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Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint

*J. Patrick Kelly**

I. INTRODUCTION

The remarkable success of the international trade regime has created demands for an international environmental policy, minimum labor standards, and other social regulatory policies to be incorporated into the law or jurisprudence of the World Trade Organization (“WTO”).¹ Linkage of social regulatory policy with trade might occur by negotiating new WTO agreements codifying political solutions to regulatory problems,² by utilizing the policy-making procedures of the General Council,³ or by judicial activism at the Appellate Body (“AB”).⁴ The AB is the WTO judicial organ

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¹ Uruguay Round Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS – THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 3 (1994) [hereinafter WTO Agreement].

² Linking other subject areas to trade by negotiating new agreements has proven difficult. The Agreement on Trade-Related Aspects of Intellectual Property Rights does require the recognition and enforcement of intellectual property rights by all WTO members. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, WTO Agreement, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 31 I.L.M. 1125 (1994) [hereinafter TRIPS]. In other areas strong resistance from developing countries and others has prevented positive regulation at the WTO. For an analysis of difficulties in linking trade and rules for foreign investment, see Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT’L ECON. L. 731, 734 (1998).

³ For a discussion of the General Council’s limited authority to interpret or amend the WTO agreements, see *infra* section II.

⁴ Several commentators propose that the AB interpret existing WTO provisions to better accommodate trade rules with environmental and social policy concerns. Some would re-

which is effectively the final legal authority on the interpretation of WTO agreements.⁵ This article offers a modified contractual approach to linkage issues and specifically opposes judicial activism as beyond the delegated authority of the AB, and contrary both to democratic legitimacy and wise policy development in a world of divergent values and interests.

Pressure for the inclusion of non-trade values into the trade regime through judicial activism is, to some degree, the product of two intersecting developments. The first is the success of the new WTO dispute settlement system. The 1995 Dispute Settlement Understanding (“DSU”) mandates compulsory dispute settlement as a condition of membership and provides an opportunity for an international trading system under the rule of law, rather than a power-based regime.⁶ Nations file complaints to panels whose decisions may be appealed on legal grounds to a professional AB. These decisions, while theoretically reversible by the Dispute Settlement Body (“DSB”), have been automatically adopted in all cases, and have the effect of judicial decisions.⁷ Petitions for adjudication that previously may have been blocked under the General Agreement on Tariffs and Trade (“GATT”) dispute process now proceed to decision.⁸

The second development is the lack of political will among nations to effectively address systemic international problems such as environmental degradation, global warming, the loss of biodiversity, and persistent human rights violations.⁹ Member states of the WTO, for example, have not used existing processes to harmonize environmental standards or to clarify whether unilateral trade measures to enforce environmental standards are

quire that the Article XX(b) exception for human and animal health be interpreted to permit a balancing of trade and environmental values. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 714-18 (1996). Robert Howse, for example, proposes that the public morality exception in Article XX(a) be interpreted to justify trade sanctions against products produced in a manner that denies workers’ core labor rights. Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999).

⁵ The Dispute Settlement Understanding provides that AB decisions are to be automatically adopted unless there is a consensus against the decision. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1994) [hereinafter DSU].

⁶ *Id.* at art. 1.

⁷ See Raj Bhala, *The Precedent Setters: De Facto Stare Decis in WTO Adjudication*, 9 J. TRANSNAT’L L. & POL’Y 1, 4 (1999) (arguing that panel and AB decisions have become a *de facto* system of precedent).

⁸ Under the prior GATT dispute system, members states could block the formation of a panel and therefore block the adoption of a panel decision. See RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 199-200 (2d ed. 2001).

⁹ For a catalog of twenty unaddressed problems that represent a “governance gap” at the global level, see Jean-Francois Rischard, *High Noon: We Need New Approaches to Global Problems*, *Fast*, 4 J. INT’L ECON. L. 507, 513-23 (2001).

contrary to members' obligations under the agreements. In this policy vacuum, the WTO bears the burden of arbitrating controversial policy disputes.

Social regulatory policy disputes at the WTO have been portrayed by activists and the media as struggles between advocates of free trade, such as multinational corporations, and environmental or labor interest groups from highly developed societies. Missing from this business/environmental dichotomy are the interests of the majority of the world's population. Many developing countries perceive that the problems of world poverty, the lack of access to the protected agricultural and textile markets in the United States, Europe and Japan, and the inadequate access to pharmaceutical drugs and health care, are of even greater importance than western perceptions of pressing social policy and should be paramount considerations in trade policy. Developing countries are concerned that the incorporation of environmental, labor, or human rights policy into the trade regime without their consent, in a manner that justifies the imposition of unilateral trade sanctions, would deny them access to markets and may undermine efforts to alleviate poverty.¹⁰

How should the competing values and interests in social policy disputes be reconciled at the WTO? Should AB judges be permitted to incorporate other international norms or modernize agreements based on their understanding of community norms? Or is the development of international law better served by member nations, as representatives of their peoples, determining the balance of protection and costs through the political process of consensual agreements? These are questions of institutional competence: the appropriate allocation of decisionmaking authority among nations and the various organs of the WTO. Much of the debate in the literature and in the streets has been a substantive debate about the appropriate policy,¹¹ but perhaps even more important than transitory positions about sub-

¹⁰ Developing countries adamantly opposed trade linkage with both environmental and labor issues in the recent Doha trade negotiations, but the European Union succeeded in placing some environmental issues on the agenda. See *WTO Members Nations Agree to Launch Development Round at Tough Talks in Doha*, 18 INT'L TRADE REP. (BNA) at 1814, 1816-17 (Nov. 15, 2001). Southern environmental NGOs also appear to understand that unilateral trade sanctions restrict imports from the South. See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 HARV. ENVTL. L. REV. 1, 72 (2001) [hereinafter WTO Member Nations].

¹¹ Critics of globalization and WTO trade liberalization policies argue that free trade reduces the ability of domestic regulators to maintain environmental and labor standards and shifts production and capital to nations with lower standards and wages. For an analysis of various critical approaches, see Gregory Shaffer, *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO's Future*, 24 FORDHAM INT'L L. J. 608, 619-23 (2000). Defenders of trade liberalization contend that liberal trade policies lead to higher incomes and economic growth that fosters stricter environmental standards and private standard setting. See, e.g., Alessandra Casella, *Free Trade and Evolving Standards*, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR

stantive issues are the structural issues of what institution should determine the content of regulation and by what process. Should a nation be permitted to require compliance with its labor and environmental laws by foreign producers as a condition of entry, or is such regulation purely a subject of international political negotiations? Procedural concerns about WTO adjudication are being debated surrounding two interrelated issues: (1) the incorporation issue – to what extent should customary and other international norms be incorporated as rules of decision in WTO dispute settlement decisions,¹² and (2) the creative interpretation issue—to what degree should panels and the AB exercise broad discretion in making law in the process of the necessary interpretation of WTO provisions.¹³ While both the incorporation and creative interpretation issues appear to raise questions about the structure and content of WTO jurisprudence, at a deeper level they raise fundamental questions about the structure and content of international law itself.

In a number of recent decisions the AB has begun to grapple in a non-systematic way with both the incorporation and creative interpretation issues.¹⁴ These decisions raise serious concerns that the AB is exceeding its authority under the DSU and inappropriately incorporating non-WTO law or interpreting WTO agreements in a manner that diminishes the rights of members. This article explores both the incorporation and creative interpretation questions by assessing the relative merits of three different models of how social regulatory policy might be integrated into WTO decision-making: the Judicial Activist Model, the Contract Model, and the Legislative Model.

The Judicial Activist Model posits a WTO legal system that empowers

and Evolving Standards, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 119, 148-49 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) [hereinafter Bagwati & Hudec, FAIR TRADE AND HARMONIZATION].

¹² Joost Pauwelyn contends that WTO agreements are part of the public international law system, and therefore international legal norms apply at the WTO unless nations specifically contract out of a particular norm. This analytical model leads him to conclude that defendants should be allowed to invoke international law as a justification for a breach of WTO rules. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001). Robert Howse and Makau Mutua argue that the WTO must be integrated into international law and that many international norms are superior to WTO treaty norms. See ROBERT HOWSE & MAKAU MUTUA, PROTECTING HUMAN RIGHTS IN A GLOBAL ECONOMY: CHALLENGES FOR THE WORLD TRADE ORGANIZATION (2000).

¹³ Several commentators have suggested that the AB should interpret provisions in WTO agreements to permit a state to unilaterally require other states to comply with its process standards or be denied access to markets. See, e.g., Robert Howse & Donald Regan, *The Product/Process Distinction, an Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000); Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739, 849-855 (2001).

¹⁴ See discussion of the Shrimp/Sea Turtle and other cases *infra* Part IV.

AB judges to incorporate non-WTO norms and to interpret the provisions of the various WTO agreements in an expansive way. Under this model, AB judges are able to respond to changes in the international social system including new norms and new problems. Advocates of this approach encourage the AB to balance competing policy values in interpreting standards or in filling gaps in WTO agreements.¹⁵ The Contract Model, on the other hand, assumes that the WTO is a self-contained contractual regime of sovereign states whereby nations accept limited obligations in exchange for reciprocal commitments by other states.¹⁶ Policy decisions under this model are appropriately made by nations themselves under the principle of consent. The Legislative Model assumes that the WTO is empowered, or could be empowered, to act as a legislature making binding decisions based on majority rule or the rule of a super-majority. Under this model the General Council could exercise its existing power to interpret WTO agreements or be further empowered to make policy by clarifying broad standards in existing agreements through interpretations or by amending agreements where necessary. Each model has, at least, some basis in WTO law or practice and has been utilized to some degree in other international legal institutions.¹⁷ Each model is a normative framework for how global governance should proceed with different assumptions about the proper allocation of authority between nations and international institutions.

All three models raise issues of the democratic legitimacy of WTO decisions and the distribution of power among nations. A choice among these models as to which is the preferred process for making law at the WTO affects the relative power of nations in policy-making and, in many cases, would determine the content of norms. If legal development at the WTO followed the Contract Model, proposed amendments to GATT 1994 to harmonize environmental standards would likely be unsuccessful without corresponding concessions to nations with lower standards.¹⁸ The acceptance of the Judicial Activist Model, however, would authorize the AB to

¹⁵ See, e.g., DAN ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (1994) (suggesting a jurisprudence that balances effects and proposing a series of interpretive and procedural reforms).

¹⁶ See P. J. Kuyper, *The Law of the GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?*, 25 NETH. Y. BK. INT'L L. 227 (1994).

¹⁷ See discussion *infra* Part II.

¹⁸ At the recently completed ministerial conference in Doha, Qatar, EU proposals to place trade and environmental issues on the negotiating agenda in the new trade round received little support and were widely perceived as 'green protectionism.' See *Trade Officials Assess Winners, Losers in Aftermath of Doha Ministerial Meeting*, 18 INT'L TRADE REP. (BNA) at 856, 1857 (Nov. 22, 2001). Similarly, developing countries successfully opposed any language in the ministerial declaration linking the new trade agenda to labor issues. See *WTO Member Nations*, *supra* note 10 at 1817.

permit unilateral sanctions and thereby shift the relative power among nations to develop global policy as well as the distribution of burdens and rewards.

This article takes a decidedly contractualist stance. Its overall premise is that international social policy should develop through contractual treaty regimes rather than by judicial activism. Customary and other norms of international law ought not be generally incorporated into WTO jurisprudence except where specifically authorized under WTO agreements or where the AB finds, in its discretion, that international norms provide useful guidance on procedural issues within its authority.

Judicial activism undermines basic values at the heart of the WTO agreement including national sovereignty and democratic legitimacy. The appropriate way to inject environmental and labor policy into the trade regime is through specific, negotiated bargains based on the legitimizing principle of consent. This article further argues that several of the recent WTO decisions that appear to utilize either the incorporation or creative interpretation approaches of the judicial activist model are better rationalized by a more sophisticated contract. This article suggests that this model, referred to as the "Contractual Authority" Model, is a better approach for reconciling democratic legitimacy, national sovereignty, and social policy claims.

Section II discusses the three models of policy-making, analyzing the extent to which each is reflected in the governance structure of the WTO, and argues that the AB lacks either express or implied authority to engage in substantive policy-making. Section III examines the wisdom of utilizing judicial activism as a process for developing international social regulatory policy at the WTO. Section IV discusses recent WTO decisions and explains the advantages of the "Contractual Authority" Model. Section V offers several principles of judicial self-restraint to circumscribe the authority of the AB and limit judicial activism.

II. MODELS OF POLICY-MAKING AND THE STRUCTURE OF THE WTO

The Legislative Model, Judicial Activist Model, and the Contract Model, comprise the primary alternative methods of governance in international institutions.¹⁹ Each has a long history within domestic societies and finds some expression within the WTO. The legislative model, as supple-

¹⁹ The Legislative Model, although rare in the international context, does occur. The United Nations Security Council, for example, is composed of ten elected representative states and five permanent members. Decisions require an affirmative vote of only nine members, including the concurring votes of the permanent members. U.N. CHARTER arts. 23, 27 ¶ 3.

mented by judicial activism in some societies, is the preferred method of law creation in democratic societies and is premised on democratic legitimacy. Legal policy in the form of legislation is generally perceived as legitimate in democratic societies if it is approved by a majority or supermajority of the peoples' representatives in the legislature.²⁰ The legislators are subject to periodic elections and thus accountable to the people.²¹

Unlike domestic legal systems, the WTO is a statist system with citizens of the constituent states possessing no direct opportunity to vote on decisions or to indirectly participate by selecting representatives who then make legislative policy decisions. Individual nations are the only official members and formal participants in this legal system. Nevertheless, the democratic legitimacy of WTO decisions is preserved in democratic societies to the extent that a nation consents to a particular policy and officials responsible for that policy are accountable to its people. In the United States, for example, the democratic legitimacy of the policies and procedures in WTO Agreements is preserved when new trade agreements are subsequently passed into law by a majority vote of both houses of Congress and signed by the President consistent with the procedures of the U.S. Constitution.²²

A legislative process for WTO decisionmaking by a majority of states would be consistent with democratic legitimacy, at least in a formal sense, if such a majoritarian process had prior approval by legislators accountable to the people.²³ The WTO Agreement does, in fact, authorize a carefully

²⁰ Legal rules and policy developed by the legislature may be legitimate in two different senses. First, such rules or policies may meet the requirements of formal or 'legal' legitimacy if they are enacted according to prior rules of law creation such as the procedures mandated in a constitution or required by tradition. See Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195 (1977). Second, legal rules may be generally perceived as legitimate because a given society, presumably democratic, accepts such norms as binding. Weiler terms this a problem of social legitimacy. See Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403, 2466-73 (1991) (updated and expanded in JOSEPH H. H. WEILER, *THE CONSTITUTION OF EUROPE* 80-86 (1999)).

²¹ Democratic elections help assure that governments continue to be responsive to the governed. See P. H. PARTRIDGE, *CONSENT AND CONSENSUS* 29 (1971).

²² This has been the current practice in the United States, but the Constitution does not specifically provide for such a procedure, and its constitutionality is a matter of some debate. Lawrence Tribe argues that because the Constitution mentions only the treaty process in Article II as a means to create binding international agreements, it is the exclusive constitutional process. Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). Peter Spiro argues that constitutional practice and wise political judgment support the current practice. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001).

²³ There would be prior consent to an authoritative process of law creation. H. L. A. Hart has termed such authoritative processes rules of recognition, that is, rules that define the criteria necessary for the formation of primary rules of conduct. H. L. A. HART, *THE CONCEPT*

circumscribed legislative role for its primary organs with regard to certain limited policy decisions. While consensus remains the preferred process of decisionmaking,²⁴ the Ministerial Conference and its executive alter ego, the General Council,²⁵ are authorized to adopt interpretations, waivers, and amendments by super-majority votes.²⁶

Binding interpretations of the WTO agreements, for example, require a vote of three-fourths of the members.²⁷ Interpretations could be utilized to clarify broad provisions such as the meaning of 'necessity' in the WTO Agreement Article XX(b) exception with regard to measures concerning animal or human health or the application Article XX(g) exception for "exhaustible natural resources." In practice, neither the Ministerial Council nor the Governing Council has exercised this arguably broad policy-making authority to clarify agreements whether by interpretation or amendment.²⁸

While the failure to utilize these legislative procedures may, in part, be explained by the high three-fourths voting threshold, there may be a more fundamental cause. The failure to engage in any significant attempt to utilize the super-majoritarian procedures for policy-making suggests that nations perceive consent through new agreements to be more compatible with the statist nature of the WTO system and with legitimate lawmaking procedures. Nations, with a few limited exceptions, remain unwilling to accept majority rule in international lawmaking.²⁹ This position reflects the continuing belief associated with national sovereignty that each nation should alone decide whether to accept a new obligation that limits its freedom of action.³⁰

The failure to embrace majoritarian processes is also a practical result

OF LAW 94-95 (2d ed. 1994). Others term this basis of legitimacy as general consent. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 618-19 (1999).

²⁴ Under the WTO Agreement, consensus is defined as no member present at a meeting formally objecting to the decision. WTO Agreement, *supra* note 1, at art. IX.1, n.1.

²⁵ The WTO Agreement creates the Ministerial Council as the primary governing body, but it is only required to meet every other year. The General Council performs the functions of the Ministerial Council when it is not in session. Both are comprised of a representative of each member state. *Id.* at art. IV.

²⁶ The Ministerial Council may waive an obligation imposed on Members by a three-fourths vote of the Members. *Id.* art. IX.3. In general, amendments that would alter rights and obligations are effective only for those nations accepting them upon a two-thirds vote of Members. *Id.* art. X.3. Certain critical provisions in agreements do, however, only take effect upon acceptance by all members. *Id.* at art. X.2.

²⁷ *Id.* at art. IX.2.

²⁸ The amendment process is even further constrained because substantive amendments are effective only for those members accepting the proposal. *Id.* at art. IX.3.

²⁹ For a discussion of the few other examples, see Bodansky, *supra* note 23, at 607-11 (discussing the limited procedures for listed chemicals under the Montreal Protocol).

³⁰ See BHALA, *supra* note 8, at 584. (viewing this reluctance as concern about the potential tyranny of the majority).

of democratic accountability. Democratic governments may not relish the prospect of subjecting citizens to policies that the electorate may perceive as against their interests. Citizens of those states opposing a particular interpretation would be bound to a policy affecting their interests even though neither they nor their elected representatives approved it. Such decisions using prior agreed majoritarian processes might possess formal legitimacy, but nevertheless be perceived as undemocratic, and hence illegitimate by a nation's electorate.³¹ If WTO organs utilized majoritarian processes to create new obligations, the democratic legitimacy of WTO decisions would be even further attenuated and public support eroded. Instead, nations continue to utilize negotiated agreements as the primary legitimate mode of legislating new policy. New agreements, when presented to legislatures, permit a national voice in policy decisions that cannot be overridden by a majority vote of other nations.

The Judicial Activist alternative for policy development posits a WTO legal system that explicitly or implicitly empowers AB judges to interpret the provisions of the various WTO agreements in an expansive way, responding to changes in the international social system. Advocates of this approach envision a WTO legal system that is part of and, in some respects, subordinate to a larger international system of norms and principles that could inform AB decisions. There are various versions of this general thesis. Robert Howse and Makau Mutua perceive an international legal system where treaty norms are subordinate to international customary norms and *jus cogens* norms.³² David Palmeter and Petros Mavroidis take the position that the provisions of the DSU effectively incorporate the various sources of international law into WTO law³³ and that other international treaties and rules of international law are relevant to the interpretation of WTO agreements.³⁴ Joost Pauwelyn draws the distinction between the substantive jurisdiction of WTO panels, which is limited to claims under WTO covered agreements, and the law to be applied in resolving those claims which po-

³¹ Joseph H.H. Weiler, in writing about the 'democracy deficit' of majoritarian processes in the European Union, terms this a problem of social legitimacy. See WEILER, *supra* note 20, at 2466-73.

³² HOWSE & MUTUA, *supra* note 12, at 4.

³³ David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 399 (1998). The argument is that articles 3(2) and 7 of the DSU incorporate the sources of international law in Article 38 of the Statute of the International Court of Justice. Article 3(2) does provide that the dispute settlement system serves to clarify provisions of the agreements "in accordance with the customary rules of interpretation of public international law." This phrase appears to refer only to the rules of interpretation codified in the Vienna Convention on Treaties, not the wider body of customary international law. See Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, n.41 (1999).

³⁴ Palmeter & Petros, *supra* note 33, at 412-13.

tentially includes all norms of international law. He asserts that because WTO rules are part of a wider body of public international law, non-WTO rules of international law apply in WTO adjudication unless the members have specifically contracted out of a particular norm.³⁵ In his view, customary international law, for example, not only appropriately fills gaps in WTO treaty law, but also may apply before a WTO panel in a manner that overrules WTO rules.³⁶ In his approach non-WTO norms may inform the meaning of WTO agreements as long as such rules do not go beyond or against the clear meaning of the interpreted term. In addition, other later treaties may override WTO rules based on the consent of the parties.³⁷ The recent Shrimp/Sea Turtle decision lends some support to this model, particularly the interpretive approach of Pauwelyn.³⁸ In the Shrimp/Sea Turtle decision, the AB utilized international environmental treaties and the goal of sustainable development in the preamble of the WTO agreement to interpret the meaning of “exhaustable natural resources.” One might also argue that judicial activism is perhaps necessary in the current environment because other modes of lawmaking at the WTO are moribund or blocked.

The Contract Model, on the other hand, assumes that the WTO trade regime is a self-contained system based on specific and detailed agreements of sovereign states. This model analogizes states to individuals in domestic societies who create law voluntarily through their contractual relations. Nations accept limited obligations, including the opening of markets and non-discrimination in exchange for reciprocal commitments by other states. Contractualists see the WTO as primarily comprised of rules and devoid of the authority to engage in judicial lawmaking. Rather, member states contract out of general international law norms under the doctrine of *lex specialis*.³⁹ Under this model, the incorporation of new policy concerns requires a renegotiation of the basic bargain. A new substantive policy, without specific agreement by all nations to be bound, would diminish a member’s basic rights under the agreements and might require a concession.

Whereas a modified contractual approach is preferable, a pure contractual regime is perhaps impossible. Even a detailed rule-oriented system could not foresee all future circumstances or eliminate all ambiguities. The WTO Agreements are, in fact, comprised of both rules and standards.⁴⁰

³⁵ Pauwelyn, *supra* note 12, at 537-39.

³⁶ *Id.* at 577.

³⁷ *Id.* at 572-73.

³⁸ WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, (98-3899), ¶ 173 (Oct. 12, 1998) [hereinafter Shrimp/Sea Turtle Report].

³⁹ See Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y. BK. INT’L L. 111 (1985).

⁴⁰ See Trachtman, *supra* note 33, at n.97 (discussing rules versus standards literature in

Rules define with particularity the conduct required. Standards, such as the term “necessary” in the Article XX(b) exception for human and animal health regulations, provide general guidance to the decisionmaker, but do not specify in detail the conduct required.⁴¹ New circumstances require judgments about the boundaries of norms and their application.⁴² Such unforeseen circumstances, gaps and ambiguities create opportunities for judicial activism. However, the incompleteness of agreements is not, in and of itself, a justification for judicial activism.

An assessment of the appropriate role of the AB in a world of gaps and ambiguities requires (1) a determination of what model, in general, member states have chosen to develop policy; and (2) an analysis of the policy implications of choosing judicial activism as a mode of articulating social policy in an international legal regime. Based on this assessment, this article will develop principles that should guide the interpretation of WTO agreements and their application to new problems.

Which model or combination of models have member states chosen for allocating legislative authority between states and the dispute settlement system? Turning first to the older GATT regime,⁴³ the history and structure of GATT 1947 appears more consistent with the Contract Model than the Judicial Activist model. The GATT agreement was negotiated by only twenty-three trading partners on a reciprocal basis.⁴⁴ The dispute settlement system was not mandatory, and panel decisions were adopted only if there was a consensus in favor of the report permitting a ‘contracting party’ to opt out of the system.⁴⁵ The power of even one nation to block a report discouraged judicial activism. GATT norms were clarified and norms added through serial rounds of trade negotiations.⁴⁶ Significant changes required

the context of the WTO).

⁴¹ See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L. J. 557, 559-60 (1992).

⁴² For an extended discussion of the advantages and disadvantages of rules versus broader approaches to judging, see Cass R. Sunstein, *Problems With Rules*, 83 CALIF. L. REV. 953 (1995).

⁴³ General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 188. [hereinafter GATT 1947]. As a result of the Uruguay Round of trade negotiations, the 1947 GATT agreement became annexed to the WTO Agreement. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex IA, MULTILATERAL AGREEMENTS ON TRADE IN GOODS, 33 I.L.M. 1154 (1994) [hereinafter GATT 1994].

⁴⁴ See generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (2d ed., 1990); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989) [hereinafter JACKSON, *WORLD TRADING SYSTEM*].

⁴⁵ For a description of the GATT 1947 dispute system and the weaknesses of this system, see BHALA, *WORLD TRADE LAW*, *supra* note 8, at 196-200.

⁴⁶ There were seven rounds of trade negotiations between 1947 and 1985. The first five rounds were primarily devoted to tariff reduction. The subsequent Kennedy and Tokyo rounds began to address the more contentious nontariff barriers. See JACKSON, *WORLD*

the consent of other trading partners. The primary mode of responding to new problems was to negotiate 'side agreements' among those nations willing to consent to the new or clarified norms. The nine new agreements and four 'understandings' that were negotiated during the Tokyo round, such as a detailed code for countervailing duties and for customs valuations, were side agreements subscribed to by less than one-half of the members and applied only to transactions among those signatories.⁴⁷ This contactual or 'side agreement' approach permitted the development of policy, but at the loss of the universality of the trading system.

The new WTO agreements, however, fundamentally changed the structure and process of dispute resolution. Dispute settlement is now compulsory with no opportunity to block panel reports.⁴⁸ Panel decisions may be appealed to the AB on legal issues, thereby promoting uniformity of norm interpretation and consistency in application.⁴⁹ Because AB decisions are automatically adopted as decisions of the DSB unless there is a consensus against the decision, dispute settlement reports now have a greater degree of finality.

In an important respect, the WTO continued the tradition of a contractual treaty-based regime. The WTO agreements define members' obligations and the benefits that they receive in exchange for their contractual commitments. In the *Japan Alcoholic Beverages* case, the AB stated that, "[T]he WTO is a treaty—the international equivalent of a contract. In exchange for the benefits member states expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they made in the WTO Agreement."⁵⁰ However, the process of interpretation and the elucidation of general standards by the AB provides the opportunity to exercise considerable discretion in the development of WTO law through judicial decision-making.⁵¹

The DSU appears to authorize only a contractual rule-applying system rather than one that incorporates non-WTO norms or delegates authority to modernize agreements. Losing parties have an obligation to comply with

TRADING SYSTEM, *supra* note 44, at 73-78.

⁴⁷ *Id.* at 75-78.

⁴⁸ If the complaining party so requests, a panel shall be established, at the latest, at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel. *See* DSU, *supra* note 5, at art. 6.1.

⁴⁹ *Id.* at art. 17.

⁵⁰ WTO Appellate Body Report on Japan-Taxes on Alcoholic Beverages, AB-1996-2, WTO DS 8/AB/R at 15 (Oct. 4, 1996).

⁵¹ For an argument that the WTO dispute resolution is creating a 'new frontier' of trade law contributing to the development of international law, *see* Donald M. McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 J. INT'L. ECON. L. 27, 27-41 (2000).

AB decisions; members effectively have a choice of responses to an adverse decision including the option to pay compensation or face retaliation.⁵²

This flexible approach preserves a measure of sovereignty and permits member states to not comply when important domestic interests would make compliance politically difficult. Such a safety valve with weak enforcement tools is concerned with sovereignty and national autonomy, not a mature legal system focused on where judges play an undefined, yet significant role, in articulating norms for a community.

The provisions of the DSU defining the WTO legal system are incompatible with both the incorporation of non-WTO norms as rules of decision and a creative interpretive role for the AB. Article 3.2 of the DSU clarifies the appropriate role of the AB and panels: “[R]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”⁵³ Members’ rights would be diminished if the AB incorporated non-WTO norms to modify member rights, overrule WTO rules, or justify trade sanctions not specifically excepted from WTO rules. The incorporation of non-WTO law in a manner that diminishes rights or gives priority to international norms over negotiated rights, such as the right of access to markets, would violate the bargain struck in the DSU.⁵⁴ For example, the incorporation of non-WTO legal norms would be inconsistent with DSU Article 3.5 requiring that all solutions reached under the dispute settlement provisions or by consultation be consistent with the agreements and not impair benefits such as access to markets.⁵⁵

Similarly, the argument that treaties should be later used to interpret WTO agreements appears to be specifically excluded by the DSU. Article

⁵² The DSU permits the payment of compensation or the authorization of the suspension of concessions if a member fails to comply within a reasonable time. DSU, *supra* note 5, at art. 22.

⁵³

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

DSU, *supra* note 5, at art. 3.2.

⁵⁴ This point of view is contrary to the view of many commentators who would place the WTO regime within a hierarchy of international legal norms or advocate the use of non-WTO norms to justify actions contrary to WTO norms. See *supra* text accompanying notes 32-37.

⁵⁵ “All solutions to matters formally raised under the consultation and disputes settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.” DSU, *supra* note 5, at art. 3.5

3(2) clarifies that the central purpose of the dispute system is to provide security and predictability to the trading system defined as preserving the rights and obligations under the agreements and clarifying existing provisions.⁵⁶ These provisions articulate a contractual, law-applying system designed to preserve existing bargains rather than delegate to AB judges the authority to interpret WTO provisions in light of their perceptions of changing policy concerns.

The sole exception to this analysis is the specific incorporation into WTO law of the "customary rules of interpretation of public international law."⁵⁷ Article 3(2) specifically incorporates only the customary rules of interpretation of treaties and excludes those rules of international law that would diminish members' rights and obligations. Rather than incorporate international law generally, as Palmeter and Mavroidis suggest, this provision evidences a common sense and efficient agreement to utilize the existing interpretive rules of the Vienna Convention on Treaties when interpreting WTO agreements.⁵⁸ Without such a designation, the AB would be required to develop its own rules of interpretation on a case by case basis.

The incorporation of the rules of interpretation was chosen by the parties and is consistent with a contractual approach. This provision limits the discretion of the AB by choosing the textual approach of the Vienna Convention and by implication excluding other more teleological forms of interpretation.⁵⁹ Any substantive law creating functions the AB may possess must be interstitial, giving definition to vague or ambiguous terms within the parameters of existing rights and obligations. The WTO agreements do not delegate to the AB and should not be read to delegate the authority to interpret agreements in a manner that modifies negotiated bargains.

The conclusion that the DSU creates an essentially self-contained system with regard to substantive norms is strengthened by the DSU approach

⁵⁶ *Id.* at art. 3.2

⁵⁷ *Id.*

⁵⁸ The WTO's AB has interpreted the phrase "customary rules of interpretation of public international law" in article 3.2 to refer to the interpretive rules of the Vienna Convention on Treaties. *See, e.g.*, WTO Appellate Body Report on Japan - Taxes on Alcoholic Beverages, AB-1996-2, WTO/DS 8,10,11/AB/R (Oct. 4, 1996) at 9 (citing WTO Appellate Body Report on United States-Standards for Reformulated of Conventional Gasoline, AB-1996-1, WT/DS2/AB/R at 17 (Apr. 29, 1996)). For an argument that the reference to customary rules of interpretation is being interpreted more broadly to refer to the rules of international law generally, *see* McRae, *supra* note 51, at 37-8.

⁵⁹ *See* Vienna Convention, Apr. 24, 1963, 596 U.N.T.S. 8638. The European Court of Justice, for example, has adopted a teleological approach to achieve its perception of the goals of the community. This expansive interpretive style is, in part, responsible for the perceived "democracy deficit" within the European community. *See* WEILER, THE CONSTITUTION OF EUROPE, *supra* note 20, at 51-63.

to remedies. Member states agree to forego the self-judging assessment of a violation under general international law and contract out of the remedies available under international law.⁶⁰ Article 23 enables member states to seek redress through the DSU only after member states agree not to make a determination that a violation has occurred. Member states must also suspend concessions after DSB authorization and in accordance with DSU procedures.⁶¹

This analysis of the DSU is not mere formalism. The DSU unequivocally articulates the allocation of authority among the institutions of the WTO, much like a constitution, and specifically requires the consent of the governed states for interpretations and amendments. Such an allocation of authority makes sense in the international trade context because the inevitable clash of culture and interests in international social policy formulation requires a political process for effective resolution.

While the DSU does not formally delegate lawmaking authority to the AB to modernize agreements or authorize the application of non-WTO law to determine disputes, it is argued that legislatures, or in this case member nations, intentionally or unintentionally delegate a measure of legislative authority to dispute resolution bodies through the process of interpreting incomplete provisions or the definition of general standards.⁶² Incompleteness may be the result of the failure to decide a difficult political issue or the intention to defer contentious policy decisions to judicial interpretation.⁶³

There is, however, a crucial distinction between the AB determining policy left incomplete because of a failure to agree and the interstitial development of vague standards. Policy decisions that are avoided or deferred leave intact existing bargains. In Articles 3.2 and 3.5, the DSU clarifies that the purpose of the dispute resolution system is to give effect to members' rights multilaterally negotiated. These provisions effectively ar-

⁶⁰ See Kuyper, *supra* note 16, at 251-52.

⁶¹ Subsection (2) provides:

In such cases, Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this understanding.

DSU, *supra* note 5, at art. 23

⁶² Trachtman suggests that the incomplete or standard-like nature of treaty provisions may be seen as a legislative decision to delegate authority to dispute resolution bodies. See TRACHTMAN, *supra* note 33, at 346.

⁶³ Joel Trachtman, *International Trade as a Vector*, 24 *FORDHAM INT'L L. J.* 726, 735 (2000).

ticulate a default rule for occasions when there are deferred issues or no law to apply (*non liquet*) in agreements - any expansion or diminution of members rights or obligations must be reserved for member states to determine.

Interstitial development within existing bargains is an inevitable problem of law application and implicit even in a system of contractual rules and standards.⁶⁴ Implicit in the interpretive function is the narrow discretion to define standards based on experience as long as such clarifications do not diminish the overarching concern regarding members' rights. This principle helps define the boundary of the lawmaking discretion of the AB. Thus, the DSU evidences an institutional choice not to delegate new policy development, even wise policy development, to adjudicatory bodies. The AB would exceed its institutional mandate if it *made* new substantive policy. The fundamental concern is that judicial innovation diminishes the negotiated rights of states in a regime characterized by a delicate balance of rights and advantages.

Nevertheless, several commentators suggest that the articulation of standards inevitably permits dispute resolution bodies an enlarged policy-making role and that the choice of standards over rules may be seen as an implicit delegation from legislators.⁶⁵ This more textured approach has some resonance in the domestic context. Both the implied delegation and the implied acceptance of international rules did not specifically exclude justifications for judge-made law are unpersuasive when applied to WTO dispute resolution.

The primary advantage of judge-made law is that it provides a mechanism to evolve legal policy when the legislature is blocked or plagued by inertia.⁶⁶ There is a long precedent for judge-made law in the United States Supreme Court and in the European Court of Justice, but it is controversial because it implies that unelected judges can exercise legislative power.⁶⁷ Justifications for judicial policy-making are inappropriate at the WTO in a

⁶⁴ Application and interpretation over time may provide greater specificity to standards. See Sunstein, *supra* note 42, at 964-65.

⁶⁵ TRACHTMAN, *supra* note 33, at 376. The suggestion of Pauwelyn that international rules not specifically contracted out may be applied in WTO adjudication may be seen as a similar delegation to the judiciary.

⁶⁶ For a particularly thoughtful analysis of this and other justifications see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 91, 91-119 (1982). Calabresi supports the use of interpretative powers by courts to modernize and improve outdated statutes as a necessary allocation of the burden of inertia because the legislature has been inattentive to this problem and court interpretations can be overturned by the legislature. *Id.* at 118-119, 163-171.

⁶⁷ See generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Alexander Bickel termed it the counter-majoritarian difficulty. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-18 (1962).

number of crucial respects. First, the selection process and the qualifications of WTO judges do not suggest that they are political officials with legislative discretion. Domestic courts are part of a political process in a relatively cohesive society with broadly shared values. In domestic courts, decisions are final, and in many societies there is a history of acquiescence to such authority.⁶⁸ U.S. Supreme Court justices, for example, are political actors chosen by elected representatives for their political philosophies in an openly political process.⁶⁹ The AB judges and WTO panelists, unlike domestic law judges, are selected in a secret process devoid of democratic accountability. Panelists are part-time officials chosen, in most cases, by a technocrat for their trade experience and expertise rather than by elected officials accountable to the people.⁷⁰ AB judges are appointed by the DSB for a four-year term, at least theoretically, based on their expertise and experience within the international trade community, not for their wider understanding of international law or for their political philosophy.⁷¹ Moreover, the DSU blueprint does not provide the level of respect for AB decisions that is normally accorded to domestic supreme courts. AB decisions, for example, are not final until reviewed by the DSB, a political organ, and the DSU delegates the exclusive authority to adopt interpretations of the agreements to the Ministerial Council and the General Council.⁷² The WTO judicial selection process suggests an expert body with a narrow, interstitial role, rather than a political position appointed and confirmed by elected officials accountable for their judicial appointments.

Second, implicit delegation cannot be justified, as it has been in a domestic context, on the basis that the legislature can reverse erroneous or improvident statutory interpretations and is thus not harmful in the long run to democratic values.⁷³ Legislative reversal at the WTO would be extraordi-

⁶⁸ For the classic argument that judges in the United States should engage in creative interpretation in order to modernize statutes, an endeavor analogous to WTO judicial activism, see CALABRESI, *supra* note 66, at 91-119.

⁶⁹ For a discussion of the necessarily political nature of the selection of Supreme Court Justices see David A. Strauss & Cass R. Sunstein, *Essay: The Senate, the Constitution and the Confirmation Process*, 101 YALE L. J. 1491 (1992).

⁷⁰ Art. 8 of the DSU describes the formal requirements. See DSU, *supra* note 5, at art. 8. For a discussion of practice, see BHALA, INTERNATIONAL TRADE LAW, *supra* note 8, at 244. In practice, panelists have some expertise and experience in the diplomatic community, but they lack legal training and are forced to rely on the Secretariat's staff for legal advice. See Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 34-5 (1999).

⁷¹ DSU, *supra* note 5, at art. 17.1-3. There was apparently a contentious selection process for the initial group of AB judges. The compromise apportioned the judges by nationality and geographical regions. See Hudec, *supra* note 70, at 38.

⁷² WTO Agreement, *supra* note 1, at art. IX 2.

⁷³ Calabresi argues that interpretive revisions are a necessary allocation of the burden of inertia when a legislature is inattentive to a problem and court interpretation can be over-

narily difficult. Reversal would require either a new negotiated agreement based on consent or the use of the interpretation or amendment procedures discussed above. Any significant policy decision is likely to benefit several nations, providing them with an incentive not to agree to a reversal or to demand a concession in return.⁷⁴

Third, compulsory adjudication is only possible because WTO law is based on relatively precise rules and the assumption that the fundamental rights in the system, such as the right of access, nondiscrimination, and national treatment will not be diminished except through bargained negotiations. Negotiated agreements represent a precarious balance of advantages and trade-offs. If these shared expectations are defeated, the WTO regime will be undermined. Judicial policy-making that advantages some members will inevitably disadvantage others, upsetting the balance in the system and reducing the commitment of the disadvantaged nations to the trade regime's norms and institutions.

The recent history of the trade regime does not suggest the delegation of authority or the deferral of issues to the AB, but rather the generally successful attempt to specify rules with greater clarity to avoid judicial innovation. Many provisions in the GATT agreement that may appear to be relatively open ended standards, such as the Article XX(b) exception for measures "necessary to protect human, animal or plant life or health,"⁷⁵ or the definition of subsidy, have been given greater specificity by negotiated agreements and by detailed understandings interpreting various provisions.⁷⁶ The "necessary" concept could have been treated as open-textured with space for non-protectionist unilateral sanctions.⁷⁷ Instead, states negotiated the Sanitary and Phytosanitary Agreement ("SPS"), which provided detailed criteria for assessing the legality of domestic health and biosafety standards.⁷⁸ The effect of this was to subject even nondiscriminatory health measures to the discipline of the SPS agreement.⁷⁹ One can expect that na-

turned by the legislature. See CALABRESI, *supra* note 68, at 118-19.

⁷⁴ Aware of the danger of judges imposing their values, Rogosta suggests that before DSB decisions become final, they be subject to blocking by a substantial minority of countries to avoid creating new obligations to which these members did not consent. See John A. Ragosta, *Unmasking the WTO-Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"?*, 31 LAW & POL'Y INT'L BUS. 739, 745-46 (2000).

⁷⁵ GATT 1994, *supra* note 43, at art. XX (b).

⁷⁶ See, e.g., Agreement on Subsidies and Countervailing Measures, April 15, 1994, [hereinafter WTO Agreement on Subsidies], Annex 1A, 33 I.L.M. 1125 (1994).

⁷⁷ See Philip Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 714-18 (1996) (arguing to assess the "necessity" of a measure by determining if the motive of the legislature was to promote a permissible purpose reflecting a given society's values, such as environmental protection, or an impermissible one, such as protecting local industry).

⁷⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, [hereinafter SPS Agreement].

⁷⁹ See Steve Charnovitz, *The Supervision of Health and Biosafety Regulations by World*

tions will amend and craft agreements with even greater specificity in the future to forestall judicial legislation.

In concluding this survey of the three models, judicial activism appears contrary to either the direct or the implied allocation of authority under the WTO legal structure. Judicial activism is particularly inappropriate at the WTO because there is no effective majoritarian structure for easy reversal of decisions and because it undermines negotiated rights. Such judicial policy-making inherently disadvantages some states, reducing their bargaining power in any subsequent negotiation.

III. ASSESSING JUDICIAL ACTIVISM AS A PROCESS OF POLICY-MAKING

The above discussion demonstrates that the legal argument for the delegation of express or implied authority to engage in judicial innovation is tenuous at best. Rather, member states negotiated an institutional structure that more closely corresponds to the Contract Model than either the Judicial Activist or Legislative Models, specifically excluding norms or interpretations that impair WTO rights and contracting out of international law remedies. Nevertheless, in the few short years since its founding, the AB has begun to expand its authority by incorporating non-WTO norms in order to interpret WTO provisions and develop new doctrine.⁸⁰ Beyond the above mentioned legal authority concerns, there are several systemic reasons why this nascent judicial activism should be curbed and the AB should play no significant role in the development of WTO policy either through the incorporation approach or the creative interpretation approach.

A. Democratic Legitimacy

Earlier, this article demonstrated that the implied delegation of legislative authority to the AB was incompatible with democratic accountability because AB judges are not selected as political actors and their activist decisions are not readily reversible by democratically accountable means. Judicial activism at the WTO raises other more fundamental concerns about the legitimacy and viability of such decisions. First, member states of the statist WTO community are deprived of their right to participate in and consent to policy decisions that affect their rights and obligations. Policy decisions are made by unelected AB judges rather than by the consent of the governed states reversing the structure of governance in the DSU.⁸¹ In the

Trade Rules, 13 TUL. ENV. L.J. 271, 272-73 (2000).

⁸⁰ In the *Shrimp/Sea Turtle* case, for example, the AB announced an “evolutionary” approach to interpretation and referred to international environmental treaties to inform their conclusion that living creatures constitute “exhaustible natural resources” in the article XX(g) exception. *Shrimp/Sea Turtle Report*, *supra* note 38, ¶¶185-86.

⁸¹ DSU, *supra* note 5, at art. 9, 10. These provisions provide a detailed process of consensus or supermajoritarian decisionmaking for amendments that alter the rights and obligations

Shrimp/Turtle case, for example, the AB made the determination that living creatures constituted “exhaustible natural resources” not by ascertaining the textual bargain negotiated by members, but by looking to international instruments in a different context.⁸² In doing so, the AB announced a new “evolutionary” method of interpretation⁸³ that is contrary to the textual approach in the Vienna Convention mandated by the DSU.⁸⁴ The AB asserted that the provisions of Article XX(g) must be read in light of contemporary concerns of the international community about the protection and conservation of the environment.⁸⁵ This conclusion renders the more relevant exception, Article XX(b) for animal health and life,⁸⁶ redundant and useless.⁸⁷ Most significantly, the effect of this decision is to permit the unilateral imposition of trade sanctions to enforce U.S. perceptions of appropriate conservation policy and the appropriate remedy.

Such unbargained for policy innovation has the additional effect of reducing the bargaining power in subsequent negotiations of those states, primarily in developing countries, that have lost market access. This shift in bargaining power makes it less likely that developing countries will receive compensation or financial assistance to help offset the additional costs necessitated by complying with western perceptions of wise environmental policy.

Second, judicial activism undermines the legitimacy of WTO decisions within each members’ society, because important policy decisions will have been made without the assent of its elected officials. Neither citizens of member states nor their elected representatives will have had a voice in such decisions or the legal criteria that will determine the legality of future member state actions. This is a problem of both legal and social legitimacy. It is unlikely that the majority of the citizens of most cultures are ready to accept important social policy decisions made by unelected international officials. The AB risks undermining the legitimacy of the trade regime when important regulatory policies are made by unelected officials without clear delegated authority and without a ready means of making these decisions accountable to the people. New agreements under the contractual approach, on the other hand, are ordinarily presented to the legislature in democratic societies for approval. Elected representatives would have the opportunity to consent to any new policy that would change their rights and place limits

of members.

⁸² Shrimp/Sea Turtle Report, *supra* note 38, ¶¶ 127-34.

⁸³ *Id.* ¶ 130.

⁸⁴ DSU, *supra* note 5, at art. 3(2).

⁸⁵ Shrimp/Sea Turtle Report, *supra* note 38, ¶129.

⁸⁶ GATT 1994, *supra* note 43, at art. XX(b).

⁸⁷ Arthur E. Appleton, *Shrimp/Turtle: Untangling the Nets*, 2 J. INT’L ECON. L. 477, 482 (1999).

on their sovereignty.

Third, in those circumstances where AB policy-making permits a nation to utilize unilateral sanctions to achieve social regulatory goals, the practical effect of that choice is inconsistent with basic notions of democratic accountability.⁸⁸ Such decisions permit one nation to apply its idiosyncratic social policies extraterritorially on other nations without the participation or consent of the elected representatives of those societies. The balance of species conservation and costs was determined in Washington, D.C., not in the nations of Southeast Asia or Latin America. The Shrimp/Sea Turtle decision permits the United States or indeed any country, if it meets the conditions of the chapeau, to dictate how shrimp are to be caught in the domestic waters of Southeast Asia, even though the citizens of the affected countries have neither the opportunity to influence those regulations nor the means to change them.

From an international perspective that is respectful of the choices of other cultures, the wisdom of unilateral sanctions is always suspect. Citizens of developing nations are more concerned with daily survival than a high level of environmental quality, and hope for economic development to improve the prospects for their children. The priorities of these citizens are necessarily different than those in wealthy post-industrialist societies and should be represented. Moreover, domestic social regulations that prescribe how goods must be produced are the product of internal interest group pressure that includes both environmental NGOs and the affected domestic industry. The local industry has a parochial economic interest in increasing the costs of producing imported goods in order to make their goods more competitive.⁸⁹ The citizens of developing nations with little disposable income would not, on their own, choose the expensive environmental and labor regulation that citizens of the most advanced developed nations can afford. When developed countries are permitted to impose their social regulations on other nations extraterritorially, citizens of affected member states face the stark choice of losing their right of access to markets, or their democratic right to elect officials who make important social policy decisions that affect them.

⁸⁸ See Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 305-8 (1996).

⁸⁹ McGinnis and Movesian argue that the most important function of WTO adjudication is to restrain protectionist groups, thereby promoting free trade and a Madisonian democracy, relatively free of the harmful effects of faction. See John McGinnis & Mark Movesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514-16 (2000). For evidence that there may have been a protectionist motive as well as a conservationist one for the U.S. tuna embargo under the Marine Mammal Protection Act, see Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 1, 17-18 (1995).

Advocates of unilateral sanctions argue that Thailand need not adopt the U.S. regulations unless it wishes to export its shrimp to the U.S.⁹⁰ While true, this argument ignores that Thailand has the right under the GATT 1994 agreement to export its products free of nontariff barriers that ban or restrict its imports unless the product itself creates a risk to human or animal health just as the United States enjoys with regard to the export of hormone feed beef.⁹¹ Moreover, Thailand does not have a practical choice. The absence of a practical alternative to exporting to their largest market is essential to the U.S. policy which is to find a mechanism that affects behavior both conserving sea turtles and leveling costs. While I am supportive of efforts to conserve both sea turtles and dolphins, the better approach, consistent with the democratic principles of the United States, is either multi-lateral cooperation or agreements. Domestic labeling is also preferable to government imposed import bans because labeling permits access to markets increasing competition and enables consumers to determine which products will be purchased and ultimately produced.

One of the perverse aspects of this unilateral approach is that one nation is able to select the environmental policy that appears important within its internal political dynamic, while other, more important environmental problems are ignored. The United States, for example, has pulled out of the negotiations of the Kyoto Protocols on Climate Control while it is excluding tuna and shrimp from its markets in order to protect species in decline. Yet, if projections of the potential damage to environmental systems by global warming are anywhere near accurate, coral reefs and endangered tropical species that feed upon them will die, forested areas will become deserts, and many island ecosystems will be inundated, offsetting any possible gains from the marine mammal protection legislation.⁹² Facing such a prospect, member states in tropical areas, such as Thailand or endangered island nations, may well have different environmental priorities than the American domestic political choice of sea turtles over climate control. While I would prefer both to protect sea turtles and to minimize global warming, the choice among alternative approaches to conserve animal and human life should be matters of international political negotiations, not unilateralism.

This unilateralist approach has its costs even for an economically powerful nation like the United States. If unilateralism is to be permitted, other

⁹⁰ Robert Howse & Don Regan, *The Product/Process Distinction - An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249, 274 (2000).

⁹¹ GATT 1994, *supra* note 43, at art. XI. (prohibiting quantitative restrictions on imports including bans).

⁹² For a discussion of the potential impact of climate change on ecosystems, see DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 594-99 (2d ed. 2002).

nations would now have, at least, a *prima facie* justification under Article XX(g) for the non-discriminatory exclusion of U.S. products, such as steel or automobiles, produced in a manner that emit greenhouse gases. If other nations have the audacity to impose their views of rational environmental policy on the United States, the United States would surely retaliate under the banner of national sovereignty. Unilateral sanctions risk the trade war cycle of retaliation and counter retaliation.

The fundamental defect of judicial activism is one of process. Judicial activism necessarily implies the selection of preferred values among the constellation of values and interests that exist in our diverse world by a small group of unelected individuals. The preferred method of resolving conflicting values and interests in democratic societies is a political process in which all interests are represented and the decisionmakers are accountable to the people. There are far more interests and more effective policy alternatives to resolve environmental and other social policy issues than can be represented in adjudication or within the body politic of one nation.

B. The Uncertain and Manipulable Nature of Customary International Law

Advocates of judicial activism place great faith in customary international law ("CIL") as a means to infuse environmental, human rights, or labor values into WTO decision-making. Some argue that the norms of customary international law are superior to treaty norms and should prevail in the event of conflict.⁹³ Others make textual arguments that CIL norms are incorporated into the WTO through their expansive interpretations of the DSU.⁹⁴ Here, I address whether CIL is a viable source of legitimate norms in a world of conflicting values and interests.

CIL is said to be formed by the general and consistent practice of states accepted by them as law.⁹⁵ It consists of two elements: (1) state practice, which is the behavioral evidence of custom; and (2) the *opinio juris* requirement, i.e., the attitude or belief by the international community that a norm is legally required.⁹⁶ Customary law is implicit law, i.e., behavioral norms generally observed by all normal members of that society.⁹⁷ The in-

⁹³ HOWSE & MUTUA, *supra* note 12 at 7-8,12.

⁹⁴ See Palmeter & Mavroidis, *supra* note 33.

⁹⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987). See also THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, ART. 38(1)(b) defining international custom "as evidence of a general practice accepted as law." For a general discussion of CIL, see ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971); IAN BROWNLIE, PUBLIC INTERNATIONAL LAW 4-11 (4th ed. 1990).

⁹⁶ *Opinio juris sive necessitatis* is the conviction by states that a norm is required as an international legal obligation. See MICHAEL AKEHURST, MODERN INTRODUCTION TO INTERNATIONAL LAW 44 (Peter Malanczuk ed., 7th ed. 1997).

⁹⁷ Anthropology literature clarifies that customary law is a social fact subject to observa-

ternational community is not really a society, but rather a collection of states comprised of many cultures without the shared values or common histories of domestic societies. In this context, CIL suffers from a number of crippling defects as a source of law to modify or trump the negotiated norms of the WTO agreements.⁹⁸

First, there is no agreed upon methodology of determining state practice or the "general acceptance" of the world community. There are wide differences of opinion on what counts as state practice that evidences behavior and on how to weigh the many different types of state practice.⁹⁹ The more serious concern is that there is no objective way to determine whether norms have, in fact, been "generally accepted" by the international community. Nor is there a court of general jurisdiction with the final authority to determine when custom has become binding and what states are bound. Rather, "general acceptance" is a fiction that permits the individual writer or judge to select their own preferred values.¹⁰⁰ Without an agreed upon methodology it is impossible to objectively determine norms.

Second, the norms of CIL are uncertain and controversial, providing unelected trade experts at the AB with the nearly unfettered discretion to choose or create norms separate from political processes further exacerbating the legitimacy problem. Most norms of CIL are a matter of perception and appear to vary from culture to culture. The primary substantive CIL norms in the Restatement of Foreign Relations, for example, are not perceived as customary obligations by many nations of the world.¹⁰¹ The asserted obligation to pay full market value as compensation for expropriation is the political position of the United States. It has been continuously op-

tion. See IAN HAMNETT, INTRODUCTION TO SOCIAL ANTHROPOLOGY AND LAW 7-11 (I. Hamnett ed., 1977). While some international law scholars have recognized that the existence of custom is a question of fact, few engage in the necessary inquiry. See e.g., LASSA OPPENHEIM, INTERNATIONAL LAW 17 (H. Lauterpacht ed., 8th ed. 1955).

⁹⁸ For an extensive analysis of the defects of CIL legal theory, see J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

⁹⁹ There is a fundamental disagreement on whether only physical acts count as state practice or whether statements and declarations constitute state practice. For a discussion of the physical act approach, see D'AMATO, *supra* note 95, at 88-90. Others argue that such a theory would encourage the use of force in order to protect one's rights when diplomacy fails. See Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 40 (1974-75).

¹⁰⁰ See Kelly, *supra* note 98, at 469-75.

¹⁰¹ For the proposition that states have an international obligation to prevent injury to the environment of another state and are internationally responsible for any significant injury, compare RESTATEMENT (THIRD), *supra* note 95, at § 601; Mary Ellen O'Connell, *Enforcing the New International Law of the Environment*, 35 GERM. Y.B. INT'L L. 293, 303 (1992); Daniel Bodansky, *Customary (and Not So Customary) International Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995); Karl Zemenak, *State Responsibility and Liability in ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW* 187, 188 (W. Lang et. al. eds., 1991) (fails to see widespread, consistent state practice).

posed by the nations of Latin America since the early nineteenth century and today is a minority view among nations.¹⁰²

Third, customary norms and norms in international instruments said to be evidence of custom, such as the Stockholm Declaration on the Environment or the Universal Declaration of Human Rights, are vague and conflicting. The reconciliation of values and principles should be determined in the realm of politics, not by judges. Principle 21 of the Stockholm Declaration, for example, provides little guidance on how to reconcile a nation's right to engage in economic development with the general goal of sustainable development.¹⁰³ Wise policy principles, such as sustainable development, should be reconciled with the goal of economic development through the use of incentives and disincentives in political negotiations. This approach proved successful in negotiating the Montreal Protocol to reduce ozone depleting chemicals.¹⁰⁴ Developing nations, including China and India, agreed to ratify the Protocol after developed countries, the historical sources of the ozone problem, created a Multilateral Fund to provide grants for technical assistance on new substitute technology and agreed to *de minimis* emissions during a transition period for developing countries.¹⁰⁵

Fourth, CIL process is a poor lawmaking process in a world of over 180 states with diverse values and interests. Few nations have historically participated in the formation of norms said to be customary and the views of dissenting states have been ignored.¹⁰⁶ The CIL process is incompatible with the process values of democratic governance. CIL does not permit the wide-ranging negotiation by all members of the world community, the deliberative consideration of alternative policy solutions, or provide a forum

¹⁰² For the position of the United States that states have a duty to pay full compensation for the expropriation of foreign owned property, compare RESTATEMENT (THIRD), *supra* note 95 at § 712 (particularly comment d); *Amoco Int'l Fin. Corp. v. Iran (Partial Award)*, 15 Iran-U.S. C.T.R. 223, 234 (1987); S.N. Guha Roy, *Is the Law of Responsibility of States For Injuries To Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 889 (1961); E. Jimenez de Arcega, *The Duty to Compensate for the Nationalization of Foreign Property*, 2 Y.B. INT'L L. COMM'N 237, 239 (1963). For the position that just compensation will vary with the circumstances, see Oscar Schacter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 124-25 (1984).

¹⁰³ Stockholm Declaration, Principle 21 provides: "States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States..." Stockholm Declaration of the United Nations Conference on the Human Environment, 11 I.L.M. 1416 (1972).

¹⁰⁴ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3 (1987). The Protocol contained a phase-out of ozone depleting chemicals.

¹⁰⁵ The London Agreements of 1990 amending the Protocol created a multilateral fund. See Amendment to the Montreal Protocol on Substances That Deplete the Ozone Layer, 10, 30 I.L.M. 541, 550 (1991) at art. 10. See generally, RICHARD ELLIOT BENEDICK, *OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET* 183-88 (1991).

¹⁰⁶ For a discussion of the participation problem, see Kelly, *supra* note 98 at 519-23.

to reconcile diverse values.¹⁰⁷ This outdated process, which may have made some sense in the nineteenth century world of poor communications and difficult travel, is no longer a wise or effective process of lawmaking in a diverse world. An effective international policy process requires a clear ritual, such as the signing and ratification of a treaty that marks the time when the norm has become binding, clarifies the contours of the norm, and indicates which nations are bound. If the AB were to assume the authority to determine which asserted norms of customary international law to incorporate, there would be a large transfer of power from states to an unelected, unrepresentative body.

Both the incorporation theory and creative interpretation theory assume that broadly shared values and norms among the nations exist and can be drawn upon to clarify incomplete agreements or fill gaps. This may be appropriate in relatively homogenous domestic societies where common goals and historical tradition may provide the values and shared norms to clarify legislation, but the international system is composed of many different cultural traditions and significantly different perspectives on the appropriate way to balance social policy goals. Only a contractual approach has the capacity to ameliorate these large differences in economic interests and the variety of policy perspectives among nations.

C. The Morality of Judicial Activism

Judicial activism at the WTO creates a fundamental moral problem that affects the viability of norms. The norms asserted for inclusion by U.S. and European social activists are essentially western values associated with individualism, such as labor rights, or the recent policy preferences of relatively-wealthy western societies, including the protection for sea mammals. These worthy objectives are or will be imposed on poor developing nations without their input or an assessment of the impact on local economies. Those who would ban products produced with child labor, for example, have little understanding of the harsh reality of poverty in overpopulated developing countries, the lack of educational opportunities for children without resources, and the absence of alternative sources of family income for all too many in these countries.¹⁰⁸ People living in squatter settlements, bathing in sewers, and suffering from poverty related diseases would hap-

¹⁰⁷ For a summary of views about the procedural defects of customary international law, see Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 767-68 (2001).

¹⁰⁸ See e.g., Drusilla Brown, *A Transactions Cost Politics Analysis of International Child Labor Standards*, in SOCIAL DIMENSIONS OF U.S. TRADE POLICY (Alan Deardorff & Robert Stern, eds., 2000).

pily choose work that would violate our modern labor laws.¹⁰⁹ The labor laws of wealthy nations should not be imposed on developing societies, just as they were premature during our own early industrialization in the nineteenth century.

Most significant are the economic consequences. Imposing western environmental and labor standards upon nations at different stages of economic development interferes with their economic development either by excluding their imports or by increasing production costs. Many of these additional costs are luxuries that Western nations could not afford themselves at a comparable stage of development. Child labor laws, occupational safety laws, and minimum wage legislation are important components of our modern civilization, but they are products of a relatively wealthy middle class society. Even our wealthy society continues to have exemptions for agricultural industries from these laws. Rather than initiate proactive policies that finance programs to encourage parents to place their children in schools, the United States restricts trade on labor rights grounds that injure the economies of developing countries and impose hidden costs on the U.S. economy.¹¹⁰ There is considerable evidence that trade sanctions are the wrong strategy to improve environmental conditions or human rights. As a recent World Bank report demonstrates, cleaner air and water, as well as concern for endangered species, increases with income.¹¹¹ Measures that limit trade inhibit economic growth, hindering development and slowing the growth of demand for environmental protection.

This imposition of western values and inappropriate priorities on nations at a different stage of economic development is often perceived as a problem of cultural imperialism.¹¹² The moral problem, however, is not just the inappropriateness of the policies, but it is the act of imposition itself which strains the necessary moral basis of many international norms. The heavy-handed use of economic sanctions coerces nations to do that which they perceive is not in their interest and will make them poorer. A moral component is necessary for many international norms, because compliance

¹⁰⁹ For a criticism of the political pressure in the United States to impose U.S. labor standards on developing nations, see Fareed Zakaria, *Dick Gephardt, Unilateralist*, NEWSWEEK, Sept. 10, 2001, at 37.

¹¹⁰ See Shaffer, *supra* note 11 at 639-44.

¹¹¹ *Globalization, Growth and Poverty: Building an Inclusive World*, World Bank Policy Research Paper # 23591 at 130 (2002) [hereinafter World Bank Report]. Where natural resources are an important component of tourism and thus income and employment, as in the Seychelles and Kenya, these assets are given special protection. *Id.* at 136-7.

¹¹² See Christopher Wall, *Human Rights and Economic Sanctions: the New Imperialism*, 22 FORDHAM. INT'L L. J. 577, 609 (1998). In the area of human rights, nations place different weight on the many possible human rights principles resulting in a battle of human rights ideals. Multilateral trade sanctions are preferable because they remove some of the aura of imperialism and cultural bias that accompanies unilateral action.

with international norms is generally based on the perception of mutual advantage. If the AB approved the unilateral imposition of environmental standards, as the Shrimp/Sea Turtle case appears to permit, at least in some circumstances, there would be a rebellion by less developed countries in the WTO, and compliance with other obligations would be threatened. The existing balance of advantages is far from satisfactory for developing countries. The recent World Bank report clarifies that while developed countries' tariff rates are low generally, they maintain barriers in exactly those areas where developing countries have a comparative advantage: agriculture and labor-intensive manufacturing.¹¹³ Unilateralism for the wealthy at the expense of the economic development of the poorer nations has the potential to unravel the gains of the last fifty years.

IV. THE "CONTRACTUAL AUTHORITY" MODEL AND RECENT APPELLATE BODY ACTIVISM

As demonstrated above, the Judicial Activist Model is inconsistent with the institutional structure of the WTO, contrary to democratic legitimacy, and inconsistent with wise policy development in an international society comprised of nations with wide differences in values and interests. Nevertheless, the AB has, on occasion, created unbargained for substantive norms, utilized putative international norms to interpret ambiguous or incomplete terms, or crafted procedural norms not specifically negotiated. Three important AB cases demonstrate the range of issues and the contextual complexity of cases in which incorporation and creative interpretation issues arise.

The first case, Shrimp/Sea Turtle, may be seen as a judicial activist decision in several important respects. First, it may be read to condone unilateral trade sanctions in order to conserve an exhaustible natural resource, sea turtles, thereby permitting individual nations to impose their domestic environmental standards on countries with weaker standards.¹¹⁴ Second, in interpreting the term, "exhaustible natural resource," the AB adopted an "evolutionary" approach to treaty interpretation, referring to "contemporary concerns" of the international community about conservation, multilateral treaties discussing natural resources, and the Preamble of the WTO Agreement acknowledging sustainable development as an objective of the organization, rather than a strict textual approach.¹¹⁵ Finally, the AB interpreted the term "arbitrary discrimination" in the chapeau of Article XX to require

¹¹³ World Bank Report, *supra* note 111, at 55-59.

¹¹⁴ The opinion determined that the United States' unilateral measures met the various requirements of the Article XX(g) exception and would be permissible if the requirements of the chapeau were met. Shrimp/Sea Turtle, *supra* note 38, ¶¶ 125-45.

¹¹⁵ *Id.* ¶¶ 127-34.

that the certification process that is used to determine eligible countries be conducted in a manner that provides basic due process protections, including an opportunity to be heard, the opportunity to respond to arguments, and the right to a written, reasoned opinion.¹¹⁶ Such a conclusion was not obvious and is not clearly grounded in GATT 1994 or the DSU.

The European Bananas Case¹¹⁷ raised the issue of the AB's authority to develop the procedural doctrine necessary to resolve substantive disputes. The United States challenged the EC's preferential trading arrangement for banana imports from certain developing countries, primarily former colonies that participate in the Lome Convention.¹¹⁸ The European Community argued that the United States lacked standing to file a complaint because, as a nation that had never exported bananas and with minimal banana production, the United States had no legal interest.¹¹⁹ The United States responded that they had a significant commercial interest because two companies based in the United States, Dole and Chiquita, exported bananas to Europe from their Latin American holdings.¹²⁰ The AB determined that the United States had standing to contest the European Community's banana preference scheme by creatively interpreting Article 3.7 of the DSU to conclude that a "legal interest" is not required to request the formation of a panel.¹²¹ Article 3.7 merely provides that before bringing a case, a member shall exercise its judgment as to whether the action would be fruitful.¹²² This portion of Article 3.7 appears to be merely a caution to members to consider the efficacy of a mutually acceptable settlement before filing a complaint, not a statement of the law of standing.

Finally, the European Beef Hormone Case¹²³ raised the issue of whether norms of customary international law modify or supervene the contractual treaty norms of the WTO. The European Community had banned the import of meat and meat products from farm animals treated with certain growth hormones.¹²⁴ While the rationale for the EC Hormone Directive had been that consumption of meat from such animals was dangerous to human health, the World Health Organization had determined that most

¹¹⁶ *Id.* ¶¶ 180-84.

¹¹⁷ European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/Ds27/AB/R (issued 9 Sept. 1997, adopted 25 Sept. 1997) [hereinafter EC Bananas Report].

¹¹⁸ For a thoughtful analysis of this important case, see Raj Bhala, *The Bananas War*, 31 *McGEORGE L. REV.* 839 (2000).

¹¹⁹ EC Bananas Report, *supra* note 117, ¶ 17.

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 132.

¹²² DSU, *supra* note 5, at art. 3.7.

¹²³ WTO Appellate Body Report on European Communities—Measures Concerning Meat and Meat Products (Hormones), (Jan. 16, 1998) [hereinafter Beef Hormone Report].

¹²⁴ *Id.* ¶¶ 1-5.

hormones are safe for human consumption and the European Community could offer no scientific evidence of harm.¹²⁵ The EC argued that its measure was based on the precautionary principal which it termed a “general customary rule of international law.”¹²⁶ The AB concluded that whatever the status of that principle as customary law, it had not been written into the SPS Agreement as a justification for adopting measures that were inconsistent with the obligations of members and did not override the negotiated principles of the SPS agreement requiring a risk assessment.¹²⁷

Several commentators view these decisions as supportive of the general incorporation of international law into WTO law and refutation of the concept that the WTO is a contractual, self-contained system.¹²⁸ I want to suggest an analytical framework that attempts to reconcile the above decisions, except the Shrimp/Sea Turtle case, in a more sophisticated contractual model that I call the “Contractual Authority” model. The concept of “contractual authority” is that the delegation of authority to the AB includes not only the specific norms negotiated in the WTO Agreements, but also the implied authority to develop such other procedural norms as are necessary to perform its fundamental duty “to preserve the rights and obligation of members under the covered agreements.”¹²⁹

The “Contractual Authority” Model thus distinguishes substantive from procedural norms. Nations have significantly different economic interests with regard to substantive issues, such as whether the extraterritorial regulation of how goods are produced is consistent with member’s obligations. Procedural issues, on the other hand, generally do not have a differential economic impact on states, apart from their strategic role in a specific litigation and need not be specifically negotiated. Moreover, the dispute settlement regime could not achieve its fundamental purpose of preserving members substantive rights unless the AB had the authority to make the procedural rulings necessary to conduct litigation to enforce these rights. A limited number of procedural choices were negotiated in the DSU, but it would be impossible to predict and then negotiate all the potential procedural issues that may arise in disputes to enforce rights secured under the agreements.¹³⁰ The negotiation of the legion of arcane procedural issues

¹²⁵ BHALA, *supra* note 8, at 1674-75.

¹²⁶ Beef Hormone Report, *supra* note 123, ¶ 121. The EC argument was that the precautionary principal entitled members to evaluate risks in a variety of ways. *Id.* ¶ 121-23.

¹²⁷ *Id.* ¶¶ 123-25. The Appellate Body observed that there was uncertainty as to whether the precautionary principal had crystallized into customary international law and that the precautionary principal had not been written into the SPS agreement as a ground to justify a measure that otherwise violated the SPS. *Id.* ¶¶ 123-24.

¹²⁸ See e.g., Palmetier & Mavroidis, *supra* note 33; see also Pauwelyn, *supra* note 12.

¹²⁹ DSU, *supra* note 5, at art. 3.2.

¹³⁰ Given the practical impossibility of negotiating all potential procedural issues, it was

would be an inefficient use of trade negotiators time and of limited interest to trade officials when such issues do not have a differential economic impact on Members. Most significantly, if the AB did not have the authority to resolve procedural disputes, procedural challenges could be manipulated to undermine substantive rights. Unlike creative interpretation to create substantive norms, the implicit authority to develop procedural rules is not an unforeseen mental construct in order to justify judicial activism. Courts in domestic societies normally assume such authority and international panels throughout history have, in fact, exercised such authority.¹³¹

On the other hand, the DSU makes it abundantly clear that the AB has not been delegated “contractual authority” to modify substantive rights and obligations secured under the agreements.¹³² As a matter of wise policy faithful to fundamental notions of national sovereignty and democratic legitimacy, the implied delegation of contractual authority to create or modify substantive norms should not be presumed when member states have fundamentally different positions and antagonistic economic interests with regard to substantive norms. The longstanding position that developing nations do not wish to even discuss environmental or labor standards in future trade negotiations is incompatible with implied delegation to create substantive norms.

V. PRINCIPLES OF JUDICIAL RESTRAINT APPROPRIATE FOR THE TRADE REGIME

From the “Constructive Authority” Model and the discussion above about legal authority and democratic legitimacy, we are now in a position to develop several principles of judicial restraint appropriate to the role assigned to the Appellate Body by the DSU while remaining faithful to the general thrust of the WTO jurisprudence. The first principle, derived from the “Contractual Authority” Model, is that the AB necessarily has a significant lawmaking role in developing procedural law whereas it lacks the authority to alter or diminish Members’ substantive rights through either the creative interpretation of terms in WTO Agreements or the incorporation of international legal norms. Courts, in general, and the AB, in particular, must, of necessity, develop a body of procedural law when there is little guidance from a legislature. The DSU appears to contain little law with regard to standing, burden of proof, mootness, and host of other procedural issues that require judicial lawmaking. The necessary procedural rulings

inevitable that the panels and the Appellate Body engage in interstitial procedural rule-making. BHALA, *supra* note 8, at 230-234.

¹³¹ See generally, GEORGE H. ALDERICH, *THE JURISPRUDENCE OF THE IRAN-U.S. CLAIMS TRIBUNAL* (1996).

¹³² Nations specifically agreed that rulings of the AB cannot create or diminish substantive rights provided in the agreements. DSU, *supra* note 5, at art. 3(2).

can be accomplished by the inventive interpretation of DSU provisions, such as that of Article 3.7 in the European Bananas case, or by the articulation of procedural rules or standards without a textual basis under its inherent authority.

Similarly, the infusion of principles of fair process into the interpretation of the undefined standard, "arbitrary discrimination," in the Shrimp/Sea Turtle case, is a procedural interpretation necessary to prevent the arbitrary negation of rights and thereby achieve the substantive goals of the GATT 1994 agreement.¹³³ Without the requirements of transparency and reasoned decision making, a nation would be able to manipulate the certification process to deny member states their right to market access. In establishing the new disputes system, members must have expected that the AB would perform its function and develop the procedural rules and doctrine necessary to resolve disputes under the substantive law of the WTO.

While the AB has generally avoided creative interpretation as a means to modify substantive law and, on occasion, has appeared to reject the use of customary international law to resolve WTO disputes, recent decisions indicate a disturbing tendency to use other treaties and customary international law in order to interpret WTO Agreements. In the European Beef Case, the AB appeared to reject the incorporation of the customary international law into the WTO regime in a manner that modifies contractual rights and obligations. The AB explained that the 'precautionary principle,' even if it were a principle of customary international law, would not override the specific provisions of the SPS Agreement without a textual basis.¹³⁴

The Shrimp/Sea Turtle Case, however, raises several concerns about the AB's use of its interpretive authority to expand the substantive rights of economically powerful nations at the expense of the less developed. First, an 'evolutionary' approach elevates current concerns in other contexts above negotiated bargains and is therefore plainly inconsistent with the AB's mandate to preserve members rights. It is not the AB's role to subjectively assess the current position of the international community on prior bargains. New bargains are the best evidence of current positions. Second, each international treaty, environmental or otherwise, contains its own delicate balance of perceived advantages and disadvantages. The meaning of a term, such as 'exhaustible natural resources,' in one context may tell us little about the meaning of a term negotiated for other purposes in 1947. This artfully expanded Article XX(g) into the subject matter of the Article XX(b)

¹³³ Shrimp/Sea Turtle Report, *supra* note 38 ¶¶ 180-84. The AB found that the certification process for exemption from the U.S. import ban on shrimp did not provide for an opportunity to be heard, the opportunity to respond to arguments, written notice of the denial, a statement of reasons, or a procedure for review or appeal. *Id.* ¶ 180.

¹³⁴ Beef Hormone Report, *supra* note 123 ¶¶ 124-25.

exception for human or animal health risks undermining the negotiated bargain in Article XX(b) between access to markets and the exception for regulations that are 'necessary' to protect human, animal, or plant life.¹³⁵

While this expansion of the Article XX(g) exception violates the principle that the AB lacks the authority to alter members rights, the Shrimp/Sea Turtle case should not be read as unqualified approval of unilateral sanctions.¹³⁶ The AB opinion expressed a clear preference for multilateral solutions to policy conflicts.¹³⁷ It further appeared to signal that the "unjustifiable discrimination" clause in the chapeau will be read to encourage multilateral cooperation.¹³⁸ Moreover, the opinion warns that measures that require other countries to adopt the same environmental standards would be discriminatory unless there is an inquiry into the appropriateness of applying the regulatory program to the differing conditions in the exporting countries.¹³⁹ This may be read as a preference for performance standards rather than the command and control requirements of U.S. law. It also suggests that applying the strict environmental controls of an advanced developed country to countries in a different stage of economic development may be discriminatory.

If the Shrimp/Sea Turtle decision were to evolve into an exception that permits unilateral trade sanctions to enforce domestic environmental measures generally, then it would seriously undermine the metaprinciples of bargained consent and state control that are the cornerstones of a contractual regime that protects members sovereignty. Judicial policy-making by incorporating non-negotiated rights or obligations, such as the "precautionary principle" or human rights to limit access to markets, will inevitably advantage some members at the expense of others, upsetting the balance of rights in the system. The AB recognized this concern when it stated that exceptions under Article XX would be read along with other substantive provisions so that neither canceled out the other or impaired the balance of rights and obligations in the GATT 1994 agreement itself.¹⁴⁰ It remains to be seen whether it is possible to construct unilateral trade measures in a manner that does not impair members' rights.

The second principle of judicial restraint, appropriate for a contractual regime, is that, in circumstances in which a general policy issue has not

¹³⁵ Article XX(b) provides that nothing in this agreement shall be construed to prevent measures that are necessary to protect human, animal, or plant life or health.

¹³⁶ Appleton argues that the AB's restrictive interpretation of the chapeau will limit the use of the Article XX(g) exception as a justification for unilateralism. See Arthur E. Appleton, *Shrimp/Sea Turtle: Untangling the Nets*, 2 J. INTL. ECON. L. 477, 491-94 (1999).

¹³⁷ Shrimp/Sea Turtle Report, *supra* note 38 ¶ 168.

¹³⁸ *Id.* ¶ 166.

¹³⁹ *Id.* ¶¶ 163-65.

¹⁴⁰ *Id.* ¶ 159.

been decided by members or there is no law to apply, the AB's role is to defer such issues to future negotiations of member states, not to attempt to discern current community thinking on wise policy. *Non liquet* or no law to apply situations should arise at the WTO with some frequency, because the WTO Agreements are not a comprehensive system of norms, but rather a limited set of contractual norms that modify members' sovereign prerogatives in order to attain mutual goals. The issue of whether living creatures are an 'exhaustible natural resource' within the meaning of the Article XX (g) exception in Shrimp/Sea Turtle case, was an issue not previously negotiated and should have been deferred to member states for resolution. In such situations, the AB should treat the issue as if it were a political question inappropriate for adjudication.¹⁴¹ Abstention follows from the default rule that members' rights must be honored and deviations from such rights, such as a loss of access to markets, require new negotiations.

The third principle that should guide judicial decisionmaking at the WTO is that international practices and doctrine developed by other institutions may provide useful guidance in developing a body of procedural law, but they are not determinative and may be inappropriate. The experience of other institutions, sometimes characterized as general rules of international law, may provide alternative models for resolving procedural issues, but they are not necessarily appropriate in the WTO context. In the EC Bananas case the AB wisely rejected the "legal interest" requirement for standing to sue articulated by the International Court of Justice¹⁴² and instead developed a more liberal approach that permits each member considerable discretion in deciding whether to bring an action. In the trade context, all member states are potential exporters and all have an economic interest in the rules being followed.¹⁴³ The AB necessarily should have the discretion to frame procedural rules that best fit the circumstances of the trade regime.

The fourth principle that should guide judicial decisionmaking at the WTO is that customary international norms or other international agreements should not be used as devices to infuse meaning into substantive provisions of WTO agreements. Norms drawn from other contexts provide few insights into the meaning of negotiated bargains. Neither specific environmental treaties nor the general goal of sustainable development furnish much guidance about the meaning of terms. Sustainable development is a worthy goal and its principles should inform policy decisions, but it is member states that must make policy decisions, not an unelected judicial

¹⁴¹ For a discussion of mediating techniques to avoid deciding the merits, see Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT. L. 733, 757-59 (1999).

¹⁴² See *Southwest Africa cases*, (Second Phase), 1966 I.C.J.R. 4.

¹⁴³ See BHALA, *supra* note 8, at 231-32.

body lacking any semblance of democratic legitimacy. The “evolutionary” interpretive methodology announced by the AB in the Shrimp/Sea Turtle case misconstrues the AB’s role in the WTO legal system. The AB is not an institution with a teleological mission of developing a comprehensive and cohesive system of international norms. It has the more mundane task of resolving trade conflicts in light of existing and necessarily incomplete rights and obligations negotiated by member states. Other sources of law should not be used as a means for AB members to inject their own values into a contractual regime.

The final principle is that the AB should not interpret the WTO agreements in a manner to permit a nation to use unilateral trade sanctions to impose social policy norms on the products of foreign states unless the product itself creates a risk to human or animal health. When the United States or Europe uses unilateral sanctions to impose standards, these nations are applying a policy choice of highly developed, post-industrial societies and the accompanying large costs, on newly or not yet industrialized countries without their consent or participation. The manner in which international public policy problems are solved should be respectful of the impact of unilateral solutions on others and respectful of the perspectives of other cultures. The zero-sum nature of adjudication is inadequate to the task of either balancing members’ divergent interests or determining the most efficacious way to achieve a policy goal. Unilateral sanctions to achieve policy goals will undermine respect for WTO norms and the commitment to a system of resolving disputes. There will be legitimacy costs to the entire system for such a strategy.

VI. CONCLUSION

The legitimacy of WTO norms must rest on the consent of states. WTO agreements are negotiated by states and ultimately approved, in many cases, by national legislatures. Specific state consent and legislative approval supply the necessary democratic legitimacy within each domestic political community. Whatever authority the AB possesses is delegated by states through contractual agreements. The current legislative process at the WTO is to articulate new norms and to refine existing obligations through rounds of trade negotiations on a contractual basis. The contentious debates and negotiations over the very language of issues for future negotiations at trade rounds testifies to the deep policy divisions about environmental and labor issues.¹⁴⁴ There is no other process that gives adequate attention to the wealth of different values and interests among the nations and peoples of the world. These interests and values cannot be reconciled by wise or

¹⁴⁴ See *Revised Draft Doha Declaration Issued; Harbison Outlines Possible Compromises*, 18 INT’L TRADE REP. (BNA) at 720 (Nov. 1, 2001).

progressive AB judges.

Judicial activism is the wrong process for developing social regulatory policy at the WTO. It violates notions of democratic legitimacy, because it diminishes the role of the majority of nations in policy-making and inherently imposes policy choices on nations without their consent. Judicial activism may be appropriate in a domestic society with broadly shared values and a relatively cohesive political community, but it is inappropriate in the international context for many of the reasons discussed above. AB judges are not representative and they have no particular insight or mandate to reconcile the conflicting values in international society. Most importantly, AB decisions cannot be reversed by a legislature or other majoritarian process. AB policy decisions that are well ahead of the values of many nations could not be readily reversed by the DSB because any such policy decision would be in the interest of some nations. The Judicial Activist Model may be efficient, but it is undemocratic and will exacerbate conflict rather than resolve it.

The problems of environmental degradation and inadequate labor standards can only be effectively addressed if all states participate in the development of standards and are committed to them. Any attempt by the AB to use customary international legal norms or creative interpretation to permit unilateral sanctions will be self defeating. An efficacious solution to environmental problems requires the proportion sharing of burdens while providing incentives to internalize costs. If powerful nations decide for themselves the proper balance of burdens, then we will have a power-based trade regime characterized by disguised self-interest, rather than a legal or ethical regime that will command the allegiance and respect of all nations.