STATE SOVEREIGNTY AND THE LEGITIMACY OF THE WTO

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1. INTRODUCTION

State consent is an important source of legitimacy for the World Trade Organization ("WTO"). State consent is seen as an expression of a state's own free will and, therefore, when a state consents to a WTO agreement, it can be assumed that WTO membership is in its best interests.\(^1\) State consent is also an expression of a state's Legal Sovereignty.\(^2\) Therefore, Appellate Body and panel decisions that are consistent with state consent can also be considered legitimate because they reinforce states' Legal Sovereignty.

State Legal Sovereignty is, however, only one understanding of sovereignty. This Article adopts Stephen Krasner's view of sovereignty as comprising different and logically independent mean-

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1 See S.S. "Lotus" (Fr. v Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (stating that "[i]nternational law governs relations between . . . states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims."). But see Alain Pellet, The Normative Dilemma: Will and Consent in International Law-Making, 12 AUSTL. Y.B. INT'L L. 22, 45 (1988) (drawing a distinction between free will and state consent while observing that "coercion is a fact of international life. It is absolutely impossible to speak of 'free will' in the international society. But this does not impede states in consenting to the rules of international law.").

2 Stephen Krasner refers to this dimension of state sovereignty as "International Legal Sovereignty." Stephen Krasner, Sovereignty: Organized Hypocrisy 4 (1999). In this Article I refer to it as "Legal Sovereignty."
ings. In order to understand the relationship between state sovereignty and the WTO and the implications for the WTO's legitimacy, Section 2 also takes the approach that the implications of membership in the WTO can only be assessed after we consider the impact of the globalization of the international system and the increasing power asymmetries between states on state sovereignty. Therefore, Section 2 also discusses how globalization, the development of intergovernmental networks, and the increased power asymmetries among states have affected state sovereignty. It is in this light that the impact of the WTO on state sovereignty is assessed, and the argument is made that the WTO strengthens, rather than undermines, state sovereignty.

From the perspective of state sovereignty, state consent to the WTO is the starting point for any assessment of the WTO's legitimacy. There are, however, limits to the extent that states' consent to the WTO agreements can explain why states should comply with their WTO obligations. For instance, the extent that states were able to meaningfully participate in the negotiating rounds limits the extent that state consent can legitimate Appellate Body decisions. Section 3 of the Article considers some of these limits in greater detail.

Section 4 of this Article analyzes the extent to which Appellate Body and panel decisions are consistent with states' consent as an important source of WTO legitimacy. For instance, if the text of the WTO agreements is assumed to capture state's consent, attention to the text is the most important source of legitimacy for Appellate Body decisions. Article 31.1 of the Vienna Convention on the Law of Treaties also points to the text of the WTO agreements as the foundation for any interpretative exercise.

Nevertheless, the text of the WTO agreements is often vague and ambiguous. As a result, the Appellate Body is often unable to base its decisions entirely on the text. Yet because of the significance of the text as a source of legitimacy, the Appellate Body has increasingly attempted to justify its decisions by strict textual analysis of the applicable WTO agreements. For example, the Appellate Body often uses the dictionary to define terms, and relies on a detailed examination of the sentence construction of WTO provisions to justify their decisions.

This Article argues that as a result of vague, ambiguous, and incomplete WTO texts, the Appellate Body has, despite its attempt at textual justifications, often been forced to rely on other justifications for its decisions. Section 4 and Section 5, therefore, use these
different meanings of state sovereignty to suggest justifications for Appellate Body decisions beyond state consent that are still consistent with or reinforce other meanings of state sovereignty.

2. WTO Membership and the Implications for State Sovereignty

The concept of sovereignty includes a number of different meanings that are related but logically independent. Therefore, it is possible to reinforce one dimension of sovereignty while undermining another. Furthermore, the impact of the WTO on state sovereignty depends on our understanding of state sovereignty. For instance, cooperation between states may be necessary in order for states to govern effectively. One way of cooperating is through international organizations. While membership in an international organization is an expression of states’ Legal Sovereignty, membership may nevertheless undermine states’ Westphalian Sovereignty.

The implications of membership in the WTO for state sovereignty have a vertical and a horizontal dimension. The vertical dimension is the effect on state sovereignty as a result of the relationship established between the WTO and each member state. The horizontal dimension focuses on how WTO membership effects interstate relations. The horizontal and vertical implications for state sovereignty of membership in the WTO needs to be assessed in light of both the increasing interdependence and globalization of the international system and the power asymmetries that exist between states. For instance, irrespective of whether a state is a member of the WTO, there exists a variance between states defined as legally equal, and what some refer to as behavioral sovereignty—the level of sovereignty that most states are in fact able to exercise. Similarly, power asymmetries amongst states also undermine states’ Westphalian Sovereignty, leading to the result that most states are not fully sovereign. This is particularly true in to-

3 See supra text accompanying note 2.
6 See Jenik Radon, Sovereignty: A Political Emotion, Not a Concept, 40 Stan. J. Int’l L. 195, 197 (2004) (stating that sovereignty during the Middle Ages was not absolute but rather shared); see also Krasner, supra note 2, at 10 (arguing that a loss of interdependence sovereignty would imply a loss of domestic sovereignty.
day's politically and economically integrated world.\(^7\)

This suggests that the WTO can reinforce rather than undermine state sovereignty. In fact, Kal Raustiala has argued that "international institutions are now the primary means by which states may prosper and achieve social objectives. Consequently they are the primary means by which states may reassert or express their sovereignty."\(^8\) Therefore, the effects of the WTO on states' sovereignty and the legitimacy of the WTO will vary between states.\(^9\)

For instance, for many states that obtained independence in the 1950s, membership in the United Nations was desired in order to affirm their sovereignty.\(^10\) Similarly today, membership in the WTO can be as much about acceptance by the international community as it is about the specific trade benefits the WTO can deliver (for example, the membership of Cambodia and Nepal). For many states, the WTO will provide them with the ability to exercise aspects of sovereignty that they did not previously have the power to exercise.\(^11\)

Globalization and power asymmetries between states also have important implications for the form of sovereignty that states are capable of exercising. When assessing the legitimacy of the WTO through its impact on state sovereignty, we need to keep in mind the real level of sovereignty that states, absent their membership in the WTO, would be able to exercise. Therefore, when participation by states in the WTO allows them to more fully exercise sovereignty in today's world, "international economic institutions can be understood as a positive force for sovereignty, not a threat."\(^12\)

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\(^7\) Robert O. Keohane, Sovereignty, Interdependence, and International Institutions, in IDEAS AND IDEALS: ESSAYS ON POLITICS IN HONOR OF STANLEY HOFFMAN 91 (Linda B. Miller & Michael Joseph Smith eds., 1993).

\(^8\) Kal Raustiala, Rethinking the Sovereignty Debate In International Economic Law, 6 J. INT'L. ECON. L. 841, 860 (2003) [hereinafter Raustiala, Rethinking].


\(^10\) Radon, supra note 6, at 199. See generally Gerry J. Simpson, The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age, 32 STAN. J. INT'L L. 255, 264-268 (1996) (stating that one of the United Nations' major purposes was self-determination, which became synonymous with the decolonization movement).

\(^11\) See Steinberg, supra note 5, at 330-33 (noting that full sovereignty may not be exercised due to a lack of institutional or political capacity).

\(^12\) Raustiala, Rethinking, supra note 8, at 856. See James Bacchus, A Few Thoughts on Legitimacy, Democracy, and the WTO, 7 J. INT'L ECON. L. 670 (2004) (observing that "as I see it, the success of the WTO makes sovereign states stronger, not weaker"); Report by the Consultative Board to the Director-General Supachai
2.1. Legal Sovereignty

Legal Sovereignty refers to the juridical independence and equality of states. The legal equality of all states is affirmed in Article 2.1 of the United Nations ("UN") Charter, which states that "[t]he organization is based on the principle of the sovereign equality of all its Members." The requirement of state consent before a state can be bound by international treaty obligations is therefore an expression of states' Legal Sovereignty. Because consent is an expression of a state's Legal Sovereignty, the WTO gains some legitimacy because it was consented to by its member states.

The extent to which WTO membership affects states' Legal Sovereignty depends on whether we use a "revocability-based conception" of state sovereignty or a "veto-based conception." Under a veto-based conception, membership in the WTO implicates states' Legal Sovereignty when membership "create[s] a process that generates rules or decisions that they cannot veto ex post." As a result of the negative consensus rule in articles 16.4 and 17.14 of the Dispute Settlement Understanding ("DSU"), states' Legal Sovereignty is affected by membership in the WTO because they are unable to veto panel and Appellate Body decisions.

However, any assessment of the implications for state sover-

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13 See Krasner, supra note 2, at 14 (explaining sovereignty in the classic model of international law).


15 See John H. Jackson, Sovereignty-Modern: A New Approach to an Outdated Concept, 97 Am. J. Int'l L. 782, 796 (2003) (“[f]or any treaty-based rule, it is plausible to say that each nation will decide, if it decides to accept the treaty obligations, its consent has legitimized its obligation.”); Julian G. Ku, The Delegation of Federal Powers to International Organizations: New Problems With Old Solutions, 85 Minn. L. Rev. 71, 128 (2000) (“[I]nternational organizations [of which the United States is a member] depend on the legitimacy provided by state consent to membership.”).

16 Raustiala, Rethinking, supra note 8, at 846-48.

17 Id. at 847. For an argument that membership rarely implicates state sovereignty under this conception because most delegations are revocable, see id. at 846-47.

18 See id. at 847-48 (noting that “member states have lost sovereignty to the WTO because they lack veto power over adverse judgments, even though they can ultimately exit the WTO if they choose”).
eignty needs to be made in light of how state sovereignty has fared in a world characterized by increasing globalization and power asymmetries between states. In this regard, there is a significant variance between states defined as legally equal and the level of power that they can in fact exercise.

Panel and Appellate Body decisions can move member states closer to the formal equality of underlying Legal Sovereignty by shifting power away from the older General Agreement on Tariffs and Trade ("GATT") 1947-style diplomatic settlements of trade disputes in which processes and outcomes were more likely to reflect the power imbalances amongst member states. Strengthening the rules-based trading system has, to some extent, contained the role of power in the trading system because the same WTO law is applied to all member states. Therefore, the legalization of states' trading relations under the WTO has helped legitimate WTO membership by reducing the ability of member states to take advantage of existing power asymmetries.

2.2. Westphalian Sovereignty

Westphalian Sovereignty is another meaning of state sovereignty. It describes the arrangement of the international political arena based on the division of the world into territorially exclusive units and includes the right to exclude external actors, whether other states or international organizations, from interfering in domestic political structures. States' Westphalian Sovereignty is therefore implicated "if the rulers of a state enter into an agreement that recognizes external authority structures." Some commentators have noted that this territorially-based conception of sovereignty has nevertheless been eroded by the in-

19 See Robert Howse, The Legitimacy of the World Trade Organization, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 355, 361 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (contrasting the Uruguay Round negotiations, in which the United States and the European Union negotiated a deal and then presented it to the rest of the membership, with WTO rules, which are developed using input from many sources and then serve as a stable and predictable guide for decision-makers).


21 KRASNER, supra note 2, at 20.

22 Id. at 4.

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creasingly international forms of economic arrangements and transactions—that "spaces of networks" instead of "spaces of places" has become the dominant paradigm in the international system.\(^{23}\) As a result, in order for states to effectively govern economies that have assumed increasingly transnational dimensions, domestic regulatory bodies and government agencies have had to overcome their territorial limitations by cooperating with other state's agencies to address the challenges posed by an international economy.\(^{24}\) This has given rise to transgovernmental networks.\(^{25}\)

However, the increasing prevalence of networks between government agencies has challenged traditional notions of Westphalian Sovereignty, and further, these networks often replicate the power asymmetries that exist between states.\(^{26}\) For example, the framework for cooperation between the United States Securities and Exchange Commission and other foreign securities regulators "deliberately seeks to transplant features of U.S. securities regulation abroad."\(^{27}\) Anne-Marie Slaughter has also observed that "[t]he United States has historically favored the network approach precisely because it has differed substantially with many other countries, including some of its most important trading partners, on the need for and the substance of a vigorous antitrust policy, and thus has much to lose in multilateral negotiations."\(^{28}\)

Further, Saskia Sassen has argued that, "[t]he state itself has been a key agent in the implementation of global processes, and it has emerged quite altered by this participation," and that the mechanisms of globalization and integration of the global economy


\(^{24}\) Id. at 447; Anne-Marie Slaughter, Global Government Networks, Global Information Agencies, and Disaggregated Democracy, 24 MICH. J. INT'L L. 1041, 1047 (2003).

\(^{25}\) See Ann-Marie Slaughter, The Real New World Order, 76 FOREIGN AFF. 183, 184-85 (1997) (describing the disaggregation of the state into distinct parts, such as courts, regulatory agencies, executives, and legislatures, which network with their counterparts abroad to create a "transgovernmental order"); see also ROBERT O. KEOHANE & JOSEPH S. NYE, POWER & INTERDEPENDENCE 257 (3d ed. 2001) (defining globalism as "networks of interdependence at multicontinental distances").


\(^{27}\) Slaughter, supra note 4, at 294.

\(^{28}\) Id. at 296.
are often concentrated in "global cities" such as New York. These
global markets are therefore amenable to regulation by only a lim-
ited number of powerful states. Therefore, while the flow of, for
example, international capital can have enormous ramifications for
state sovereignty, some states are more capable than others of en-
couraging and regulating these markets and, by extension, the im-
 pact of globalization on state sovereignty. This also highlights
how decisionmaking authority is not necessarily congruent with
national boundaries, challenging traditional notions of sovereignty
as territorially bounded.

States' Westphalian Sovereignty is implicated as a result of
membership in the WTO. One of the fundamental norms of West-
phalian Sovereignty is nonintervention in the affairs of another
state. However, Westphalian Sovereignty is a question of author-
ity, not control. As a result, the negative consensus rule, which
leads to the automatic adoption of WTO Appellate Body reports,
affects states' Westphalian Sovereignty. For example, when mem-
ber states are required to alter domestic legislation in order to
comply with adverse Appellate Body rulings, it gives the WTO au-
thority over states' decisionmaking processes.

At the same time, membership in the WTO has strengthened
states' Westphalian Sovereignty. Firstly, the implications of Appel-
late Body decisions over member states' domestic decisionmaking
processes need to be assessed in light of a globalizing world com-
prised of intergovernmental networks. Secondly, the reduction in
the effectiveness of territoriality as the basis for economic govern-
ance and the development of transgovernmental networks have
themselves challenged states' Westphalian Sovereignty. Due to
their sub-treaty-level forms of cooperation, these networks are im-
portant avenues whereby powerful states are able to impose their

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30 See Steinberg, supra note 5, at 340 (noting that full sovereignty may not be
exercised due to a lack of institutional or political capacity).

31 Jayasuriya, supra note 23, at 434-35. See generally Kal Raustiala, The Evolu-
tion of Territoriality: International Relations & American Law, in TERRITORIALITY AND
CONFLICT IN AN AGE OF GLOBALIZATION (Miles Kahler & Barbara Walter eds.,
Paper, Paper No. 05-6 at 27-28), available at
http://www.law.georgetown.edu/LegalTheory/documents/Territoriality.doc
[hereinafter Raustiala, Evolution] (discussing history of the link between territori-
ality and sovereignty).

32 KRASNER, supra note 2, at 20.

https://scholarship.law.upenn.edu/jil/vol26/iss4/3
regulatory model on other states. Therefore, from the horizontal perspective of inter-state relations, membership in the WTO is an alternative or parallel form of economic governance that can strengthen states’ Westphalian Sovereignty by minimizing the negative implications of transgovernmental networks.

For example, harmonization through the development of international standards is an important part of this new form of governance. The WTO Technical Barriers to Trade ("TBT") Agreement in particular also regulates the role of international standards. However, the WTO’s emphasis on consensus may lead to the development of international standards in ways that are more consistent with sovereign equality and the rights of states to exclude external actors, than would transgovernmental networks, the latter being more susceptible to the imposition of powerful states’ own regulatory models.

2.3. Interdependence Sovereignty

Interdependence Sovereignty is another dimension of state sovereignty, and “refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.” States’ Interdependence Sovereignty is significantly affected by the growing interdependence and globalization of the world economy. Membership in the WTO to some extent further erodes states’ control over cross-border flows as they agree to limitations on their ability to restrict trade in goods and services. These effects can only be properly assessed by first considering the level of control that existed (or would have existed) prior to membership in the WTO.

For instance, low transport costs and the “communication revolution” expressed through mechanisms such as the internet have

33 Slaughter, supra note 4, at 293.


35 See Raustiala, Architecture, supra note 26, at 59 (discussing the tendency for U.S. regulatory agents to favor their own models, and the incentives to adopt those models wholesale).

36 Krasner, supra note 2, at 4.
made it easier for businesses to disaggregate: producing goods in one country, assembling them in another, and selling them in a third country. These factors have also driven international travel, for both business and leisure, as well as international trade. The ease with which large sums of money move between countries means that decisions made in New York or London have important implications for people in Malaysia or South Africa. This increasing interconnectedness also means that war or famine in the Middle East poses immigration and refugee issues for Australia and provides the black market economy in drugs and guns greater opportunities than ever before.

The increasing interconnectedness of the world translates into interdependence when these relationships create mutual dependence, restricting state autonomy and imposing costs. For example, growing interdependence and globalization has reduced the ability of states to achieve optimal policy outcomes acting alone. While it is true that not all reductions in autonomy necessarily implicate state sovereignty, the environment within which states now operate challenges states’ sovereignty.

37 See Adeno Addis, The Thin State in Thick Globalism: Sovereignty in the Information Age, 37 VAND. J. TRANSNAT’L L. 1, 23 (2004) (discussing the effects of the “communication revolution” on business); Jeffrey Frankel, Globalization of the Economy, in GOVERNANCE IN A GLOBALIZING WORLD 45, 45 (Joseph S. Nye Jr. & John D. Donahue eds., 2000) (“The two major drivers of economic globalization are reduced costs to transportation and communication in the private sector.”).

38 See generally Frankel, supra note 37, at 58–65 (discussing the effects of economic globalization).


40 See KEOHANE & NYE, supra note 25, at 7–8 (detailing the costs of interdependence).

41 See Judith H. Bello, National Sovereignty and Transnational Problem Solving, 18 CARDOZO L. REV. 1027, 1029 (1996) (“[i]n today’s global economy, the United States can better promote economic growth, prosperity, and job creation through international cooperation, specifically the WTO, than it can acting alone.”).

42 ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 26–27 (1995); see also Henkin, supra note 39, at 5–7 (noting various challenges to state sovereignty previously raised by commentators). See generally Jayasuriya, supra note 23, at 427, 433–35 (arguing that economic globalization has caused a “disjunction between the territorial nature of sovereignty and the increasing global nature of economic flows,” which demands a new viewpoint which admits that sovereignty is less a matter of territory and more a polycentric legal order based on networks of regu-
The increasing interdependence and globalization of the world has also been referred to as the Americanization of the world.\textsuperscript{43} Regardless of whether this is an accurate understanding of the forces driving the international system, this observation does point to increasing disparities in power between states.\textsuperscript{44} These power asymmetries are another factor which operate in tandem with, and reinforce the effects of, growing interdependence and globalization on states' sovereignty.

2.4. A World Without an Effective WTO

An analysis of how the WTO affects state sovereignty must take into account the environment in which states operate. This can be demonstrated by consideration of how states would adapt to a world without an effective WTO.

International organizations like the WTO govern as well as drive economic globalization.\textsuperscript{45} For example, the TBT and the Sanitary and Phytosanitary ("SPS") Agreements contain obligations regarding the role of states in international standards bodies, the need to harmonize domestic standards, and the role of mutual recognition agreements.\textsuperscript{46} The WTO's DSU provides a detailed and effective dispute settlement mechanism under which states settle their international economic disputes. Furthermore, the range of issues already dealt with in the WTO increases the scope for issue linkages and therefore increases the ability to progress negotiations in a wide variety of areas.\textsuperscript{47} As a result, a world without an effective WTO not only threatens the processes of economic liberalization, but would also mean the absence of a multilateral institution capable of governing international economic life.

On the trade liberalization front, states would be left with the

\textsuperscript{43} See KEOHANE & NYE, supra note 25, at 257 (arguing that "there is some truth" to understanding "globalism as a network with an American hub").

\textsuperscript{44} See id. at 9–17 (exploring power and interdependence).

\textsuperscript{45} Raustiala, Rethinking, supra note 8, at 862.


option of engaging in unilateral action, either by instituting greater levels of protection or, alternatively, conditioning access to their markets on other states making similar concessions; the latter option would only be effective for economically larger states.

Alternatively, states would seek to promote further economic liberalization by negotiating bilateral or regional trade agreements with willing nations. In fact, the apparent difficulties with WTO negotiations and the impetus this has provided for Free Trade Agreements ("FTAs") is a window into a world without an effective WTO. Furthermore, the WTO, with its binding rules and dispute settlement procedures, disciplines the otherwise naked effects of power asymmetries between states.\(^{48}\) A trading regime governed by bilateral trade agreements, instead of multilateral negotiations, commitments, and dispute settlement procedures would magnify these power asymmetries.

The lack of an effective WTO also raises governance issues.\(^{49}\) As discussed, part of the attractiveness for powerful states of governance through inter-governmental networks has been the ability to avoid the compromise that occurs when these issues are dealt with in a multilateral setting. Networks also provide greater opportunities for states to use their soft and hard power to achieve desired outcomes.\(^{50}\) For example, the failure of the WTO to include investment and competition in the current negotiating rounds provided impetus for the United States to promote these regulatory goals through agency networks,\(^{51}\) leading to "convergence through regulatory export."\(^{52}\)

This suggests that these sub-treaty forms of governance will

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\(^{48}\) See generally Alvarez, supra note 20, at 418–19 (pointing out the effects of political factors on the decisionmaking of international juridical bodies which lack binding authority).

\(^{49}\) See Dani Rodrik, Governance of Economic Globalization, in GOVERNANCE IN A GLOBALIZING WORLD 347, 357–62 (Joseph S. Nye & John D. Donahue eds., 2000) (proposing that WTO mechanisms be designed to allow states to participate selectively, without undermining the international trade governance system as a whole).

\(^{50}\) Joseph S. Nye, The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone 9 (2002) (defining soft power as "getting others to want what you want").

\(^{51}\) See generally Slaughter, supra note 4, at 292–95 (remarking that the United States' mechanisms controlling investments and competition are being shared between U.S. and foreign agencies).

\(^{52}\) Id.; see Raustiala, Evolution, supra note 31, at 27–28 (noting that the extension of the economically powerful nations' regulatory laws is one way to encourage global convergence of regulatory policy).
become increasingly prevalent. In addition, FTAs and regional trade agreements also regulate issues such as investment and government procurement, issues that states initially sought to include in the WTO. As a result, these agreements will assume increasing importance as mechanisms for global governance. Finally, states will undoubtedly seek to achieve outcomes in whatever forum is possible. (For example, witness the attempt to negotiate an agreement on investment in the Organization for Economic Co-operation and Development ("OECD") in response to the rejection of such an agreement by the WTO.)

An example of how membership in the WTO can reinforce states' sovereignty is provided by the Appellate Body's decision in the Shrimp-Turtle case. The United States had negotiated the Inter-American Convention for the Protection and Conservation of Sea Turtles, which required the parties to use turtle excluder devices ("TEDS") that were suitable for each party's maritime area. This was in contrast to the United States' application of section 609 to states not party to the Convention, whereby imports of shrimp into the United States were banned when they were not caught by boats using TEDs certified as being comparable to their own.

In applying the chapeau to Article XX of GATT, which requires that measures are not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail," the Appellate Body found that the failure of the United States to negotiate seriously with the complainants constituted "unjustifiable discrimination," particularly in light of their negotiation of the Convention with Central American and Caribbean states. Furthermore, the U.S. requirement that countries adopt a TED program comparable to their own failed to exhibit "sufficient flexibility to take into account the specific conditions prevailing in any exporting Member," and that this also constituted "unjustifiable discrimination."

In the above ruling, the Appellate Body found that a sovereign member is not prohibited from adopting qualified unilateral measures that condition access to their markets on the exporting country's adoption of certain policies. Therefore, the WTO recognized

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54 Shrimp-Turtle, supra note 53, ¶ 49.

55 Id. ¶¶ 165-166, 172.

56 See id. ¶ 121 (finding that a country can condition access on the adoption of conditions)
the sovereign right of member states to condition access to their markets based on their own policies.

Member state sovereignty was also enhanced by the Appellate Body's finding that the right of member states to condition access to their markets is limited by an obligation to take into account the circumstances prevailing in individual member states. The Appellate Body also found that there is an obligation on members, when applying measures, to be flexible and, circumstances permitting, to attempt to find a negotiated solution. These WTO obligations require stronger member states to take into account the interests of weaker states, thereby giving effect to their sovereign equality. While these limitations on the otherwise sovereign right to unilateral action apply to all member states, the Appellate Body's ruling particularly strengthens weaker states' sovereignty.

3. SOME LIMITS TO STATE CONSENT

The extent that state consent can legitimate Appellate Body decisions partly depends on the circumstances under which states consented to the WTO agreements. Where member states consented under conditions that undermine the claim that states consent to what is in their best interest, state consent loses some of its ability to legitimate the WTO and Appellate Body decisions.

3.1. Agency Costs

Commentators have noted that the literature on agency costs is applicable to understanding the information asymmetries and differences in interests that can arise in political institutions between principals and their negotiators. From a state's perspective, agency costs arise when negotiators agree to WTO rules that are different from what the government they represent would have ac-

\footnotesize{measures that are "important and legitimate in character").

57 See Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia, ¶ 144, WT/DS58/AB/RW (Oct. 22, 2001) (noting the difference between conditioning market access on a specific program and conditioning market access to satisfaction of programs comparable in effectiveness).

58 See Robert Howse, How to Begin to Think About the "Democratic Deficit" at the WTO, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 79, 82 (Stefan Griller ed., 2003) (noting that information asymmetries which come from the fact that agents "typically know more about their task than their principals do" are one of the challenges in the principal-agent relationship).}
cepted. When this occurs, the quality of state consent is diminished because the state’s consents to WTO agreements that are not in its best interests.

Agency costs between the state and its WTO negotiators can arise in a number of ways. For example, because negotiators are experts, they are often “repeat players” at the WTO. This can lead negotiators to emphasize good working relationships with negotiators from other states, and as a result, agree to outcomes or processes that the state would not have agreed to in the absence of these agency costs.59

Furthermore, relying on negotiators in Geneva compounds these agency costs as the physical distance, time spent away from capitals, and greater possibility for forms of group think, can lead to a divergence between the values and positions of the trade negotiators and the desires of their principals.60 Alternatively, the reliance on information that capitals may place on negotiations that occur in another time, place, and forum, or a lack of trade policy expertise, can lead politicians to adopt views that are more extreme and therefore less likely to be in their state’s best interest.61

3.2. Was State Consent to the WTO Agreements Freely Given?

To the extent that state consent is coerced, then the legitimating nature of state consent is reduced. According to article 52 of the Vienna Convention on the Law of Treaties, state consent is vitiated when procured by the threat or use of force.62 One way of understanding this exception to state consent is as an expression of the underlying principle that consent needs to be freely given in order to binding. Therefore, while article 52 only refers to the threat or use of force, in principle any form of coercion reduces the normative quality of state consent.

59 See id. at 83 (explaining how working relationships created over time may cause agents to act differently in making delegated decisions than would principals if they had full information in the circumstances).

60 See Cass Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 YALE L.J. 71, 75 (2000), (noting that “when like-minded people are participating in ‘iterated polarization games’—when they meet regularly, without sustained exposure to competing views—extreme movements are all the more likely”).

61 See id. at 82–84 (noting that the risk of such problems is created by “informational cascades” caused when government officials or legislators lack sufficient information to make their own decisions, and therefore are forced to rely heavily on the judgment of negotiators in Geneva).

One of the arguments leveled against the WTO is that negotiations were undertaken against a backdrop of threats of unilateral action by the United States under section 301, and that certain WTO agreements, particularly the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), were only entered into to avoid such action. While a threat of unilateral trade sanctions is quantitatively different from a threat of force, it is qualitatively similar. This is because under a threat of such action we can no longer reasonably conclude that states' consent to the WTO agreements was freely given.

However, control by the United States (or any state) of the flow of goods and services across its borders is an exercise of its sovereignty. Due to the size of the U.S. economy, such control has economic repercussions for many states. This does not necessarily make such action illegal. Nevertheless, the question still remains whether a threat of trade sanctions undermined the legitimating nature of state consent.

One response is that conditioning trade measures on another country adopting certain policies is coercion. In *Shrimp-Turtle*, the Appellate Body found that in order to avoid a finding that the United States' application of its measures constituted "unjustifiable discrimination" under the chapeau of Article XX of GATT, the United States had an obligation to treat all affected states the same. In that case it meant that the United States had an obligation to enter into similar negotiations with the complainants as it had with the Caribbean states. While the Appellate Body's decision did not create a legal duty to negotiate, the emphasis of its ruling was on the need for flexibility — the need to take into account different

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63 See Peter Drahos & John Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? 194 (2002) (explaining that many states had no alternatives to entering into such agreements with the United States); Peter Gerhart, Reflections: Beyond Compliance Theory — TRIPS as a Substantive Issue, 32 CASE W. RES. J. INT'L L. 357, 368 (2002) (suggesting a "coercion" story, explaining that many developing countries ultimately agreed to TRIPS not because they thought they could gain from intellectual property, but because of their interest in access to the United States market).

64 See Henkin, supra note 14, at 29 (observing that, "there is, also, no escape from consent that is induced by economic pressures or unequal bargaining power").

conditions in different countries.66

Adopting this framework, it can be argued that during the Uruguay round, the United States did take into account the conditions and demands of other states by entering into negotiations with other states, instead of unilaterally applying section 301 rules.67 As a result, while it is undoubtedly true that states understood that failure to conclude the Uruguay round would have led to increased reliance by the United States on section 301, the WTO agreements cannot only be understood as a pareto optimal outcome for the United States (and other economically large states). Instead, the WTO is better understood as representing a greater balance of all member states' values and interests than would have occurred in the absence of the WTO.68

Notwithstanding the absence of formal equality in the bargaining process during the past and current negotiating rounds, if we assess the opportunities for states during these rounds against the situation that would have otherwise existed, we can conclude that the Uruguay round provided a context for negotiations which allowed even the least powerful (and therefore de facto less sovereign) states to have their interests represented and taken into account.

There are however, limits to this argument. Negotiations occur because states are not bound to an international rule to which they have not expressed their consent. Negotiations are therefore a response to a state's Legal Sovereignty. However, though this Article argues that any assessment of the WTO's legitimacy needs to take into account the different levels of sovereignty that states in fact possess, when states' exercise of their power during the nego-


67 See GREGORY C. SHAFFER, DEFENDING INTERESTS 51–52 (2003) (observing that because Section 301 should be understood not only as a unilateral measure but also as a process of public-private fact gathering and a means to pressure foreign governments, that "overall, countries' acceptance of a more legalized WTO dispute settlement system has both facilitated and constrained Section 301's use"); see also Panel Report, United States—Section 301–310 of the Trade Act of 1974, ¶ 8.1, WT/DS152/R, (Jan. 27, 2000) (finding a promise from the U.S. not to take action under Section 301 without first having exhausted WTO procedures).

68 See Howse, supra note 19, at 360 (arguing that "one can discern in the rules consented to a balance of values and interests that might not have been present had the law simply been imposed unilaterally," but conceding that "but for the threat of unilateralism, 'consensual' rules would probably have been much less favorable to the interests of some powerful countries").
tations creates too great a divergence from the theory of state equality, sovereignty is undermined as a basis for assessing the Appellate Body’s legitimacy. Consent loses some of its ability to legitimate the WTO agreements.

3.3. The Circular Reasoning of State Consent

One final problem with state consent is that while it can explain the process by which states assume international legal obligations, it cannot answer the question why states must comply with their obligations. One answer is to point to another principle that is independent of consent, such as pacta sunt servanda—the rule that treaties are binding on the parties and must be performed in good faith. This principle, however, also relies on states consent, leaving us with circular reasoning. In other words, consent itself is unable to provide a reason why states should not be able to change their minds.

As Robert Howse has observed, there are other reasons for complying with WTO rules, such as the economic benefits of liberalized trade, or to point to the role of the WTO in avoiding the beggar-thy-neighbor protectionism that helped create the environment which made World War Two possible. Nevertheless, it remains the case that state consent alone cannot adequately explain why

69 For example, WTO negotiations are often undertaken by small groups of states (such as the “Quad,” which is comprised of the United States, Japan, the European Community, and Canada), with the outcome presented to the other member states for their ratification. See generally Understanding the WTO: Membership, Alliances, and Bureaucracy. www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (discussing the membership and role of the “Quad”). This process limits the amount of meaningful input from the rest of the WTO membership.

70 See Alain Pellet, The Normative Dilemma: Will and Consent in International Law-Making, 12 Austl. Y.B. Int’l L. 22, 33 (1988) (observing “that [state] will is only an explanation for one part of the process, ie [sic], the entry into a treaty. It does not explain the basis of a state’s obligation when that state is no longer willing to implement a treaty”).


72 Lea Brilmayer, American Hegemony: Political Morality in a One-Superpower World 93 (1994); see also Thomas M. Franck, The Power of Legitimacy Among Nations 187 (1990) (explaining that contractual obligations, much like treaties, are not made binding by “the mere agreement of the parties”).

73 See generally Howse, supra note 19, at 363 (discussing the effect WTO rules have on the behavior of individual states with regard to their own processes and industries).
states should comply with their WTO obligations.

4. **STATE CONSENT AND LEGITIMATE APPELLATE BODY RULINGS**

4.1. **Attention to the Text**

To the extent that the legitimacy of the WTO is derived from member state consent, the text of the WTO agreements captures this consent,\(^\text{74}\) suggesting that the Appellate Body should adopt a strict textual reading of the WTO agreements.\(^\text{75}\) The text is also the document on which the Appellate Body is constituted. However, as one commentator has observed, "[t]he [Appellate Body], inexorably, faces profound interpretative choices, often on the basis of a text which is strikingly vague. A commitment to textual fidelity will not buy interpretative peace of mind."\(^\text{76}\) In other words, in many cases, the text can only take the Appellate Body so far. In these cases, the Appellate Body needs to look to other sources to give its decisions legitimacy.

Article 3.2 of the DSU outlines the goals and limits of Appellate Body interpretations.\(^\text{77}\) The first interpretative parameter is that "[m]embers recognize that [the DSU] 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."\(^\text{78}\) The second parameter is that "[r]ecommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish

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\(^{77}\) See Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 564 (2001) (stating that DSU article 3.2 "deal[s] with the inherent limits a WTO panel must observe in interpreting WTO covered agreements").

of the rights and obligations provided in the covered agreements."  

One of the reasons that the Appellate Body has often attempted to ground its decisions in the text of the WTO agreements is because this interpretative approach is most likely to satisfy article 3.2 of the DSU. This is because findings that at least appear to be only an application of the text are most likely to be considered clarifications of the agreements, and not to be adding to or diminishing the rights and obligations of member states. 

However, the vagueness and ambiguities in the text of the WTO agreements means that the question remains as to how the Appellate Body can interpret the text in a manner consistent with state consent as a source of formal legitimacy. The first point is that consistent with article 32 of the Vienna Convention, the Appellate Body can look to the intentions of the negotiators as a supplementary means of interpretation when the meaning resulting from the application of article 31 of the Vienna Convention is ambiguous, obscure, or leads to a manifestly absurd or unreasonable result.

Besides references to the dictionary, the Appellate Body has used various interpretative rules to guide its interpretations of the text. For example, the Appellate Body has made it clear that the rules of interpretation of public international law include articles 31 and 32 of the Vienna Convention. While the Vienna Convention is a treaty extrinsic to the WTO agreements, its legitimacy as a guide for interpreting the WTO agreements is derived from the words of article 3.2 of the DSU. This suggests that extrinsic materials can be used to interpret the WTO agreements when they are referred to in the text of the WTO agreements.

Article 31.1 of the Vienna Convention states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the

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79 DSU art. 3.2.
81 Id. at 480.
82 Id.; see also Reformulated Gasoline, supra note 65, at 17 (stating that article 31 “has attained the status of a rule of customary or general international law”).
83 See Howse, supra note 66, at 507–08 (noting that the Appellate Body has in the past claimed justification under the Preamble of the WTO Agreement for using international environmental law to define a term in the GATT); Pauwelyn, supra note 77, at 554–555 (explaining that certain “WTO rules do not incorporate non-WTO rules but do refer to them explicitly. In this way these non-WTO rules can become part of a WTO claim”).

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light of its object and purpose.\textsuperscript{84} This reinforces the text of the treaty as the starting place for an interpretative process. However, it also means that interpretations cannot be made in a vacuum but need to be made in light of the WTO agreement’s object and purpose.\textsuperscript{85} As will be discussed in greater detail in Section 5, the Appellate Body has “eschewed teleological interpretations based on a general goal of promoting trade liberalization” and instead continues to endorse only specific textually supported goals to justify its decisions.\textsuperscript{86}

While the Appellate Body has endorsed the Vienna Convention rules of treaty interpretation, it has also observed that “these principles of interpretation [in the Vienna Convention] neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”\textsuperscript{87} The Appellate Body has also stated that “it is certainly not the task of either panels or the Appellate Body to amend the DSU,” and that “[o]nly WTO Members have the authority to amend the DSU.”\textsuperscript{88}

Consistent with this approach, the Appellate Body has overruled numerous panel decisions on the grounds that they were not based on the text. For example, in \textit{Shrimp-Turtle} the Appellate Body overruled the panel’s interpretation of Article XX of GATT on the grounds that “the panel did not expressly examine the ordinary meaning of the words of Article XX,"\textsuperscript{89} and instead based its interpretation on “a standard or a test that finds no basis either in

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\textsuperscript{84} Vienna Convention on the Law of Treaties, supra note 63, art. 31.1.

\textsuperscript{85} See Richard H. Steinberg, \textit{Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints}, 98 Am. J. Int’l L. 247, 261 (2004) (stating that “[s]o much weight can be placed on ordinary meaning that object, purpose, context, and negotiating history are ignored. In such cases, failure to give weight to non-textual factors could lead to interpretations that contradict what the negotiators manifestly intended, effectively contradicting the fundamental principle of treaty law—state consent—and risking political repercussions”).

\textsuperscript{86} John H. Knox, \textit{The Judicial Resolution of Conflicts Between Trade and the Environment}, 28 Harv. Envtl. L. Rev. 1, 3 (2004); see also Ehlermann, supra note 80, at 480 (2003) (noting that article 31.1 of the Vienna Convention calls for treaties to “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).


\textsuperscript{89} \textit{Shrimp-Turtle}, supra 53, ¶ 115.
the text of the *chapeau* or in that of either of the two specific exceptions claimed by the United States."\(^90\)

In its report *Measures Affecting Asbestos and Asbestos-Containing Products* ("Asbestos"), the Appellate Body overturned the panel's exclusion of evidence of health risks from the Article III of GATT analysis of "'likeness of products" on the grounds that there was no basis in the text for the exclusion of this evidence.\(^91\) In its report *Measures Concerning Meat and Meat Products* ("Hormones"), the Appellate Body was also forced to overturn a panel ruling on article 3 of the SPS Agreement because the panel failed to pay attention to the implications of the differences between the phrases "based on" in article 3.1 and "conform to" in article 3.2.\(^92\)

This is only a sample of cases where the Appellate Body has overturned panel decisions because of the panel's failure to pay attention to the text of the agreements. However, these cases reveal that, despite the Appellate Body's rhetoric of a textual interpretation, a closer analysis reveals that its decisions are based on sources other than the text.

For example, in *Asbestos*, the deficiency in the panel's decision was largely procedural, in that they had excluded evidence from its analysis and therefore failed to evaluate all the relevant evidence.\(^93\) Even after considering all the evidence that the panel failed to consider in its analysis, it was still open for the Appellate Body to reach the same decision as the panel. Instead, this decision reveals a form of deference to member states; by recognizing that the health risk of a product can inform an analysis of whether it is a "like product" under Article III of GATT, the Appellate Body provided member states with increased scope for distinguishing between domestic and imported products in ways that are consistent with their national treatment obligations under GATT.

Further, while the Appellate Body's ruling in *Hormones*—that the panel failed to pay attention to the different phrases in articles 3.1 and 3.2—was based on the text, the text did not define these differences. Instead, the Appellate Body relied upon both the "object

\(^{90}\) Id. ¶ 121.


\(^{93}\) *Asbestos*, supra note 91, ¶ 113.

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and purpose" of article 3, combined with an appeal to the need to adopt an interpretation that accorded deference to member states. These cases raise the question as to what extent the reference to the object and purpose of the WTO agreements is legitimate, and will be discussed in more detail in Sections 4.3 and 4.4. This still leaves open the question of the legitimacy of deference as an interpretative guide.

4.2. Deference

Deference as traditionally understood is captured in the interpretative principles of in dubio mitius. As noted above, this principle was explicitly relied upon by the Appellate Body in the Hormones case to overturn the panel's interpretation of the SPS Agreement article 3.1 phrase "based on" as creating an obligation to use international standards. In that case the Appellate Body described the principle as meaning that "[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards, guidelines, and recommendations."\(^95\)

One of the problems with deference as an interpretative principle is that its legitimacy is derived not from the text but solely from what one commentator has described as "an uncritical and unqualified deference to sovereignty."\(^96\) This highlights not only the absence of any textual basis, but also that an understanding of sovereignty that requires Appellate Body deference to member states ignores how membership in the WTO can reinforce a state's sovereignty.

There is, however, another more limited form of deference that has informed Appellate Body interpretations and which avoids interpretations that merely seek to limit the disciplines of the WTO agreements. This form of deference recognizes the right of member states to set their own level of protection. The Appellate Body has applied such deference when it has recognized the right of a member state to "determine its own appropriate level of sanitary

\(^94\) Hormones, supra note 92, ¶ 165.

\(^95\) Id.

protection,97 and in the context of Article XX of GATT, it has been referred to as the undisputed right of member states to "determine the level of protection of health that they consider appropriate in a given situation."98

These findings by the Appellate Body also have limited grounding in the text of the WTO agreements.99 Yet, the type of freedom of action that is being recognized here is deference to the policy options of states.100 This is distinct from deference to the types of measures member states adopt and how these measures are implemented in order to achieve their policy choices. The former type of deference does not undermine the sovereignty-enhancing role of the WTO because it is based on the argument that the right of member states to set a level of risk was never intended to be disciplined by the WTO agreements. Further, the choice by a member state of a level of risk does not implicate other member states' sovereignty.

Finally, in recent cases the Appellate Body has used a textual justification to interpret WTO obligations in ways that reduce the regulatory autonomy of member states. For example, in the Conditions for the Granting of Tariff Preferences to Developing Countries case ("GSP"), the Appellate Body found that the reference in footnote 3 of the Enabling Clause to GSP preferences that are non-

97 Hormones, supra note 92, ¶ 172; see also Steve Charnovitz, Commentary, Internet Roundtable: The Appellate Body’s GSP Decision, 3 World Trade Rev. 239, 241 (2004) (arguing that "the WTO treaty does not accord substantive rights to Members, and could not possibly do so. Rather, what the WTO treaty does is to convey substantive obligations"). This suggests that the Appellate Body in Hormones is not accord members a right but instead recognizing that WTO rules do not determine the level of protection a member state can choose.

98 Asbestos, supra note 91, ¶ 168.

99 See Hormones, supra note 92, ¶ 172 (referring to the sixth preamble which supports member states’ right to choose their own level of protection).

100 See Claus-Dieter Ehlermann & Nicolas Lockhart, Standard of Review in WTO Law, 7 J. Int'l Econ. 491, 517 (2004) (describing deference accorded states on policy choices in adoption of SPS measures). The argument that the WTO does not constrain the right of member states to choose their own level of protection is not without some uncertainty. See, e.g., Hormones, supra note 92, ¶ 173 (stating that “[t]he right of a Member to define its appropriate level of protection is not, however, an absolute or unqualified right"); see also Henrik Horn & Joseph Weiler, Textualism and its Discontents, in The Principles of World Trade Law: The World Trade Organization 25, 30 (2003) (noting that the only test of whether an international standard is effective or appropriate that can sustain the argument that “the TBT is not meant to affect the level of protection or risk as member may adopt” is one derived from consumer behavior).
discriminatory created a legal obligation. Commentators have nevertheless pointed out that "donor states never accepted that their ability to modify or withdraw GSP preferences would be subject to such a 'hard' legal constraint." In the Sardines case, the Appellate Body also used a textual analysis to support its finding that international standards do not have to be adopted by consensus in order to be part of the TBT Agreement. Further, despite article 17.6(ii) of the Anti-Dumping Agreement containing a specific deferential standard of judicial review, compared with article 11 of the DSU "the existence of the article 17.6(ii) standard has had no perceptible impact on WTO review of national anti-dumping actions."

These cases raise other issues, namely the extent that the text can justify these decisions or whether they can be justified on other grounds. The Sardines case will be discussed in more detail in Sections 4.3 and 4.4. It suffices to note here that in contrast to deference, Appellate Body decisions that strengthen WTO obligations may claim some legitimacy from an understanding of the WTO as capable of reinforcing member state sovereignty.

4.3. Exceptions and the Burden of Proof

"Burden of proof" refers to whether the complainant or the defendant is required to produce evidence to either prove or refute a claim. The Appellate Body report in Woven Wool Shirts and Blouses from India described the general rule regarding the assignment of the burden of proof as follows:

[T]he burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a par-

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101 Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, ¶ 147, WT/DS246/AB/R (Apr. 7, 2004) [hereinafter GSP].

102 Charnovitz, supra note 97, at 249; Robert Howse, Commentary, in Internet Roundtable: The Appellate Body’s GSP Decision, supra note 98, at 246 & 249 (2004); see also Robert Howse, India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for “Political” Conditionality in US Trade Policy, 4 Chi. J. INT’L L. 385, 393 (2003) (arguing that “the idea of non-discrimination in the description of the GSP has a largely, though not entirely, aspirational legal effect”).


ticular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.\textsuperscript{105}

Therefore, a decision when to shift the burden of proof from the complainant to the defendant can be a proxy for deference to member states.\textsuperscript{106} This is because it is assumed that the party not under the burden of proof is not in breach of its WTO obligations until a \textit{prima facie} case has been established.

The significance of the decision of where to allocate the burden of proof raises the question of how this determination is to be legitimately made. The formulation contained in \textit{Woven Wool Shirts and Blouses from India} indicates that the burden shifts when the defendant seeks to affirm a particular claim or defense. However, it is not always clear when a WTO obligation becomes an exception that requires the burden of proof to shift to the defending state.

In \textit{Hormones}, the Appellate Body stated that the general rule requiring the complaining party to establish a \textit{prima facie} case of inconsistency "is not avoided by simply describing that same provision as an 'exception.'"\textsuperscript{107} This suggests that the Appellate Body is emphasizing substance over form and can mean that it is attention to the text that counts. However, Appellate Body cases indicate that considerations other than the text will take a leading role in determining when an exception arises.

Article XX of GATT is headed "General Exceptions," and the Appellate Body has made it clear that while the complaining member state bears the burden of establishing a breach of the obligations contained in Articles I, III, and XI of GATT, the burden then shifts to the defending state when they wish to rely on the Article XX exceptions.\textsuperscript{108} In the GSP case, a similar rule-exception relationship was also found to exist between Article I of GATT and

\textsuperscript{105} Appellate Body Report, \textit{United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India}, WT/DS33/AB/R (Apr. 25, 1997) [hereinafter \textit{Woven Wool Shirts and Blouses from India}].

\textsuperscript{106} See Veijo Heiskanen, \textit{The Regulatory Philosophy of International Trade Law}, 38 \textit{J. WORLD TRADE} 1, 32 (2004) (arguing that the better tool to accord deference is the standard of review).

\textsuperscript{107} \textit{Hormones}, supra note 92, ¶ 104.

\textsuperscript{108} Reformulated Gasoline, supra note 65, at 22; accord Shrimp-Turtle, supra note 53, ¶ 34.
the Enabling Clause, though the Appellate Body drew a distinction between those exceptions that the defendant had to raise and prove, and those that the complainant had to raise and the defendant prove.

The approach of the Appellate Body to the SPS Agreement and the TBT Agreement has been considerably less straightforward. This is because while the panel in Hormones found that articles 3.1 and 3.3 of the SPS Agreement created a similar rule-exception relationship, this finding was overturned by the Appellate Body. One of the grounds for this was that the relationship between articles 3.1 and 3.3 was "qualitatively different" from the relationship between Articles I, III, and XX of GATT. Little guidance was given by the Appellate Body as to what this difference consists of except to note that "article 3.3 recognizes the autonomous right of a Member to establish [a] higher level of protection."

In Sardines, the Appellate Body also overturned the panel's ruling that article 2.4 of the TBT Agreement contained a rule-exception relationship. The Appellate Body found that the strong conceptual similarities between article 2.4 of the TBT Agreement and articles 3.1 and 3.3 of the SPS Agreement meant that the panel should have applied the Appellate Body's reasoning in Hormones. This meant that the burden remained on Peru, the complainant, to establish that Codex standards were "effective and appropriate" to fulfill the legitimate objectives of the EC. This approach by the Appellate Body has made it more difficult to establish a prima facie breach of the TBT and SPS Agreements.

The problem that the Appellate Body has had in tying these decisions to the text was revealed in the Sardines case. The decision by the Appellate Body that article 2.4 of the TBT Agreement did not contain an exception meant that the Appellate Body imposed upon Peru the obligation of establishing whether the international standards were "effective and appropriate." In contrast, article 2.4 of the TBT Agreement states that members are to use technical regulations except when such international standards or relevant

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109 GSP, supra note 101, ¶ 99.
110 Id. ¶¶ 110–115.
111 Hormones, supra note 92, ¶ 106.
112 Id. ¶ 104.
113 Sardines, supra note 103, ¶ 282.
114 Id. ¶ 274.
115 Id. ¶ 275.
parts would be an "ineffective or inappropriate means for the fulfillment of the[ir] legitimate objectives."\textsuperscript{116} The use of the word "except" and the obligation to prove a negative—that standards are ineffective or inappropriate, as distinct from the positive formulation used by the Appellate Body—reveals that the Appellate Body’s decision was not grounded in the text.\textsuperscript{117}

This raises the issue of the legitimacy of the Appellate Body’s departure from the text. As noted in 	extit{Sardines}, the Appellate Body did not provide any additional insight into what were the qualitative differences between the SPS Agreement, the TBT Agreement, and the GATT. One commentator has suggested that the different approaches of the Appellate Body in GATT cases compared with the TBT and SPS Agreement cases stems from the "philosophy of positive harmonization"\textsuperscript{118} contained in the SPS and TBT Agreement. For example, member states may be in breach of the TBT and SPS Agreements when they fail to base a regulation on international standards, even when the impugned regulation is non-discriminatory. This is in contrast to the GATT, which principally disciplines member states when they adopt discriminatory regulations.

These differences are reflected in the means employed by the GATT, which is largely aimed at disciplining measures applied at the border. In contrast, the TBT and SPS Agreements discipline internal measures that discriminate against local and foreign goods. The TBT and SPS Agreements therefore have the potential to significantly intrude into member states’ regulatory autonomy because most government regulation has the potential to implicate international trade. This raises the question of how the Appellate Body is to distinguish between measures that discriminate against trade and legitimate measures. While this is a question that is beyond the scope of this Article, several observations will be made in Section 2.4.

The analysis so far suggests that despite claims of the Appellate Body to the contrary, it was not the text but the different regulatory functions of the TBT and SPS Agreements compared with the GATT that caused the Appellate Body to find that these agreements did not contain rule-exception relationships.

This naturally raises the question of the legitimacy of the Ap-

\textsuperscript{116} Id. (emphasis added).
\textsuperscript{117} Heiskanen, supra note 106, at 30.
\textsuperscript{118} Id. at 9–10.
pellate Body's approach. One possible source of legitimacy for the Appellate Body's approach is article 31.1 of the Vienna Convention. As discussed, article 31.1 makes it legitimate to take into account, along with the text, the object and purpose of the treaty. It has been shown that the TBT and SPS Agreements are significantly different than the GATT. This suggests that legitimate Appellate Body interpretations of the TBT and SPS Agreements not only can take into account these differences in their interpretation of articles 2.4 and 3 (which is arguably what that Appellate Body did), but that the Appellate Body is required to take these differences into account.119

This ruling undercuts the article 2.5 encouragement in the TBT Agreement for member states to adopt regulations that are in accordance with relevant international standards and potentially reduces the role of international standards and the WTO as a means for distinguishing between legitimate and discriminatory measures. Additionally, the ruling makes it less likely that a state will be found in violation of the TBT Agreement for not using international standards, thereby reducing the incentive to use them in the first instance. On the other hand, member states are given greater freedom to adopt regulations that do not use international standards.

In Sardines, the Appellate Body also interpreted the reference in article 2.4 of the TBT Agreement to international standards and the explanatory note to the term "standard" in annex I of the TBT Agreement to include international standards that are not developed by consensus.120 It is unclear from the explanatory note whether "standards" encompasses non-consensually agreed international standards. Therefore, the unclear and ambiguous language in annex I means that the text can only provide the Appellate Body's interpretations with a limited amount of legitimacy.121

Any assessment of the legitimacy of its decision, however, should be made in light of its approach to the burden of proof de-

119 See Henrik Horn and Joseph H. H. Weiler, European Communities—Trade Description of Sardines: Textualism and its Discontents, Discussion Paper prepared for the American Law Institute Project, 'The Principles of World Trade Law: The World Trade Organization,' November 25, 2003; see also id. at 5–7 (arguing that taking into account the object and purpose is not going beyond the text but is instead part of a sophisticated hermeneutics).

120 Sardines, supra note 103, ¶¶ 222–27.

121 Id. ¶¶ 219–27 (upholding the panel's interpretation against the European Communities' argument).
scribed above. On its face, the result of the decision is that a relevant international standard may be one that is not adopted by consensus, thus opening up the WTO to a wider range of applicable international standards. This appears to undermine the argument that the Appellate Body was being sensitive to the need for member states to have flexibility in deciding whether to use international standards. It also means that a member state may be in breach of article 2.4 of the TBT Agreement when it does not use an international standard as a basis for its regulations, whether or not that member state has consented to the international standard, thereby undermining the state's Legal Sovereignty. States' Westphalian Sovereignty is also undermined to the extent that international standards are imposed on them through the WTO.

However, if we consider Sardines' effect on the horizontal relationships between states, then the Appellate Body's decision can be understood as reinforcing states' Westphalian Sovereignty because it strengthens smaller states in international standard-setting bodies. This conclusion is based on the following observations. The first is that states such as the EU and the United States, due to their economic size, can effectively require states to comply with their own domestic standards in order to import into their territory. These states therefore have less need for international standards organizations. But these organizations are the most effective means for most other states to affect the creation of international standards. This suggests that, where standards are voted by consensus, larger standard-setting states will use their vetoes more often than standard-takers will use their vetoes. This is because standard-setters have an alternative to international standards organizations, namely the unilateral development of international standards. Further, the fact that international standards are made enforceable via the TBT and SPS Agreements provides added incentives for larger states to bypass international standards organizations and establish standards unilaterally.

By incorporating into the TBT Agreement standards not adopted by consensus, the Appellate Body ruling creates an incentive for most states to engage seriously in international standards organizations. To the extent this observation proves true, this ru-

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122 See Charnovitz, supra note 34, at 13 (arguing that standards developed unilaterally rather than by international standards organizations may be designed to enhance the competitiveness of their domestic producers more than technical and scientific goals).
ing will strengthen many member state's Westphalian Sovereignty by reducing the unilateral development of standards.\footnote{This is not to suggest that even under consensus voting rules the outcomes in international standards organizations are necessarily free of the influence of powerful states. See Slaughter, supra note 4, at 292 (discussing how powerful states can set the agenda). However, it is argued that the outcomes achieved in these bodies undermine weaker states' Westphalian and Legal Sovereignty to a lesser extent than would be the case if powerful states developed standards unilaterally. See Steinberg, supra note 5, at 333 (demonstrating that states' sovereign equality is putatively observed in international organizations, but powerful states can drive outcomes in these settings by setting agendas and using sources of power extrinsic to decisionmaking procedures).}

In addition, we now see that the burden of proof issue cuts both ways. By making it less easy to find a violation of article 2.4 of the TBT Agreement, the Appellate Body made it more difficult to establish a \textit{prima facie} violation of the TBT Agreement. As noted, this form of deference can be justified by the more intrusive regulation of member states' measures that occurs under the TBT Agreement than under the GATT. The \textit{Sardines} decision also means that a greater range of standards (i.e., consensual and non-consensual) is incorporated into the TBT Agreement. This means that once a \textit{prima facie} violation has been established, the Appellate Body has a greater range of standards available to help it distinguish between legitimate and discriminatory measures.

The practical effect is that the Appellate Body appears keen to avoid, at least explicitly, drawing the line between those internal measures that are legitimate and should be allowed, and those measures that the TBT Agreement should condemn. It is beyond the scope of this Article to determine the legitimacy of its approach, but the following issues should be noted. The first and most significant problem is that the decision in \textit{Sardines} (that international standards include those not adopted by consensus) raises significant sovereignty issues. Further, the interpretation of article 2.4 of the TBT Agreement gains limited legitimacy from its attention to the text. It therefore remains to be seen whether these legitimacy concerns will be outweighed by the reduced likelihood that a member state will be found to violate the TBT or SPS Agreement, and by the role of international standards in determining whether a measure violates the TBT Agreement.

Finally, an alternative approach that avoids some of these significant sovereignty issues would be to read annex I of the TBT Agreement as referring only to international standards adopted by consensus, while finding that article 2.4 contains a rule-exception
relationship. There is certainly room for this approach in the text of TBT annex I. This approach would also give meaning to article 2.5, itself an interpretative approach advocated by the Appellate Body.124

Also, to the extent that the Appellate Body should take into account the differences between the TBT and SPS Agreements, a more appropriate tool than the allocation of the burden of proof may be the standard of judicial review.125 The standard of judicial review refers to the level of Appellate Body scrutiny that will be applied to a member state’s measure, and therefore “plays a central role in defining the powers of national authorities in the trade field.”126 Different standards of review are already being used in the GATT; the Appellate Body applies a stricter review to measures that seek justification as being “necessary” under Article XX(b) of GATT, than to measures that are claimed to “relat[e] to” under Article XX(g) of GATT.127

In the case of article 2.4 of the TBT Agreement, this could provide that the phrase “as a basis” is interpreted to require a less stringent rational relationship between the member state’s regulation and the international standard, thereby making it difficult for the complaining state to establish a prima facie violation of article 2.4. Alternatively, the Appellate Body could apply a less deferential standard when determining whether the international standard was ineffective or inappropriate for achieving the member states’ legitimate objectives.128

4.5. Legitimacy and the Appellate Body’s Use of Public International Law

The Appellate Body’s use of public international law has been grounded in its incorporation through article 3.2 of the DSU and its

124 See Shrimp-Turtle, supra note 53, ¶ 121 (stating that a treaty interpreter cannot adopt an interpretation that would render the text superfluous).
125 See Heiskanen, supra note 106, at 32 (exploring the role and operation of standards of review in WTO law).
126 Ehlermann & Lockhart, supra note 100, at 491.
127 Reformulated Gasoline, supra note 65, at 17–18.
128 See Jacqueline Peel, Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick 73 (Jean Monnet Working Paper 02/04, 2004), available at http://www.jeanmonnetprogram.org/papers/04/040201.pdf (noting that “WTO decision-makers in SPS cases do not adopt a deferential stance in reviewing the scientific basis of national SPS measures,” but that the “[s]cope for deference to operate through a strategic allocation of the burden of proof is also very limited”).

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reference to article 31 of the Vienna Convention. In particular, article 31.3 of the Vienna Convention refers to the use of other sources of public international law in the interpretative process.

Article 31.3 of the Vienna Convention states that:

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation

(c) any relevant rules of international law applicable in the relations between the parties.

This Article focuses on article 31.3 because of its relevance to the use of international rules and particularly treaty law. As can be seen, article 31.3 is not a model of clarity. For example, it is unclear whether the reference to "parties" means parties to the WTO agreement or parties to other rules of international law, and if the latter, whether all WTO members or just the members involved in the dispute need to be parties to the rule of international law.

As a result of this ambiguity, the scope that these rules of interpretation give to the Appellate Body to consider other rules of public international law remains hotly contested. To the extent that consent is a source of legitimacy for Appellate Body rulings, article 31.3 provides a textual basis for using other rules of public international law to interpret the WTO agreements.130

In addition to this textual basis, the Appellate Body often merely incorporates other international law that has been consented to by states.131 However, this is not the case when the Appellate Body is asked to apply customary international law. The

129 Vienna Convention on the Laws of Treaties, supra note 62, art. 31.3.
130 See Knox, supra note 86, at 55-56 (noting that "in Shrimp-Turtle I, the Appellate Body appeared to rely primarily on an extratextual principle").
131 See Scott, supra note 76, at 311 (observing that "the [Appellate Body] might adopt a more 'forgiving' approach to trade restrictions adopted pursuant to a multilateral environmental regime ... even where the party against which the restriction is imposed is not a party to the environmental agreement in question, and hence has not consented to it").
Appellate Body appeared to be aware of this issue when in *Hormones* it refused to decide whether the precautionary principle had become a principle of customary international law.\(^{132}\)

One of the problems with the use of sources of law extrinsic to the WTO agreements is that the absence of binding dispute settlement in other treaty regimes suggests that states never intended that these rules be interpreted by a binding dispute settlement body or bootstrapped into the WTO's enforcement mechanisms.\(^{133}\) Another difficulty with relying too heavily on article 3.2 of the DSU and the Vienna Convention as a textual basis for using public international law is that, as discussed above, the Vienna Convention article 31.1 is unclear as to when other rules of public international law can be relied upon by the Appellate Body.

These problems may partly explain why the Appellate Body, despite ruling that articles 31 and 32 of the Vienna Convention are incorporated into the WTO agreement via article 3.2 of the DSU, has rarely used these articles to justify relying on other rules of public international law. For example, despite the use by the Appellate Body of public international law sources such as the ICJ's Namibia (legal consequences) Advisory Opinion, the United Nations Convention on the Law of the Sea ("UNCLOS"), and other principles of international environmental law to interpret the word "exhaustible" in Article XX(g) of GATT as including living and non-living resources,\(^{134}\) no mention is made of the Vienna Convention as a basis for its interpretative approach. The failure of the Appellate Body to use the Vienna Convention to justify its decision in terms of the undermines the legitimacy of its interpretation, despite the uncertainties discussed above.

The Appellate Body has also relied upon extrinsic sources of public international law as examples of fact.\(^{135}\) As John Knox has

\(^{132}\) *See* Hormones, *supra* note 92, ¶ 123 (noting that the Appellate Body decided not to take a position on the status of the precautionary principle in international law).

\(^{133}\) *See* Pauwelyn, *supra* note 77, at 560 (advocating the approach that draws a distinction between using public international law rules to interpret WTO agreements and applying these rules, and also limiting the applicability of public international law rules to defenses asserted by member states in WTO disputes, thereby keeping the WTO's dispute settlement mechanism from enforcing non-WTO obligations).

\(^{134}\) *See* Shrimp-Turtle, *supra* note 53, ¶ 130 (noting that many modern international conventions and declarations frequently refer to "natural resources as embracing both living and non-living resources").

\(^{135}\) *See* Howse, *supra* note 66, at 506 (noting the Appellate Body's reliance on

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pointed out, in the case of multilateral environmental agreements, these reflect a politically acceptable balance between trade liberalization and environmental protection. For example, in Shrimp-Turtle, the Appellate Body noted that the Inter-American Convention read in light of member states WTO obligations demonstrated that "consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles." The Appellate Body also referred to the listing of turtles in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora as demonstrating the turtles are "exhaustible" within the meaning of GATT Article XX(g). Further, in the GSP case, the Appellate Body found that the requirement in the Enabling Clause that a developing country have "development, financial or trade need[s]" can be determined by reference to multilateral instruments adopted by international organizations. In this case, the Appellate Body used multilateral instruments as indicators of fact, and not as sources of legal obligation.

The legitimacy of this approach is largely derived from its lack of illegitimacy. In particular, the Appellate Body's factual use of other international law means that it is not changing member states' WTO rights and obligations and therefore respecting the parameters set by article 3.2 of the DSU. To the extent that these international agreements do reflect political compromises, references to them by the Appellate Body may also contribute to decisions that are more consistent with the norms of the international system. The extent to which this contributes to the stability of the trading system can be seen to be a goal of the WTO. However, as will be discussed in more detail in Section 5, infra, the stability of the trading system is too broad a goal to provide much legitimacy

the agreement embodied in the Inter-American Convention for the Protection and Conservation of Sea Turtles; Pauwelyn, supra note 77, at 572 (noting that non-WTO rules that have been ratified by a significant number of WTO members may affect the Appellate Body's interpretation of WTO agreements).

136 Knox, supra note 86, at 58.

137 Shrimp-Turtle, supra note 53, ¶170.


139 Shrimp-Turtle, supra note 53, ¶132 (arguing that the list in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora includes all species threatened with extinction).

140 GSP, supra note 101, ¶163.
for Appellate Body decisions.

The Appellate Body’s factual use of other rules of public international law as fact does not implicate states’ Legal Sovereignty because it does not lead to a change in states’ legal rights and obligations. Further, if we accept that states enter into multilateral treaties in order to achieve goals that cannot be achieved by acting alone, then using these agreements factually in WTO dispute settlement will at a minimum avoid member states’ WTO obligations undermining their ability to achieve other non-trade goals and thereby reinforce their Interdependence Sovereignty.

5. THE OUTPUT LEGITIMACY OF APPELLATE BODY DECISIONS

Globalization has led to states being affected by decisions and events that occur beyond their borders. For example, environmental degradation and organized crime often have an international dimension. Furthermore, states are also being forced into increasingly complex forms of cooperation with other states and international organizations in order to deliver the type of governance expected by their citizens.141

The WTO has always, to some extent, been about increasing the ability of member states to achieve broadly desired goals. For example, the preamble to the Marrakesh Agreement refers to the goals of “raising standards of living, ensuring full employment . . . while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment.”142

Interdependence Sovereignty captures the regulators’ desire for control over “transboundary goods and harms.”143 Appellate Body decisions that are informed by the WTO as a mechanism to enable member states to achieve goals they would be unable to achieve acting alone will gain some legitimacy.144 This also supports the claim that the legitimacy of the WTO needs to be assessed by comparing the sovereignty of states as a result of their membership in the WTO with their ability to exercise sovereignty absent membership in the WTO. For example, the WTO enhances states’ Interde-

141 Bello, supra note 41, at 1030.
142 TBT Agreement, supra note 34, at pmbl.
143 Raustiala, Rethinking, supra note 8, at 867.
144 See Jackson, supra note 15, at 790 (arguing that sovereignty issues are really questions about whether “decisions should be made, as a matter of good governmental policy, at the nation-state (U.S.) level, and not at the international level”).
pendence Sovereignty when membership in the WTO enables states to pursue a broader range of policy options than would otherwise be possible. ¹⁴⁵

This raises the question of how the Appellate Body is to legitimately determine the goals of the WTO that can guide its interpretations. It is often argued that membership in the WTO enables member states to increase their economic welfare. ¹⁴⁶ According to international economic theory, unilateral liberalization of a states' tariffs unambiguously increases national welfare. However, this economic case for free trade does not therefore explain the need for reciprocity that characterizes WTO negotiations. ¹⁴⁷ A political economy understanding of trade agreements sheds some light by taking into account rent-seeking amongst powerful domestic interest groups, and the motives of trade officials to maximize their own political fortunes. ¹⁴⁸ As a result, trade agreements like the WTO are often pareto optimal in the political rather than in the economic sense. ¹⁴⁹

As discussed, WTO agreements such as the TBT and SPS Agreements do not deal with reductions in tariffs and other border measures, whose elimination is required by the economic case for free trade. Instead, these Agreements have been described as regulatory, as member states have not only agreed to not engage in discrimination against foreigners, but have assumed positive obligations, such as basing their regulations on risk assessments and international standards. ¹⁵⁰ As a result, member states may be in

¹⁴⁵ See Sir Robert Jennings, Sovereignty and International Law, in STATE SOVEREIGNTY AND INTERNATIONAL GOVERNANCE 27, 37 (Gerard Kreijen ed., 2002) (arguing that the creation of institutions that enable appropriate governmental functions to be preformed internationally is not so much a limitation on a state's sovereignty but rather an extension of state governmental power to the international plane).


¹⁴⁷ Howse, supra note 19, at 365.


¹⁴⁹ Sykes, supra note 148, at 24-26.

¹⁵⁰ See generally Heiskanen, supra note 106 (reflecting on the present state of the
violation of these Agreements without engaging in any form of discrimination. In these cases, the welfare implications of compliance are uncertain.\textsuperscript{151}

Other WTO agreements such as the Anti-Dumping Agreement ("ADA")\textsuperscript{152} and TRIPS also have uncertain economic credentials. For example, the prohibition by the ADA of dumping is often seen as discouraging price competition.\textsuperscript{153} Furthermore, the TRIPS Agreement requires all member states to adopt similar levels of intellectual property protection. Whether or not the level of protection specified in TRIPS will increase member states' welfare can only be determined on a case-by-case basis. The emphasis that TRIPS places on protecting the fruits of innovation as opposed to access to innovation means that TRIPS "cannot be expected to increase welfare in all countries,"\textsuperscript{154} and often it will be the less developed countries, who are more likely to rely on the innovation from wealthy countries, whose welfare will be reduced.

What this suggests is that while economic theory underpins unilateral liberalization, the claim that compliance with the WTO is legitimate because it achieves member states' generally desired goal of increased economic welfare is too general a statement, too dependent on the facts of each case, to provide much legitimacy. This is also true of the other stated role of the WTO—to avoiding the beggar-thy-neighbor protectionism that provided the conditions for the Second World War. This is undoubtedly a worthwhile goal. However, it is also too general to provide specific guidance for legitimate Appellate Body adjudication.\textsuperscript{155}

The propensity of panels to interpret the WTO agreements in light of broad goals was addressed by the Appellate Body in the \textit{Shrimp-Turtle} case. In that case the panel interpreted Article XX of GATT in light of the very general goal of not "undermining the WTO multilateral trading system."\textsuperscript{156} The Appellate Body rejected

multilateral trading system).

\textsuperscript{151} Howse, \textit{supra} note 19, at 355–56.

\textsuperscript{152} TBT Agreement, \textit{supra} note 34.

\textsuperscript{153} See Tarullo, \textit{supra} note 104, at 111 (noting the perception by most economists that anti-dumping laws are misguided because they discourage price competition in some circumstances).


\textsuperscript{155} Howse, \textit{supra} note 19, at 369.

\textsuperscript{156} \textit{Shrimp-Turtle}, \textit{supra} note 53, ¶ 36.
this approach because this goal is "not a right or an obligation, nor is it an interpretative rule."\textsuperscript{157} Instead, the Appellate Body found that the panel should have looked into the object and purpose of the \textit{chapeau} of Article XX.\textsuperscript{158}

\textit{Shrimp-Turtle} suggests that the Appellate Body largely rejects interpreting the WTO agreements in light of broad goals such as the maintenance of the trading system, or indeed, economic welfare. As the panel demonstrated, such goals fail to provide any guidance as to what constitutes a legitimate interpretation other than the panel's sense of the teleology of the trading system and what it can bear.\textsuperscript{159} Instead, the Appellate Body relied on the object and purpose of specific articles to guide its interpretations.

In the \textit{Hormones} case, the Appellate Body also relied on the object and purpose of the SPS Agreement to support its interpretation of article 3.3. In that case, the Appellate Body was forced to interpret what it described as the "involved and layered language" of article 3.3.\textsuperscript{160} The Appellate Body was therefore required to forge meaning from article 3.3 in a way that led it to reading the disjunctive "or" as substantively irrelevant. As a result of this departure from the text, the Appellate Body also relied on the object and purpose of article 3 of the SPS Agreement to support its conclusion that the EC was required to have performed an article 5.1 risk assessment. The Appellate Body therefore noted that:

\begin{quote}
In generalized terms, the \textit{object and purpose} of article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people (emphasis added).\textsuperscript{161}
\end{quote}

As discussed above, interpreting the WTO agreements in light of their object and purpose is mandated by article 31.1 of the Vienna Convention. It has been argued in Section 4.3 \textit{supra} that the Appellate Body's decision in \textit{Sardines} regarding the allocation of the burden of proof was at least partially justified by the different

\begin{footnotes}
\item[157] Id. at ¶ 116.
\item[158] Id. at ¶ 116.
\item[159] Howse, \textit{supra} note 19, at 363.
\item[160] Hormones, \textit{supra} note 92, ¶ 176.
\item[161] Hormones, \textit{supra} note 92, ¶ 177.
\end{footnotes}
object and purpose of the TBT Agreement compared with the GATT. At first glance, this suggests that the Appellate Body is prepared to use a broad understanding of the WTO agreements' "object and purpose" to guide its interpretations. However, the decision in Sardines can be distinguished by its outcome, which was to make it more difficult to establish a violation of article 2.4 of the TBT Agreement. This differs from the approach of the panel in Shrimp-Turtle, which was to significantly limit the scope of the exceptions in Article XX of GATT. As a result, the issue that Sardines raises is more a question of the legitimacy of the Appellate Body's conception of deference.

I believe that the Appellate Body is correct to rely on the object and purpose of the WTO agreements, when these are based within the text. This keeps the Appellate Body from having to justify its references to objects and purposes that in other treaties. In most cases, the Appellate Body derives the objects and purposes from a preamble in a WTO agreement. These preambles are often generally drafted, and therefore allow the Appellate Body to interpret the WTO agreements in ways that allow member states to achieve goals they would be unable to achieve acting alone, while allowing the Appellate Body to ground its interpretations by reference to the text.

6. CONCLUSION

The Appellate Body is increasingly being called upon to interpret complex WTO agreements that can have far-reaching economic and social ramifications for member states. As a result of the glacial pace of the current Doha Round and the difficulty of member states in using Article X of the Marrakesh Agreement process for amending the WTO agreements, member states are increasingly relying on the Appellate Body to solve disputes that at times would best be left to political processes. In this environment, the Appellate Body has understandably sought to ground its decisions in the least controversial source, the text of the WTO agreements.

While this approach is definitely correct, interpretation of the texts can often only take the Appellate Body so far. As a result, it has often been forced to rely on other interpretative tools for its de-

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162 GSP, supra note 101, ¶ 91-99 (determining how the enabling clause operates by looking to the object and purpose in the preamble of the WTO Agreement); Shrimp-Turtle, supra note 53, ¶ 129.
decisions. At times these are expressly recognized by the Appellate Body, while at other times they are hidden beneath a veneer of textual rhetoric. This Article has considered some of these interpretative tools and their legitimacy in light of their implications for state sovereignty.

This Article has suggested that some of the more obvious approaches to interpreting the WTO agreements, such as *in dubio mitius*, which are traditionally understood as being consistent with deference to state sovereignty, are not only without basis in the text of the WTO agreements but are also contrary to an understanding of the WTO as capable of reinforcing state sovereignty. In contrast, this Article has suggested that different understandings of state sovereignty point to other non-textual justifications for Appellate Body decisions that take into account the sovereignty-enhancing role of membership in the WTO.

Finally, failure by the Appellate Body to expressly state and explain the reasoning underlying its decisions, even when its rationales are not as strictly textual as they may desire, undermines the legitimacy of Appellate Body decisions. Instead, this Article argues that a clearer articulation of justifications that are based on the sovereignty-enhancing role of WTO membership will increase the legitimacy of Appellate Body decisions, and avoid the otherwise tortured and often unconvincing textual analysis that the Appellate Body currently feels it is obliged to perform.