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## A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case

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The regulation of agricultural biotechnology (the use of genetically modified organisms, GMOs) is of great importance. Opponents maintain that it can irreparably harm the environment and threaten human health. Supporters contend that it can significantly increase food yields and enhance nutrition in a world where almost a billion people go hungry every day. Disputes over this technology threaten to trigger a trade war among the world's two economic powers, the United States and European Union, posing risks to the global economy and international relations. The World Trade Organization (WTO) provides a legal forum that addresses these politically-charged conflicts, but it suffers from challenges to its legitimacy.

Grounding itself in this regulatory conflict, this Article puts forward and applies a theoretical framework for understanding what international courts do—that of comparative institutional analysis. Comparative institutional analysis assesses the impacts of judicial interpretive choices in terms of their structural allocation of power to alternative institutions. The Article demonstrates how WTO judicial interpretive choices allocate institutional authority for addressing policy concerns to alternative institutional processes, including the market, political and administrative processes, and courts, at different levels of social organization, from the local to the global. These choices are particularly important in a pluralist world involving constituencies with different interests, priorities, perceptions and abilities to be heard.

This theoretical framework is essential from a positive perspective (for understanding the structural role that judicial decisions play), and from a normative one (for evaluating institutional alternatives). From a normative perspective, the Article demonstrates that we cannot meaningfully assess the attributes and deficiencies of one institutional process – beset by resource, informational and other asymmetries – without comparing it with other institutions that may be subject to similar (but never identical) dynamics. Each institutional decision-making process has its attributes and deficiencies in terms of the dynamics of participation within it, ultimately affecting *who decides*.

From a structural perspective, the focus shifts from the question of what is being interpreted to the question of *who* is determining it. The Article shows how the WTO judicial process effectively allocates power “from” one institution “to” another, thus affecting who participates and how they participate in deciding which substantive goal(s)

to pursue. By shifting authority among institutional alternatives, the WTO judicial process alters relations between who decides and affected publics.

The Article first lays out the comparative institutional analytic framework in relation to other leading approaches applied in the legal academy—and in particular those of global constitutionalism, global pluralism/conflicts of laws, and global administrative law. It then demonstrates how to apply the framework through the WTO dispute over the regulation of GMOs.