

LESS THAN ZERO: THE EFFECTS OF GIVING DOMESTIC EFFECT TO WTO LAW

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Introduction

Consider the following fact patterns:

- The U.S. Commerce Department (“Commerce”) imposes antidumping duties on certain imports. In challenging this action in a U.S. court, could a foreign trader successfully invoke a World Trade Organization (“WTO”) Appellate Body (“AB”) determination that the methodology Commerce used to calculate duties was inconsistent with WTO obligations?¹

- A U.K. citizen runs an internet gambling firm. He is arrested as his flight from London to Costa Rica touches down in Dallas, and is charged with violating U.S. law prohibiting internet gambling. Can the defendant successfully move to dismiss the complaint on the grounds that the WTO’s AB has determined that the federal law violates U.S. obligations under the General Agreement on Trade in Services?²

- U.S. environmental measures are successfully challenged at the WTO. Thereafter, the U.S. issues new regulations that environmental groups promptly challenge as inconsistent with the underlying federal statute. In this litigation, can the government successfully argue that accepting the plaintiff’s claims would place the U.S. in violation of its WTO obligations?³

The answers to these questions turn, in part, on the status of international norms in domestic law and, more specifically, on the domestic legal effect of WTO dispute reports. Although inquiry into the domestic status of WTO norms

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¹ Compare *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (rejecting application of WTO dispute findings) with Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, USA-CDA-2002-1904-02 (March 5, 2004) (giving effect to WTO dispute findings).

² *United States v. Lombardo*, No. 2:07-CR-286 TS, slip op. (D. Utah Dec 13, 2007) (denying defendants’ motion to dismiss); Matt Richtel, *Arrest Made in Crackdown on Internet Betting*, N.Y. TIMES, July 18, 2006, at C1.

³ See, e.g., *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002).

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is not a new topic, the number of cases raising this issue is sharply rising, and the issue is worthy of sustained attention in this Symposium for a variety of reasons.⁴

First, despite apparently clear language addressing this issue in the implementing legislation, tribunals applying U.S. law have adopted widely divergent positions regarding the domestic effect of WTO law and, in particular, WTO dispute reports. Most courts considering the issue refuse to give domestic effect to WTO norms. However, two recent North American Free Trade Agreement (“NAFTA”) tribunals, applying U.S. law and sitting in effect as U.S. courts, adopted a diametrically opposed approach by giving effect to WTO law and specifically WTO dispute reports. In particular, they used WTO dispute reports, finding certain U.S. measures WTO-illegal, thus rejecting previously accepted interpretations of U.S. law. This dramatic split in recent case law invites renewed attention to questions of the domestic effect of WTO norms.

Second, examining the domestic effect of WTO law can enrich our understanding of other topics addressed in this Symposium. Consider, for example, Symposium papers that focus on the role of “WTO Law in a World of Fragmented International Law.” Professors Tomer Broude and Ernst-Ulrich Petersmann provide richly nuanced discussions of this complex issue.⁵ Both of their papers, like most discussions of fragmentation, foreground the horizontal dimensions of fragmentation by focusing on relations among various international regimes. However, as the analysis below suggests, fragmentation can also have a vertical dimension. If domestic courts give effect to WTO dispute reports, then WTO law would be interpreted and applied by hundreds of highly decentralized domestic courts, as well as by WTO dispute panels and the AB. It is likely that a rapid proliferation of courts interpreting WTO norms would lead to divergent interpretations of WTO law at national levels. Should those troubled by horizontal fragmentation also be concerned about vertical fragmentation? To date, the fragmentation literature has paid insufficient attention to the vertical aspects of the fragmentation debate, and the analysis of the domestic effect of WTO law presented below can begin to fill this scholarly void.

Third, as Professors Karen Alter and Rachel Brewster perceptively noted in their Symposium comments, focusing on the domestic effects of WTO dispute reports reverses the usual ways that international relations scholars and international lawyers examine relationships between domestic actors and international law. Typically, scholars focus on the ways that state preferences determine the institutional and substantive features of international regimes. Realist scholars, for example, often take state interests as endogenous to an anarchic international order, while liberal scholars examine how individuals, firms, NGOs, and other

⁴ While questions about the domestic effect of WTO dispute reports can arise in the domestic courts of any WTO member state, this paper focuses on the treatment of this issue by tribunals applying U.S. law.

⁵ Tomer Broude, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 *LOY. U. CHI. INT'L. L. REV.* 173 (2009), available at <http://www.worldtradelaw.net/articles/broudenormativeintegration.pdf>; Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law through Constitutional Interpretation: An Adjudication with Due Respect for Reasonable Disagreement*, 6 *LOY. U. CHI. INT'L L. REV.* 209 (2009).

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non-state actors pursue their interests in domestic fora and thereby determine state preferences on the international plane. However, trade scholars much less frequently examine the influence of international institutions and norms on domestic politics.⁶ Moreover, even when scholars examine the ways that international forces shape states' domestic trade politics, they rarely examine the relationships between international and domestic judicial fora.⁷

Finally, debates over the domestic status of WTO dispute reports should be understood as one important but understudied component of much larger debates over the status of international law in domestic legal systems. In recent years, these larger debates have assumed increased importance in the United States. At the risk of oversimplification, these highly polarized debates have given rise to two competing positions. On the one side, a group of self-styled "internationalists" urge domestic courts to view themselves as part of a "global community" of courts, to engage in a process of transnational judicial dialogue and cross-fertilization, and to give direct effect to international legal norms.⁸ A competing group of "revisionists" counters that the international and domestic legal orders can and should be sharply distinguished. They argue that international norms do not and should not be directly effective domestically, and that the political branches, rather than the courts, should determine the domestic status of international legal obligations.⁹

We might expect internationalists to urge domestic courts to give domestic effect to WTO rulings. From the internationalist perspective, granting domestic legal effect to WTO rulings might be seen as a desirable empowerment of individuals. It could be seen as a means to enhance compliance with WTO norms, and a vehicle to advance uniformity, predictability, and certainty in the interpretation and application of international trade law.

This paper suggests that such an instinct is at least partially misguided. First, domestic court enforcement of trade norms may "solve" a problem that does not exist as it is far from clear that noncompliance is a major problem facing the trade system. Compliance with WTO AB and panel reports is relatively high, and trading states already have potent tools available to address the relatively rare instances of noncompliance.

⁶ This approach is known in international relations literature as "second image reversed scholarship." See JON C. PEVEHOUSE, *DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION* (Cambridge University Press 2005); Peter Gourevitch, *The Second Image Reversed: The International Sources of Domestic Politics*, 32 INT'L ORG. 881 (1978).

⁷ See, e.g., RONALD ROGOWSKI, *COMMERCE AND COALITIONS: HOW TRADE AFFECTS DOMESTIC POLITICAL ALIGNMENTS* (Princeton University Press 1989); Michael Hiscox, *Class Versus Industry Cleavages: Inter-Industry Factor Mobility and the Politics of Trade*, 55 INT'L ORG. 1 (2001).

⁸ See, e.g., Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). For earlier versions of similar arguments, see RICHARD FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (Richard B. Lillich ed., Syracuse University Press 1964); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

⁹ See, e.g., Mark Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65 (2007); Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59; Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006).

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Moreover, even if greater compliance were desirable, domestic litigation over WTO norms may not achieve this goal. Rather, as explained in more detail below, domestic court actions might serve as a *substitute* for, rather than a *complement* to, international actions. Hence, opening domestic courts to WTO-based litigation might actually decrease the amount of WTO-related litigation.

In addition, even if domestic litigation produced the benefit of increased compliance, this gain would not come without costs to the WTO system. A decentralized system of domestic court interpretation and application of WTO law would, in effect, displace the AB from its current role as authoritative interpreter of WTO norms. Such a system would likely disserve the values of uniformity, predictability, and certainty, as various national courts would likely produce divergent readings of different WTO norms. Domestic litigation of international trade norms in hundreds of national courts may generate a body of confusing and possibly inconsistent doctrine.

Thus, as demonstrated more fully below, the supposed benefits of giving domestic effect to WTO dispute reports are largely illusory, while the potential costs are substantial. On balance, the net effect of giving domestic effect to WTO reports is less than zero. Hence – paradoxically – internationalists should support domestic courts' refusal to give effect to WTO rulings.

The remainder of this paper proceeds as follows. Part I sets out the relevant statutory framework for determining the legal status of WTO norms in U.S. law. In particular, it briefly reviews the relevant language from the Uruguay Round Agreements Act: the domestic statute implementing the United States's obligations arising out of the treaties creating the WTO. Part II describes how tribunals applying U.S. law have treated WTO norms. Specifically, it summarizes both the dominant line of cases refusing to give domestic effect to WTO norms, as well as more recent opinions that give domestic effect to WTO dispute reports. Part III examines some of the benefits and costs associated with giving domestic effect to WTO dispute reports. A brief conclusion follows.

I. The Uruguay Round Agreements Act and the Domestic Effect of WTO Law

Trading states created the WTO via a series of treaties collectively known as the Uruguay Round Agreements. As a matter of international law, these agreements create international rights and obligations for the United States. However, as a matter of domestic law, these treaties do not automatically change any inconsistent provisions of domestic law, and treaty norms are not automatically enforceable in domestic courts. Rather, these agreements “are not self-executing and thus their legal effect in the United States is governed by implementing legislation.”¹⁰

¹⁰ S. REP. NO. 103-412, at 13 (1994). *See also* H.R. REP. NO. 103-826, pt. 1, at 25 (1994). The distinction between “self-executing” and “non-self-executing” treaties was introduced into U.S. jurisprudence by Chief Justice Marshall’s opinion in *Foster v. Neilson*, 27 U.S. 253 (1829). The Supreme Court’s most recent treatment of the issue can be found in *Medellin v. Texas*, 129 S. Ct. 360 (2008). The distinction between self-executing and non-self-executing treaties has proven to be highly confusing

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On December 8, 1994, Congress enacted the Uruguay Round Agreements Act ("URAA") to implement into domestic law the obligations assumed by the United States under the Uruguay Round Agreements, and at the same time giving final authority for the United States to become party to these agreements.¹¹ The URAA is enormously complex; it spans over 650 pages in its official printed format and addresses a wide variety of substantive issues.¹² For current purposes, the most important provisions are those that address the relationship between the Uruguay Round Agreements and domestic law, and those that address the status of WTO dispute reports as domestic law. As we shall see, Congress sought to limit the domestic legal effect of the Uruguay Round Agreements in a variety of ways.

For example, URAA provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."¹³ This section goes on to provide that nothing in URAA "shall be construed . . . to amend or modify any law of the United States . . . unless specifically provided for in this act."¹⁴ This section clarifies that all changes to U.S. law "known to be necessary or appropriate" to implement the WTO agreement are incorporated into URAA.¹⁵ The import of these provisions is, in the words of the statute, that "United States law [will] prevail in [the event of a] conflict."¹⁶

Like previous bills implementing trade agreements, URAA was accompanied by a Statement of Administrative Action ("SAA") prepared by the Executive Branch.¹⁷ URAA provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation and application."¹⁸ The SAA confirms that, as a matter of domestic law, WTO norms do not trump U.S. law: "[i]f there is a conflict between U.S. law and any of the Uruguay Round agree-

as a matter of both practice and theory. See, e.g., Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

¹¹ Uruguay Round Agreements Act, 19 U.S.C. § 3501 (1994).

¹² For a detailed analysis, see David Leebron, *Implementation of the Uruguay Round Results in the United States*, in IMPLEMENTING THE URUGUAY ROUND 175 (John H. Jackson & Alan Sykes eds., 1997).

¹³ 19 U.S.C. § 3512 (a)(1).

¹⁴ *Id.* § 3512 (a)(2).

¹⁵ H.R. REP. *supra* note 10; see also S. REP. *supra* note 10, at 13.

¹⁶ H.R. REP. *supra* note 10, pt. 2, at 3; see also S. REP. *supra* note 10, at 13.

¹⁷ Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 [hereinafter SAA].

¹⁸ 19 U.S.C. § 3512(c). The SAA similarly provides:

[T]his statement represents an authoritative expression by the Administration concerning its views regarding the implementation and application of the Uruguay Round Agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by Congress at the time that it implements the Uruguay Round Agreements, the interpretations . . . included in this Statement carry particular authority.

SAA, *supra* note 17, at 1, reprinted in 1994 U.S.C.C.A.N. at 4040.

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ments, . . . the implementing bill makes clear that U.S. law will take precedence.”¹⁹

The implementing legislation also explicitly addresses the domestic effect of WTO dispute settlement reports. The statute provides that an adverse WTO dispute report has no automatic effect on the relevant U.S. law. Rather, should a WTO dispute report find a federal law to be WTO-inconsistent, only Congress can act to change the offending law, pursuant to normal legislative processes. Moreover, if an executive branch agency regulation or practice is deemed WTO-inconsistent, the relevant agency is not to immediately or automatically bring the offending U.S. practice into conformity with WTO obligations. Instead, Congress provided for a consultative process in such instances. URAA provides that “[i]n any case in which a dispute settlement panel or the AB finds . . . that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended . . . or otherwise modified” unless and until the United States Trade Representative (“USTR”) consults with congressional committees and relevant private sector actors, publishes a proposed modification, and provides the relevant congressional committees with time to indicate their agreement or disagreement.²⁰

A separate provision addresses panel or AB findings that “an action by the International Trade Commission in connection with a particular proceeding” is WTO-inconsistent. In those cases, the USTR can ask the Commission for an “advisory report” on whether the Commission can “take steps in connection with the particular proceeding that would render its action not inconsistent with findings of the panel or the [AB]”²¹ Thereafter, USTR can request the Commission to “issue a determination in connection with the particular proceeding” that would be “not inconsistent” with panel or AB report.²² Similar provisions apply to determinations by the Commerce Department regarding antidumping and countervailing duties.²³

The SAA confirms the intent to limit the domestic effect of WTO dispute reports. The SAA provides that:

Reports issued by panels or the [AB] . . . have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. . . . If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

¹⁹ SAA, *supra* note 17, at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042.

²⁰ 19 U.S.C. § 3512 (b)(1).

²¹ 19 U.S.C. § 3533 (g)(1).

²² *Id.* § 3538 (a)(4). These are known as “section 129” determinations, after the numbering of the bill.

²³ *Id.* § 3538 (b).

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The SAA further provides that “neither federal agencies nor state governments are bound by any finding or recommendation included in such reports” and “panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations”²⁴

Finally, the URAA explicitly addresses the ability of private parties to rely upon WTO law or dispute reports in domestic litigation. The statute provides that:

No person other than the United States –

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency or other instrumentality of the United States, any State . . . on the ground that such action or inaction is inconsistent with such agreement.²⁵

In short, the implementing legislation, as well as the authoritative Executive Branch interpretation of this legislation, consistently emphasize that (1) as a matter of domestic law, the U.S.’s WTO obligations do not trump inconsistent federal law; (2) adverse dispute reports do not automatically produce any change in domestic law or practices; and (3) private parties cannot use WTO dispute reports in domestic litigation to challenge government actions. One might reasonably assume, on the basis of these legal texts, that domestic courts would not give effect to WTO norms and, in particular, findings contained in WTO dispute reports. However, as demonstrated below, this assumption – while reasonable – would be mistaken.

II. The Status of WTO Law in U.S. Courts

As noted above, the legislation implementing the Uruguay Round Agreements and the SAA go to great lengths to cabin the domestic legal effect of WTO law in general and WTO dispute reports in particular. Specifically, they provide that “[dispute] reports issued by panels or the AB . . . have no binding effect under the law of the United States,” and the implementing legislation also provides that no private party can challenge “any” government action on the grounds that it is WTO-inconsistent.²⁶

Despite this seemingly clear language, private parties have attempted to rely upon WTO law, particularly WTO dispute reports, in U.S. courts. Most of these cases involve challenges to the interpretation and/or implementation of U.S. trade law by executive branch agencies, such as the Commerce Department. In many of these cases, courts summarily reject claims based upon WTO law. However,

²⁴ SAA, *supra* note 17, at 103.

²⁵ 19 U.S.C. § 3512 (c)(1)(B).

²⁶ SAA, *supra* note 17, at 1032-33.

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tribunals in some more recent cases have given a form of indirect effect to WTO law. Remarkably, the most important cases illustrating both application and rejection of WTO rulings arise out of antidumping disputes involving a controversial U.S. practice known as “zeroing.” Hence, before describing the divergent lines of cases, it will be useful to provide a very brief explanation of “zeroing.”

A. What is Zeroing?

Antidumping law is highly technical; happily, for current purposes, only a rudimentary understanding of the relevant law is sufficient. A product is considered as being dumped if it is “introduced into the commerce of another country at less than its normal value.”²⁷ WTO law permits states to offset the price advantage that dumped goods enjoy through special tariffs known as antidumping duties. To do so, investigating authorities in the importing state must establish the “dumping margin” by calculating the difference between the “normal” value of the goods - usually the price on the exporter’s home market - and the export price.²⁸ In making this calculation, WTO rules require domestic authorities to conduct a “fair” comparison between the two prices.

In practice, these calculations are enormously complex and often involve examination of numerous sales transactions. Not all of these sales will be at the same price, as prices may vary due to quantities sold, the season when the sale occurs, changing prices of inputs, and many other factors. In many contexts, when calculating dumping margins across numerous transactions, the U.S. Commerce Department has long used a methodology known as “zeroing.” Under this methodology, where sales in the home market are at prices *above* export prices, the difference is regarded as the “dumping margin” for that comparison. However, where other sales occur in the home market at prices *below* the export price, Commerce does not calculate a “negative” dumping margin; rather, in these circumstances, the goods are deemed not to be dumped; i.e., the dumping margin for these sales is zero. Commerce then aggregates the results of these various comparisons. Critics argue that this method of calculation artificially inflates dumping duties and, as discussed below, zeroing has been subject to sustained challenge before both domestic and international tribunals.

B. Cases Denying Domestic Effect to WTO Law

The dominant line of cases denies domestic legal effect to WTO norms and dispute reports. This line is well-illustrated by *Timken v. United States*.²⁹ In this action, a Japanese producer challenged Commerce’s method of calculating antidumping duties in an administrative review of an antidumping order.³⁰ In par-

²⁷ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, April 15, 1994, art. 2.1 (1994).

²⁸ See, 19 U.S.C. § 1677 (34) (1996); *Id.* § 1677 (35)(A).

²⁹ *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied*, *Koyo Seiko Ltd. v. United States*, 543 U.S. 976 (2004).

³⁰ See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Ja-*

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ticular, the petitioner argued that the department's use of a "zeroing" methodology in calculating duties violated the provisions of the U.S. antidumping statute requiring that Commerce engage in a "fair comparison" of various transactions in the calculation of duties.

The court examined Commerce's interpretation of the relevant statutory language under the familiar two-step *Chevron* analysis which grants substantial deference to administrative agencies' interpretations of statutes.³¹ Under the *Chevron* test, a court must first determine whether Congress has spoken clearly to the question at issue: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."³² If a statute is clear and unambiguous, courts will strike contrary agency interpretations. However, if a statute is silent or ambiguous on the question at issue, then courts proceed to Step Two and decide whether "the agency's [reading] is based on a permissible construction of the statute."³³ The Court explained that this deference is justified because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones", and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated."³⁴

Applying this test, the *Timken* court first determined that Congress did not speak clearly to the precise question presented: whether or not zeroing should be used in the calculation of antidumping duties. In particular, the court found that even though it was "a close question," the statutory language did not "compel a finding that Congress expressly intended to require zeroing."³⁵ Because the statute did not directly speak to the question at issue, the court turned to Step Two of the *Chevron* test. Under this inquiry, "[a]ny reasonable construction of the statute is a permissible construction."³⁶ Relying upon both statutory language and a finding that the practice of zeroing "makes practical sense," the court determined that the use of zeroing is "a reasonable interpretation of the statute."³⁷

pan, Final Results of Antidumping Duty Administrative Reviews, 66 Fed. Reg. 15,078 (Dep't of Commerce Mar. 15, 2001); Initiation of Antidumping and Countervailing Duty Administrative Reviews, 64 Fed. Reg. 67,846-01 (Dep't of Commerce Dec. 3, 1999).

³¹ *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

³² *Id.* at 842-43.

³³ "If the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's [interpretation] is based on a permissible [i.e., reasonable] construction of the statute." *Id.*

³⁴ *FDA v. Brown & Williamson*, 529 U.S. 120, 121 (2000) (citing *Chevron* and *Rust v. Sullivan*, 500 U.S. 173, 187 (1991)).

³⁵ *Timken*, *supra* note 29, at 1341.

³⁶ *Id.* at 1342 (quoting *Torrington v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996)).

³⁷ *Id.* A number of subsequent cases have similarly concluded that zeroing is a permissible interpretation of the relevant statutory language. *See, e.g.* *Corus Staal*, *supra* note 1; *Paul Muller Indus. GmbH & Co. v. United States*, 435 F.Supp. 2d 1241 (Ct. Int'l Trade 2006). For a discussion of pre-1994 cases upholding the use of zeroing, *see* James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions*, 34 GA. J. INT'L. & COMP. L. 1 (2005).

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The court then examined petitioner's alternative argument that interpreting the statute to permit zeroing was "unreasonable" because such an interpretation would put the U.S. in violation of its international obligations. This argument rested upon two claims, namely that (i) in the *EC-Bed Linen* dispute the WTO's AB authoritatively determined that use of the zeroing methodology violated WTO law,³⁸ and (ii) under the *Charming Betsy* canon of statutory construction, courts should interpret U.S. law, whenever possible, in a manner consistent with U.S. international obligations.³⁹

The *Timken* court rejected this challenge. Without explicitly stating whether or not the *Charming Betsy* canon was applicable, the court reasoned that since the United States was not party to the *Bed Linen* dispute, "the decision is not binding on the United States, much less this court."⁴⁰ The court then declared that it did not find the *Bed Linen*'s reasoning "sufficiently persuasive to find Commerce's practice unreasonable."⁴¹

A more recent case raising similar issues is *Corus Staal v. Dep't of Commerce*.⁴² This protracted litigation involved several challenges to the imposition of antidumping duties on the import of hot rolled steel from the Netherlands. Commerce used the zeroing methodology in calculating the dumping margin. Corus challenged this action, arguing *inter alia* that the use of zeroing violated U.S. obligations to conform to a series of WTO reports prohibiting zeroing. In particular, Corus argued that "Commerce unreasonably refused to interpret the statute in a manner consistent with U.S. international obligations under the *Charming Betsy* doctrine, which states that courts should interpret U.S. law, whenever possible, in a manner consistent with international obligations."⁴³

The Court of Appeals for the Federal Circuit gave short shrift to this argument. First, relying upon *Timken*, the court conclusively proclaimed that "WTO deci-

³⁸ The *EC-Bed Linen* dispute involved an antidumping determination involving Indian exports of bed linen to the European Communities. Appellate Body Report, *An Initial Commentary on European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001). In calculating the amount of duties, the EC had used a 'zeroing' methodology. India challenged the EC's use of zeroing as inconsistent with provisions of the WTO's Antidumping Agreement requiring that the existence of dumping margins be "established on the basis of a comparison . . . of all comparable export transactions."

India prevailed on a number of arguments, including that the use of zeroing was inconsistent with WTO obligations. As described in more detail below, the AB found zeroing to be WTO-inconsistent in number of subsequent disputes, including disputes involving challenges to the United State's use of the zeroing methodology. See, e.g., Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 9, 2007); Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (April 18, 2006). For a more detailed analysis of the WTO's zeroing cases, see Sungjoon Cho, *Constitutional Adjudication in the World Trade Organization* (unpublished manuscript, on file with author); Edwin Vermulst & Daniel Ikenson, *Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?*, 2 *Global Trade & Customs J.* 231 (2007).

³⁹ The canon was first articulated by Chief Justice Marshall in *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁴⁰ *Timken*, *supra* note 29, at 1344.

⁴¹ *Id.*

⁴² *Corus Staal*, *supra* note 1.

⁴³ *Id.* at 1347.

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sions are ‘not binding on the United States, much less this court.’”⁴⁴ Notably, the court did not address the fact that the U.S. was not party to the WTO report at issue in *Timken*, but was the losing respondent in two of the cases that Corus Staal invoked. The court then quoted from URAA that “no provision of any of the Uruguay Round Agreements nor the application of any such provision to any person or circumstance that is inconsistent with any law of the United States shall have any effect.”⁴⁵ In passages that accurately summarize the dominant position of U.S. courts to consider the issue, the court stated that:

Neither the GATT nor any enabling international agreement outlining compliance therewith . . . trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress. Congress has enacted legislation to deal with the conflict presented here. It has authorized the [USTR] . . . to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.

We therefore accord no deference to the cited WTO cases . . .

We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce’s zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.⁴⁶

These passages reflect a strong dualist approach to WTO law and dispute reports. Under this approach, international legal obligations do not become effective as domestic law unless or until the legislature has “incorporated” them into the domestic legal systems. However, the passage might also be read to suggest a narrow circumstance in which U.S. courts would give effect to WTO rulings, namely when the political branches “adopt” a ruling “pursuant to the specified statutory scheme;” i.e., the URAA.⁴⁷

However, later iterations of the *Corus Staal* litigation reveal that this opening is extremely narrow – if not illusory. In 2004, Commerce undertook a second administrative review of the antidumping order on Corus’s exports.⁴⁸ In conducting this review, Commerce again used a zeroing methodology and, once again, Corus challenged this action in federal court.⁴⁹

⁴⁴ *Id.* at 1348 (quoting *Timken*, *supra* note 29, at 1344).

⁴⁵ *Id.* (quoting 19 U.S.C. § 3512(a)).

⁴⁶ *Id.* at 1348-49 (citations omitted).

⁴⁷ Such a reading would be consistent with European Court of Justice jurisprudence which generally denies domestic effect to WTO law except where the EC legislature has explicitly indicated that it seeks to implement WTO law in the relevant legislation. *See, e.g.*, Case C-69/89, *Nakajima v. Council*, 1991 E.C.R. I-2069.

⁴⁸ Certain Hot-Rolled Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 70 Fed. Reg. 18,366 (Dep’t. of Commerce Apr. 11, 2005).

⁴⁹ *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007).

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In this litigation, Corus did not directly challenge the use of zeroing or the court's previous rulings upholding that methodology. Instead, Corus argued that the U.S. had adopted a new policy with respect to zeroing, and that this new policy should be applied to the second administrative review of its products. In particular, Corus argued that, following the condemnation of zeroing in the *U.S.-Zeroing* panel report, the United States had announced that it would abandon the use of zeroing in certain dumping investigations.⁵⁰ In addition, following this announcement, Commerce had subsequently recalculated Corus's dumping margin without zeroing, and concluded that no dumping existed.⁵¹ In light of these developments, Corus argued that the United States had "adopted" WTO reports condemning zeroing, and sought an order compelling Commerce to reconsider its second administrative review without zeroing. However, the Federal Circuit rejected this argument, largely on the grounds that when Commerce announced the elimination of zeroing in certain antidumping *investigations*, "it stated that the new policy did not apply to any other type of proceeding, including *administrative reviews*."⁵²

Corus argued that the AB had recently found the U.S.'s use of zeroing in *administrative reviews* to be WTO-inconsistent⁵³ and that the United States had committed to comply with this ruling.⁵⁴ However, the court noted that the United States had strongly objected to the AB's reasoning with respect to zeroing in administrative reviews – the United States had characterized the AB's report as "devoid of legal merit" and "illogical" – and that while the United States stated that it "intends to comply in this dispute with its WTO obligations" it also said it "will be considering carefully how to do so." Hence, the court reasoned, the United States had not undertaken an "unequivocal adoption" of the WTO report and Corus's reliance upon it was misplaced.⁵⁵

Corus advanced one additional argument. In April 2007, the USTR instructed Commerce to issue an order regarding Corus's goods "that would render its actions not inconsistent with" the report in *U.S.-Zeroing*. Corus's recalculated margin was zero.⁵⁶ However, the court did not believe that even these actions constituted adoption of the AB report. The court noted that, after the instant appeal was filed and after Commerce had recalculated Corus's duties, Commerce undertook a fourth administrative review of the earlier antidumping order. In

⁵⁰ In particular, Commerce announced that it would no longer use zeroing when undertaking average-to-average comparisons to calculate weighted average margins in antidumping investigations. *See* Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Dep't of Commerce March 6, 2006).

⁵¹ Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25,261 (Dep't of Commerce May 4, 2007).

⁵² Corus Staal, *supra* note 49, at 1374 (emphasis added).

⁵³ Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007).

⁵⁴ Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statement at the WTO Dispute Settlement Body Meeting (Feb. 20, 2007).

⁵⁵ Corus Staal, *supra* note 49, at 1374.

⁵⁶ US-Zeroing, *supra* note 51.

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that review, Commerce noted the AB reports condemned zeroing but determined that they had “no bearing” on the instant case.⁵⁷ Commerce also noted that the determination revoking duties was prospective only and did not apply to duties assessed on pre-revocation entries.⁵⁸

In short, the court determined that the various U.S. responses to the AB report, either alone or in combination, did not constitute sufficient “adoption” of the report for Corus to invoke them successfully. Instead, the court noted that, under *Chevron*, it accords substantial deference to Commerce, and quoted the statement from its earlier opinion that it would “refuse to overturn Commerce’s zeroing practice based on any ruling by the WTO . . . unless and until such ruling has been adopted pursuant to the specified statutory scheme.” The court concluded that its “previous determination that Commerce’s policy of zeroing is permissible under the statute applies to the challenged administrative review.”⁵⁹

More recent cases are to the same effect. For example, in *NSK v. U.S.*,⁶⁰ Japanese producers challenged Commerce’s use of zeroing in an administrative review of an antidumping order on antifriction bearings from Japan.⁶¹ The producers noted that the AB had “found that Commerce’s zeroing practice, as applied to the administrative review at issue in this case, is inconsistent with the United States’ international obligations” and that the United States had announced its intention to comply with this report. However, the *NSK* court, citing *Corus Staal*, refused to overturn Commerce’s practice. The court concluded that “because Commerce’s zeroing practice is in accordance with our well-established precedent, until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case.”⁶²

In a handful of cases outside the trade remedies context, the courts have also rejected private parties’ efforts to invoke WTO decisions. For example, a European exporter argued that the USTR “violated” the *Beef-Hormones* dispute report by collecting retaliatory duties in excess of the amount permitted by the WTO’s Dispute Settlement Body (“DSB”).⁶³ Relying upon the *Corus Staal* holding that “WTO decisions are ‘not binding on the United States, much less this court’” the court had little difficulty finding the plaintiff’s claim to be “without merit.”

In a more recent case, a trade association moved to preliminarily enjoin the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), a federal law

⁵⁷ Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 72 ITADOC 28676 (May 15, 2007).

⁵⁸ *Id.*

⁵⁹ *Corus Staal*, *supra* note 49, at 1375.

⁶⁰ *NSK v. United States*, 510 F.3d 1375 (Fed. Cir. 2007).

⁶¹ Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Recession of Administrative Review in Part, and Determination to Revoke Order in Part, 69 Fed. Reg. 55,574 (Dep’t of Commerce Sept. 15, 2004).

⁶² To the same effect, *see SNR Roulements v. United States*, 521 F. Supp. 2d 1395 (Ct. Int’l Trade 2007).

⁶³ *Gilda Indus., Inc. v. United States*, 446 F.3d 1271 (Fed. Cir. 2006).

that criminalizes the receipt of funds in connection with internet gambling.⁶⁴ The plaintiff argued that the UIGEA was inconsistent with the U.S.'s WTO obligations. The court ruled that the URAA "precludes private actions" and that the plaintiff therefore had "no cause of action under the WTO." The court also determined that, if it were to reach the merits, under the last in time rule, the 2006 statute "would trump" any obligations arising under the 1994 Uruguay Round agreements. Finally, the court quoted *Corus Staal* for the proposition that "WTO decisions are 'not binding on the United States, much less this court.'" For all of these reasons, the court rejected plaintiff's WTO-based arguments as a matter of law.

Finally, on rare occasions, parties, have attempted to rely upon a WTO panel or AB report in a criminal action. For example, in *U.S. v. Lombardo*,⁶⁵ defendants were charged with bank fraud, transmitting wagering information in violation of the Wire Act, and money laundering. Defendants moved to dismiss the Wire Act count on the ground that the AB had held that the Wire Act violated U.S. commitments under the General Agreement on Trade in Services.⁶⁶ Quoting *Corus Staal* and the SAA for the proposition that AB reports "have no binding effect under the law of the United States," the court denied the motion to dismiss.

C. Cases Giving Effect to WTO Dispute Reports

As noted above, other tribunals considering similar issues under U.S. law have adopted a different approach to the domestic status of WTO dispute reports. In particular, they have used WTO dispute reports to reject agency interpretations of U.S. trade statutes. Ironically, two of the most striking examples of tribunals giving effect to WTO rulings have occurred in disputes involving challenges to Commerce's use of zeroing.

Perhaps the most dramatic invocation of WTO dispute reports occurred in the *Softwood Lumber* dispute. This protracted litigation involves multiple challenges filed before WTO panels, NAFTA panels, U.S. courts, and U.S. administrative agencies over allegedly unfair Canadian trade practices in connection with the harvesting and sale of softwood lumber.⁶⁷ For current purposes, the relevant dimension of this dispute involves a series of challenges to Commerce's use of zeroing.

After Commerce used zeroing in calculating antidumping duties on Canadian softwood lumber, Canada sought review before a NAFTA Chapter 19 binational panel. These panels are to "determine whether . . . [the imposition of antidumping duties] was in accordance with the antidumping . . . law of the importing

⁶⁴ 31 U.S.C. § 5363 (2006).

⁶⁵ *United States v. Lombardo*, Case No. 2:07-CR-286 TS (Dec. 13, 2007).

⁶⁶ Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/R (April 7, 2005).

⁶⁷ In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (N. Am. Free Trade Agreement Binat'l Panel 2003) (Decision of the Panel). For an extended analysis of this dispute, see Jeffrey L. Dunoff, *The Many Dimensions of Softwood Lumber*, 45 ALTA. L. REV. 319 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013609.

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Party,” and sit, in effect, as national tribunals.⁶⁸ Canada challenged these duties on several grounds, including that, under *EC – Bed Linen*, use of zeroing was inconsistent with WTO law. The NAFTA panel held that zeroing was permissible under U.S. law and that “WTO decisions are not binding upon Commerce or this Panel.”⁶⁹ However, the panel found that Commerce erred in several respects in the calculation of antidumping duties and remanded.⁷⁰ On October 15, 2003, Commerce issued a remand determination, which Canada promptly appealed to a Chapter 19 panel.

In March 2004, the panel found that several determinations were not adequately supported, and again remanded. Significantly, the panel rejected a request to re-examine its decision on the use of zeroing on the basis of a pending WTO dispute involving the United States. The panel reasoned that it had to “decide this case based on the law in effect; it cannot avoid decision based on the speculation of legal change.”⁷¹ In July 2004, the panel found, for the third time, that the use of zeroing was a permissible practice under the U.S. anti-dumping statute.

While it pursued the NAFTA litigation outlined above, Canada simultaneously challenged Commerce’s use of zeroing at the WTO. In April 2004, a WTO panel held that Commerce’s use of zeroing was WTO-inconsistent.⁷² In August 2004, the WTO’s AB affirmed this determination.⁷³

After the AB’s determination, Canada again challenged Commerce’s use of zeroing before the NAFTA panel. The panel had to determine whether it should again deem zeroing a permissible interpretation of the statute under *Chevron* or whether the AB determination – even if technically not binding upon the NAFTA panel – changed the analysis. In a detailed and lengthy opinion, the panel relied on the *Charming Betsy* principle, rather than *Chevron*, to conclude that Com-

⁶⁸ North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. In general, U.S. agency determinations in antidumping and subsidy cases are subject to review by the U.S. Court of International Trade. This review, in turn, may be appealed to the U.S. Court of Appeals for the Federal Circuit. However, NAFTA Chapter 19 provides for a review by a binational panel of antidumping and countervailing duty determinations issued by national authorities. Thus, in effect, the binational panel system “replace[s] judicial review of final antidumping and countervailing duty determinations.” *Id.* Panels may either uphold a final determination or remand it for action not inconsistent with the panel’s decision. *Id.* A panel decision is not appealable to the domestic courts. *Id.* An involved Party may avail itself of an extraordinary challenge procedure against a panel decision. However, only limited grounds are available, such as allegations that a panel member was guilty of gross misconduct or a serious conflict of interest. *Id.* See also NAFTA, Annex 1904.13 (setting out extraordinary challenge procedure).

⁶⁹ *Softwood Lumber*, *supra* note 67.

⁷⁰ *Id.* For example, Commerce was ordered to make certain adjustments to reflect dimensional differences between different softwood products being compared, to exclude certain products from its calculation, and to explain why it reached certain conclusions.

⁷¹ In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination (5 March 2004), USA-CDA-2002-1904-02 (N. Am. Free Trade Agreement Binat’l Panel 2004) (Decision of the Panel Respecting Remand Determination).

⁷² Panel Report, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/R (Apr. 13, 2004).

⁷³ Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004).

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merce was precluded from using the zeroing methodology. This conclusion came despite its own three earlier determinations and a U.S. Court of Appeals decision holding that zeroing was a permissible interpretation of the relevant statute.⁷⁴ In attempting to reconcile *Chevron* and *Charming Betsy*, the panel reasoned that “[a]n otherwise permissible agency interpretation (i.e., one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law.”⁷⁵

The panel addressed the effect of the URAA. While noting that WTO dispute reports “do not directly affect the internal law of the United States,” the tribunal reasoned that the URAA “does not strip away from a court (or from a binational panel) the ability – indeed the responsibility – to consider WTO obligations in assessing the legality of an agency action. . . .”⁷⁶ The panel argued that the AB’s *Softwood Lumber* report “does not itself cause the challenged United States measure (zeroing) to be in conflict with [the United States’ international legal obligations]. Rather, it establishes with considerable authority that the measure is so in conflict, which makes application of *Charming Betsy* more assuredly correct.”

The tribunal also carefully distinguished *Corus Staal*. It claimed that the *Corus Staal* court declined to apply the WTO’s *Softwood Lumber* decision “because the finding therein was not adopted as per Congress’s statutory scheme.”⁷⁷ However, according to the panel, after *Softwood Lumber* was decided, the United States determined “that the [Commerce] Department should render its actions in the relevant investigation to be not inconsistent with the findings of the DSB. . . .”⁷⁸

Notably, the panel explicitly sought to limit the potential reach of its decision:

Our decision does not purport to change U.S. antidumping law; rather it applies U.S. antidumping law (as appropriately interpreted through *Charming Betsy*) to agency action. DSB decisions are not directly binding on U.S. courts, nor – by implication – on NAFTA Chapter 19 binational panels . . . [However, t]he URAA does not render *Charming Betsy* unavailable as a rule of statutory construction. The [United States’s WTO obligations] have been clarified in the WTO *Softwood Lumber* Decision, and that clarification was accepted by the United States [through statutorily prescribed administrative procedures]. . . . We find that the application of zeroing in this investigation is inconsistent with a United States international obligation and, by application of the *Charming Betsy* doctrine, to be unreasonable and not in accordance with the law. . . .⁷⁹

⁷⁴ In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (N. Am. Free Trade Agreement Binat’l Panel 2005) (Decision of the Panel Following Remand).

⁷⁵ *Id.* at 25.

⁷⁶ *Id.* at 27.

⁷⁷ *Id.* at 28, quoting *Corus Staal*, *supra* note 1, at 1349.

⁷⁸ *Id.* at 34.

⁷⁹ *Id.* at 42, 43-44.

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A more recent NAFTA dispute involved similar issues. *Wire Rod from Canada* involved the imposition of antidumping duties against certain Canadian products.⁸⁰ In an annual review of these duties, Commerce “zeroed” all sales where the dumping margins would otherwise have been negative.⁸¹ Canadian petitioners argued that this use of the zeroing methodology had been precluded by various WTO reports, and that under *Charming Betsy* the relevant domestic statutes should be interpreted in a manner consistent with international law. Commerce countered that, under *Chevron*, the court should defer to the agency’s reasonable interpretation of the statute.

The panel acknowledged the significance of both canons of construction. *Chevron* is “an important constituent of domestic administrative law” and *Charming Betsy* is “an important constituent of Supreme Court jurisprudence in the international relations field.”⁸² The panel noted that the “mandatory provisions of the [WTO Antidumping Agreement] constitute international law . . . [and] obligations of the United States” and that it would therefore “be unseemly. . . to prefer discretion of an administrative agency over compliance with. . . the WTO Agreements which the United States quite willingly entered into a little over a decade ago.”⁸³

The panel also determined that the URAA did not preclude application of the *Charming Betsy* principle. First, the panel emphasized that URAA addresses adverse WTO holdings regarding a U.S. “law,” meaning a statute, regulation or practice. However, zeroing is not explicitly required by the relevant statute, and its use “results . . . from administrative interpretations and applications of the URAA by Commerce on a case-by-case basis.”⁸⁴ The panel noted that given the absence of a written policy of general applicability for zeroing, no Congressional review is necessary to discontinue the use of zeroing. Thus, effectively precluding Commerce from using zeroing in this action would not run afoul of URAA’s prohibition on using WTO dispute reports to override a statute, regulation or practice.⁸⁵

Moreover, the NAFTA panel found that applying *Charming Betsy* would not “implement in either form or substance any single WTO ruling.” Rather, it would “recognize, for this case only, that the totality of AB rulings and other

⁸⁰ In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada: 2nd Administrative Review, USA-CDA-2006-1904-04 (N. Am. Free Trade Agreement Binat’l Panel 2007) (Decision of the Panel).

⁸¹ *Id.* at 8.

⁸² *Id.* at 38.

⁸³ *Id.*

⁸⁴ *Id.* at 34.

⁸⁵ There is some irony in this argument. In much of the WTO litigation, the United States argued that the informal nature of Commerce’s decision to use zeroing meant that the practice did not rise to the level of a “measure” properly challengeable before a WTO panel. Panels and the AB uniformly rejected this argument. As a result, zeroing was sufficiently formal that it was properly subject of WTO dispute processes. On the other hand, in response to an argument that URAA insulated zeroing from review, the panel determined that the use of zeroing was insufficiently formal to rise to the level of a regulation or practice. Hence, zeroing was too formal to be insulated from challenge at the WTO, and too informal to be insulated from review pursuant to the URAA.

precedents respecting zeroing now definitively regard zeroing as a violation of the Anti Dumping Agreement.” For these reasons, the panel reasoned that “zeroing seems inconsistent . . . with the underlying principle of the *Charming Betsy* canon, to respect the law of nations whenever possible,”⁸⁶ and remanded the matter back to Commerce with instructions to re-calculate the dumping margins “without zeroing.”⁸⁷

These holdings represents rather extraordinary examples of international tribunals, sitting in effect as domestic courts, interpreting domestic law to require the application of a decision by another international tribunal to trump a judicially-sanctioned interpretation by the domestic agency responsible for administering the applicable statute. These decisions stand in sharp contrast to the *Timken* and *Corus Staal* decisions discussed above, and present a radically different vision of the status of WTO dispute reports in domestic litigation.

The divergent approaches found in these two lines of cases raise a series of critical doctrinal and normative questions. What is, and what should be, the domestic status of WTO dispute reports? As an institutional matter, should the judiciary or Congress determine the domestic legal effect of international tribunal decisions? How does the *Chevron* doctrine interact with the *Charming Betsy* doctrine, and what should courts do when these doctrines suggest differing outcomes?

While these questions are timely and important, a full exploration of these broad issues is beyond the scope of this paper. For current purposes the divergent approaches outlined in the cases discussed above suggest two salient observations. First, notwithstanding the apparently clear statutory language intending to exclude legal effect for WTO norms and WTO dispute reports in domestic litigation, judicial practice is divergent, and the lines governing when WTO norms have effect in domestic litigation are not yet firmly drawn. Second, given this doctrinal disarray, it is appropriate to undertake an inquiry into the potential effects of greater domestic court use of WTO norms. Which policies and values are advanced by giving domestic effect to WTO dispute reports? Which are disadvantaged? Do the benefits of domestic court use of WTO dispute reports outweigh the costs? It is to these inquiries that we now turn.

III. Potential Costs and Benefits of Giving Effect to WTO Reports in Domestic Courts

As outlined in Part I above, the URAA appears to foreclose private party reliance upon WTO law in general, and WTO dispute reports in particular, in litigation in U.S. courts. However, as demonstrated in Part II, tribunals applying U.S. law have responded quite differently to efforts to invoke WTO law. Many courts have flatly rejected these efforts. However, some more recent opinions have permitted private parties to rely upon international trade law. These tribunals have used WTO law, in particular WTO dispute reports, to reject agency interpreta-

⁸⁶ *Wire Rod*, *supra* note 80, at 38.

⁸⁷ *Id.* at 40.

tions of U.S. statutes, and to find in favor of private parties challenging agency actions.

The sharp and dramatic split among tribunals raise difficult doctrinal and normative questions. Is it desirable for domestic courts to give effect to WTO dispute reports? Would doing so make international trade law more enforceable, and thereby address one of international law's most obvious weaknesses, its lack of enforceability? Would increased enforceability increase the power and efficacy of international norms? Or would domestic court application of WTO law threaten the unity and coherence of WTO law? Would empowering private parties to decide which WTO claims to pursue open the door to the litigation of "wrong cases;" i.e., disputes that resist resolution, and thereby lessen respect for WTO law and processes?⁸⁸

We might expect internationalists, who generally favor domestic court use of international law and advocate international judicial dialogue, to favor the legal doctrine developed and applied by the *Softwood Lumber* and *Wire Rod* panels. In particular, internationalists might argue that domestic court application of WTO law would strengthen the enforceability of WTO law and thereby increase compliance levels with WTO norms as well as the security and predictability of WTO law. However, as demonstrated below, granting domestic effect to WTO dispute reports is unlikely to produce these benefits. Instead, it is likely to produce significant costs to the WTO dispute system. On balance, then, the effect of giving domestic effect to WTO dispute reports in domestic litigation is less than zero.

A. Enhancing the Enforceability of WTO Law and Increasing Compliance with WTO Dispute Reports

Domestic court consideration of WTO-related claims might be justified if states currently fail to comply with the result of WTO dispute proceedings at an unacceptably high rate. The operative assumption is that permitting private parties to invoke WTO law – and particularly WTO dispute reports – against recalcitrant states in domestic courts would produce greater compliance with WTO dispute reports. An example may help to illustrate the point. In the long-running *Bananas* dispute, GATT and WTO panels ruled that the EC's bananas regime

⁸⁸ A number of scholars have focused on these difficult disputes. The idea, like so many others in the international trade context, originates with Robert Hudec. See Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 159-63 (1980). See also William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 73-76 (1987); Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111 (1992); C. O'Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309 (2007). I have explored the pressures that such cases can put on the WTO's dispute system in Jeffrey L. Dunoff, *When – and Why – Do Hard Cases Make Bad Law? The GSP Dispute*, in WTO LAW AND DEVELOPING COUNTRIES 283 (George A. Bermann & Petros C. Mavroidis eds., Cambridge University Press 2007); Jeffrey L. Dunoff, *Lotus Eaters: Reflections on the Varietals Dispute, the SPS Agreement, and WTO Dispute Resolution*, in TRADE AND HUMAN HEALTH AND SAFETY 153 (George A. Bermann & Petros C. Mavroidis, eds., Cambridge University Press 2006); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733 (1999).

was WTO-inconsistent.⁸⁹ The EC made certain changes to its bananas regime. However, many states and private parties claimed that the new measures did not bring the EC into compliance with its WTO obligations. A private trader injured by the EC's alleged noncompliance sought a remedy in domestic litigation. However, the European Court of Justice held that a private party could not rely upon WTO dispute reports in a challenge to the EC regime: "It is settled case law . . . that, given their nature and structure, WTO Agreements are not in principle among the rules in light of which the Court is to review the legality of measures adopted by Community institutions."⁹⁰ Presumably, had the private party been able to successfully invoke WTO law, it could have obtained damages for the EC's failure to bring its bananas regime into compliance, or possibly even a judgment ordering the EC to modify its regime to come into compliance with WTO norms.

The desirability of giving domestic effect to WTO law to enhance compliance with WTO dispute reports turns, in part, on current levels of compliance with these reports and, in part, on whether alternative mechanisms to induce compliance exist.⁹¹ However, to the extent that advocates urge domestic courts to give effect to WTO dispute reports to enhance compliance, they may be looking to 'solve' a problem that does not exist as it is far from clear that WTO dispute settlement suffers from insufficient rates of compliance. Indeed, many official and academic studies consider the WTO's dispute resolution process to be the "jewel in the crown" of the trading system,⁹² and the global community's most effective international dispute resolution system.⁹³

Presumably, unacceptably low rates of compliance would discourage states from using the WTO dispute system, as states would have little incentive to pursue complaints if legal success was unlikely to produce change in the losing state's behavior. However, states frequently invoke the system. In just 13 years, some 369 complaints have been submitted to the WTO dispute settlement sys-

⁸⁹ For a summary discussion of this protracted dispute, see JEFFREY L. DUNOFF, ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 828-45 (2d ed., Aspen Publishers 2006). For a detailed analysis, see Raj Bhala, *The Bananas War*, 31 *McGEORGE L. REV.* 839 (2000).

⁹⁰ Case C-377/02, *Van Parys v. Belgisch Interventie Restitutiebureau*, 2005 E.C.R. I-1465, ¶¶ 48, 50. See also Case C-149/96, *Port. v. Council*, 1999 E.C.R. I-8395, ¶ 47.

⁹¹ For current purposes, I put to one side difficult questions of what is meant by compliance and how compliance is measured. See, e.g., Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538 (Walter Carlsnaes et al. eds., 2002); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 *MICH. J. INT'L L.* 345 (1998). For purposes of this discussion, I assume that problems of defining and measuring compliance can be overcome, and that compliance is a rough proxy for effectiveness.

⁹² See, e.g., Supachai Panitchpakdi, Dir.Gen., World Trade Org., *Ten Years After Marrakesh: the WTO and Developing Countries* (June 9, 2004). (transcript available at http://www.wto.org/english/news_e/spsp_e/spsp29_e.htm).

⁹³ See, e.g., Jose Alvarez, *The New Treaty Makers*, 25 *BC INT'L & COMP. L. REV.* 213, 226 (2002) (noting the perception among international lawyers "that WTO dispute settlement constitutes the most effective enforcement tool available at the global level"). But see Jeffrey L. Dunoff, *Compliance at the WTO: Seduced by the Dispute Settlement System?*, in *THE MEASURE OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY* 196 (Canadian Council on Int'l. L. ed., 2004) (questioning whether this general perception overstates the success of WTO dispute settlement).

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tem, making WTO dispute settlement “the busiest international system for resolving international disputes in the history of the world.”⁹⁴ This figure is particularly impressive when compared with the use of other international dispute systems. For example, trading states initiated roughly 200 dispute settlement proceedings under GATT between 1948 and 1994; states have filed less than 100 adversarial proceedings at the International Court of Justice since 1946; and NAFTA parties have filed only three Chapter 20 disputes over the last decade. The high volume of WTO disputes is a strong indication that states find the system to be a useful mechanism to resolve disputes, and in particular that the system is not stymied by unacceptably high rates of noncompliance. The lack of any proposals for radical reform of the dispute system in the current round of trade negotiations is additional, albeit indirect, evidence that states are generally satisfied with WTO dispute settlement, including compliance rates. This supposition is consistent with the general consensus among trade scholars that the WTO dispute system works well.⁹⁵

The dispute process itself has two mechanisms that shed some light on compliance rates. First, losing respondents are expected to modify or withdraw their WTO-inconsistent measure. If immediate compliance with an adverse report is “impracticable,” losing parties are supposed to comply within a “reasonable period of time.” Parties have arbitrated the length of this period in only twenty one cases. If losing parties were frequently “dragging their feet” regarding compliance, we would expect to see many more arbitrations over the appropriate period of time for coming into compliance. More importantly, article 21.5 of the DSU provides for a special dispute settlement process “where there is disagreement as to the existence of consistency with a covered agreement of measures taken to comply with [WTO dispute report] recommendations or rulings . . .” As of January 1, 2008, some thirty six article 21.5 disputes have been initiated, sometimes with a formal request for consultations and sometimes with a request for a panel; there have been twenty four panel reports in these cases and fourteen appellate body reports. Thus, out of 369 complaints brought to the system, prevailing parties formally challenged compliance in thirty six disputes, a rate of approximately 9.75%.⁹⁶ While it is certainly possible that prevailing parties will fail to pursue cases of noncompliance with WTO dispute reports, the relatively low number of noncompliance complaints is additional evidence that the system is not currently plagued by unacceptable rates of noncompliance.

⁹⁴ James Bacchus, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44 HARV. INT'L L. J. 533, 540 (2003).

⁹⁵ See, e.g., Warwick Comm'n, THE MULTILATERAL TRADE REGIME: WHICH WAY FORWARD 32 (2007) (“The [dispute settlement system] has been a major success. It represents a substantive advance on the previous GATT regime.”); Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 2 (2008) (noting the “general perception” among “most if not all developed countries” that WTO dispute system “works well”); William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 50 (1995) (stating that “. . .since its inception in 1995, the system has worked reasonably well in providing an effective mechanism through which WTO members are able to resolve disputes.”).

⁹⁶ Of course, not every complaint over compliance represents an example of noncompliance.

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These observations regarding state behavior are confirmed by several studies that attempt to evaluate compliance rates quantitatively, qualitatively, and in comparison with other international dispute systems. In one widely-cited study, Bill Davey reviewed the first decade of WTO dispute resolution and calculated a compliance rate of 83%;⁹⁷ another study found full or partial compliance in 88% of disputes.⁹⁸ Other commentators praise WTO compliance rates, which are characterized as “extraordinarily high”⁹⁹ and as “quite remarkable for an international court.”¹⁰⁰ Moreover, most comparative studies conclude that compliance rates with WTO dispute settlement reports compare favorably with compliance rates associated with other international tribunals, such as the International Court of Justice and human rights tribunals.¹⁰¹

Finally, powerful tools to induce compliance with WTO dispute reports already exist. In particular, the Dispute Settlement Understanding provides a complex set of procedures to ensure compliance. If a panel finds that a challenged measure violates a WTO obligation, it typically recommends that the Member concerned brings the offending measure into conformity with its WTO obligations.

If the Member concerned does not implement the report within a reasonable time, the prevailing party may seek compensation.¹⁰² If the parties are unable to agree on an amount of compensation, the prevailing party may ask the DSB to authorize it to suspend concessions owed the noncomplying party; i.e., to take retaliatory action. That is, the prevailing state can raise tariffs or other trade barriers in a level that is equivalent to the injury caused by the WTO-inconsistent measure. DSB authorization is automatic, unless there is a consensus to the contrary. If the parties disagree on the appropriate level of retaliation, this figure can be set by arbitration.¹⁰³ Thus, virtually alone among international tribunals, WTO dispute settlement provides for economic sanctions in the event of non-compliance. While this system is not without its critics,¹⁰⁴ it is functional in the

⁹⁷ Davey, *supra* note 88, at 47.

⁹⁸ Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 48 (2005).

⁹⁹ Sarah Elizabeth Kreps & Anthony Clark Arend, *Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Norms*, 16 DUKE J COMP & INT'L L. 331, 386 (2006).

¹⁰⁰ David L. Breau, *The World Court's Advisory Function: "Not Legally Well-Founded"* 14 U. MIAMI INT'L & COMP. L. REV. 185, 215 & n.148 (2006).

¹⁰¹ See, e.g., Posner & Yoo, *supra* note 98; Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

¹⁰² Understanding on Rules and Procedures Governing Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 22.2 Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1239 (1994) [hereinafter DSU].

¹⁰³ *Id.* at art. 22.6, 22.7. See Holger Spamann, *The Myth of 'Rebalancing' Retaliation in WTO Dispute Settlement Practice*, 9 J. INT'L ECON. L. 31 (2006).

¹⁰⁴ Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT'L L. 127 (2007); Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO*, 8 J. INT'L ECON. L. 101 (2005); Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 786–87 (2004); Kym Anderson, *Peculiarities of Retaliation in WTO Dispute Settlement*, 1 WORLD TRADE REV. 123, 128 (2002); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 814–24 (2001);

sense that states do seek authorization to retaliate; from time to time do retaliate against noncompliance; and there is evidence that retaliation helps induce compliance, at least in some cases.

To be sure, the fact that compliance is high in general and that states can (and do) retaliate against noncompliance is not to ignore the reality that the WTO has experienced some highly troubling instances of non-compliance, particularly by its most powerful members. But the relatively high rates of compliance, and the presence of potent alternative enforcement mechanisms suggests that the argument that national courts should give effect to WTO dispute reports to enhance compliance with WTO law is a solution in search of a problem. If domestic courts are to give effect to WTO reports, some other justification is needed.

B. Strategic Interactions among WTO Domestic and International Tribunals

Of course, compliance with WTO reports may be the wrong benchmark. Perhaps compliance with dispute reports is relatively high, but overall compliance with WTO norms relatively low because states file an insufficient number of WTO actions. In these circumstances, opening domestic courts to WTO-related claims might bring a desirable increase in the net amount of WTO-related litigation, and hence an increase in the overall compliance rates with WTO norms.

There is ample reason to believe that states currently under-litigate at the WTO. In recent years, a substantial amount of literature has attempted to empirically examine the factors that account for the use of WTO dispute settlement as well as the structural impediments to WTO litigation.¹⁰⁵ This literature has identified a number of obstacles to the filing of WTO actions, all of which may significantly reduce the number of WTO-inconsistent measures subject to legal challenge.

First, the pattern of trade disputes is closely related to patterns in the diversity and size of exports.¹⁰⁶ Apart from sheer trade volume, research by Greg Shaffer

Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR J. INT'L L. 763 (2000); Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Toward a More Collective Approach*, 94 AM. J. INT'L L. 335, 346 (2000).

¹⁰⁵ Gregory Shaffer, *Can WTO Technical Assistance and Capacity Building Serve Developing Countries?*, 23 WIS. INT'L L. J. 643 (2005); Chad Bown, *Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes*, 27 THE WORLD ECON. 59 (2004); Gregory Shaffer, *How to Make WTO Dispute Settlement Work for Developing Countries: Some Proactive Developing State Strategies*, SUSTAINABLE DEV. AND TRADE ISSUES ICTSD RESOURCE PAPER No. 5 1(2003), available at www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

¹⁰⁶ Henrik Horn, Petros Mavroidis & Hakan Nordstrom, *Is the Use of WTO Dispute Settlement System Biased?*, (London Center Econ. Pol. Res., Discussion Paper No. 2034, 1999). More specifically, trade disputes emerge only when states actually trade with each other, and countries that trade very little with each other are unlikely to litigate over trade restrictions. Thomas Sattler & Thomas Bernauer, *Dispute Initiation in the World Trade Organization* (unpublished manuscript, on file with author); Peter Holmes et al., *Emerging Trends in WTO Dispute Settlements: Back to the GATT?* (The World Bank Dev. Res. Group, Policy Research Working Paper 3133, 2003). Similarly, whether a measure is challenged is related to how much trade is affected; not surprisingly, measures that impact a large volume of imports are more likely to be challenged than measures that result in the loss of a small volume of imports. For example, the mean value of lost imports due to U.S. trade remedy measures that are challenged at the WTO is \$49.9 million, as compared with a mean value of \$3.2 million for nonchallenged

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and others¹⁰⁷ identifies three primary challenges to initiation of WTO disputes:

(i) **RELATIVE LACK OF LEGAL EXPERTISE IN WTO LAW.** To successfully use WTO dispute settlement, states must possess substantial legal capacity, including the capacity to recognize an injury to its trading prospects, properly identify the foreign trade measure causing the injury, and organize sufficient legal and political resources to pursue a legal claim.¹⁰⁸ Although some trading states, including the United States and the EC, have formal and informal vehicles for identifying potentially actionable foreign trade measures,¹⁰⁹ many other states lack such mechanisms and it is more difficult for them to engage in the process of “naming, blaming and claiming” that is a necessary precondition to successful use of the dispute settlement system.¹¹⁰

(ii) **LACK OF FINANCIAL RESOURCES.** The direct and indirect financial costs of WTO litigation are large. While the cost of different cases vary widely – some disputes are intensely fact intensive, others involve relatively straight-forward legal analysis; some involve multiple legal claims, others just one central issue; some settle early, some are appealed and/or involve substantial collateral litigation – it is clear that even simple disputes involve substantial resources. In a recent paper, Nordstrom and Shaffer offer suggestive “back of the envelope” approximations of these costs.¹¹¹ They estimate that a “case of average complexity” would cost \$100,000 if it ended after initial consultations; that advancing to the panel stage would cost an additional \$320,000; and that an appeal would generate another \$135,000 in legal fees.¹¹² More complex disputes would presumably result in correspondingly higher legal costs. Nordstrom and Shaffer conclude that these transaction costs create a “threshold effect that effectively discriminates against small claims and countries that have

U.S. remedies. Chad P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 *J. LEGAL STUDIES* 515, 521 (2005).

¹⁰⁷ Gregory C. Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 *WORLD TRADE REV.* 177 (2006); Chad Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 *WORLD BANK ECON. REV.* 287 (2005); Chad Bown & Bernard Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 *J. INT'L ECON. L.* 861 (2005).

¹⁰⁸ Shaffer, *supra* note 107, at 179.

¹⁰⁹ The classic study remains GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (Brookings Institution Press 2003).

¹¹⁰ William Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 *L. & SOC'Y REV.* 631 (1980-81).

¹¹¹ Hakan Nordstrom & Gregory Shaffer, *The Case for a Small Claims Procedure: A Preliminary Analysis*, (Int'l Cen. For Trade and Sustainable Dev., ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2, 2007) available at <http://ictsd.net/downloads/2008/05/access-to-justice-in-the-wto.pdf> (July, 2007).

¹¹² *Id.* at 10.

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them, even though such small claims are relatively large in relation to those countries' small economies."¹¹³

(iii) FEAR OF RETALIATION. States may forego WTO litigation because legal actions may complicate important political or economic relations with trading partners. For example, published reports suggest that the United States refrained from initiating a WTO action against the EU over GMOs while it sought EU support in the diplomatic maneuvering prior to the Iraq war.¹¹⁴ Alternatively, states may forgo meritorious complaints out of fear that the respondent will retaliate with a suit of its own.¹¹⁵

It is of course difficult to know whether these factors, whether alone or in combination, suppress litigation rates at the WTO and, if so, by how much. However, if the current system of state-to-state litigation at the WTO produces a sub-optimal amount of litigation, then private actions in domestic courts might be useful.¹¹⁶ Private trading interests are, of course, vastly more numerous than states, and in many cases may have incentives to pursue litigation over disputes that states would not initiate litigation over.

However, arguments along these lines do not account for the interplay of private litigation in domestic courts and state-to-state actions at the WTO. Specifically, how would the availability of domestic court actions affect state-to-state litigation in Geneva? Would domestic actions increase or decrease the number of complaints filed in WTO dispute processes?

In considering the relationship between international and domestic enforcement of WTO law, it would seem that at least three options are possible. First, domestic and international litigation might function *independently*, and it is possible that adding a domestic litigation option will have no effect on the level of disputes filed at the WTO. Second, international and domestic options may be *complementary*. The possibility of domestic litigation may increase the value of international litigation at little additional cost. In this case, we would expect the availability of domestic litigation to increase the amount of filings at the WTO.

¹¹³ *Id.* at 11. On the other hand, some evidence suggests that lack of legal capacity does not play a significant role in the initiation of disputes. See, e.g., Bown, *supra* note 106, at 525 ("I find no evidence that, holding other things constant, the measure of a foreign country's limited "legal capacity" negatively affects the decision to participate in a dispute against a potentially WTO-inconsistent policy.")

¹¹⁴ See, e.g., Gary G. Yerkey, *U.S. Looking to Ask EU for Talks in WTO Over Ban on Imports of GMO Food Products*, BNA WTO Reporter, Oct. 22, 2002.

¹¹⁵ One study suggests that filing a complaint increases the probability that the respondent will file a subsequent action against the complainant by up to 55 times. Eric Reinhardt, *Aggressive Multilateralism: The Determinants of GATT/WTO Dispute Initiation, 1948-1998*, 19 (2000) available at <http://userwww.service.emory.edu/~erein/research/initiation.pdf> (Feb. 16, 2000).

¹¹⁶ A substantial literature has addressed the various issues raised by proposals for the private enforcement of WTO norms. See, e.g., Ernst-Ulrich Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 J. INT'L ECON. L. 529 (2007); Philip M. Moremen, *Costs and Benefits of Adding a Private Right of Action to the World Trade Organization and the Montreal Protocol Dispute Resolution Systems*, 11 UCLA J. INT'L L. & FOR. AFF. 189 (2006); Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. LEGAL STUD. 631 (2005); Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?* 44 HARV. INT'L L.J. 221 (2003).

Finally, domestic and international litigation may be *rivalrous*. That is, the availability of domestic litigation may substitute for international dispute settlement. For example, if foreign sugar interests could pursue WTO-related claims in U.S. courts, Brazil or other states may be less inclined to assume the burden of challenging U.S. sugar programs in Geneva.

A rich literature describes the various ways that adding a particular form of dispute resolution may crowd out other forms.¹¹⁷ The open question is whether public and private enforcement of WTO norms would be complements or substitutes. To the extent this is an empirical question, no *a priori* answer is available. Experience in other international regimes suggests ample reason to believe that the availability of private claims based on WTO law may indeed act as a substitute for state to state litigation over alleged violations of WTO norms.

Consider, for example, the North American Free Trade Agreement, which governs international economic relations among Canada, the U.S. and Mexico. The treaty provides for several types of dispute settlement mechanisms. For example, Chapter 20 of the treaty creates a panel mechanism for the “settlement of all disputes between the Parties regarding the interpretation or application of this Agreement. . . .”¹¹⁸ Chapter 11 of the treaty provides for international arbitration in the event of a dispute between a party and an investor of another party for a claimed violation of the substantive provisions of Chapter 11. Notably, in providing this mechanism for private parties to challenge state behavior, Chapter 11 provides that its dispute settlement mechanism is “[w]ithout prejudice to the rights and obligations of parties under Chapter 20.”¹¹⁹ Thus, virtually any fact pattern that would give rise to a private claim under Chapter 11 could also give rise to a claim by a state under Chapter 20.

There is substantial investment by citizens of one NAFTA party in other NAFTA parties. Hence, not surprisingly, from time to time investment disputes arise. Of these disputes that have advanced to formal legal proceedings, the number of actions initiated by private parties substantially exceeds the number of actions filed by NAFTA parties. To date, it appears that there has only been one dispute filed by a NAFTA party under Chapter 20 that alleges a violation of Chapter 11.¹²⁰ In contrast, as of January 2008, it appears that approximately 13 Chapter 11 complaints have been filed against the U.S.; approximately ten

¹¹⁷ See, e.g., ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (Cambridge University Press 2006) reviewing the empirical evidence. For an argument in a very different context of how permitting private litigation might undermine public enforcement of the same norms, see Alvin K. Klevorick & Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on Empagran*, 3 J. COMPETITION L. & ECON. 309 (2007).

¹¹⁸ NAFTA, *supra* note 68, at art. 2004.

¹¹⁹ *Id.* at art. 1115.

¹²⁰ In the Matter of Cross-Border Trucking Services, USA-Mex-98-2008-1 (N. Am. Free Trade Agreement Arbitral Panel 2001) (Final Report of the Panel), Mexico alleged that the United States violated Chapter 11 by refusing to permit Mexican investment in U.S.-based companies that provide transportation of international cargo. Other Chapter 20 cases include U.S. Safeguard Action taken on In the Matter of the Broom Corn Brooms from Mexico, USA-97-2008-1 (N. Am. Free Trade Agreement Arbitral Panel 1998) (Final Report of the Panel) (challenge to ITC definition of “domestic industry” for purposes of safeguard action against broom corn brooms); In the Matter of Tariffs Applied by Canada to Certain

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against Canada; and approximately 12 against Mexico. Presumably, many if not all of these cases could have been filed by the investor's home state, pursuant to chapter 20.

Some of Chad Bown's research is also highly suggestive in this regard. In one study, he investigated the hypothesis that the ability of a foreign industry to directly retaliate against a U.S. industry through domestic antidumping procedures substitutes for the foreign state challenging a U.S. measure at the WTO.¹²¹ More specifically, Bown tests whether a country may "choose not to use the WTO's formal dispute settlement process to challenge a U.S.-imposed trade remedy because it has access to an alternative retaliatory instrument, that is, because it is able to take matters into its own hands and target the protected U.S. industry with a trade remedy of its own."¹²² Bown finds substantial evidence that this is the case. He writes: "the foreign industry's first choice after being targeted by a U.S. trade remedy is to respond by initiating a trade remedy investigation of its own against its U.S. competitors. Then, if that is not possible, the industry resorts to the next-best instrument, convincing its government to engage in formal, government-to-government litigation through a WTO trade dispute."¹²³

To be sure, these examples do not prove that private actions will always crowd out state-to-state litigations, or that permitting domestic court actions on WTO-related claims would necessarily crowd out WTO litigation in Geneva. But they do support the claims that private parties and states face different incentives to litigate, that they will likely pursue different claims, and that private enforcement actions and state-initiated litigations interact in complex and subtle ways. More importantly for current purposes, these examples call into question the assumption that opening domestic courts to WTO-related claims would increase the net amount of WTO-related litigation and thereby increase the strength and enforceability of WTO norms.

C. The Progressive Development of WTO law

International tribunals, like their domestic counterparts, do not exist only to resolve disputes. Through the application of abstract rules and principles to concrete fact patterns, international tribunals have the ability to develop and clarify the rules of international law.¹²⁴ This form of judicial lawmaking necessarily

U.S.-Origin Agricultural Products, CDA-95-2008-1 (N. Am. Free Trade Agreement Arbitral Panel 1996) (Final Report of the Panel) (challenge to Canadian tariffs on poultry and other agricultural products)

¹²¹ Bown, *supra* note 106.

¹²² *Id.* at 534.

¹²³ *Id.* at 545.

¹²⁴ See, e.g., HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 4-5 (Grotius Publications Limited 1982) (suggesting that the ICJ's primary utility is in its capacity to develop international law, rather than in its role as a dispute settlement body). To be sure, international tribunals do not often admit that they are engaged in law-making. As the late Judge Robert Jennings wrote of the International Court of Justice: "perhaps the most important requirement of the judicial function [is to] be seen to be applying existing, recognized rules, or principles of law," even when it "creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction . . ." MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 232 (Cambridge University Press 1996).

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occurs in any incomplete rule system – which is to say, in every system of rules. However, this law development function is “particularly important in the international society in which the legislative process by regular organs is practically non-existent.”¹²⁵

In principle, WTO dispute panels are not authorized to make new law. Indeed, the DSU explicitly denies the panels the ability to do so by providing that panel recommendations and rulings “cannot add to or diminish the rights and obligations provided in the [WTO treaties].”¹²⁶ Nevertheless, there is little doubt that WTO dispute panels de facto engage in lawmaking functions. Like other bodies of law, the WTO treaties are marked by constructive ambiguity and deliberate silence. As a result, WTO dispute panels necessarily generate new law when they clarify ambiguities and fill gaps in the WTO agreements. Indeed, many of the most controversial and influential WTO disputes involve precisely judicial efforts to resolve issues that are not resolved by treaty text. While the particulars of some of these decisions have been subject to harsh criticism,¹²⁷ the general exercise of judicial lawmaking power is not generally viewed as a lawless usurpation of legislative prerogative. Rather, such efforts are often realistically viewed as an exercise of implicit delegation of lawmaking authority to WTO dispute resolution panels.¹²⁸

However, the suggestion that *domestic* courts interpret WTO rules in order to determine the precise scope of meaning of the WTO’s wide-ranging and multifarious provisions is problematic for several reasons. First, it is far from clear that domestic courts possess the necessary expertise to interpret and apply WTO law. The Uruguay Round Agreements alone consist of over 22,000 pages of legal text, and dispute settlement panels and the AB have generated in excess of 50,000 pages of jurisprudence. As a result, the interpretation and application of WTO law is a highly specialized and highly technical undertaking.

There can be little doubt that panelists and AB members have a comparative advantage over national judges in the interpretation and application of this complex body of law. Many panelists are former trade negotiators or otherwise possess substantial experience in trade matters, and AB members include preeminent international jurists who regularly and systematically consider questions of WTO law. Domestic court judges, in contrast, are unlikely to have specialized expertise in international trade law and will necessarily only have limited and sporadic

¹²⁵ LAUTERPACHT, *supra* note 124, at 162.

¹²⁶ DSU, *supra* note 102, at art. 3.2. Moreover, when interpreting the Antidumping Agreement, where a panel “finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the [member’s] measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.” Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Art. 17.6(ii), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

¹²⁷ See, e.g., John Ragosta, et al., *WTO Dispute Settlement: The System is Flawed and Must be Fixed*, 37 INT’L L. 697 (2003); Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL’Y INT’L BUS. 109 (2002).

¹²⁸ See, e.g., Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L. J. 333 (1999).

exposure to WTO law. Under these circumstances, miscues by domestic courts are virtually inevitable – and, in the absence of review by the AB, virtually uncorrectable.

Moreover, lawmaking by WTO panels is tolerated, in part, because states exercise significant controls over WTO dispute processes and procedures. As Larry Helfer and Anne-Marie Slaughter have explained, international tribunals generally operate in a context of “constrained independence,” meaning that although they act as independent decision makers, there are significant limits to their authority.¹²⁹ Thus, states can specify, for example, the interpretative methodologies that tribunals should employ and the level of deference courts should give to national measures, as well as the “rules governing access to the tribunal, the scope of its procedures, its fact-finding powers, the type and form of its decisions, the remedies it awards, and fundamental issues such as whether its decisions are binding or not.”¹³⁰

In the specific case of the WTO, Richard Steinberg details a series of discursive, constitutional and political constraints that limit judicial lawmaking by panels and the AB.¹³¹ Among the various constraints operating on the AB, Steinberg emphasizes that “Appellate Body members are selected through a process in which powerful members may veto candidates whom they assess as likely to engage in inappropriate or undesired lawmaking; the Appellate Body acts in the shadow of threats to rewrite DSU rules that would weaken it and of possible defiance of its decisions by powerful members; and the Appellate Body receives – and has established means of obtaining – information on the preferences of members, helping it to avoid political pitfalls.”¹³²

Trading states as a whole do not exercise the same control mechanisms vis-à-vis national courts. The WTO membership does not appoint national judges, nor control for their composition or tenure. They do not write the jurisdictional, access or procedural rules that define a domestic court’s authority. Thus, trading nations have few mechanisms to express their disapproval of legal interpretations generated by other states’ courts, or of imposing constraints on lawmaking by those courts.

In short, although panels and the AB necessarily engage in substantial lawmaking, the gaps and lacunae in WTO texts and dispute reports cannot realistically be viewed as a delegation of lawmaking authority to *domestic* courts, and there is no evidence of political will to change the identity of the delegatee from the AB to national courts. Moreover, there is little reason to believe that national courts engaged in a decentralized system of delegated common law-making possess sufficient expertise to make the law rational or sufficient accountability to

¹²⁹ Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 942 (2005). But see Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411 (2008) (arguing that states generally lack effective mechanisms to control international courts).

¹³⁰ Helfer & Slaughter, *supra* note 129, at 946.

¹³¹ Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT’L L. 247 (2004).

¹³² *Id.* at 274.

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make the resulting law legitimate. Hence, the supposed benefit of giving domestic effect to WTO law – permitting the progressive development of WTO norms – is unlikely to occur in a satisfactory manner.

D. The Coherence and Consistency of WTO Law and the Role of the AB

Advocates claim that giving effect to WTO norms in domestic courts will enhance the certainty and predictability of WTO law. But transferring interpretative authority from one AB in Geneva to the national judiciaries of over 150 WTO member states would likely produce inconsistent judicial interpretations. Frequent disagreements are inevitable when hundreds of domestic courts are all independently empowered to identify the best readings of ambiguous treaty texts and dispute resolution reports. To the extent that such conflicts remain unresolved, the quest for certainty and uniformity is undermined. Alternatively, to the extent such conflicts are ultimately resolved by the AB or through trade negotiations, the system loses the legislative economies thought to be associated with implied delegation to judicial bodies. Moreover, in the time it takes to resolve judicial dissensus, states and private actors must endure the costs associated with uncertainty over the scope or meaning of the law. Hence, empowering domestic courts to interpret and apply WTO law would likely reduce, rather than augment, the certainty and predictability of WTO law.

Again, examination of other regimes provides useful points of reference. In any number of issue areas, decentralized domestic courts interpret international norms. Not surprisingly, in virtually every instance, different domestic courts produce divergent readings of the same treaty norms. Consider, for example, the U.N. Convention on Contracts for the International Sale of Goods (CISG).¹³³ This treaty has been adopted by virtually all economically powerful states and has been characterized as one of the world's most successful attempts to harmonize international commercial law. The CISG provides for no standing international tribunal; rather, it is to be interpreted and applied by domestic courts (and international arbitrators). CISG explicitly instructs domestic courts to interpret the Convention in light of "its international character and the need to promote uniformity in its application."

However, notwithstanding the explicit textual directive to interpret the treaty autonomously from domestic law, domestic courts have repeatedly read treaty provisions in light of familiar domestic law concepts.¹³⁴ Moreover, divergent national court interpretations have plagued other unification efforts. For example, an extensive literature details the various ways that national courts have pro-

¹³³ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

¹³⁴ JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS, AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS 1 (Kluwer Law and Taxation Publishers 1989); Djakhongis Saidov, *Damages: The Need for Uniformity*, 25 J. L. & COM. 393 (2005); Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG*, 25 J. L. & COM. 75 (2005); Larry A. DiMatteo, *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT'L L. & BUS. 299 (2004).

duced divergent readings of the Hague Rules,¹³⁵ the Warsaw Convention,¹³⁶ and other international legal instruments.¹³⁷

In addition to producing legal disarray, decentralized interpretation and application of WTO law would displace the AB as the preeminent and authoritative interpreter of WTO law. If domestic courts – and particularly common-law domestic courts – begin to interpret and apply WTO law, they will not mechanically receive and apply settled WTO norms. To the contrary, domestic courts will become active creators, not passive recipients, of WTO law. Given the inevitability of judicial lawmaking, discussed above, these courts would actively shape the nature and breadth of WTO norms.

Of course, it is highly unlikely that all WTO members would participate equally in this law-making activity. Given the size of the U.S. market, the complexity of U.S. trade law, and the creativity of the U.S. trade bar, the largest number of cases would likely arise in U.S. courts, with filings in Europe not far behind. In this event, we might find that, as a practical matter, the center of gravity for the legal interpretation and application of WTO law would shift from the AB in Geneva to U.S. and European courts. Would U.S. courts correctly interpret WTO law? Or would they produce ‘WTO law’ with an ‘American accent’? Once again, it appears that a benefit thought to be associated with domestic court use of WTO dispute reports would not materialize but that a cost to the WTO system would.

Conclusion

Recent cases have split sharply over whether domestic tribunals applying U.S. law should give effect to WTO dispute settlement reports. This doctrinal disarray invites examination of the costs and benefits of giving domestic effect to WTO law in national courts. Domestic application of WTO law might appear to be a useful mechanism to enhance compliance with WTO norms and advance the uniformity, predictability and certainty of international trade law. However, these supposed benefits are largely illusory, as compliance with AB and panel reports is relatively high, and trading states already have potent tools available to address the relatively rare instances of noncompliance. Instead, a decentralized system of domestic court interpretation and application of WTO law would likely disserve the values of uniformity, predictability and certainty, as various national courts would produce divergent readings of different WTO norms. Domestic litigation of international trade norms in hundreds of national courts may generate a body of confusing, and possibly, inconsistent doctrine. Moreover, such a system would displace the Appellate Body from its current role as authoritative judicial interpreter of WTO norms. In sum, for those committed to maintaining

¹³⁵ See, e.g., Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553 (1995).

¹³⁶ See, e.g., Paul Stephen Dempsey, *International Air Cargo & Baggage Liability and the Tower of Babel*, 36 GEO. WASH. INT'L L. REV. 239 (2004).

¹³⁷ See generally, Paul B. Stephan, *Courts, Tribunals, and Legal Unification - The Agency Problem*, 3 CHI. J. INT'L L. 333 (2002).

Less Than Zero

and strengthening the WTO's innovative dispute resolution system, the net effect of giving domestic effect to WTO reports is less than zero.