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How the world trade community operates: norms and discourse

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Abstract: Based on the new conceptualization of the world trading system as the world trade 'community', this Article illuminates its internal operation based on legal discourse. The Article first defines WTO norms as *lingua franca* of the world trade community that enables various forms of discourse among members of the community. It then introduces three main institutionalized forms of the WTO discourse, namely adjudication, peer review, and consultation/negotiation. These three forms of WTO discourse are mainly responsible for the diurnal operation of the world trade community. The Article also explores the intermodal dynamics among these three forms of WTO discourse and demonstrates that such dynamics might generate both positive and negative consequences.

Life is not only . . . choice but also interpretation.
James G. March and Johan P. Olsen[1]

1. Introduction: enter the world trade community

The conventional image of the WTO may best be portrayed as a global 'contract' in which trading nations pursue free trade through reciprocal bargaining. Under this bargaining, opening up one's own market, such as through tariff concessions, is a price that a country pays to acquire access to its trading partner's market. Each trading nation is eager to minimize its tariff concessions (costs) and maximize its market access (benefits). In sum, exports are virtue and imports vice.[2]

Admittedly, this rationalist framework provides a powerful heuristic. As long as our everyday lives cannot be detached from these material conditions, the aforementioned bargaining-based, contractarian model not only explains states' behaviors but also may predict them. The point is, however, that no optic is perfect: this conventional framework cannot *exhaust* such explanation and prediction.

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1 *Rediscovering Institutions: The Organizational Basis of Politics* (New York: The Free Press, 1989), 51.

2 See, generally, Sungjoon Cho and Claire R. Kelly, 'Are World Trading Rules Passé?', 53 *Va. J. Int'l L.* 623 (2013).

For example, the contractarian model alone might not fully capture rich state practices under the dispute settlement system, often dubbed the crown jewel of the WTO. The actual operation of the WTO dispute settlement system, composed of a complaining party's framing of another trading nation's measure as a violation of WTO norms, a defending party's responding justification, and a WTO tribunal's eventual ruling, requires more sophisticated account than mere bargaining.

Admittedly, the contractarian model still appears to work, as it depicts the traditional quid pro quo tariff reduction negotiations. Yet domestic regulations have nowadays begun to replace tariffs with a new type of trade barrier.[3] Left uncoordinated, these non-tariff barriers (NTBs) clog the arteries of global commerce, with or without protectionist purposes. The problem is that trading nations cannot simply bargain away these NTBs, as informed by the contractarian model, because they are difficult to quantify and thus are not amenable to conventional give-and-take. On the contrary, those NTBs must be dismantled, or mitigated, through learning and understanding. In fact, varying rhetorical devices, including notification, inquiries, justificatory responses, and deliberation, constitute a main modus operandi in such sectors as the sanitary and phytosanitary (SPS) measures.[4] Yet the contractarian model cannot effectively embrace this emerging discursive nexus between trade and regulation.[5]

In addition to this descriptive dilemma, the contractarian framework is hardly susceptible to normative concerns. Bargaining under the WTO contract is inevitably driven by mercantilist competition. First, WTO members – both developed and developing countries – tend to equate national interests with those of major domestic producers that are in favor of exports but resistant to imports. Second, any bargaining is prone to power dynamics among contracting parties. Unsurprisingly, powerful countries in general are likely to enjoy a better leverage *vis-à-vis* less powerful countries. For example, although some of rich countries' current farm protection measures, such as subsidies, may violate both the letter and the spirit of WTO rules, they can still refuse to articulate and bind those rules in the negotiations.[6]

The Doha crisis has painfully revealed this normative deficit, which may be dubbed development failure. Some WTO members simply regard the Doha Round as yet another commercial negotiation in which they could press other countries for

3 See, notably, Daniel Y. Kono, 'Optimal Obfuscation: Democracy and Trade Policy Transparency', 100 *Am. Pol. Sci. Rev.* 369 (2006).

4 WTO, Trade Topics, Sanitary and Phytosanitary Measures, http://www.wto.org/english/tratop_e/sps_e/sps_e.htm.

5 See Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance', 20 *Eur. J. Int'l L.* 575, 596 (2009) (observing that the SPS Agreement monitoring process 'serves as a catalyst for dialogue', which allows for the exchange of information and situates the committee as 'an interlocutor in the process of international harmonization').

6 See, e.g., Jagdish Bhagwati, 'The Selfish Hegemon Must Offer a New Deal on Trade', *Financial Times*, 20 August 2008, at 11.

the latter's market opening in return for the former countries' reduction of chronic agricultural protections. Under this bargaining mentality, the world's poorest countries' weak bargaining positions prevent them from tapping free trade, as has eloquently been demonstrated by the torpor of agricultural trade liberalization. However, one of the very properties of globalization, i.e., interdependence, has made this development disparity increasingly intolerable.[7] '(P)overty anywhere constitutes a danger to prosperity everywhere.'[8] The recent global financial crisis has amplified the necessity of a communal bond within the global trading system. A global trade contract by its nature cannot fully account for these collective risks.

The aforementioned discontents with the rationalist framework compel us to envision a new way of understanding the WTO. We need an alternative optic through which we can rediscover what the contractarian model has omitted. Moreover, unless we question the long-held bargaining framework of the WTO, the future of the world trading system could witness a frustrating continuation of self-fulfilling prophesies.

In this regard, this article proposes an alternative framework of the world trading system as a 'community'. The world trade community framework views the WTO operation as a web of social interactions among WTO members steered by legal discourse. Under the new framework, the meaning of worldly factors, such as power and interest, is not always given: it is to be interpreted. As norms and discourse construct the very meaning of power and interest, these ideational factors can effectively structure state actions. The main thesis of the Article is both descriptive and normative. It is descriptive in that it attempts to seek an alternative explanation on what guides WTO members' actions. It is also normative in that the social framework proposed in the Article identifies and addresses normative concerns of the world trading system.

Importantly, the Article does not claim that the new framework always works. Under certain circumstances, brute material factors may simply obviate any illustrative room for ideational factors. Neither would the mere adoption of the community framework necessarily guarantee cooperation among WTO members. Nonetheless, some of the most challenging regulatory disputes that the WTO faces today, ranging from genetically modified organisms to renewable energy subsidies, tend to require structural, systemic, and long-term solutions, which the new framework appears to be better equipped to deal with.

Against this background, the article unfolds in the following sequence. Section 2 characterizes the operational logic of the world trade community as norm-governed discourse. Here, WTO norms function as a language of the world trade

7 See Amartya Sen, 'Global Doubts', *Harvard Magazine* 68 (September–October 2000).

8 International Labour Organisation, 'Constitution of the International Labour Organisation and Selected Texts', Annex, Declaration Concerning the Aims and Purposes of the International Labour Organisation, para. 1(c), 2010, http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf.

community. The section also explores the main aspects of trade norms qua language, such as sharedness, rhetoric, and reproduction. Section 3 introduces three institutionalized modes of discourse: adjudication, peer review, and negotiation–consultation. This section highlights differing properties of each mode of discourse that represent its unique social configuration within the world trade community. Section 4 argues that these three modes of WTO discourse, distinctive as they may be, should not be appreciated in isolation. The section observes that each mode is indeed interrelated to another, and that such interrelationships could generate both positive and negative outcomes. Section 5 concludes.

2. The *modus operandi* of the world trade community: norm-governed discourse

2.1 *WTO norms as a language*

As discussed above, the new social framework views the WTO as a community of law and thus highlights its normative properties.[9] In this regard, what is happening within the WTO community is based on legal principles and legal reasoning. Its consistent and systematic operation based on norms engenders principled arguments that are predictable based on similar situations.[10] This norm-based operation furnishes the WTO with a firm communal bond which is unfathomable by the contract model alone. Given this repeated, collective, and self-referential nature, one can reasonably conceptualize WTO norms as a common language (*lingua franca*) within the WTO community. Note that 'norms' are defined broadly for the purpose of this article: they include not only codified rules but also various interpretive practices – administrative and judicial – emerging from within the community.

Importantly, the meaning of language adopted in this article does not merely denote a medium for conveying information. In such a case, action coordination via language might proceed in a strategic and manipulative manner.[11] In contrast, the true import of language in legal discourse, as used in the WTO context, is a communicative one, which concerns an interlocking dimension, such

9 For purposes of this article, norms are defined as 'collective expectations about proper behavior for a given identity'. Ronald L. Jepperson *et al.*, 'Norms, Identity, and Culture in National Security', in Peter J. Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 54; see also, Émile Durkheim, *Les Règles de la Méthode Sociologique*, 8th edn (Paris: F. Alcan, 1927), 127 ('Society is not a simple sum of individuals, but the system formed by their association which represents a specific reality with its own characteristics'), quoted and translated in Hans-Geog Moeller, *Luhmann Explained: From Souls to Systems* (Chicago: Open Court, 2006), 229; Charles Taylor, 'Interpretation and the Sciences of Man', 25 *Rev. Metaphy* (1971).

10 See Frederic L. Kirgis, *International Organizations in Their Legal Setting*, 2nd edn (West Publishing Co, 1993), viii.

11 See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT Press, 1996), 18.

as argumentation, persuasion, and perspective-taking.[12] This communicative understanding of language is oriented toward action coordination and social integration. Therefore, legal discourse is a communicative *action* which establishes certain stabilized standards or expectations.[13]

First of all, WTO norms qua social knowledge provide WTO members with typified schemata through which they understand specific WTO situations, such as a dispute.[14] Take the *Hormones* dispute[15] as an example. In *Hormones*, the EU bans the beef imports from the US on the grounds that it was administered with growth-promotion hormones. The US would view the situation through the lens of relevant preexisting WTO norms, such as the GATT, the SPS Agreement, and other case law. Here, the high degree of typicality, that is, the degree to which the factual pattern in question resembles the preexisting stock of social knowledge (WTO norms), tends to accord the US an immediate familiarity with these norms and satisfy the US with its own interpretation of the situation at hand. Then, the US would communicate its own interpretation to the EU, and the former would anticipate possible responses from the latter also drawn from the same stock of social knowledge based on WTO norms.

Importantly, both the US and the EU's practical use of social knowledge is basically selective, reflecting each nation's motivation in a particular situation. The US' use of WTO norms as an importing, not exporting, country would feature a completely different vector from the current situation. In fact, one might reasonably speculate that the US's invocation of WTO norms as an importing country in another dispute would be quite similar to that of the EU in the current situation. This idealized nature of WTO norms sustains itself as a stable stock of social knowledge.

Although the high typicality allows WTO members to rely on their prior knowledge of WTO norms, some situations could lead them to question their prior knowledge. Suppose, as an hypothetical case, the EU bans the cloned beef imported from the US. In its protest to the EU, the US would attempt to identify any relevant schemata out of WTO norms. First, it might not locate any WTO case law that would immediately satisfy the level of typification it needs. Then, it would revert to the less direct yet still relevant stock of knowledge, such as the SPS Agreement.

12 Cf. Rajeev Bhargava, *Individualism in Social Science* (New York: Oxford, 1992), 147.

13 See Habermas, *supra* n. 11, at 21. Scholars discuss 'legal discourse' beyond the realm of IR theories (such as constructivism), such as in legal philosophy. See, notably, Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St Martin's Press, 1987), 2 (regarding law as a 'system of communication'). This article draws on, and benefits from, rich discussions from a broad range of literatures whenever relevant.

14 For this part, see Alfred Schutz and Thomas Luckmann, *The Structures of the Life-World* (vol. 2) trans. Richard M. Zaner and David J. Parent (Evanston, IL: Northwestern University Press, 1989), 144–6.

15 *European Communities – Measures Affecting Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Appellate Body and the Panel Report, as modified, adopted on 13 February 1998, para. 208, available at http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm.

It would first attempt to apply certain plausible schemata stipulated in Annex A of the Agreement, such as disease-causing organisms or contaminants, to the situation at hand. Of course, this new typification might trigger a different typification from the EU that would better serve its situation in the dispute.

The WTO tribunal would eventually accept, reject, or modify such new typifications from both countries. Note that as far as the WTO discourse is concerned, WTO panelists or Appellate Body members are not passive umpires, but active interlocutors. They do not merely pick a better rhetoric between two disputing parties: they often reconstruct their rhetoric and create a new one as guided by the WTO's normative goals. The outcome of this discourse, including both countries' claims (typifications) and the WTO tribunal's own interpretation (re-typifications), could alter the preexisting stock of WTO norms.

The objectified nature of WTO norms qua social knowledge detached from subjective knowledge characterizes them as a *language*.[16] Social norms, such as WTO norms, are comprised of predetermined sets of meaning patterns that are idealized from episodic, situation-specific sets of knowledge. It is the unique faculty of language as a medium of communication, such as syntactic regularities and connectional possibilities, which enables social actors to learn, confirm, transfer, and even generate knowledge about realities within the meaning context of the WTO community. As a language, WTO norms can even provide knowledge that WTO members may not immediately experience.

As a common referential structure, WTO norms function as a set of commonly accepted ideas that shape both trading nations' and private businesses' sense of what is socially real.[17] For example, Mexico would not question, and thus would take for granted, the US's commitment under the latter's tariff schedules that the latter would impose no tariffs on tequila exports from the former. Likewise, a Texan liquor retailer may plan to market Mexican tequila without worrying that she might suddenly be compelled to pay tariffs for tequila imports in the future.

2.2 *Sharedness, rhetoric, and reproduction*

Analogous to a language, WTO norms feature three main attributes: sharedness, rhetoric, and reproduction. First, narratives shared by those who use the same language define a community where those narratives emerge alongside its historical pathway. As Robert Cover aptly observed, any legal entity or community cannot be

16 Cf. Schutz and Luckmann, *supra* n. 14, at 233–35.

17 Cf. John W. Meyer, John Boli, and George Thomas, 'Ontology and Rationalization in the Western Cultural Account', in George M. Thomas (ed.), *Institutional Structure: Constituting State, Society, and the Individual* (Newbury Park, CA: Sage Publications, 1987), 12–37; Paul Shiff Berman, 'Global Legal Pluralism', 80 *S. Cal. L. Rev.* 1155, 1173, n. 81 (2007); Paul Schiff Berman, 'Seeing Beyond the Limits of International Law', 84 *Tex. L. Rev.* 1265 (2006).

separated from the 'narratives that locate it and give it meaning'.[18] These narratives are nothing but a collective representation of shared ideas and experiences among the GATT/WTO members over six decades of uninterrupted discursive practices.[19] These narratives are more stable than any anecdotal, individual observations since they have been collectively elaborated for decades.[20]

One cannot understand the WTO without appreciating those collective behavioral patterns in various institutionalized forms, for example a panel proceeding or a peer review session under the TBT (Technical Barriers to Trade) Committee.[21] They are non-trivial social facts that enable us to agree intersubjectively on the social reality named the WTO.[22] In other words, through these social facts, social actors – states and individuals alike – naturalize and constitute epistemological bases for understanding the WTO.[23] Speaking the same (WTO) language may not solve all the problems, but it can certainly initiate a dialogue and be a first step to problem-solving; more importantly, it may change the nature of the problem by rebuilding social reality around the WTO.[24]

This sharedness of the WTO language translates into its public nature. Any language is public in that it is a product of cultural representation of a given community.[25] A language would lose its rationale if it could be privatized. In contrast, a contractarian model of the WTO would accord, based on the notion of party autonomy, the dispositive power to a bargain struck by negotiating members. From a contractarian standpoint, parties should be allowed to settle in whatever terms they would entertain between themselves. Admittedly, under the current WTO dispute settlement procedure, complainants and defendants do settle on their own terms. Nonetheless, from the standpoint of the WTO community, even this type of settlement might not be completely dispositive. In other words, those *terms* of settlement should still be within the acceptable purview of WTO norms because they may affect other parties. The language used by any two parties, no matter how convenient to themselves, cannot change the grammar and syntax of the *lingua franca* commonly used in the community.

18 Robert M. Cover, 'Foreword: Nomos and Narrative', 97 *Harv. L. Rev.* 4, 4 (1983).

19 Cf. Emile Durkheim, *Elementary Forms of Religious Life*, trans. Joseph Ward Swain (New York: Macmillan, 1915), 434–7.

20 Ibid. at 434–5.

21 Cf. Alexander Wendt, *Social Theory of International Politics* (New York: Cambridge University Press, 1999), 163.

22 Cf. Vincent Pouliot, '"Sobjectivism": Toward a Constructivist Methodology', 51 *Int'l Stud. Q.* 359, 362–3 (2007).

23 Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (New York: Routledge, 2005).

24 Cf. Brian C. Rathbun, 'Uncertain about Uncertainty: Understanding the Multiple Meanings of a Crucial Concept in International Relations Theory', 51 *Int'l Stud. Q* 533, 551 (2007).

25 Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe, 3rd edn (Oxford: Blackwell, 1967), §243.

For example, after a heated negotiation followed by an epic WTO dispute on cotton subsidies,[26] the US, the defendant, and Brazil, the complainant, struck a deal. Under the deal, euphemistically labeled the 'framework agreement', the US (the Commodity Conservation Corporation) agreed to subsidize the Brazilian cotton farmers (the Brazilian Cotton Institute) up to $147 million annually in the name of technical assistance.[27] However, this payment would not absolve the US of its WTO obligation as long as it maintained its cotton subsidies, which had been found to be inconsistent with the WTO subsidy norms. In fact, other cotton-producing countries, in particular the group of African, Caribbean, and Pacific (ACP) countries, complained that such buying out of violations hurt cotton producers in poor countries and aggravated inequality in treatment.[28] To the extent that these countries could initiate a new adjudication on the same issue and that they would prevail against the US, the previous negotiation between the US and Brazil might not be dispositive.

Second, WTO narratives originate from various rhetorical practices, such as discussing, arguing, debating, persuading, deliberating, and learning,[29] within the WTO's socio-legal context. These rhetorical practices distinguish the WTO's discourse from a pure bargaining process. While bargaining plays a strategic role, the discursive practice serves an interpretive function. Here, interpretation is more than a literal reduction of legal text to law.[30] Instead, it is an intersubjective process of 'mirroring' or 'reflected appraisals'.[31] Each member's own interpretation of both facts and norms in a particular dispute setting may or may not converge with that

26 Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (3 March 2005).

27 'Congress Votes to Preserve US Subsidies for Brazilian Cotton Farmers', 15 *Bridges Weekly Trade News Digest*, no. 6, 2011.

28 'ACP Countries Call For "Immediate Action" on Cotton Subsidies', 15 *Bridges Weekly Trade News Digest*, no. 3, 2011.

29 Regarding the discussion of rhetorical practices, see Friedrich V. Kratochwil, *Rules, Norms, and Decisions* (New York: Cambridge University Press, 1991), 209; Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Col. J. Transnat'l L.* 19, 40 n. 82 (2000). Participants in the rhetorical practice 'first assent to the language and values of the text itself, and use the language and values to inform their relations with one another'. A. H. Kastely, 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention', 8 *Nw. J. Int'l L. and Bus.* 574 (1988); see also, Bruno Zeller, 'The Language of International Trade Law: Problems or Salvation?', 10 *Int'l Trade and Bus. Rev.* 179, 183 (discussing a 'rhetorical community' involving the United Nations Convention on the International Sales of Goods (CISG)).

30 Joseph Vining, 'Fuller and Language', in Willem J. Witteveen and Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999), 453, 457.

31 Wendt, *supra* n. 21, at 327. From a broad sociological standpoint, this intersubjective communicative process may also connote a 'framing' process in that each interlocutor tends to present relevant facts and arguments in a particular fashion and that a subsequent framing (reframing) is conditioned by the initial framing. See, generally, Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (New York: Harper & Row, 1974).

of another member.[32] Parties in the dispute may address such hermeneutical divergence through ritualized forms of dialogue, such as the establishment of a panel, surveillance of parties' compliance, and even enforcement consultation, under the Dispute Settlement Understanding (DSU). These rituals not only glue WTO members together by imbuing a deep-seated sense of relatedness but also create collective meanings in members' normative interactions within the mechanism, such as consultations, argumentations, persuasion, settlement, and compliance.[33]

If the parties cannot achieve dialectical closure, institutional interlocutors, such as panelists or Appellate Body members, may intervene via adjudication and seal this interpretive gap. Once issued and publicized, an end-product of the foregoing dialogue or trilogue, such as a panel or an Appellate Body decision, immediately constitutes an interpretive foundation for another case in the future. This process of hermeneutical convergence tends to set in motion a virtuous circle since it generates the so-called 'elicitative' trust by communicating the expectation for cooperation from the other party.[34] To enhance their communicative power, institutional interlocutors often frame esoteric legal doctrines into generally accessible principles, such as good faith.[35]

Third, WTO norms are not only transmitted but also preserved and reproduced through routinized patterns of certain sequential actions.[36] As other occasions arise, they are reproduced with their basic meanings intact.[37] Peter Goodrich's linguistic-discursive understanding of law helps capture these reproductive aspects of WTO norms. Goodrich identified certain linguistic-discursive elements in law, such as organized appropriation of norms, prioritization over widely recognized meanings, and selective rejection of alternative meanings.[38]

WTO norms exhibit these elements. First of all, the existence of common law-type precedents bespeaks organized appropriation of rules. The WTO Agreement

32 Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, 2nd rev. edn (New York: Crossroad, 1989), 306.

33 Regarding this 'relatedness', see Kratochwil, *supra* n. 29 at123.

34 Wendt, *supra* n. 21, at 347; Roderick Kramer *et al.*, 'Collective Trust and Collective Action', in R. Kramer and T. Tyler (eds.), *Trust in Organizations*eds (Thousand Oaks, CA: Sage Publications, 1995), 357.

35 David A. Snow *et al.*, 'Frame Alignment Processes, Micromobilization, and Movement Participation', 51 *Am. Soc. Rev.* 464 (1986).

36 Cf. Walter W. Powell, 'The New Institutionalism', in Stewart Clegg and James Russell Bailey (eds.), *The International Encyclopedia of Organization Studies* (Thousand Oaks, CA: Sage Publications, 2008), 976; Ronald L. Jepperson, 'Institutions, Institutional Effects, and Institutionalization', in Walter W. Powell and Paul J. DiMaggio (eds.), *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991), 144–45.

37 Cf. Lynne G. Zucker, 'The Role of Institutionalization in Cultural Persistence', 42 *Am. Soc. Rev.* 726, 728 (1977).

38 Goodrich, *supra* n. 13, at 3.

provides that 'the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947'.[39] Likewise, the Appellate Body in *Shochu II* highlighted this very point. It ruled that:

> Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute … We agree that a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant.[40]

In other words, regardless of technical formality (adopted or unadopted), panel reports are meant to be systematically appropriated among WTO members as useful precedents. Therefore, any given panel report may remain usable not only for the parties concerned. It will be used, namely cited, quoted, and referenced, even by third parties and future WTO tribunals, such as panels and the Appellate Body, that desire to make, and reinforce, their own arguments and reasoning by means of repeating what they interpret the original reports would have meant.

Next, the jurisprudential use of certain legal precepts, such as good faith and due process,[41] as recurrent referential points is tantamount to the use of widely recognized meanings. The WTO court frequently invokes interstitial norms, namely general principles of law,[42] not necessarily because they are binding in and of themselves, but more because they are essential to process legal reasoning.[43]

39 WTO Agreement, art. XVI, ¶1.

40 *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report adopted on November 1 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

41 See, e.g., *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from United States*, Recourse to Article 21.5 of the DSU by the United States, Appellate Body Report adopted on 21 November 2001, WT/DS132/AB/RW:

> 107. In our view, the duty of panels under Article 12.7 of the DSU to provide a 'basic rationale' reflects and conforms with the *principles of fundamental fairness and due process* that underlie and inform the provisions of the DSU … Article 12.7 also furthers the objectives, expressed in Article 3.2 of the DSU, of *promoting security and predictability in the multilateral trading system* and of clarifying the existing provisions of the covered agreements, because the requirement to provide 'basic' reasons contributes to other WTO Members' understanding of the nature and scope of the rights and obligations in the covered agreements. (emphasis added).

42 Cf. Daniel A. Farber, 'The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History', 95 *Cal. L. Rev.* 1335, 1336 (2007) (discussing 'background legal principles'); Andrew D. Mitchell, *Legal Principles in WTO Disputes* (New York: Cambridge University Press, 2008); Marion Panizzon, 'Good Faith, Fairness, and Due Process in WTO Dispute Settlement Practice', in Julian Chaisse and Tiziano Balmell (eds.), *Essays on the Future of the World Trade Organization (*vol. 2, *The WTO Judicial System – Contributions and Challenges)* (Genève: Edis, 2008).

43 Vaughan Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (New York: Oxford University Press, 2000), 207, 212–21.

Thus, the use of these general principles of law tends to facilitate legal communication, not only between the court and disputing parties, but also between the court and other WTO members. This way, any particular decision of the WTO court potentially constitutes an important element of the broader WTO jurisprudence. It is one effective way to augment the intersubjective nature of the court's reasoning in that such fundamental principles are widely shared and accepted in any community of law, such as the WTO's community.

Finally, a certain mechanism must exist to screen out meanings that do not conform to norms. Utterances that contradict the grammar and syntax of a given language are to be rejected. This authoritative selectivity is a key factor in securing coherence that any kind of judicially reproductive system may require. For example, the Appellate Body, as an official interlocutor of the WTO, has unequivocally rejected an alternative, pro-zeroing interpretation of the Antidumping Code, to which a minority of WTO members, including the US, refers, and yet is inconsistent with the well-established WTO jurisprudence. The Appellate Body also criticized a panel's rebellious departure from the well-established anti-zeroing jurisprudence as it emphasized that only the Appellate Body can 'uphold, modify or reverse' panels' legal interpretations.[44]

Of course, this stability does not necessarily equate to non-adaptability. As the grammar and syntax of a language may change over time, so do WTO norms. In fact, the GATT/WTO's gradual yet undeniable path toward juridification lends credence to such evolution. Specific meanings of various GATT/WTO vocabularies, ranging from 'nullification or impairment' to 'like products', have been subject to interpretive change,[45] particularly as the initial GATT contract transformed into a community.[46]

3. Reinterpreting the WTO operation: three modes of WTO discourse

WTO norms as a language of WTO discourse are not monolithic. Different institutionalized forms may channel different kinds of socially meaningful patterns of practice, which are eventually crystallized into socially acceptable norms. From this perspective, three conventional institutionalized forms of the WTO operation, i.e., adjudication, peer review, and negotiation–consultation, can be understood as three different modes of WTO discourse. Each mode provides a distinctive avenue in which various actors interact and communicate as they use and at the same

44 *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Appellate Body Report, 30 April 2008, para. 161.

45 Cf. Marc J. Ventresca and John W. Mohr, 'Archival Research Methods', in Joel A.C. Baum (ed.), *The Blackwell Companion to Organizations* (Malden, MA: Blackwell Publishers, 2002), 805–28.

46 See, generally, Sungjoon Cho, *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System* (New York: Kluwer Law International, 2003).

time develop shared WTO norms.[47] Importantly, these different forms of WTO discourse subsequently engender numerous derivative discourses. That is, numerous communications and interactions in trade and trade-related areas of everyday lives are based on various types of social knowledge, such as panel reports, minutes of committee meetings, working party reports, and negotiation history.[48] It is through such derivative discourse that various micro-participants of the WTO community, such as producers, importers, and NGOs,[49] engage in, and ultimately sponsor, the WTO discourse. Derivative discourse may even reduce the relative significance of primary institutionalized forms of WTO discourse. For example, WTO members have recently become less litigious, which may attest to the enhanced level of understanding and routinization of WTO norms in everyday lives.[50]

As social-rhetorical fora, these three institutionalized modes of WTO discourse affirm, modify, and generate legitimate (socially acceptable) norms. Importantly, an intermodal dynamic among these three discursive modes adds a critical layer of complication to the normative operation of the world trade community, as discussed below. It is through this intermodal dynamics that the world trade community may still maintain a largely coherent normative solidarity despite instantaneous diverging typifications (interpretations) of WTO members.[51]

3.1 Adjudication

Adjudication is a distinctive form of WTO discourse, *vis-à-vis* peer review and negotiation–consultation, in that it involves an arbiter, such as a panel or the Appellate Body, which manages the discourse in a hierarchical, not horizontal, sense. The main role of this impartial interlocutor is to resolve a dispute by rendering an independent decision binding both disputants. Sophisticated procedural rules under the DSU symbolize the characteristically serious nature of this mode of discourse. All participants of adjudicative discourse, such as complaining parties, defending parties, the WTO Secretariat, and even panelists (or the Appellate Body members), share rich and well-established communicative foundations offered by the WTO language, namely substantive norms based on various WTO legal documents and jurisprudence and procedural norms grounded in DSU and its supplementary rules. In accordance with such communicative

47 Cf. Susan Park, 'Norm Diffusion within International Organizations: A Case Study of the World Bank', 8 *J. Int'l R. and Dev*. 111, 113 (2005).

48 See Moshe Hirsch, 'The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System', 19 *Eur. J. Int'l L*. 277, 281 (2008) (observing that 'international trade spreads knowledge, norms and values, through traders who often across boundaries and settle in new communities').

49 Cf. Park, *supra* n. 47 (emphasizing NGO's active participation in the legal discourse within international organizations via 'transnational advocacy networks').

50 See Progressive Policy Institute, *The WTO Has Handled 391 Disputes Since 1995*, 22 April 2009.

51 I owe this insight to an anonymous referee.

foundations, those participants complain, respond, argue, counter-argue, refute, prove, reason, interpret, and judge. Even after a panel or the Appellate Body renders a decision, the discourse continues if a losing party refuses to comply and a winning party challenges such non-compliance under Articles 21 and 22 of the DSU.

Note that the WTO adjudication as a full-blown mode of legal discourse was not programmed at the outset of the GATT. In fact, it has emerged over a long period of time. The GATT in its origin was biased in favor of dispositive settlement of disputes, rather than full adjudication. Its contractarian nature led GATT contracting parties to be obsessed with the restoration of any breach of a delicate balance of tariff concessions established after laborious tariff negotiations. The legal barometer for such balance was the nullification or impairment under GATT Article XXIII.

However, the subsequent accumulation of cases generated a set of jurisprudence that reconfigured the GATT dispute settlement system from private arbitration to public litigation. The once-quintessential requirement of nullification or impairment, which was a hallmark of GATT remedies, was marginalized.[52] The violation itself became what really mattered, rather than its commercial consequences. In terms of *legal*, not necessarily dispositive, discourse, any particular outcome of litigation, be it a panel ruling or an Appellate Body ruling, has now been part of a coherent set of discourse in the form of precedent. Technically speaking, such a ruling binds only disputants to that particular case, which demonstrates a strong semblance to arbitration. Nonetheless, these rulings as past units of discourse guide subsequent WTO rulings. After rounds of these guided rulings, the original 'informal normativity' turns into a more established 'legal normativity', such as case law or jurisprudence.[53] John Jackson demonstrates a stronger, and more direct, position on this reproductive effect of precedents. He observes that a WTO panel or the Appellate Body decision, once adopted, in general obligates *all* WTO members to change their policies consistent with the decision.[54] Likewise, even a settlement between WTO members is made in the shadow of the WTO jurisprudence. In this sense, a settlement is also a discursive outcome informed by precedents.

Importantly, this *social* dimension of adjudicative discourse is distinct from the conventional triadic dispute resolution, which some scholars argue might represent a 'sociologically impoverished universe'.[55] Owen Fiss contends that individualistic

52 *United States – Taxes on Petroleum and Certain Imported Substances*, Panel Report adopted on 17 June 1987, BISD 34S/136.

53 Brunnée and Toope, *supra* n. 29, at 48.

54 John Jackson, *The Jurisprudence of Gatt and the WTO: Insight on Treaty Law and Economic Relations* (New York: Cambridge University Press, 2000), 163.

55 Owen M. Fiss, 'The Social and Political Foundations of Adjudication', 6 *L. and Human Behaviour* 121, 122–24 (1982).

party structure equates a judge with a passive referee. According to him, such passive role deprives the judge of the broader sociological-structural dynamics behind any given dispute that potentially affect multiple parties. In contrast, WTO adjudication can be depicted as a constitutional adjudication whose remedy requires the elimination of threats to the WTO's fundamental values, rather than focusing entirely on individual compensation.[56] Here, a judge may transcend private interests, such as the restoration of the status quo, and instead enunciate norms in a prospective sense.[57] Therefore, theorized as a form of discourse, WTO adjudication does not necessarily translate into an adversarial mechanism. Instead, WTO adjudication depends on assumed general duties to cooperate among adjudicative participants.[58] In this regard, the locus standi ('legal interest') is more liberal than in a typical domestic litigation. Participating in a WTO discourse (adjudication) benefits the WTO community as a whole, which confirms the hypothesis of a 'communitization' of WTO norms.[59]

Indeed, the WTO's unique 'third party' intervention policy attests to the social dimension of adjudicative discourse. In stark contrast to an ordinary, domestic adversarial litigation structure, the WTO dispute resolution system is quite liberal in allowing non-disputants (third parties) to participate in the panel and the Appellate Body proceedings. For example, Article 4.11 facilitates third parties' access to consultation through a lenient *locus standi* requirement,[60] while Article 10.2 grants third parties with a substantial interest to submit their comments to the panel.

Note the innate *public* nature of adjudicative discourse substantiated by the WTO's liberal third party policy. Granted, third parties may be incentivized to intervene since a particular adjudicative outcome affects them in an economic sense.[61] However, even without direct commercial interests involved, a third party may engage in a WTO discourse initiated by other WTO members for the sake of public systemic interests.[62] Such access tends to offer third parties an opportunity

56 See, generally, Sungjoon Cho, 'Global Constitutional Lawmaking', 31 *U. Pa. J. Int'l L.* 621 (2010).

57 See Harold Hongju Koh, 'Transnational Public Law Litigation', 100 *Yale L. J.* 2347, 2348–49, 2368 (1991).

58 See Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties', 14 *Eur. J. Int'l L.* 1, 2, 9, 15–16 (2003)

59 See Pascal Lamy, 'The Place of the WTO and Its Law in the International Legal Order', 17 *Eur. J. Int'l L.* 969 (2006).

60 Marc L. Busch and Eric Reinhardt, 'Three's a Crowd: Third Parties and WTO Dispute Settlement', 58 *World Politics* 446, 451 (2006) (observing that the WTO panels seldom reject third parties' requests to join the consultations).

61 Chad P. Bown, 'MFN and the Third Party Economic Interests of Developing Countries in GATT/WTO Dispute Settlement', in Chantal Thomas and Joel P. Trachtman (eds.), *Developing Countries in the WTO Legal System* (New York: Oxford University Press, 2009), 265.

62 *United States – Section 306 of the Trade Act of 1974 and Amendments Thereto, Request to Join Consultation (Communication from Canada)*, WT/DS200/8 (27 June 2000). Admittedly, commercial interests remain critical reasons behind third party interventions. See Kyle Bagwell and Robert W. Staiger,

to contribute to the shaping of the very discourse in which they participate.[63] Naturally, this institutionalized channel for third parties both broadens and deepens the WTO discourse among its members.

Therefore, third party interventions play a critical norm-sponsoring role in the WTO community. Not only are third parties entitled to exchange submissions with the parties of the dispute, but also the WTO tribunal should reflect third parties' submissions in its decision.[64] Here, WTO members can effectively expand what would have otherwise been a bilateral discourse to a multilateral one. The WTO tribunal can establish a valuable discursive connection to the enlarged WTO membership beyond the parties directly concerned in a particular dispute.[65] Those interventions may even help legitimize a panel or the Appellate Body's finding that references them. In sum, third parties as norm sponsors help preserve the normative integrity of the WTO's community. They convert an otherwise private exchange between a complaining and defending party into a public discourse.[66]

Perhaps, the public (multilateral) nature of WTO adjudication may also explain why the ratio of settlement in the WTO setting is far lower than in the domestic setting.[67] In the WTO dispute settlement system, commercial stakes as well as long-term normative considerations motivate an adjudicative discourse. Governments themselves often initiate certain disputes to establish legal precedents, even without serious commercial considerations.[68]

'Multilateral Trade Negotiations, Bilateral Opportunism, and the Rules of GATT/WTO', *J. Int'l Econ.* no. 1, 2004, at 63 (implying that third parties aim to preserve their 'own share of the dispute market' through interventions); Chad Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders', *World Bank Econ. Rev.* no. 2, 2005, at 19 (observing that those countries having a considerable 'market share' in the disputed market tend to become third parties).

63 Cf. Lorand Bartels, *Procedural Aspects of Shared Responsibility in the WTO Dispute Settlement System* (University of Cambridge Faculty of Law Research Paper No.27-2012, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181526## (raising various situations in which third parties may share elements of a primary actor's responsibility).

64 WTO Dispute Settlement Understanding, arts. 10-2, 10-3

65 James McCall Smith, 'WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings', 2 *World Trade Rev.*, 75, 85 (2003); see also Chi Carmody, 'Of Substantial Interest: Third Parties under GATT', *Mich. J. Int'l L.* 18 (1997).

66 Abram Chayes famously attributed this 'demise of the bipolar structure' to one of the characteristics of *public* law litigation as opposed to private law litigation. Abram Chayes, 'The Role of the Judge in Public Law Litigation', 89 *Harv. L. Rev.* 1281, 1289 (1976); see also, Henry P. Monaghan, 'Constitutional Litigation: The Who and When', 82 *Yale L. J.* 1363, 1371 (1973) (observing that constitutional litigation as 'public actions' might not involve private rights).

67 According to Amelia Porges, about a half of formal complaints launched in the WTO dispute settlement system reached a panel stage from 1996 – 2000, and only 35% of these complaints resulted in a panel ruling. In the domestic setting, only 10% of all suits reach a trial. Amelia Porges, 'Settling WTO Disputes: What Do Litigation Models Tell Us?', 19 *Ohio St. J. on Disp. Resol.* 142 (2003).

68 Ibid. at 154.

3.2 *Peer review*

While adjudication remains a judicial, hierarchical form of WTO discourse, peer review in various avenues, such as WTO Committees and the Trade Policy Review Mechanism (TPRM), represents an administrative, horizontal type of discourse. It is administrative, or trans-governmental, in that sector-specific administrative agencies, rather than trade diplomats, are directly involved in the discourse. It is horizontal in that no higher authority, such as the WTO Appellate Body, directs parties' discourse. One of the most salient features of the WTO system created in the Uruguay Round is the institutionalization of such peer review, as seen in the TBT Agreement, the SPS Agreement, and the TPRM Agreement. These side agreements require WTO members to engage in 'justificatory discourse'[69] through various discursive avenues, such as notifications, inquiries, and reason-giving. By framing their inquiries and responses within the context and terms of WTO norms, both an inquirer and a respondent transmit WTO norms to each other.

For example, the TPRM Agreement provides a regular peer review forum where WTO members collectively monitor whether an individual member's trade policies and practices are consistent with WTO norms. In each trade policy review, a policy statement written by the monitored WTO member and the WTO Secretariat's independent report are available to WTO members. Based on these documents, WTO members hold several meetings under the auspices of the Trade Policy Review Body where WTO members discuss a wide range of trade and trade-related measures by the monitored WTO member. As the monitored WTO member responds to other WTO members' inquiries in these meetings, it justifies its measures as being in compliance with WTO norms.[70]

Justificatory discourse enables WTO members to generate 'regulatory learning and adaptation', which might not be fully captured by rationalist narratives.[71] This social element of regulatory dialogue tends to sensitize regulating (importing) states as to the external (trade) impact of their regulations on affected (exporting) members and thus motivate regulating states to modify or repeal the original regulations.[72] Notably, clarification on the meaning of some SPS provisions often results from informal discussions among working-level government officials, rather than from the Appellate Body reports.[73] This endogenous nature

69 Cf. Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), 27.

70 WTO, *Trade Policy Reviews: Ensuring Transparency*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm.

71 See Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (New York: Oxford University Press, 2007), 4.

72 Ibid. at 57.

73 Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System', 11 *Eur. J. Int'l Relations* 339 (2005).

of social interaction among like-minded regulators explains the 'normative self-understanding' among them, which eventually forms their collective identity.[74]

The recently initiated 'SPS Information Management System' (SPS IMS) may serve as an empirical confirmation of the aforementioned social thesis of peer review. The SPS IMS is an inclusive source that enables users, both governments and the public, to locate and obtain information on notified measures, specific trade concerns, SPS Committee documents, domestic enquiry points, and the authorities that handle notification.[75] This database helps not only WTO members but also private businesses to locate various SPS information in a way that serves their particular needs. It is a user-friendly system which provides a variety of search criteria such as 'geographical groupings, product codes, comment periods, keywords, etc'.

This type of innovative institutionalization greatly facilitates an administrative discourse among regulators from WTO member countries by broadening the base of shared information on members' SPS measures. Any WTO member can now easily identify any questionable SPS measure from another member which may affect the former's exporters. Then, the former can designate it as a 'specific trade concern' which is numerically coded for identification purposes, such as 'STC 229'. Within the SPS Committee, members discuss and debate on these STCs as they challenge or defend them. Under certain circumstances, WTO members can easily defuse trade disputes via dialogue before they are escalated to full-blown complaints for adjudication.

Granted, peer review might not necessarily deliver the desired outcome, such as enhanced compliance. A number of potential obstacles may hinder its full manifestation. Due to its soft, non-binding nature, peer review may end up with the titular 'cheap talks'. Furthermore, developing countries' participation in these meetings is limited due to their lack of technical and financial capacities.[76] These obstacles lead to questions on the legitimacy of WTO discourse. Nonetheless, various empirical studies point out that social actors are more likely to change their behaviors when they are regularly given an opportunity to examine and defend their original position in the face of new information.[77] This is especially so when members of committees manage to produce 'secondary law',[78] such as decisions and recommendations, as a result of their deliberations.

74 John Gerard Ruggie, 'What Makes the World Hang Together?: Neo-Utilitarianism and the Social Constructivist Challenge', 52 *Int'l Org.* 855, 860 (1998); See, generally, Max Weber, *The Methodology of the Social Sciences*, eds. and trans. Edward A. Shils and Henry A. Finch (Glencoe, IL: Free Press, 1949).

75 WTO, SPS Information Management System, http://spsims.wto.org/.

76 B. S. Chimni, 'Co-Option and Resistance: Two Faces of Global Administrative Law', 37 *N.Y. U. J. Int'l L. and Pol.* 799, 806, 813–14 (2005).

77 James L. Gibson, 'A Sober Second Thought: An Experiment in Persuading Russians to Tolerate', 42 *Am. J. Pol. Sci.* 819 (1998).

78 See Petros C. Mavroidis, 'No Outsourcing of Law?: WTO Law as Practiced by WTO Courts', 102 *Am. J. Int'l L.* 1, 9 (2008).

Ironically, however, this informal and provisional nature of peer review tends to 'open up space for less powerful actors to articulate their position'.[79] As Nico Krisch aptly observes, a formal, concentrated regulatory decision-making setting is likely to be exposed to power disparities and thus vulnerable to regulatory capture. In contrast, peer review enables less powerful actors, such as developing countries, to contest dominant regulatory positions and thus maintain a pluralist structure of regulatory governance.

3.3 Negotiation–consultation

In a conventional sense, negotiation may be synonymous with bargaining. Bargaining tends to be strategic: it reflects the market logic[80] and involves economic exchanges between parties.[81] Ministerial meetings where tariff reduction negotiations take place may best suit this conventional definition of negotiation. At the same time, however, negotiation may serve other purposes, such as fact-finding or persuasion. By juxtaposing and debating over contested facts, a negotiation may turn into a consultation, which enables an impartial assessment of the situation and therefore narrows down parties' original differences.[82] For this reason, WTO norms not only encourage[83] but also mandate[84] parties concerned to engage in a consultation when they encounter any disputes. In fact, a majority of disputes have been resolved in the consultation stage.[85] At the same time, however, parties might not engage in genuine discourse in the consultation stage if they had already decided to move to the next stage, adjudication. They might attempt to minimize any substantial discussion on a given dispute as they heeded a subsequent panel procedure.[86]

79 Nico Krisch, 'The Pluralism of Global Administrative Law', 17 *Eur. J. Int'l L.* 247, 276–77 (2006). But see Gregory Shaffer, 'A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case', 41 *N.Y.U. J. Int'l L. and Pol.* 1, 64–65 (2008) (warning that pluralist approaches may allow powerful actors to 'manipulate processes to give the appearance of consideration of affected foreigners without in any way modifying a predetermined outcome').

80 Thomas Risse, 'Let's Argue!: Communicative Action in World Politics', 54 *Int'l Org.* 1, 8 (2000) (citing Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in Jon Elster and Aanund Hylland (eds.), *Foundations of Social Choice Theory* (New York: Cambridge University Press, 1986), 1–18).

81 Andrew T. Guzman and Beth A. Simmons, 'To Settle or Empanel?: An Empirical Analysis of Litigation and Settlement at the World Trade Organization', 31 *J. Legal Stud.* S205, S206 (2002) (arguing that WTO members are more likely to settle on such subjects as make transfer payments between parties easier than those ones that leave little room to compromise).

82 Robert Echandi, 'How to Successfully Manage Conflicts and Prevent Dispute Adjudication in International Trade', 26 (ICTSD Issue Paper No. 11, 2013).

83 See, e.g., GATT art.XXII

84 See, e.g., WTO DSU, arts. 4.2, 4.6

85 *WTO, Dispute Settlement System Training Module: Chapter 6, The Process – Stages in a Typical WTO Dispute Settlement Case*, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm.

86 See William J. Davey and Amelia Porges, 'Performance of the System I: Consultations and Deterrence', 32 *Int'l Law* 695, 705 (1998).

Notably, negotiation–consultation is by far less formal than other modes of WTO discourse, such as adjudication or peer review. Although flexibility may be a virtue, negotiation–consultation is still prone to an innate risk of inequity. To induce the counterpart to accept its position, a more politically powerful party may mobilize various kinds of threats against a less powerful one.[87] Superpowers, such as the US and the EU, enjoy enormous advantages in drafting WTO rules since they can deploy unsurpassed resources, such as legal staff.[88] Considering an average of ten meetings per working day in the WTO,[89] how could poor countries effectively follow up all those meetings and reflect their positions in final policy drafts?

Importantly, however, the conventional dimension of negotiation represented by reciprocal bargaining has increasingly become anachronistic, and even misleading.[90] The conventional modus operandi of trade negotiation was mutual tariff reduction based on reciprocal bargaining.[91] Under the new trade reality, however, the changing nature of trade barriers should be taken seriously. Administrative barriers, such as domestic regulations, have recently replaced the traditional mode of trade barriers, such as tariffs, which are generally in decline after a series of trade rounds in the past.[92] Trading nations cannot simply bargain away these new non-tariff barriers. To tackle these barriers, they should first understand the nature of each other's regulations and learn to broaden their common regulatory grounds through discursive practices, such as argumentation, persuasion, and deliberation.

Once WTO members disabuse themselves of anachronistic mercantilism and embrace the reality of economic interdependency, the nature of negotiation shifts from negotiation (reciprocal bargaining) to consultation (cooperative dialogue). The recent success of the WTO 'Information Technology Agreement' (ITA) provides a case in point, particularly in stark contrast to the epic failure of the Doha Round talks. Global production chains characterize IT products, ranging from semiconductors to flat panel displays (FPDs) to wireless internet equipment. Their production is divided into multiple stages in multiple countries in a way that minimizes transaction costs. This contemporary reincarnation of the classical division of labor among participating countries benefits both developed and

87 Jon Elster, 'Arguing and Bargaining in Two Constituent Assemblies' (presentation, The Storrs Lectures, New Haven, CT, 1991), quoted in Habermas, *supra* n. 11.

88 John Braithwaite and Peter Drahos, *Global Business Regulation* (New York: Cambridge University Press, 2000), 196.

89 Gregory Shaffer, 'Power, Governance, and the WTO: A Comparative Institutional Approach', in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance* (New York: Cambridge University Press, 2005), 130–34.

90 Pascal Lamy, Director-General, WTO, 'Changes in Trade Challenge How We Manage Trade Policies', *WTO News* (16 March 2012), available at http://www.wto.org/english/news_e/sppl_e/sppl221_e.htm.

91 J. Michael Finger *et al.*, *Market Access Bargaining in the Uruguay Round: Rigid or Relaxed Reciprocity?* 2–4 (World Bank, Policy Research Working Paper No. 2258, 1999).

92 See Kono, 'Optimal Obfuscation', *supra* n. 3, at 371 (viewing that democracy reduces incentives to employ tariffs while increasing incentives to employ less transparent NTBs).

developing countries that contribute different production factors, be they labor, capital, or technology, to manufacture one single product. Moreover, IT products tend to generate enormous derivative trades in services, such as software development and online travel reservation.[93] Sparked by a rare moment of collective enlightenment, a selected group of WTO members launched the ITA in 1996 to facilitate the global stream of IT products by eliminating their tariffs. This initiative has proved to be one of the greatest successes in WTO history. The original 28 members have grown into the current 74 members; the total world exports of IT products have tripled since its inception.

The ITA Committee circumspectly incubated the cooperation-inducing shift from negotiation to consultation. Under the auspices of the ITA, the Committee provides a discursive forum for ITA participants to resolve their specific concerns arising under the ITA. For example, in 2000 the US and the EU consulted with Thailand under the Committee regarding the latter's origin certificates requirement imposed on certain IT imports. The US and the EU's interpretation of the ITA eventually persuaded Thailand to undo the requirement.[94]

All told, negotiation as a mode of WTO discourse, for the purposes of this article, is defined rather broadly, connoting not only the conventional reciprocal bargaining but also the discursive properties of consultation.[95] In reality, the latter dimension of negotiation often overshadows the former. The latter may shape the former from a normative perspective[96] since not every bargain may emerge from a pure normative vacuum. In fact, it transpires in the shadow of WTO norms.[97] Even bilateral settlements still remain in the public sphere: they may be subject to further surveillance and monitoring by the WTO community. All mutually acceptable solutions must be disclosed and subject to potential intervention from the rest of WTO members.[98] It is in this context that WTO norms provide negotiating parties with 'institutional power' that can effectively check 'compulsory power'.[99]

In the same vein, negotiation need not be a zero-sum game. Negotiating parties can continuously adjust their different interpretations and eventually expand their shared grounds. In this sense, negotiation may be understood as

93 See, generally, World Trade Organization, *15 Years of the Information Technology Agreement: Trade, Innovation and Global Production Networks* (Geneva: World Trade Organization, 2012).

94 Ibid. at 27.

95 See Sungjoon Cho and Claire R. Kelly, 'Promises and Perils of New Global Governance: A Case of the G20', 12 *Chi. J. Int'l L.* 491 (2012).

96 Cf. Habermas, *supra* n. 11, at 166.

97 See Richard H. Steinberg, 'In the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 *Int'l Org.* 339 (2002). Cf. Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of Law: The Case of Divorce', 88 *Yale L. J.* 950 (1979).

98 DSU art. 3.7; Emanuela Ceva and Andrea Fracasso, 'Seeking Mutual Understanding: A Discourse-Theoretical Analysis of the WTO Dispute Settlement System', 9 *World Trade Rev.* 457, 476 (2010).

99 Cf. Michael Barnett and Raymond Duvall, in Michael Barnett and Raymond Duvall (eds.), *Power in Global Governance* (New York: Cambridge University Press, 2005), 13–17.

cross-persuasion: one party's persuasion is contingent on that of the other party.[100] The dynamic outcome of such negotiation, qua cross-persuasion, holds the potential for a positive sum in the form of regulatory convergence. After all, negotiation as a mode of discourse adopted in this article bears a public nature where WTO members sustain the discourse in a collective sense.[101]

4. The intermodal dynamic of the WTO discourse

Distinctive as these three modes of WTO discourse may be, each of them should not be understood in isolation. In fact, each mode is somehow interrelated to another. Such a dynamic may be positive or negative.

4.1 Adjudication v. peer review

Peer review may redress a certain limitation intrinsic to adjudication. For example, peer review may prevent adjudication from generating undesirable circumstances due to one of the latter's structural attributes, such as adversarial finality. In some highly controversial issues, such as food regulation, both importing and exporting are often sharply divided by ostensibly irreconcilable dogmatic positions. These issues involve diverging, and often conflicting, socio-cultural positions in different regulatory jurisdictions.[102] Entwined with vested commercial interests and seasonal politics, disputes around those issues are often emotionally escalated.

In this situation, disputants are likely to fashion their claims into flamboyant rhetoric to produce self-serving narratives, rather than engaging in a workman-like discourse.[103] The *Hormones* dispute between the US and the EU is a case in point. This dispute, whose origin dates back to the GATT era in the 1980s, was adjudicated under the WTO twice, in 1998 and 2008. It still remains unresolved. Here, the US position, which supports the safety of hormone-treated beef for human consumption, and the EU position, which questions the safety of the same product, are diametrically opposed to each other. What we often witness in this kind of dispute is a vicious circle of non-compliance and subsequent re-litigation.[104]

In dealing with those disputes resulting from fundamental socio-cultural differences, adjudication should yield to regulatory dialogue via peer review or consultation. Here, the 2001 breakthrough between Canada and Brazil over the

100 See Cho and Kelly, *supra* n. 95, at 509.

101 Cf. Taylor, *supra* n. 9, at 60.

102 See, generally, Sungjoon Cho, 'Of the World Trade Court's Burden', 20 *Eur. J. Int'l L.* 675 (2009).

103 Vivien A. Schmidt, *The Futures of European Capitalism* (New York: Oxford University Press, 2002).

104 See Sungjoon Cho, 'United States – Continued Suspension of Obligations in the EC–Hormones', 103 *Am. J. Int'l L.* 299 (2009).

mad cow disease (BSE) incidence provides a case in point. The Canadian import ban on Brazilian beef, for the fear of mad cow disease (BSE), in February 2001 invited fierce protest from Brazil, which threatened to sue Canada before the WTO tribunal.[105] Soon, however, parties elected to address the issue in the SPS Committee instead of pursuing adjudication. In the course of deliberation under the SPS Committee, Brazil proposed a new mandate for developed countries to notify the WTO of the introduction of SPS measures that may negatively affect trade opportunities of developing countries.[106]

The SPS Committee eventually adopted this proposal in the form of a revised 'Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)'.[107] Both Brazil and Canada agreed that the dispute had been resolved with the adoption of the revised recommendation. The aforementioned example is not an isolated anecdote. In fact, an increasing number of SPS concerns have been resolved through regulatory discourse under the SPS Committee instead of by WTO adjudication.[108] Nearly 30% of the 'specific trade concerns' reported to the SPS Committee were addressed by discussions and consultations under the Committee.[109]

Admittedly, such soul-searching regulatory dialogue should not be taken for granted. It requires trust-building and thus takes time. Any outcome of regulatory dialogue, if fully implemented, requires both parties concerned to engage in serious risk communication efforts within their own domestic jurisdictions.[110] These efforts are seldom visible and appreciable. Politicians subject to short-term election cycles are often impatient with this vague, long-term vision. Pressured by interest groups, they are often tempted to have recourse to a quicker, more direct strategy, such as litigation. Given this situation, once an exporting country requests a consultation with an importing country, such a consultation may be a preparatory step for a subsequent full litigation, rather than a genuine effort toward reconciliation.

Also, peer review might not prevent a dispute from full adjudication. For example, not all IT disputes are resolved in the ITA Committee. The Committee

105 'Canadian Ban on Brazilian Beef Imports Escalates Trade Battle', *Bridges Weekly Trade News Digest*. (Int'l Centre for Trade and Sustainable Dev., Geneva, Switzerland), 13 February 2001.

106 *WTO Committee on Sanitary and Phytosanitary Measures, Implementation Proposal under Paragraph 21: Proposal by Brazil*, G/SPS/W/108 (22 June 2001).

107 WTO Committee on Sanitary and Phytosanitary Measures, *Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7): Revision*, G/SPS/7/Rev.2 (2 April 2002).

108 See, generally, Sungjoon Cho, 'From Control to Communication', 44 *Cornell J. Int'l L.* 249.

109 WTO Committee on Sanitary and Phytosanitary Measures, *Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures*, G/SPS/36, 11 July 2005.

110 See, generally, World Health Organization, *Food Safety: Risk Communication*, available at http://www.who.int/foodsafety/micro/riskcommunication/en/.

failed to resolve a recent dispute over the EU's refusal to accord certain IT products, such as flat panel displays and set top boxes, duty-free treatment under the ITA. A WTO panel eventually struck down the EU's tariff treatment on these IT products.[111] This panel report is significant in that it upheld the evolutionary nature of technology by prioritizing functionality over product properties of IT products. One might reasonably speculate that such a finding will reinforce discursive power of those who advocate the expansion of the ITA.[112]

4.2 *Adjudication v. negotiation–consultation*

First of all, adjudication has a unique faculty to negotiation. For example, when trade negotiators struggle to draft a decision or agreement, they seldom create new meanings for each provision from scratch. Their discourse (negotiation) is mediated by, and at the same time based on, the outcome of previously established discourses, be it adjudication or peer review, which collectively constitute the GATT *aquis*.[113] Note that a number of DSU provisions are simply a codification of past GATT practices. Trade negotiators in the Uruguay Round did not invent the panel proceeding under Articles 6–16 of the DSU for the first time. In fact, they imported this time-honored practice from the past discourse under the old GATT. Likewise, the *Superfund* decision in 1987[114] shaped the principle of presumption of 'nullification or impairment' with the demonstration of violations, as stipulated in Article 3 of the DSU. Also, we might easily notice that a number of key precepts under the SPS Agreement, such as 'less trade-restrictive' means (Article 5.6), originate from the old GATT jurisprudence, such as the *Section 337* decision in 1989.[115]

In contrast, adjudication and negotiation may often cancel each other out. To settle or litigate is always a difficult decision for disputing parties. WTO norms are basically structured in a way that consultation toward settlement is a pre-condition to full adjudication. GATT Article XXII:1 provides that each contracting party shall accord an 'adequate consideration for consultation to another contracting party with respect to any dispute arising under the GATT. The WTO DSU even prefers settlement through consultation to adjudication. DSU Article 3.7 stipulates that 'a solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.'

111 Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, Aug. 16, 2010.

112 See, e.g., *WTO, Information Technology: Progress Reported on Expanding Product Coverage*, 1 November 2012.

113 See Fiona Smith, 'Law, Language and International Trade Regulation in the WTO', 63 *Current Legal Problems 2010*, 458 (George Letsas and Colm O'Cinneide eds., 2010).

114 *United States – Taxes on Petroleum and Certain Imported Substances*, *supra* n. 52.

115 *United States –* Section 337 *of the Tariff Act of 1930*, Panel Report adopted on 7 November 1989, B.I.S.D.36S/386, para. 5.11 (1989) [hereinafter Section 337].

Those scholars who adopt a rationalist approach do not take this primacy of consultation seriously. According to them, settlement through consultation and adjudication is simply a matter of rational choice informed by strategic calculations. For example, Andrew Guzman and Beth Simmons argue that WTO members elect to settle in those disputes where transfer payments are relatively easy (such as disputes involving tariff rates) and adjudicate in other disputes where such transfer payments are difficult (such as disputes involving health and safety issues).[116] As long as the choice between settlement and adjudication is dictated by rational calculation, it is not possible to fully explain the structural primacy of consultation.

From a social framework proposed in this article, however, such primacy of consultation can be easily understood. The operative nature of adjudication is adversarial and therefore inevitably accompanies a certain social cost, such as escalation of antagonism, in its course. This confrontational structure of litigation may increase the level of hostility among trading nations and thus poison the atmosphere for subsequent negotiation. In this context, the former WTO Director-General Pascal Lamy warned that replacing negotiation with litigation could undermine the delicate balance between interpretation of existing texts and the creation of new ones.[117] In the same vein, DSU Article 3.7 warns that 'before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful'. Therefore, from a normative standpoint consultative discourse should precede adjudicative discourse.

Moreover, once disputants enter into an adjudicative mode, certain factors beyond their control might further complicate settlement. For example, the institutionalization of third parties' liberal access to the WTO dispute settlement mechanism may be a mixed blessing. Currently, third parties participate in about 60% of all WTO disputes.[118] As William Davey warns, such prominence of third party interventions could be a disservice to the WTO dispute settlement mechanism since they often hold very different views than disputants.[119] Even when third parties raise systemic legal issues that might matter to the whole WTO membership, complicating the original dispute tends to inevitably diminish space for settlement between the parties concerned.[120] Therefore, third party participation in general is likely to hamper early settlement and instead provoke full adjudication.[121] While

116 Guzman and Simmons, *supra* n. 81, at S205.

117 'Governments Exploring How to Restart Doha Round Talks', 10 *Bridges Weekly Trade News Digest*, no. 28, 2006.

118 Busch and Reinhardt, *supra* n. 60, at 446.

119 William J. Davey, 'The WTO Dispute Settlement Mechanism', Illinois Public Law and Legal Theory Research Papers Series, no. 03-08 (University of Illinois, 2003), 15.

120 Busch and Reinhardt, *supra* n. 60, at 457.

121 Ibid. at 448.

such full adjudication exhibits a law-generating function of WTO discourse, it may also suppress another form of discourse that may contribute to conflict resolution in a more amicable way.

On the other hand, however, a deadlock in the consultation–negotiation mode of discourse tends to spur an adjudicative mode of discourse, thereby generating the risk of over-litigation. As the negotiation track closes with the collapse of Doha Round talks, more WTO members venture to litigate their way to enhanced access to foreign markets.[122] In particular, some WTO members may be determined to resolve those issues unaddressed in the Doha negotiation via the WTO dispute settlement mechanism. This litigation drive appears inevitable for now. Since the failure of the Doha deal, Brazil has planned to sue the US for the latter's cotton subsidies and tariffs on Brazilian ethanol.[123] Brazil originally expected that the US would reduce its subsidies on a wide range of farm products such as cotton and ethanol; however, the failure of the negotiation has led Brazil to have recourse to WTO litigation in the same matter.[124] In sum, while the abundance of litigation may be an auspicious sign of rule of law in the WTO system, more and harder cases will soon overburden the system and test its integrity.[125]

4.3 Peer Review v. negotiation–consultation

As discussed above, the nature of negotiation has recently shifted from traditional bargaining to consultation or cooperative dialogue. To this extent, negotiation increasingly resembles peer review. Indeed, this new perspective merits even more consideration of the the very nature of the WTO's future homework, such as services, food security, and non-tariff barriers. The remaining hardest nuts to crack in the future seem to hinge not on episodic, big time bargains but more on workman-like, diurnal regulatory dialogue that could widen shared grounds among members: not overnight by negotiation, but only incrementally by mutual understanding.

In this regard, ramifications of the recent Bali breakthrough, in particular the Trade Facilitation Agreement, which rekindled the moribund Doha Round trade negotiations, are non-trivial, although disappointing to some in scope.[126] For a moment, WTO members suspended a tacit commitment to the taken-for-granted mercantilist attitude.[127] Ironically, WTO delegates in Bali could deliver the deal

122 See Sungjoon Cho, 'Doha's Development', 25 *Berkeley J. Int'l L.* 165 (2007).

123 Jonathan Wheatley, 'Brazil to Dispute US Subsidies', *Financial Times*, 3 August 2008.

124 Ibid.

125 See William J. Davey, 'WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding "Over-Legalization"', in *New Directions in International Economic Law: Essays in Honor of John H. Jackson* 295–56 (Marco Bronckers and Reinhard Quick eds., 2000) (prioritizing 'consultation' over adjudication in resolving politically sensitive disputes).

126 See Richard Baldwin, 'WTO agreement: The Bali Ribbon', *Vox* (12 December 2013).

127 The WTO Director-General Roberto Azevêdo also attributed the Bali success to a 'collective awareness' among WTO members that: '(1) the agreement being pursued was desirable for everyone and,

only by stopping bargaining. For that moment, at least, they appeared to realize that the old bargaining model based on an instant quid pro quo mentality might not always work. They subscribed to the critical proposition that trade is not a game of winning or losing and that a trading nation might not always need to outsmart its trading partner to get a better deal.

Once WTO members refocus their negotiation under this social framework, they will soon realize that each trade negotiation on a certain subject must be guided by a peer review process under a corresponding WTO committee on the same subject. For example, negotiations on agricultural subsidies must be in parallel with simultaneous peer review processes under the Agriculture Committee, the Cotton Sub-Committee, and the Committee on Subsidies and Countervailing Measures. Accordingly, negotiations must not be driven by a rigid, on–off *deal* mentality, as eloquently demonstrated in the notion of 'single-undertaking'. Instead, they must be flexible and incremental.

This sober recognition of this vital operational flexibility, which leaves room for talk, and therefore learning, among WTO members, is the true accomplishment of the Bali deal.[128] The Trade Facilitation Agreement certainly departs from the legalistic rigidity symbolized by the single-undertaking principle. As a framework agreement, its implementation requires WTO members to fill in a number of unknown details. This room for talk is essential under the social framework proposed in this article. Learning, and subsequently better understanding, of each other's system and situation, not bargaining, is key to overcome new barriers borne not of protectionism but of differences in both administrative culture and the level of economic development.

5. Conclusion

The new community framework, if widely shared among trading nations, may enable them to embrace new ideas that have remained largely inconceivable under the old mindset. For this purpose, the WTO and its norms must become exoteric, not esoteric, to its broad community, including not only its state members

above all, doable for everyone; (2) a positive outcome would not produce winners and losers, nor a North-South divide (both developed and developing countries would need to work for the agreement); (3) the multilateral trading system needs to be reinvigorated to benefit everyone, particularly the smallest countries and those with least capacity to manage the intricacies of large-scale trade negotiations'. WTO, WTO News, '"Bali Is Just the Start" –Azevêdo' (6 January 2014), http://www.wto.org/english/news_e/spra_e/spra4_e.htm. However, as of 31 July 2014, the Protocol of Amendment for the WTO's Trade Facilitation Agreement remains unadopted. See 'WTO Trade Facilitation Deal in Limbo as Deadline Passes Without Resolution', 18 *Bridges Weekly Trade News Digest*, no. 28 (31 July 2014), available at http://www.ictsd.org/bridges-news/bridges/news/wto-trade-facilitation-deal-in-limbo-as-deadline-passes-without-resolution.

128 See Uri Dadush, 'How Can the World Trade Organization Stay Relevant?', World Econ. Forum (14 January 2014), available at http://forumblog.org/2014/01/how-can-the-world-trade-organization-stay-relevant/.

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but also individual economic players, such as producers, importers, distributors, retailers, wholesalers, forwarders, shippers, bankers, and consumers. This social marketing of the WTO may disabuse the public of those mercantilist myths preached by special interests and politicians who cater to those interests. Also, the better-informed public will engage in better deliberation, which will in turn shape better trade policy. In this regard, trade scholars and the WTO Secretariat should work together to create an accessible heuristic on the WTO and its operation. Such a heuristic will accord the world trade community a much improved language.