

**Chicago-Kent College of Law**

---

**From the Selected Works of Sungjoon Cho**

---

August 18, 2009

# Global Constitutional Lawmaking

Sungjoon Cho

# Global Constitutional Lawmaking

Sungjoon Cho<sup>★</sup>

## Abstract

*This article identifies a nascent phenomenon of “global constitutional lawmaking” in a recent WTO jurisprudence which struck down a certain calculative methodology (“zeroing”) in the antidumping area. The article interprets the Appellate Body’s uncharacteristic anti-zeroing hermeneutics, which departs from a traditional treaty interpretation under the Vienna Convention on the Law of Treaties and the past pro-zeroing GATT case law, as a “constitutional” turn of the WTO. The article argues that a positivist, inter-governmental mode of thinking, as is prevalent in other international organizations such as the United Nations, cannot fully expound this phenomenon. Critically, this turn originates from bold ideas which envision, and thus “constitute,” new institutional meaning and possibilities within the WTO, which are anchored firmly by a discernible purpose of cabining trade distortive/restrictive consequences from the use of zeroing which have long been left unchecked. The legitimacy (sustainability) of such constitutional lawmaking can be secured not only by exogenous factors such as domestic political support but also by endogenous factors such as normative recognition by the domestic legal system (“internalization”).*

---

<sup>★</sup> Associate Professor of Law and Norman and Edna Freehling Scholar, Chicago-Kent College of Law, Illinois Institute of Technology. I extend my deepest gratitude to Professor Joseph H.H. Weiler for his extraordinary mentorship without which this article would have never come to light. I also thank Harold Koh, Bruce Ackerman, Benedict Kingsbury, Jeffrey Dunoff, David Trubek, Charles Irish, Heinz Klug, John Ohnesorge, Jason Yackee, Sumudu Atapattu, Claire Kelly, Arthur Pinto, Samuel Murumba, Kari Aamot, Gheewhan Kim, Seong-Joong Kim, Jaehyoung Lee, Yun-Young Lee and participants in the Guest Lecture co-sponsored by the East Asian Legal Studies Center and the Global Legal Studies Center at University of Wisconsin (Madison) Law School, the International Legal Theory Colloquium at New York University Law School, the International Economic Law Forum at Brooklyn Law School, the 2008 Stanford/Yale Junior Faculty Forum, the Inaugural Conference of the Society of International Economic Law, and the Third Trade Law Forum at Korean Ministry of Foreign Affairs and Trade for their valuable comments and suggestions on earlier drafts. Maribel Nash and Daniel Crimmins provided excellent research assistance. All errors are mine.

## Table of Contents

Introduction .....	1
I. A Judicial Revolution in the World Trade Organization.....	7
A. “Zeroing”: The Epicenter of the Revolution .....	7
B. The Ancien Régime: The Old GATT Jurisprudence on Zeroing.....	9
C. The Making of the Revolution: The Anti-Zeroing Jurisprudence in the WTO .....	11
1. The Genesis.....	11
2. The Expansion.....	13
3. The Solidification .....	15
II. Interpreting the Revolution: Toward Global Constitutional Lawmaking .....	18
A. Putting the Zeroing Jurisprudence in Constitutional Perspectives	18
1. Constitutional Adjudication as Constitutional Lawmaking .....	18
2. Why Global Constitutional Lawmaking in the WTO? .....	20
B. Normative Ramifications of Global Constitutional Lawmaking ....	25
1. Could WTO Members Overturn Constitutional Lawmaking? .....	25
2. Could a Lower Tribunal (Panel) Reject Constitutional Lawmaking? .....	27
III. Resistance to Global Constitutional Lawmaking.....	30
A. Challenges to Constitutional Adjudication on Zeroing .....	30
B. Defending Constitutional Adjudication on Zeroing .....	32
1. The Augmented Role of International Adjudication .....	32
2. The Ambiguous Nature of WTO Bargain.....	36
3. The Enlightened Meaning of Sovereignty .....	39
IV. The Legitimacy of Global Constitutional Lawmaking .....	42
A. An Exogenous (Political) Test .....	42
B. An Endogenous (Legal) Test .....	44
Conclusion .....	47

## Introduction

Can we conceive “constitutional” norms at the global level beyond the nation state? Conventional international relations (IR) scholars may be lukewarm as to this c-word since it tends to menace their ontological premise, i.e., the state-centeredness.<sup>1</sup> This article

---

<sup>1</sup> See J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 363 (1996-97) (observing that the continued centrality of the national and the state is ontologically necessary to conventional IR scholars); Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621, 631 (2009) (stating that mainstream IR

challenges this mainstream view. It argues that under certain circumstances global organizations may self-generate constitutional norms in an effort to regulate states' behaviors which ambiguous treaty provisions may not fully capture. The article finds a case in point in a recent development concerning a technical issue in the World Trade Organization (WTO).<sup>2</sup> The article explores the dynamic process of global constitutional law-making, namely *how* global organizations, such as the WTO, can actually build constitutional norms within their institutional contexts.<sup>3</sup>

Ironically, the WTO's constitutional revolution originated from a rather unspectacular calculative methodology in the area of trade remedy (antidumping) labeled "zeroing."<sup>4</sup> Given that WTO texts do not explicitly prohibit such practice, public international law, considering the *Lotus* case<sup>5</sup> and the principle of *in dubio mitius*,<sup>6</sup> would recognize its members' discretion to freely adopt the practice. In fact, as what might constitute "useful guidance,"<sup>7</sup> a panel under the old General Agreement

---

theorists refused to recognize an international organization's capacity to "develop autonomous capacities to produce, monitor, and enforce legal norms").

<sup>2</sup> Marrakech Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter WTO Agreement], LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND [hereinafter RESULTS OF THE URUGUAY ROUND], 6, 6-18; 33 I.L.M. 1140, 1144-1153 (1994).

<sup>3</sup> Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413, 422 (2009) (contending that global constitutionalism is a "process of continuous development," rather than a "final good" akin to domestic constitutions). Importantly, this article does not address yet another critical aspect of global constitution lawmaking in the area of "human rights." Regarding the human rights dimension of global constitutionalism, see Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749, 768 (2008) (witnessing an ongoing process of implicit constitutionalization in the area of human rights in the international sphere).

<sup>4</sup> See generally Sungjoon Cho, [The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations](#), ASIL INSIGHTS (May 4, 2006).

<sup>5</sup> *SS Lotus (France v. Turkey)* (1927), PCIJ Ser. A., No. 10, at 18-19 (stating that sovereign states enjoy "a wide measure of discretion which is only limited in certain cases by prohibitive rules.").

<sup>6</sup> What is preferred under international law is "the less onerous meaning to the party which assumes the obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." 1 OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

<sup>7</sup> Japan - Taxes on Alcoholic Beverages, Appellate Body Report adopted on November 1 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R [hereinafter *Shochu II*]; WTO Agreement, *supra* note \_\_, art. XVI, para. 1 ("[T]he WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947").

on Tariffs and Trade (GATT) previously upheld the same measure.<sup>8</sup> Moreover, the WTO Antidumping Agreement stipulates that when a provision “admits [] more than one permissible interpretation,” a WTO tribunal, such as the Appellate Body (AB), shall validate a domestic authority’s antidumping measure “if it rests upon one of those permissible interpretations.”<sup>9</sup> Under traditional rules on treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT), the WTO tribunal would simply endorse the practice as it would interpret the Antidumping Agreement in a literal fashion.

Surprisingly, however, the AB, in a series of high-profile decisions, recently struck down all types of zeroing methodology.<sup>10</sup> These decisions are not a mere collection of inadvertent rulings on the same subject. Rather, they constitute a deliberate and systematic pattern toward a new jurisprudence in this area. Then, the question becomes whether, and how, the AB’s uncharacteristic stance could be justified in the face of traditional public international law, the GATT precedent, and the Antidumping Agreement, all of which appear to conflict with the AB’s position?

This article construes the AB’s anti-zeroing position not as a simple jurisprudential change but as a more serious judicial revolution, which is tantamount to “constitutional lawmaking,” in a determined endeavor to contain WTO members’ manipulative use of zeroing methodologies under the subterfuge of the textual ambiguity of the relevant WTO norms. The AB, this article contends, has firmly recognized the structural damage that zeroing, if left unchecked, could inflict on the global trading system through the propagation of antidumping measures. At first glance, the AB’s departure from the old GATT case law might be neither inevitable nor stunning. Admittedly, not all interpretive shifts deserve the “constitutional” label. Critically, however, it is not the shift itself but the *nature* of the shift which should draw our attention to this development. Both the subject matter and the unique topicality of the zeroing decisions render the AB’s jurisprudential shift a constitutional lawmaking via international adjudication.

First, despite the missing *Constitution* – with a capital “C” – global organizations may still need to re-configure the power allocated between themselves and their members with respect to measures which seriously undermine their ultimate object and purpose. To that end, certain fundamental (constitutional) norms within the meaning of the

---

<sup>8</sup> EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, Apr. 28, 1995 (unadopted) [hereinafter *EC – Cassettes*].

<sup>9</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note \_\_, Annex 1A, art. 17.6 (ii) (emphasis added) [hereinafter AD Agreement].

<sup>10</sup> See *infra* pt. II, § C.

WTO should tame an egregious form of protectionist politics which the zeroing practice denotes. The unparalleled evolution over a half century, from a provisional pact among a few contracting parties (GATT) to a full-blown multilateral trading system as a public good (WTO), tends to provide institutional maturity befitting such a constitutional mission.

Markedly, global constitutional lawmaking in the form of constitutional adjudication in the WTO has not sprung from a vacuum. One can fully capture this nascent phenomenon only with critical appreciation of certain historical contexts, to wit the unique topicality of zeroing and antidumping measures at present.

Trade remedies, such as antidumping measures, are widely prone to protectionism.<sup>11</sup> The use of antidumping remedies has recently skyrocketed as they are rapidly replacing more conventional trade barriers, such as tariffs and quotas, which rounds of trade talks have gradually demolished. WTO members now invoke antidumping measures competitively and with alarming frequency and intensity. Since the launch of the WTO in 1995, WTO members have initiated about 3,100 antidumping investigations.<sup>12</sup> In stark contrast, GATT contracting parties initiated only 1,600 investigations in the four decades before the 1980's. More demoralizing is antidumping measures' highly contagious nature.<sup>13</sup> In what appears to be a defensive attack, new globalizers, such as India, Brazil and China, have now begun to imitate the developed countries' penchant for antidumping suits.<sup>14</sup>

What makes matters worse, the current global financial crisis has exacerbated this already alarming trend. In a protectionist reaction to the crisis, trading nations initiated more than two hundred new antidumping investigations in 2008, which is a stark increase of nearly a third from 2007.<sup>15</sup> Considering that zeroing can inflate dumping margins by as much as 90%,<sup>16</sup> the practice is likely to fuel the abuse of

---

<sup>11</sup> See generally Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N. C. L. REV. 357 (2009) (criticizing an inherently protectionist nature of antidumping measures).

<sup>12</sup> Regarding the antidumping statistics, see the antidumping section of the WTO website, [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm) [hereinafter WTO AD Website].

<sup>13</sup> *Id.*

<sup>14</sup> Major developing countries have increasingly used the antidumping measures since the launch of the WTO. See *id.*

<sup>15</sup> Chad P. Bown, *Monitoring Update to the Global Antidumping Database*, available at [http://www.brandeis.edu/~cbown/global\\_ad/](http://www.brandeis.edu/~cbown/global_ad/) (2009); WTO, *WTO Secretariat Reports Increase of New Antidumping Investigations*, Press 556, May 7, 2009. See also Robert Guy Matthews, *Steelmakers Accuse China of Dumping in the U.S.*, WALL ST. J., Apr. 9, 2009 (reporting that the recent \$2.7 billion antidumping suit launched by the U.S. steelmakers against Chinese exporters may be "a string of steel-dumping cases against China").

<sup>16</sup> Daniel Ikenson, *Antidumping Reformers Rejoice*, Cato@Liberty, Dec. 18, 2006.

antidumping measures, if it remains intact. In short, zeroing could wreak havoc on the global trading system.

These disturbing developments within the global trading system, have prompted the WTO high court (the Appellate Body) to cultivate a new hermeneutics on the WTO Antidumping Agreement, one that envisions new institutional meanings and possibilities within the WTO that resonate with its *telos*,<sup>17</sup> “an integrated, more viable and durable multilateral trading system.”<sup>18</sup> This critical choice flows from the AB’s awareness of immediate and powerful normative consequences which would affect the future of the WTO. In other words, the AB was well aware that the AB’s adjudication would “(re-) constitute” the WTO, at least as far as this particular topic (antidumping) is concerned. Here, the AB departed from a conventional role of a triadic settler (arbiter) of disputes, a role that applies given rules neutrally, and instead assumes the innovative role of a “constitutional court.”<sup>19</sup>

At this juncture, articulating what this article does *not* present, or represent, might be in order. The article does not claim that its thesis provides an exclusive lens through which one may investigate constitutional phenomena in global organizations like the WTO. There are certainly different ways in which one can appreciate constitutional issues in those organizations from what this article suggests.<sup>20</sup> Nor does this article attempt to construct a grand theory of the “WTO Constitution,” as many scholars appear to have undertaken.<sup>21</sup> In essence, the article captures and theorizes *one* notable constitutional dynamic as it emerges in the WTO.

Against this backdrop, my thesis of global constitutional lawmaking unfolds in the following sequence. Part I documents a jurisprudential transformation on the zeroing practice from the old GATT to the new WTO. The AB’s judicial abolition of zeroing is anchored firmly by a discernible purpose: avoiding unfairness from an undue inflation of dumping margins and minimizing uncertainty in administering antidumping measures. Methodologically, the use of

---

<sup>17</sup> See Kenneth W. Abbott, “Economic” Issues and Political Participation: *The Evolving Boundaries of International Federalism*, 18 CARDOZO L. REV. 971, 974 (1996) (trenchantly submitting that political structures are not “corporeal” things whose existence derives from “constitutive ideas”).

<sup>18</sup> WTO Agreement, *supra* note \_\_, pmbi.

<sup>19</sup> See Sweet, *supra* note \_\_, at 640 (highlighting the “constitutional jurisdiction” of the highest courts, such as the WTO Appellate Body, for reviewing members’ domestic measures in light of the WTO regime).

<sup>20</sup> See e.g., Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 6 CHI. J. INT’L L. 625 (2005) (analyzing “trade and ...” issues from a constitutional standpoint).

<sup>21</sup> See *infra* note \_\_.

interstitial norms, such as “fairness,” tends to furnish the AB with maneuvering room for this teleological interpretation.<sup>22</sup>

Part II then attempts to theorize the AB’s judicial revolution on zeroing through the conceptual lens of “constitutional lawmaking,” which authoritatively re-configures the distribution of regulatory competence between the WTO and its members. This part highlights the AB’s innovative undertaking of constitutional adjudication as a vehicle for constitutional lawmaking in the WTO. It also discusses normative consequences of such constitutional lawmaking as they relate to WTO members and the WTO’s lower court (panel). Finally, it argues that the normative supremacy of constitutional norms created by constitutional lawmaking applies to both WTO members and panels.

Part III defends the AB’s constitutional lawmaking in the form of constitutional adjudication. Admittedly, the AB’s constitutional adjudication is not without opposition. It has sparked harsh criticisms ranging from judicial activism<sup>23</sup> to a “kangaroo court.”<sup>24</sup> This part responds to these criticisms by contending that international tribunals, like domestic courts, often engage in judicial rule-making via construction beyond mere mechanical application of treaty provisions. It also warns that any “disarticulated,” self-righteous concept of sovereignty mobilized to foreclose necessary discussions in this area

---

<sup>22</sup> Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 212-21 (M. Byers ed., 2000) (observing that tribunals employ interstitial norms “not because those norms are obligatory as a matter of law, but because they are necessary in order that legal reasoning should proceed”). These interstitial norms function as “standards” vis-à-vis “rules” in an adjudicative setting. See Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 350-55 (1999) [hereinafter Trachtman, *The WTO’s Domain*].

<sup>23</sup> The United States, an ever-present defendant in these anti-zeroing decisions, has denounced the AB’s anti-zeroing position as an improper form of judicial legislation because it “[makes] up rules that the U.S. never negotiated.” See U.S. Sen. Comm. on Finance, *News Release: U.S. Trade Laws and WTO*, Sep. 27, 2002, at <http://finance.senate.gov/press/pro92702.pdf>. Likewise, others have also asserted that the AB has violated the sovereignty-preserving standard of review enshrined under Article 17.6 (ii) of the Antidumping Agreement, which they contend is modeled after the U.S.’ *Chevron* doctrine. 467 U.S. 837 (1984). See also Roger P. Alford, *Reflections on U.S. – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT’L L. 196, 200-02 (2006) (arguing that the AB should have upheld the zeroing practice, which domestic regulators saw as permissible under the Antidumping Agreement).

<sup>24</sup> See Gary G. Yerkey, *Sen. Baucus Calls WTO ‘Kangaroo Court’ with Strong ‘Bias’ Against the United States*, 19 INT’L TRADE REP. (BNA) 1679 (2002); Congressional Record, S4308-26 (online ed., 14 May 2002).



does not do justice to the contemporary status of global market integration under the WTO system.<sup>25</sup>

Part IV deals with an evaluative aspect of the thesis. It first observes that exogenous factors such as domestic political support may not exhaust legitimizing bases for global constitutional lawmaking. This part emphasizes that “endogenous” factors such as normative recognition by the domestic legal system (“internalization”) will eventually secure the legitimacy (sustainability) of such constitutional lawmaking.

Finally, this article concludes that constitutional *culture* in the global trading community, which harbors and promotes a legal discourse of constitutional jurisprudence among the community participants, is a critical catalyst for constitutional lawmaking. Because trade inherently connotes a “transnational” value, participants – importers, exporters, consumers and investors – of the global trading community tend to be susceptible to such discourse. It is this constitutional culture within the WTO that liberates us from myopic mercantilism, which zeroing embodies, and leads us to embrace constructive normative possibilities envisaged by the multilateral trading system, in particular amid the current global economic crisis. Only this liberation can redefine WTO members’ interests, and their identities, from unreceptive sovereigntists to enlightened norm-builders.<sup>26</sup>

## I. A Judicial Revolution in the World Trade Organization

### A. “Zeroing”: The Epicenter of the Revolution

Dumping is a pricing strategy under which foreign producers export their products at less than fair (normal) value, such as at prices lower than their home prices or at prices below the cost of production plus normal profits.<sup>27</sup> Antidumping authorities and the beneficiaries of

---

<sup>25</sup> Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 393 (1994); Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992).

<sup>26</sup> See generally Sungjoon Cho, *The WTO’s Gemeinschaft*, 56 ALA. L. REV. 483 (2004) [hereinafter Cho, *Gemeinschaft*]; Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT’L ECON. L. 81 (2006). From a standpoint of sociological institutionalism, Martha Finnemore envisioned “continuing and even increasing adherence to multilateralism – even when it runs contrary to expressed national interests – because it embodies some set of values central to the larger world culture.” Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism*, 50 INT’L ORG. 325, 339 (1996).

<sup>27</sup> 19 U.S.C. § 1677(34) (stating that imports at less than fair value constitute dumping).

antidumping measures, i.e., domestic producers, attempt to justify the antidumping system as a bulwark against foreign producers' alleged "unfair" trade practices which enable the latter to reduce the production cost.<sup>28</sup> Since these discounted sales are legitimate under the domestic (antitrust) law, unless they are motivated by a predatory intent, i.e., to drive out rivals from the market,<sup>29</sup> a number of economists and policymakers view the antidumping system which lacks such strict requirement as a protectionist device.<sup>30</sup> Yet the GATT/WTO "does not pass judgment" on the fairness of dumping.<sup>31</sup> Instead, GATT Article VI authorizes importing countries to "condemn" dumping if it incurs material injury to domestic industries by imposing antidumping duties on dumped imports.<sup>32</sup> In other words, under these circumstances, importing countries may impose antidumping duties on dumped products to offset any allegedly unfair effects.

Under a typical antidumping investigation, the amount of antidumping duties corresponds with the magnitude of dumping ("dumping margin") which is defined as a gap between domestic price (normal value) and export price. In the United States, the Department of Commerce (DOC) calculates dumping margins. The DOC determines an overall dumping margin over a particular product under investigation by adding up multiple dumping margins ("Potential Uncollectible Dumping Duties" or "PUDD") collected from various sub-product groups ("averaging groups" specified by "Control Numbers" or "CONNUM") of the same product.<sup>33</sup> In doing so, the DOC ignores ("zeros") any "negative" PUDD (any excess of export prices over normal values) in each group. Consequently, an overall dumping margin (a total sum of multiple PUDDs) is inflated since the zeroing methodology prevents those negative individual dumping margins (PUDDs) from offsetting positive individual dumping margins (PUDDs). According to one study, dumping margins would have been 86 percent lower if zeroing had not

---

<sup>28</sup> See BRINK LINDSEY & DANIEL J. IKENSON, *ANTIDUMPING EXPOSED THE DEVILISH DETAILS OF UNFAIR TRADE LAW*, xi (2003).

<sup>29</sup> However, "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 589 (1986).

<sup>30</sup> Alan Greenspan once observed that antidumping remedies are "just simple guises for inhibiting competition" imposed in the name of "fair trade." Richard J. Pierce, Jr., *Antidumping Law as a Means of Facilitating Cartelization*, 67 *ANTITRUST L.J.* 725, 725 (2000) (quoting the former Federal Reserve Board Chairman Alan Greenspan, Remarks Before the Dallas Ambassadors Forum, Dallas, Texas (Apr. 16, 1999)).

<sup>31</sup> WTO AD Website, *supra* note \_\_.

<sup>32</sup> General Agreement on Tariffs and Trade, October 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. VI; AD Agreement, *supra* note \_\_, art. 1.

<sup>33</sup> Regarding the detailed methodology of the DOC's calculation of dumping margins, see U.S. Department of Commerce (Import Administration), *Antidumping Manual*, ch. 6 (Fair Value Comparisons), available at <http://ia.ita.doc.gov/admanual/index.html> [hereinafter AD Manual].

been employed.<sup>34</sup> The DOC uses this methodology not only in an original investigation but also in the subsequent stage of investigation, such as an “administrative review” under which it may annually compute a company-specific dumping margin upon a request by interested parties.<sup>35</sup>

Suppose that a foreign widget producer makes two U.S. sales.<sup>36</sup> The first U.S. sale (export) concerns Model A, and is given CONNUM #1. This sale is made at fifty cents per unit with 100 units. The second sale involves Model B, and is accorded CONNUM #2. This sale is made at a dollar and fifty cents per units with 100 units. The weighted-average normal value (home market price) is one dollar in both sales. The weighted-average margin for the first and the second sale is 50 cents and *minus* 50 cents, respectively. Each PUDD is calculated as a unit margin multiplied by total units sold. In the U.S. sale No.1 (CONNUM #1), the PUDD is 50 dollars, while in the U.S. sale No.2 (CONNUM #2) the PUDD is *minus* 50 dollars. The total PUDD is a sum of these individual PUDDs. In this example, the total PUDD would be 0 (50 minus 50) dollars.

However, under the zeroing practice the DOC ignores (“zeros”) any negative PUDD before summing up. Therefore, the total PUDD in this example is still 50 (50 plus 0) dollars, and the (weighted-average) dumping margin, which is total PUDD/total value of U.S. sales, is 25% (50/(50+150)). In sum, the dumping margin is inflated by 25% in this hypothetical case on account of zeroing because it would have been 0% ((50-50)/(50+150)) without zeroing. This zeroing practice under the ordinary (weighted average-to-weighted average) comparison method is called “model zeroing.”<sup>37</sup> In the administrative review, as in an ordinary investigation process, any negative individual dumping margins (such as weighted average normal value minus individual export prices) are zeroed, which is called “simple zeroing.”<sup>38</sup>

#### *B. The Ancien Régime: The Old GATT Jurisprudence on Zeroing*<sup>39</sup>

In *EC – Audio Cassettes* (1995), Japan complained that the EC’s zeroing practice led to arbitrary results in the calculation of dumping

---

<sup>34</sup> Ikenson, *supra* note \_\_.

<sup>35</sup> 19 U.S.C. § 1675(a) (periodically reviewing the amount of the antidumping duty).

<sup>36</sup> AD Manual, ch. 6, *supra* note \_\_.

<sup>37</sup> United States - Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”), Panel Report circulated on Oct. 31, 2005, para. 2.3.

<sup>38</sup> *Id.*, para. 2.5.

<sup>39</sup> Unlike the WTO, under the old GATT system any party, including a losing party, could “veto” the adoption of a panel report so that the report would not be legally “binding.” However, even such an unadopted report is still regarded as a useful legal guidance. See *Shochu II*, *supra* note \_\_.

margins since the practice tended to inflate dumping margins vis-à-vis the normal averaging (non-zeroing) methodology.<sup>40</sup> Japan therefore argued that such methodology violated Article 2 (paragraphs 1 and 6) of the Tokyo Round Antidumping Code requiring “fair comparison”<sup>41</sup> as well as Article 8 (paragraph 3) stipulating that the amount of antidumping duties should not exceed the actual dumping margin.<sup>42</sup> However, the EC responded that Article 2 concerned only those circumstances in which normal prices exceed export prices and did not cover the opposite situation where export prices exceed normal prices.<sup>43</sup> While Japan accentuated the unfairness of zeroing by highlighting the eventual consequences of zeroing, the EC simply adopted the narrow textualist reading of Articles 2 and 8 from which it attempted to legitimize the zeroing methodology.

The panel sided with the EC in its decision which was reminiscent of the *Lotus* doctrine.<sup>44</sup> The panel opined that nothing in Article 2 prevented the EC from adopting other calculative methodologies than normal averaging.<sup>45</sup> Therefore, an antidumping authority would not need to consider any negative dumping margins because it would obtain a *separate* dumping margin from each comparison between a price of a particular transaction in the home market (a normal value) and a price of yet another particular transaction in the export market (an export price). Whenever, an export price exceeds a home price, such a negative margin instantaneously becomes a zero margin under this single transaction framework.<sup>46</sup>

Under the panel’s approach, antidumping authorities would enjoy an option *not* to “aggregate” multiple results of multiple individual comparisons between home and export transactions. Such option tends to render fortuitous, and thus insignificant, the eventuality of final dumping margins being exaggerated. Here, the panel ignored the general necessity of aggregating multiple results of comparison in any comparison methodology. It assumed, wrongly, that the necessity of aggregation would occur only under an average-to-average comparison methodology. Therefore, the panel rejected Japan’s argument for the

---

<sup>40</sup> *EC – Cassettes*, *supra* note \_\_, para. 115.

<sup>41</sup> The same rule now appears in Article 2 (paragraphs 1 and 4) of the WTO Antidumping Agreement.

<sup>42</sup> The same rule now appears in Article 9 (paragraph 3) of the WTO Antidumping Agreement.

<sup>43</sup> *EC – Cassettes*, *supra* note \_\_, para. 119.

<sup>44</sup> *See supra* note \_\_.

<sup>45</sup> *EC – Cassettes*, *supra* note \_\_, para. 350.

<sup>46</sup> *Id.*, para. 356 (“[I]f the existence and extent of dumping and the imposition of duties had been conducted on a transaction-to-transaction basis, the EC would have been entitled to impose a duty with respect to dumped transactions, where injury existed, irrespective of the prices at which other undumped transactions occurred.”).

aggregation by opining that Article 2 would not require antidumping authorities to use exclusively the average-to-average comparison methodology.<sup>47</sup>

The panel report was unadopted, reflecting high political profiles which it engendered. Subsequently, despite intense negotiations under the Uruguay Round, WTO members failed to provide clear rules on zeroing.<sup>48</sup> As a result, this controversial practice had been quite prevalent among the main users of antidumping remedies, such as the U.S. and the EU, when India challenged the practice for the first time under the WTO system.<sup>49</sup>

### *C. The Making of the Revolution: The Anti-Zeroing Jurisprudence in the WTO*

#### 1. The Genesis

##### *a. EC – Bed Linen (2001)*

Echoing *EC – Audio Cassettes*, the EC clung to strict textualism and argued that Article 2 (Determination of Dumping) of the WTO Antidumping Agreement rendered no guide on how to combine individual dumping margins for specific product types to calculate an overall rate of dumping margin for the product under investigation.<sup>50</sup> The EC viewed that a “dumping margin” under the Agreement could be established “for each *product type* or for each *individual transaction*” as well as for the product as a whole.<sup>51</sup> It would not be difficult to read between the lines of the EC position. To implement the zeroing methodology, one should logically recognize each transaction as a separable segment (an individual transaction or a sub-product category) of the product under investigation. Only in this way, can one avoid including negative individual dumping margins in the calculation of an overall dumping margin for the product as a whole. In other words, this fragmentation of a product into autonomous transactional units prevents any negative results in one sub-product (transaction) category from offsetting any positive results in other sub-product categories.

However, in a surprising hermeneutical turn from the old GATT jurisprudence the AB rejected the EC position. It ruled that the dumping

---

<sup>47</sup> *Id.*, para. 358.

<sup>48</sup> Terence P. Stewart, *Antidumping*, in *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), vol. 2, 1383, 1540 (Terence P. Stewart ed. 1993).

<sup>49</sup> See John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113, 118 (2003) (observing that zeroing has been a common practice in the antidumping community).

<sup>50</sup> European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Appellate Body Report adopted on Mar. 12, 2001, WT/DS141/AB/R, para. 11 (emphasis original) [hereinafter *EC – Bed Linen*].

<sup>51</sup> *Id.*, para. 12 (emphasis original).

margin should be established “for the *product* – cotton-type bed linen – and not for the various types or models of that product.”<sup>52</sup> The EC should have “compare[d] the weighted average normal value with the weighted average of prices of *all* comparable export transactions,” which include those transactions with negative individual dumping margins.<sup>53</sup> Therefore, the EC failed to take into account these transactions by zeroing the minus dumping margins.<sup>54</sup> The AB invoked a general obligation of “fair comparison” under Article 2 as it implied that the zeroing methodology would entail unfair results.<sup>55</sup> This is exactly what Japan had presented in the *EC-Audio Cassettes*. Japan’s position, which had been rejected by a GATT panel in 1995, was finally vindicated by the AB in this case. This is the very first AB decision which struck down the zeroing practice. Yet it was just a beginning of the WTO anti-zeroing jurisprudence.

*b. U.S. – Softwood Lumber V (2004)*

The AB in this case reaffirmed the case law established in *EC – Bed Linen* which defined dumping in terms of “a product as whole,” not narrowly for “a type, model, or category of that product.”<sup>56</sup> The AB delegitimized the U.S. zeroing methodology by denying its calculative selectiveness embedded in zeroing. It viewed that the “results of the multiple comparisons at the sub-group level” are “only intermediate calculations,” not the dumping margin for the purpose of the WTO Antidumping Code.<sup>57</sup> The logical conclusion is therefore that an antidumping authority should “aggregate” *all* of these intermediate calculations regardless of being plus or minus.<sup>58</sup> Because zeroing basically cherry-picks only positive results of these intermediate calculations in the situation of multiple comparisons and disregards (zeroes) negative ones, it does “not take into account the *entirety* of the

---

<sup>52</sup> *Id.*, para. 53 (emphasis original).

<sup>53</sup> *Id.*, para. 55 (emphasis original).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*, para. 59

<sup>56</sup> United States - Final Dumping Determination on Softwood Lumber from Canada, Appellate Body Report adopted on Aug. 31, 2004, WT/DS264/AB/R, paras. 95-96 [hereinafter *U.S. – Softwood Lumber*].

<sup>57</sup> *Id.*, para. 97.

<sup>58</sup> *Id.* Those who do not recognize this essential principle of “aggregation” argue that the negation of zeroing would be tantamount to a situation in which “a driver should not be found guilty of speeding if, along other portions of the road, he was driving under the speed limit.” Alford, *supra* note \_\_, at 208 (quoting Stewart, *supra* note \_\_, at 1540). Yet this is a flawed analogy. Any individual incidence of speed-driving is an independent infringement, while an individual computation outcome between normal value and export price in a single transaction is mere an intermediate step to reaching a dumping margin. A dumping margin presupposes a process of combination or aggregation, if there are multiple transactions under investigations.

prices of some export transactions” and thus “inflates the margin of dumping for the product as a whole.”<sup>59</sup>

## 2. The Expansion

### a. *U.S. – Zeroing (EC) (2006)*

Mirroring the EC’s earlier position in the *EC – Bed Linen*, the U.S. argued that the dumping margin “could be interpreted as applying on a transaction-specific basis.”<sup>60</sup> However, in line with the previous case law in *EC – Bed Linen* and *U.S. – Softwood Lumber V*, the AB rejected this argument by reconfirming that the dumping margin should be established “for each known exporter or producer concerned of the product under investigation,” as stipulated in Article 6.10 of the WTO Antidumping Agreement.<sup>61</sup> The AB viewed that such interpretation would be consistent with the goal of an antidumping regime which is “designed to counteract the foreign producer’s or exporter’s pricing behaviour.”<sup>62</sup>

In particular, the AB ruled that zeroing was also illegal in the “administrative review” process, besides in the original investigation process. An administrative review refers to a process under which upon the request of interested parties the antidumping authority (DOC) annually calculates the amount of antidumping duties owed by each individual importer by comparing the price of each individual export transaction with a monthly average normal value.<sup>63</sup> The DOC then aggregates the results of these comparisons and calculates the rate for each importer as a percentage of her total imports in the U.S.<sup>64</sup> The AB opined that the DOC’s “systematic” disregard of negative individual dumping margins before aggregating these individual dumping margins resulted in an increased rate of dumping for the importer. The AB ruled that such systematic disregard violated Article 9.3 of the WTO Antidumping Agreement and GATT Article VI:2 both of which stipulate that an antidumping duty shall *not exceed* a dumping margin.

The AB based its decision strictly on textual grounds and justified it from the standpoint of “customary rules of interpretation of public international law” under the Vienna Convention on the Law of the Treaties.<sup>65</sup> The AB might want to deflect the potential criticism of

---

<sup>59</sup> *U.S. – Softwood Lumber*, *supra* note \_\_, paras. 98, 101 (emphasis original).

<sup>60</sup> United States - Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”), Appellate Body Report adopted on May 9, 2006, WT/DS294/AB/R, para. 128 [hereinafter *U.S. – Zeroing (EC)*].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*, para. 129.

<sup>63</sup> *Id.*, para. 109.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, para. 134.

judicial activism in relation to Article 17.6 (ii) through this ostensibly literal interpretation. It seemed to be a wise move since rejecting zeroing through pure construction would have engulfed the AB with heavier attacks than it has invited under the current interpretation.

Interestingly, the AB opened a window for future “as such” complaints against zeroing by endorsing the panel’s finding that zeroing “does have *general* and *prospective* application.”<sup>66</sup>

*b. U.S. – Softwood Lumber V (Article 21.5 – Canada) (2006)*

The U.S. challenged the AB’s emphasis on “multiple comparisons” on which the AB based its prohibition of zeroing. The U.S. argued that the AB’s position would render “illusionary” the U.S. “right to choose” different methods in calculating dumping margins.<sup>67</sup> According to the U.S., WTO members can elect not to aggregate multiple comparisons. In particular, the U.S. presented a seemingly plausible argument under Article 2.4.2 of the WTO Antidumping Agreement. The AB’s “product as a whole” approach in the previous cases would not make sense in a “targeted dumping” scenario under the Article (a “pattern of export prices which differ significantly among different purchasers, regions or time periods”) because two different dumping margins would occur for the same product, i.e., “one margin of dumping for transactions falling within the specified pricing pattern and another for all other transactions”<sup>68</sup> Moreover, without zeroing the Article itself would be meaningless since two different methodologies, i.e., the “weighted average-to-transaction comparison” for a targeted dumping, and the “weighted average-to-weighted average comparison” for normal scenarios, would produce the “mathematically equivalent” results.<sup>69</sup>

However, the AB blatantly dismissed the U.S. arguments. It viewed them as a “non-tested hypothesis” since the U.S. “has never applied” the weighted average-to-transaction methodology under the second sentence of the Article (targeted dumping), nor “has it provided examples of how other WTO Members have applied this methodology.”<sup>70</sup> In addition, according to the AB the “mathematically equivalent” outcome would be at best “limited to a specific set of circumstances.”<sup>71</sup>

Having condemned the zeroing practice under the aforementioned hypothetical scenario (the weighted average-to-

---

<sup>66</sup> *Id.*, para. 204 (emphasis added).

<sup>67</sup> United States - Final Dumping Determination on Softwood Lumber from Canada (Article 21.5 – Canada), Appellate Body Report adopted on Sep. 1, 2006, WT/DS264/AB/RW, para. 33 [hereinafter *U.S. – Softwood Lumber (Article 21.5)*].

<sup>68</sup> *Id.*, para. 36.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*, para. 97.

<sup>71</sup> *Id.*, para. 99.



transaction comparison in a targeted dumping), the AB further moved to strike down zeroing in yet another comparison methodology under the Article, i.e., a “transaction-to-transaction” comparison for the same reasons on which it based its previous rulings as to zeroing. It held that “the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the “fair comparison” requirement in Article 2.4” because it “distorts” certain export transactions (in that they are eventually zeroed) and consequently “inflates” dumping margins.<sup>72</sup>

### 3. The Solidification

#### *a. U.S. – Zeroing (Japan) (2007)*

The AB’s anti-zeroing jurisprudence has reached its climax in this case. The decision, which was dubbed the “death knell of zeroing,”<sup>73</sup> has been the most sweeping and unyielding one of all zeroing decisions in the WTO thus far. The AB struck down the U.S. use of the zeroing methodology *as such* in a transaction-to-transaction (T-T) comparison as well as in a weighted average-to-transaction (W-T) comparison. It also illegalized zeroing under three types of administrative review (periodic review, new shipper review and sunset review) both *as such* and *as applied*. The U.S. repeated its previous defense that the zeroing issue must be addressed “separately for each comparison methodology and for each type of anti-dumping proceeding”<sup>74</sup> so that an antidumping authority can enjoy the maximum discretion in its methodological choice among different types of comparisons.<sup>75</sup>

Markedly, in addition to its previously seen recourse to textual grounds<sup>76</sup> and practical damages to exporters due to the inflation of dumping rates,<sup>77</sup> the AB rejected the U.S. argument from a rather “teleological” standpoint, taking into account one of the most

---

<sup>72</sup> *Id.*, paras. 138-40. Furthermore, the AB noted that the unfair effects of zeroing tend to be more serious in the transaction-to-transaction comparison than in the weighted-average-to-weighted-average comparison because in the latter situation zeroing is performed after individual transactions were grouped and averaged, while in the former situation “excludes *ab initio* the results of all the comparisons in which the export prices are above normal value.” *Id.*, para. 141.

<sup>73</sup> Daniel Pruzin, Latest WTO Ruling May Spell End of U.S. Use of Zeroing Methodology, 24 Int’l Trade Rep. 83, Jan. 18, 2007.

<sup>74</sup> United States – Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report adopted on Jan. 23, 2007, WT/DS322/AB/R, para. 87 [hereinafter *U.S. – Zeroing (Japan)*].

<sup>75</sup> *Id.*, paras. 19, 21.

<sup>76</sup> *Id.*, para. 115.

<sup>77</sup> *Id.*, para. 123.

paramount values of the global trading system, i.e., certainty and predictability. It held that:

126. (...) If it is permissible to determine a separate margin of dumping for each transaction, the consequence would be that several margins of dumping could be found to exist for each known exporter or foreign producer. The larger the number of export transactions, the greater the number of such transaction-specific margins of dumping for each exporter or foreign producer. This *would create uncertainty and divergences* in determinations to be made in original investigations and subsequent stages of anti-dumping proceedings.<sup>78</sup>

As the culmination of a series of anti-zeroing decisions for the last several years, this ruling's disciplinary range is quite broad, covering nearly all comparison methodologies not only in the original investigation but also in the different administrative review procedures. This ruling seems to have delivered a clear message to the global trading community that the era of zeroing is gone.

*b. U.S. – Zeroing (Mexico) (2008)*

In a shocking move, the panel in *U.S. – Zeroing (Mexico)* explicitly defied the AB's established anti-zeroing position and instead reverted to the findings of panels in *U.S. – Zeroing (EC)* and *U.S. – Zeroing (Japan)* which had upheld the "simple zeroing" in the administrative (periodic) review.<sup>79</sup> The panel in *U.S. – Zeroing (Mexico)* emphasized that panels "are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue."<sup>80</sup> Interestingly, it found support for its position in Article 19.2 of the Dispute Settlement Understanding (DSU) which prohibits the panel and the AB from "adding to or diminishing" WTO members' rights and obligations.<sup>81</sup> It also claimed that its reversal of the AB's position in this issue is in pursuit of its obligation of an "objective examination" under Article 11 of the DSU.

The AB, as had widely been predicted, reversed the panel's findings on the U.S.' simple zeroing practice and invalidated this

---

<sup>78</sup> *Id.*, para. 126 (emphasis added).

<sup>79</sup> *U.S. – Zeroing (Mexico)*, *infra* note \_\_, paras. 7.106, 7.115. A "simple zeroing" refers to the zeroing practice adopted under "weighted average-to-transaction" (W-T) or transaction-to-transaction (T-T) comparisons between export price and normal value. The simple zeroing is often conducted in the administrative (periodic) review which starts after a year from the publication of antidumping duties. In contrast, the zeroing practice under weighted average-to-weighted average comparisons is called a "model zeroing."

<sup>80</sup> *Id.*, para. 7.102.

<sup>81</sup> *Id.*

methodology both “as such” and “as applied.”<sup>82</sup> The AB rejected the panel’s premise that there can be multiple dumping margins, and emphasized that dumping (and dumping margin) is an “export-specific” concept which should be defined in terms of *a product* as a whole, based on the textual interpretation of GATT Articles VI:1, VI:2 and VI:6(a) as well as WTO Anti-Dumping Code Articles 2.1, 2.3, 3.4, and 5.1.<sup>83</sup> The AB also justified its position by the “context” found in various other related provisions of the WTO Anti-Dumping Code, such as Articles 5.2(ii), 5.8, 6.1.1, 6.7, 6.10, 8.1, 8.2, 9.4, 9.5 and 11.<sup>84</sup> Interestingly, the AB confirmed that both French and Spanish versions of Article 6.10 of the WTO Anti-Dumping Code represent *one* single dumping margin (“*une marge*” and “*el margen*,” respectively). Finally, the AB expressed its deep concern over the panel’s rebellious behavior.<sup>85</sup>

*c. U.S. – Continued Zeroing (2009)*

In this decision, the AB delivered a *coup de grâce* to the zeroing methodology in its entirety. Regarding the “*continued* use of the zeroing methodology in successive proceedings” as measures, the AB sent an unequivocal signal that the simple zeroing, which the U.S. had continued to use in the periodic and subset reviews in defiance to the previous AB decisions, was illegal.<sup>86</sup> The AB’s position was particularly definite in that it captured even the aforementioned “ongoing conduct” as a reviewable measure.<sup>87</sup> In a rare Concurring Opinion, a member of the AB warned future panels not to further disobey the AB’s anti-zeroing jurisprudence by relying on rulings of the previous defiant panels (“pick[ing] over the entrails of battles past”).<sup>88</sup>

In a similar tenor, the AB ruled firmly against the U.S.’ recurring claim that the panel violated the standard of review under Article 17.6 (ii) of the Antidumping Agreement. The AB’s hermeneutics was basically teleological in this ruling. The AB rejected the AB’s self-serving construction of the term “permissible” by highlighting that “multiple meanings of a word or term [do not] automatically constitute “permissible” interpretations within the meaning of Article 17.6(ii).”<sup>89</sup> For the purpose of a “harmonious and coherent” interpretation, the AB

---

<sup>82</sup> United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, Appellate Body Report circulated on Apr. 30, 2008 [hereinafter AB Report, *U.S. – Zeroing (Mexico)*].

<sup>83</sup> *Id.*, paras. 83-86.

<sup>84</sup> *Id.*, paras. 87-93.

<sup>85</sup> *Id.*, para. 162.

<sup>86</sup> United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, Appellate Body Report circulated on Feb. 4, 2009, para. 185 [hereinafter AB Report, *U.S. – Continued Zeroing*].

<sup>87</sup> *Id.*, para. 181.

<sup>88</sup> *Id.*, para. 312.

<sup>89</sup> *Id.*, para. 268.

prioritized the first sentence of Article 17.6 (ii), which provides the law of treaty interpretation under the Vienna Convention on the Law of Treaties, over the second sentence, which endorses “permissible” interpretations.<sup>90</sup> Under the AB’s “holistic” interpretation, the first sentence informs the second one, not vice versa.<sup>91</sup> In other words, the critical role of “object and purpose” of a treaty in clarifying textual ambiguities, which is enshrined in the first sentence, should eventually “narrow the range of interpretations” under the second sentence.<sup>92</sup>

## II. Interpreting the Revolution: Toward Global Constitutional Lawmaking

### A. Putting the Zeroing Jurisprudence in Constitutional Perspectives

#### 1. Constitutional Adjudication as Constitutional Lawmaking

Capturing the constitutionality of the WTO’s new jurisprudence on zeroing involves “a dialogue of imagination and possibility” in that it produces a new way (theory) of observing this particular reality (zeroing).<sup>93</sup> It is a daunting challenge since the terminology (constitution) is innately elusive and resistant to any fixed meaning.<sup>94</sup> A recently emerging wide spectrum of narratives on trade constitution<sup>95</sup>

---

<sup>90</sup> *Id.*, paras. 268-72.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, para. 273.

<sup>93</sup> Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT’L L. 623, 623, 645 (2006) [hereinafter Trachtman, *Constitutions*].

<sup>94</sup> Deborah Z. Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT’L L. 39, 40-41 (2001) (observing difficulties in defining constitutionalism in the WTO context).

<sup>95</sup> For example, Jeffrey Dunoff offered three (institutional, normative and judicial) lenses through which one could capture trade constitution. Dunoff located an “institutional” lens in John Jackson’s classical framework of the multilateral trading system (GATT/WTO) under which a constitutional transformation from a “power-oriented” regime to a “rule-oriented” system through a development (evolution) of institution, i.e., the “structure and machinery” of an organization. Dunoff also discovered a “normative” lens in Ernst-Ulrich Petersmann’s thesis which views the WTO’s constitutionalism as pre-commitments on fundamental values, such as market freedom or non-discrimination. According to Petersmann, WTO constitutionalism effectively disciplines national policies “which tend to limit economic freedom to domestic citizens and, for centuries, have discriminated against foreign goods, foreign services and foreign consumers.” Finally, Dunoff unearthed a “judicial” (or “jurisprudential”) lens of trade constitution in Deborah Cass’ thesis which focuses on certain constitutional principles which the WTO tribunal has increasingly invoked in shaping its decisions. Dunoff, *supra* note \_\_, at 651-56.

appears both useful and distracting. While these narratives may provide us with helpful cognitive frameworks by which we can re-formulate the AB's zeroing rulings on a more profound ground, various taxonomies and perspectives which attempt to define trade constitution on their own terms often complicate a coherent understanding of this tricky notion. Nonetheless, certain critical elements, such as the subject-matter, the function of adjudication and the milieu, tend to characterize in combination the nature of constitutionalism or constitutionality within the WTO for the purpose of this article.

First, constitutional adjudication basically addresses the "governance" issue. As it is related to the WTO's *telos* of anti-protectionism, constitutional adjudication is to "enable its members to pursue common goals without being defeated by competing antisocial conduct of members of the group."<sup>96</sup> In other words, it aims to discipline parochial protectionism which undermines the multilateral trading system, i.e., *legal* disciplines over protectionist *politics*.<sup>97</sup> Therefore, the purpose of constitutional adjudication goes beyond a mere settling of a bilateral trade dispute before the WTO court: it aims to establish a general rule which other WTO members than parties concerned will also observe in the future.

Second, constitutional adjudication concerns the WTO court (the AB)'s deliberate departure from the conventional role of a triadic arbiter whose main mission is "neutral rule applier."<sup>98</sup> It self-licenses to engage in a "creative interpretation" in order to "giv[e] effect to the trade regime's primary purpose."<sup>99</sup> In this regard, Deborah Cass viewed that the AB has adopted a unique interpretive technique ("constitutional doctrine amalgamation") which borrows from other constitutional domains certain general (interstitial), constitutional principles, such as rule of reason or proportionality.<sup>100</sup> Therefore, constitutional adjudication eventually associates itself with broader and deeper issues (values), such as "how to design a fair system of law."<sup>101</sup>

Finally, a certain set of developments fashioning the environment of the AB's critical adjudication may help illustrate an institutional *self* of the WTO. Topical controversies and debates over the AB's adjudication offer rich narratives in the WTO which attempt to

---

<sup>96</sup> JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 788 (1969) [hereinafter JACKSON, *THE LAW OF GATT*].

<sup>97</sup> Dunoff, *supra* note \_\_, at 649; JACKSON, *THE LAW OF GATT*, *supra* note \_\_, at 788. See also Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 *YALE J. INT'L L.* 301, 316-24 (1998) (discussing Professor Jackson's constitutional premise of international trade law).

<sup>98</sup> ALVAREZ, *supra* note \_\_, at 492.

<sup>99</sup> *Id.*

<sup>100</sup> Cass, *supra* note \_\_, at 51, 67.

<sup>101</sup> *Id.*, at 52.

“constitute,” on their own terms, desirable institutional paradigms re-configuring the subtle power allocation between the WTO and its members. In sum, a proper constellation of interrelated factors, such as the AB’s hermeneutical shift, a legislative proposal to codify the shift and a counter-proposal to reverse the shift, tends to provide a unique constitutional moment within the WTO which facilitates the advent of constitutional adjudication.

Admittedly, the very invocation of “constitution” in the WTO context itself may be provoking.<sup>102</sup> After all, the WTO has “no constitutional court, no constitutional convention, [and] no constitutional drafting process.”<sup>103</sup> Nonetheless, any direct, un-nuanced domestic analogy derived from the image of the *Constitution* may be ill-suited in the WTO context. Despite such social contexts and institutional paraphernalia as are different from those of states, the WTO may still retain certain “constitutional features” to the extent that governance or power allocation between the WTO and its members still matters.<sup>104</sup> In other words, the WTO’s institutional arrangement different from states should not thwart otherwise useful constitutional imaginations within the context of the WTO.

In this regard, constitutional discourse in international trade law should involve various dynamic and flexible developments which may “proceed along a number of *dimensions*, and in a number of different institutional settings,” rather than “advance[ing] a particular constitutional structure or agenda.”<sup>105</sup> This “plasticity” of trade constitution enables WTO Members to willingly respond to certain constitutional moments with adequate institutional changes.<sup>106</sup> In this line, one possible dimension of trade constitution, *inter alia*, which this article concerns, may be defined as “a legal and judicial constitution that provides rules ... for determining supremacy and the scope of judicial application of rules.”<sup>107</sup>

## 2. Why Global Constitutional Lawmaking in the WTO?

On the surface, the AB’s hermeneutical shift in zeroing does not appear inevitable. The AB could still have been faithful to the literal

---

<sup>102</sup> *Id.*, at 40 (quoting John H. Jackson, Lecture, John F. Kennedy School of Government, Boston, Nov. 3, 1999).

<sup>103</sup> Dunoff, *supra* note \_\_, at 650.

<sup>104</sup> Trachtman, *Constitutions*, *supra* note \_\_, at 625. Cf. Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflection on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 AM. REV. INT’L ARB. 177, 189, n.38 (2002) (observing that the Appellate Body has a “constitutional” nature or dimension in that it interprets a “constituent document”).

<sup>105</sup> Trachtman, *Constitutions*, *supra* note \_\_, at 645 (emphasis added).

<sup>106</sup> *Id.*, at 626, 645

<sup>107</sup> *Id.*, at 624.

ambiguities of the Antidumping Agreement as to zeroing and thus endorsed it under Article 17.6 (ii) of the Antidumping Agreement in the same fashion followed by the 1995 GATT panel. Here, the role of the AB would have been an ordinary settler of trade disputes. There would have been nothing peculiar here. Furthermore, the hermeneutical shift, as it happened, might have been deemed unspectacular as well: it might just have been yet another change of interpretation. While it is true that the AB employed a teleological interpretation to overcome a possible textual interpretation which might have validated zeroing under Article 17.6 (ii),<sup>108</sup> such teleological shift itself does not necessarily deserve the label of “constitutional” adjudication. After all, neither all interpretive changes nor all teleological interpretations should necessarily be constitutional. However, it is not the interpretive shift itself but the *nature* of the shift which should draw our attention in this issue. Both the subject-matter (zeroing) and its unique topicality tend to define the unique, constitutional quality of the AB’s hermeneutical shift.

Crucially, one cannot fully capture the significance of AB’s hermeneutical turn without taking into account the current developments on antidumping measures and implications that zeroing exerts in those developments. Since the launch of the WTO in 1995, members have thus far initiated about 3,100 antidumping investigations,<sup>109</sup> while GATT contracting parties conducted only 1,600 investigations by the 1980’s.<sup>110</sup> What is more problematic is that while major developed countries, such as the U.S. and the EU, used to be main users of antidumping measures in the past, developing countries have

---

<sup>108</sup> Regarding the AB’s refusal of publicly announcing that it conducted teleological interpretation, see *supra* note \_\_. In the same context, the AB refused to acknowledge its teleological hermeneutical *shift* from permitting zeroing to abandoning it. Instead, it simply *disconnected* from the old GATT jurisprudence in this matter based on narrow formalistic, textual differences between the Tokyo Round Antidumping Code and the current WTO Antidumping Code, and thus eliminated any need to disclose the teleological root of its anti-zeroing decision. See United States – Final Antidumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, Appellate Body Report circulated on Apr. 30, 2008, para. 132 (viewing that “the relevance of these panel reports [under the Tokyo Round Anti-Dumping Code] is diminished by the fact that the plurilateral Tokyo Round Anti-Dumping Code was legally separate from the GATT 1947 and has, in any event, been terminated.”). Nonetheless, one could reasonably submit that panel reports under the Tokyo Round Anti-Dumping Code constitute the GATT *acquis*. See European Communities - Regime for the Importation, Sale and Distribution of Bananas - Complaint by the United States, WT/DS27/R/USA, Panel Report circulated on May 22, 1997, para. 7.26 (upholding a certain practice of panels under the Tokyo Round Anti-Dumping Code); Brazil – Measures Affecting Desiccated Coconut, WT/DS22/AB/R, Appellate Body report circulated on Feb. 22, 1997, at 22 (supporting conclusions expressed by panels under the Tokyo Round Anti-Dumping Code).

<sup>109</sup> WTO AD Website, *supra* note \_\_.

<sup>110</sup> *Id.*

recently begun to have recourse to these trade remedies more frequently.<sup>111</sup> In particular, this proliferation of antidumping measures is devastating to poor countries whose economic growth is linked critically to access to rich countries' markets. Even if the currently staggering Doha round trade talks were to live up to its sobriquet ("development round") by generously allowing poor countries duty and quota-free market access, rich countries could always impose hidden extra tariffs on poor countries' main exports, such as shoes, clothes and catfish, in the name of remedying foreign producers' alleged dumping practice.<sup>112</sup> These antidumping measures tend to effectively neutralize any previously enhanced market access borne to poor countries based on their comparative advantages.<sup>113</sup> At this juncture, it may be worthy of reiterating the fact that zeroing facilitates the progress of these damaging events by inflating dumping margins up to around 90%.<sup>114</sup>

Against this alarming background, the AB has issued a series of zeroing decisions. In a total of six decisions since 2001, the AB has thus far rendered a very coherent and unwavering line of jurisprudence which unequivocally rejects this problematic practice. It is this resoluteness which distinguishes the AB's teleological exegesis from an otherwise mere interpretive methodology. Silhouetted against the aforementioned topicality of zeroing, the judicial rule-making on zeroing was the AB's purposeful mission of institutionalizing a "proper test"<sup>115</sup> which would shrink the domestic government's administrative discretion to null, and thus render a pro-zeroing interpretation "impermissible" under Article 17.6 (ii) in this particular antidumping

---

<sup>111</sup> *Id.*

<sup>112</sup> See Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS. 315, 338-41 (2005); Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. \_\_ (forthcoming 2008).

<sup>113</sup> This developmentally fatal effect of rich countries' antidumping measures is well corroborated by trade statistics. For the last decade, the world's richest countries' antidumping measures have aimed primarily at low-income developing countries. Since the launch of the WTO, the U.S. has initiated a total of 366 antidumping investigations, 215 of which have targeted low-income developing countries. WTO AD Website, *supra* note \_\_. The EU follows the U.S. in this regard. During the same period, the EU initiated 345 antidumping investigations in total, 237 of which were directed to low-income developing countries. Unsurprisingly, most of these antidumping initiations have concentrated on primary commodities and labor-intensive manufacturing goods on which developing countries hold the main comparative advantages vis-à-vis developed countries. If left unchecked, this developmentally fatal trend might be enduring as the share of manufacturing products in developing countries' gross exports increases in the future. WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2004: REALIZING THE DEVELOPMENT PROMISE OF DOHA AGENDA xx (2003), <http://siteresources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf>.

<sup>114</sup> Ikenson, *supra* note \_\_.

<sup>115</sup> Cf. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 203-04 (1985).



issue (zeroing). In doing so, the AB activated a fundamental normative force field which would govern the behaviors of *all* members, not only those who were direct parties of the dispute, in a way which would herald a new policy in this field (zeroing). It is fundamental in the sense that zeroing undermines the very *telos* of the WTO (free trade) and defies the very identity of the WTO as a *trade* organization.

This constitutional adjudication is inextricably linked to a string of developments which in combination may signify a certain “constitutional moment” in the WTO. What the AB struck down in its first zeroing decision (*EC – Bed Linen*) in 2001 concerned only a specific type of zeroing (zeroing in a weighted-average-to-weighted-average comparison). However, a large group of WTO members, consisting of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore, Switzerland and Thailand which are collectively coined “Friends of Antidumping,” seized this moment to propose for the prohibition of zeroing in *all* kinds of comparison methodologies in June 2003.<sup>116</sup> The Friends of Antidumping proposal was vindicated by the AB’s subsequent across-the-board invalidation of zeroing.<sup>117</sup> However, the U.S., the sole defendant which lost all zeroing cases, proposed to reinstate the zeroing practice via amendment.<sup>118</sup> On November 30, 2007, the Chair of the Negotiating Group on Rules circulated the “Drafted Consolidated Chair Texts of the AD and SCM Agreements,” which attempted to compromise between the AB jurisprudence and the U.S. proposal, but dissatisfied both sides.<sup>119</sup> In sum, those tensions and controversies engendered by

---

<sup>116</sup> Proposal on Prohibition of Zeroing, Paper from Brazil; Chile; Columbia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland and Thailand, TN/RL/W/113, Jun. 6, 2003. (“Amend Article 2.4.2 to explicitly provide that regardless of the basis of the comparison of export prices to normal value (i.e. weighted average-to-weighted average or transaction-to-transaction, or weighted average-to-transaction), all positive margins of dumping and negative margins of dumping found on imports from an exporter or producer of the product subject to investigation or review must be added up.”) [The Anti-Zeroing Proposal].

<sup>117</sup> See *supra* pt. II, § C.

<sup>118</sup> The U.S. May 2006 Communication, *supra* note \_\_; Proposal on Offsets for Non-Dumped Comparisons, TN/RL/GEN/147, Jun. 27, 2007 [hereinafter The June 2007 Proposal].

<sup>119</sup> WTO, Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213, Nov. 30, 2007 [hereinafter WTO AD Draft]. Regarding reactions to the Draft Texts, see the Office of the United States Trade Representative, Joint Statement by the Office of the United States Trade Representative and the Department of Commerce’s International Trade Administration, Nov. 30, 2007 (stating that the U.S. was “very disappointed with important aspects of this draft text”); Statement on “Zeroing” in the Anti-Dumping Negotiations, Statement of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong,

the AB's zeroing decisions are testimonial to a constitutional moment, as far as zeroing is concerned, in that they, together with the AB's constitutional adjudication, tend to shape the contour of an institutional identity of the WTO as an international organization which upholds free trade.

In sum, the AB has thrown to us, and answered itself behind the recent train of anti-zeroing decisions, a "constitutional" question, i.e., how we should understand and construct the WTO in the face of members' policy options which could potentially compromise the very goal of the organization. Here, the AB chose a different interpretive path from the old GATT panel, thereby breathing a new life into the same old texts, such as "a fair comparison between the export price and the domestic price" (Article 2.4 of the WTO Antidumping Agreement and Article 2 of the Tokyo Round Antidumping Code) and "the amount of the anti-dumping duty must not exceed the margin of dumping" (Article 9.3 of the WTO Antidumping Agreement and Article 8 of the Tokyo Round Antidumping Code). This critical choice was based on the AB's firm consciousness of immediate and powerful normative consequences which its adjudication would engender to the future of the WTO. To wit, the AB was well aware that its adjudication would "constitute" the WTO, at least as far as this particular issue (zeroing) is concerned. This is why the nature of the AB's hermeneutical shift on zeroing might be coined constitutional.

One important caveat is in order. Constitutional adjudication which this article theorizes in this article is entirely subject matter-specific: it is exclusively regarding the zeroing practice. Therefore, constitutional adjudication addressed here should not be unduly generalized and expanded to other WTO issues. Importantly, constitutional adjudication on zeroing does not fossilize in general Article 17.6 (ii), which may still provide ample deference to domestic antidumping authorities on other antidumping issues. Moreover, constitutional adjudication might not make sense in non-antidumping contexts, and even if it does, it could feature quite different patterns from what is described here. For example, if the AB were to adjudicate another important regulatory issue of reconciling trade value and non-trade value (legitimate policy objectives), such as the protection of public health and the environment, its judicial rule-making in these

---

China; India; Indonesia; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Viet Nam, TN/RL/W/214/Rev.3, Jan. 25, 2008 (emphasizing that zeroing as a "biased" method for calculating dumping margins risks "nullify[ing] the results of trade liberalization efforts.") [hereinafter *The Anti-Zeroing Statement*].

areas would demonstrate different types of constitutional adjudication.<sup>120</sup>

### *B. Normative Ramifications of Global Constitutional Lawmaking*

#### 1. Could WTO Members Overturn Constitutional Lawmaking?

After losing a series of zeroing cases under the WTO dispute settlement mechanism, the U.S. proposed that zeroing be ultimately resolved through negotiations, instead of being left to adjudication.<sup>121</sup> Naturally, the U.S. suggested that relevant provisions of the Antidumping Agreement, such as Articles 2.4 and 9.3, be amended in a way which explicitly endorses zeroing.<sup>122</sup> The U.S.' drive for negotiation prompted the Chair of the Negotiating Group on Rules, the Uruguayan Ambassador Guillermo Valles Games, to circulate on November 30, 2007 the "Drafted Consolidated Chair Texts of the AD and SCM Agreements" which "[he] believe[d] could facilitate the negotiation of a balanced outcome."<sup>123</sup>

The Chair's draft text on zeroing appears to be a compromise between the current WTO case law and the U.S. proposal. While the text prohibits zeroing in "multiple comparisons of a weighted average normal value with a weighted average of prices of all comparable export transactions," it permits zeroing "on a transaction-to-transaction basis or of multiple comparisons of individual export transactions to a weighted average normal value" as well as in case of administrative reviews.<sup>124</sup> A large group of countries opposing zeroing criticized the text. They emphasized that zeroing as a "biased" method for calculating dumping margins risks "nullify[ing] the results of trade liberalization efforts."<sup>125</sup> The Chair subsequently conceded that there simply existed "no hints on possible middle ground approaches nor suggestions for possible compromises or trade-offs."<sup>126</sup>

---

<sup>120</sup> See generally SUNGJOON CHO, FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM (2003).

<sup>121</sup> The U.S. June 2007 Communication, *supra* note \_\_.

<sup>122</sup> The U.S. proposed to add the following paragraph: "Authorities are not required to offset the results of any comparison in which the export price is greater than the normal value against the results of any comparison in which the normal value is greater than the export price." The U.S. May 2006 Communication, *supra* note \_\_; The U.S. June 2007 Proposal, *supra* note \_\_.

<sup>123</sup> WTO AD Draft, *supra* note \_\_.

<sup>124</sup> *Id.*

<sup>125</sup> The Anti-Zeroing Statement, *supra* note \_\_.

<sup>126</sup> WTO, Negotiating Group on Rules, Working Document from the Chairman, TN/RL/W/232, May 28, 2008, at 1, A-10, A-11.

Considering these diametrically opposite views on zeroing among major WTO members as well as the inchoate stage of WTO negotiations in this controversial issue, any pro-zeroing amendment of the Antidumping Agreement is highly unlikely, at least in the near future.<sup>127</sup> Nonetheless, if such amendment should ever transpire, would it trump the outcome of the AB's constitutional adjudication (constitutional jurisprudence)?

Purely from a normative standpoint, one might argue that it should not. According to this position, since constitutional jurisprudence on zeroing directly addresses the most essential value (*telos*) of the WTO system, such as anti-protectionism, even an amendment of WTO norms should not repeal this *fundamental* norm.<sup>128</sup> This preemptive, *per se* invalid position tends to distinguish constitutional jurisprudence from other WTO case laws concerning more mundane trade disputes whose outcome may be altered by subsequent negotiations.

However, this position appears not only infeasible but also illogical. The existence of one constitutional norm (anti-zeroing jurisprudence) should not unduly block any future constitutional dynamics under the WTO. One might logically envision a situation in which WTO members might need to modify, if not repeal, even this jurisprudence via a constitutional amendment, such as a revision of the WTO Charter and/or the WTO Antidumping Agreement.

Nevertheless, WTO members must not entertain any lax overriding of such paramount constitutional jurisprudence, for example repealing the constitutional jurisprudence through a soft norm, such as a decision or a declaration by Ministers<sup>129</sup> simply as a result of mundane bargaining in the trade negotiation, as is currently conducted in Negotiating Group on Rules.<sup>130</sup> This lower threshold in nullifying constitutional norms risks over-politicizing the WTO's normative operation in this important area.<sup>131</sup> In this sense, the legal status of anti-

<sup>127</sup> See Jonathan Lynn, *Anti-Dumping Row Roils WTO, Isolates U.S.*, REUTERS, Jan. 10, 2008 (quoting Brendan McGivern who observed that "it's wildly optimistic of the U.S. to think they'll get this back through negotiations").

<sup>128</sup> See The Anti-Zeroing Statement, *supra* note \_\_.

<sup>129</sup> See Mary E. Footer, *The Role of 'Soft' Law Norms in Reconciling the Antinomies of WTO Law* (July 14, 2008), Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper, available at SSRN: <http://ssrn.com/abstract=1159929>, at 12-13 (observing that soft norms, such as a "decision," are subject to a *hardening* process, such as an "amendment"). According to Footer, it is conceivable that a decision remains unamended. *Id.*

<sup>130</sup> Currently, most WTO members approach this issue not even through "negotiation" but rather merely as "discussion." WTO: 2008 News Items, *Lamy Urges "Maximum Effort" for July Meeting of Ministers*, Jun. 27, 2008.

<sup>131</sup> Cf. Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments*, in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE

zeroing jurisprudence might be analogous to a *strong* version of the U.S. “constitutional common law,” which survives an ordinary legislative challenge yet is still subject to a subsequent constitutional amendment.<sup>132</sup> In other words, procedural rigors built in Article X (Amendment) of the WTO Agreement, including a super majority rule,<sup>133</sup> must govern any modification of the zeroing jurisprudence. A simple decision or declaration engineered by a negotiation must not immediately overturn it without a formal amendment.

On the contrary, under an ideal scenario WTO members should “codify” the outcome of constitutional adjudication, i.e., the AB’s anti-zeroing case law.<sup>134</sup>

## 2. Could a Lower Tribunal (Panel) Reject Constitutional Lawmaking?

Despite the well-established anti-zeroing jurisprudence, a recent panel in *U.S. - Zeroing (Mexico)* explicitly rejected the AB’s positions, in particular those in *U.S. - Zeroing (EC)* and *U.S. - Zeroing (Japan)*, and instead followed the same line of reasoning which two previous panels had employed in these cases.<sup>135</sup> These cases concerned, *inter alia*, a

---

39 (1999) (warning that frequent constitutional amendments might be used as “a chip in short-run political games”).

<sup>132</sup> A *strong* version of constitutional common law, which I analogize here, refers to certain constitutional rules which are “elaborated by judges through precedent-based reasoning” and “not defeasible by ordinary legislation.” See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). See also Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, CHICAGO PUBLIC LAW AND LEGAL THEORY WORKING PAPER No. 73, at 1, n.2. In contrast, a *soft* version of constitutional common law envisions being overturned by legislation. See generally Henry Paul Monaghan, *The Supreme Court, 1974 Term – Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

<sup>133</sup> WTO Agreement, *supra* note \_\_, art. X, paras. 1 and 3 (“Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.”).

<sup>134</sup> A group of countries, such as Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore, Switzerland and Thailand, which are collectively called the “Friends of Antidumping” proposed for the prohibition of zeroing in *all* kinds of comparison methodologies in June 2003. They proposed to “amend Article 2.4.2 to explicitly provide that regardless of the basis of the comparison of export prices to normal value (i.e. weighted average-to-weighted average or transaction-to-transaction, or weighted average-to-transaction), all positive margins of dumping and negative margins of dumping found on imports from an exporter or producer of the product subject to investigation or review must be added up.” The Anti-Zeroing Proposal, *supra* note \_\_.

<sup>135</sup> United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, Report of the Panel, WT/DS344/R, Dec. 20, 2007, para. 7.106 (“[W]e have decided

“simple zeroing” in the administrative (periodic) review.<sup>136</sup> Although the *U.S. - Zeroing (Mexico)* panel admitted that the AB “*de facto* expects” the panel to respect adopted AB reports “to the extent that the legal issues are similar,”<sup>137</sup> it emphasized that panels “are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue.”<sup>138</sup> However, the panel’s stance here is unacceptable for the following reasons as long as one envisions the notion of constitutional adjudication in this matter.

First of all, the panel exaggerated the technical deficiency of legal bindingness of AB decisions. No matter how one may label the WTO jurisprudence, it has never been the label itself which has actually bestowed compliance pull upon those decisions.<sup>139</sup> Regardless of the label, members *perceive* these precedents as well-established “jurisprudence” which they voluntarily observe: they cite, quote and reference the AB’s precedents to substantiate and reinforce their own legal positions in the dispute. While not all members abide by the WTO jurisprudence all the time, such breaches do not necessarily nullify the legal authority of the jurisprudence. In particular, if such jurisprudence concerns constitutional issues, such as zeroing, its compliance pull tends to be stronger than other situations as members fully appreciate the normative weight of such jurisprudence. Perhaps this heightened compliance pull can explain the EC’s swift change of course the moment the AB struck down its own zeroing practice in 2001.<sup>140</sup>

Second, as discussed above, constitutional adjudication on zeroing normatively prevails even over members’ attempt to modify its outcome through political bargaining (amendment). If constitutional adjudication should govern members’ behaviors, it should also regulate panels’ rulings. Otherwise, the normative superiority flowing from constitutional adjudication would be meaningless.

Third, the *U.S. - Zeroing (Mexico)* panel rationalized its defiance by invoking DSU Article 19.2 which prohibits both the panel and the AB from “adding to or diminishing” WTO members’ rights and obligations.<sup>141</sup> In other words, the panel implied that the AB diminished

---

that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews.”) [hereinafter *U.S. - Zeroing (Mexico)*].

<sup>136</sup> *Id.*, paras. 7.106, 7.115.

<sup>137</sup> *Id.*, para. 7.105.

<sup>138</sup> *Id.*, para. 7.102.

<sup>139</sup> Cf. Gélinas, *supra* note \_\_, at 493 (observing that the precedent effect in the WTO does not originate strictly from the “*stare decisis*” but rather from a concern for “formal justice” which is interested in preserving the “security and predictability” of the multilateral trading system).

<sup>140</sup> See *supra* pt. II, § C.

<sup>141</sup> *U.S. - Zeroing (Mexico)*, *supra* note \_\_, para. 7.102.

the U.S.' rights under the WTO norms by judicially enacting a new proscription on zeroing. However, the very idea of constitutional adjudication tends to prevent the panel from making such self-assured determination. Especially because it regards a "constitutional" issue, a WTO panel, as a lower tribunal, is not entitled to question the validity of the decision rendered by the AB as a constitutional tribunal. Moreover, the panel's justification for departing from the AB's constitutional jurisprudence is itself groundless: the AB's constitutional adjudication never diminishes members' WTO rights and obligations: it simply "clarifies" them from the standpoint of trade constitution.

Sharing the same position, the AB in *U.S. – Zeroing (Mexico)* rightly rejected the panel's position in this issue. It emphasized that the fact that AB reports may not be "binding" per se does not free panels from observing previous reports.<sup>142</sup> The AB reiterated its previous findings that adopted AB reports create "legitimate expectations" among WTO members and that panels' observance with those reports would also be expected.<sup>143</sup> The AB justified its position with a critical observation on the value of "jurisprudence" within the WTO, which is arguably the most important dicta in this question.

160. (...) Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. (...) <sup>144</sup>

The AB did not forget to admonish the panel's unusual behavior. With a solemn tone, it emphasized that the panel's defiance is against the hierarchical division of labor in DSU under which only the AB can "uphold, modify or reverse" panels' legal interpretations.<sup>145</sup> The AB expressed its deep concern over the panel's rebellious behavior.<sup>146</sup>

In the most recent zeroing dispute (*U.S. – Continued Zeroing*), the panel did follow the AB's well-established anti-zeroing jurisprudence unlike previous panels, which had defied the AB. Yet the panel did so only reluctantly. The panel still viewed those decisions by defiant panels as "persuasive,"<sup>147</sup> although it eventually struck down the U.S.' zeroing

---

<sup>142</sup> AB Report, *U.S. – Zeroing (Mexico)*, *supra* note \_\_, para. 158.

<sup>143</sup> *Id.*, para. 159

<sup>144</sup> *Id.*, para. 160.

<sup>145</sup> *Id.*, para. 161.

<sup>146</sup> *Id.*, para. 162.

<sup>147</sup> United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/R, Panel Report circulated on Oct. 1, 2008, para. 7.169.

practices for the sake of the WTO jurisprudence.<sup>148</sup> In response, a rare Concurring Opinion eventually tolled the death knell on zeroing by declaring that:

312. (...) In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. (...) At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.<sup>149</sup>

### III. Resistance to Global Constitutional Lawmaking

#### *A. Challenges to Constitutional Adjudication on Zeroing*

The bold jurisprudence which the AB has crafted in striking down zeroing has invited a good deal of criticisms from various fronts. Some contend that nowhere in the WTO and its Antidumping Agreement texts as well as their legislative history (Uruguay Round negotiation history) does an explicit prohibition of this practice exist. According to them, therefore, the AB is “making up rules that the U.S. never negotiated.”<sup>150</sup> In this line, the U.S. government has observed that:

A prohibition of zeroing, or a requirement to provide offsets for non-dumped transactions, simply cannot be found in the text of the AD [Antidumping] Agreement. (...) The issue of zeroing, on which Members could not reach agreement in the Uruguay Round, should not be left to dispute settlement. We as Members should endeavour to reach an agreement on this issue through negotiation.<sup>151</sup>

In fact, Article 17.6 (ii) of the Antidumping Agreement provides that in times of ambiguities (when a provision “admits of more than one permissible interpretation”) a WTO panel shall validate a domestic antidumping authority’s measure “if it rests upon one of those permissible interpretations.”<sup>152</sup> In the presence of this Article, the AB’s invalidation of zeroing which is not prohibited under GATT Article VI and the Antidumping Agreement might be seen to amount to “legislating

<sup>148</sup> *Id.*, para. 7.182.

<sup>149</sup> AB Report, U.S. – *Continued Zeroing*, *supra* note \_\_, para. 312.

<sup>150</sup> *See supra* note \_\_.

<sup>151</sup> Communication from the United States, *Offsets for Non-Dumped Comparisons*, TN/RL/W/208, Jun. 5, 2007, at 2 [The U.S. June 2007 Communication].

<sup>152</sup> AD Agreement, *supra* note \_\_, art. 17.6 (ii).



to fill in the perceived gaps in the coverage of the Antidumping Agreement” and thus violates the “standard of review contained in the Antidumping Agreement that calls for deference to national administrators of antidumping laws.”<sup>153</sup>

These discontents on the AB’s judicial activism may be encapsulated as “judicial legislation.”<sup>154</sup> Judicial legislation exercised by an overzealous trade tribunal would encroach upon member states’ regulatory autonomy in certain policy matters which they believe has never been ceded to international organizations like the WTO. The way in which the DSU is written might attest to this position. Under the DSU, the formal mission of the WTO tribunal is merely to “assist” the Dispute Settlement Body (*i.e.*, the General Council) to “settle” disputes between WTO members by delivering mere “recommendations.”<sup>155</sup> As frequently cited, these recommendations are not permitted to *add to* or *diminish* the rights and obligations of member states.<sup>156</sup>

Often, criticisms against the AB’s judicial activism become rather emotional. Understandably, they originate from certain domestic producers who compete with foreign rivals. They contend that “zeroing” is one of the sinews of U.S. antidumping law. Abandonment of “zeroing” would not be, as some have suggested, a methodological tweak of Commerce’s dumping methodology or a minor concession by the United States to mollify the WTO.”<sup>157</sup>

The U.S. Congress has been quite responsive to these anxious voices. In a recent statute renewing the president’s trade promotion authority (TPA, formerly known as the fast track authority), it explicitly demonstrated its frustration over the AB’s interpretation of Article 17.6 (ii) of the WTO Antidumping Agreement in a way which has allegedly deprived the U.S. regulatory agency (the DOC) of its rightful deference

<sup>153</sup> Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHI. J. INT’L L. 417, 421 (2001). *See also* Alford, *supra* note \_\_, at 199-202; Greenwald, *supra* note \_\_, at 114.

<sup>154</sup> Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 247-48 (2004) (observing that a wide range of commentators, such as scholars, practitioners, politicians and NGOs, have recently accused the WTO Appellate Body of judicial activism).

<sup>155</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, WTO Agreement, *supra* note \_\_, art.19.1 [hereinafter DSU].

<sup>156</sup> *Id.*, arts. 3.2, 19.2. *See* Communication from the United States, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), WT/DS294/16, May 17, 2006, para. 29 (“The perception that the dispute settlement system is operating so as to add to or diminish rights and obligations actually agreed to by Members, notwithstanding DSU Articles 3.2 and 19.2, is highly corrosive to the credibility that the dispute settlement system has accumulated over the past 11 years.”) [hereinafter The U.S. May 2006 Communication].

<sup>157</sup> House Committee Ways and Means, Joint Statement of Ad Hoc Shrimp Trade Action Committee and Southern Shrimp Alliance, available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5468>.

secured under the Article. §2101 (b) (3) (B) of the 2001 TPA Bill provides that “[t]he Congress is concerned that dispute settlement panels of the WTO and the Appellate Body appropriately apply the standard of review contained in Article 17.6 of the Antidumping Agreement, to provide deference to a permissible interpretation by a WTO member of provisions of that Agreement, ...”<sup>158</sup> In a similar context, a group of ten U.S. senators sent a letter to the USTR and the DOC in December 2006 anxiously warning that eliminating zeroing would lead to a “dramatic weakening” of the U.S. antidumping laws.<sup>159</sup>

Facing these protests from the Congress, some commentators warn that the AB’s disregard of the special standard of review might deter the U.S.’ generous trade concessions in the subsequent round of trade negotiations.<sup>160</sup> According to them, the AB’s judicial activism might end up with a Pyrrhic victory to free tradists.<sup>161</sup>

### *B. Defending Constitutional Adjudication on Zeroing*

#### 1. The Augmented Role of International Adjudication

Despite the criticism of “judicial usurpation,”<sup>162</sup> it is widely recognized that judges, both international and domestic, do more than merely apply rules in the book in a mechanical fashion. To some extent, judicial legislation is an innate, unavoidable function of adjudication.<sup>163</sup> To deny this preposition would be close to sticking to a myth.<sup>164</sup> As early as over a century ago, Ezra Thayer emphasized that the “growth of law” via judicial legislation is not only “desirable” but also “necessary.”<sup>165</sup> Two decades later, Justice Oliver Wendell Holmes famously ruled that when

<sup>158</sup> Pub. L. No. 107-210, 116 Stat. 933(2002), § 2101(b)(3)(B).

<sup>159</sup> Rossella Brevetti, *U.S. Zeroing Methodology Hit Again by WTO Appellate Body*, 24 INT’L TRADE REP. 53, Jan. 11, 2007.

<sup>160</sup> Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2 WORLD TRADE REV. 373, 374 (2003); Steinberg, *supra* note \_\_, at 261. *But see* United States General Accounting Office (GAO), *World Trade Organization: Standard of Review and Impact of Trade Remedy Rulings*, July 2003 (observing that “of the legal experts GAO consulted, a majority concluded that the WTO has properly applied standards of review and correctly ruled on major trade remedy issues.”).

<sup>161</sup> Tarullo, *supra* note \_\_, at 374.

<sup>162</sup> Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, (1892).

<sup>163</sup> See Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1221 (1967). *See also* Fabien G  linas, *Dispute Settlement as Institutionalization in International Trade and Information Technology*, 74 FORDHAM L. REV. 489, 490 (2005) (observing a general trend of judicial legislation in the post-war era) (citing Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* 1 (2004)).

<sup>164</sup> JOS   E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 521 (2005).

<sup>165</sup> Thayer, *supra* note \_\_, at \_\_.

we interpret “constituent act[s]” such as the Constitution, we must be aware that “they have called into life a being the development of which could not have been foreseen completely be the most gifted of its begetters.”<sup>166</sup> More recently, Martin Shapiro observed that it would be “logically required” that any judicial discovery involves judicial law-making since no pre-existing norm completely covers future cases.<sup>167</sup> After all, any norms, if left unchanged, tend to become outmoded, and even anachronistic, as it fails to respond to altered realities with the passage of time.

The necessity of judicial progressive development (updating) of fixated text is no less acute in the international law arena than in the domestic legal system. In fact, the need for judicial gap-filling may be stronger in the international law setting considering that deliberated ambiguities in the text are often a necessary evil for unyielding state parties to reach any compromise. These textual ambiguities unavoidably widen a gap between the black letter law (*past*) and the cases at hand (*present*). Thus, it becomes a vital mission of any (well-functioning) international tribunal to “seek consistency that connects past, present, and future.”<sup>168</sup> This is the very reason why international judges, in interpreting treaty texts, “must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it.”<sup>169</sup> In this sense, international adjudication, more than domestic one, engages in a “dynamic” process of judicial rule-making, which produces jurisprudence or case law.<sup>170</sup> The WTO tribunal is not an exception to this trend.<sup>171</sup>

---

<sup>166</sup> *Missouri v. Holland*, 253 U.S. 416 (1920), at 433-4.

<sup>167</sup> MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 29 (1981).

<sup>168</sup> THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 335 (1995).

<sup>169</sup> *Competence of the General Assembly for the Admission of a State to the UN*, 1950 ICJ Rep. 4, at 17-18 (quoted in ALVAREZ, *supra* note \_\_, at 96).

<sup>170</sup> See Alec Stone Sweet, *The New GATT: Dispute Resolution and the Judicialization of the Trade Regime in LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS* 139 (Mary L. Volcansek ed., 1997). Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 UNIV. CHI. L. REV. 877, 884 (1996) (discussing the “prevalence and importance of non-textual amendments”); HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 155-266 (1982) (addressing “judicial legislation”); EDWARD MCWHINNEY, *SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW* 168 (1988) (discussing the “imperative principles” of a novel *jus gentium*); RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 3 (1985) (arguing that “independent judges” in international trade tribunals can develop a *jus gentium* free from the contingencies of the various States). See also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 937 (2005) (recognizing the inevitability of gap-filling and certain “minimal lawmaking” by independent international tribunals). Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1500 (2004) (observing many scholars’ view

The WTO's unique institutional structure may further warrant the case of judicial rule-making. The WTO suffers, like many other international treaties, basic "positivist" predicaments stemming from often stubborn and eccentric "wills" of state. The difficulty of converging more than 150 wills tends to make any legislation under the WTO extremely painful and thus impracticable. Legislation in the WTO is also compounded by the daunting decision-making mechanism, which is either consensus or supermajority in any important matter.<sup>172</sup> Under these taxing circumstances, the WTO jurisprudence developed by the WTO panels and the AB should be given more weight in terms of the WTO's nuanced institutional balance than in terms of the Montesquiean notion of separation of powers that are better suited to the domestic context.<sup>173</sup> After all, this is a useful manifestation of "judicial prudentialism,"<sup>174</sup> rather than as reckless judicial activism.

---

that the "power of international institutions to interpret their founding instruments is a significant source of authority for generating new rules").

<sup>171</sup> See Raj Bhala, *The Myth about Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845, 848-49 (1999) (recognizing the WTO tribunal's rule-making role). Joel Trachtman espouses the case of judicial rule-making in the WTO dispute settlement system as he employs an economic approach of "incomplete contract" and "rules/standards distinction." Trachtman, *The WTO's Domain*, *supra* note \_\_, at 350-55; Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 547 (1994). Trachtman views that the WTO tribunal is "not simply a mechanism for neutral application of legislated rules but is itself a mechanism of legislation and of governance." Trachtman, *The WTO's Domain*, *supra* note \_\_, at 336. In a similar context, Kenneth Abbott views "legalization" as "delegation" which means that third parties are authorized to interpret and apply those rules as well as resolve disputes. Kenneth W. Abbott et al., *The Concept of Legalization*, in LEGALIZATION AND WORLD POLITICS 17 (Judith L. Goldstein et al. eds., 2001). After all, it may be optimal if an originally incomplete contract, such as the WTO treaty, which contains not only definite *rules* but also more open-ended *standards*, may be filled in later by a judicial organ.

<sup>172</sup> See notably John H. Jackson, *Appraising the Launch and Functioning of the WTO*, 39 GERMAN Y. B. INT'L L. 20, 39 (1996) (viewing that "the decision-making and voting procedures of the WTO, although much improved over the GATT, still leave much to be desired. It is not clear how the consensus practice will proceed, particularly given the large number of countries now or soon involved.").

<sup>173</sup> See Donald M. McRae, *The WTO in International Law: Traditional Continued or New Frontier?*, 3 J. INT'L ECON. L. 27, 40 (2000) (arguing that the WTO dispute settlement system fosters the "development of principles of international law through judicial decisions at a much faster pace than has occurred under existing international legal institutions"). See Philippe Sands, *'Unilateralism,' Values, and International Law*, 11 EUR. J. INT'L L. 291, 301 (2000) (advocating the Appellate Body's "enhanced role for a self-confident judiciary, filling in the gaps which states in their legislative capacity have been unwilling – or unable – to fill"); Steinberg, *supra* note \_\_, at 260. Cf. Shimon Shetreet, *Judging in Society: The Changing Role of Courts*, in THE ROLE OF COURTS IN SOCIETY 469 (Shimon Shetreet ed., 1988) (observing that "legislatures are

Predictably, critics of the AB would emphasize the textual semblance of Article 17.6 (ii) to the *Chevron* doctrine, and argue that the Article is a specific “rule” which must be directly applied, not constructed, by the WTO tribunal in the same manner in which the *Chevron* doctrine is applied in the U.S. court.<sup>175</sup> However, if one categorizes the Article as a more flexible “standard,” the WTO tribunal can certainly fill in the gap of an incomplete treaty, i.e., the WTO Antidumping Agreement. In fact, considering the murky nature of negotiation history under the Uruguay Round over the antidumping issues in general,<sup>176</sup> it would be only logical to construe the Article as a standard whose real life applications have been delegated to the WTO tribunal.<sup>177</sup> According to the game theory, this interpretive flexibility is to enhance “allocative efficiency.”<sup>178</sup> One could reasonably speculate that the Antidumping Agreement would not have come to light if disagreeing negotiators had stubbornly clung to their own original preferences, which had been diametrically opposite.

Despite its strong merits, judicial rule-making by the WTO tribunal manifests itself in a much nuanced fashion. As José Alvarez observed, “candid acknowledgment of judicial law-making ... is a rarity in international decisions.”<sup>179</sup> In fact, Judge Jennings, one of the most respected ICJ judges, once wrote that “the most important requirement of the judicial function” appears to be applying preexisting norms even when it “creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction.”<sup>180</sup> The WTO tribunal, like any other international tribunal, is rather reserved and circumspect in performing this inevitable judicial function.<sup>181</sup> This low-key stance results from the fact that the AB is all

---

generally slow to introduce law reforms to ensure that the law adapts to changing times and changing social and moral norms”).

<sup>174</sup> Cf. Russell Gabriel & Louis B. Sohn, *Equity in International Law*, 82 AM. SOC'Y INT'L L. PROC. 277, 283-84 (1988).

<sup>175</sup> Regarding the distinction between “rules” and “standards,” see Trachtman, *The WTO's Domain*, *supra* note \_\_, at 335.

<sup>176</sup> See *supra* note \_\_.

<sup>177</sup> Trachtman, *The WTO's Domain*, *supra* note \_\_, at 352.

<sup>178</sup> *Id.*

<sup>179</sup> ALVAREZ, *supra* note \_\_, at 532.

<sup>180</sup> MOHAMMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 232 (1996); ALVAREZ, *supra* note \_\_, at 532, n. 38; Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation*, 25 MICH. J. INT'L L. 929, 945 (2004) (viewing that “judicial legislation at the international level is a well recognized occurrence, albeit within limits of judicial caution and restraint”).

<sup>181</sup> See Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law?: Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25 (1998).

too well aware of members' anxieties over its potential judicial activism and the subsequent encroachment on their sovereignty. Therefore, the AB always endeavors to avoid any implications which may lead some members to suspect that it overreaches its textually limited mandate under DSU, i.e., not adding to or diminishing members' rights and obligations. The AB's well-documented preoccupation with textual interpretation, even when it in fact adopts teleological interpretation, attests to this caution.<sup>182</sup>

## 2. The Ambiguous Nature of WTO Bargain

As discussed above, critics of the AB seem to subscribe to a contractarian view on the multilateral trading system. They basically view that invalidating zeroing is not what members, especially those members which advocate zeroing, had bargained for in the Uruguay Round negotiations.<sup>183</sup> On the contrary, the real deal struck in the Uruguay Round, according to them, was to bestow considerable deference to domestic antidumping authorities, which is allegedly enshrined in Article 17.6 (ii) of the WTO Antidumping Agreement. Those critics appear to deem this Article as a sacrosanct *term* of the Uruguay Round contract. As a matter of fact, the Article was inserted at the eleventh hour in the Uruguay Round negotiation at the U.S.' strong behest. No doubt, the U.S. did not want the newly created, and more judicialized, WTO dispute settlement mechanism to restrain the operation of its politically sensitive domestic antidumping regime, which is a critical protectionist bulwark serving politically powerful domestic producers. To them, Article 17.6 (ii) would be a Trojan horse deliberately deployed in the middle of the multilateral trading system.

However, a contractarian understanding of the WTO may overstate a positivist/realist nature of the multilateral trading system and thus fails to fully capture its true aspects at the risk of committing

---

See also Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 658 (2006) (observing that "there can be little doubt that the AB's larger, if implicit, message -- that it will not adopt or articulate a 'constitutional' understanding of the WTO's institutional architecture -- was widely understood.").

<sup>182</sup> See notably Henrik Horn and Joseph H.H. Weiler, *European Communities – Trade Description of Sardines: Textualism and its Discontent*, in THE WTO CASE LAW OF 2002 262 (H. Horn and P.C. Mavroidis eds. 2005). See also Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 617 (2002) (observing that the AB emphasized the textual interpretation so as to avoid criticism that it has modified WTO members' rights and obligations in the WTO treaty).

<sup>183</sup> See *supra* note \_\_. But cf. Submission by Japan, \_\_ (observing that there existed no consensus on zeroing at the time of Uruguay Round negotiations).

anachronism. Concededly, the prototypical construct of the post-war global trading system *was* a sovereign contract dealing mostly with tariffs, i.e., General Agreement on Tariffs and Trade. The agreement was negotiated, signed and implemented by “contacting” parties. Under this originally positivist structure, both the formation and the operation of GATT would be determined by power disparity or the so-called “hegemony stability thesis” under which power is a main currency.<sup>184</sup> Perhaps this is the reason why most criticisms on judicial activism are staged by political scientists or politicians whose main language is power, not norms.<sup>185</sup>

Yet, for the past half century the gravity of governance in the global trading system has shifted from power to norms on account of a remarkable institutional evolution which has transformed an erstwhile contract to a “system.”<sup>186</sup> As the former Director of the WTO Appellate Body Secretariat Debra Steger once put appositely, the GATT turned into “something *greater than a contract* that could be withdrawn from by any contracting party whenever it found the obligations too onerous.”<sup>187</sup> In the same vein, the nature of the WTO remedies is no longer obsessed with the “rebalancing” of their original negotiational matrices of gives-and-takes, but more tuned in norm-building.<sup>188</sup> In sum, the WTO as a system, or a “trade constitution,”<sup>189</sup> continuously

<sup>184</sup> See Hans J. Morgenthau & George A. Lipsky, *Political Limitations of the United Nations*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 143, 150 (Hans J. Morgenthau & George A. Lipsky eds., 1953).

<sup>185</sup> See e.g., Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 603, 603-32 (2000).

<sup>186</sup> See Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 U. PITT. L. REV. 763, 769-71 [hereinafter Cho, *Remedies*].

<sup>187</sup> Debra P. Steger, *Afterword: The “Trade and ...” Conundrum – A Commentary*, 96 AM. J. INT’L L. 135, 137 (2002) (emphasis added). In a similar context, it can be said that GATT evolved from an interest-driven “contract” to a norm-based “covenant.” See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 424-25 (2000).

<sup>188</sup> Cho, *Remedies*, *supra* note \_\_, at 792-95.

<sup>189</sup> See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 339 (2d ed 1997); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 101-04 (1998); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT’L ECON. L. 17, 25-28 (1996); John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL’Y INT’L BUS. 873 (1996); John O. McGinnis and Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 573-83 (2000). Professor Cottier also notes “while the GATT was an agreement the purpose of which was almost exclusively the reduction of trade barriers, the WTO increasingly assumes *constitutional* functions in a globalizing economy (emphasis added).” Thomas Cottier, *The WTO and Environmental Law: Some Issues and Ideas*, Trade & Development Center Essay Series, available at <http://www.itd.org/issues/essay1.htm>. Cf. Brian F. Fitzgerald, *Trade-Based Constitutionalism: The Framework for Universalizing Substantive International Law?*, 5 U. MIAMI Y. B. INT’L L. 111, 129 (1996-97) (arguing that “the

transforms both the content of international trade law and state actors' behaviors<sup>190</sup> in a way which creates stability and predictability of the multilateral trading system.<sup>191</sup> From this perspective, the alleged *term* of the Uruguay Round contract, which is raised by the U.S. in a self-serving way, could (and should) not determine legal destinies of measures in question.

Even if one *arguendo* adheres to a contract analogy in interpreting Article 17.6 (ii), the U.S. is just *one* party to the contract. Its interpretation of Article 17.6 (ii) must not be representative and thus authoritative. As the AB held in *LAN*, "the purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties, which "cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty."<sup>192</sup> At the same time, "a proper interpretation also would have included an examination of the existence and relevance of subsequent practice,"<sup>193</sup> such as strong objections to the zeroing practice expressed by other parties (to the contract), such as the Friends of Antidumping.<sup>194</sup>

More importantly, the Article eventually fails to deliver what sovereigntists believe they have earned through a bargain. An alleged semblance of the Article to the *Chevron* doctrine does not necessarily accord this international norm the same doctrinal content as the putative domestic legal doctrine. To sovereigntists' disappointment, Steven Croley and John Jackson eloquently demonstrated why Article 17.6 (ii) of the Antidumping Agreement must *not* be interpreted like the *Chevron* doctrine.<sup>195</sup> First, an explicit use of different languages in two situations, which are "permissible" in Article 17.6 (ii) and "reasonable" in the *Chevron* doctrine, tends to oppose a similar pattern of interpretation between the two. Second, as an international treaty, the Antidumping Agreement must be interpreted in accordance with those

---

Uruguay Round of the GATT has presented us with a trade structure that no longer seeks only to deregulate or regulate in the names of some narrow universal principle of free trade, but that seeks to regulate sovereignties for the purpose of finding universality.")

<sup>190</sup> ALVAREZ, *supra* note \_\_, at 588 (viewing that "international organizations have changed and are continuing to change the international sources of law, their substantive content, and the actors that make them, including states themselves.").

<sup>191</sup> See notably WTO Panel Report on United States-Sections 301-310 of the Trade Act of 1974, WT/DS152/R (Jan. 27, 2000), para. 7.76.

<sup>192</sup> European Communities – Custom Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Appellate Body Report circulated on Jun. 5, 1998, para. 84.

<sup>193</sup> *Id.*, para. 90.

<sup>194</sup> See *infra* note \_\_.

<sup>195</sup> Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standards of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 205-6 (1996).



interpretive principles under the Vienna Convention on the Law of the Treaties, especially Articles 31 and 32, not with the U.S.' rules of statutory construction. Finally, they aptly pointed out that certain underlying rationales in the *Chevron* doctrine, such as "agency expertise" and "administrative or coordination" cannot find their places in the WTO context.<sup>196</sup>

Carlos Manuel Vázquez has also echoed Croley and Jackson's well-situated arguments. He criticized the *Chevron* deference in the context of the Antidumping Agreement. He has argued that "*Chevron* deference takes place in the context of *horizontal* judicial review, whereas WTO adjudication is *vertical* judicial review" and that the *Chevron* analogy, if used to interpret Article 17.6 (ii), would be tantamount to requiring that "federal courts defer to state court interpretations of federal law."<sup>197</sup> Like Croley and Jackson, he also emphasized that the agency expertise rationale in the *Chevron* doctrine cannot stand valid in the WTO context. He incisively observed that applying this doctrine to the WTO would be tantamount to a U.S. court's deferring its statutory interpretation to those who are being regulated.<sup>198</sup>

The AB in *U.S. – Continued Zeroing* (2009) confirmed this futility of the *Chevron* analogy. The AB ruled that:

273. (...) [A] permissible interpretation for purposes of the second sentence of Article 17.6(ii) is not the result of an inquiry that asks whether a provision of domestic law is "necessarily excluded" by the application of the *Vienna Convention*. Such an approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member's municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty.<sup>199</sup>

In conclusion, a contractarian analogy, which zeroing advocates employ in justifying its validity, tends to oversubscribe to a positivist understanding of the WTO and thus runs the risk of a misguided assessment of the measure.

### 3. The Enlightened Meaning of Sovereignty

A central theme revealed in those critics on the AB's anti-zeroing jurisprudence is "sovereignty" which carries a hallmark of the *Lotus* principle. Under the well-known principle of public international law,

<sup>196</sup> *Id.*, at 206-11.

<sup>197</sup> Carlos Manuel Vázquez, *Judicial Review in the United States and in the WTO: Some Similarities and Differences*, 36 GEO. WASH. INT'L L. REV. 587, 603-4 (2004).

<sup>198</sup> *Id.*

<sup>199</sup> AB Report, *U.S. – Continued Zeroing*, *supra* note \_\_, para. 273.

sovereign states are capable of doing whatever they desire as long as no explicit prohibition exists under international law.<sup>200</sup> Following this logic, WTO members would be free to adopt the zeroing practice because the WTO Antidumping Code does not expressly ban such practice.

Yet this “disarticulated” use of sovereignty may not do justice to the contemporary status of global market integration under the WTO system.<sup>201</sup> There are plausible risks that protectionists may seek refuge in an overarching claim of sovereignty. It might be too extensive and inferential to accuse the AB’s decision on a regulatory issue such as zeroing of actually eroding the classical notion of sovereignty as “self-government.”<sup>202</sup> Zeroing does not concern the sanctity of self-determination and non-interference in the area of national security as stipulated and protected under the UN Charter. An “emotional appeal” through sovereignty hiding “a surrogate argument by opponents of some government proposal”<sup>203</sup> risks foreclosing otherwise meaningful and constructive discourses on the allocation of regulatory competence between the WTO and its members.<sup>204</sup>

---

<sup>200</sup> See *supra* note \_\_.

<sup>201</sup> Wendt, *supra* note \_\_, at 393; Pogge, *supra* note \_\_.

<sup>202</sup> Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L ECON. L. 841, 875-6 (2003) [hereinafter Raustiala, *Rethinking Sovereignty*].

<sup>203</sup> John H. Jackson, *The Great 1994 Sovereignty Debate: The United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT’L L. 157, 187-88 (1997) [hereinafter Jackson, *The Great 1994 Sovereignty Debate*]. See also Ronald A. Brand, *Semantic Distinctions in an Age of Legal Convergence*, 17 U. PA. J. INT’L ECON. L. 3, 6 (1996) (arguing that “theories of sovereignty borrowed from prior centuries can no longer accommodate economic and political reality at the end of the twentieth century”). Dan Sarooshi also documented a self-serving utilization of sovereignty as a surrogate argument for specific policy preferences. He emphasized the essentially “contestable” nature of sovereignty by submitting that “sovereignty is largely contingent upon the text in which it figures.” Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship*, 15 EUR. J. INT’L L. 651, 652 (2004). In other words, the concept of sovereignty, despite its “prima facie categorical use,” is subject to “conceptions and interpretations that should be evaluated and maybe amended in order to account better for the values encompassed by these concepts.” *Id.*, at 654 (quoting Besson, *Sovereignty in Conflict: Post-Sovereignty or Mere Change of Paradigms?*, in *THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW* 3-4 (S. Tierney and C. Warbrick eds. 2004)). This view parallels that of Stephan Krasner who regarded sovereignty as “organized hypocrisy.” STEPHAN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 9 (1999).

<sup>204</sup> John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 783-86 (2003). See also Raustiala, *Rethinking Sovereignty*, *supra* note \_\_, at 843 (observing that “prevailing sovereignty-based critiques are instead usually disguised arguments about reallocations of power and the creation of incentives and disincentives for policy choices”). But cf. Philip R. Trimble, *International Trade and the ‘Rule of Law,’* 83 MICH. L. REV. 1016, 1027 (1985) (reviewing JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL*

Gravely, an invocation of a Baroque version of sovereignty runs the risk of nurturing a culture of “veto” among members, especially powerful members such as the U.S., and consequently poisoning the atmosphere of international cooperation. Those powerful countries tend to summon this ill-defined concept whenever they find compliance with international law and cooperation within an international organization politically inconvenient and cumbersome. This culture of veto may be percolated to adventurous isolationism which could provoke some governments to disconnect themselves from WTO despite the prohibitively high cost.<sup>205</sup> Undoubtedly, any of these consequences would be perilous both to the WTO and those countries which might self-excommunicate from the WTO in the name of sovereignty. It is imperative that in this highly interdependent international environment, trading nations, even the most powerful ones, should embrace a novel concept of sovereignty. Trading nations should realize that all international solutions necessarily involve “a degree of intrusiveness into domestic governance,” which stresses the necessity of a cooperative mechanism, including “appropriate allocation of power,” between international institutions and diverse national legal systems.<sup>206</sup> In other words, an altering international context requires a more flexible concept of sovereignty<sup>207</sup> which departs from that which is symbolized by the peremptory exercise of unbridled power. Therefore, as Abraham Chayes and Antonia Chayes argued, nations should adopt the “new sovereignty” which is more mature, constructive and participatory.<sup>208</sup> For this purpose, trade norms should be “disaggregated” to make it possible to assess the relative advantages and disadvantages of reinforcing particular norms.<sup>209</sup> This approach will enable governments to identify and focus on important “policy” issues that confront the entire international community, such as antidumping and the zeroing

---

CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES (1984)) (arguing that “the kind of international law-making envisioned by the authors cannot be easily reconciled with the American political tradition”).

<sup>205</sup> Raustiala, *Rethinking Sovereignty*, *supra* note \_\_, at 849. He aptly viewed that states in fact join various international organizations to “lock-in desired policy outcomes” and thus make any exit difficult. *Id.*

<sup>206</sup> John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT. ECON. L. 3, 10-14.

<sup>207</sup> Cf. Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 966 (2000) (reviewing STEPHEN D. KRASNER, *ORGANIZED HYPOCRISY* (1999)) (introducing the “contingent and plastic” view of constructivists on sovereignty).

<sup>208</sup> See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

<sup>209</sup> Jackson, *The Great 1994 Sovereignty Debate*, *supra* note \_\_, at 187-88.

practice without any unnecessary rhetorical escalation.<sup>210</sup> Ironically, this new approach to sovereignty can actually help governments achieve their own policy objectives by taming parochialism in the name of international obligations.<sup>211</sup>

#### IV. The Legitimacy of Global Constitutional Lawmaking

##### A. An Exogenous (Political) Test

Although the constitutional adjudication by the WTO tribunal may be firmly anchored by the WTO's *telos* of anti-protectionism, and thus self-sustaining from the standpoint of the WTO as an autonomous international organization, such a macro, organizational sustainability is yet to be tested by the member-driven political dynamics. Some commentators cast serious doubts on the wisdom of constitutional adjudication itself. According to them, constitutional adjudication may be unsustainable because it tends to short-circuit the necessary and proper political process which the subject-matter of adjudication should have triggered. Therefore, they view that the AB's interpretation must be tightly controlled by political safeguards to prevent it from creeping into the forbidden realm of constitutional adjudication.

For example, Jeffrey Dunoff found constitutional narratives unpersuasive in general. Dunoff discovered a "puzzling disjunction" in the debates of trade constitution between the "deep disciplinary anxieties" of trade law scholars and a positivistic reality check that "neither WTO texts nor practices suggest that the WTO is a constitutional entity."<sup>212</sup> He warned that constitutional discourse as a rhetorical strategy adopted by trade law scholars might be "self-defeating" in that it tends to invoke the very politics that it wants to avoid.<sup>213</sup> Dunoff might find the vindication of his warning in sovereigntists' lambasting against the AB's teleological interpretation.

---

<sup>210</sup> *Id.* Cf. Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 776 (1996-97) (asserting that nowadays more States wish to regulate trade relations by using norms, rather than through sovereignty and flexibility).

<sup>211</sup> McGinnis argued that the WTO, unlike many sovereigntists' lamentation, reinforces its members' sovereignty by protecting them from their Madisonian constitutional failures precipitated by rent-seeking special interests or "factions." John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT'L L. 381 (2000)

<sup>212</sup> Dunoff, *supra* note \_\_, at 647, 649. He observed that "there is no constitutional court, no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment." and that "on their face, the Uruguay Round texts lack a number of features often associated with constitutional entities." *Id.*, at 650-51.

<sup>213</sup> *Id.*, at 649.

In a similar fashion, one might submit that the very notion of trade constitution or trade constitutionalism as an apolitical discipline would be even undesirable. According to Klabbers, the “idea of overcoming politics by insisting on adhering to certain fixed values” would be unlikely to work since “reference to those values itself is immensely and intensely political.”<sup>214</sup> Furthermore, Robert Howse and Kalypso Nicolaidis viewed that the WTO constitution as a Madisonian pre-commitment to resist the rent-seeking protectionism by special interest groups might be detrimental because “it is an attempt to take politics out of the global equation when on the contrary it needs to be brought back in.”<sup>215</sup>

All these criticisms are not without merits. In a formal matter, the WTO panel or the AB is merely to “assist” the Dispute Settlement Body, i.e., the General Council, to “settle” disputes between Members by delivering their “recommendations.”<sup>216</sup> More importantly, these recommendations should not “add to or diminish” members’ rights and obligations.<sup>217</sup> Also, overemphasizing this judicial governance in the WTO, especially through a constitutional lens, risks trivializing recognizable *political* checks against the WTO panel or the AB, including the possible overriding of any panel or the AB decision by the WTO members’ “authoritative interpretation.”<sup>218</sup> These risks tend to invite more fundamental criticisms regarding the WTO tribunal’s alleged lack of accountability or more broadly the democracy deficit. One of these critics contend that the WTO produce “quasi-constitutional” rules (“generativity”) flowing from the confidential WTO tribunal (“insularity”).<sup>219</sup> According to this position, the WTO’s substantive virtue, i.e., free trade, may become a potential threat to democracy of its members, including (or especially) the U.S. in the absence of any democratic disciplines, such as those under the U.S.’ Administrative Procedural Act.<sup>220</sup>

---

<sup>214</sup> Jan Klabbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. (2004) 31, 54 (quoted in Dunoff, *supra* note \_\_, at 665)

<sup>215</sup> See Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227 (Roger B. Porter et al eds. 2001).

<sup>216</sup> DSU, *supra* note \_\_, art.19.1.

<sup>217</sup> *Id.*, arts. 3.2, 19.2

<sup>218</sup> WTO Agreement, *supra* note \_\_, art. 9.2.

<sup>219</sup> Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 415 (2000).

<sup>220</sup> *Id.*, at 418-19. Ironically, the way in which certain Western countries administer antidumping measures domestically fails to meet their own democratic standards. For example, the U.S. Administrative Procedural Act does not apply to antidumping proceedings, raising due process questions in the antidumping administration. See Theodore W. Kassinger, *Antidumping Duty Investigations*, in LAW AND PRACTICE OF UNITED STATES REGULATION OF INTERNATIONAL TRADE 1, 16-20 (Charles R. Johnston, Jr.

One might suspect that those political risks are a certain price that WTO members should willingly pay to secure the integrity of “an integrated, more viable and durable multilateral trading system.”<sup>221</sup> Yet these risks might not necessarily be high, in particular as long as domestic political economy could accommodate the AB’s constitutional adjudication. Judith Goldstein and Richard Steinberg insightfully observed that the U.S. Congress has recently tolerated “*de facto* delegation” of trade authority to the WTO’s judicial law-making function.<sup>222</sup> They attributed such domestic political tolerance to the WTO’s judicial activism to certain transformative features in the U.S. trade politics.<sup>223</sup> First, export-oriented producers have propped up their lobbying effects as they have witnessed “a clear and credible loss” from protection touted by import-competing groups. Second, trade liberalization tends to be “self-reinforcing” since these protectionist lobbies “peel off” as they become unable to sustain protection. Third, domestic “elites and leaders” tend to regard trade liberalization and market openness advantageous to the national interest.

### *B. An Endogenous (Legal) Test*

In contrast to the aforementioned exogenous (political) test, an apolitical, i.e., normative, foundation for constitutional adjudication derives nowhere but from an “internal” dimension of law, i.e., the way in which members interpret, react and respond to those constitutional decisions of the WTO tribunal, not as “one-time grudging compliance,” but “habitual internalized obedience.”<sup>224</sup>

This self-legitimizing osmosis of constitutional adjudication from the WTO level into the domestic legal realm does not remain a mere academic imagination. Empirical confirmations are legion as to real world examples of such legal osmosis. The reactions from the EU and the U.S. government to the AB’s anti-zeroing decisions provide cases in

---

ed., 1989); Hilary K. Josephs, *The Multinational Corporation, Integrated International Production, and the United States Antidumping Laws*, 5 TUL. J. INT’L & COMP. L. 51, 66 (1997). See also *Elof Hansson, Inc. v. United States*, 41 Cust. Ct. 519, 528 (1958) (ruling that the APA was not applicable to dumping investigations). Moreover, even if domestic industries’ first attempt does not prevail in an antidumping complaint, they can re-file the same complaint until they eventually prevail because the doctrine of *res judicata* and collateral estoppel does not apply to the antidumping proceeding unlike other civil procedures. 19 U.S.C. §§ 1671a(a) & 1673a(a). See also Josephs, *supra* note \_\_, at 66.

<sup>221</sup> WTO Agreement, *supra* note \_\_, pmbl.

<sup>222</sup> Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate?: Effects of WTO Judicial Delegation on U.S. Trade Politics*, UCLA SCHOOL OF LAW, LAW & ECONOMICS RESEARCH PAPER SERIES, No. 07-14, at 36-37.

<sup>223</sup> *Id.*

<sup>224</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2655 (1997).

point. For example, although the EU was one of the long-standing users of the zeroing practice, it has boldly changed its policy direction in a way which fully conforms to the AB's ruling since it lost the very first case in *EC – Bed Linen*. Instead of resisting to the AB's decisions, it has elected to go after another main user, i.e., the U.S.<sup>225</sup> Even the U.S. government (DOC) has recently modified, albeit partially, its long-standing zeroing practice in the weighted-average-to-weighted-average comparison in an attempt to comply with the AB's decisions, despite severe resistance from the special interest groups as well as the Congress which is captured by these groups.<sup>226</sup>

This legal osmosis or “internalization” of the WTO's constitutional adjudication leads to a symbiotic co-existence between the WTO system and domestic legal regimes. In fact, trade constitution can contribute even to achieving domestic constitutional goals since the former can provide an effective check against a Madisonian failure (parochialism) in the domestic arena.<sup>227</sup> Public choice theorists teach us that gains from trade are often underrepresented while its costs are overrepresented.<sup>228</sup> Under these circumstances, constitutional adjudication tends to empower local voices for free trade and competition. For example, since the WTO rulings on zeroing the U.S. domestic consumer groups have stepped up their lobbying efforts to the government with a view to the elimination of all zeroing practices which serve the interests of certain domestic producers at the expense of U.S. consumers and consuming industries.<sup>229</sup>

---

<sup>225</sup> See *supra* pt. II, § C.

<sup>226</sup> 71 Fed. Reg. 77,722 (Dec. 27, 2006); Rossella Brevetti, *Commerce Makes Change in Dumping Methodology to Comply with WTO Case*, 24 INT'L TRADE REP. 26, Jan. 4, 2007. This is an example of internalization through “executive action,” such as the change of administrative interpretation. Koh, *supra* note \_\_, at 2657.

<sup>227</sup> See Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, UCLA SCHOOL OF LAW, LAW & ECONOMICS RESEARCH PAPER SERIES, No. 07-15, at 2-3 (arguing that the WTO's regulatory shift from the legislative to the judicial sector by “freeing member states from the capture by entrenched domestic interests”).

<sup>228</sup> See Sungjoon Cho, *Toward a New Economic Constitution: Judicial Disciplines on Trade Politics*, 42 WAKE FOREST L. REV. 167, 184-86 (2007).

<sup>229</sup> See Consuming Industries Trade Action Coalition (CITAC), Rebuttal Comments on the Commerce Department's “Zeroing” Proposal, May 4, 2006 (urging the Commerce Department to “eliminate zeroing from all antidumping calculation methodologies”), available at

[http://www.citac.info/about/issues/zeroing/CITAC\\_On\\_Zeroing\\_2300285\\_1.pdf](http://www.citac.info/about/issues/zeroing/CITAC_On_Zeroing_2300285_1.pdf).; Robin Lanier, A Letter to Secretary of Commerce (Re: “Zeroing” of Duties), Jan. 6, 2005 (proposing to “eliminate the practice of zeroing in all dumping cases”). Harold Koh defines this phenomenon as “legislative internalization” which “occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law that officials of a noncomplying government must then obey as part of the domestic legal fabric.” Koh, *supra* note \_\_, at 2657.

Even if certain domestic producers may attempt to preserve the zeroing practice in the domestic court which usually renders huge deference to agencies, such as the DOC, under the *Chevron* doctrine, the court can still respect the decisions of the WTO (AB) under the *Charming Betsy* doctrine, which prescribes that the U.S. law should be interpreted in a way which is consistent with international law.<sup>230</sup> In other words, between two possible statutory constructions of the antidumping statute, i.e., one which does permit zeroing and the other which does not, the U.S. court could choose the latter since the WTO tribunal unambiguously ruled against zeroing. To this extent, any modicum of deference which the DOC would have enjoyed under the second prong of the *Chevron* is squeezed to nil.<sup>231</sup>

In sum, this “transnational legal process,” which internalizes the WTO norms on zeroing via the executive, legislative and judicial channels, continuously enhances the WTO members’ susceptibility of the WTO’s constitutional adjudication. As WTO members repeat and regularize this process, and thus as domestic law becomes enmeshed with “sticky” international law,<sup>232</sup> their compliance with the outcome of constitutional adjudication becomes ever closer to a “default pattern.”<sup>233</sup> Furthermore, in most cases trade constitution is firmly in sync with fundamental principles of domestic (constitutional) law, such as free interstate commerce and anti-parochialism. This “sovereignty-

---

<sup>230</sup> This situation may fall within the rubric of “judicial internalization” which Harold Koh defines as an implicit incorporation of international law into the domestic legal system through interpreting existing statutes harmoniously with international law or as an explicit incorporation via “transnational public law litigation.” Koh, *supra* note \_\_, at 2657.

<sup>231</sup> A recent North American Free Trade Agreement (NAFTA) Article 1904 binational panel (the *Mittal* panel) has followed the AB’s anti-zeroing jurisprudence by invoking the *Charming Betsy* doctrine. NAFTA Article 1904.2 requires this tribunal whose mandate is a judicial review on government’s decisions on trade remedy issues such as zeroing to apply the same laws, regulations and even standards of review which a court of a defending country (the U.S. in this dispute). In this sense, the *Mittal* panel spoke on behalf of the U.S. court. It ruled that “zeroing seems inconsistent (...) with both the underlying principle of the *Charming Betsy* canon, to respect the law of nations wherever possible, and the United States’ Uruguay Round negotiation goal of obtaining an effective dispute-resolution system.” In the Matter of Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2006-1094-04, Nov. 28, 2007, at 38. *But see* Elizabeth C. Seastrum, *Chevron Deference and Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?*, 13 FED. CIRCUIT B.J. 229, 238-39 (2003) (concluding that the *Charming Betsy* doctrine should not undermine the operation of the *Chevron* doctrine).

<sup>232</sup> Koh, *supra* note \_\_, at 2654-55.

<sup>233</sup> *Id.* See Helfer & Slaughter, *supra* note \_\_, at 935 (observing that some international tribunals’ rulings can “mobilize compliance constituencies to press governments to adhere to their treaty obligations”) (emphasis added).



enhancing” aspect of internalization reinforces its self-legitimizing nature.<sup>234</sup> Under these circumstances, members’ “loyalty” on the WTO regime mitigates, or even replaces, their initial demand for “voice” or threat of “exit.”<sup>235</sup>

## Conclusion

This article has challenged major critiques to the recent WTO case law which has invalidated zeroing in a radical departure from the old GATT case law legalizing the same practice. The article has argued that critics to the AB’s zeroing decisions misconstrue the nature of the WTO, its judicial review, and sovereignty itself. The article has also demonstrated why, and how, the recent WTO zeroing jurisprudence can be appreciated as a form of constitutional adjudication. Finally, it has contended that constitutional adjudication is self-legitimizing to the extent that such adjudication communicates with the domestic legal system via various forms of internalization, be it a judicial accommodation, as regards the *Charming Betsy* doctrine, or a policy change at the executive level. After all, compliance leads to legitimacy inasmuch as legitimacy renders compliance pull.

This mutually reinforcing dynamics between internalization and legitimacy of constitutional adjudication on zeroing may crystallize into a certain *cultural* phenomenon. In this regard, “constitutional culture” may be defined as the “cultural cohesion that habitually accepts the propriety and necessity of constitutional compliance.”<sup>236</sup> In fact, internalization itself is “constitutive” and thus facilitative of constitutional culture.<sup>237</sup> The WTO’s constitutional culture denotes the “generally shared” and “intersubjective” understanding of the WTO’s ultimate goal (*telos*) and the normative universe (*nomos*) in which such goal is pursued.<sup>238</sup> Within the WTO’s *nomos* defined by its *telos*, an unrelenting interaction, or discourse, among members of the global

---

<sup>234</sup> See ALVAREZ, *supra* note \_\_, at 618. Cf. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 272-73 (2008) (suggesting that inter-judicial coalitions could enhance democratic governance).

<sup>235</sup> See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 76-105 (1970).

<sup>236</sup> Allan Ides, *The Emerging Transnational Constitution: Introduction*, 37 LOY. L.A. L. REV. 187, 188 (2003).

<sup>237</sup> Koh, *supra* note \_\_, at 2646.

<sup>238</sup> See notably Lang, *supra* note \_\_, at 84-85, 95, 105-6 (employing a “constructivist” perspective on the WTO system); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (observing that “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”); *id.*, at 9 (defining *nomos* as a “present world constituted by a system of tension between reality and vision”).

trading community forms, and fortifies, the WTO's constitutional culture via a communitarian mechanism of habituation.

Importantly, the constitutional culture should also be didactic. The WTO's constitutional jurisprudence, no matter how far it has been evolved thus far, is still remote and inaccessible to ordinary people. Most people, even scholars in this field, associate it with *esoteric* codes which can be deciphered only by certain cognoscenti.<sup>239</sup> Under such a low level of awareness, the legal force cannot overcome the short-term protectionist politics which is often well-organized and thus very effective in capturing trade policy-makers. Therefore, the public should become further educated on the issue of international trade law and trade constitution so that well-informed deliberation, not misleading protectionist banners, guides their political choices.<sup>240</sup> The necessity of public education and social marketing on the WTO's constitutional jurisprudence may be analogous to the reason why American citizens, not only legal scholars, are taught on certain paramount constitutional jurisprudence, such as *Marbury* and *Brown*. At this juncture, the academia bears a critical responsibility of framing and dispersing discourses on the trade constitution and constitutional adjudication.<sup>241</sup> Such discourses will eventually provide the public with helpful heuristics with which to better comprehend international trade law, thereby paving a propitious ground for the WTO's constitutional culture.

In conclusion, the WTO's constitutional culture liberates us from a long-standing "positivist nostrum" based on an outmoded belief that "multilateral mechanisms for making global law, binding on the international community as a whole, do not exist."<sup>242</sup> Only this liberation can disabuse trading nations of their misguided mercantilist interests, which zeroing represents, and redefine their identities and interests within the global trading system from impervious sovereign entities to enlightened norm-builders.<sup>243</sup>

---

<sup>239</sup> See Sungjoon Cho, *A New Agenda for Peace: International Trade Law as a Practical Discourse*, in *TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES* 63 (Padideh Ala'i et al eds. 2006).

<sup>240</sup> *Id.*

<sup>241</sup> I owe this insight to David Gerber.

<sup>242</sup> Alvarez, *supra* note \_\_, at 586-87.

<sup>243</sup> See generally Cho, *Gemeinschaft*, *supra* note \_\_. From a standpoint of sociological institutionalism, Martha Finnemore envisioned "continuing and even increasing adherence to multilateralism – even when it runs contrary to expressed national interests – because it embodies some set of values central to the larger world culture." Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 339 (1996).