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## IILJ International Legal Theory Colloquium Interpretation and Judgment in International Law

NYU Law School

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Thursdays 4.00pm-5.50pm

*Provisional Semester Program - Attached Paper is shown in Bold*

- January 17 – Jeremy Waldron, NYU Law School  
Topic: *"Partly Laws Common To All Mankind": Foreign Law In American Courts*
- January 24 - Catharine MacKinnon, University of Michigan Law School  
Topic: *Women's Status, Men's States*
- January 31 - Beth Simmons, Harvard University Government Department  
Topic: *Explaining Variation in State Commitment to and Compliance with International Human Rights Treaties*
- February 7 - Richard Stewart, NYU Law School  
Topic: *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*
- February 14 - Joseph Weiler, NYU Law School  
Topic: *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century*
- February 21 - NO COLLOQUIUM
- February 28 - Sungjoon Cho , Chicago-Kent College of Law**  
**Topic: *Constitutional Adjudication in the WTO***
- March 6 - Robert Howse, University of Michigan Law School  
Topic: *Beyond Compliance: Rethinking Why International Law Really Matters*  
(paper co-authored with Ruti Teitel)
- March 13 - Martti Koskeniemi, University of Helsinki/NYU Law School  
Topic: *Natural Law between Moral History and Raison d'Etat: Understanding the Pre-History of International Law*
- Note: March 14 and 15, the Program in the History and Theory of International Law convenes in the same room a conference on Roman Law and Imperialism in the Foundations of Modern International Law (all welcome – see [iilj.org](http://iilj.org))
- March 20 - NO COLLOQUIUM – Spring Break
- March 27 - Jose Alvarez, Columbia University Law School  
Topic: *Interpretive Problems in International Investment Law*
- April 3 - Ryan Goodman, Harvard Law School  
Topic: *Sociological Theory Insights into International Human Rights Law*
- April 10 - Sally Engle Merry, NYU Anthropology Dept & Law and Society Institute  
Topic: *Indicators in Global Governance*
- April 17 - Christopher McCrudden, Oxford University/U. of Michigan Law School  
Topic: *Human Dignity in Human Rights Interpretation*
- April 24 - Stephen Gardbaum, University of California at Los Angeles Law School  
Topic: *Is U.S. Constitutional Rights Jurisprudence Exceptional?*

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# Constitutional Adjudication in the World Trade Organization

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## I. Introduction

How much could an international tribunal contain member states' behaviors, especially when a treaty fails to enunciate any prescription on these behaviors? Under public international law along the lines of the *Lotus* case and the principle of *in dubio mitius*, the international tribunal might be inclined to grant a maximum level of deference to member states. In case of a tribunal established by the World Trade Organization (WTO),<sup>1</sup> such as a panel and the Appellate Body (AB), this presupposition appears even more plausible when the tribunal addresses a domestic government's trade remedies, i.e., antidumping measures. Article 17.6 (ii) of the WTO Antidumping Agreement provides that a WTO tribunal should validate a domestic authority's antidumping measure "if it rests upon one of [] *permissible* interpretations."<sup>2</sup>

Surprisingly, however, the AB, in a series of high-profile decisions, has recently invalidated an antidumping measure ("zeroing"),<sup>3</sup> despite the fact that a panel under the old General Agreement on Tariffs and Trade (GATT) had upheld the same measure.<sup>4</sup> The AB's bold position against zeroing has invoked vehement sovereigntist backlashes. The United States government, which was a defendant in these decisions, has viewed the position as an unacceptable form of judicial legislation since it "[made] up rules that the U.S. never negotiated."<sup>5</sup> Others have condemned the AB's position as judicial activism in that the AB has violated the sovereignty-preserving standard of review enshrined in Article 17.6 (ii). They contend that this Article, modeled after the U.S.' *Chevron* doctrine,<sup>6</sup> grants a wide range of deference to domestic antidumping authorities. Therefore, according to them the AB should have upheld the zeroing practice which domestic regulators view was permissible under the Antidumping Agreement. One frustrated sovereigntist even condemned the WTO tribunal as a "kangaroo court."<sup>7</sup>

This article responds to these criticisms and advocates the AB's position. In doing so, the article critically observes that the AB has assumed a role of "constitutional court," beyond a mere dispute settler which most international tribunals undertake, in that the AB's rulings have re-configured the subtle power allocation between the WTO and member states in this important area (antidumping) in a way which institutionalizes firm legal disciplines over protectionist trade politics. The article also maintains that WTO members should not overturn the AB's constitutional jurisprudence even via political bargaining, such as an amendment. On the contrary, it contends that WTO members should cement, i.e., "codify," such jurisprudence.

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4 EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, Apr. 28, 1995 (unadopted).

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In what appears to be the most paradoxical feature of the modern global trading system, WTO norms allow its members to penalize cheap imports, if they think these foreign goods are produced at less than fair value, i.e., dumped, by imposing extra tariffs to the extent that fair values of their own reckoning exceed export prices (dumping margins). Although this antidumping mechanism is clad in a euphemistic rhetoric of trade *remedy* for alleged unfair foreign practices, most economists and policymakers, including the former Federal Reserve Board Chairman Alan Greenspan, agree that it is nothing more than a sheer protectionist device.<sup>8</sup> After all, discounted sales are fair and legal in the U.S. as long as these sales do not derive from a predatory intent.<sup>9</sup>

“Zeroing” contributes greatly to this protectionist scheme by exaggerating dumping margins and consequently antidumping duties. It refers to an asymmetrical calculative methodology in obtaining final dumping margins which omits any *negative* results occurring when export prices exceed normal values (such as home prices) and instead includes only positive results occurring when home prices exceed export prices.<sup>10</sup> According to one study, zeroing tends to increase dumping margins nearly by 90%.<sup>11</sup> The desperate resistance to the AB’s recent anti-zeroing decision from potential antidumping petitioners (domestic producers) tends to substantiate the vital role that zeroing has been playing in this protectionist game of antidumping investigation.<sup>12</sup> The paper argues that protectionism embedded in zeroing has prompted the AB to take the position that any pro-zeroing interpretation of the Antidumping Agreement is “impermissible” even under Article 17.6 (ii).

Nevertheless, the AB’s ruling may still be prone to controversies in that zeroing had been a time-honored practice by powerful members such as the U.S. and the European Communities (EU), and that a GATT panel had in fact legalized the practice in 1995.<sup>13</sup> How could one reconcile these diametrically opposite interpretations over the same subject-matter within a decade? The AB could have simply followed the old panel decision endorsing zeroing. While unadopted, the 1995 panel report could still have been the so-called “useful guidance” for the AB’s pro-zeroing decision.<sup>14</sup> This guidance notwithstanding, I argue, the recent proliferation of antidumping measures as a new protectionist instrument, as well as contributions that zeroing has made to this phenomenon, has motivated the AB to depart from the past interpretation.<sup>15</sup>

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<sup>10</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>11</sup> Ikenson

<sup>12</sup> House Committee on Ways and Means, Submissions for the Record, Joint Statement of Ad Hoc Shrimp Trade Action Committee and Southern Shrimp Alliance, Feb. 7, 2007, <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5468> [hereinafter AHSTAC/SSA Joint Statement].

<sup>13</sup> DS322/R, para. 4.102

<sup>14</sup> Shochu II; WTO Guidance Clause

<sup>15</sup>

Although antidumping embodied the lingering protectionism in the GATT at time of its creation, it has gained its true prominence only recently. It has provided governments with a new protectionist device as conventional trade barriers, such as tariffs and quotas, subside through rounds of negotiations for trade liberalization. WTO members have recently vied to have recourse to this brainchild of trade politics to an alarming level. Since the launch of the WTO in 1995, WTO members have initiated about 3,100 antidumping investigations.<sup>16</sup> In stark contrast, GATT contracting parties had initiated only 1,600 investigations for four decades by the 1980's. More demoralizing is the antidumping system's highly contagious nature. In what appears to be a defensive attack,<sup>17</sup> new globalizers, such as India, Brazil, and China, have now begun to imitate the developed countries' penchants for antidumping suits for the former's own protectionist purposes.

These new developments within the global trading system, the article observes, have prompted the AB to cultivate a new hermeneutics on the Antidumping Agreement which envisions and "constitutes" new institutional meanings and possibilities within the WTO in accordance with its *telos*, i.e., free trade and global market integration.<sup>18</sup> Nonetheless, the article does *not* maintain that the WTO's constitutional adjudication should repeal the antidumping regime on its entirety, which would not only be politically infeasible but also exceed a judicial mandate of the WTO tribunal. Instead, it contends that constitutional adjudication could effectively remedy certain egregious features of the antidumping system, such as zeroing.

My thesis of constitutional adjudication in the WTO unfolds in the following sequence. Part II documents a jurisprudential transformation on the zeroing practice from the old GATT to the new WTO. It demonstrates how the AB has managed to establish a transformative jurisprudence in this high-profile regulatory area through a train of decisions. At first glance, the AB has taken a traditionally unassuming interpretive methodology based on "ordinary meanings" of relevant provisions, which would have obscured its constitutional undertaking. Yet its exegesis is nonetheless anchored firmly by a discernible purpose of cabining trade distortive/restrictive consequences from the use of zeroing against the broader backdrop of a recent surge of antidumping measures. In other words, the AB has predicated its decisions on "teleological" grounds, such as avoiding unfairness from an undue inflation of dumping margins, and minimizing uncertainty in administering antidumping measures. Methodologically, the use of interstitial norms, such as fairness, tends to furnish the AB with maneuvering room for teleological interpretation.<sup>19</sup>

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<sup>18</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>19</sup> Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in M. Byers ed., *The Role of Law in International Politics: Essays in International Relations and International Law* 207, 212-21 (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

Part III then defends this new jurisprudence. It first introduces sovereigntists' attacks to the AB's case law on zeroing, and more broadly on antidumping measures in general. It subsequently challenges their positions on the multiple grounds that they misconstrue the nature of the WTO and its adjudication, not to mention the nature of sovereignty itself. As in most domestic courts, international tribunals often engage in judicial rule-making via construction beyond a mere mechanical application of treaty provisions. The WTO's evolution into a full-blown legal system from an old contract model under the GATT also tends to substantiate this enhanced judicial role by the WTO tribunal. Finally, a "disarticulated" concept of sovereignty used to foreclose necessary discussions in this area does not do justice to the contemporary status of global market integration under the WTO system.<sup>20</sup> Innately self-righteous logic enshrined in this hoary notion should not accord immunity to protectionism which is reincarnated in zeroing.

Projecting these critiques on sovereigntists to a constitutional backdrop, Part IV attempts to structure the zeroing jurisprudence within the conceptual framework of constitutional adjudication, which authoritatively re-configures the distribution of regulatory competence between the WTO and its members. It also observes that the sustainability of such constitutional adjudication can be secured not by exogenous factors such as certain political safety valves but by endogenous ones such as the normative recognition by the domestic legal system. This internalization of the WTO's constitutional adjudication is self-legitimizing because it eventually contributes to the attainment of domestic constitutional goals, such as Madisonian anti-parochialism, by empowering a broader array of constituencies, including consumers and consuming industries.

Finally, Part V concludes that constitutional *culture* in the global trading community, which harbors and promotes a legal discourse of jurisprudence among the community participants, is a critical catalyst for both trade constitution and constitutional adjudication. It is this constitutional culture within the WTO that liberates us from a defeatist positivism which preserves protectionist measures, such as zeroing, and thus unduly undermines constructive normative possibilities envisaged by multilateralism. Only this liberation can redefine the WTO members' interests, and their identities, from what unreceptive sovereignty represents to what enlightened norm-builders can accomplish.<sup>21</sup>

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should proceed"). These interstitial norms function as "standards" vis-à-vis "rules" in an adjudicative setting. See Joel Trachtman, *The Domain of International Trade Law*

<sup>20</sup> Wendt 393; Pogge 1992

<sup>21</sup> WTO's *Gemeinschaft*; Lang; Wendt 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).

## II. From Legal to Illegal: The Jurisprudential Transformation on Zeroing

### A. Dumping, Antidumping and Zeroing

Dumping is a pricing strategy under which foreign producers export their products at less than fair value, such as at prices lower than their home prices or at prices below the cost of production plus normal profits.<sup>22</sup> Antidumping authorities and the beneficiaries of 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>23</sup> However, 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>24</sup> In the absence of such strict requirement (predatory intent) in the antidumping system, most economists and policymakers, including the former Federal Reserve Board Chairman Alan Greenspan, view it as a sheer protectionist device.<sup>25</sup> Nonetheless, in what seems to be one of imperfections of the global trading system the GATT/WTO norms permit importing countries to impose antidumping duties to neutralize dumping when it inflicts material injuries on domestic industries.<sup>26</sup>

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 a 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>27</sup> In doing so, the DOC ignores ("zeros") any "negative" PUDD (any excess of export prices over normal values) in each group.<sup>28</sup> 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).

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<sup>22</sup>

<sup>23</sup> My piece

<sup>24</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>25</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>26</sup> General Agreement on Tariffs and Trade, October 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. VI; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1 A, Marrakech Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 6, 6-18; 33 I.L.M. 1140, 1144-1153 (1994).

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According to one study, dumping margins would have been 86 percent lower if zeroing had not been employed.<sup>29</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 the company’s request.<sup>30</sup>

Suppose that a foreign widget producer makes two U.S. sales.<sup>31</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 and 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) dollar.

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>32</sup> In the administrative review, as in an ordinary investigation process, any negative individual dumping margins (weighted average normal value minus individual export prices) are zeroed, which is called “simple zeroing.”<sup>33</sup>

#### B. The GATT Jurisprudence<sup>34</sup>: Zeroing Upheld

In *EC – Audio Cassettes* (1995), Japan complained that the EC’s zeroing practice led to arbitrary results in the calculation of dumping margins since the practice tended to inflate dumping margins vis-à-vis the normal averaging (non-zeroing) methodology.<sup>35</sup> Japan therefore argued that such methodology violated Article 2 (fair comparison) of the

<sup>29</sup> Daniel Ikenson, Antidumping Reformers Rejoice, Cato@Liberty, Dec. 18, 2006

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<sup>31</sup> AD Manual Chapter 6 (Fair Value Comparisons).

<sup>32</sup> DS 294 (Panel), 31 October 2005, para. 2.3

<sup>33</sup> *Id.*, para. 2.5

<sup>34</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* Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 13, Appellate Body and Panel Report, as modified, adopted on November 1 1996.

<sup>35</sup> *EC – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, Apr. 28, 1995 (unadopted), para. 115.

Tokyo Round Antidumping Code as well as Article 8 which stipulated that the amount of antidumping duties should not exceed the actual dumping margin.<sup>36</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>37</sup> While Japan accentuated the unfairness of zeroing by highlighting the eventual, practical consequences of zeroing, 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>38</sup> The panel opined that nothing in Article 2 prevented the EC from adopting other calculative methodologies than normal averaging.<sup>39</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.

This case law remains 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>40</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, before India challenged it for the first time under the WTO system.

### C. The WTO Jurisprudence: Zeroing Zeroed

#### 1. 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>41</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>42</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

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<sup>36</sup> Id.

<sup>37</sup> para. 119

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<sup>39</sup> para. 350

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<sup>41</sup> EC-Bed Linen, para. 11

<sup>42</sup> para. 12 (emphasis original).

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, thereby leading to a lower overall rate of dumping for the product as a whole.

However, in a surprising hermeneutical turn from the old GATT jurisprudence the AB rejected the EC position. It ruled that the dumping margin should be established “for the *product* – cotton-type bed linen – and not for the various types or models of that product.”<sup>43</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>44</sup> Therefore, the EC failed to take into account these transactions by zeroing the minus dumping margins.<sup>45</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>46</sup> This is exactly what Japan had presented in the *EC-Audio Cassettes*. Japan’s position, which was rejected by a GATT panel in 1995, had finally been vindicated by the AB. 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.

## 2. 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>47</sup> The AB de-legitimized 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>48</sup> The logical conclusion is therefore that an antidumping authority should “aggregate” *all* of these intermediate calculations regardless of being plus or minus.<sup>49</sup> Because zeroing basically cherry-picks only positive results of these intermediate calculations in the situation of

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<sup>43</sup> para. 53 (emphasis original)

<sup>44</sup> para. 55 (emphasis original).

<sup>45</sup> Id.

<sup>46</sup> para. 59

<sup>47</sup> paras. 95-96.

<sup>48</sup> para. 97.

<sup>49</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, 208 (quoting Terence P. Stewart, Antidumping, in 2 *The GATT Uruguay Round: A Negotiating History (1986-1992)* 1383, 1540 (Terence P. Stewart ed., Kluwer Law & Taxation Publishers 1993)). 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.

multiple comparisons and disregards (zeroes) negative ones, it does “not take into account the *entirety* of the *prices* of *some* export transactions” and thus “inflates the margin of dumping for the product as a whole.”<sup>50</sup>

### 3. 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>51</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>52</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>53</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>54</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>55</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>56</sup> The AB could deflect the potential criticism of 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.

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<sup>50</sup> paras. 98, 101 (emphasis original)

<sup>51</sup> para. 128

<sup>52</sup> *Id.*

<sup>53</sup> para. 129

<sup>54</sup> para. 109

<sup>55</sup> *Id.*

<sup>56</sup> para. 134

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>57</sup>

#### 4. 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 “illusory” the U.S. “right to choose” different methods in calculating dumping margins.<sup>58</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>59</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>60</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, nor “has it provided examples of how other WTO Members have applied this methodology.”<sup>61</sup> In addition, according to the AB the “mathematically equivalent” outcome would be at best “limited to a specific set of circumstances.”<sup>62</sup>

Having condemned the zeroing practice under the aforementioned hypothetical scenario (the weighted average-to-transaction comparison in a targeted dumping), the AB further moved to strike down zeroing in yet another comparison methodology under the Article, i.e., “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>63</sup>

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<sup>57</sup> para. 204 (emphasis added).

<sup>58</sup> para. 33

<sup>59</sup> para. 36

<sup>60</sup> para. 36

<sup>61</sup> para. 97

<sup>62</sup> para. 99.

<sup>63</sup> 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.”<sup>64</sup>

#### 5. 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>65</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 the transaction-to-transaction (T-T) comparison as well as in the weighted average-to-transaction (W-T). 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>66</sup> so that an antidumping authority can enjoy the maximum discretion in its methodological choice among different types of comparisons.<sup>67</sup>

Markedly, in addition to its previously seen recourse to textual grounds<sup>68</sup> and practical damages to exporters due to the inflation of dumping rates,<sup>69</sup> the AB rejected the U.S. argument from a rather “teleological” standpoint, taking into account one of the most paramount values of the global trading system, i.e., certainty and predictability. It held that:

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>70</sup>

As a culmination of a train 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

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<sup>64</sup> para. 141

<sup>65</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>66</sup> para. 87

<sup>67</sup> paras. 19, 21

<sup>68</sup> para. 115

<sup>69</sup> para. 123

<sup>70</sup> para. 126 (emphasis added).

administrative review procedures. This ruling seems to have delivered a clear message to the global trading community that the era of zeroing is gone.

### III. Evaluating the New WTO Jurisprudence on Zeroing

#### *A. Sovereignists Strike Back: Judicial Legislation, Contract (Bargain), and Sovereignty*

The nitty-gritty of most criticisms on the WTO's invalidation of the zeroing practice derives from the WTO's alleged trespassing on members' sovereignty which those critics believe should justify this perplexing calculative practice in the antidumping proceeding. Certain scholars, commentators, policymakers and especially politicians, who may collectively be labeled "sovereignists," 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. Therefore, sovereignists argue, the AB is "making up rules that the U.S. never negotiated."<sup>71</sup> 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 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>72</sup>

Some scholars even forewarn that the WTO's inattentiveness to the negotiation history might contradict the fundamental element of treaty law, i.e., state consent, and thus risk provoking political backlashes.<sup>73</sup> Daniel Tarullo alerted that the AB's blatant disregard of deference to domestic antidumping authorities secured by a special standard of review under Article 17.6 of the WTO AD Agreement might deter the U.S.' generous trade concessions in the subsequent round of trade negotiations.<sup>74</sup> Therefore, according to him this judicial activism is a Pyrrhic victory to free tradists.<sup>75</sup>

A more emotional objection originates, understandably, from certain domestic producers who compete with foreign rivals. They contend that:

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<sup>71</sup> News Release: U.S. Trade Laws and WTO, U.S. Sen. Comm. on Finance, Sep. 27, 2002, at <http://finance.senate.gov/press/pr092702.pdf>.

<sup>72</sup> Offsets for Non-Dumped Comparisons, Communication from the United States, TN/RL/W/208, Jun. 5, 2007 (p2).

<sup>73</sup> Steinberg, 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>74</sup> Tarullo, *The Dynamic Effects*, *supra* note x, at 374.

<sup>75</sup> *Id.*

“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>76</sup>

These accusations have been accompanied by the pejorative rhetoric of “judicial legislation” or “judicial activism.”<sup>77</sup> According to sovereigntists, judicial legislation exercised by an overzealous trade tribunal would encroach upon member states’ sacrosanct regulatory competence in certain policy matters which they believe has never been ceded to international organizations like the WTO. They may find an important sovereignty-preserving mechanism in the DSU itself. After all, the formal mission of the WTO tribunal is merely to “assist” the Dispute Settlement Body (*i.e.*, the General Council) to “settle” disputes between Member states by delivering “recommendations.”<sup>78</sup> As frequently cited, these recommendations are not permitted to *add to* or *diminish* the rights and obligations of member states.<sup>79</sup>

In this regard, Alan Wolff has submitted that the WTO tribunal’s “legislating to fill in the perceived gaps in the coverage of the Antidumping Agreement” violates the “standard of review contained in the Antidumping Agreement that calls for deference to national administrators of antidumping laws.”<sup>80</sup> Roger Alford has argued that the AB failed to exercise the judicial restraint and thus violated the principle of deference or the margin of appreciation which he believed was embedded in Article 17.6 of the Antidumping Agreement incorporating the U.S. *Chevron* doctrine.<sup>81</sup> John Greenwald also viewed that WTO panels and the AB had unduly undermined WTO members’ ability to regulate trade beyond the negotiated level by “legislating,” not “applying,” WTO law.<sup>82</sup>

The sovereigntists’ apprehension on the AB’s anti-zeroing case law has reached its apex when the U.S. Congress echoed its concern. 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 of the WTO Antidumping Agreement in a way which has allegedly deprived the U.S. regulatory agency (the DOC) of its rightful deference secured under the Article. §2101 (b) (3) (B) of the 2001 TPA Bill provides that:

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<sup>76</sup> AHSTAC/SSA Joint Statement

<sup>77</sup> Steinberg 247-48 (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>78</sup> DSU, *supra* note 106, art.19.1.

<sup>79</sup> DSU, *supra* note 106, arts. 3.2, 19.2; The U.S. Communication, 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.”)

<sup>80</sup> Alan Wm. Wolff, Problems with WTO Dispute Settlement, 2 *Chi. J. Int'l L.* 417, 421 (2001).

<sup>81</sup> 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, 199-202 (2006).

<sup>82</sup> John Greenwald, WTO Dispute Settlement: An Exercise in Trade Law Legislation?, 6 *J. Int'l Econ. L.* 113, 114 (2003).

“[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>83</sup>

In a similar protest, 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>84</sup>

### *B. Challenging Sovereignists: Three Fundamental Questions*

#### 1. The Nature of International Adjudication: Is It a Mere Mechanical Application of Treaty Provisions?

Despite the sovereignists’ criticism of “judicial usurpation,”<sup>85</sup> it is widely recognized that judges, both international and domestic, do more than merely applying rules in the book in a mechanical fashion. To some extent, judicial legislation is an innate, unavoidable function of adjudication.<sup>86</sup> To deny this proposition would be close to sticking to a myth.<sup>87</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>88</sup> Two decades later, Justice Holmes famously ruled that when 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>89</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>90</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 tends to be stronger in the former setting considering that deliberated ambiguities in the text are often a necessary evil for unyielding state parties to reach a 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

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<sup>83</sup> Pub. L. No. 107-210, 116 Stat. 933(2002), § 2101(b)(3)(B).

<sup>84</sup> Rossella Brevetti, U.S. Zeroing Methodology Hit Again by WTO Appellate Body, 24 Int’l Trade Rep. 53, Jan. 11, 2007.

<sup>85</sup> Ezra R. Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law, 5 Harv. L. Rev. 172, (1892).

<sup>86</sup> Thomas M. Franck, Some Psychological Factors in International Third-Party Decision-Making, 19 Stan. L. Rev. 1217, 1221 (1967).

<sup>87</sup> Alvarez 521

<sup>88</sup> Thayer

<sup>89</sup> *Missouri v. Holland*, 253 U.S. 416 (1920), at 433-4.

<sup>90</sup> Martin Shapiro, *Courts: A Comparative and Political Analysis* 29 (1981).

any (well-functioning) international tribunal to “seek consistency that connects past, present, and future.”<sup>91</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>92</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>93</sup> The WTO tribunal is not an exception to this trend.<sup>94</sup>

The WTO’s unique institutional structure may further defend 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, which is also compounded by the daunting logistics of decision-making mechanism in any important matter, which is either consensus or supermajority.<sup>95</sup> Under this taxing circumstance, 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 lofty Montesquiean notions of

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<sup>91</sup> Thomas Franck, *Fairness in International Law and Institutions* 335 (1995) (cited in Alvarez, 545).

<sup>92</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 96)

<sup>93</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). Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *Colum. L. Rev.* 1492, 1500 (2004) (observing many scholars’ view that the “power of international institutions to interpret their founding instruments is a significant source of authority for generating new rules”).

<sup>94</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; 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: *Domain*, 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>95</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.”).

separation of powers that are better suited to the domestic context.<sup>96</sup> After all, this is a useful manifestation of “judicial prudentialism,”<sup>97</sup> rather than as reckless judicial activism.

Predictably, sovereigntists would aver the textual determinedness of Article 17.6 (ii) based on the similar textual semblance 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 which the *Chevron* doctrine is applied in the U.S. court.<sup>98</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.<sup>99</sup> In fact, considering the murky nature of negotiation history under the Uruguay Round over the antidumping issues in general,<sup>100</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>101</sup> According to the game theory, this interpretive flexibility is to enhance “allocative efficiency.”<sup>102</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, in the form of “rules.”

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>103</sup> In fact, Judge Jennings, one of the most respected ICJ judges, once wrote that “the most important requirement of the judicial function” is to be deemed 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>104</sup> The WTO tribunal, like any other international

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<sup>96</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 x, 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 generally slow to introduce law reforms to ensure that the law adapts to changing times and changing social and moral norms”).

<sup>97</sup> Cf. Russell Gabriel & Louis B. Sohn, *Equity in International Law*, 82 AM. SOC’Y INT’L L. PROC. 277, 283-84 (1988) [hereinafter *Equity*].

<sup>98</sup> Trachtman, *The WTO’s Domain*, 335

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

<sup>100</sup> Cite!

<sup>101</sup> Trachtman, *The WTO’s Domain*, 352

<sup>102</sup> *Id.*

<sup>103</sup> Alvarez 532

<sup>104</sup> Mohammed Shahabudeen, *Precedent in the World Court* 232 (1996); Alvarez 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”).

tribunal, is rather reserved and circumspect in performing this inevitable judicial function.<sup>105</sup> This low-key stance results from the fact that the AB is all too well aware of members' anxieties over its potential judicial activism and the subsequent encroachment on their sovereignty. Therefore, it always strives 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 preoccupation with textual interpretation, even when it in fact adopts teleological interpretation, attests to this caution.<sup>106</sup>

## 2. The Nature of WTO Bargain: Is It a Mere Contract? (If So, What Kind of Bargain?)

As discussed above, sovereigntists tend to adhere to a contractarian view on the multilateral trading system. Sovereigntists basically view that invalidating zeroing is not what members, especially those members which advocate zeroing, had bargained for in the Uruguay Round negotiations.<sup>107</sup> On the contrary, the real deal struck in the Uruguay Round, according to sovereigntists, was to bestow considerable deference to domestic antidumping authorities, which is allegedly stipulated in Article 17.6 (ii) of the WTO Antidumping Agreement. The Article reads that:

Where the panel finds that a relevant provision of the Agreement admits of *more than one permissible interpretation*, the panel shall find the authorities' measure to be *in conformity with the Agreement* if it rests upon one of those permissible interpretations.<sup>108</sup>

Sovereigntists appear to deem this Article as a sacrosanct *term* of the Uruguay Round contract. In fact, it was inserted at the last ditch 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 to certain 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.

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<sup>105</sup> 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)

See also Dunoff 658 (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>106</sup> 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>107</sup> But cf. Submission by Japan etc. (observing that there existed no consensus on zeroing at the time of Uruguay Round negotiations).

<sup>108</sup> (emphasis added)

However, a contractarian understanding of the WTO tends to overstate a positivist/realist nature of the multilateral trading system and thus fails to fully capture its true aspects at the risk of anachronism. Admittedly, 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 is likely to be influenced by power disparity or the so-called “hegemony stability thesis” under which power is a main currency.<sup>109</sup> Perhaps this is the reason why most criticisms on judicial activism are staged by political scientists or political activists whose main language is power politics, not norms.<sup>110</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>111</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>112</sup> In the same vein, the nature of the WTO remedies is no longer obsessed with the “rebalancing” of their original negotiational matrices of give-and-take, but more tuned in norm-building.<sup>113</sup> In sum, the WTO as a system, or a trade constitution,<sup>114</sup> continuously transforms both the content of international trade law and state actors’ behaviors<sup>115</sup> in a way which creates stability and predictability of the multilateral trading system.<sup>116</sup> From this perspective, the

<sup>109</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>110</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); CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001); Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401 (2000); Lori Wallach, *The FP Interview: Lori’s War*, FOREIGN POL’Y, Spring 2000, at 37; Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

<sup>111</sup> My book

<sup>112</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>113</sup> My Remedies Piece

<sup>114</sup> Jackson; McGinnis; 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> (last visited on Mar. 29, 2001). 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 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>115</sup> Alvarez, 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>116</sup> Sec.301 decision

alleged *terms* of the Uruguay Round contract, which are 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* subscribes to a contract analogy in interpreting Article 17.6 (ii) as sovereigntists insist, 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>117</sup> At the same time, “a proper interpretation also would have included an examination of the existence and relevance of subsequent practice,”<sup>118</sup> such as strong objections to the zeroing practice expressed by other parties (to the contract), such as the Friends of Antidumping.<sup>119</sup>

More importantly, the Article eventually fails to deliver what sovereigntists thought they would have bargained for. An alleged semblance of the Article to the *Chevron* doctrine does not necessarily accord the 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>120</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 defy a similar pattern of interpretation between the two. Second, as an international treaty, the Antidumping Agreement must be interpreted in accordance with those 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 merely because of some textual similarity. Finally, they aptly pointed out that certain underlying rationales in the *Chevron* doctrine, such as “agency expertise” and “administrative or coordination” cannot simply be found when it is applied to the WTO review.<sup>121</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>122</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

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<sup>117</sup> *LAN*, para. 84

<sup>118</sup> *Id.*, para. 90.

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<sup>120</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).

<sup>121</sup> *Id.*, at 206-11.

<sup>122</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).

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>123</sup>

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

### 3. The Nature of Sovereignty: Should It Remain Antiquated?

One may notice in the sovereigntist condemnation of the WTO zeroing case law a hallmark of the hoary *Lotus* principle,<sup>124</sup> which would empower sovereign states to do whatever they desire as long as no explicit prohibition exists in international law. Therefore, sovereigntists might speculate that WTO members would be free to adopt the zeroing practice as long as the WTO Antidumping Code does not expressly ban such practice.

Yet the aforementioned “disarticulated” notion of sovereignty does not do justice to the contemporary status of global market integration under the WTO system.<sup>125</sup> The WTO denotes a voluntary, self-enlightened lock-in, i.e., fastening one's hand, against the Sirens of protectionism. Of course, the initial lashing might have been loose enough to allow protectionist devices, such as antidumping measures, to be codified in the GATT. However, this imperfection is something to be overcome by subsequent institutional developments, rather than being permanently enshrined, if the object and purpose of the global trading system remains free trade and market integration. Sovereigntists basically mistake a salutary destabilization of mercantilist status quo for a blasphemous erosion of state sovereignty. Although getting rid of protectionism certainly incurs pain to some part of the domestic economy, a good medicine tends to be bitter to our mouth.

John Jackson insightfully warned that an outdated mantra of the Westphalian sovereignty whose core argument is “power monopoly” threatens to foreclose otherwise meaningful and constructive discourses or debates on “trade constitution,” which governs an orderly power allocation between the WTO and its members in the field of international trade.<sup>126</sup> By advertising that the WTO case law on zeroing undermines their sovereignty, sovereigntists basically engage in fear-mongering. A reasonable person would find it too extensive and inferential to accuse the AB's decision on a regulatory

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<sup>123</sup> Id.

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<sup>125</sup> Wendt 393; Pogge 1992

<sup>126</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 2003, 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 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”).

issue such as zeroing of actually eroding the classical notion of sovereignty as “self-government.”<sup>127</sup> Here, sovereigntists attempt to cast a defensive atmosphere aided by the sanctity of self-determination and non-interference as stipulated in the UN Charter. In this regard, Jackson delivered an incisive observation that sovereignty has an “emotional appeal” and is often used “in a blunt and undifferentiated way as a surrogate argument by opponents of some government proposal.”<sup>128</sup>

Dan Sarooshi also well 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.”<sup>129</sup> 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.”<sup>130</sup> This view parallels that of Stephan Krasner who regarded sovereignty as “organized hypocrisy.”<sup>131</sup>

In the area of antidumping remedies in general and zeroing in particular, sovereigntists employ this organized hypocrisy in unilaterally executing an underlying protectionist agenda in the pretext of remedying the allegedly unfair trade (dumping) to achieve the “level-playing field” for domestic producers.<sup>132</sup> This highly flawed self-righteous logic attempts to take refuge in the sovereignty’s falsified immunity from being questioned. This protectionist/mercantilist project cocooned in the concept of sovereignty is yet another manifestation of “corporate economic autonomy,” which can also be found in Section 301 and the Super 301<sup>133</sup> and eventually constitute “exceptionalist” trade policies. Captured by well-organized special interests, such as the steel industry, which is the most vociferous and ardent user of antidumping measures,<sup>134</sup> the U.S. government has incessantly argued for the rationale and effectiveness of this trade remedy.

This disarticulated 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

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<sup>127</sup> Raustiala 2003, 875-6

<sup>128</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 *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”).

<sup>129</sup> 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).

<sup>130</sup> 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)).

<sup>131</sup> Stephan D. Krasner, *Sovereignty: Organized Hypocrisy* 9 (1999).

<sup>132</sup> Id., at 669-70.

<sup>133</sup> Sarooshi, at 669-70.

<sup>134</sup> Durling, 145

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>135</sup> Undoubtedly, any of these consequences would be perilous both to the WTO and those countries which self-excommunicated from the WTO in the name of sovereignty.

Some scholars have endeavored to overcome this conceptual flaw, and danger, of sovereignty by reconceptualizing it. John Jackson trenchantly observed, in this highly interdependent international environment, trading nations, even the most powerful ones, should fully 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>136</sup> In other words, an altering international context requires a more flexible concept of sovereignty<sup>137</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 embrace the “new sovereignty” which is more mature, constructive and participatory.<sup>138</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>139</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 practice without any unnecessary rhetorical escalation.<sup>140</sup> Ironically, this new approach to sovereignty can actually help governments achieve their own policy objectives by taming domestic politics in the name of international obligations.<sup>141</sup>

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<sup>135</sup> Raustiala 2003, 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>136</sup> John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT. ECON. L. 3, 10-14.

<sup>137</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>138</sup> *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995); *cf.*

<sup>139</sup> *The Great 1994 Sovereignty Debate*, *supra* note 203, at 187-88.

<sup>140</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>141</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)

## IV. Toward Constitutional Adjudication in the WTO

### A. *Setting the Stage: Narratives on Trade Constitution*

To divulge underlying flaws in the sovereigntists' criticism on the WTO's antidumping decisions, in particular those involving the zeroing practice, does more than merely disabusing us of serious misconceptions which sovereigntists hold. Such divulgence also offers us auspicious opportunities to rethink the very nature of the WTO and its adjudication, as it spotlights the subtle power allocation between the WTO and its members on issues vital to its objective and purpose (*telos*), for example antidumping measures as contingent protectionism. Whether and/or to what extent should the WTO tolerate members' autonomous invocation of such protectionist devices? Should the WTO tribunal continue to defer this critical determination to its members despite the currently widespread use of antidumping measures which risk undermining the efficacy of the multilateral trading system? How we answer these questions determines the institutional identity of the WTO: It *constitutes* the WTO. Therefore, any debates and discourses on this power allocation over antidumping issues, such as zeroing, concern a nascent concept of "constitution" within the context of the WTO.

A recently emerging wide spectrum of narratives on trade constitution is certainly indicative of various kinds of constitutional vision within the WTO. These rich narratives tend to provide us with a helpful cognitive framework by which we can re-approach antidumping issues, such as zeroing, from a constitutional perspective. Yet these various taxonomies and perspectives which portray trade constitution on their own terms often complicate a coherent understanding of this innate complex subject. In response to this challenge, Jeffrey Dunoff and Joel Trachtman have recently provided a systematic account of hitherto narratives on trade constitution.

First, Jeffrey Dunoff offered three (institutional, normative and judicial) lenses through which one could capture trade constitution.<sup>142</sup> 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.<sup>143</sup> The *telos* of this trade institution is basically governance: it is to "enable its members to pursue common goals without being

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<sup>143</sup> Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 *Eur. J. Int'l L.* 647, 649 (2006); John H. Jackson, *World Trade and the Law of GATT* 788 (1969) [hereinafter JACKSON, *THE LAW OF GATT*]. See also Jackson 2003, 793-94. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 339 (2d. 1997); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 101-4 (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, 873 (1996). 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).

defeated by competing antisocial conduct of members of the group.”<sup>144</sup> To the extent that this antisocial conduct is accompanied by the jealousy of sovereignty over losing its decision-making prerogatives, sovereignty militates against a new (constitutional) debate on whether to broaden and deepen the global trading community by achieving freer trade via normative means.<sup>145</sup>

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.”<sup>146</sup> 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.<sup>147</sup> Cass identified a role of constitutional court in a series of the AB’s decisions which pertained to constitutional issues such as the allocation of powers.<sup>148</sup>

Joel Trachtman presented his own typology of trade constitution different from that of Dunoff. Trachtman focused on various aspects or “dimensions” of trade constitution, rather than pitting one “model” against another.<sup>149</sup> He insightfully analogized a trade constitution as the “fabled elephant at the hands of six blind men” who would conjure up a “different animal based on his encounter with a different part of the elephant.”<sup>150</sup> His six dimensions of trade constitution are as follows:

1. an economic constitution in the Buchanan sense: a set of rules for transactions in, and institutionalization of, authority;

<sup>144</sup> JACKSON, *THE LAW OF GATT*, supra note \_\_, at 788.

<sup>145</sup> See Sarooshi, 655. This understanding of trade constitution parallels that which John McGinnis and Mark Movsesian offered under the label of “World Trade Constitution.” **Cite!** Their trade constitution is based on anti-protectionism. According to them, the trade constitution should only discipline captured policies driven by special interests’ rent-seeking behaviors. To the extent that the WTO offers an institutional basis for this anti-discriminatory discipline, their trade constitution may be translated as that of John Jackson.

<sup>146</sup> Dunoff, 654; Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 *EJIL* 621, 644 (2002); Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 *MICH. J. INT’L L.* 1, 30 (1998) (arguing that “European integration law and WTO law confirm the Kantian insight that rule of law requires compulsory judicial protection of freedom and non-discrimination at home and abroad”); 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, 32 (1998) (arguing that the ever-growing adjudication phenomenon in international economic law is an empirical confirmation of the necessity of a judicial dispute settlement system for the strengthening of the ‘rule of law’ and of more democratic ‘checks and balances’ for the benefit of the citizens).

<sup>147</sup> Dunoff, 655; Cass, *The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 *EJIL* (2001) 39, 52

<sup>148</sup> Cass, 72

<sup>149</sup> Trachtman 624

<sup>150</sup> *Id.*

2. an interfunctional constitution that allows for the integration of various social values;
3. a political constitution that reflects the cultural and democratic integrity of a group of people;
4. a legal and judicial constitution that provides rules for the making of other rules, and for determining supremacy and the scope of judicial application of rules;
5. a human rights constitution that limits the sphere of governmental authority, and
6. a redistributive constitution founded on social solidarity.<sup>151</sup>

Notably, Trachtman opined that constitutional discourse in international trade law should concern 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>152</sup> This “plasticity” of trade constitution enables WTO Members to willingly respond to certain constitutional moments with adequate institutional changes.<sup>153</sup> Trachtman’s interstitial approach inform the trade constitution in a critical way in that it theoretically enables the WTO (and the AB) to profit from a certain “de-contextualized” form of constitutional narratives, free from any particular institutional paraphernalia. After all, it is these de-contextualized narratives which shape and legitimize the WTO’s constitutional adjudication.

#### *B. The Case for Constitutional Adjudication on the Zeroing Practice*

##### 1. Projecting the Antidumping Measure (Zeroing) onto the WTO’s *Telos* of Anti-Protectionism and Development

Yet these broad-spectrum constitutional narratives alone are deficient in answering the critical question which this article raises, i.e., whether the WTO should tolerate or regulate members’ protectionist use of zeroing. While those constitutional narratives equip us with necessary constitutional imagination at a general level, they should still be projected to the legal, historical, and institutional particularities of the WTO and its antidumping mechanism in order to customize our exploration on trade constitution to what is meaningful to the legal status of antidumping measures in the WTO system.

To reformulate the zeroing debate within the framework of trade constitution, one should conduct two critical inquiries, i.e., what the constitutional rationale (*telos*) of the GATT/WTO has been, and whether the zeroing practice would live up to such rationale. Among the varying WTO narratives on trade constitution, two seem to be uniquely suitable to these inquiries: Jeffrey Dunoff’s “institutional” approach to trade constitution and Joel Trachtman’s “legal and judicial” constitution. These two angles enable us to

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<sup>151</sup> Id.

<sup>152</sup> Id., at 645.

<sup>153</sup> Id., at 626, 645

discover the GATT/WTO's legal/institutional responses to various challenges, which could have threatened its very foundation, at GATT/WTO's certain historical moments. These legal/institutional responses, which one can fully capture only in a dynamic fashion, characterize the trade constitution. Therefore, our task of constitutional reformulation of the zeroing issue should begin with an analysis of the institutional development (*history*) of the global trading system itself.

The genesis of the modern global trading system dates back to the creation of GATT, a pillar of the Bretton Woods system which served as a blueprint for a post-war international economic order. Although people and civilizations had engaged in various forms of trade from antiquity, the critical lack of its regulatory mechanism in the *inter-*national dimension often precipitated numerous incidences of economic balkanization. The U.S. Constitution was in fact built upon a bitter experience of tariff wars among thirteen Confederates which brought demise to the fragile Articles of Confederation.<sup>154</sup> Much later, the world faced the worst-ever economic balkanization in history with the U.S. being still at the center. The Smoot-Hawley Tariff Act of 1930, the ill-conceived response to the Great Depression, triggered a spiral of mercantilist competition all over the world, and eventually contributed to the outbreak of the Second World War.<sup>155</sup> The GATT, among other things, aimed to prevent another such tragedy by tying treacherous protectionist hands of governments firmly to the mast of multilateral trading norms.<sup>156</sup>

However, the GATT was not without its primordial imperfections one of which was to include antidumping remedies as a contingent protectionist mechanism. As discussed above, antidumping remedies serve only one purpose: protecting domestic industries.<sup>157</sup> Antidumping remedies provided in GATT Article VI reflected *political* preferences of powerful contracting parties, such as the U.S., which had retained these remedies in their domestic legal system.<sup>158</sup> Nonetheless, these developed countries had not needed to rely heavily on antidumping measures in the early days of GATT mainly because conventional barriers, such as tariffs and quotas, had been sufficient in providing protectionist devices.<sup>159</sup> The dormant position of antidumping remedy came to a halt as old trade barriers faded out. As the unprecedented success of GATT had gradually dismantled old trade barriers, governments had to discover new tools of protectionism, such as antidumping measures.<sup>160</sup> Importantly, the protectionist effect of those new trade

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<sup>160</sup> See Christopher F. Corr, Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures, 18 Nw. J. Int'l L. & Bus. 49, 53 (1997) (observing that antidumping measures have recently been emerging as a new weapon of trade protection while tariffs are phased out). Under the theory of "optimal obfuscation," rich countries are likely to compensate the gradual dismantling of old protectionist instruments, and thus maintain an optimal level of protection, by replacing conventional barriers, such as tariffs, with more esoteric administrative barriers, such as antidumping measures. Daniel Y. Kono, Optimal Obfuscation: Democracy and Trade Policy Transparency, 100 Am. Pol. Sci. Rev. 369 (2006). See also Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. \_ (forthcoming 2007).

barriers, such as antidumping remedies, tends to become increasingly damaging as globalization has inevitably turned each economy more sensitive to others' domestic measures than before.<sup>161</sup>

GATT was not without efforts to reform the antidumping regime. The fear for potential abuse led GATT members to attempt to introduce certain disciplines via international agreements as early as in Sixties. However, earlier initiatives such as the Kennedy Round Antidumping Code in the Sixties and the Tokyo Round Antidumping Code in the Seventies were deficient, leaving too many ambiguities and benign neglects.<sup>162</sup> Even the most recent WTO Antidumping Code itself could not halt a proliferation of antidumping use. In fact, as many scholars have pointed out, the WTO Antidumping Code is still rife with loopholes, and even retrogressions, which militate against disciplining abuse, overuse and misuse of antidumping measures as a destructive protectionist artillery.<sup>163</sup>

This failure to restrain the protectionist exploitation of antidumping remedy has recently yielded troublesome symptoms. First, the WTO antidumping complaints have recently mushroomed at an alarming rate.<sup>164</sup> Since the launch of the WTO in 1995, members have thus far initiated about 3,100 antidumping investigations,<sup>165</sup> while GATT contracting parties conducted only 1,600 investigations by the 1980's.<sup>166</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 recently begun to have recourse to these trade remedies more frequently.<sup>167</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>168</sup> These antidumping measures tend to effectively neutralize any previously enhanced market access.

This developmentally fatal effect of rich countries' antidumping measures is well corroborated by trade statistics. For the last decade, the world's richest countries'

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<sup>161</sup> See GLOBAPHOBIA: CONFRONTING FEARS ABOUT OPEN TRADE 89 (Gary Burtless et al eds. 1998); Sol Picciotto, *The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 89 (William Bratton et al eds. 1996).

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<sup>163</sup> Raj Bhala

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<sup>168</sup> A Dual Catastrophe of Protectionism; Beyond the Doha's Promise

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.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup>

## 2. Constitutional Adjudication as a Safeguard for the WTO System

The resilience and prominence of antidumping remedies, despite its undesirability on many fronts, is characteristic of its positivistic relic. Their disconcerting presence in the WTO system is attributable only to powerful members' penchants for them. The WTO, as a "global Gesellschaft" cannot but be at the mercy of power, interest and bargains without a centralized system of governance.<sup>173</sup> This setting is inherently vulnerable to the collective action problem, such as economic balkanization, as was witnessed in the interwar period.<sup>174</sup> Moreover, under these circumstances, superpowers, such as the U.S., are capable of maintaining unilateralist trade policies embedded in antidumping remedies and zeroing, to the detriment of smaller trading partners. While superpowers tend to justify such unilateralism in the name of sovereignty, the price of such sovereignty would be enormous systematic damages to multilateralism. The WTO has no legislative power, such as the U.S. Commerce Clause, to counter this parochial politics.

Nonetheless, the mere fact that antidumping is part of the WTO system does not necessarily self-legitimize it since negotiations often produce bad laws which must be addressed somehow. Nor does the fact that the WTO is not a federal polity or a World Government not necessarily mean that the WTO should turn blind eyes on system-undermining consequences of antidumping remedies, such as zeroing. The aforementioned dire situation tends to compel the WTO to discipline, in a vertical mode, certain members' unbridled (ab-)use of antidumping remedies as is seen in zeroing which aggravates antidumping remedies' protectionist effect by inflating dumping margins. This vertical discipline on zeroing is "constitutional" in the sense that it seriously concerns the allocation of power between the WTO and member countries. Without workable legislative options, the only way to attain this constitutional goal may be to rethink the

<sup>169</sup> WTO, Statistics on Antidumping, [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm#statistics](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm#statistics).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> WORLD BANK 2003, *supra* note \_\_, at xx. .

<sup>173</sup>

<sup>174</sup>

way in which the WTO tribunal “interprets” the Antidumping Code.<sup>175</sup> This is the very juncture where an otherwise technical methodological issue (zeroing) becomes a constitutional question which must be addressed by “constitutional adjudication.”

The WTO tribunals’ constitutional adjudication proposed here must be distinguished from more routine occasions of dispute resolution in the WTO. Beyond merely resolving or “settling” individual trade disputes between certain members, this constitutional adjudication is characterized by a purposeful mission to engender a certain normative (jurisprudential) force field, which will subject future behaviors of *all* members in the same subject-matter, i.e., zeroing, to its effect in a way which heralds a new policy in that area. While any individual WTO case may potentially become a future precedent in the sense that it may guide future behaviors of members, constitutional adjudication tends to carry with it a more immediate and powerful jurisprudential impact than ordinary adjudication.

The idea of constitutional adjudication is not limited to the WTO. Recently, international law scholars have widely recognized this nascent phenomenon. Notably, José Alvarez presented a powerful case of constitutional adjudication within international organizations. He exhibited a critical contrast between Martin Shapiro’s traditional (triadic) perspective of adjudication and Owen Fiss’ opposite stance characterized by public litigation. Under Shapiro’s view, an inescapable rift between a conventional image, or role expectation, of the court as “neutral rule appliers,” and its practical function of judicial rule (policy)-maker tends to test its legitimacy.<sup>176</sup> However, Fiss challenged Shapiro’s triadic perspective and thus dismissed the latter’s fear of legitimacy by reconceptualizing the nature of adjudication within a constitutional parameter in a way which justifies the court’s legitimacy as a constitutional organ. Owen observed that in certain powerful, paradigmatic constitutional cases, such as *Brown v. Board of Education*, how the court addresses certain social conditions affecting constitutional values is far more important than a specific, adversarial outcome of the litigation itself.<sup>177</sup> Alvarez located the similar logic in Harold Koh’s “transnational public litigation”<sup>178</sup> in which certain international human rights cases are litigated before the U.S. courts.

In the same line, the WTO tribunal’s review of the zeroing practice goes beyond a mere level of settling individual trade disputes. It tends to (re-) configure the right power allocation between the WTO and its members, anchored by the WTO’s rationale (*telos*).

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<sup>175</sup> It is not the final outcome of the ruling, i.e., who will prevail in the end, which may interest us. Rather, it is be how panels or the AB would reach its decision. For example, in a series of recent zeroing decisions the AB would have reached the same conclusion by interpreting Article 17.6 (ii) of the Antidumping Code as though the Article directly incorporated the *Chevron* doctrine as the U.S. insists: the AB could have simply ruled that the Commerce Department’s interpretation as “unreasonable.” Cf. Department of Treasury, *I.R.S. v. Federal Labor Relations Authority*, 494 U.S. 922 (1990) (refusing to defer to FLRA interpretation of Title VII of the Civil Service Reform Act of 1978 because it was unreasonable and plainly contradictory to the language of the statute). However, such interpretation would have still been unacceptable under the WTO despite the right outcome.

<sup>176</sup> Alvarez 534

<sup>177</sup> Alvarez, 535; Owen M. Fiss, Forward: The Forms of Justice, 93 Harv. L. Rev. 1, 18, 53 (1979).

<sup>178</sup> Harold H. Koh, Why Do Nations Obey International Law?, 106 Yale L. J. 2599 (1997); Alvarez, 535.

The advent of constitutional adjudication in the WTO realm has already been recognized as a beacon of trade constitution by the foregoing constitutional narratives.<sup>179</sup> As John Jackson observed, if “trade constitution” is defined largely as an issue of power allocation between the WTO and its member countries, the “impact of a dispute settlement system and its jurisprudential techniques such as those used to “interpret” international agreements” certainly relates to trade constitution as long as it addresses such power allocation.<sup>180</sup>

Importantly, constitutional adjudication on the zeroing practice is powered by a “teleological interpretation” of the WTO norms, such as the Antidumping Code. Without referencing to the ultimate values or purposes to which the WTO system as a whole is institutionally committed, it would be hard for the WTO tribunal to change perforce the past interpretation which had endorsed zeroing since the old GATT era. In order to “giv[e] effect to the trade regime’s primary purpose,” the AB’s constitutional adjudication necessitates “creative” interpretation.<sup>181</sup> As discussed above, the AB’s hermeneutical turn from the old GATT position which upheld the zeroing practice resulted from the AB’s innovative interpretation of the WTO Antidumping Code, which is in fact textually identical to the old Tokyo Round Antidumping Code on which the GATT panel based its own ruling. In stark contrast with the GATT panel, the AB breathed a new life into the same old texts, such as “a fair comparison between the export price and the domestic price” and “the amount of the anti-dumping duty must not exceed the margin of dumping.” The AB’s new interpretation of these texts purports to proscribe any undue intensification of protectionist impact of antidumping measures, such as the inflation of final dumping margins through the zeroing methodology, which is informed by the objective and purpose of the global trading system, i.e., free trade and anti-protectionism.

Critically, what has apparently made the AB change its interpretive heart is nothing but the aforementioned disquieting proliferation of antidumping measures which might trigger an Armageddon of antidumping wars. This new development unseen under the old GATT regime tends to grant the AB a “new license” to interpret the WTO norms in a more innovative fashion to discipline one of the most problematic practices in this area, i.e., zeroing.<sup>182</sup> Although the AB has not explicitly based its ruling on such a phenomenon, its interpretive focus on “fairness” in comparing prices could nonetheless be understood against this background.<sup>183</sup>

The AB’s constitutional adjudication engineered by teleological interpretation parallels the judicial constitution envisioned by Deborah Cass. Cass has discovered certain “constitutional force” which signifies trade constitution in the WTO tribunal’s “norm-generating” function. According to her, the AB adopted a unique interpretive

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<sup>179</sup> Cass; Trachtman → “legal constitution” 638

<sup>180</sup> Jackson 2003, 796

<sup>181</sup> Alvarez (492)

<sup>182</sup> Alvarez 95-96 (quoting Judge Alvarez’ dissenting opinion in Competence case).

<sup>183</sup> As discussed above, any expressive reliance on teleological interpretation may place the AB in a politically difficult position vulnerable to the criticism of judicial legislation, which may explain the AB’s perseverance on textualism.

technique (“constitutional doctrine amalgamation”) which borrows from other constitutional domains certain general (interstitial), constitutional principles, such as rule of reason or proportionality.<sup>184</sup> Her analysis of the AB’s constitutional interpretation centering on certain general (constitutional) principles of law parallels my approach proposed here. In a series of zeroing decisions, the AB justified its reasoning by invoking similar principles, such as fairness and consistency, which are often entrenched in textual cloaks.<sup>185</sup> Therefore, constitutional adjudication eventually associates itself with broader and deeper issues (values), such as “how to design a fair system of law.”<sup>186</sup>

This paradigm of constitutional adjudication ultimately elevates the institutional status of the AB from a mere settler of trade disputes to a supreme trade tribunal which devises a “proper test” to be applied to certain areas of domestic regulation.<sup>187</sup> Thus, the supreme trade tribunal retains the competence of regulating some members’ administrative discretion bestowed to them, such as the zeroing practice in the antidumping administration. This constitutional check against members’ administrative discretion results from the AB’s circumspect interpretive choice which is distinguishable from other choices feasible under different circumstances. 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, it would probably accord members more deference under the principle of *in dubio mitius*.<sup>188</sup> However, considering that antidumping remedy is a legal reincarnation of protectionism, members’ self-fulfilling discretion in this area (such as zeroing) should be interpreted narrowly rather than broadly if such interpretation is guided by the WTO’s fundamental value.

Finally, any political bargaining must not overrule the outcome of constitutional adjudication, i.e., constitutional jurisprudence. Since it 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 constitutional jurisprudence.<sup>189</sup> On the contrary, WTO members should endeavor to “codify” it.<sup>190</sup> This preemptory nature of constitutional jurisprudence distinguishes itself from other case law concerning more mundane trade disputes whose outcome may be altered by subsequent negotiations. In this sense, constitutional jurisprudence, such as the WTO’s zeroing case law, might be labeled as *jus cogens* of international trade.<sup>191</sup>

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<sup>184</sup> Cass 51, 67

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<sup>186</sup> *Id.*, at 52.

<sup>187</sup> Cf. Robert F. Nagel, *The Formulaic Constitution*, 84 *Mich. L. Rev.* 165, 203-04 (1985).

<sup>188</sup> *Hormones*

<sup>189</sup> Draft text. It is no co-incidence that the recent amendment draft proposed by the Chair of the Negotiating Group on Rules, which attempted to go against some of the AB’s anti-zeroing rulings has severely been criticized by many WTO members. **[Cite!]**

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### C. The Sustainability of the WTO's Constitutional Adjudication

#### 1. Exogenous (Political) Tests to Its Sustainability

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 member-driven political dynamics. Some scholars cast serious doubts on the wisdom of constitutional adjudication.<sup>192</sup> According to them, constitutional adjudication may be illegitimate and thus unsustainable because it tends to short-circuit the necessary and proper political process which the subject-matter of adjudication should have triggered. Therefore, according to them the AB's interpretation must be tightly controlled by political safeguards to prevent it from creeping into the forbidden realm of constitutional adjudication.<sup>193</sup>

For example, 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>194</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>195</sup> Dunoff might find the vindication of his warning in sovereigntists' lambaste against the AB's teleological interpretation.

In a more radical fashion one might submit that the very notion of trade constitution or trade constitutionalism as an apolitical discipline would be futile and 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>196</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>197</sup>

At first glance, these criticisms might seem credible. In a purely technical sense, the WTO tribunal is to "assist" the Dispute Settlement Body, *i.e.*, the General Council, to

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<sup>192</sup> See *supra*

<sup>193</sup> See *supra*

<sup>194</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>195</sup> *Id.*, at 649.

<sup>196</sup> Klabbers, 'Constitutionalism Lite', 1 Int'l Org. L. Rev. (2004) 31, 54 (quoted by Dunoff, 665)

<sup>197</sup> See Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*

“settle” disputes between Members by delivering their “recommendations,”<sup>198</sup> which can be overruled by an “authoritative interpretation” issued by the General Council.<sup>199</sup> More importantly, these recommendations should not “add to or diminish” members’ rights and obligations.<sup>200</sup> Richard Steinberg contended that this very restraint would function as the aforementioned *political* safeguards against the AB’s any adventurous judicial activism. Steinberg viewed that if the AB’s judicial legislation is too expansive to “cause a fundamental shift in the balance of WTO rights and responsibilities against the interests of *powerful* members,” those members will weaken the AB by changing DSU rules.<sup>201</sup> He further noted that such possibility “casts a shadow” over the AB’s constitutional adjudication,<sup>202</sup> and that this “political correction” mechanism is effective since no AB decisions have thus far triggered the mechanism.<sup>203</sup> This observation relieved him of concerns for the AB’s sovereignty-undermining judicial activism.<sup>204</sup>

However, the “hegemonic” thesis on which Steinberg based his proposition has been widely criticized.<sup>205</sup> Even if one subscribes to this controversial thesis in general, Steinberg’s application of the thesis to the WTO context is still driven by a highly unrealistic assumption that the “Appellate Body acts in the shadow of threats to rewrite DSU rules.”<sup>206</sup> To change the current DSU rules or initiate an authoritative interpretation, the WTO should undergo a tortuous decision-making process engineered by a consensus or super-majority rule.<sup>207</sup> Even a superpower such as the U.S. would find it extremely

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<sup>198</sup> DSU, *supra* note x, art.19.1.

<sup>199</sup> WTO Agreement, *supra* note x, Introduction, art. 9.2.

<sup>200</sup> DSU, *supra* note x, arts. 3.2, 19.2

<sup>201</sup> *Id.*, at 249 (italics added)

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*, at 249, 268.

<sup>204</sup> *Id.*, at 249. In fact, such political correction itself may not be legitimate in the first place. As Kenneth Abbott observed, public officials in a democracy tend to discount long-term benefits from free trade heavily in pursuit of short-term political gains from protectionism. Abbott (1985), 521. In other words, powerful countries’ political check against constitutional adjudication may result not from their genuine national interests but from capture or parochial lobbies. In this situation, the very notion of political correction seems to lose ground. On the contrary, politicians or public officials may want to deflect parochial (protectionist) demands from their constituencies by actively adhering to the WTO’s constitutional adjudication. *Id.*, at 522.

<sup>205</sup> See e.g., Detlev F. Vagts, *Hegemonic International Law*, 95 *Am. J. Int’l L.* 843, 848 (2001) (observing that “the process of adapting present international law to a move toward hegemony . . . would highlight features of the hegemonic order that many would find unattractive”); José E. Alvarez, *Hegemonic International Law Revisited*, 97 *Am. J. Int’l L.* 873, 873-74 (2003) (submitting that “worries about the hegemonic capture . . . should not be relegated to science fiction”). Steinberg’s analysis led to a misguided conclusion that the “capacity of powerful members to assert political control” should lessen the concerns of sovereignty undermined by expansive judicial legislation. Steinberg, 249. Although his conclusion is acceptable to the extent that the AB’s current form of constitutional adjudication should not be deemed a threat to members’ sovereignty, the absence of such threat should not be attributed to a mere political capacity of certain powerful members, such as the U.S. While the AB might strategically design its rulings (*dicta*) in a way which would please even a losing superpower, it would be tantamount to dismissing the WTO’s normative nature if one might argue that the AB’s core findings are constantly under the shadow of political overriding by such a superpower. Note that the WTO dispute settlement system deliberately eliminated the “veto” possibility which would have served a similar political safety valve that Steinberg envisioned.

<sup>206</sup> Steinberg 274

<sup>207</sup>

difficult, if not impossible, to marshal all the political capital (votes) from other members to pass any amendment.

More importantly, most WTO members seem to be against the zeroing practice, which tends to make the U.S. position even more politically untenable. “Friends of Antidumping” consisting of major developing and developed countries such as Brazil; Chile; Columbia; Costa Rica; Hong Kong (China); Israel; Japan; Korea; Mexico; Norway; Taiwan; Singapore; Switzerland and Thailand, have long proposed to repeal the zeroing practice.<sup>208</sup> Even the EC, another superpower and the long-standing advocate for zeroing, has recently reversed its position and converted into an enthusiastic critic of zeroing.<sup>209</sup> In sum, the U.S. has turned out to be nearly the *only* advocate for zeroing. Under these circumstances, the recent U.S.’ attempt for political correction on the AB’s zeroing decision, even by linking this issue to the success of the Doha round trade talks, does not augur well.<sup>210</sup> On the contrary, any such attempt risks reverberating an accusation of the American Exceptionalism.<sup>211</sup>

Another possible political attack to the WTO’s constitutional adjudication may find its way to the WTO’s alleged disconnection from key domestic values such as democracy. Kal Raustiala criticized that the WTO produce “quasi-constitutional” rules

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<sup>208</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 (“[R]egardless of the comparison methodology, if margins of dumping are determined separately for imports during multiple portions of the entire period of an investigation or review, the margin of dumping to be determined in the investigation or review must be a single margin of dumping for all imports during the entire period of investigation or review.”)

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<sup>210</sup> The U.S. has consistently and continuously attempted to undo the zeroing decision in a unilateral fashion ever since it lost the zeroing dispute. First, it has submitted proposals to amend the WTO Antidumping Code to repeal the zeroing decisions. See Unites States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”), Communication from the United States, WT/DS294/16, May 17, 2006; Proposal on Offsets for Non-Dumped Comparisons, TN/RL/GEN/147, Jun. 27, 2007, Article 2 (“[A]uthorities 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.”) Second, some members of the Congress have threatened to veto the Doha round unless the zeroing practice is reinstated through the negotiation. See *WTO ‘Zeroing’ Decisions Should Be Part of Doha Talks, Senators Tell Administration*, 24 Int’l Trade Rep. 1478, 1478 (2007).

<sup>211</sup> A recent Doha round negotiation text distributed by the Negotiating Group on Rules has shocked a number of WTO members since the text simply mirrored the U.S. position on the zeroing issue. See WTO, Negotiating Group on Rules, Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/213, Nov. 30, 2007; Brazil Slams ‘Biased and Protectionist’ US-EU Proposal on Green Trade, Int’l Herald Trib., Dec. 4, 2007; U.S. Import Penalties New Problem for WTO Pact, Reuters, Dec. 12, 2007. Interestingly, however, the U.S. government and the U.S. industries expressed that the text was not good enough to keep the U.S. zeroing practice alive. 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”); U.S. Negotiating Objectives Not Served by Doha Draft Text in Trade Remedies, Reuters, Dec. 6, 2007 (quoting David Hartquist, Executive Director of the Committee to Support U.S. Trade Laws (CSUSTL), who observed that the draft proposal was “weaker than U.S. law and practice had been before it was overturned by the WTO Appellate Body”).

(“generativity”) flowing from the confidential WTO tribunal (“insularity”).<sup>212</sup> The gist of Raustiala’s argument is that the WTO’s substantive virtue, i.e., trade liberalization, may still be insufficient to fully inoculate its constitutional adjudication from being a potential threat to democracy of its members, including (or especially) the U.S. According to him, the WTO should be equipped with the same procedural disciplines, such as those under the U.S.’ Administrative Procedural Act, as long as the WTO ever engages in regulation in the international level.<sup>213</sup> He viewed that:

[W]hen major policy decisions are made through international law that not only have significant ramifications for domestic policy and politics but also directly address the content of domestic policy and politics, the institutions responsible for those decisions should more closely *resemble*, in process, the accepted and legitimate practices that are broadly shared by *liberal democratic states*.<sup>214</sup>

This bold observation reveals his contentious assumption that “international law is a fundamentally *Western* legal system.”<sup>215</sup> Yet this highly prejudiced analogy seems too extensive and inferential. One simply could not project every domestic, especially the Western, vision of governance to an international landscape. The status quo of the WTO’s governance structure, whatever it is, largely reflects its current stage of institutional evolution. Any over-ambitious democratization of the WTO via a liberal transplant without due consideration of the current institutional context simply would not work, in particular considering that three quarters of its members are not developed countries, not to mention that the WTO is highly underbudgeted and understaffed. Empirical confirmations also do not seem to support such liberal transplant, as witnessed in the Latin America in the Sixties and Seventies as well as in the Eastern and Central Europe in the Nineties.<sup>216</sup>

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.<sup>217</sup> 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

<sup>212</sup> Kal Raustiala, *Sovereignty and Multilateralism*, 1 *Chi. J. Int’l L.* 401, 415 (2000).

<sup>213</sup> 418-19.

<sup>214</sup> 496 (emphasis added). However, Raustiala observed that an “expansive take” on sovereignty, which stems from absolute sovereignty, tends to result in a “zero-sum” relationship between international organizations such as the WTO and member state, and that the WTO may strengthen domestic governments’ regulatory competence rather than depriving them of their pre-assigned competence.” Raustiala 2003, 849-50.

<sup>215</sup> n. 53 (emphasis added). Raustiala himself acknowledged the possible criticism over this assumption in the line of “colonialism” but did not fully address it. *Id.*

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<sup>217</sup> 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. 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).

collateral estoppel does not apply to the antidumping proceeding unlike other civil procedures.<sup>218</sup> These flaws militate against granting full deference to domestic agencies, such as the DOC, in the area of antidumping remedy.

Finally, others might view that the AB's constitutional adjudication and the resultant weakening of politics may reduce WTO members' potential "voice," while providing less "exit." According to this position, which is based on Albert Hirschman's celebrated Exit/Voice theory, "increased legalization or discipline such as more supervision by the WTO and less exit, must not come at the expense of less politics in the form of less voice from member countries and their constituencies."<sup>219</sup> However, "voice" as politics is a double-edged sword: It could be a constructive kind of politics engineered by participation and deliberation, but at the same time a destructive one espoused by rent-seekers and protectionists. The moment we accept a political veto as a channel of such voice, the WTO dispute settlement system would regress to the old GATT era. While trade law should still interact with legitimate voices so that it could embrace more input from non-trade values, such as the environmental protection, trade law should not be reduced to mere mercantilist, parochial politics: On the contrary, trade law should discipline it.

## 2. Endogenous (Legal) Foundations for the Sustainability

The aforementioned failure of various political attacks in undermining the case of the WTO's constitutional adjudication attests to its sustainability, and thus its legitimacy. The apolitical, i.e., normative, foundations of such legitimacy derive 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>220</sup>

This self-legitimizing osmosis of constitutional adjudication from the WTO level into the domestic legal realm does not remain a mere academic fantasy. Empirical confirmations are legion as to real world impacts of such legal osmosis. The reactions from the EU and the U.S. government to the AB's anti-zeroing decisions provide cases in 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*.<sup>221</sup> Instead of resisting to the AB's decisions, it has elected to go after another main user, i.e., the U.S.<sup>222</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

<sup>218</sup> 19 U.S.C. §§ 1671a(a) & 1673a(a). See also Josephs, *supra* note \_\_, at 66.

<sup>219</sup> Joost Pauwelyn, The Transformation of World Trade, 104 Mich. L. Rev. 1, 4-5 (2005).

<sup>220</sup> Koh, 2655

<sup>221</sup>

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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>223</sup>

This 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>224</sup> Public choice theorists teach us that gains from trade are often underrepresented while its costs are overrepresented.<sup>225</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.<sup>226</sup>

Even if those rent-seekers 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>227</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 should 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>228</sup>

<sup>223</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, 2657.

<sup>224</sup> Cho, Remedies. Cf. 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 138 (Mary L. Volcansek ed., 1997) (observing that "WTO legal norms gradually embed themselves within national legal systems, either by domestic legislative actions or judicial decisions."). See also McGinnis, [World Trade Constitution](#)

<sup>225</sup> Wake Forest

<sup>226</sup> See Consuming Industries Trade Action Coalition (CITAC), Comments on the Commerce Department's "Zeroing" Proposal, Apr. 5, 2006 (urging the Commerce Department to "eliminate zeroing from all antidumping calculation methodologies"); 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, 2657.

<sup>227</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, 2657.

<sup>228</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

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>229</sup> their compliance with the outcome of constitutional adjudication becomes ever closer to a “default pattern.”<sup>230</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-enhancing” aspect of internalization reinforces its self-legitimizing nature.<sup>231</sup> Under these circumstances, members’ “loyalty” on the WTO regime mitigates, or even replaces, their initial demand for voice or threat of exit.<sup>232</sup>

## V. Conclusion: Building the Constitutional Culture within the Global Trading Community

This article has challenged major (sovereigntist) 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 sovereigntists 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 crystallizes into a *cultural* phenomenon. “Constitutional culture” may be defined as the “cultural cohesion that habitually accepts the propriety and necessity of constitutional compliance.”<sup>233</sup> In fact, internalization itself is

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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>229</sup> Koh, 2654-55

<sup>230</sup> Koh

<sup>231</sup> Alvarez 618; McGuinnis & Movesian

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<sup>233</sup> Allan Ides, *The Emerging Transnational Constitution: Introduction*, 37 Loy. L.A. L. Rev. 187, 188 (2003). [US; EU]

“constitutive” and thus facilitative of constitutional culture.<sup>234</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>235</sup> Within the WTO’s *nomos* defined by its *telos*, an unremitting interaction, or discourse, among members of the global trading community forms and fortifies the WTO’s constitutional culture as a matter of habituation.

A certain communicative device (language) intermediates such discourse. As far as the WTO is concerned, its jurisprudence functions as such language.<sup>236</sup> In other words, the GATT/WTO’s jurisprudence as the global trading community’s *acquis communautaire* enable participants of the community, both member states<sup>237</sup> and individual economic players (producers and consumers), to communicate among each other under the common grammar and syntax of international trade law.<sup>238</sup> This communication may be direct (participating in litigation as parties) or indirect (studying and referencing the jurisprudence). The bottom line is that via this trade language the community participants reflect upon others’ behaviors and choose their own course of actions through a “review and assessment of past discrete actions to the shaping of future plans, policies, and programs.”<sup>239</sup> This socialization, and solidification, tends to gradually cultivate the culture of compliance which is often backed by the “communitarian peer pressure.”<sup>240</sup>

The constitutional culture reified in, and at the same time reifying, the WTO’s jurisprudence hinges firmly on the collective welfare of the global trading community which denotes our shared possibilities of greater prosperity.<sup>241</sup> As Ronald Dworkin observed, law is “constructive” in that it “show(s) the best route to a better future” and thus “unifying” despite divergent interests and projects scattered in the community.<sup>242</sup> The constitutional discourse generated by the WTO jurisprudence on zeroing will

<sup>234</sup> Koh, 2646

<sup>235</sup> See notably 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, 84-85, 95, 105-6 (2006) (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”).

<sup>236</sup> WTO’s *Gemeinschaft*

<sup>237</sup> Abbott 1985, 520 (observing that even government officials may share “such commonly held values as maximizing national and consumer economic welfare”).

<sup>238</sup> Section 301; My IELG piece Cf. JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 117-18 (Thomas McCarthy trans. 1984). See also Lang 102-03 (locating a “dialogical” nature of international regimes from their intersubjective quality).

<sup>239</sup> See C&C 231. These various participants in the trade discourse form an “issue network” or “epistemic community” over trade issues which is nothing but an “interpretive regim[e]” which “interpret[s] and elaborate[s] upon the meaning of the norm.” Koh 2640, 2656. These “norm entrepreneurs” often “embrac[e] a far larger and more complex group than those institutions and parties that comprise the treaty regime.” *Id.*, at 2640, 2649.

<sup>240</sup> Koh, 2642

<sup>241</sup> See RICHARD E. CAVES ET AL., *WORLD TRADE & PAYMENTS: AN INTRODUCTION* 35-46 (7<sup>th</sup> ed. 1996).

<sup>242</sup> Ronald Dworkin, *Law's Empire* 413 (1986).

eventually enlist broader normative support for the multilateral trading system by constructing a new political economy by pitting the mercantilist interests against those of consumers and consuming industries.<sup>243</sup> Therefore, in the long-run the constitutional culture shaped by this discourse toward a well-functioning multilateral trading system tends to gather greater political support from diversified domestic constituencies.<sup>244</sup>

Importantly, the constitutional culture should also be didactic. The WTO's 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>245</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 get more educated on the cause of international trade law and trade constitution so that well-informed deliberation, not misleading protectionist banners, guides their political choices.<sup>246</sup> The necessity of public education, or social marketing,<sup>247</sup> on the WTO's 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>248</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>249</sup> Only this liberation can disabuse trading nations of their misguided mercantilist interests, which antidumping and zeroing represent, and redefine their identities within the global trading system from impervious sovereign entities to enlightened norm-builders.<sup>250</sup>

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<sup>243</sup> Cf. Dunoff 672-73 (observing that "trade scholars can -- and should -- articulate forms of constitutionalism designed to open up spaces for political dialogue and contestation, rather than pre-empt such discourse").

<sup>244</sup> Jide Cf. Franck 14 (locating the fairness of international law in the process of discourse).

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<sup>248</sup> David Gerber (Book)

<sup>249</sup> Alvarez 586-87

<sup>250</sup> WTO's Gemeinschaft; Lang; Wendt 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).