How the WTO Shapes the Regulatory State

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I. Introduction

Regulatory governance within nation states is transnationally shaped in different ways. By regulatory governance, I refer broadly to national governance characterized by a “rule-based, technocratic and juridical approach to economic governance” 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 chapter provides a new analytic framework regarding the domestic regulatory implications of the WTO, and assesses those implications in light of what we know to date.

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 154 adopted panel reports and 92 adopted Appellate Body reports as of July 2014.²

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. The WTO is an institution that 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.

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² Data from Worldtradelaw.net (as of July 14, 2014). As of July 14, 2014, there were 154 adopted standard panel reports, 27 Article 21.5 panel compliance reports, 92 standard Appellate Body compliance reports, and 18 Appellate Body article 21.5 compliance reports.
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 (Barak-Erez & Perez, 2013; Howse & Teitel, 2010; Shaffer, 2013a). This chapter provides a framework for assessing the WTO’s broader implications in terms of four dimensions of regulatory change within nation states, building on and applying a general framework on transnational legal ordering (Shaffer, 2013a). After first discussing theories of transnational governance, the chapter assesses seven types of formal legal changes required by WTO law. These requirements affect how the state raises revenue, how the state spends it, and the principles the state applies to regulation. The chapter then presses deeper and assesses four broader dimensions of regulatory change catalyzed by WTO rules: (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 (including the role of lawyers); and (iv) changes in normative frames and accountability mechanisms for overseeing national regulation (which are trade liberal and transnational in scope). In practice, these four dimensions of change interact and build on each other.

It is a demanding question to ask how the WTO affects domestic regulation and domestic regulatory institutions because of the scope of WTO law (covering the regulation of trade in goods, services, intellectual property protection, and investment), the number and diversity of countries and administrative systems covered (one hundred and sixty WTO members). Yet although the WTO’s effects may not be easy to measure quantitatively, they are important to study — indeed they are more important than the few studies we have of compliance with WTO dispute settlement decisions. The WTO legal order has profound implications for legal and institutional choices within the nation state, and it is critical to understand and assess its effect on national regulatory governance. Normatively, these effects can be viewed positively or negatively or both. But before assessing them normatively, one must first assess what they are.

II. Liberalization and Regulatory Governance in Transnational Context

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). The development of regulatory governance refers to nation states’ increasing use of technocratic governance based on regulatory and judicial institutions and professional expertise that aim to shape market behavior.

There has been a sectoral shift toward market liberalization and away from state control of economies since the Berlin Wall’s fall, the collapse of the Soviet Union, and the turn toward trade and markets in East Asia and elsewhere, including when
state enterprises participate as market actors, as in China (Shambaugh, 2013). Concomitantly, new independent regulatory agencies have arisen around the world, reflecting the diffusion of regulatory institutional forms across jurisdictions (Jordana, Levi-Faur & Marin, 2011). These dual shifts have given rise to what John Braithwaite and David Levi-Faur call regulatory capitalism (Braithwaite, 2008; Jordana, Levi-Faur & Marin, 2011; 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 (Vogel, 1996). 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 (its institutions and substantive and procedural rules); its legitimation dimension (through democracy and other accountability mechanisms); and its welfare dimension (through market-making, market-braking, and market-correcting regulation) (Leibfried & Zurn, 2005).

Social theorists have addressed these transnational processes in functionalist, culturalist and power-based terms that vary in terms of their predictions of convergence. One set of theories stresses the frequent disjuncture or decoupling between formal legal change and actual legal practice and behavior. World polity theory, for example, addresses how states adopt global norms that are often diffused through international organizations (such as the WTO) and predicts frequent decoupling between the global norms and local practice because of the gap between global and local cultural norms (Meyer et al., 1997).

Similarly, legal transplant theory focuses on how the norms of dominant states diffuse transnationally, although it varies in its assessment of the norm’s impact on the law in action (Nelken, 2001). Although legal transplant theory tends to focus on the horizontal dimension of borrowing and not on international organizations, in many cases an international organization may adopt norms that initially come from powerful states, what Santos (2003) has called “globalized localisms.” In the WTO context, for example, the norms within the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) derive from, and were promoted by, the United States (U.S.) and Europe Union (EU) (Braithwaite & Drahos, 2000).

In contrast, other theories predict greater convergences of practices because of increased social connectedness and the need to address common challenges that are transnational in their functional scope. Theory that is cultural-oriented focuses on the rise of transnational connectedness in explaining concordant changes in national law that give rise to what can be called transnational law (Cotterrell, 2012). Network theory focuses on the connectedness of experts in particular domains that operate under particular epistemic logics (Djelic & Quack, 2012). These theories have both functionalist and constructivist aspects. From a functionalist perspective, global economic interdependence creates incentives for states to coordinate and cooperate to address common challenges. Functionalists view the WTO as addressing a
prisoners dilemma and the management of externalities; the institution helps nation states to mutually comply with their WTO commitments knowing that if they do not there will be tit-for-tat retaliation and they all will be worse off. From a constructivist perspective, actors conceive of problems in similar fashions through their interaction, whether in policy networks, such as those engaged on WTO-related matters, or more broadly. To the extent that actors from around the world participate in these WTO processes over time, they become socialized to see issues within particular policy frames. There is more than one way to conceive of a problem and its resolution, but institutions such as the WTO create a common frame and forum for interaction that permits for convergence in how problems and their resolutions are viewed.

A third group of theories takes a middle ground which addresses both the multiple mechanisms that can lead to convergences in practice, such as coercion, competition, reciprocity, emulation, and persuasion, and the dynamic and recursive processes that can lead to settlement and unsettlement of the meaning of legal norms, including through their formal revision and reinterpretation at the international level (Halliday & Carruthers, 2009; Shaffer, 2013a; Halliday & Shaffer, 2015). These latter approaches address 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 (Halliday & Carruthers, 2009; Shaffer, 2013a). When one finds normative concordance 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, 2015).

States participate in their own transformations in agreeing to the creation of international institutions, and state and civil society responses to international requirements dynamically feed back into the revision of those requirements, including through the reinterpretation of their meaning (Shaffer, 2013; Halliday & Shaffer, 2015). Public and private actors attempt to promote, change, and resist these institutions, their requirements, and their implications for regulatory governance. States accordingly vary in applying, adapting, and ignoring international legal norms, including on account of differences in regulatory capacity, state-society relations, and institutional path dependencies. The chapter’s conclusion briefly addresses the issue of variation in the application of WTO legal norms in light of nation state differences, with particular attention to developing countries.

III. WTO Requirements for National Law

The WTO entered into effect on January 1, 1995 but was the successor to the earlier 1948 General Agreement on Tariffs and Trade (GATT) so that many of the WTO’s institutional foundations preceded its formal creation. The WTO’s institutional framework covers 160 nations that account for 97 percent of world trade as of July 10, 2014. The organization oversees eighteen multilateral agreements and numerous
“understandings” and “protocols” which together comprise around 22,000 pages of text, including schedules. These agreements, 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. Dissatisfied complainants can then initiate an arbitral process to determine if compliance has occurred, and if not, an enforcement procedure which authorizes them to withdraw an equivalent amount of trade concessions against the respondent. Studies show high levels of compliance with adopted WTO dispute settlement decisions, some of which have systemic regulatory implications. These decisions represent a form of “judicial liberalization” as states delegate authority to define the meaning of the legal norms governing liberalization and protectionism to the WTO Appellate Body and dispute settlement panels (Goldstein & Steinberg, 2009; Bown, 2004).

These WTO agreements, backed by interpretation and enforcement through the WTO dispute settlement system, require scores of changes in national law and legal practice. At its core, the WTO requires the reduction of tariffs, sometimes to zero, prohibits quotas and other quantitative restrictions, and prohibits regulatory discrimination. The WTO likewise promotes harmonization of standard setting, cabins how import protection is provided, and requires publicity, transparency, and due process in administrative procedure. As a result, WTO agreements shape how governments raise revenue, how they spend it, and the principles for how they regulate, affecting national tax systems, industrial and development policy, regulatory law, standard setting, import relief, and administrative procedure.

1. Lowering Tariffs and thus Changing Sources of Government Revenue: Effects on the Broader Tax System. Traditionally, the central role of the WTO and its GATT predecessor is to provide a forum for the reciprocal negotiation of reduced tariffs within an institutional context that stresses the normative benefits of freer trade for national economic welfare. The reduction of tariffs — or trade taxes — has broad implications for national tax systems — a core aspect of national sovereignty — because governments must seek other revenue to meet constituent demands (Christians, 2010). Governments replace trade taxes with other taxes, such as personal income taxes, corporate taxes, and consumption taxes. For example, in 1880, around 90 percent of U.S. federal government revenue came from a combination of customs duties (56 percent) and excise taxes (34 percent) (Mehrotra, 2005). In 1934, when the U.S. began to negotiate a series of bilateral trade agreements that are the predecessors of the GATT, U.S. customs duties and excise taxes still made up 45.8 percent of the federal budget. That figure plummeted to a mere 3 percent by 2012 (Office of Management and Budget, 2013), as the size of the government increased and tariff rates plummeted through eight GATT rounds of reciprocal tariff cuts.

More recently, as developing countries have reduced trade taxes, they have likewise shifted to new forms of tax revenue and tax collection, such as value added taxes (Christians, 2010; Stewart, 2003). These shifts in developing country tax law give rise to new tax-collecting institutions since government revenue is no longer collected primarily by customs officials. They also result in new reporting obligations for individuals and businesses in light of the rise in importance of income and value added taxes. These changes create a demand for new expertise to comply with and avoid these new taxes, involving tax accountants, consultants, and lawyers, and new courses taught in universities. These shifts have sometimes triggered riots in cases where governments have imposed sales taxes on basic necessities such as foodstuffs and means for livelihood such as petrol, potentially leading to the overthrow of governments (Christians, 2005). More broadly, when tariff and other trade barriers are low, so that companies have more choice where to produce goods and source income, concerns have risen over harmful tax competition that affect the general funding of the state and its social welfare programs. WTO-induced trade liberalization is certainly not the sole cause of these changes in tax systems that go to the core of nation-state sovereignty, but it is part of the transnational context that helps to explain them, one which is not addressed in traditional WTO scholarship.

WTO rules implicating tax are backed by the WTO’s dispute settlement system, and the WTO is the only international organization that offers the ability for a country to bring a legal claim against another country’s tax policies, including on the grounds of discrimination or subsidization (covered below), whatever the policy reasons for them. About one in ten WTO complaints have challenged national tax policies and practices (Farrell 2013), including those of the United States, Canada, Mexico, the European Union, France, Belgium, Netherlands, Ireland, Greece, China, India, Japan, Korea, Philippines, Thailand, Brazil, Chile, Colombia, Peru, and Uruguay, among others.

2. Legal Constraints on Subsidies: Limiting Industrial Policy and the Developmental State. The WTO places limits not only on how national governments raise revenue, but also on how they spend it. In particular, the WTO places limits on government intervention in the economy through subsidies that affect trade by creating advantages for domestic producers. In this way, the WTO limits the extent to which the state can provide subsidies for innovation policy, environmental policy, regional development policy, and, more generally, industrial policy. It can thus affect developing countries’ development strategies, including the role of government in what has been called the new developmental state (Trubek et al., 2013).

The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) generally prohibits all export subsidies and subsidies contingent on the use of domestic products. It also prohibits the provision of subsidies targeted at specific industries to the extent they have adverse trade effects. Where the law does not expressly reference the industry but a single industry receives the bulk of the subsidy, such subsidy may constitute a de facto violation. For example, in Brazil—
Financing Programme for Aircraft (1999), the Appellate Body found that Brazil engaged in a de facto violation when it subsidized its aircraft manufacturer Embraer, a symbol of its efforts to become a global economic power. National subsidies in a number of different economic sectors, including aeronautics, automobiles, auto parts, shipbuilding, renewable energy, and agricultural and textile products, have been found to violate the SCM Agreement.

Tax breaks to promote the development of particular economic sectors, such as tax holidays, preferential rates, and tax deferrals, also fall within WTO anti-subsidy rules. These rules prohibit all such measures that promote exports, whether explicitly or implicitly. Most famously, in Appellate Body Report, United States—Tax Treatment for “Foreign Sales Corporations” (2002), the EU successfully challenged U.S. tax laws creating tax discounts through the use of “foreign sales corporations.” The WTO authorized the EU to withdraw trade concessions worth four billion per year on U.S. exports, and the EU created a broad list of potential targets (Brightbill, 2004). Such a ruling creates leverage, and the U.S. Congress twice changed provisions of corporate tax law, the first time resulting in a renewed EU challenge that gave rise to a WTO arbitral panel finding that the U.S. had yet to comply with the ruling, triggering a further amendment.

The demand for tax and other subsidies remains, and special interests seeking them hire lawyers to draft legislation that will more easily survive WTO scrutiny. These efforts give rise to highly complex and obscure income tax code sections and regulatory interpretations of these sections. As a result, the use of tax subsidies by sophisticated actors becomes more difficult to detect, both by foreign governments and concerned domestic constituencies. In other words, when governments persist in subsidizing industries, WTO rules can shift subsidy practices underground. Special interests work to obtain non-transparent tax rules and interpretations affecting their tax returns that are concealed from the larger public, especially since tax returns are confidential (Fleming & Peroni, 2008).

Although WTO rules do not prohibit all subsidies, such as those that are not specific to particular industries and those that do not cause serious prejudice to other WTO members, they constrain a government’s legal options where targeted subsidies are used for industrial and other developmental policy goals. WTO jurisprudence, however, is dynamic and could increase government policy space in certain areas. In 2013 in the Canada-FIT case, the Appellate Body held that Ontario’s measures to encourage renewable energy production did not constitute a subsidy because they facilitated the creation of a market (that of renewable energy) as opposed to providing benefits to particular enterprises in an existing market. By narrowing the scope of what constitutes a subsidy, the Appellate Body appeared to open greater policy space for market-building measures—designed, in this case, to promote social policy goals where existing markets failed to account for negative production externalities.
3. Instilling the Norm of Non-Discrimination. Throughout the WTO agreements, countries are prohibited from adopting regulatory standards that directly or indirectly discriminate among like or competitive domestic and foreign products. They are prohibited from doing so through taxes and through regulation. The definition of a like or competitive product is often broad. Countries around the world, including Japan, Korea, Chile, Philippines, and India, have changed their tax systems on alcohol that had taxed domestically-produced alcohol such as sochu, soju, and pisco at significantly reduced rates, and others have foregone regulatory changes (McGrady, 2013). Similarly, states have changed their regulations where they imposed higher regulatory standards on foreign products than on domestic ones. For example, following United States--Standards for Reformulated and Conventional Gasoline (1996), the U.S. changed its oil refining requirements for foreign gasoline so that foreign producers would have the same choice between two standards as U.S. domestic refiners. The U.S. argued that it offered only one standard to foreign producers because the second one was more difficult and costly to oversee from a regulatory compliance perspective when the refining was done abroad. But its argument failed and the result was increased market competition.

4. Beyond Discrimination: Proportionality and the Least Trade-Restrictive Alternative Principle. WTO agreements and jurisprudence 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 may balance the importance of the regulatory aim, the means used to achieve it, and the adverse impacts on trade. Within the GATT, this principle is required for a country to defend its regulations on public policy grounds that otherwise would violate GATT norms, such as its anti-discrimination norms. Korea, for example, created a retailing system for beef products where stores could not simultaneously sell both domestic and foreign-produced beef. Korea claimed that it did so to counter fraud in labeling and to facilitate ease regulatory surveillance, a legitimate public policy exception. The WTO Appellate Body, however, balanced the above three factors and held that a less trade restrictive alternative was available — that of labeling with enhanced regulatory inspections — even though it acknowledged that the alternative entailed higher regulatory enforcement costs (Korea--Measures Affecting Imports of Fresh, Chilled and Frozen Beef, 2000). Korea undid its regulation in favor of more market-friendly labeling.

Under other WTO agreements, in contrast, this obligation is a positive one. Most notably, Article 2.2, of the WTO Agreement on Technical Barriers to Trade (TBT Agreement) explicitly provides that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.” Similarly, as regards trade in services, the General Agreement on Trade in Services (GATS) Article VI.4(b) provides that where a country makes a positive commitment to liberalize a service sector, it must meet a series of
market access commitments. The WTO Council on Trade in Services is to develop disciplines to ensure that services regulation is “not more burdensome than necessary to ensure the quality of the service.” The key challenge is to assess how national administrative bodies apply these provisions in practice.

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. In practice, the Appellate Body has become more deferential over time to non-discriminatory restrictions imposed by states provided they have a legitimate policy rational in support. For example, the WTO Appellate Body refrained in a series of cases from finding violations of the TBT Agreement requirement that measures should be no more “trade-restrictive than necessary” (Shaffer, 2013b), and it also deferred to member state defenses on social policy grounds in some controversial WTO cases involving the GATT exception clause (Article XX). Nonetheless, national measures are subject to institutionalized peer-review before WTO committees that oversee the agreements’ implementation, which can exercise normative discipline (Lang & Scott, 2009).

5. Harmonizing National Standards. WTO law, directly and indirectly, also presses for the harmonization of domestic regulatory standards through the incorporation of international ones. Most directly, it does so regarding intellectual property rights. Under the TRIPS Agreement, the WTO creates mandatory standards for patents, copyrights, trademarks, trade secrets, geographical indications, industrial designs, and layout designs for industrial circuits. Sometimes it does so directly through particular provisions, such as requiring the protection of patents for twenty years, covering all economic sectors equally, and thus including for many countries the pharmaceutical and agro-chemical sectors for the first time. Sometimes it does so indirectly by incorporating the provisions of other intellectual property treaties by reference, such as the Paris Convention for the Protection of Industrial Property; the Stockholm Act of this Convention of 1967; the Berne Convention for the Protection of Literary and Artistic Works; the Paris Act of this Convention of 1971; the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits.

The WTO, through its TBT and SPS Agreements, also indirectly promotes the adoption of harmonized standards created by other international standard-setting bodies, such as food standards by the Codex Alimentarius Convention, animal health standards by the World Organization for Animal Health (or OIE), and plant protection standards under the International Plant Protection Commission (IPPC) (Büthe, 2009).

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4 The TBT Agreement, in Article 6.3, and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), in Article 4(2), also encourage but do not require countries to enter into mutual recognition agreements pursuant to which they recognize each other’s regulatory standards where they are of equivalent effectiveness, as does the General Agreement on Trade in Services (GATS), in Article VII, regarding trade in services (Nicolaidis & Shaffer, 2005; Krajewski, 2003).
These agreements do so by providing a regulatory safe harbor from WTO challenge for those countries that adopt international standards (SPS Article 3.1; TBT Article 2.5), coupled by an obligation to base national standards on international ones unless the international standard is not sufficiently protective of a legitimate national objective (SPS Article 3.1; TBT Article 2.4). For example, in *European Communities--Trade Descriptions of Sardines – Mutually Accepted Solution on Implementation* (2002), Peru successfully brought a claim against an EU regulation on what could be sold and labeled as a sardine when the EU failed to apply a Codex standard. The EU complied by conforming its regulation to the Codex standard which had otherwise only constituted a non-binding “soft law” standard (Davis, 2006).

6. Harmonizing Import Protection: New Institutions and Regulatory Law for Antidumping, Countervailing Duties, and Safeguards. WTO law not only harmonizes national substantive and procedural standards that promote the liberalization of trade. It also harmonizes standards and institutional practices for the protection of domestic producers from injury from foreign imports, and thus cabins the way members may provide import protection. It sets forth three exclusive legal channels: anti-dumping law, countervailing duties, and safeguard relief. These WTO agreements affect not only national law, but spur the creation of entirely new national institutions and new professional specializations around the world.

Countries may provide for relief against product dumping and foreign subsidies as long as they comply with the substantive and procedural requirements set forth in the WTO Antidumping and SCM Agreements. These agreements contain detailed requirements concerning the proof that must be afforded of dumping or subsidization, on the one hand, and of injury to a domestic industry and causation, on the other. As of August 2013, adopted WTO rulings found at least one violation of the Antidumping Agreement in 38 of the 41 cases in which a decision was rendered, or 92.68 percent of the total.\(^5\) They likewise found at least one violation of the countervailing duty provisions of the SCM Agreement in 13 of the 16 cases in which a decision was rendered, or 81.25 percent of the total.\(^6\)

Under WTO safeguards law, a country can provide temporary safeguard relief subject to compliance with more stringent injury and causation requirements. As of August 2013, eight national safeguards had been challenged before the WTO, and WTO panels found that all eight violated the WTO Agreement on Safeguards.\(^7\)

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\(^5\) In one case, DS211, Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey (Complainant: Turkey), the panel found for the respondent on the substance and against Egypt only on the procedures. Counting this case as a victory for the respondent would change the calculation to 37 of 41 cases.

\(^6\) In one case, however, DS345, United States —Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (brought by India), the AB only found against the U.S. for failing to notify the SCM Committee, so this case could be viewed as a victory on the substance for the U.S. if this case is counted as a victory for the respondent, the total would change to 12 of 16 cases.

\(^7\) In total there were twenty complaints, but they involved only eight safeguard measures.
Regulations that do not comply with the requirements under these three agreements are subject to challenge before the WTO. For example, there has been debate over the possibility of imposing tariffs against a country whose currency is manipulated or otherwise significantly undervalued, but most scholars find such tariffs would likely violate current WTO rules. Countries have so far refrained from introducing them, constrained in part by WTO law.

7. Shaping the Administrative State’s Procedures. WTO law affects not only substantive regulation; it also aims to shape administrative procedures, in particular as regards reason-giving, publicity, transparency, and due process. GATT Article X sets forth crosscutting notification, publicity, and transparency requirements for all domestic regulation. A number of WTO members have had to modify their national procedures and practices to comply with this requirement, including the U.S., EU and China (Maruyama, 2003; Chen, 2012).

Other WTO agreements contain analogous procedural requirements. The TBT Agreement has detailed procedural rules for all national standard setting and in Article 5.4, requires WTO members to use international standards in the creation of conformity assessment procedures. The SPS Agreement has analogous transparency requirements for sanitary and phytosanitary regulations. Once it becomes effective, the WTO Agreement on Trade Facilitation, signed at the Bali Ministerial meeting in December 2013, expands these requirements by going into much greater detail regarding customs regulations and practices. Each of the TBT, SPS, and Trade Facilitation Agreements include requirements for government enquiry points that are to respond promptly to questions from foreign producers. The Trade Facilitation Agreement provides affected traders and other interested parties a right to receive notice of and comment on proposed rules, a right to obtain advance rulings on customs questions such as the tariff classification and origin of the good, and a right to administrative and/or judicial appeals.

The SPS Agreement includes the additional administrative procedure requirement that all sanitary and phytosanitary regulations must be based on a scientific risk assessment. Although this requirement on its face appears to be purely procedural, in practice it permits WTO dispute settlement panelists to interrogate the substantive scientific basis supporting a regulation. 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. Joanne Scott and others have noted the impacts on EU risk assessment procedures in particular (Scott, 2003; Pollack & Shaffer, 2009). Joseph Conti (2014) similarly 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.
The WTO Appellate Body increasingly has called on panels not to second-guess national administrations’ factual findings, but rather to review the processes and reasoning through which they make their decisions, analogous to a ‘hard look’ review in U.S. administrative law (Trachtman, 2014). In particular, panels are to review whether national bodies have fully investigated all issues required by the WTO treaty in question and have explained their findings clearly. In the case United States — Import Prohibition of Certain Shrimp and Shrimp Products (1998), the WTO Appellate Body held that a U.S. ban on shrimp imports from Asian countries could not be upheld under WTO law because the U.S. did not meet due process requirements and therefore adversely affected foreign imports. In particular, the U.S. had failed to explain the reasoning of its decision to the affected parties and to provide them with an opportunity for administrative or judicial review. The U.S. adapted its regulation accordingly, and scholars frequently cite this case as central to the creation of a “global administrative law” (Cassese, 2005; Steinberg, 2009).

IV. Four Dimensions of State Regulatory Change: The State-Market Boundary, Institutional Architecture, the Role of Professions, and Normative Frames

These formal legal changes potentially have much broader institutional implications if they permeate regulatory governance in nation states. We now turn to examine four dimensions of state regulatory change implicated by formal WTO law. The first two dimensions involve state institutional change: the boundary between the state and the market, and the relative power of different state institutions (the executive, legislature, judiciary, and administrative branch) in relation to each other. The third dimension — changes in professional expertise — turns from public institutions to individuals who invest in developing their careers in relation to legal change, whether within or outside of state institutions. In doing so, they help to normalize the meaning of law in everyday legal and administrative practice. The fourth dimension — normative frames embedded in WTO accountability mechanisms — complements formal legal change by creating a normative and institutional scheme for assessing domestic policy initiatives in light of WTO legal requirements. These normative frames are embedded in WTO institutional processes that involve ongoing peer review among national government officials. Over time, these accountability mechanisms can shape domestic understandings of policy options, in particular because those participating in WTO peer review hold positions in national bureaucracies and engage with their national counterparts. They act as intermediaries who convey and bring WTO legal norms home.

1. Shifting the Boundary of the Market and the State. Most profoundly, WTO law spurs a number of institutional changes that facilitate global product competition by reducing government intervention. For some, the WTO represents a force for deregulation in favor of markets under the mantra of freer, unencumbered trade and competition without state interference. Yet the freeing of markets also
comes with new forms of regulation so that WTO law contributes to the growth of state regulatory institutions. In practice, the WTO legal order concomitantly involves both market liberalization in areas that, in many cases, were traditionally controlled by the state, and the proliferation of administrative regulation involving new and transformed state institutions. In these ways, the WTO legal order affects the boundary between the state and the market, shaping what the state does.

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., 2014a). 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 (Watson, 2009). The U.S. 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, through a WTO challenge on the grounds that it constituted a WTO-incompatible quantitative restriction (Shaffer et al., 2014a). 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, as shown in the case of Korea’s regulation of retailers of beef discussed above, although this principle has been enforced infrequently.

WTO rules can also constrain multilateral and unilateral initiatives to bolster global regulation. Trade sanctions are a logical enforcement tool for multilateral regulatory requirements, such as for environmental protection. Concerns that such sanctions could violate WTO rules, however, somewhat constrain their adoption (Safrin, 2002; Bartley, 2007).

In addition, the WTO can potentially constrain countries from applying their domestic regulation extraterritorially to induce foreign regulatory change. The U.S. periodically attempts to do so in order to create a level playing field, requiring that
foreign producers meet the same regulatory standards that are imposed on U.S. producers. The WTO places limits on such countries’ ability to do so, as reflected in the Appellate Body decision in *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (1998). However, once more, WTO jurisprudence has evolved over time in response to member state and civil society responses, and has been less restrictive and more 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 procedural due process criteria, implicating our second dimension — the institutional architecture of regulatory governance.

The pressure on domestic regulation created by WTO rules comes not only from the outside but also from forces internal to the nation state. 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 often 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. For developing countries, WTO members subsidized the creation of an Advisory Centre on WTO Law (ACWL) to assist them in participating in the WTO dispute settlement system, thereby leveling the playing field and contributing to the WTO’s legitimation among developing country members. In practice, it turns out that about one-third of the ACWL’s work is providing reviews of a country’s own domestic regulatory proposals regarding their compliance with WTO requirements (Shaffer, 2011). Similarly, 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 transformative regulatory change as part of India’s internal economic reform effort, even though they faced considerable pressure from the International Monetary Fund and WTO (Shaffer et al., 2014a).

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 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). In this way, WTO rules can (in theory) contribute to a regulatory chill, although the empirical evidence is mixed.
WTO-supported trade liberalization has arguably weakened the bargaining power of labor, and thus helped to reduce labor protections in advanced economies facing low-wage competition. Indirectly, debates over WTO-induced trade liberalization helped spur the negotiation of a 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work containing four core labor standards: freedom of association and collective bargaining; elimination of forced labor; abolition of child labor; and elimination of employment discrimination. But this declaration seems weak compared to the broader pressures to make labor regulation more “flexible” in order to enhance competitiveness and reduce unemployment. Research shows a correlation between WTO membership and the adoption of regulations that are more market-oriented toward capital, business, and labor (policy areas outside of the WTO’s direct mandate), suggesting that WTO membership can unleash processes of socialization through persuasion and emulation (Cao, 2009), as well as competition for capital.

The result could be reduced protections for workers and the environment, on the one hand, and greater protections for capital, on the other (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). Similarly, WTO rules and rulings can affect national debates over climate change regulation, including regulation through carbon taxes. Those opposing such regulation contend that the country’s producers would be at a competitive disadvantage if the country imposes a carbon tax or other carbon emissions regulation. Were the country to attempt to apply a border tax adjustment on imports to equalize competition in the domestic market, even if it were designed to comply with WTO rules (Horn & Mavroidis, 2011), it would only protect domestic industry competitiveness in the domestic market and not in foreign markets.

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 (Jordan, Levi-Faur & Marin, 2011; Levi-Faur, 2005; Vogel, 1996). In some cases, the WTO itself mandates the creation and expansion of new agencies, as most famously (or infamously) under the TRIPS Agreement (Deere, 2009). 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 SPS and TBT agreements have helped to invigorate international product standard setting, engaging states that otherwise might impose no regulatory standard (Büthe, 2009; Büthe & Mattli, 2011). To legitimize these bodies, developed countries fund technical assistance to facilitate greater developing country participation (Stewart & Johanson, 1998). 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, lower quality competition. It may also require the private sector actors responsible for importing foreign products to adhere to new regulatory requirements, as in the case of food products from China (Tavernise, 2013; 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 EU rejections of Indian food products (Bollyky, 2009).

The temptation to raise internal regulatory standards that affect imports explains, in part, the concern among trade liberals of ‘non-tariff’ barriers to trade, which they hoped would be addressed more effectively through the TBT and SPS Agreements. Yet those agreements provide no regulatory floor, and in practice, they have legitimized 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 legitimate regulatory objective, which can be broadly defined. WTO rules thus 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 those countries’ demanding technical standards (United Nations Industrial Development Organization, 2007).

As a result, the WTO can contribute to a ‘race to the top’ among domestic regulators. Given the cost of complying with multiple standards, domestic producers may choose to comply with the standard of their most important trading partner, which may in fact be quite high; in the WTO context, it will likely be either a U.S. or an EU standard (known as the “California effect” or the “Brussels effect”) (Vogel, 1995; Bradford, 2013; Greenhill et al., 2009; Kelemen, this volume). In this way, the WTO can contribute to expanding the effective geographic scope of U.S. and EU regulatory governance. EU chemical regulation and data privacy regulation, for example, affect business practices around the world (Shaffer, 2000; Birnhack, 2008; Scott, 2009). Similarly, toys in China tend to bear the CE (Communauté européenne) mark, signifying that they conform with the EU’s regulatory requirements, even when they

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8 See e.g. The WTO’s European Communities--Measures Concerning Meat and Meat Products (Hormones) (1998), and United States--Continued Suspension of Obligations in the EC – Hormones Dispute (1998), and United States--Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (2012).
are sold in China or other non-EU 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 the U.S. and the EU 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 EU faced internal pressure to control fish imports from the Great Lakes region of Africa where fishermen used cyanide and other poisons to catch fish. Faced with an EU ban on imports, Kenya and neighboring African nations considered bringing a WTO case, but instead decided to accept EU 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 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; but cf. enforcement challenges in China discussed in van Rooij, this volume).

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 EU passed new complementary legislation. Large retail stores were then pressed by activists to require, and often did require, compliance with such private standards, such as Home Depot’s requirements for sustainable lumber (Bartley, 2007: 323; Mayer & Gereffi, 2010: 9).

Similarly, the export of cut flowers is of great importance to many developing countries, including multiple countries in Central and South America and Africa (United States International Trade Commission, 2003). Activist groups in the United States and Europe are concerned about the use of pesticides in the industry affecting worker health. They have initiated campaigns against importers and sellers that in turn have placed pressure on producers in these countries to enhance production standards (Life Science Weekly, 2010; Global Pesticide Campaigner, 2005). The increase in such private regulation affects trade in a vast array of products, including not only cut flowers and timber, but also 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 EU has signed FLEGT VPAs with six African and Asian countries, was in negotiation with nine others as of February 2014, and it 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 form of regulation, 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 that 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

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9 Appellate Body Report, Brazil-Measures Affecting Imports of Retreaded Tyres, ¶ 154, WT/DS332/R (Dec. 3, 2007) (“we wish to underscore that the Import Ban must be viewed in the broader context of the comprehensive strategy designed and implemented by Brazil to deal with waste tyres. This comprehensive strategy includes not only the Import Ban but also the import ban on used tyres, as well as the collection and disposal scheme adopted by CONAMA [the Ministry of Environment]”). Brazil notified the conclusion of the implementation process by document WT/DS332/19/Add.6. In this official notification Brazil states that (i) the Supreme Court ruled against the import of reformed tires, arguing that it infringes human health and the environment enshrined as human rights by articles 170, 196 and 225 of the Federal Constitution of 1988 (Decision ADPF N. 101); (ii) the Ministerial Order, Portaria SECEX, 24/2009, prohibits the concession of import licenses to used and reformed tires, regardless of their origins. Subsequently, at the domestic level the Ministry of Environment published in October 2009 CONAMA Order N. 416/2009 ruling that recycling tires is mandatory by law and providing for the manufacturers’ responsibility.

10 See CONAMA Order N. 416/2009 (October 2009).
admitting that “[e]xcessive rare earth mining has resulted in landslides, clogged rivers, environmental pollution emergencies and even major accidents and disasters.”\textsuperscript{11} It prompted the government to initiate “a broad environmental cleanup,” opening up possibilities for those within China who advocate for enhanced environmental regulation. Powerful stakeholders may successfully resist new regulation and undermine its effectiveness. What WTO processes nonetheless do is contribute to these new regulatory dynamics.

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 national, 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 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 — that is, it affects not just what the state does in relation to the market, but which state institutions do what. Overall, the WTO constrains the role of legislatures to provide protectionism, enhances the relative power of the executive, catalyzes the creation and professionalization of bureaucratic agencies, and opens the possibility for the strengthening of judiciaries in regulatory governance.

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, nation-states are pressed to concentrate expertise in and cede authority to the center. Within Europe, EU member states have granted sole authority on most trade matters to the European Commission because the Commission can speak with a single voice and, as a result, leverage EU market power and enhance the overall authority of EU member states in negotiations. EU 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).

\textsuperscript{11} Keith Bradsher, China Ties to Clean Up Toxic Legacy of its Rare Earth Riches, New York Times, Oct. 23, 2013, at B7 (quoting Chinese “white paper”).
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 EU in relation to EU member states.\(^\text{12}\) 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.\(^\text{13}\) As a result, sub-state actors often develop some WTO expertise, both to support exporters in relation to export markets and to protect themselves from challenges to their own policies, as Aseema Sinha (2007) shows in her work on India, Henry Gao (2005) in his work on China, and my own experience working with state officials in the United States.

At the federal level, the central executive’s role can also 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 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 for their domestic producers. The WTO creates binding obligations not to increase tariffs above bound rates, and not to use quotas and other quantitative restrictions, which constrains legislative discretion (Chorev, 2007). WTO rules rather provide that economic protection may only be legally provided 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 procedures (Trachtman, 2014), 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

\(^{12}\) I thank David Vogel for his comments on this point.

\(^{13}\) Shaffer interview with Samir Gandhi, Indian lawyer working on these issues (Jan. 15, 2010).
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 and greater rigor in their procedures, and it can shift authority among them. Countries around the world have created and expanded executive agencies for granting protection from imports when implementing antidumping, countervailing duty, and safeguard laws, requiring professionalized, technocratic procedures (Wu, 2012; Pruzin, 2009). 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 by 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 research on the relation between the WTO, enhanced international standard setting, and domestic institutions.

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. They do so directly through the incorporation into national law of substantive WTO and WTO-related law that calls for judicial oversight, including customs, import relief, intellectual property, and standards law. 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 in order to comply with WTO antidumping and countervailing duty law (Yilmaz, 2013). Under import licensing systems, executive agencies could exercise authority with little to no judicial oversight. But 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 is 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).

14 See Article 23 of Agreement on Subsidies and Countervailing Measures ("Judicial Review"); and Article 13 of Agreement on Implementation of Article VI of GATT 1994 ("Judicial Review" [of antidumping decisions]).
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 in countries around the world (Helfer, 2015; Klug, 2013; Licks, 1999; Karky, 2011). Major litigation over intellectual property rights is taking place in India and South Africa in the shadow of the TRIPS Agreement (such as Novartis v. Union of India 2007; Novartis Ag v. Union of India 2013; Bayer v. Union of India 2010; McDonald’s Corp. v. Joburgers Drive-In Restaurant 1997). 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, where a member makes a sectoral commitment, it “shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.” The Annex on Telecommunications and Reference Paper adds further requirements where incorporated into a member’s schedule, including the requirement of an “independent regulator” that is “impartial” and competition law requirements (Krajewski, 2003; Roseman, 2003). We need more empirical work on changes in national governance in these services sectors that is linked to the WTO agreements (cf. Badran, 2013, on Egypt). Nonetheless, the WTO agreements provide leverage in domestic contexts for the enhancement of judicial authority, and affected companies can refer to these agreements in defending their positions, as has been documented in the intellectual property and import relief fields.

The WTO can also indirectly spur 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. Ironically, in this way, WTO trade liberal rules can be synergistically linked with activist groups’ use of domestic courts to constrain imports on social policy grounds. 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.\footnote{Only two of these cases 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 (2015) 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.”}

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 the TRIPS Agreement and domestic civil society reactions to it 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. Legislative authority can also be indirectly enhanced as part of the broader dynamic of WTO legal processes, which is revealed especially at the implementation stage. Legislatures at times become quite engaged in debates regarding choices over the implementation of WTO agreements, such as the TRIPS Agreement. In India, for example, the Parliament became active in deliberations over a new patent law during the transition period for India’s implementation (Chaudhuri, Park & Gopakumar, 2010). Moreover, when countries reduce trade barriers and eliminate discrimination against foreign products, legislatures can become activated to enhance regulation in new and different ways, catalyzed by social concerns implicated by markets, such as environmental and consumer protection, as well as protectionist ones. The Korean parliament, for example, has 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 (Sang-Hun, 2008). Developmental states traditionally with strong executives have often seen power shift to legislatures as the regulatory state expands to address consumer, environmental, and other social welfare issues.
3. Catalyzing New Professions that Promote Institutional Change. WTO law concomitantly enhances the role of professionals with particular expertise. These professionals, in advancing 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, including because national measures must be justified in relation to WTO reason-giving requirements. 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 national 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 by consulting 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 parties. 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. Once more, the TRIPs Agreement is not the sole cause of these professional changes, but it is an important part of the transnational context that contributes to them.

Specialized lawyers likewise develop expertise in import relief law subject to the constraints of the WTO antidumping, countervailing duty, and safeguard agreements. Antidumping cases 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 for 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, as documented by James Nedumpara (2012) in India and Mark Wu (2012) in India and China. 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 grown in these countries.

Within bureaucracies of governments that are active in WTO matters, international trade work grew in status during the 2000s because of the technical legal and economic demands of WTO policy (Shaffer et al., 2008, on Brazil; Shaffer et al., 2014a, on India). These government bureaucrats, in turn, work with private lawyers, economists, 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 the interaction between government and 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 different departments of government, private practice, and the WTO itself. The interaction of these processes leads to the potential normalization of WTO law through practice that can shape national legislation and administrative regulation over time.

4. Providing Normative Frames and Accountability Mechanisms that Shape National Administration. The institutional implications of WTO rules (such as that regarding the boundary between the market and the state) are also shaped by normative frames defined through WTO processes. These frames 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 is reflected in most WTO casebooks, which typically start with social welfare analysis of the benefits of liberalized trade and the costs of protectionism, followed by public choice analysis regarding why trade agreements are necessary because protectionist business interests are better organized than consumer interests 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 is the definition, categorization, and interpretation of WTO legal norms, such as those regarding discrimination, risk assessment, proportionality, and exceptions based on ‘legitimate’ policy objectives. The understanding of these norms will have distributive implications, and reflect results of 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 seeds and 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. It is complemented by other WTO norms, such as the norm of science-based risk assessment for sanitary and phytosanitary regulations, and the norm of adopting regulatory measures that are no more trade-restrictive than necessary. The scope and understanding of these norms are settled and unsettled over time as a result of contestation, cooperation, and practice.

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. 16 These committees can operate as arenas of socialization. The TBT committee reviews national standard-setting measures under the TBT Agreement; the SPS committee reviews national sanitary and phytosanitary measures under the SPS Agreement; the antidumping, countervailing duty, and safeguard committees respectively review laws and practices under the AD, CVD, and Safeguard Agreements; the Committee on Market Access and other committees operating under the Council on Trade in Goods review measures affecting goods; the Council on Trade in Services (within which there are sub-committees and working parties, including a Working Party on Domestic Regulation pertaining to services) reviews measures affecting services; and the TRIPS Council reviews intellectual property laws and practices. Not only can WTO requirements be internalized through these iterated committee processes, but disputes can also be solved through them without resort to formal WTO proceedings. For example, the WTO’s SPS Committee (2014, 7) reports that of the 368 SPS issues in dispute brought before it through 2013, members reported a solution in 141 cases and a partial solution in 31 cases.

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 (Chaisse & Chakraborty, 2007).

Curiously there is even a formal body consisting of all WTO members that meets to review and discuss WTO panel and Appellate Body reports at least once a month in order for them to be adopted, the WTO Dispute Settlement Body. Although WTO members may have intended this body to provide a check on the WTO judicial process, members can only reject the adoption of a decision by consensus so that the reports are always adopted. Ironically, by meeting to review and discuss the adoption of the reports, national officials are more likely to internalize the report’s interpretation of WTO law, further enhancing their knowledge, understanding, and conveyance of the jurisprudence. No other international dispute settlement body has its decisions discussed on a formalized monthly basis by national officials who, in the process, become socialized regarding the meaning of the legal texts and their application to particular factual contexts.

Although smaller developing countries do not attend many of these meetings, which gives rise to significant asymmetries in participation regarding 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, 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 when they are implicated by regulatory proposals and they can point to WTO rules as leverage. Through these inter-agency processes, knowledge of WTO law is diffused across government.

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 the WTO implicates national regulatory governance is through the lens of national compliance with WTO law. But such studies only touch the surface of the implications of WTO law for regulatory governance. This chapter invites researchers to push deeper, assessing four broader dimensions of regulatory change catalyzed by the WTO with which legal compliance is synergistically linked. After assessing the implications of key aspects of WTO law for national law and administrative process, the chapter turned to these four dimensions: the boundary of the state and the market; the state’s institutional architecture and allocation of power to national institutions; public and private professional expertise catalyzed by WTO law; and the normative frame and transnational accountability mechanisms under which national implementation and
legal and administrative practice take place. These dimensions are interrelated in shaping the effects of WTO law on regulatory governance.

The dimensions involve both the advance of market liberalization and the proliferation of new regulation. Most directly, WTO rules set forth trade liberal norms, including bound tariffs and non-discrimination, proportionality, and transparency principles. They also include substantive and procedural requirements for intellectual property protection, risk regulation, standard setting, and import relief. Indirectly, they catalyze public and private regulatory initiatives as tariffs decrease; stakeholders press the state to upgrade and enhance regulation and, where it does not, spur private regulation. Enhanced regulations, especially in countries with large markets that are attractive to exporters, lead to the effective expansion of regulatory requirements globally. Professionals invest in expertise that in turn helps to embed these regulatory changes.

Nation states are not passive recipients of WTO norms and influence. Each state is different in how actors not only adapt to WTO norms but shape them (Halliday & Shaffer, 2015). States, appropriate, resist, hybridize, and transform WTO norms that can 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 chapter’s focus. Rather, before addressing how different nation-state institutions respond to WTO law norms, it is helpful to understand and assess the different dimensions of regulatory change at stake. This chapter 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 empirical work.
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