to their natural resources remains instructive in interpreting "products essential" to the exporting Member State.

In an examination of Article XX(g), the Appellate Body in *China – Rare Earth* held that the interpretative element "relates to" has to be construed with reference to the "rational connection" test, developed in *US –Shrimp*. Accordingly, for a measure to "relate to" conservation within the meaning of Article XX(g) GATT, it must demonstrate a "close and genuine relationship of ends and means"[984] which is to be assessed on a case-by-case

[981] Matthias Oesch, *Standards of Review in WTO Dispute Resolution* (New York: Oxford University Press, 2003), pp. 32-33.
[982] WTO Appellate Body Report, *US – Gasoline* (1996), at 17.
[983] UNGA Resolution, Permanent Sovereignty over Natural Resources, 1803 (XVII), New York, December 14, 1962. See also, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997).
[984] WTO Appellate Body Report, *US – Shrimp* (1998), ¶136.

basis.[985] In particular, the "design and structure" of the contested measure, set "in their policy and regulatory context," is considered informative (but not of itself decisive) by the Appellate Body.[986]

The adjudicator is subsequently held to weigh these measures against the appropriate object and purpose of the GATT as it understands its operation in light of Article XX(g) GATT and the Member State's permanent sovereignty to its natural resources.[987] According to the Panels in *China - Raw Materials* and *China – Rare Earth*, the term "conservation," the pivotal term in Article XX(g) GATT, should be construed to allow Member States a measure of policy flexibility to determine their own conversation policy.[988] However, conservation policies cannot be invoked to "excuse export restrictions adopted in aid of economic development if they operate to increase protection of [a] domestic industry."[989]

According to the Panel in *China – Raw Materials*, a "reading of Article XX(g) in the context of the GATT 1994 [should] take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development. As the Appellate Body explained, to do so may require 'a comprehensive policy comprising a multiplicity of interacting measures'."[990]

Resource-endowed WTO Members thus find expression of their (horizontal) right to sovereignty over natural resources in Article XX(g) GATT 1994 "precisely by designing and implementing conservation policies based on their own assessment of various, sometimes competing, policy considerations, and in a way that responds to their own concerns and priorities."[991] For good measure, the Panel goes on to emphasize that it "considers that measures the objective of which is to promote economic development are not 'measures relating to conservation' but measures relating to industrial policy."[992]

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[985] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.113; WTO Panel Report, *China–Rare Earth* (2014), ¶7.292.
[986] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.108; WTO Panel Report, *China–Rare Earth* (2014), ¶7.289.
[987] WTO Panel Report, *China–Raw Materials* (2011), ¶¶7.377–7.381; WTO Panel Report, *China–Rare Earth* (2014), ¶¶7.262.
[988] This policy space includes a deliberate comprehensive policy consisting of multiple interacting measures that pursue Member State specific economic and sustainable policy needs; WTO Panel Report, *China–Raw Materials* (2011), ¶¶7.375, and 7.381; WTO Panel Report, *China–Rare Earth* (2014), ¶¶7.265–7.267.
[989] WTO Panel Report, *China–Raw Materials* (2011), ¶7.386; WTO Panel Reports, *China–Rare Earth* (2014), ¶7.270.
[990] WTO Panel Report, *China – Raw Materials* (2011), ¶7.375; Referencing the WTO Appellate Body Report, *Brazil – Retreaded Tyres* (2007), ¶151.
[991] WTO Panel Report, *China – Rare Earth* (2014), ¶7.459.
[992] WTO Panel Report, *China – Rare Earth* (2014), ¶ 7.460.

While removing industrial policies from application of Article XX(g) is sensible, especially as the policies that fall under its scope can be held in place for a long duration and are bound by additional application requirements. The exclusion of industrial policies furthermore comports to the integral understanding of the object and purpose of Article XX(g) GATT 1994.

Consideration of the treaty guaranteeing permanent sovereignty to natural resources in the context of Article XI:1 and XI:2(a) GATT does, principally, not run into these limitations however. Instead, the treaty can inform the understanding of Article XI GATT on at least two additional grounds.

First, the scope of Article XI:1 GATT does not exclude export restrictive measures maintained for industrial policy reasons. As argued, Article XI:2(a) adopts its scope from Article XI:1 GATT and as such also adopts a broad concept of "measure." The "perverse" signals the Appellate Body identified in the context of a resource-conserving export restriction therefore do not limit the scope and construction of Article XI.

Second, the permanent sovereignty to natural resources bolsters the broad scope of "essential" products in Article XI:2(a) GATT. While the Panel and Appellate Body already brought the breadth of "essential" products within the purview of the Member State, Member State control over this concept is fortified by application of the treaty granting permanent sovereignty to natural resources. Interpretative deference, as applied to the exemption provision of Article XI:2(a) GATT 1994, furthermore offers a functional methodology to appropriately translate Member State's rights to define its raw materials as "essential products" to those down-stream industries that rely on their commercial availability.

D. Accession Protocol

Since the Marakesh Declaration, 29 countries have successfully acceded to the WTO "on terms to be agreed between it and the WTO" – as stipulated by Article XII of the WTO Agreement. Out of these 29 countries, nine countries have been required to commit to additional restrictive language on their ability to introduce and maintain

export restrictions.[993] Of these nine, China is subject to the broadest set of WTO-plus commitments.[994] The most extensive bonds have however been placed on Russia, as it committed to bind export duties on more than 700 tariff lines.[995]

Accession protocols are particular vexing to the interpretation of GATT/WTO: while they are bilateral agreements between the acceding Member State and the WTO as an international organization,[996] accession protocols are designed to serve as bargaining solutions between the Membership and the acceding Member State. While not by necessity, Accession Protocols most often include provisions to curtail the rights and expand the obligations the acceding Member derives from the multilateral treaty.[997] In this sense, the terms of Accession Protocols strictly inform the political balance of concessions as they pertain to acceding Member in relation to the Membership. For example, in *US — Tyres (China)* Appellate Body considered that:

> [...] the object and purpose of [China's Accession] Protocol, as reflected in Section 16 thereof, is to afford temporary relief to domestic industries that are exposed to market disruption as a result of a rapid increase in Chinese imports of like or directly competitive products, subject to the conditions and requirements provided therein.[998]

[993] These countries are: Mongolia (1997), Latvia (1999), Croatia (2000), China (2001), Saudi Arabia (2005), Viet Nam (2007), Ukraine (2008), Montenegro (2012) and Russia (2012). The accession packages of the acceding countries are available at http://www.wto.org/english/thewto_e/acc_e/acc_e.htm. See, Julia Ya Qin, "Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection," 46(5) *Journal of World Trade* 1147 (2012), p. 1152 et seq., for insight analysis.

[994] Julia Ya Qin, "'WTO-Plus' Obligations and Their Implications for the WTO Legal System – An Appraisal of the China Accession Protocol," 37 *Journal of World Trade* 483 (2003).

[995] The Report of Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70 (2011), para. 638. Wu notes that while Russia has committed to strict restraints on its ability to impose and maintain export taxes, no commitments were won by the WTO Member States on Russia's practice of dual energy pricing (leading Saudi Arabia to withdraw similar commitments). Chien-Huei Wu, "Access to Raw Materials: The EU's Pursuit of Trade Disciplines on Export Control," in Bart Van Vooren, Steven Blockmans, and Jan Wouters, eds., *The EU's Role in Global Governance: The Legal Dimension* (New York: Oxford University Press, 2013), p. 158 and Section 2.3. See also Sergey Ripinsky, "The System of Gas Dual Pricing in Russia: Compatibility with WTO Rules," 3(3) *World Trade Review* 463 (2004); David Tarr and Peter Thomson, "The Merits of Dual Pricing of Russian Natural Gas," The World Bank Working Paper (2003); Reinhard Quick, "Export Taxes and Dual Pricing - How to Tackle Trade Distortive Government Practices?," Graduate Institute, Centre for Trade and Economic Integration, Working Paper (2009).

[996] The rules governing agreements between a State and an international organization are set out in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (21 Mar. 1986) (VCLTIO) (not yet in force). The VCLTIO was developed by the International Law Commission and opened for signature in 1986. U.N. Doc. A/CONF.129/15. See also, Julia Y. Qin, "The Challenge of Interpreting WTO-plus Provisions," 44(1) *Journal of World Trade* 127 (2010).

[997] For this reason, excessive use of Accession Protocols has been critiqued on the perceived broad and invasive reach of the reservations in some WTO Accession Protocols. Some commentators have in fact argued that strenuously binding Accession Protocols could be considered "impermissible reservations" in the sense of the International Law Commission's *Guide to Practice on Reservations to Treaties* (International Law Commission, *Guide to Practice on Reservations to Treaties*, adopted by at its 63rd session (2011), and submitted to the United Nations General Assembly (A/66/10, para 75). See, Mitali Tyagi, "Flesh on a Legal Fiction: Early Practice in the WTO on Accession Protocols," 15(2) *Journal of International Economic Law* 391 (2012). See for a topology of different conceptual categories of whether the accession protocol adds or diminishes the obligation of the acceding Party, the incumbent Parties, or the WTO itself; Steve Charnovitz, "Mapping the Law of WTO Accession," in Merit E. Janow, Victoria Donaldson and Alan Yanovich, *WTO at Ten: Governance, Dispute Settlement and Developing Countries* (Huntington: Juris Publishing, 2008).

[998] WTO Appellate Body Report, *US — Tyres (China)* (2011), ¶184.

The Appellate Body determined that as the prospective Member State accedes to the WTO Agreement (ex Article XII:1 Marakesh Agreement), the accession protocol can become an integral part thereof[999] – depending on its wording. The Appellate Body stresses, in *China – Rare Earth*, that the WTO Agreement is understood as a "single package of rights and obligations,"[1000] for:

> Paragraph 1.2 of China's Accession Protocol, and in particular its stipulation that the Protocol is to be an 'integral part' of 'the WTO Agreement', essentially serves to build a bridge between the package of protocol provisions and the existing package of WTO rights and obligations under the Marrakesh Agreement and the Multilateral Trade Agreements. The bridge created by Paragraph 1.2 between the protocol provisions and the existing package of rights and obligations under the WTO legal framework, however, is of a general nature. The fact that such a bridge exists does not in itself answer the question as to *how individual provisions* in China's Accession Protocol are related or linked to individual provisions of the other WTO agreements. More specifically, this bridge does not dispense with the need to analyse, on a case-by-case basis, the specific relationship between an individual provision in the Protocol, on the one hand, and provisions of the Marrakesh Agreement and the Multilateral Trade Agreements, on the other hand.[1001]

The nature of the specific linguistic link between the Accession Protocol and individual provisions of the GATT has been examined in a series of cases involving China.

In *China - Publications*, China relied on the opening phrase of Paragraph 5.1 of China's Accession Protocol, "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement," to argue its "right to regulate" trade in a manner consistent with the WTO Agreement. It argued that to interpret the "without prejudice" clause differently would fail to give meaning to all the terms in paragraph 5.1.[1002] The US rather made two more technical arguments on the language of China's Accession Protocol, namely that the scope of Paragraph 5.1 already limits China's "right to regulate" to certain products not excepted in relevant Annexes; and that Paragraph 5.1 pertains to "traders" instead of to the goods "being traded."[1003]

Whereas the Panel had first examined the possible success of reliance on Article XX GATT 1994,[1004] the Appellate Body examines the connection between Paragraph 5.1 of China's Accession Protocol and the exception provision of

[999] See, Article II:2 Marrakesh Agreement, as examined by the Appellate Body in its Report, *China – Rare Earth* (2014), ¶5.53.
[1000] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.74.
[1001] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.50.
[1002] WTO Appellate Body Report, *China – Publications* (2009), ¶206.
[1003] WTO Appellate Body Report, *China – Publications* (2009), ¶207.
[1004] WTO Panel Report, *China – Publications* (2009), ¶¶7.745, 8.2(2)(ii); The Appellate Body notes that while using an arguendo assumption is a valid legal technique, it "could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risks creating uncertainty with respect to China's implementation obligations." (WTO Appellate Body Report, *China – Publications* (2009), ¶215)

Article XX in the GATT 1994 head on. First, the Appellate Body observes that "paragraph 5.1 […] contains a commitment, or obligation, undertaken by China, namely, to progressively liberalize the right to trade […]," but notes that this obligation is qualified by the introductory clause of the first sentence. The Appellate Body identifies the "right" that is not to be impaired as China's "right to regulate trade," which is itself qualified by the phrase "in a manner consistent with the WTO Agreement."

As noted before, the Appellate Body sees "the 'right to regulate', in the abstract, as an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the *WTO Agreement*. With respect to trade, the *WTO Agreement* and its Annexes instead operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder."[1005] The Appellate Body proceeds to interpret "reference to China's power to regulate trade 'in a manner consistent with the WTO Agreement' [] to encompass [] China's power to take regulatory action provided that its measures satisfy prescribed WTO disciplines."[1006]

In the twin cases *China–Raw Materials* and *China - Rare Earth*, the Appellate Body examined, for the first time, whether Article XX GATT 1994 could equally be available to justify the use of export duties in breach of China's obligations under Paragraph 11.3 of its Accession Protocol. The Appellate Body first sets out the relationship between the different terms of the covered agreements and accession protocols in relation to the Marrakesh Agreement, such that:[1007]

> "the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis through a proper interpretation of the relevant provisions of these agreements. In other words, this specific relationship must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments […]."

[1005] WTO Appellate Body Report, *China – Publications* (2009), ¶222. (emphasis in original)
[1006] WTO Appellate Body Report, *China – Publications* (2009), ¶228. It furthermore held that "whether China may, in the absence of a specific claim of inconsistency with the GATT 1994, justify its measure under Article XX of the GATT 1994 must in each case depend on the relationship between the measure found to be inconsistent with China's trading rights commitments, on the one hand, and China's regulation of trade in goods, on the other hand." (¶229)
[1007] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶¶ 5.55, 5.57.

In effect, this means that neither obligations nor rights may be automatically transposed from one part of the legal framework into another. Rather, the link between a particular provision and specific obligations under the Marrakesh Agreement and the Multilateral Trade Agreements has to be established in an "objective" manner (i.e. with reference to the appropriate standard of review), on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute.[1008]

The bridge, constructed earlier, was found only to be the starting point when examining the question as to whether an objective link exists between the specific obligations under China's Accession Protocol and the relevant covered agreement. Whereas the Appellate Body found in *China – Publications* that this close relationship is confirmed by the text of Paragraph 5.1 itself, in *China – Raw Materials* the Appellate Body noted that reference to Article VIII GATT alone, while leaving out other GATT provisions, could not be read to infer reference to the general exceptions of Article XX GATT 1994.[1009]

China, supported by a dissenting panelist in *China – Rare Earth*,[1010] rather argues that the nature of the enhanced obligation on China, as per its Accession Protocol, expands its obligations under Articles II and XI:1 GATT 1994. This in turn compels, so it argued, that Paragraph 11.3 of China's Accession Protocol be read "cumulatively and simultaneously" with Articles II and XI GATT 1994.

The Appellate Body however limits the extrapolation from an explicit mention of Article VIII to Article XX GATT 1994 by observing that:

> as China's obligation to eliminate export duties arises *exclusively from China's Accession Protocol*, and not from the GATT 1994, we consider it reasonable to assume that, had there been a *common intention* to provide access to Article XX of the GATT 1994 in this respect, *language* to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol.[1011]

[1008] WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.57.
[1009] WTO Appellate Body Report, *China–Raw Materials* (2012), ¶¶290-291.
[1010] See WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.7; Furthermore, "the panelist opined that 'the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations – unless a contrary intention is expressed by the acceding Member and the WTO Members.' The panelist thus concluded that, 'unless China explicitly gave up its right to invoke Article XX of GATT 1994, which it did not, the general exception provisions of the GATT 1994 are available to China to justify a violation of Paragraph 11.3 of its Accession Protocol'." (references omitted).
[1011] WTO Appellate Body Report, *China–Raw Materials* (2012), ¶293 (emphasis added).

The Appellate Body thus reinforces the separation of China's rights and obligations arising out of the Accession Protocol, from those it might derive under the GATT 1994 or other multilateral agreements. The way the Appellate Body argues this separation is particularly instructive as it connects its assessment of the pre-contractual "common intention" of the Membership and China to attribute meaning to the absence[1012] of an explicit reference to Article XX GATT 1994. Such attribution is only possible in a bilateral relationship and bespeaks a true political (power/Utopia) assessment by the Appellate Body. Qin rather critically observes that this reading approaches Accession Protocols in the spirit of "self-contained agreement[s], independent from the rest of the WTO Agreement."[1013]

The carefully constructed interpretative bridge, connecting China's Accession Protocol generally to the WTO Agreement, is not meant to allow indiscriminate traffic between the two regimes. In fact, the Membership explicitly distanced China from certain rights and obligations of the multilateral trading system; putting it at arm's length of certain provisions of the multilateral collaborative framework. Accession Protocols are, from the perspective of the WTO adjudicator, a relic from the pre-contractual political process of accession. Failing to give meaning to the separation of the two regimes, connected as they might be through the proverbial bridge of the accession protocol, damages the multilateral character of collaboration that is at the core of the GATT/WTO.

Accession Protocols allow the Membership to achieve customized solutions by a careful threading of the needle. The language of Accession Protocols determine, with a high matter of precision, which provisions of the covered agreements the acceding Member gets knitted into and which provisions remain at arms-length. The language of

[1012] Note that the observation of an "omission" itself presupposes an interpretative act, such that the remaining language did not "cure" the omission; preventing it from materializing. As observed, a textual reference, per omission or expressed, might not be dispositive in itself; WTO Appellate Body Report, *China–Rare Earth* (2014), ¶5.61. See further for an application of the effectiveness principle in WTO case law, Appellate Body Report, *US – Antidumping and Countervailing Duties (China)* (2011), ¶¶138, 567, citing Appellate Body Report, *Japan — Alcoholic Beverages II* (1996), p. 18. Interestingly, Russia submitted in their Integrated Executive Summary of Arguments before the Panel in *China – Rare Earth* that it received assurances by the EU and U.S. that omission of specific reference language would not adversely impact Russia's rights to treaty defenses. In fact, Russia submits, "[i]nclusion of such language in [the view of the Members] might have been interpreted as the opposite, thus undermining the rights of those Members whose Protocols of accession became effective before the accession of the Russian Federation and did not contain similar language." Integrated Executive Summary of the Arguments of the Russian Federation, Annex C-9 to the Panel Report in *China - Rare Earths* (2014), ¶. 5. Although both the U.S. and EU dispute Russia's account of the negotiation history in this matter, Russia's position resonates well with the partially dissenting opinion of one of the Panelists in *China – Rare Earth*, who opined that "the defences provided in the GATT 1994 are automatically available to justify any GATT-related obligations, including border tariff-related obligations – unless a contrary intention is expressed by the acceding Member and the WTO Members." See Julia Ya Qin, "Russia's Account of Negotiation History: Reason for Deletion Further Explained," International Economic Law and Policy Blog (August 19, 2014); WTO Panel Reports, *China – Rare Earth* (2014), ¶7.137 and cited in WTO Appellate Body Reports, *China - Rare Earth* (2014), ¶5.7.

[1013] Julia Y. Qin, "Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection," 46 *Journal of World Trade* 1147 (2012), p. 1170.

accession protocols can thus be determinative in a single case, but do not influence the construction and interpretation of the multilateral treaty. The two regimes are separate and should be treated as such in order to avoid "tainting" the multilateral collaborative intent of Parties with bilateral political associations.

The Multilateral Standard of Review: Export Restrictions, GATT Exceptions and Exemptions

Epilogue: The Multilateral Standard of Review

Epilogue: The Multilateral Standard of Review

In this dissertation I argue for the adoption of a new interpretative standard that urges the adjudicator to explicitly take account of the rational (economic) heterogeneity of the WTO Membership when construing a provision of the covered agreements. In particular, I posit that the judicial decision maker should construe and interpret exemption provisions using the embedded standard of review, such that the Member States' economic conditions enlighten the contextual interpretation of the language of the provision. Instead of reading her preconceptions, of power or Utopia, into the construction of the provision under examination, I argue the judicial decision maker should allow for a measure of conditional deference to Member State's developmental policies in exemption provisions. In this way, the proposed "multilateral" standard of review leads to a superior expression of the Membership's collaborative intent as captured by the WTO Agreement and the Marrakesh Declaration.

The multilateral standard of review makes explicit how the adjudicator uses economic theories to craft the judicial lens through which not only "facts" are determined, but agreements are construed and provisions are interpreted. A judicial decision, when delivered within the scope of a multilateral agreement with heterogeneous Member States, invariably is an expression of the adjudicator's structured reliance on her preconceptions. Application of the multilateral standard of review to the construction and interpretation of exemption provisions compels the adjudicator to accord conditional deference to developmental policies as a method to limit prejudicial reliance on the adjudicator's preconceptions. For as Stiglitz observes: "[m]odels of perfect markets, badly flawed as they might seem for Europe or America, seemed truly inappropriate for [the developing world]."[1014]

However, introduction of an interpretative standard that mandates the adjudicator to recognize economic heterogeneity among the Membership can lead to a weakening of the predictability of the multilateral trading system.[1015] In order for the adjudicator to reach a dispositive decision in a reasoned and predictable manner, I

[1014] Joseph E. Stiglitz, "Information and the Change in the Paradigm in Economics," Nobel Prize Lecture (December 8, 2001).

[1015] Note that Article 3.2 of the Dispute Settlement Understanding (DSU) tasks the judicial decision to contribute to the security and predictability of the multilateral trading system. A focus on predictability is warranted as, in the words of Weiss, "[s]ecurity and predictability of the trading system and through it that of the market place and its different operators depend on to what extent legal certainty and predictability can be reached in the reports of panels and the Appellate Body" in Wolfgang Weiss, "Security and Predictability under WTO law," 2(2) *World Trade Review* 183 (2003), p. 183 (without footnote); see for criticism on the performance of WTO adjudicators, for instance, Bernard Hoekman and Petros Mavroidis, "The Dark Side of the Moon: 'Completing' the WTO Contract through Adjudication," European University Institute (2012).

emphasize the formal aspects of predictability over the substantive predictability of the decision. Instructively, the Appellate Body observes that the judicial decision's "line of equilibrium, [...], is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ."[1016]

An affirmative judicial decision, following application of the multilateral standard of review, strikes an appropriate balance between predictability and deference. The judicial space for striking an adjudicatory balancing between predictability and deference is determined by the Dispute Settlement Understanding (DSU). Within the adjudicatory scope of review set by the DSU, I argue the adjudicator needs to anchor an appropriate balance between predictability and deference in her understanding of the object and purpose of the agreement.[1017]

Instead of placing substantive predictability at the core of the dispositive judicial decision, which could re-introduce concepts of a "beneficial" outcome (Utopia) or those associated with the historic pre-agreement bargaining of between then-prospective Member States (Power), I introduce formal conditions to adjudicatory deference. The tenets of the Oates' Decentralization Theorem serve to provide these formal conditions. The Theorem's demands further provide for a clear assignment of the burden of proof and fit well with the agreement's object and purpose. In addition, the adjudicator remains disciplined by the applicable normative and doctrinal constraints as developed in judicial practice.

My examination concentrates on the construction and interpretation of the exemption provision of Article XI:2(a) GATT 1994. In my analysis, I pay particular attention to the object and purpose of both the provision and the agreement as a whole and deploy the concept of an "embedded" standard of review to facilitate critical consideration hereof by the adjudicator. As a function of my analytical approach, the adjudicator's construction of the scope of the exemption provision is of critical importance. Application of the multilateral standard of review consciously expands the ambit of exemption provisions to restore a tripartite balance in the GATT 1994 (of "rules-exemptions-

[1016] WTO Appellate Body Report, *US – Shrimp*, ¶¶158-159.

[1017] By placing emphasis on the inter-subjectivity of the agreement, in opposition to Koskenniemi's "cultures of formalism," I ensure the judicial decision remains anchored in the agreement and parties collaborative intent. See, Martti Koskenniemi, "The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law," 65 *The Modern Law Review* 159 (2002); reproduced in *The Politics of International Law* (Oxford: Hart Publishing, 2011), p. 128

exceptions") in furtherance of a judicial construction that is "consistent with [Member State's] respective needs and concerns at different levels of economic development."

The embedded multilateral standard of review allows the adjudicator to accord full meaning and scope to exemption provisions, on par with exception provisions (such as Article XX GATT 1994) and headline rules (such as Article XI:1 GATT 1994). The envisioned standard of review aims to construct exemption provisions in an "open" manner that maximizes Member State's ability to pursue developmental policies as a function of the rational heterogeneity within the Membership.

As argued in Chapter 1, *supra*, adjudicatory practice under the GATT 1947 oscillated between a narrow and a more invasive application of the standard of review without actually formulating a steady doctrine. Parties eventually settled on a *negotiated* compromise in the context of the Anti-Dumping Agreement (ADA): formal incorporation of a deferential standard of review into the ADA centered on the standard of "permissible" instead of "reasonable."

After the Uruguay Round, the Appellate Body finds the appropriate standard of review, in its report *EC – Hormones*, in "an objective assessment"[1018] of the matter before it when discussing legal interpretations and for factual matters it sets "the applicable standard [as] neither de novo review as such, nor 'total deference,' but rather [as] the objective assessment of the facts."[1019] The Appellate Body in subsequent case law clarified that "objective assessment" under Article 11 of the Dispute Settlement Understanding (DSU) must be considered "in the light of the obligations of the particular covered agreements at issue in order to derive the more specific contours of the appropriate standard of review."[1020]

In an effort to better derive the contours of an objective assessment of exemption provisions in the particular covered agreement, Chapter 4, *supra*, argues for an open construction thereof in the GATT 1994. I argue that, in

[1018] WTO Appellate Body Report, *EC – Hormones* (1998), ¶117.
[1019] WTO Appellate Body Report, *EC – Hormones* (1998), ¶118 (footnotes omitted).
[1020] WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), ¶184. See further WTO Appellate Body Report, *US – Continued Hormones Suspension* (2008), ¶¶590-593; and WTO Appellate Body Report, *Australia – Apples* (2010), ¶¶356-359.

order to properly contextualize the applicable object and purpose of both the agreement and provision under consideration, the adjudicator reasonably assumes collaboration at the WTO to be goal-oriented.

This goal orientation is however explicitly not derived from the adjudicator's understanding of the communal or Utopian spirit of the covered agreements. Neither is the adjudication by the decision maker in conflicts between multilateral treaty partners properly envisioned as a "completion" of the "contract,"[1021] especially with a time-inconsistent heterogeneous Membership. Rather the goal orientation of the covered agreements is established only to the extent that all Members are assumed to be rational (although not perfectly so) and have agreed to a limited cooperation on and coordination of their trade policies to enhance the outcome of the "trade game."

Conditional on the existence of rational (economic) heterogeneity among the Membership, [1022] I argue that the proper interpretation of exemption provisions should balance (i) the maximalist demands of "developmental" policies (thereby showing judicious restraint when identifying implicit cooperation and coordination) with the constraints set by (ii) legal doctrine and by (iii) normativity. In this dissertation I have argued it possible to apply an open-ended standard of review to exemption provisions, while maintaining the security and predictability of the multilateral trading system in good faith.[1023] However, several perspectives deserve additional attention.

A. Reaching Dispositive Decisions

An objective judicial construction of the rules and provisions of covered agreements finds its limit in accordance with Article 3(2) DSU, such that it "cannot add to or diminish the rights and obligations provided in the covered agreements." The dispute settlement system is furthermore mandated to provide "security and predictability" to the "multilateral trading system." The judicial decision maker thus has to be mindful of the limits to her interpretative powers, but also make her decision fit with the needs of a secure and predictable multilateral trading system. The

[1021] As argued in Chapters 3 and 4, *supra*. For a contract completion approach to adjudication under the GATT/WTO see, for instance, Simon A. B. Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization: A Law and Economics Analysis* (Cambridge: Cambridge University Press, 2009), p. 69 et seq, identifying six types of contractual incompleteness; see also Giovanni Maggi and Robert W. Staiger, "The Role of Dispute Settlement Procedures in International Trade Agreements," 126(1) *The Quarterly Journal of Economics* 475 (2011).

[1022] As detailed in Chapter 2, *supra*.

[1023] Chapter 5, *supra*, seeks to apply an "open" standard of review to critique the Panel and Appellate Body's reports in *China – Raw Materials*.

judicial decision by the WTO adjudicator thus needs to contribute to legal certainty in service of "the market-place and its different operators,"[1024] such that the provisions of the covered agreements work to "expand[] the production of and trade in goods and services" in a manner "consistent with [Member State's] respective needs and concerns at different levels of economic development."[1025]

From the perspective of the decision maker however, an interpretative standard needs to first and foremost directly serve the finality of the dispositive decision. In a legal sense, a decision can be considered "dispositive" simply because no appeal is possible – ending the conflict as a legal proceeding – or because the decision resolves the conflict by providing a singular outcome. It is in this last sense that an open-ended construction of exemption provisions could defer to domestic developmental policies at a too early stage; depriving the judicial decision from an essential quality.

1. Resisting "Eunomia": The Oates' Theorem

In (post)modern theories of adjudication, conclusive meaning attribution is unlikely to follow from a deductive approach by means of legal positivism and textualism. As d'Aspremont notes, "international legal positivism is [no longer] about determining the right content of norms and the right adjudicative truth,"[1026] rather international legal positivism is restricted to a theory about the mechanism by which the validity of sources (of legal norms) is recognized. Textualism is, in important ways, an application of the earlier theories of legal positivism (see Chapter 3, *supra*).

In one version of contemporary positivistic theory, normativity is identified by and recognized in connection with supporting concepts that can be juxtaposed. As such, "relative normativity" can, classically, be found in the juxtaposition "Natural Law v. Sovereignty" and, in contemporary times, in direct relation to conceptions of

[1024] WTO Panel Report, *US – Sections 301–310 of the Trade Act 1974* (2000), ¶¶7.73-7.75.
[1025] First Preamble to the WTO Agreement, cited approvingly in WTO Panel Report, *US – Sections 301–310 of the Trade Act 1974* (2000), ¶7.74.
[1026] See Jean d'Aspremont, "Herbert Hart in Today's International Legal Scholarship," in Jorg Kammerhofer and Jean d'Aspremont, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014), p. 115 (footnote omitted). See also Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (New York: Oxford University Press, 2011).

globalization.[1027] It is a similar view on the adjudicator's power to assess the validity of norms that moves Petersmann to argue "that […] governments, judicial bodies and civil society can, and should, use WTO law for resisting intergovernmental power politics so as to defend 'public reason' […] vis-à-vis 'populist protectionism' - with due respect for legitimate 'legal pluralism'."[1028] The purposeful juxtaposing of concepts, which themselves are external to the agreement under consideration, is argued as a necessary to allow adjudicators to overcome Koskenniemi's post-modern deconstructive critique "that law is incapable of providing convincing justifications to the solution of normative problems."[1029]

Whereas this judicially activist approach correctly prioritizes the adjudicator's constructive task in service of the multilateral trading system, I cannot agree with Petersmann's conception of the public realm as thick with readily identifiable, shared values and legal norms. Instead, I argue that to overcome Koskenniemi's aporia, the adjudicator has to emphasize the inter-subjective collaborative intent of the parties: as evidenced by their participation in the Membership and its goal-oriented collaboration in the "trade game" by means of the agreements under consideration (see Chapter 4, *supra*).

Parties' inter-subjective collaborative intent is apparent to the adjudicator from her understanding[1030] of the object and purpose of both the agreement and the provision under examination, aided by the declarations in the preamble. In this analysis though, it is crucial for the adjudicator not to impose her beliefs about what the agreement "should have been." Rather, the adjudicator is to take a more formalized approach that is substantively agnostic; that is, the adjudicator is deliberately transparent in her advancement of the purposive elements in her construction and interpretation, such that she avoids to preclude rational heterogeneity among the Membership.

[1027] See Matthias Goldmann, "Relative Normativity," in Jean d'Aspremont and Sahib Singh, eds., *Fundamental Concepts of International Law* (forthcoming, 2018).

[1028] Ernst-Ulrich Petersmann, "Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement," European University Institute, Working Paper Law 2018/04 (2018), p. 2.

[1029] Martii Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), p. 69.

[1030] See Chapter 4, supra; reference is intended to Gadamer's concept of "mens auctoris." See also, Alexandra Kemmerer, "Sources in the Meta-Theory of International Law: Hermeneutical Conversations," Max Planck Institute, MPIL Research Paper Series No. 2017-02. For an accessible introduction into Gadamer's analysis of "understanding," see Jean Grondin, "Gadamer's Basic Understanding of Understanding," in Robert J. Dostal, *The Cambridge Companion to Gadamer* (Cambridge: Cambridge University Press, 2002), p. 40

For the decision of the adjudicator to be accepted as an authoritative expression of judicial interpretation in the matter before her, it needs to supersede mere "regulated madness."[1031] The decision maker accomplishes this not only by attending to the "fit" of her decision with the text of the provisions, but primarily by satisfying the doctrinal, normative and sociological teleologies as they pertain to the provision under consideration (Kantorowicz' triptych). In this respect, it is important to observe that Member State collaboration in the WTO is not unidirectional or cooperative, but instead subject to conflicting normative and sociological preferences (as I have argued in Chapter 2, *supra*, with respect to economic theories of growth).

When applying the embedded standard of review of the exemption provision Article XI:2(a) GATT 1994, the adjudicator accordingly needs to be mindful of: (i) the doctrinal constraints as developed by GATT 1994, noting that the WTO does not recognize the doctrine of "stare decisis" but rather relies in its adjudicatory practice on the reasoned persuasion and judicial fit of the judicial decision; (ii) the normative constraints emerging from a contextual analysis of the provision and the agreement; and (iii) the constructive constraints that emerge from the heterogeneity of the Membership, such that space for rational divergence of economic teleology is maintained.

Within this framework, the adjudicator works to achieve an objective assessment of the matter through application of the embedded standard of review, in accordance with Articles 11 and 3.2 of the DSU which provide the hermeneutic boundaries. This process does not leave the adjudicator short of a dispositive decision, but rather opens a delineated interpretative space within which she can decide to defer to the policies of the defendant or deny deference to explicitly further the goals of the multilateral trading system. The obvious risk in so denying a measure of deference to the defendant is that the adjudicator enforces her concept of the "good order" (Eunomia) instead of respecting the rational heterogeneity of the Membership as it exists.

Above all, the decision of the adjudicator needs to contribute to the security and predictability of the multilateral trading system. Whereas the decision maker can close the "open" multilateral standard of review by offering an affirmative decision, by drawing on her material preconceptions or by relying on teleologies that are external to the

[1031] See for the importance of the "decision" Martti Koskenniemi, "International Law as Political Theology: How to Read the Nomos der Erde," 11 *Constellations: An International Journal for Critical and Democratic Theory* 492 (2004).

agreement,[1032] I argue the adjudicator can also advance the predictability of the trading system by emphasizing the formal contours that regulate her decision. These formal conditions should emerge directly from goal-orientation of the Membership and serve as an applied framework for deference in service of the agreement. Unlike Koskenniemi's "cultures of formalism,"[1033] my conception of formal predictability immediately services the adjudicatory decision and remains anchored in the adjudicator's understanding of Member State's inter-subjectivity. Such concept of formal predictability is rooted in and contained by the object and purpose of the agreement, while resisting aspects of Power and Utopia in the judicial decision.

The precise judicial balance between the demands for predictability and the argued for constructive deference to developmental policies will be found through the application of the formal demands of the Oates' Decentralization Theorem. The Oates' Decentralization Theorem holds that, in a Membership with heterogeneous preferences, the decentralization of certain functions increases welfare as a result of increased policy sensitivity and economic alignment at the lower level. In order to recommend decentralization or "deference," the Theorem introduces certain conditions which work as formal constraints to the adjudicator's fitting of the contested policies to the language of the exemption provision. The Oates' Decentralization Theorem furthermore assigns the burden of proof to the party relying on its application, while its application by the judicial decision maker falls within the scope of good faith adjudication under Article 11 and 3.2 of the DSU.

When confronted with rational heterogeneity among the WTO Membership along one of Kantorowicz' teleological dimensions, I argue that the multilateral standard of review better aids the adjudicator in her constructive task to overcome (international) law's aporia. To facilitate the application of the appropriate standard of review, the conditions of the Oates' Decentralization Theorem can serve as a formal mechanism to positively identify the conditions under which deference can be appropriate. This dissertation has developed this framework in the context of the exemption provision of Article XI:2(a) GATT 1994, the rational heterogeneity among the Membership as

[1032] Under conditions of rational heterogeneity such substantive or material prejudice comes to the fore when the adjudicators draw on economic science to support their notion that the GATT 1994 expresses the demands of the Washington Consensus as sociological teleology, or when adjudicators effectively construe the provisions of the covered agreement along those lines without clarifying their understanding of the cooperative stance of the Membership in this context.

[1033] Martti Koskenniemi, "The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law," 65 *The Modern Law Review* 159 (2002); reproduced in *The Politics of International Law* (Oxford: Hart Publishing, 2011), p. 128

pertains to the normative theories of economic growth (a sociological teleology), and critically applied to the case *China – Raw Materials*.

To address the potential for application of the multilateral standard of review to the weaken of the predictability of the multilateral trading system, in contravention of Article 3.2 DSU, I formally delineate the space of the adjudicator to exercise deference to developmental policies in her decision. This formal approach to judicial predictability retains its embedded character (provision specific) as well as allows the adjudicator to situate her decision within the object and purpose of the covered agreement, without precluding the rational heterogeneity of the Membership. However, the lack of substantive predictability potentially leaves the decision maker at risk of finding insufficient discipline when construing the material scope of exemption provisions. This challenge to the proposed standard of review and associated judicial decision is considered hereunder.

2. Doctrinal Distinctions: Implications for Scope

The legal distinction at the center of this dissertation is between "exemption" and "exception" provisions, as applied to Article XI:2(a) GATT 1994 in contrast with Article XX GATT 1994. Mavroidis lucidly clarifies that "[t]he former term covers transactions that do not come at all under the ambit of the relevant legal discipline, the consequence being that parties remain free to act on their own volition […] [the latter term covers] an agreed deviation from an established discipline and signals a shift in the allocation of the burden of proof […]."[1034]

Whereas application of the multilateral standard of review maintains the formal aspects of predictability of the adjudicator's decision, a judicial decision also needs to comport to established legal doctrine and allow for a construction of the provision that fits the agreement as whole. The judicial decision maker's interpretation of the provision therefore needs to satisfy the hermeneutic demands of Article 11 and 3.2 DSU, while her construction considers the provision's object and purpose in relation to the goal-orientation of the Membership as well as the agreement's rules and exceptions – both as developed and as written.

[1034]Petros C. Mavroidis, *The Regulation of International Trade* (Boston: MIT Press, 2016), p. 86.

By according proper scope to exemption provisions, the decision maker more comprehensively addresses the tripartite balance of the GATT 1994: "rule-exception-exemption." The cross-provision implication of the adopting the multilateral standard of review primarily finds expression in the discipline it exerts on the (overly-broad) construction of exception provisions. However, by the same measure, it is crucial to set appropriate limits to the scope of exemption provisions. The adjudicator finds this scope through application of the customary rules of interpretation in public international law, in accordance with the relevant standard of review – i.c. the multilateral standard of review.

Whereas I address the particular analytical aspects of Article XI:2(a) GATT 1994 in Chapter 5, *supra*, it is useful to observe that the Appellate Body found the appropriate standard of review in light of the obligations of the particular covered agreement.[1035] The Appellate Body went on to note that its concept of an "embedded" standard of review is particularly instructive as an agreement-specific expression of a broader rule.[1036] Note that the Appellate Body will, in almost all cases, seek to identify the revealed "common intention" of the Membership and apply it toward its construction of the "broader rule."

Crucially, it is through her assessment of the "colour, texture and shading"[1037] of the object and purpose of covered agreements that the adjudicator finds the revealed common intention of the Membership and sets the contours to her legitimate interpretation of the provisions of the multilateral agreement. The Appellate Body has, as argued in Chapters 3 and 4, *supra*, established a hierarchy of proximity in its assessment of the "object and purpose," looking at the construction and purported aim of the commitment first ("l'objet"), with the general result ("le but") elucidating that construction. As the Appellate Body observes in its report *China – Rare Earth*:[1038]

> "the specific relationship among individual terms and provisions of the Multilateral Trade Agreements, and between such provisions and the Marrakesh Agreement, must be determined on a case-by-case basis

[1035] The WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), notes: "[W]e recall that an 'objective assessment' under Article 11 of the DSU must be considered in the light of the obligations of the particular covered agreements at issue in order to derive the more specific contours of the appropriate standard of review." (¶184) See further WTO Appellate Body Report, *US – Continued Hormones Suspension* (2008), ¶¶590-593; and WTO Appellate Body Report, *Australia – Apples* (2010), ¶¶356-359.

[1036] WTO Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS* (2005), ¶184; notes that its standard of review is "instructive for cases under the SCM Agreement that also involve agency determinations."

[1037] WTO Appellate Body Report, *US – Shrimp* (1998), ¶153.

[1038] WTO Appellate Body Report, *China – Rare Earth* (2014), ¶¶ 5.55, 5.57

> through a proper interpretation of the relevant provisions of these agreements. In other words, this specific relationship must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments [...]."

The adjudicator's understanding of the place of the exemption provision of Article XI:2(a) GATT 1994 relative to the rule of Article XI:1 GATT 1994, to which it creates space for Member States to act on their own volition, and to the GATT 1994 as a whole, co-determines the appropriate scope of the exemption provision together with the standard of review identified as appropriate to the provision under consideration. As such, exemption provisions serve as the third point to the Appellate Body's two-part observation on the discipline the covered agreements exert on Member State's unfettered volition.[1039]

In this dissertation I argue that the appropriate standard of review suitable to Article XI:2(a) GATT 1994, under conditions of rational heterogeneity among the Membership, is the multilateral standard. This conclusion directly impacts the balance between this exemption provision and Article XI:1 (rule) and Article XX:j GATT 1994 (exception) in a way that centrally raises the potential of over-extending the scope of the exemption provision. Should the adjudicator be relatively free of doctrinal and normative teleological demands – which the Appellate Body was in its report *China – Raw Materials* – the formal predictability of an "open" standard of review alone might leave her interpretative room crucially unconstrained.

Attention therefore shifts to the interpretation of the language and the construction of the appropriate scope of the provision. The adjudicator construes the appropriate scope through a good faith object and purpose analysis of the provision, while offering an interpretation that is in accordance with the customary rules of interpretation of public international law – as demanded by Article 3.2 DSU. Note that the Appellate Body found[1040] the customary rules of interpretation to be codified in Articles 31-33 Vienna Convention on the Law of Treaties (VCLT).

[1039] WTO Appellate Body Report, *China – Publications* (2010), ¶¶222-223, the AB notes "that WTO Members' regulatory requirements may be WTO-consistent in one of two ways. First, they may simply not contravene any WTO obligation. Secondly, even if they contravene a WTO obligation, they may be justified under an applicable exception." This perspective in turn clarifies the WTO Appellate Body Report, *US – Gasoline* (1996), p. 30, where it held that "so far as concerns the WTO, [Member State legislative autonomy] is circumscribed only by the need to respect the requirement of the General Agreement and the other covered agreements."

[1040] WTO Appellate Body Report, *US – Gasoline* (1996), at 16-17.

An object and purpose analysis first establishes the immediate substantive content of the provision under consideration before considering the scope of its obligations against the agreement as a whole. This hierarchical approach by the Appellate Body finds support in the embedded nature of the standard of review. Consequently, the standard of review and the object and purpose analysis work in tandem in a manner that is sensitive to the character of the exemption provision as part of the tripartite "rule-exception-exemption" balance of the GATT 1994. The VCLT furthermore uses the singular "object and purpose" to place emphasis on the balance and unity of the concepts.

The exemption provision of Article XI:2 fully inherits its primary scope from Article XI:1 GATT 1994, as it reads: "The provisions of paragraph 1 of this Article shall not extend to the following." The use of the imperative "shall not extend" indicates the preclusion of the obligations as captured by paragraph 1 of Article XI GATT 1994. The exemption provision therefore inherits the full scope of the obligations created by Article XI:1 GATT 1994.

The WTO Panel report in *India – Quantitative Restrictions* observed that "[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'." The Panel furthermore interpreted the scope of "restrictions" according to its ordinary meaning, noting that "the scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'."[1041] Subsequent reports of the Panel and Appellate Body[1042] and various commentators[1043] have generally agreed and accorded a broad scope to Article XI:1 GATT 1994.

More pressingly, the scope of Article XI:2(a) is narrowed to capture only those "export prohibitions or restrictions *temporarily* applied to *prevent or relieve critical shortages* of foodstuffs or other products *essential to the exporting contracting party*." (emphasis added) In this dissertation, I argue that the adjudicator should read this sentence in accordance with the multilateral standard of review, such that "other products essential" stands in relation to "critical shortage" but not to "foodstuffs." In other words, the multilateral standard of review allows for an interpretation of

[1041] WTO Panel Report, *India – Quantitative Restrictions* (1999), ¶5.128.
[1042] See Chapter 5, *supra*.
[1043] A notable exception can be found in Robert Howse and Tim Josling, "Agricultural Export Restrictions and International Trade Law: A Way Forward," International Food and Agricultural Trade Policy Council (IPC) Position Paper, 2012.

the coordinating conjunctive "or" that does not substantively limit one part of the expression by another of equal rank. In this way an interpretative space for substantial deference is opened up that works to favor developmental policies. The multilateral standard of review does however impose formal limits when fitting disputed policy measures to the exemption provision (see previous section of this epilogue).

The central criticism of my permissive interpretation of "or" asserts it does not comport with the intended meaning of the provision at the time of drafting and rests mainly on two arguments: (i) it violates a reasonable interpretation of the intentions of the Contracting Parties as expressed by the preparatory work (Article 32 VCLT); and (ii) it limits the value of the well-established relationship between the headline rule of Article XI:1 and the exceptions of Article XX GATT 1994.

a. Preparatory Work and the Multilateral Standard of Review

The judicial decision maker may, according to Article 32 VCLT, have recourse to supplementary means of interpretation in case an interpretation in accordance with Article 31 VCLT leaves the meaning of a word ambiguous or obscure, or leads to a constructive result which is manifestly absurd or unreasonable. Such supplemental means of interpretation include the preparatory work of the treaty as well as the circumstances of its conclusion.

Article 32 VCLT clarifies when an adjudicator may have reference to material outside the text of a treaty and how this should inform her interpretation and construction. The supplementary means of interpretation can only support the decision maker in her judicious task after application of the framework of Article 31 VCLT leaves the meaning of the provision in serious doubt or manifestly absurd. Dorr stresses the limited room for application of the supplemental means of interpretation, where he observes that "[s]ince the role which preparatory material can play in the process of interpretation marks the essential difference between the textual and the 'intentions' approaches to

treaty interpretation, the restrictive design of Art 32 characterize the provision as a further confirmation of the fact that the Vienna rules of interpretation are clearly based on the textual approach."[1044]

The multilateral standard of review, while emphasizing the collaborative intent of the Membership, is strictly bound by and limited to the declarations hereof in the preamble and what the adjudicators can learn through the language and structure of the provisions of the covered agreements. The proposed multilateral standard of review is not party-specific in its construction of these "intentions" and works to avoid the interpretative trap of having to directly weigh one Member State's collaborative intent against another's.

This emphasis on the common intention of the Membership finds support in the work of International Law Commission on the law of treaties. Waldock, for instance, cautions use of the preparatory work "because they are simply evidence of the intentions of some of the parties, and their cogency depends on the extent to which they furnish proof of the common understanding of the parties as to the meaning of the terms of the treaty."[1045] The United States objected to this approach and attempted, unsuccessfully, to have the rule on the use of preparatory work (Art. 32 VCLT) and the general rule on interpretation (Art. 31 VCLT) be expressed in one provision – which would have been suggestive of equal rank and footing.[1046]

In addition to the preparatory work, Article 32 VCLT allows the adjudicator to have supplemental reference to the factual circumstances at the time of conclusion of the treaty. In its report in *EC – Chicken Cuts*, the Appellate Body clarifies that:

> "an event, act or instrument may be relevant […] not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a 'circumstance of the conclusion' when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision."[1047]

[1044] Oliver Dorr, "Article 32," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 572 at 3.
[1045] See Waldock III 58, ¶21, as paraphrased in Oliver Dorr, "Article 32," in Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer Verlag, 2012), p. 573 at 6.
[1046] See, Richard K. Gardiner, *Treaty Interpretation* (New York: Oxford University Press, 2008), pp. 303–304.
[1047] WTO Appellate Body Report, *EC – Chicken Cuts* (2005), ¶¶282-309.

While the supplemental means of interpretation can be used to "confirm" a chosen meaning or construction, the customary rules of interpretation of public international law instead favor its use to aid the adjudicator in her "meaning determination" in case of ambiguity or absurdity. This application of the supplemental rules of interpretation finds support in the Appellate Body's report *US – Gambling*, where it concluded after an investigating in accordance with Article 31 VCLT that the meaning of the commitments made by the United States were still ambiguous. The Appellate Body ultimately felt that it was "required, in this case, to turn to the supplementary means of interpretation provided for in Art 32 of the Vienna Convention."

In order to have recourse to the supplemental means of interpretation, the adjudicator has to persuasively argue that the meaning she arrived at by recourse to the elements of Article 31 VCLT remains sufficiently ambiguous or is manifestly absurd to the extent that further clarification needs to be sought for her to reach a judicial decision.[1048] While I argue that an interpretation of the language of Article XI:2(a) GATT 1994 in accordance with the multilateral standard of review does not leave the meaning of the provision or its language (i.e. the word "or") sufficiently ambiguous or manifestly absurd, some may disagree and prefer recourse to supplemental means of interpretation to elucidate its meaning further.

Recourse to the preparatory work of Article XI:2(a) GATT 1947, suggests that the economic circumstances of its conclusion (i.e. post-war shortages and a desire to retain industrial capacities) were of pre-eminent importance to the Contracting Parties. In that context, Australia tabled a carve-out from the abolition of quantitative restrictions in Article XI:1 that addressed temporary restrictions applied to prevent critical shortages of foodstuffs.[1049] Cuba and India rather expressed support for a carve-out favoring the promotion of domestic infant industries.[1050]

[1048] A regrettable example of where this was insufficiently achieved by the adjudicator can be found in the WTO Panel Report, *Chile – Price Band System* (2002), where the Panel merely observed that it "considered that the text and context of 'variable import levy' and 'minimum import price' alone do not enable us to determine the meaning of those terms without ambiguity" (¶7.35) before taking recourse to supplemental means of interpretation.

[1049] See, GATT documentation, E/PC/T/W/223 at p. 3, referenced by Douglas A. Irwin, Petros C. Mavroidis, and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 153.

[1050] See, GATT documentation, E/PC/T/A/PV/40(1) at p. 18, referenced by Douglas A. Irwin, Petros C. Mavroidis, and Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), p. 153.

The proposal Australia tabled formed the backbone of the later Article XI:2(a) GATT 1947, however other Contracting Parties succeeded in widening the scope of the provision.[1051] Whereas the concerns voiced by India in the context of the exemption provision to Article XI:1 GATT 1947 gave primary shape to Article XVIII:C GATT 1947, its apparent failure to have its concerns directly adopted in Article XI:2(a) GATT 1947 is of limited interpretational value as supplementary means of interpretation.

The International Court of Justice, for example, held in its *Namibia* Opinion that: "[t]he fact that a particular proposal is not adopted by an international organ does not necessarily carry with it the inference that a collective pronouncement is made in a sense opposite to that proposed. There can be many reasons determining rejection or non-approval."[1052] This reasoning suggests a construction which aims to limit the scope of Article XI:2(a) GATT 1994 based on the rejection of India's concerns during the negotiations is not persuasive. The failure to adopt India's suggestion in Article XI:2(a) does not therefore suggest an expansive reading of the provision goes against the intention of all Contracting Parties – in fact, there is some evidence in the expansion of the provision's scope beyond foodstuffs to suggest the opposite.

Moreover, the multilateral standard of review is preferable as a judicial standard to an interpretation that explicitly relies on aspects of Power and Utopia that originate from outside the text of the agreement to supplement its understanding. Application of the multilateral standard of review promises to safeguard the judicial decision, as an expression of the multilateral character of the agreement, against arguments that a certain interpretation or balance was not foreseen or intended by one or several Contracting Parties during the negotiations.

To stress the urgency of such concerns, as neither fanciful or contrived, recent remarks by the United States Trade Representative (USTR) Lighthizer in service of President Trump's radical turn in trade policy[1053] are instructive.

[1051] See for further detail on the genesis of the exemption provision of Article XI:2(a) GATT 1994, Chapter 5, *supra*, and the sources referenced.

[1052] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) (1970), ICJ Rep 16, ¶ 69.

[1053] At the time of writing, the United States has initiated global safeguard action on washers and solar panels, and declared global tariffs on steel and aluminum imports on national security grounds. While various WTO Member States are petitioning to be exempt from these unilateral trade enforcement actions by the United States, President Trump is set to continue his posture by suggesting further action against China on account of alleged historic and ongoing "theft" of US intellectual property. For an analysis of the trade agenda's in the 2016 US Presidential campaign, see Marcus Noland, Gary Clyde Hufbauer, Sherman Robinson, and Tyler Moran, "Assessing Trade Agendas in the US Presidential Campaign," Peterson Institute for International Economics, PIIE Briefing 16-6 (September 2016); Safeguard action is undertaken pursuant to Section 201 of

USTR Lighthizer has observed that it would be a mistake to assume that "the United States effectively gave away its entire trade regime in the Uruguay Round."[1054] He argues that the agreement cannot but be understood against various pre-conclusion aspects of the Uruguay Round negotiations and associated power dynamics.

USTR Lighthizer testified that: "[o]ur negotiators in the Uruguay Round painstakingly set forth specific rules [regarding trade remedies] and made clear that WTO dispute settlement panels should defer to national authorities like the Department of Commerce and the U.S. International Trade Commission where possible. However, the WTO has ignored this mandate and has instead engaged in an all-out assault on trade remedy measures."[1055] The USTR continues:

> Rogue WTO panel and Appellate Body decisions have consistently undermined U.S. interests by inventing new legal requirements that were never agreed to by the United States. […] Our trading partners have been able to obtain through litigation what they could never achieve through negotiation. The result has been a loss of sovereignty for the United States in its ability to enact and enforce laws for the benefit of the American people and American businesses.[1056]

This is the same kind of argument Brexiteers have raised against the European Court of Justice and should not serve as part of the interpretative toolkit of the adjudicator to a multilateral or plurilateral agreement.

Furthermore, the "Contracting Parties" of 1947 are not identical to the Membership of WTO and GATT 1994. There is not only a clear time-inconsistency in the Membership between 1947 and 1994, but more importantly, the character of the Membership is distinctly different from the post-War victorious parties of 1947. By attempting to anchor the interpretation of Article XI:2(a) to circumstances that might have been prevalent in the post-War or Cold-War context, the adjudicator pays insufficient attention to the development of the (sociological) context as well as the evolving extent of heterogeneity of the Membership from 1947 to 1994 (and beyond).

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the Trade Act of 1974; See, US President Trump, Remarks by President Trump at Signing of Section 201 Actions (January 23, 2018); National security action is undertaken pursuant to Section 232 of the Trade Expansion Act of 1962; US President Trump, Presidential Proclamation on Adjusting Imports of Steel into the United States (March 8, 2018); Further trade enforcement action is expected pursuant to Section 301 of the Trade Act of 1974.

[1054] "Closing Statement of USTR Robert Lighthizer at the Sixth Round of NAFTA Renegotiations," as delivered (January 29, 2018) in Montreal, Canada, with respect to Canada's WTO claim that US trade remedy measures violate the Anti-Dumping Agreement and the Subsidies and Countervailing Measures Agreements; *United States – Certain Systematic Trade Remedies Measures* (January 8, 2018).

[1055] Testimony of Robert E. Lighthizer, US Senate Committee on Finance, Hearing on Trade Enforcement for a 21st Century Economy (June 12, 2007), p. 6. See also, Testimony of Robert E. Lighthizer, U.S. China Economic and Security Review Commission, Evaluating China's Role in the World Trade Organization Over the Past Decade (June 9, 2010), pp. 23-24, together with fn. 111.

[1056] Testimony of Robert E. Lighthizer, US Senate Committee on Finance, Hearing on Trade Enforcement for a 21st Century Economy (June 12, 2007), p. 6.

Note that a categorical exclusion of the application of Article 32 VCLT to the GATT 1994 is itself a violation of the customary rules of interpretation of international law and conflicts with judicial practice under the WTO/GATT. Whereas recourse to Article 32 VCLT can be appropriate in general, when proposed interpretations leave the meaning of provisions ambiguous or obscure, application to the exemption provision of Article XI:2(a) GATT 1994 is circumscribed by an objective good faith construction of that provision. Such judicial construction takes the object and purpose of the exemption provision into account to limit the extent to which historic conditions of Power and Utopia can constrain the specific and evolving multilateral character of the Membership of GATT 1994.

Lastly, an adjudicatory decision that favors the incorporation of supplemental means of interpretation could point to practice in the GATT 1994 that facilitates continuity of thought between the GATT 1947 and GATT 1994. As Roessler notes: "in short, in dubio pro GATT 1947."[1057] The Appellate Body, in its report in *Japan – Alcoholic Beverages*, similarly finds adopted reports "an important part of the GATT acquis."[1058] However, reliance on this connection to reject an application of the multilateral standard of review to the interpretation of Article XI:2(a) GATT 1994 reads the obligations of an "objective good faith" object and purpose interpretation too thin.

b. Conscious Expansion of the Exemption Provision

By proposing application of a new multilateral standard of review, I consciously argue for an expansion of the ambit of exemption provisions to restore a tripartite balance in the GATT 1994 of "rules-exemptions-exceptions". I argue that this expansion furthers a judicial construction of the exemption provision that more comprehensively satisfies the object of the agreement, to enter into "reciprocal and mutually advantageous arrangements" that are responsive to and "consistent with [Member State's] respective needs and concerns at different levels of economic development."

[1057] Frieder Roessler, "The Institutional Balance Between the Judicial and Political Organs of the WTO" in Marco Bronckers and Reinhard Quick, eds., *New Directions in International Economic law: essays in honor of John H. Jackson* (Hague/London/Boston, Kluwer Law International, 2001), p. 343.

[1058] Unadopted reports under the GATT 1947 can still provide "useful guidance" to GATT 1994 Panels and the Appellate Body; see WTO Panel Report, *Japan – Alcoholic Beverages* (1996), ¶ 6.10; confirmed by the Appellate Body in WTO Appellate Body Report, *Japan – Alcoholic Beverages* (1996), p. 15.

To achieve these collaborative principles of the WTO Agreement, I argue the adjudicator should interpret the exemption provision of Article XI:2(a) primarily in its own right and not as an inherently subservient appendix to the established relationship between Article XI:1 (rule) and Article XX GATT 1994 (exception). The effectiveness principle of legal interpretation supports a construction of the exemption provision that does not limit its ambit in favor of an incomplete, but existing, relationship between rule and exception provisions in the GATT 1994.

The effectiveness principle was not however incorporated separately in Articles 31-33 VCLT, for fear of inviting "extensive" or "liberal" approaches that go beyond what the terms of any treaty can reasonably be said to express.[1059] Instead, the ILC held that a good faith reading of the treaty's text within its object and purpose sufficiently captures this maxim without exceeding the four-corners of the treaty itself. In the context of the WTO, this interpretative maxim is generally taken to prohibit a reading of the covered commitments "that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[1060]

In expanding the ambit of exemption provisions, I argue that "redundancy" or "inutility" are relative terms to the extent that they do not have a precise singular meaning outside their application to a particular agreement. A good faith construction of the agreement consequently seeks to strike an appropriate balance between the scope of provisions in conformity with the object and purpose of the agreement as a whole. The Appellate Body, in its report *Korea – Dairy*, held similarly that "[i]n light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."[1061]

Therefore, I argue the inappropriateness of constructing the exemption provision of Article XI:2(a) limited to its direct relation to the exception provision of Article XX(j) GATT 1994. I contend the Appellate Body errs where it proceeds to consider the provision of Article XI:2(a) in the framework of the entire agreement to find appropriate

[1059] International Law Commission, Draft Articles on the Law of Treaties with Commentaries (1966), Yearbook of the International Law Commission, 1966, Vol. II, p. 219, ¶6.

[1060] See, for example, WTO Appellate Body Report, *United States – Gasoline* (1996), at 21 and the WTO Panel Report, *Chile – Price Band System* (2002), ¶7.71.

[1061] WTO Appellate Body Report, *Korea – Dairy* (2000), ¶81.

context to the construction of "critical shortage" in "the words 'general or local short supply' in Article XX(j) of the GATT 1994."[1062]

In fact, the Appellate Body relates Article XI:2(a) even more directly to Article XX(j) GATT, when it holds that "[c]ontrary to Article XI:2(a), […], Article XX(j) does not include the word 'critical', or another adjective further qualifying the short supply. We must give meaning to this difference in the wording of these provisions. To us, it suggests that the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)."[1063]

Whereas I submit that the Appellate Body thus effectively collapses the exemption provision of Article XI:2(a) into a "critical shortage"-test, it moreover fails to accord appropriate analytical weight to the exemption provision as a separate category in the GATT's tripartite balance. The multilateral standard of review seeks to re-establish an appropriate balance between the various provisions of the GATT 1994 that is in better conformity with its object and purpose.

It seems uncontroversial, given a proper scope of the provision, that the "purpose" of the exemption provision of Article XI:2(a) GATT 1994 should be construed to support the "reciprocal and mutually advantageous arrangements" of the GATT/WTO. The embedded multilateral standard of review works to give effect to the provisions of the GATT 1994 so as to contribute to the agreement's collaborative objectives of "expanding the production of and trade in goods and services [...] in a manner consistent with [Member States'] respective needs and concerns at different levels of economic development."

In this way, the space for Member States to pursue policies in service of their rational economic heterogeneity is preserved, while maintaining the necessary balance and constraints for the adjudicator to arrive at a legitimate judicial decision. However, the lack of substantive predictability in the adjudicator's decision, as a result of application of the multilateral standard of review, places considerable onus on the formal constraints to the judicial

[1062] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 325.
[1063] WTO Appellate Body Report, *China – Raw Materials* (2012), ¶ 325.

decision. Furthermore, as I argue for an improved balance between rules, exception and exemption provisions, to favor including developmental policies under the ambit of the exemption provision of Article XI:2(a) GATT 1994, existing "strong" developmental rights are possibly diminished in scope as a consequence.

B. (Un)Intended Consequences: Impact on "Strong" Developmental Rights

In this dissertation I show that an economic distinction between "Developmental" and "Commercial" policies can be made – as argued in Chapter 2, *supra* – and use it to delineate the rational heterogeneity among of the WTO Membership, with respect to their economic/sociological teleology (Kantorowicz). This distinction goes to the heart of the rules-based multilateral trading system that aims to prevent beggar-thy-neighbor, mercantilist behavior while stimulating international commerce, such that "a large and steadily growing volume of real income and effective demand" might be realized for all Member States. Crucially, the multilateral trading system is normatively indeterminate between the pursuit of an economic "mature growth model" or a model of "catch up" growth, within the disciplines set by the provisions of the agreement.

Developing countries however negotiated the introduction of Article XVIII:C to explicitly afford more legal space for the adoption of industrial policies aimed at import substitution industrialization. While born out of India's early amendment to the prohibition on quantitative restrictions for development reasons, the current language was first introduced during the 1955 Review Session and maintained in the GATT 1994 – accompanied from an "Understanding on the Balance of Payment Provisions of the GATT 1994."

The provision demands particular consideration now that my proposed multilateral standard of review seeks to expand the ambit of exemption provisions in an effort to effect the tripartite balance of the GATT 1994. Moreover, the established constructive triangle "rule-exception-exemption" leaves no obvious room for previously strong developmental rights that received analytical and interpretative strength from standing tangential to the established relation between headline rules and exception provisions, such as Article XX GATT 1994.

A potential consequence of the application of a multilateral standard of review to certain provisions in the GATT 1994 is that the proposed deference to domestic developmental policies could lead to a weakening of existing "strong" developmental rights. Strong "developmental rights" find separate expression in the GATT in Article XVIII:C GATT 1994, which lays out a mechanism by which the establishment of certain industries might be aided by state help – including by deviations from otherwise regulated policies in the GATT 1994.

The language of this provision has not been subject to interpretation by Panels or the Appellate Body. In fact, this Article has been invoked only three times thus far under the GATT 1994.[1064] In all three cases, the issue turned on the determination of which relevant (political/institutional) body has jurisdiction over the notification and consultation process (see Chapter 4, *supra*). The relationship between these Committees, rooted in the political WTO institution, and the judicial dispute settlement system was the central topic in the Appellate Body report in *India – Quantitative Restrictions*.[1065] In that case, the Appellate Body rejected the demand that it should adopt a measure of deference to the (political) decision in the relevant WTO institutions as function of the notion of institutional balance.

Moreover, the Appellate Body considered India's substantial position, that a removal of its quantitative restrictions would demand it materially alter its developmental policy, against the context of Balance of Payment problems.[1066] The original connection of Article XVIII GATT with BoP problems limits application to the present economic circumstances of floating or flexible exchange rate policies being adopted broadly.

The question at present is different however and pertains to the classification of Article XVIII:C GATT 1994 as either an "exception" or "exemption" for industrial policy purposes by qualifying Member States. Consistent with the Appellate Body's general practice, barring doctrinal or normative constraints, I approach the construction of

[1064] World Trade Organization, "Application of Article XVIII, Section C, of GATT 1994," WT/COMTD/39 (July 24, 2002), Committee on Trade and Development, identifies: *Malaysia – Polypropylene and Polyethylene* (1995), *Colombia – Imports of Salt* (1998), and *Bangladesh – Chicks, Eggs, Cartons and Salt* (2002).

[1065] WTO Appellate Body Report, *India – Quantitative Restrictions* (1999); see Chapter 4, *supra*, for a deeper examination of this case.

[1066] BoP problems had been a consequence of India's import substitution policy before, but the International Monetary Fund found that India, at the time of the dispute, was no longer facing BoP problems. However the Panel and Appellate Body did consider India's recourse to Article XVIII primarily under section "B" pertaining to the balance of payments instead of the industrial policy section "C."

Article XVIII:C GATT 1994 through an object and purpose assessment in order to establish its appropriate "embedded" standard of review.

Article XVIII:13 observes that "if a contracting party [which is in the early stages of development] finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section [C]." Article XVIII:4(a) GATT 1994 contains even stronger language, noting a qualifying Member State "shall be free to deviate temporarily […]." This language is not further clarified by the 1994 Understanding on the Balance-of-Payments Provisions of the GATT 1994.

The strong and mandatory formulation "shall be free" om Article XVIII:4(a) GATT 1994, whether or not read in combination with the permissive "may" of Article XVIII:13, is integrally connected with the word "temporary." The question of how to construct "temporary" will help clarify whether to envision Article XVIII as an exemption or exception provision – and subsequently, in what way the introduction of the multilateral standard of review impacts the provision's rights and obligations.

In furtherance of her effort to establish the appropriate object and purpose of the provision, the decision maker can find contrast with the exemption provision of Article XI:2(a) GATT 1994, where the word "temporary" connects to the "applied" measures (as in "temporarily applied").[1067] As a consequence, it becomes meaningful that "temporary" in Article XVIII:4(a) relates to the "deviation" from the rules of the covered agreement (as in "shall be free to deviate temporarily"). If however, the adjudicator chooses to give pre-eminence to a construction of the word "temporarily" in relation to the general exception provision Article XX the focus falls away and instead accrues to the temporary deviation from "the provisions of the other Articles of this Agreement."

[1067] possibly also in relation to the "critical" nature of the shortages to distinguish the (see Chapter 5, *supra*)

The relationship with the exemption provision of Article XI:2(a) GATT 1994 is however contested when concerning quantitative restrictions on exports.[1068] In particular, Article XVIII:2 refers specifically to "measures affecting imports" whereas XVIII:7 seems primarily concerned with the modification of concessions – which practically all pertain to imports. Article XVIII:5, lastly, seeks to primarily address a loss of export markets for prime commodities. While it is safe to say that Article XVIII provides a carefully crafted method of adjusting tariff concessions, I hold the "stronger" reading to emphasize the ability to temporarily deviate from the obligations of the GATT.

Furthermore, the provision of Article XVIII:C is arguably meant to stand tangential to the established relationship between headline rules and exception provisions, such as Article XX GATT 1994, in order to fortify developing countries' industrial policy rights. The object and purpose analysis of the provision situates Article XVIII:C GATT 1994 in the ambit of the WTO Agreement, which observers that Member State's "relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, […] and expanding the production of and trade in goods and services […] in a manner consistent with their respective needs and concerns at different levels of economic development."

From the object and purpose analysis of the provision, the adjudicator could conclude that a measure of liberty was meant to be accorded to qualifying Member States in Article XVIII GATT 1994 to pursue the establishment of certain industries, in temporary – but complete - deviation from the "other Articles of this Agreement." As such, the provision materially operates as time-constrained exemption provision and is, as such, subject to the multilateral standard of review.

The arguments made in support of an interpretation that emphasizes the Membership of the GATT 1994 as a heterogeneous and evolving body, instead of being statically reflective of the composition of the Contracting Parties in 1947 (or 1955 respectively), also find application to the current provision. Such an expansive analysis of the scope of this (temporary) exemption provision could, perhaps problematically, work to accord deference to a claim

[1068] See, Ilaria Espa, *Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines* (Cambridge: Cambridge University Press, 2015), pp. 138-139.

by a Member State to be "in the early stages of development" with respect the promotion of the establishment of a particular industry.[1069]

Note however that at the core of the "rational heterogeneity" of the Membership, from which the multilateral standard of review operates, lies the distinction between "commercial" and "developmental" policies. This crucial distinction clearly places the accumulation of productive skills central to the process of economic growth and development; rejecting vehemently application of industrial policies for mercantilist considerations – even if undertaken by those Member States that are in the early stages of development.

Application of the multilateral standard of review to the construction and interpretation of Article XVIII:C GATT 1994, does, in the absence of further constraining doctrinal and normative teleologies, bring with it the formal discipline of the conditions of the Oates' Decentralization Theorem. These conditions, such as (a) the absence of meaningful centralization gains and (b) limited inter-jurisdictional spill-over, likely work to limit the scope of the words "shall be free to deviate" when fitting the contested policies to the language of the provision. At the same time, application of the multilateral standard of review could deprive the permissive language of Article XVIII:C of its "strong" character such as to effectively hollow out the meaning of "may have recourse to" in Article XVIII:13 GATT 1994 through application of formal requirements to ensure predictability of the judicial decision.

[1069] In the context of Article 1.1(b) Agreement on Subsidies and Countervailing Measures, a similar development could be said have occurred in respect of Canada's Feed-in Tariff Program; it is unclear how in future disputes the Appellate Body will distinguish between circumstances in which a government intervenes or distorts an existing market, on the one hand; and circumstances in which the government's intervention is deemed to be so far-reaching as to create a new market, on the other hand; see, for a broader analysis, Jan Bohanes, "WTO Dispute Settlement and Industrial Policy," E15 Think Piece, ICTSD and World Economic Forum (2015).