How the WTO Shapes Regulatory Governance

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Abstract: The World Trade Organization (WTO) arguably shapes regulatory governance in more countries to a greater extent than any other international organization. This article provides a framework for assessing the broader transnational regulatory implications of the WTO as part of a transnational legal order (TLO) in terms of four dimensions of regulatory change that permeate the state: (i) changes in the boundary between the market and the state (involving concomitantly market liberalization and growth of the administrative state); (ii) changes in the relative authority of institutions within the state (promoting bureaucratized and judicialized governance); (iii) changes in professional expertise engaging with state regulation (such as the role of lawyers); and (iv) changes in normative frames and accountability mechanisms for national regulation (which are trade liberal and transnational in scope). In practice, these four dimensions of change interact and build on each other. The article presents what we know to date and a framework for conducting further study of such transnational legal ordering.

I. Introduction

Regulatory governance within nation states is transnationally shaped in different ways. By regulatory governance, we refer to governance characterized by a “rule-based, technocratic and juridical approach” that aims to shape the behavior of market actors (Phillips 2006: 24). Arguably no international organization exercises as broad influence over national regulatory governance in as many countries as the World Trade Organization (WTO). This article provides an analytic framework regarding the broader domestic regulatory implications of the WTO as part of what can be viewed as a transnational legal order (TLO), and assesses those implications in light of what we know to date.

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Most analysis of the WTO treats the organization as if it hovers above the nation state in a separate plane — that of inter-state relations and global governance. The law and economics literature, for example, treats the WTO as a contract between nation states that, if they breach it, is subject to a type of liability rule, enabling "efficient breach" (Schwartz & Sykes 2002; Mavroidis 2008). When scholars turn to the link between WTO law and national regulation, they tend to address the issue of "compliance" with WTO dispute settlement decisions, of which there were 169 adopted decisions as of February 2014.

Traditional compliance studies, however, only address second order compliance — compliance with dispute settlement decisions — and not first order compliance — compliance with the rules outside of dispute settlement. They thus only touch the surface of WTO law's implications for national regulatory governance. Compliance studies are also static in their conception of legal rules and do not address how the understanding of legal rules develops dynamically over time through interpretation and practice engaging an array of actors and factual contexts. WTO jurisprudence develops the meaning of WTO rules and governments follow those developments. The WTO, as an institution, organizes thousands of meetings each year that bring together thousands of government officials that are followed by private trade associations, professionals, and civil society. The WTO potentially has much broader implications within national regulatory systems than captured by the analogy of contract and the literature on compliance.

To assess the WTO’s regulatory implications within states, we should think more broadly about the WTO as part of a transnational legal order and the dimensions of regulatory change at stake. This article provides a framework for doing so in terms of four dimensions of regulatory change. The article first briefly presents a theoretical framework through which the WTO can be viewed as part of a transnational legal order that permeates national regulatory governance (Shaffer 2013; Halliday & Shaffer 2014), and then briefly discusses the extent and scope of WTO law. The article assesses four dimensions of regulatory change implicated by WTO rules: (i) changes in the boundary between the market and the state (involving both market liberalization and growth of the administrative state); (ii) changes in the relative authority of institutions within the state (promoting bureaucratized and judicialized governance); (iii) changes in professional expertise engaging with state regulation (including the role of lawyers); and (iv) changes in normative frames and accountability mechanisms for national regulation (which are trade liberal and transnational in scope). In practice, these four dimensions of change interact and build on each other.

II. Regulatory Governance in Transnational Context: The WTO as Part of a Transnational Legal Order

Regulatory governance developed over the course of the twentieth century in developed countries and has grown significantly in emerging economies since the fall of the Berlin Wall, the rise of economic globalization, and promotion of the so-called
"Washington Consensus" by international financial institutions (Dubash & Morgan 2012). As countries have liberalized markets and engaged in global trade, new regulatory institutions have diffused across jurisdictions (Jordana, Levi-Faur & Marin 2011). The dual shifts of market liberalization and enhanced regulation have given rise to what John Braithwaite and David Levi-Faur call regulatory capitalism (Braithwaite 2008; Levi-Faur 2005). This combination of market-oriented development models and the rise of administrative bureaucracies involves not so much deregulation but re-regulation to facilitate, oversee, and check capitalism, involving both public and private actors. As part of these processes, regulatory governance, quintessentially seen in nation-state terms, has become transnationalized. These transnational processes implicate traditional notions of state sovereignty, including the state’s resource dimension (its tax regime); its legal dimension (the rule and role of law); its legitimation dimension (through democracy); and its welfare dimension (through market-making, market-braking, and market-correcting regulation) (Leibried & Zurn 2005).

This article applies a theoretical framework that the author and Terence Halliday have developed regarding how transnational legal orders (TLOs) are constructed and have effects (Shaffer 2013; Halliday & Shaffer 2014). We define a TLO as a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions. The concept has three elements. TLOs seek to produce order in an issue area that relevant actors construe as a “problem”; they are legal insofar as they adopt legal form to address the problem, including through directly or indirectly engaging national legal bodies; and they are transnational insofar as they transcend and permeate state boundaries in one way or another. The concept of TLOs focuses researchers and practitioners on how legal ordering transcends and penetrates state boundaries.

TLO theory and empirical research does not look solely at international or transnational law — the traditional approaches of much of international law and international relations scholarship. Rather it assesses how these legal norms institutionalize at the transnational, national, and local levels, and how norm-making at these levels interacts dynamically and recursively over time. The lens of TLO theory thus helps us address the broader implications of international rules by focusing our attention on whether and how they permeate, enroll, and implicate institutions, professions, and norms within nation states.

TLO theory addresses the significant pressures for convergence while also examining variation in the local application, resistance, and recasting of the transnational legal norms, including through bricolage and hybridization (Campbell 2004; Merry 2006), and ongoing differentiation among states because of differences in local power dynamics, economic and cultural contexts, and the role of intermediaries between the transnational, national, and local (Shaffer 2013). When one finds normative concordance in the dynamic relationship between the transnational legal norms, their national adoption, and local legal understandings,
one can speak of a transnational legal order that transcends the nation state (Halliday & Shaffer 2014).

From the perspective of TLO theory, states participate in their own transformations in agreeing to the creation of international institutions, and state and civil society responses to international requirements recursively feed back into the revision of those requirements, including through their interpretation. Public and private actors attempt to promote, change, and resist these institutions and their implications for regulatory governance. States accordingly vary in applying international legal norms on account of differences in state-society relations, regulatory capacity, and institutional path dependencies. This article focuses on the WTO’s broader transnational effects on regulatory governance, but in doing so also points to how national and local initiatives and responses recursively feed into WTO law’s meaning. The article’s conclusion briefly addresses variation in the application of WTO legal norms in transnational context in light of nation state differences.

III. The Extent of WTO Requirements for National Law

The WTO entered into effect on January 1, 1995 and was the successor to the earlier 1948 General Agreement on Tariffs and Trade (GATT). The WTO’s institutional framework covers 159 nations that account for 97 percent of world trade as of February 2014. The organization oversees eighteen multilateral agreements and numerous “understandings” and “protocols” which together comprise around 22,000 pages of text, including schedules. The agreements cover the regulation of trade in goods, services, intellectual property protection, and investment. They, in turn, have given rise to over 90,000 pages of WTO jurisprudence from WTO dispute settlement rulings. WTO members can bring claims before WTO panels, which are subject to appeal before the WTO Appellate Body. Their decisions represent a form of judicial liberalization as states delegate authority to define the meaning of the legal norms governing liberalization and protectionism.

These WTO agreements require scores of changes in national law and legal practice. At its core, the WTO prohibits quotas and other quantitative restrictions, and requires the reduction of tariffs, sometimes to zero, and the elimination of discrimination — de jure and de facto — in national regulation. It promotes harmonization of standard setting and cabins how import protection is provided. It requires publicity, transparency, and due process in administrative procedure. WTO agreements shape how governments raise revenue, how they spend it, and the principles for how they regulate. In the process, the WTO affects national tax systems, industrial and development policy, regulatory law, standard setting, import relief, and administrative procedure.

IV. Four Dimensions of Regulatory Change

The WTO’s transnational implications for change in regulatory governance within nation states can be assessed in terms of four dimensions. The first two dimensions involve state institutional change: the boundary between the state and the market, and the relative power of state institutions (the executive, legislature, judiciary, and administrative branches). The third dimension — changes in professional expertise — turns from public institutions to individuals who develop their professional careers. In doing so, they help to normalize the meaning of law in everyday legal and administrative practice. The fourth dimension — changes in normative frames embedded in WTO accountability mechanisms — involves how regulation is viewed, including through peer review processes engaging national officials. Over time, WTO accountability mechanisms operating within a trade liberal frame can shape the understanding of policy options, as those participating in these transnational processes hold positions in national bureaucracies and engage with national counterparts. They act as intermediaries who convey and bring WTO legal norms home, even while they aim to shape the norms’ content through their participation in WTO processes.

1. Shifting the Boundary of the Market and the State. Most profoundly, WTO law represents an institutionalization that facilitates global product competition. In this way, the WTO legal order affects the boundary between the state and the market, shaping what the state does. For some, the WTO represents a force for deregulation in favor of markets under the mantra of ever freer, unencumbered trade and competition without state interference. This trajectory is reflected in WTO processes that lead to the reduction of tariffs and WTO principles that regulation shall not discriminate or be more trade-restrictive than necessary. Yet, as we will see, the freeing of markets does not come without new forms of regulation. What has shifted is the boundary of the state and the market, with regulation becoming more transnational in scope.

The WTO operates directly and indirectly as a liberalizing force, harnessing both external and internal pressure from public and private actors to open markets. The WTO’s dispute settlement system is tilted toward market liberalization in that it creates opportunities to challenge government measures as trade barriers, but not to challenge them for providing insufficient regulatory protection. Externally, countries, typically spurred by underlying business interests, challenge other countries’ regulations. The confluence of governmental and private interests — rarely identical but nonetheless complementary — gives rise to public-private partnerships to challenge them. This process started in the United States and European Union but has since diffused to the larger developing countries (Shaffer 2003; Shaffer et al 2008; Shaffer et al 2014). These external actors place pressure for regulatory change not only through formal WTO dispute settlement, but also informally in the shadow of the threat of bringing a WTO complaint. Most WTO complaints settle, and many others are settled without formally being brought.
States challenge other states’ domestic regulations, arguing that they discriminate, constitute quantitative restrictions, or are disproportionately more trade-restrictive than necessary. In light of WTO anti-discrimination norms, the Obama administration revised its signature American Recovery and Reinvestment Act during the height of the financial crisis, pursuant to which it had designed government procurement regulation to increase domestic employment by favoring domestic products over foreign ones. A U.S. claim before the WTO, combined with pressure through the WTO committee system, helped bring down India’s long-standing “license Raj,” a bureaucratic licensing system for the management of imports and exports affecting thousands of tariff lines, on the grounds that they constituted quantitative restrictions. Under the “necessity” test, WTO dispute settlement panels ask whether there is a less trade restrictive alternative available that meets the regulatory objective, potentially posing an additional force for deregulation. This principle, which first appeared in the GATT to limit regulatory defenses, has been codified as a positive obligation in the WTO Agreement on Technical Barriers to Trade (TBT Agreement).

The pressure to constrain domestic regulation in light of WTO rules also comes internally. States are not monolithic entities but consist of rival factions, some of which use WTO rules as leverage to advance their policy agendas. They can be viewed as ‘trusty buddies’ of the WTO, allied intermediaries between the global and the local. Trade agencies act as the overseers of not only foreign compliance with WTO rules, but also with domestic compliance so as to avoid WTO disputes, supporting market liberalization. The United States Trade Representative plays this role in the U.S. and the European Commission in Europe. After a state loses a WTO case, internal policymakers can harness the decision to advance their own policy initiatives, facilitating compliance. When India revised its “license Raj” for example, government officials promoted the regulatory change as part of India’s internal economic reform effort, even though they faced considerable pressure through the International Monetary Fund and WTO (Shaffer et al 2014).

The WTO as an institution can also affect the balance of power of different interest groups within nation states, both in relation to each other and in relation to government regulators. To start, the WTO provides leverage favoring export-oriented businesses over protectionist ones (Chorev 2007). More diffusely, liberalized trade enhances global product competition, which can also trigger domestic producer interests to demand a reduction of government regulation in order for them to be more competitive. In this way, some critique the WTO for potentially leading to a ‘race to the bottom’ in regulation and taxation of business. They fear that such pressures can be particularly strong regarding the regulation and taxation of production processes, such as the regulation of capital, labor, and the environment (Rodrik 1997). For example, because capital can invest elsewhere to develop technology and produce high value added goods, governments have been pressed to reduce taxes on production involving research and development, recently giving rise to a new tax reduction mechanism known as “patent boxes” (Graetz & Doud 2013).
WTO rules also constrain multilateral initiatives to bolster global regulation. Trade sanctions are a logical enforcement tool for multilateral regulatory requirements, such as for environmental protection. Concerns over WTO legal constraints, however, have somewhat limited their adoption, such as to enforce international environmental and labor agreements (Bartley 2007).

Countries with large markets might also use their market power to apply domestic regulation unilaterally to induce foreign countries to enhance their regulations. The U.S. periodically attempts to do so in order to create a level playing field so that foreign producers must meet the same regulatory standards that the U.S. imposes on U.S. producers. The WTO places limits on countries’ ability to do so. WTO jurisprudence has recursively evolved over time in light of state and civil society responses, and has been less restrictive and deferential than pre-1995 GATT panels. Rather than simply prohibiting unilateral action, the Appellate Body has imposed procedural disciplines, finding that state regulation implicating the use of certain production processes might be consistent with WTO rules provided the regulating state meets due process criteria, implicating our second dimension — the institutional architecture of regulatory governance.

Yet the conclusion that the WTO is only a force for deregulation is wrong. As has been shown by many scholars, we do not see a reduction in the size of the state, but rather the rise of regulatory capitalism around the world, involving a proliferation of government agencies, including relatively autonomous ones. In some cases, the WTO itself mandates the creation and expansion of new agencies, as most famously (or infamously) under the TRIPS Agreement. In other cases, the WTO indirectly gives rise to them, such as with the creation and expansion of new agencies for standard setting. The WTO agreements on Sanitary and Phytosanitary Measures (SPS Agreement) and TBT Agreement have helped to invigorate international product standard setting, engaging states that otherwise might impose no regulatory standard (Buthe 2009). To legitimize these bodies, developed countries fund technical assistance to facilitate greater developing country participation. With greater participation, more countries are likely to bring these standards home. Where before these matters were left to the market or other forms of social ordering, now the state expands its reach.

The WTO shapes the size of the state by many means. To start, although the WTO’s binding of tariffs, combined with its core non-discrimination norms, unleash greater product competition from imports, increased imports can concomitantly give rise to enhanced concerns over consumer and other protection in the importing state, and in particular in wealthy states. They have many regulatory means to address these concerns. The state may enhance its customs, quarantine, and other inspection services at the border, creating an expanded import regulatory apparatus. The state may concomitantly raise internal regulatory standards behind the border, which reduces the pressure from cheap, low quality competition. It may also create new requirements on the private sector importing foreign products, such as food products from China (Bamberger & Guzman 2010). Exporting states, in turn, are pressed to
enhance their own inspection standards so that their products are accepted in global markets. For example, India has tightened its inspection and certification standards and procedures in response to U.S. and E.U. rejections of Indian food products (Bollyky 2009).

Concerns over internal regulatory standards that affect imports gave rise to the TBT and SPS Agreements. Yet those agreements provide no regulatory floor, and they, in practice, legitimize more stringent regulation. WTO jurisprudence has clarified that a member is not limited by international standards if the member finds that the standard is insufficient to meet its regulatory objective, which it can broadly or narrowly define. WTO rules, as a result, can provide a shield against unilateral pressure challenging domestic regulation. Not surprisingly, a common complaint from developing countries is that their producers have difficulty exporting to developed country markets because of the demanding technical standards required (United Nations Industrial Development Organization 2007). Rather than challenge them before the WTO, and likely lose that challenge, they comply with them where they wish to sell in these markets.

As a result, the WTO can contribute to a ‘race to the top’ in domestic regulation on account of global markets. Given the cost of complying with multiple standards, domestic producers may comply with the standards of the most important trading partner which may in fact be quite high, which, in the WTO context, will likely be either a U.S. or an E.U. standard (known as the “California effect” or the "Brussels effect") (Vogel 1995; Bradford 2013; Greenhill et al. 2009). In this way, the WTO can contribute to expanding the effective geographic scope of U.S. and E.U. regulatory governance. E.U. chemical regulation and data privacy regulation, for example, affect business practices around the world (Shaffer 2000; Birnback 2008; Scott 2009). Similarly, toys in China tend to bear the CE (Communauté européenne) mark, signifying that they conform with the E.U.’s regulatory requirements, even when they are sold in the Chinese or other non-E.U. domestic markets (Snyder 2002). Trade liberalization institutionalized through the WTO facilitates these transnational legal ordering effects.

Wealthy countries concerned with the implications for their consumers of low-quality products imported from developing countries under low tariffs bound by the WTO agreements also provide technical assistance to these countries to enhance their local regulatory standards and institutions. In turn, regulators in developing countries borrow from the models provided by U.S. and European regulatory governance, both to avoid regulatory constraints in key export markets and to protect their own citizens, leading to the expansion of the state. For example, the E.U. faced internal pressure to control fish imports from the Great Lakes region of Africa where fishermen used cyanide and other poisons to catch the fish. Faced with an E.U. ban on imports, Kenya and neighboring African nations considered bringing a WTO case, but rather accepted E.U. technical assistance to regulatory officials and fishermen to control fishing and other practices affecting the consumer safety of the fish (Mosha & Magoma 2002). Similarly, the U.S. provides technical assistance to and cooperates
with Chinese regulators to inspect products in line with U.S. requirements, which couples with increased pressure within China to upgrade inspections for the Chinese market (Bollyky 2009).

The global competition protected and facilitated by the WTO’s liberalizing trading rules can also indirectly spur private regulation. The GATT/WTO system has spurred private regulation in some sectors in part because it encourages governments to offload extra-territorial regulatory tasks to private actors who are not covered by GATT/WTO rules. For example, Bartley (2007) shows how this dynamic worked regarding timber after the 1992 UN Conference on Environment and Development failed to adopt binding international rules, and Austria was pressed to remove its import ban in light of a potential GATT legal challenge. Austria then helped finance private certification systems, the International Tropical Timber Organization eventually endorsed them, and the E.U. passed new complementary legislation. Similarly, the export of cut flowers is of great importance to many developing countries. Activist groups in the United States and Europe, however, become concerned about the use of pesticides in the industry affecting worker health. They initiate campaigns against importers and sellers that in turn have placed pressure on producers in these countries to enhance production standards. The increase in such private regulation affects trade in a vast array of products, including cut flowers, timber, textiles, coffee, tea, fruits, and vegetables (Meidinger 2009; Wood & Johannson 2008; Bartley 2007).

This private regulation, in turn, often interacts with public regulation. For example, the EU created a Forest Law Enforcement Governance and Trade (FLEGT) initiative in 2003 which engages developing countries in Voluntary Partnership Agreements (VPAs) to create export licensing systems to control for illegally harvested timber, and the U.S. amended the Lacey Act in 2008 to criminalize the import of logs that violate export country laws (Overdevest & Zeitlin 2012). The E.U. has signed FLEGT VPAs with six African and Asian countries, is in negotiation with nine others as of February 2014, and has provided assistance to bolster these countries’ Legality Assurance Systems. These public law initiatives interact with private regulation in ways aimed to ensure WTO-compatibility. They show that private regulation acts not only as a substitute for public regulation, but also as a complement in dynamic relation with public regulation in the shadow of WTO law. Such public and private regulation would not occur if it were not for the trade facilitated by WTO rules, on the one hand, and the constraints WTO rules impose, on the other.

Finally, emerging economies have been pressed to justify trade restrictions before the WTO and have attempted to do so on environmental protection and other grounds permitted under WTO agreements. The need for justification has strengthened the position of domestic actors favoring environmental regulation and spurred them to enhance regulatory oversight. Brazil, for example, successfully argued that its ban on the import of retreaded tires from Europe was justified by the hazards of accumulated waste tires in landfills that collect water facilitating the
breeding of mosquitoes carrying malaria and dengue fever, and combust and emit toxic fumes (Santos 2012). It designed and implemented a comprehensive program to address the waste tires problem. Subsequent to the WTO case, Brazil went further and made the recycling of tires mandatory and provided for manufacturer liability. Similarly, China argued that its export restrictions on rare earth metals were justified because the mining of these materials severely harms the environment. The WTO case against China led to a government White Paper admitting that “[e]xcessive rare earth mining has resulted in landslides, clogged rivers, environmental pollution emergencies and even major accidents and disasters,” and prompted the government to initiate “a broad environmental cleanup” (Bradsher 2013). WTO processes contribute to these new regulatory dynamics by opening up possibilities for those who advocate for enhanced environmental regulation.

In sum, the WTO forms part of broader processes of transnational legal ordering that shapes the boundary between the market and the state. On the one hand, WTO tariff bindings and non-discrimination norms enlarge markets by catalyzing product competition across borders. On the other hand, WTO norms directly and indirectly spur new international and transnational standard-setting initiatives by international organizations, nation states, and private actors. As a result, WTO processes both expand markets and spur regulation to become more transnational in scope, in the process arguably expanding regulatory governance more than constraining it.

2. Shaping the Institutional Architecture of the State. The WTO legal order not only shapes the boundary between the market and state regulation; it also shapes the institutional architecture of the state (Halliday 2013; Shaffer 2013). In this way, it affects the relative authority of state institutions, such as the executive, legislature, agencies, and courts, as well as the federal government in relation to sub-state governments. Overall, the WTO constrains the role of legislatures to provide protectionism, catalyzes the creation and professionalization of bureaucratic agencies, and promotes the strengthening of judiciaries.

To start, the WTO, as do international institutions generally, tends to enhance the power of the federal government in federalist systems. The WTO creates a focal point for negotiation, monitoring, deliberation, and dispute settlement in which sub-state actors do not participate. In order to obtain and enforce reciprocal trade concessions from each other, states are pressed to concentrate expertise and cede authority toward the center. Within Europe, E.U. member states have granted sole authority on most trade matters to the European Commission because the Commission can speak in a single voice and, as a result, leverage E.U. market power and enhance the overall authority of E.U. member states in negotiations. E.U. member state officials at times refer to the Commission as the professor in light of its enhanced knowledge of trade negotiations, trade rules, and trade dispute settlement (Shaffer 2003).
WTO rules provide that national governments are responsible for any trade restrictions enacted by a sub-national jurisdiction. These rules further strengthen the authority of national governments in federal systems as well as that of the E.U. in relation to E.U. member states. In India, for example, Indian states unsuccessfully brought politically-charged cases before the Indian Supreme Court contesting whether the central government can make trade commitments on agriculture in which state governments have competence (Sinha 2007). Indian state governments similarly revised their internal tax systems under pressure from the central government in light of the India—Additional Duties case before the WTO. Yet as a result, sub-state actors often develop some WTO expertise, both to support exporters in relation to export markets and protect themselves from challenge to their own policies, such as by assessing alternatives in light of WTO rules, as Aseema Sinha (2007) shows in her work on India, and my own experience working with state officials in the United States.

At the federal level, the central executive’s role can at times be enhanced in relation to the legislature. Executive authority is generally augmented because the executive has a role in both the international and national domains, whereas the legislature has no seat at the WTO. The executive has privileged knowledge of the dynamics of WTO developments that puts it at an advantage in relation to legislators. While some legislators have attended WTO ministerial meetings in sideline events organized under the auspices of the Inter-Parliamentarian Union, they depend on national executive officials to obtain information in order to say anything substantively meaningful (Shaffer 2004). Because the executive is present in both international and national lawmaking forums, it can enhance its leverage in relation to the legislature by playing what Putnam (1988) calls a two-level game.

Most directly, WTO rules cabin the way governments may legally provide economic protection. The WTO creates binding obligations not to increase tariffs above bound rates, and not to use quotas and other quantitative restrictions. It further provides that economic protection may be provided (beyond bound tariffs) exclusively through three mechanisms — antidumping, countervailing duties, and safeguard regulations. These rules affect not only national law, but spur the creation of entirely new national institutions and new professional specializations, which enhances the role of executive agencies, courts, lawyers, and accountants.

When WTO dispute settlement panels find violations of WTO rules, they often determine that only administrative practices, and not the legislation itself, violates WTO rules. They appear to do so because compliance is easier if regulators interpret their legislative mandates in ways consistent with WTO rules, than if the executive must request a change in national legislation. In this way, WTO dispute settlement bodies channel rule making back to executive and regulatory bodies in order to avoid legislatures.

Most directly for regulatory governance, WTO law induces the creation and expansion of domestic regulatory agencies. Emerging economies have created and expanded executive agencies for granting protection from imports when
implementing antidumping, countervailing duty, and safeguard laws (Wu 2012). The TRIPS Agreement has given rise to new intellectual property agencies around the world, often housed in new state-of-the-art buildings that may be financed in part by new and enhanced filing fees (Drahos 2010). WTO law also indirectly empowers standard-setting agencies through promoting the adoption of national standards based on international ones, especially in countries that previously were unengaged in standard setting. For example, Brazil expanded its standard-setting organization INMETRO (the Instituto Nacional de Metrologia, Normalização e Qualidade Industrial) which is within the Ministry of Development (Shaffer et al 2008). We could benefit from more empirical work regarding the relation of the WTO and enhanced international standard setting to domestic institutions in more countries.

Complementarily, the WTO affects the relative role of courts and tribunals in national legal systems. Formalist legal scholarship has addressed the lack of direct effect of WTO law before domestic courts in the U.S. and Europe, so that private parties do not have standing to enforce it. WTO rules nonetheless have significant effects in multiple ways on the authority and scope of activity of national courts. Multiple WTO agreements require mechanisms of judicial review, in particular for customs, import relief, and intellectual property law. This form of administrative governance can be viewed as a U.S. export, facilitated through the WTO.

Import relief has become a particularly bureaucratized and legalized form of import protection that now must be subject to judicial review. Under antidumping and countervailing duty law, national courts or administrative tribunals are to review executive agency decisions. The agency may retain considerable authority, but judicial authority can be enhanced as a complement. Given the nature of the judicial process in many countries, the reality of judicial review is subject to significant variation not captured by formalist scholarship. The courts of India, for example, are quite active and reference WTO law (even though India is a dualist system in which international law should have no direct effect), while those of Argentina, Brazil, and China are so far unengaged (even though they formally are monist jurisdictions in which WTO law should have direct effect) (Yilmaz 2013).

Arguably the most significant example of the WTO’s empowering national courts is in the realm of intellectual property rights. Articles 41 and 52 of the TRIPS Agreement expressly call for national courts to hear complaints brought by private parties regarding intellectual property protection, and they have done so. Major litigation over intellectual property rights is taking place in India and South Africa in the shadow of the TRIPS Agreement (Helfer 2014; Klug 2013). Russia created a new intellectual property court in 2013 following its joining the WTO and the amendment of its civil code to comply with the TRIPS Agreement (BNA WTO Trade Reporter 2013). In China, “[d]omestic litigation has surged, with most cases involving Chinese litigants suing other Chinese firms. Between 2003 and 2010, intellectual property lawsuits in China rose from 9,000 to 42,092” (Reynolds & Sell 2012).

Similarly, regarding the services sector, GATS Article VI.2 provides that where a member makes a sectoral commitment, it shall maintain judicial, arbitral or
administrative tribunals to review and provide remedies for administrative decisions upon a service provider's request. We need more empirical work on changes in national governance in services sectors that is linked to the WTO agreements (cf. Badran 2013 on Egypt). The WTO agreements nonetheless provide potential leverage for the enhancement of judicial authority in this area of growing economic importance as well.

The WTO also indirectly spurs litigation over regulation that affects social concerns. As governments reduce tariffs and correspondingly increase regulations that implicate foreign trade, the regulations become subject to litigation, engaging courts. The environmental group Earth Island Institute, for example, has consistently brought litigation before U.S. courts to force the U.S. government’s hand to restrict imports on environmental grounds, giving rise to such famous GATT and WTO cases as those regarding the import of tuna caught with methods that kill dolphin and the import of shrimp caught by means that kill endangered sea turtles. As other governments enhance environmental and consumer protection in response to market liberalization, it will be interesting to study if such litigation increases elsewhere (Kelemen 2011).

The increased role of judiciaries is apparent in many developing countries. Activist groups have brought constitutional law claims to protect the right to health in relation to the enforcement of intellectual property rights, pressuring their governments to grant compulsory licenses or otherwise use their leverage to induce pharmaceutical companies to lower their prices. Multinational companies, in turn, have challenged government actions before national courts in high profile cases, such as those brought by Novartis in India resulting in a Supreme Court decision against it in 2013. We have identified 110 cases involving 30 countries invoking a right of access to medicines, with a success rate of 78 percent.3

Developing country governments have also initiated competition law cases before new national competition law agencies to reduce pharmaceutical prices. These actions have spurred new court litigation that directly or indirectly implicate activist groups’ causes (Klug 2013 on South Africa; Sanchez 2013 on Brazil). In each case, it is civil society reactions to the implementation of WTO requirements that have brought these issues to the fore for national courts to address, activating judiciaries. These processes complement what Dubash and Morgan (2012) generally find regarding the role of judiciaries in the development of the regulatory state in the Global South.

It would nonetheless be a mistake to contend that the WTO uniformly diminishes the legislature’s role in favor of executives, bureaucracies, and courts. Legislatures at times become quite engaged in debates regarding choices over the implementation of WTO agreements, such as the TRIPS Agreement. Legislatures can

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3 Only two of these case involved high-income countries, the U.S. and U.K. respectively. To derive this number, I updated a database from a previous study referenced by Lawrence Helfer (2014) who notes, “a 2006 study identified seventy-one cases from twelve countries invoking a right of access to medicines, with a success rate of 83 percent.”
also become catalyzed by social concerns implicated by markets to enhance regulation in new and different ways, such as for environmental and consumer protection. In India, for example, the legislature became active in deliberations over a new patent law during the transition period for India’s implementation of the TRIPS Agreement (Chaudhuri, Park & Gopakumar 2010). In Korea, the legislature passed multiple regulations affecting the import of U.S. beef, both to protect Korean farmers and over concerns about safety. In 2008 the Korean Prime Minister and other cabinet ministers offered to resign in response to mass protests that eventually triggered the renegotiation of provisions of the U.S.-Korea free trade agreement. Developmental states traditionally with strong executives have often seen power shift to legislatures.

3. Catalyzing New Professions that Promote Institutional Change. One cannot fully understand the impact of the WTO legal order without assessing the role of professionals. Professionals, in pursuing their own careers, help to promote legal change within countries. WTO law advances the role of technocrats within national administrations, including those engaged in standard setting, the review of patents, and the criteria for providing protection based on antidumping, countervailing duty, and safeguards law. WTO law, in parallel, enhances the role of lawyers in these domains. These lawyers work within and outside of national administrations. When outside, they work with officials as consultants and against them for private clients. They most frequently work for private parties against other private parties before administrative bodies and courts.

Intellectual property law, notably, has increasingly and lucratively beckoned new career pursuits in countries around the world. Lawyers represent both sides in the legal struggles, and in the process reciprocally advance the demand for each other’s expertise, whether they represent multinational pharmaceutical companies or generic ones, copyright enforcers or alleged infringers. Law schools respond to the new demand by offering new courses. The law professors supplement their income in providing consulting advice and practicing on the side. They inculcate intellectual property protection norms among their students. Their students work in law firms that grow in size and develop specialized intellectual property departments. There is increasing work to support them. As the World Intellectual Property Organization (2013) reports, “[f]rom 1997 to 2011, patent filings increased in Brazil, China and India by 106 percent, 3245 percent, and 605 percent respectively.” In China, the country “increased the number of IP courts, trained judges in IP, and introduced a university IP curriculum,” which together create new demand for intellectual property professionals (Reynolds & Sell 2012, 6). Patent filings exploded from 476,264 in 2005 to 1,109,228 in 2010, the vast majority of which were filed by Chinese. To handle the increased activity, China expanded its State Intellectual Property Office “from 2,700 patent examiners in 2007 to roughly 6,000 in 2011, with plans to increase it to 10,000 by 2015” (Reynolds & Sell 2012). Trademark and copyright applications similarly jumped.
Specialized lawyers likewise develop expertise in import relief law. Antidumping suits create demand for legal representation on both sides. Some lawyers specialize in defending respondents, some in representing claimants, and some act for both. They work with accountants to analyze price differentials and with economists to develop causal arguments regarding injury. Their activation places pressure on investigating authorities to develop legal and factual justifications of agency findings. Some individual investigating authorities see the potential gains to be made from leaving government service and develop their own private practice. Practitioners write books and brochures to attract clients. Expertise pits against expertise in developing the law that becomes ever more demanding, requiring further investment in expertise.

There are growing opportunities for such professional work. From 1994-2012, India initiated 668 antidumping investigations, Argentina 353 investigations, and Brazil 340 investigations (Bown 2012). Overall, developed country G20 members imposed antidumping measures that, between 1993-2009, affected around 1,200-2,000 product lines each year, reaching a peak in 2002. Developing country G20 members’ activity steadily rose from close to zero measures in 1994 to around 600 in 2000, 1,200 in 2004, and 1,600 in 2009 (Bown 2011, Fig. 4). By 2011, developing country G20 members imposed a greater share of these measures against imports from other emerging economies than from high-income economies, a trend that applies not only to imports from China but for imports generally from emerging economies (Bown 2013, 8). As developing countries have adopted, developed, and used these forms of import relief laws, the domestic profession has grown (Wu 2012). For trade liberals that wish to curtail import relief laws, it should now be more difficult to do so given how the professional stakes of private lawyers and administrative officials have developed.

Within bureaucracies of governments active in WTO matters, international trade work grew in status during the 2000s (Shaffer et al 2008 on Brazil; Shaffer et al 2014 on India). These government bureaucrats, in turn, work with private lawyers and representatives of the private sector for support in trade negotiations and litigation. Public-private partnerships develop in different ways, as states seek to empower themselves in trade relations through the diffusion of trade law expertise. Individuals seek trade law-related internships in government, the WTO, and other institutions. The number of individuals in each country is small, and U.S. and European private legal expertise remains dominant (Shaffer 2003), but nonetheless there have been significant changes in government’s interaction with private professionals in the larger developing countries, as documented regarding Brazil, India, and China (Shaffer & Meléndez-Ortiz 2010). Countries invest in WTO expertise as they gain experience with WTO dispute settlement, giving rise to economies of scale (Davis & Bermeo 2009). As individuals build their careers, trade law expertise circulates, in and out of governments, private practice, and the WTO itself. The interaction of these processes leads to the potential normalization of WTO law through practice.
4. Providing Normative Frames and Accountability Mechanisms that Shape National Administration. We have addressed the institutional implications of WTO rules above, but these institutional implications (such as that regarding the boundary between the market and the state) are also shaped by normative frames defined through WTO processes. In the case of the WTO legal order, the frame can reflect a market ideology (that of market liberalism and liberalized trade), which can exercise a form of symbolic power in shaping discourse, understandings, and conceptualizations of problems and their solutions (Eagleton-Pierce 2013; Lang 2011). That ideology, for example, is reflected in most WTO casebooks, which typically start with social welfare analysis of the benefits of liberalized trade, followed by public choice analysis regarding why trade agreements are necessary because protectionist business interests are better organized than consumers before national bodies. That ideology shapes the frame through which national regulation is then assessed. Participants in WTO processes contest and defend regulation as either illegitimate trade barriers or legitimate policy, such that the regulation’s legitimacy must be justified under the trade rules, including as permitted “exceptions.”

The frames, however, are not simply given. They are rather shaped over time through recursive rounds of engagement among actors with differing epistemologies and interests at different levels of governance. In practice, the positions taken by state representatives in the WTO are often more of a mercantilist nature, as they defend both their export and their import-competing business interests. This provides an opening for contestation and argumentation in which officials must simultaneously look at their own practices when challenging others’. Government representatives before the WTO’s network of councils and committees engage in sustained deliberation, and, in this way, are subject to persuasion and learning.

A central struggle in WTO negotiations and WTO litigation, as recursivity theory would predict, are struggles over determinacies of meaning, such as the definition, categorization, and interpretation of WTO legal norms, including those regarding discrimination, risk assessment, proportionality, and legitimate policy exceptions. The understanding of these norms has distributive implications, and reflects results of argumentation and contests between those with competing ideas and interests. The WTO’s central norm is non-discrimination and a central aim of its promoters is to instill this norm within national regulatory cultures. The non-discrimination norm, however, can be defined in different ways. For example, activists against genetically modified foods contend that it is not discriminatory if a ban applies equally to foreign and domestically produced products. Those challenging the regulation contend that one should compare foreign genetically modified products with domestic non-modified ones given their otherwise common physical characteristics and end uses, especially when the foreign products are mostly modified and the domestic ones are not. The non-discrimination norm is defined through these debates and clashes, including through WTO jurisprudence.
The non-discrimination norm is complemented by others, such as the norm of science-based risk assessment for sanitary and phytosanitary regulations. The SPS Agreement requires that all sanitary and phytosanitary regulations must be based on a scientific risk assessment. Although this requirement appears on its face to be purely procedural, in practice it permits not only WTO dispute settlement panelists, but also technocrats in national jurisdictions to interrogate the legitimacy of a proposed regulatory measure in light of its scientific basis. Whether or not the requirement should be viewed as purely procedural, it has had major implications for national risk regulation. The OECD, Codex, and other standard setting organizations have created procedural guidance for the conduct of risk assessments. These risk assessment norms, backed by SPS rules and the WTO dispute settlement system, have been imported into national regulatory systems. They induce state regulators to engage in justification of their measures, including to affected foreign traders. Joanne Scott and others have assessed the impacts on EU risk assessment procedures (Scott 2003; Pollack & Shaffer 2009). Joseph Conti (2014) examines the shadow effects in national efforts to address new technologies such as nanotechnology, which he contends exemplifies how the WTO exercises symbolic power, the power to define what constitutes appropriate regulatory practice.

WTO agreements and jurisprudence also provide that national regulation should apply the least trade restrictive alternative available to attain a particular regulatory objective. This principle complements a type of proportionality principle in which a WTO dispute settlement panel balances the importance of the regulatory aim, the means used to achieve it, and the adverse impacts on trade. This area of WTO law is relatively dynamic, demonstrating how the meaning of WTO norms evolves through practice, including through member state and civil society reactions to WTO jurisprudence. The Appellate Body has become more deferential over time to states’ imposing non-discriminatory restrictions provided they advance a persuasive policy rational. National measures are nonetheless subject to institutionalized peer-review before WTO committees and contested before national bodies which can exercise normative discipline, as well as give rise to processes of justification, learning, and persuasion (Lang & Scott 2009).

The most routine part of WTO governance is not dispute settlement, but reporting and peer review systems involving each of the WTO’s substantive agreements. These systems represent new types of accountability mechanisms that are transnational in scope. WTO members must report their compliance with different WTO commitments before a web of over seventy WTO councils, committees, working parties, and other groupings that involve over a thousand meetings (and, according to one estimate, over five thousand meetings) each year (Hoekman 2011, 330). These committees can operate as arenas of deliberation and socialization.

The WTO further subjects governments to periodic cross-cutting reviews under the Trade Policy Review Mechanism (TPRM) organized by the WTO secretariat. The secretariat and the country under review each prepare a general paper on developments in that country’s national regulation since its last TPRM assessment.
Other WTO members pepper the member with questions to which the member must respond. The secretariat then compiles a report on the assessment that documents the issues.

Although smaller developing countries do not attend most of these meetings, which gives rise to significant asymmetries in participation for the creation and development of legal norms, large and wealthy countries do, as well as representatives of different groupings of countries for certain meetings. These peer review processes are designed to hold governments accountable, and they do so within a particular transnational normative framework — that of the WTO agreements as they have been, and are being, interpreted. National officials attend these Council, committee, working party, and TPRM meetings. They challenge each other’s regulatory practices and they defend their own in iterative processes.

Over time, TLO theory points to complex dynamics in which the understanding of WTO norms can settle and unsettle, exercising shadow effects, whether in the resolution of disputes, or more pervasively in the domestic understanding of legitimate policy. WTO members create inter-agency processes to develop positions before the WTO and, more broadly, address the implications of regulatory proposals that fall within the jurisdiction of multiple agencies. Industrial, financial, and other interests make claims to different ministries where regulatory proposals implicate them and they can point to WTO rules as leverage. Through these inter-agency processes, knowledge of WTO law is diffused across government. For example, a subset of WTO members subsidized the creation of an Advisory Centre on WTO Law (ACWL) to assist developing countries in participating in the WTO dispute settlement system, thereby leveling the playing field and contributing to the WTO’s legitimation. In practice, it turns out that about one-third of the ACWL’s work is responses to requests from developing countries to review their own domestic regulatory proposals regarding compliance with WTO requirements (Shaffer 2011). They internalize WTO constraints.

National officials who participate in WTO meetings go home, whether in their government capacity, or if they leave the government then in a private sector capacity. They provide input regarding new regulatory proposals and the interpretation of existing national regulations. WTO legal norms, in this way, become transnationalized. They enter national regulatory systems conveyed through the intermediary of national officials and private sector experts who interact with them. The norms circulate, they build on each other, and their meaning settles and unsettles in light of ongoing contestation. The impact of the WTO normative frame is not seamless. The norms are resisted, debated, translated, hybridized, and transformed within national contexts. But the regulatory debates are informed, sometimes directly, but often diffusely, by WTO legal norms within a transnational, trade liberal, anti-protectionist normative frame.

V. Conclusion
The most common way of addressing how international law implicates national regulatory governance is through the lens of national compliance. But such studies only touch the surface of the implications of international law. This article invites researchers to push deeper by viewing the WTO as part of a broader process of transnational legal ordering. While addressing only WTO law, its analytic frame can be applied to other subject areas, from health law to bankruptcy law, women’s rights law to environmental law. The article assesses four dimensions of regulatory change catalyzed by the WTO with which legal compliance is synergistically linked. It shows how nation states are reshaped in the process of their engagement with WTO law, demonstrating how professions, normative frames, and domestic institutions are central to these processes. While the area of international trade law is special because of the nature of reciprocity, those same dimensions of change can be applied to the study of other subject areas.

Nation states are not passive recipients of WTO norms and influence, or any other area of international law. It is a central premise of TLO theory, often missing from regulatory governance theory, that transnational governance is a negotiated order in which states and sub-national and local actors not only adapt to WTO norms but shape them (Halliday & Shaffer 2014). States promote, appropriate, resist, hybridize, and transform WTO norms that recursively feed back into WTO decision-making. Since many of the rules have come from the legal systems of the U.S. and Europe — such as intellectual property, import relief, and administrative procedure rules that include judicial review — it is easier for these countries to adopt them because any required changes are more likely marginal. Countries with strong legal professions and pluralist domestic political orders, it can be hypothesized, are generally more subject to processes of diffusion of these legal norms, as professions and private parties adapt to them in domestic contexts.

Poor developing countries are the least engaged in WTO processes because they trade less and are unlikely to have robust administrative states in the first place, giving rise to what Phillips (2006) calls “regulation without a regulatory state,” with government departments beset by low regulatory capacity, capture, and corruption. As countries develop and trade more, however, it can be hypothesized that enhanced regulatory governance will ensue, implicated by WTO law in the ways we have examined. The results will vary in light of institutional path dependencies and state-society relations, but they will be shaped by the collision of traditional national and local governance with transnational processes of which the WTO is emblematic.

The assessment of differentiation and hybridization of regulatory governance in nation states, as well as their recursive impact on the understanding of WTO legal norms, is not this article’s focus. Rather, before addressing how different nation-state institutions respond to WTO law norms, it is helpful to assess the different dimensions of regulatory change at stake. This article presents a way of doing so, highlighting the broad implications of WTO law for national regulatory governance, giving examples of what we know to date, and providing a framework for further study. In doing so, it shows how the WTO can be viewed as part of a process of
transnational legal ordering that penetrates national legal orders along the dimensions discussed.

References:


