

GLOBAL CONSTITUTIONAL LAWMAKING

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ABSTRACT

This Article identifies a nascent phenomenon of “global constitutional lawmaking” in recent World Trade Organization (“WTO”) jurisprudence that struck down a certain calculative methodology (“zeroing”) in the anti-dumping area. This Article interprets the Appellate Body’s uncharacteristic anti-zeroing hermeneutics, which departs from a traditional treaty interpretation under the Vienna Convention on the Law of Treaties and the past pro-zeroing under the General Agreement on Tariffs and Trade (“GATT”) case law, as a “constitutional” turn of the WTO. The Article argues that a positivist, inter-governmental mode of thinking, as is prevalent in other international organizations such as the United Nations, cannot fully expound this phenomenon. Critically, this turn originates from bold ideas which envision, and thus “constitute,” new institutional meanings and possibilities within the WTO. They are anchored firmly by the discernible purpose of cabining distortive and restrictive trade consequences from the use of zeroing which have long been left

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unchecked. Exogenous factors, such as domestic political support, and endogenous factors, such as normative recognition by the domestic legal system (“internalization”), can secure the legitimacy and sustainability of such constitutional lawmaking.

1. INTRODUCTION

Can we conceive “constitutional” norms at the global level beyond the nation-state? Conventional international relations (“IR”) scholars may be lukewarm to this c-word because it tends to menace their ontological premise, i.e., state-centeredness.¹ This Article challenges that mainstream view. It argues that under certain circumstances global organizations may self-generate constitutional norms in an effort to regulate states’ behaviors that ambiguous treaty provisions may not fully capture. The Article finds a case in point in a recent development concerning a technical issue in the WTO.² This Article explores the dynamic process of global constitutional law-making—namely *how* global organizations, such as the WTO, can actually build constitutional norms within their institutional contexts.³

Ironically, the WTO’s constitutional revolution originated from a rather unspectacular calculative methodology in the antidumping remedy known as “zeroing.”⁴ The WTO texts do not

¹ See J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT’L L. & BUS. 354, 363 (1996–97) (observing that the “continued centrality of the national and the state is ontologically necessary” to conventional IR scholars); Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621, 631 (2009) (stating that mainstream IR theorists have often refused to recognize an international organization’s capacity to “develop autonomous capacities to produce, monitor, and enforce legal norms.”).

² Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

³ See Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413, 422 (2009) (contending that global constitutionalism is a “process of continuous development,” rather than a “final good” akin to domestic constitutions). Another critical aspect of global constitution lawmaking is in the area of “human rights.” For an argument regarding the human rights dimension of global constitutionalism, see Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749, 768 (2008).

⁴ See generally Sungjoon Cho, *The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations*, ASIL INSIGHTS, May 4, 2006, <http://www.asil.org/insights060504.cfm> (providing background on zeroing and the Appellate Body’s reaction to zeroing).

explicitly prohibit this practice, and public international law principles, such as *in dubio mitius*,⁵ recognizes its members' discretion to freely adopt the practice.⁶ In fact, in what might constitute "useful guidance," a panel⁷ under the old General Agreement on Tariffs and Trade ("GATT") previously upheld the same measure.⁸ Moreover, the WTO Antidumping Agreement stipulates that when a provision "admits of more than one permissible interpretation," a WTO tribunal, such as the Appellate Body ("AB"), shall validate a domestic authority's antidumping measure "if it rests upon one of those permissible interpretations."⁹ Under traditional rules on treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT"), the WTO tribunal would simply endorse the practice since it would interpret the Antidumping Agreement in a literal fashion.

Surprisingly, however, the AB, in a series of high-profile decisions, recently struck down *all* types of zeroing methodology challenged thus far.¹⁰ These decisions are not a mere collection of inadvertent rulings on the same subject; rather, they constitute a deliberate and systematic pattern toward a new jurisprudence in this area. The question then becomes whether, and how, the AB's

⁵ This principle is a tool of treaty interpretation that gives deference to state sovereignty. If the meaning of a treaty term is ambiguous, the preferred meaning is that which is "the less onerous meaning to the party which assumes the obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." 1 OPPENHEIM'S INTERNATIONAL LAW 1278 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

⁶ This discretion is a long-recognized public international law principle. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) (stating that sovereign states enjoy "a wide measure of discretion which is only limited in certain cases by prohibitive rules").

⁷ See WTO Agreement, *supra* note 2, art. XVI, para. 1 ("[T]he WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter *Shochu II*] (finding that the reasoning of an unadopted panel report may still provide "useful guidance").

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

⁹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note 2, Annex 1A, art. 17.6 (ii) [hereinafter AD Agreement].

¹⁰ See generally, *infra*, Section 2.3.

uncharacteristic stance could be justified in the face of traditional public international law, the GATT precedent, and the Antidumping Agreement, all of which appear to conflict with the AB's position.

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

First, despite the missing "Constitution" – with a capital "C" – global organizations may still need to reconfigure the power allocated among themselves and their members with respect to measures that seriously undermine their ultimate object and purpose. To that end, certain fundamental, constitutional norms within the meaning of the WTO should tame an egregious form of protectionist politics that the zeroing practice denotes. The unparalleled evolution over a half century, from a provisional pact among a few contracting parties—GATT—to a full-blown multilateral trading system as a public good—WTO—tends to provide institutional maturity befitting such a constitutional mission.

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

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

To make matters worse, the current global financial crisis has exacerbated this already alarming trend. In a protectionist reaction to the crisis, trading nations initiated more than two hundred new antidumping investigations in 2008, an increase of nearly one-third from 2007.¹⁵ Since zeroing can inflate dumping margins by as much as 86%,¹⁶ the practice is likely to fuel the abuse of

¹¹ See generally Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. REV. 357 (2009) (arguing that antidumping measures often protect domestic producers at the expense of market competition).

¹² For antidumping statistics from the WTO, see WTO, ANTI-DUMPING, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Feb. 21, 2010) [hereinafter WTO AD Website].

¹³ For statistics, see WTO, AD INITIATIONS: BY REPORTING MEMBER FROM: 01/01/95 TO: 31/12/08, http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf (last visited Feb. 21, 2010).

¹⁴ Major developing countries have increasingly used the anti-dumping measures since the launch of the WTO. WTO, AD INITIATIONS: BY EXPORTING COUNTRY FROM: 01/01/95 TO: 31/12/08, http://www.wto.org/english/tratop_e/adp_e/ad_init_exp_country_e.pdf (last visited Feb. 21, 2010).

¹⁵ Press Release, WTO, WTO Secretariat Reports Increase of New Antidumping Investigations, (May 7, 2009), available at http://www.wto.org/english/news_e/pres09_e/pr556_e.htm. See Robert Guy Matthews, *Steelmakers Accuse China of Dumping in the U.S.*, WALL ST. J., Apr. 9, 2009, at B1 (reporting that the recent \$2.7 billion antidumping suit launched by U.S. steelmakers against Chinese exporters may indicate the beginning of a string of steel-dumping cases against China).

¹⁶ Daniel Ikenson, *Antidumping Reformers Rejoice*, CATO@LIBERTY <http://www.cato-at-liberty.org/2006/12/18/antidumping-reformers-rejoice/> (Dec. 18, 2006).

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

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

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

Against this backdrop, my thesis of global constitutional lawmaking unfolds in the following sequence. Section 2 documents the jurisprudential transformation the zeroing practice

¹⁷ See Kenneth W. Abbott, “Economic” Issues and Political Participation: The Evolving Boundaries of International Federalism, 18 *CARDOZO L. REV.* 971, 974 (1996) (“Economic and political structures are not corporeal things; they owe their existence to constitutive ideas . . .”).

¹⁸ WTO Agreement, *supra* note 2, pmb1.

¹⁹ See Sweet, *supra* note 1, at 640 (highlighting the “constitutional jurisdiction” of the highest courts, such as the WTO Appellate Body, for reviewing members’ domestic measures in light of the WTO regime).

²⁰ See, e.g., Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 *CHI. J. INT’L L.* 625 (2004) (arguing that the WTO, in alliance with other international institutions, must develop a synergistic linking within the constitutional structure of the global trading system).

²¹ See *infra* Section 3.1.1.

underwent between the old GATT and the new WTO. The AB's judicial abolition of zeroing is anchored firmly by a discernible purpose: avoiding unfairness from an undue inflation of dumping margins and minimizing uncertainty in administering antidumping measures. Methodologically, the use of interstitial norms, such as fairness, tends to furnish the AB with maneuvering room for this teleological interpretation.²²

Section 3 then attempts to conceptualize the AB's judicial revolution on zeroing through the conceptual lens of "constitutional lawmaking," which authoritatively reconfigures the distribution of regulatory competence between the WTO and its members. This Section highlights the AB's innovative undertaking of constitutional adjudication as a vehicle for constitutional lawmaking in the WTO. It also discusses the normative consequences of such constitutional lawmaking as they relate to WTO members and the WTO's lower court, the panel. Finally, it argues that the normative supremacy of constitutional norms created by constitutional lawmaking applies to both WTO members and panels.

Section 4 defends the AB's constitutional lawmaking in the form of constitutional adjudication. Admittedly, the AB's constitutional adjudication is not without opposition. It has sparked harsh criticisms, with accusations ranging from charges of judicial activism²³ to being a "kangaroo court."²⁴ This Section

²² See Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 207, 217 (M. Byers ed., 2000) (observing that tribunals employ interstitial norms "not because those norms are obligatory as a matter of law, but because they are necessary in order that legal reasoning should proceed"). These interstitial norms function as "standards" vis-à-vis "rules" in an adjudicative setting. See Joel R. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *HARV. INT'L L.J.* 333, 350-55 (1999) (generally discussing WTO rules and standards).

²³ The United States, an ever-present defendant in these anti-zeroing decisions, has denounced the AB's anti-zeroing position as an improper form of judicial legislation because it "[makes] up rules that the United States never negotiated." Press Release, U.S. Sen. Comm. on Finance, U.S. Trade Laws and WTO, (Sept. 27, 2002), available at <http://finance.senate.gov/press/pr092702.pdf>. Likewise, others have also asserted that the AB has violated the sovereignty-preserving standard of review enshrined under Article 17.6 (ii) of the Antidumping Agreement, which they contend is modeled after the United States' *Chevron* doctrine. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). See also Roger P. Alford, *Reflections on US—Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 *COLUM. J. TRANSNAT'L L.* 196, 200-02 (2006) (analogizing the *Chevron* doctrine to the zeroing and antidumping context

responds to these criticisms by contending that international tribunals, like domestic courts, often engage in judicial rule-making via construction beyond mere mechanical application of treaty provisions. It also warns that any “disarticulated,” self-righteous concept of sovereignty mobilized to foreclose necessary discussions in this area does not do justice to the contemporary status of global market integration under the WTO system.²⁵

Section 5 deals with an evaluative aspect of the thesis. It first observes that exogenous factors such as domestic political support may not exhaust legitimizing bases for global constitutional lawmaking. This Section emphasizes those “endogenous” factors, such as normative recognition by the domestic legal system (“internalization”) that will eventually secure the legitimacy and sustainability of such constitutional lawmaking.

Finally, this Article concludes in Section 6 that constitutional *culture* in the global trading community—which harbors and promotes a legal discourse of constitutional jurisprudence among the community participants—is a critical catalyst for constitutional lawmaking. Because trade inherently connotes a “transnational” value, participants—importers, exporters, consumers and investors—in the global trading community tend to be susceptible to such discourse. It is this constitutional culture within the WTO that liberates us from myopic mercantilism, which zeroing embodies, and leads us to embrace the constructive normative possibilities envisaged by the multilateral trading system, particularly amid the current global economic crisis. Only this liberation can redefine WTO members’ interests, and their identities, from unreceptive or unapologetic advocates of state sovereignty to enlightened norm-builders.²⁶

to argue that “reasonable interpretations by Member States should be upheld by WTO panels”).

²⁴ Gary G. Yerkey, *Sen. Baucus Calls WTO ‘Kangaroo Court’ with Strong ‘Bias’ Against the United States*, 19 INT’L TRADE REP. 167 (2002).

²⁵ See Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 393 (1994) (advocating harmony between “democratic and international relations theorists”); Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 48 (1992) (noting that political scientists are looking at “grand pictures” that political scientists are looking at).

²⁶ See generally Sungjoon Cho, *The WTO’s Gemeinschaft*, 56 ALA. L. REV. 483, 541–42 (2004) [hereinafter Cho, *Gemeinschaft*] (suggesting a move toward greater “global empathy”); Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INT’L ECON. L. 81 (2006) (analyzing the normative underpinnings of the

2. A JUDICIAL REVOLUTION IN THE WORLD TRADE ORGANIZATION

2.1. "Zeroing": The Epicenter of the Revolution

Dumping is a pricing strategy under which foreign producers export their products at less than fair (normal) value, such as at prices lower than their home prices or at prices below the cost of production plus normal profits.²⁷ Anti-dumping authorities and the beneficiaries of anti-dumping measures, i.e., domestic producers, attempt to justify the anti-dumping system as a bulwark against foreign producers' alleged "unfair" trade practices which enable the latter to reduce the production cost.²⁸ Since these discounted sales are legitimate under domestic antitrust laws, unless they are motivated by a predatory intent to drive out rivals from the market,²⁹ a number of economists and policymakers view the anti-dumping system, which lacks such strict requirements, in a negative light.³⁰ Yet the GATT/WTO "does not pass judgment" on the fairness of dumping.³¹ Instead, GATT Article VI authorizes importing countries to "condemn" dumping if it incurs material injury to domestic industries by imposing anti-dumping duties on dumped imports.³² In other words, under these circumstances,

international trade regime). From the 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).

²⁷ 19 U.S.C. § 1677, 34 (2009) (stating that sale at less than fair value constitutes dumping).

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

²⁹ However, "predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

³⁰ Alan Greenspan once observed that anti-dumping remedies are oftentimes "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 Alan Greenspan, former Federal Reserve Board Chairman, Remarks Before the Dallas Ambassadors Forum (Apr. 16, 1999)).

³¹ WTO AD Website, *supra* note 12.

³² General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187; AD Agreement, *supra* note 9, art. 1.

importing countries may impose anti-dumping duties on dumped products to offset any allegedly unfair effects.

Under a typical anti-dumping investigation, the amount of anti-dumping duties corresponds with the magnitude of dumping ("dumping margin"), which is defined as a gap between domestic price (normal value) and export price. In the United States, the Department of Commerce ("DOC") calculates dumping margins. The DOC determines an overall dumping margin over a particular product under investigation by adding up multiple dumping margins ("Potential Uncollectible Dumping Duties" or "PUDD") collected from various sub-product groups ("averaging groups" specified by "Control Numbers" or "CONNUM") of the same product.³³ In doing so, the DOC ignores ("zeros") any "negative" PUDD (any excess of export prices over normal values) in each group. Consequently, an overall dumping margin (a total sum of multiple PUDDs) is inflated since the zeroing methodology prevents those negative individual dumping margins from offsetting positive individual dumping margins. According to one study, dumping margins would have been 86% lower if zeroing had not been employed.³⁴ The DOC uses this methodology not only in an original investigation but also in the subsequent stage of investigation, such as an "administrative review" under which it may annually compute a company-specific dumping margin upon a request by interested parties.³⁵

Suppose that a foreign widget producer makes two U.S. sales.³⁶ 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 assigned CONNUM #2. This sale is made at a dollar and fifty cents per unit 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

³³ See IMPORT ADMIN., U.S. DEP'T OF COMMERCE, ANTIDUMPING MANUAL, ch. 6 (Fair Value Comparisons), available at <http://ia.ita.doc.gov/admanual/index.html> [hereinafter AD MANUAL] (discussing the detailed methodology of the DOC's calculation of dumping margins).

³⁴ Ikenson, *supra* note 16.

³⁵ 19 U.S.C. § 1675(a) (2008) (mandating methods for periodic review of the amount of the anti-dumping duty).

³⁶ AD MANUAL, *supra* note 33.

by total units sold. In the U.S. sale No.1 (CONNUM #1), the PUDD is 50 dollars, while in the U.S. sale No.2 (CONNUM #2) the PUDD is *minus* 50 dollars. The total PUDD is a sum of these individual PUDDs. In this example, the total PUDD would be 0 (50 minus 50) dollars.

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

2.2. *The Ancien Régime: The Old GATT Jurisprudence on Zeroing*³⁹

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.⁴⁰ Japan therefore argued that such methodology violated Article 2 (paragraphs 1 and 6) of the Tokyo Round Antidumping Code, requiring “fair comparison,”⁴¹ as well as Article 8 (paragraph 3), stipulating that the amount of anti-dumping duties should not exceed the actual dumping margin.⁴² However, the EC responded that Article 2 concerned only those

³⁷ Panel Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 2.3, WT/DS294/R (Oct. 31, 2005).

³⁸ *Id.* ¶ 2.5.

³⁹ 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 was still regarded as a useful legal guidance. See, e.g., *Shochu II*, *supra* note 7.

⁴⁰ *EC – Cassettes*, *supra* note 8, at ¶ 115.

⁴¹ The same rule now appears in Article 2 (paragraphs 1 and 4) of the WTO Antidumping Agreement. AD Agreement, *supra* note 9.

⁴² The same rule now appears in Article 9 (paragraph 3) of the WTO Antidumping Agreement. AD Agreement, *supra* note 9.

circumstances in which normal prices exceed export prices and did not cover the opposite situation where export prices exceed normal prices.⁴³ While Japan accentuated the unfairness of zeroing by highlighting the eventual consequences of zeroing, the EC simply adopted the narrow textualist reading of Articles 2 and 8 from which it attempted to legitimize the zeroing methodology.

The panel sided with the EC in its decision, which was reminiscent of the *Lotus* doctrine.⁴⁴ The panel opined that nothing in Article 2 prevented the EC from adopting other calculative methodologies than normal averaging.⁴⁵ Therefore, an anti-dumping 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.⁴⁶

Under the panel's approach, anti-dumping authorities would enjoy an option *not* to "aggregate" multiple results of multiple individual comparisons between home and export transactions. Such option tends to render fortuitous, and thus insignificant, the eventuality of final dumping margins being exaggerated. Here, the panel ignored the general necessity of aggregating multiple results of comparison in any comparison methodology. It assumed, wrongly, that the necessity of aggregation would occur only under an average-to-average comparison methodology. Therefore, the panel rejected Japan's argument for the aggregation by opining that Article 2 would not require anti-dumping authorities to use exclusively the average-to-average comparison methodology.⁴⁷

The panel report was not adopted, reflecting the high political profile that it engendered. Subsequently, despite intense

⁴³ EC – Cassettes, *supra* note 8, at ¶ 119.

⁴⁴ S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7).

⁴⁵ EC – Cassettes, *supra* note 8, at ¶ 350.

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

⁴⁷ *Id.* ¶ 358.

negotiations under the Uruguay Round, WTO members failed to provide clear rules on zeroing.⁴⁸ As a result, this controversial practice had been quite prevalent among the main users of anti-dumping remedies, such as the U.S. and the EU, when India challenged the practice for the first time under the WTO system.⁴⁹

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

2.3.1. *The Genesis*

2.3.1.1. *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.⁵⁰ The EC held 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.⁵¹ It is not difficult to read between the lines of the EC position. To implement the zeroing methodology, one should logically recognize each transaction as a separable segment (an individual transaction or a sub-product category) of the product under investigation. Only in this way can one avoid including negative individual dumping margins in the calculation of an overall dumping margin for the product as a whole. In other words, this fragmentation of a product into autonomous transactional units prevents any negative results in one sub-product (transaction) category from offsetting any positive results in other sub-product categories.

⁴⁸ Terence P. Stewart, *Antidumping*, in 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) 1383, 1540 (Terence P. Stewart ed. 1993).

⁴⁹ See John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT’L ECON. L. 113, 118 (2003) (observing that zeroing has been a common practice in the anti-dumping community).

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

⁵¹ *Id.* ¶ 12 (emphasis in original).

However, in a surprising 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.”⁵² 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.⁵³ Therefore, the EC failed to take into account these transactions by zeroing the minus dumping margins.⁵⁴ The AB invoked a general obligation of “fair comparison” under Article 2 as it implied that the zeroing methodology would entail unfair results.⁵⁵ This is exactly what Japan had presented in *EC – Audio Cassettes*. Japan’s position, which had been rejected by a GATT panel in 1995, was finally vindicated by the AB. This is the very first AB decision which struck down the zeroing practice. Yet it was just the beginning of the WTO anti-zeroing jurisprudence.

2.3.1.2. 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 a whole,” not narrowly for “a product type, model, or category of that product.”⁵⁶ The AB rejected the U.S. zeroing methodology by denying its calculative selectiveness embedded in zeroing. In its view, “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.⁵⁷ The logical conclusion is that an anti-dumping authority should “aggregate” *all* of these intermediate calculations regardless of being plus or minus.⁵⁸ Because zeroing basically cherry-picks only

⁵² *Id.* ¶ 53 (emphasis in original).

⁵³ *Id.* ¶ 55.

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 59.

⁵⁶ Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 95-96, WT/DS264/AB/R (Aug. 11, 2004), [hereinafter *U.S. – Softwood Lumber*].

⁵⁷ *Id.* ¶ 97.

⁵⁸ *Id.* Those who do not recognize this essential principle of “aggregation” argue that the negation of zeroing would be tantamount to a situation in which “a driver should not be found guilty of speeding if, along other portions of the road, he was driving under the speed limit.” Alford, *supra* note 23, at 208 (quoting Stewart, *supra* note 48, at 1540). Yet this is a flawed analogy. Any individual

positive results of these intermediate calculations in the situation of multiple comparisons and disregards (zeroes) negative ones, it does “not take into account the *entirety* of the *prices* of *some* export transactions” and thus “inflates the margin of dumping for the product as a whole.”⁵⁹

2.3.2. *The Expansion*

2.3.2.1. *U.S. – Zeroing (EC) (2006)*

Mirroring the EC’s earlier position in the *EC–Bed Linen*, the United States argued that the dumping margin “can be interpreted as applying on a transaction-specific basis.”⁶⁰ 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.⁶¹ The AB viewed that such interpretation would be consistent with the goal of an anti-dumping regime which is “designed to counteract the foreign producer’s or exporter’s pricing behaviour.”⁶²

In particular, the AB ruled that zeroing was also illegal in the “administrative review” process, in addition to the original investigation process. Administrative review processes occur upon request by interested parties. The process is carried out by an antidumping authority (“DOC”), which performs an annual calculation of antidumping duties owed by each importer by comparing the price of each export transaction with a monthly average nominal value.⁶³ The DOC then aggregates the results of

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.

⁵⁹ *U.S. – Softwood Lumber*, at ¶¶ 98, 101 (emphasis in original).

⁶⁰ Appellate Body Report, *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶128, WT/DS294/AB/R (May 14, 2006) [hereinafter *U.S. – Zeroing (EC)*].

⁶¹ *Id.*

⁶² *Id.* ¶ 129.

⁶³ *Id.* ¶ 109.

these comparisons and calculates the rate for each importer as a percentage of her total imports in the United States.⁶⁴ 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 anti-dumping 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.⁶⁵ The AB possibly wanted to deflect the potential criticism of judicial activism in relation to Article 17.6(ii) through this ostensibly literal interpretation. Rejecting zeroing through pure construction would have engulfed the AB with heavier attacks than it has invited under the current interpretation.

Interestingly, the AB opened a window for future "as such" complaints against zeroing by endorsing the panel's finding that zeroing "does have *general and prospective* application."⁶⁶

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

The United States challenged the AB's emphasis on "multiple comparisons" on which the AB based its prohibition of zeroing. The United States argued that the AB's position would render "illusory" the United States "right to choose" different methods in calculating dumping margins.⁶⁷ According to the United States, WTO members can elect not to aggregate multiple comparisons. In particular, the United States plausibly argued under Article 2.4.2 of the WTO Antidumping Agreement that 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

⁶⁴ *Id.*

⁶⁵ *Id.* ¶ 134.

⁶⁶ *Id.* ¶ 204 (emphasis added).

⁶⁷ Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, ¶ 34, WT/DS264/AB/RW (Aug. 15, 2006) [hereinafter *U.S. – Softwood Lumber (Article 21.5)*].

export prices which differ significantly among different purchasers, regions or time periods”) because two different dumping margins would occur for the same product, that is, “one margin of dumping for transactions falling within the specified pricing pattern and another for all other transactions.”⁶⁸ Moreover, without zeroing, Article 2.4.2 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 “mathematically equivalent” results.⁶⁹

However, the AB blatantly dismissed the United States’ arguments. It viewed them as a “non-tested hypothesis” since the United States “has never applied” the weighted average-to-transaction methodology under the second sentence of the Article (targeted dumping), “nor has it provided examples of how other WTO Members have applied this methodology.”⁷⁰ In addition, according to the AB the “mathematically equivalen[t]” outcome would be at best “limited to a specific set of circumstances.”⁷¹

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 Article 2.4, namely, a “transaction-to-transaction” comparison for the same reasons on which it based its previous rulings as to zeroing. It held that “the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the ‘fair comparison’ requirement in Article 2.4” because it “distorts” certain export transactions (in that they are eventually zeroed) and consequently inflates dumping margins.⁷²

⁶⁸ *Id.* ¶ 36.

⁶⁹ *Id.*

⁷⁰ *Id.* ¶ 97.

⁷¹ *Id.* ¶ 99.

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

2.3.3. *The Solidification*

2.3.3.1. *U.S. – Zeroing (Japan) (2007)*

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

Markedly, in addition to its previously seen recourse to textual grounds⁷⁶ and practical damages to exporters due to the inflation of dumping rates,⁷⁷ 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, certainty and predictability. It held that:

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

⁷³ Daniel Pruzin, *Dumping: Latest WTO Ruling May Spell End of U.S. Use of Zeroing Methodology*, 24 INT'L TRADE REP. (BNA) 83, 83 (2007) (quoting Brendan McGivern).

⁷⁴ Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, ¶ 87, WT/DS322/AB/R (Jan. 9, 2007) [hereinafter *U.S. – Zeroing (Japan)*].

⁷⁵ *Id.* ¶¶ 19, 21.

⁷⁶ *Id.* ¶ 115.

⁷⁷ *Id.* ¶ 123.

investigations and subsequent stages of anti-dumping proceedings.⁷⁸

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

2.3.3.2 U.S. – Zeroing (Mexico) (2008)

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

The AB, as had widely been predicted, reversed the panel's findings on the United States' simple zeroing practice and invalidated this methodology both "as such" and "as applied."⁸²

⁷⁸ *Id.* ¶ 126 (emphasis added).

⁷⁹ Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 7.106, 7.115, WT/DS344/R, (Dec. 20, 2007) [hereinafter *Panel Report, U.S. – Zeroing (Mexico)*]. A "simple zeroing" refers to the zeroing practice adopted under W-T or T-T comparisons between export price and normal value. The simple zeroing is often conducted in the administrative (periodic) review, which starts after a year from the publication of antidumping duties. In contrast, the zeroing practice under weighted-average-to-weighted-average comparisons is called a "model zeroing."

⁸⁰ *Id.* ¶ 7.102.

⁸¹ *Id.*

⁸² Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 133, 129, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter *Appellate Body Report, U.S. – Zeroing (Mexico)*].

The AB rejected the panel's premise that there can be multiple dumping margins, and emphasized that dumping (and dumping margin) is an export-specific concept which should be defined in terms of *a product* as a whole, based on the textual interpretation of GATT Articles VI:1, VI:2 and VI:6(a) as well as WTO Anti-Dumping Code Articles 2.1, 2.3, 3.4, and 5.1.⁸³ The AB also justified its position by the "context" found in various other related provisions of the WTO Anti-Dumping Code, such as Articles 5.2(ii), 5.8, 6.1.1, 6.7, 6.10, 8.1, 8.2, 9.4, 9.5 and 11.⁸⁴ Interestingly, the AB confirmed that both French and Spanish versions of Article 6.10 of the WTO Anti-Dumping Code represent *one* single dumping margin ("*une marge*" and "*el margen*," respectively).⁸⁵ Finally, the AB expressed its deep concern over the panel's rebellious behavior.⁸⁶

2.3.3.3. U.S. – Continued Zeroing (2009)

In this decision, the AB delivered a *coup de grâce* to the zeroing methodology in its entirety. Regarding the "*continued* use of the zeroing methodology in successive proceedings" as measures, the AB sent an unequivocal signal that the simple zeroing, which the United States had continued to use in the periodic and subsequent reviews in defiance of the previous AB decisions, was illegal.⁸⁷ The AB's position was particularly definite in that it captured even the aforementioned "ongoing conduct" as a reviewable measure.⁸⁸ In a rare Concurring Opinion, a member of the AB warned future panels not to further disobey the AB's anti-zeroing jurisprudence by relying on rulings of the previous defiant panels ("pick[ing] over the entrails of battles past").⁸⁹

In a similar tenor, the AB ruled firmly against the United States' recurring claim that the panel violated the standard of review under Article 17.6(ii) of the Antidumping Agreement. The AB's hermeneutics was basically teleological in this ruling. The AB

⁸³ *Id.* ¶¶ 83–86.

⁸⁴ *Id.* ¶¶ 87–93.

⁸⁵ *Id.* ¶ 88 n.200.

⁸⁶ *Id.* ¶ 162.

⁸⁷ Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 185, WT/DS350/AB/R (Feb. 4, 2009) (emphasis added) [hereinafter *AB Report, U.S. – Continued Zeroing*].

⁸⁸ *Id.* ¶ 181.

⁸⁹ *Id.* ¶ 312.

rejected the AB's self-serving construction of the term "permissible" by highlighting that "multiple meanings of a word or term [do not] automatically constitute 'permissible' interpretations within the meaning of Article 17.6(ii)."⁹⁰ For the purpose of a "harmonious and coherent" interpretation, the AB prioritized the first sentence of Article 17.6(ii), which provides the law of treaty interpretation under the Vienna Convention on the Law of Treaties, over the second sentence, which endorses "permissible" interpretations.⁹¹ Under the AB's "holistic" interpretation, the first sentence informs the second one, not vice versa.⁹² In other words, the critical role of "object and purpose" of a treaty in clarifying textual ambiguities, which is enshrined in the first sentence, should eventually "narrow the range of interpretations" under the second sentence.⁹³

3. INTERPRETING THE REVOLUTION: TOWARD GLOBAL CONSTITUTIONAL LAWMAKING

3.1. *Putting the Zeroing Jurisprudence in Constitutional Perspective*

3.1.1. *Constitutional Adjudication as Constitutional Lawmaking*

Capturing the constitutionality of the WTO's new jurisprudence on zeroing involves "a dialogue of imagination and possibility" in that it produces a new way (theory) of observing this particular reality (zeroing).⁹⁴ It is a daunting challenge since the terminology (constitution) is innately elusive and resistant to any fixed meaning.⁹⁵ A recently emerging wide spectrum of narratives on trade constitution⁹⁶ appears both useful and

⁹⁰ *Id.* ¶ 268.

⁹¹ *Id.* ¶¶ 268–272.

⁹² *Id.*

⁹³ *Id.* ¶ 273.

⁹⁴ Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623, 645 (2006) [hereinafter Trachtman, *Constitutions*].

⁹⁵ Deborah Z. Cass, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39, 40–41 (2001) (observing difficulties in defining constitutionalism in the WTO context).

⁹⁶ For example, Jeffrey Dunoff offered three (institutional, normative and judicial) lenses through which one could capture trade constitution. Dunoff located an "institutional" lens in John Jackson's classical framework of the multilateral trading system (GATT/WTO) under which a constitutional

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

First, constitutional adjudication basically addresses the "governance" issue. As it is related to the WTO's *telos* of anti-protectionism, constitutional adjudication "enable[s] its members to pursue common goals without being defeated by competing antisocial conduct of members of the group."⁹⁷ In other words, it aims to discipline parochial protectionism which undermines the multilateral trading system, i.e., *legal* disciplines over protectionist *politics*.⁹⁸ Therefore, the purpose of constitutional adjudication goes beyond a mere settling of a bilateral trade dispute before the WTO court: it aims to establish a general rule which other WTO members, not just parties concerned, will also observe in the future.

Second, constitutional adjudication concerns the WTO court's (the AB's) deliberate departure from the conventional role of a

transformation from a "power-oriented" regime to a "rule-oriented" system occurred through a development (evolution) of institution, i.e., the "structure and machinery" of an organization. Dunoff also discovered a "normative" lens in Ernst-Ulrich Petersmann's thesis which views the WTO's constitutionalism as pre-commitments on fundamental values, such as market freedom or non-discrimination. According to Petersmann, WTO constitutionalism effectively disciplines national policies "which tend to limit economic freedom to domestic citizens and, for centuries, have discriminated against foreign goods, foreign services and foreign consumers." Finally, Dunoff unearthed a "judicial" (or "jurisprudential") lens of trade constitution in Deborah Cass' thesis which focuses on certain constitutional principles which the WTO tribunal has increasingly invoked in shaping its decisions. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 651-56 (2006).

⁹⁷ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 788 (1969) [hereinafter JACKSON, *THE LAW OF GATT*].

⁹⁸ See Dunoff, *supra* note 96, at 649 ("[W]e can understand the turn to constitutionalism as a mechanism for withdrawing controversial and potentially destabilizing issues from the parry and thrust of ordinary politics."); 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 view of international trade law).

triadic arbiter whose main mission is “neutral rule applier.”⁹⁹ It self-licenses to engage in “creative forms of judicial law-making” in order to “giv[e] effect to the trade regime’s primary purpose.”¹⁰⁰ In this regard, Deborah Cass argues that the AB has adopted a unique interpretive technique (“constitutional doctrine amalgamation”) which borrows from other constitutional domains certain general, interstitial constitutional principles, such as rule of reason or proportionality.¹⁰¹ Therefore, constitutional adjudication eventually associates itself with broader and deeper issues, such as “how to design a fair system of law.”¹⁰²

Finally, a certain set of developments fashioning the environment of the AB’s critical adjudication may help illustrate an institutional *self* of the WTO. Topical controversies and debates over the AB’s adjudication offer rich narratives in the WTO which attempt to “constitute,” on their own terms, desirable institutional paradigms re-configuring the subtle power allocation between the WTO and its members. In sum, a proper constellation of interrelated factors, such as the AB’s hermeneutical shift, a legislative proposal to codify the shift, and a counter-proposal to reverse the shift, tends to provide a unique constitutional moment within the WTO which facilitates the advent of constitutional adjudication.

Admittedly, the very invocation of “constitution” in the WTO context itself may be provoking.¹⁰³ After all, the WTO has “no constitutional court, no constitutional convention, [and] no constitutional drafting process.”¹⁰⁴ Nonetheless, any direct, unnuanced domestic analogy derived from the image of the Constitution may be ill-suited in the WTO context. Despite social contexts and institutional paraphernalia that are different from those of states, the WTO may still retain certain “constitutional

⁹⁹ Cf. JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 492 (2005) (noting that the WTO panels and Appellate Body aid their decision making by applying the rules and canons of treaty interpretation used by other international tribunals).

¹⁰⁰ *Id.*

¹⁰¹ Cass, *supra* note 95, at 51, 67.

¹⁰² *Id.* at 52.

¹⁰³ *See id.* at 40 (“In public lectures, John Jackson recalls the time when his use of the term among trade policy officials caused some consternation and criticism.”) (citing John H. Jackson, Lecture, John F. Kennedy School of Government, Boston, Nov. 3, 1999).

¹⁰⁴ Dunoff, *supra* note 96, at 650.

features” to the extent that governance or power allocation between the WTO and its members still matters.¹⁰⁵ In other words, the WTO’s institutional arrangement, being different from that of states, should not thwart otherwise useful constitutional imaginations within the context of the WTO.

In this regard, constitutional discourse in international trade law should involve various dynamic and flexible developments which may “proceed along a number of *dimensions*, and in a number of different institutional settings,” rather than “advance a particular constitutional structure or agenda.”¹⁰⁶ This “plasticity” of trade constitution enables WTO Members to willingly respond to certain constitutional moments with adequate institutional changes.¹⁰⁷ In this line, one possible dimension of trade constitution, *inter alia*, which this article concerns, may be defined as “a legal and judicial constitution that provides rules . . . for determining supremacy and the scope of judicial application of rules.”¹⁰⁸

3.1.2. *Why Global Constitutional Lawmaking in the WTO?*

On the surface, the AB’s hermeneutical shift in zeroing does not appear inevitable. The AB could still have been faithful to the literal ambiguities of the Antidumping Agreement as to zeroing and thus endorsed it under Article 17.6(ii) of the Antidumping Agreement in the same fashion followed by the 1995 GATT panel. Here, the role of the AB would have been an ordinary settler of trade disputes and there would have been nothing peculiar. Furthermore, the hermeneutical shift as it happened might have been deemed unspectacular as well: it might just have been yet another change of interpretation. While it is true that the AB employed a teleological interpretation to overcome a possible textual interpretation that might have validated zeroing under Article 17.6(ii),¹⁰⁹ such a teleological shift itself does not necessarily

¹⁰⁵ Trachtman, *Constitutions*, *supra* note 94, at 625; cf. Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 13 AM. REV. INT’L ARB. 177, 189 n.38 (2002) (observing that the Appellate Body has a “constitutional” nature or dimension in that it interprets a “constituent document”).

¹⁰⁶ Trachtman, *Constitutions*, *supra* note 94, at 645 (emphasis added).

¹⁰⁷ *Id.* at 645.

¹⁰⁸ *Id.* at 624.

¹⁰⁹ Regarding the AB’s refusal to publicly announce that it conducted teleological interpretation, see Pemmaraju Sreenivasa Rao, *Multiple International*

deserve the label of “constitutional” adjudication. After all, neither all interpretive changes nor all teleological interpretations should necessarily be constitutional. However, it is not the interpretive shift itself but the *nature* of the shift that should draw our attention to this issue. Both the subject matter (zeroing) and its unique topicality tend to define the unique, constitutional quality of the AB’s hermeneutical shift.

Crucially, one cannot fully capture the significance of AB’s hermeneutical turn without taking into account the current developments in anti-dumping measures and implications zeroing has for those developments. Since the launch of the WTO in 1995, members have thus far initiated about 3,427 anti-dumping investigations, while GATT contracting parties conducted only 1,600 investigations by the 1980s.¹¹⁰ What is more problematic is that while developed countries such as the United States and EU nations were historically the primary users of anti-dumping measures in the past, developing countries have recently begun to seek recourse in these trade remedies on a frequent basis.¹¹¹ In

Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation, 25 MICH. J. INT’L L. 929, 952 (2004) (“In considering the relationship between WTO Agreements and multilateral environmental agreements (MEAs), one must recognize that decisions of the panels or Appellate Body of the WTO do not make pronouncements in a direct fashion.”). In the same context, the AB refused to acknowledge its teleological hermeneutical shift from permitting zeroing to abandoning it. Instead, it simply disconnected from the old GATT jurisprudence in this matter based on narrow, formalistic, textual differences between the Tokyo Round Antidumping Code and the current WTO Antidumping Code, and thus eliminated any need to disclose the teleological root of its anti-zeroing decision. See Appellate Body Report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶ 132, WT/DS344/AB/R (Apr. 30, 2008) (“[T]he relevance of these panel reports [under the Tokyo Round Anti-Dumping Code] is diminished by the fact that the plurilateral Tokyo Round Anti-Dumping Code was legally separate from the GATT 1947 and has, in any event, been terminated.”). Nonetheless, one could reasonably submit that panel reports under the Tokyo Round Anti-Dumping Code constitute the GATT *acquis*. See Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States*, ¶ 7.26, WT/DS27/R/USA, (May 22, 1997) (upholding a certain practice of panels under the Tokyo Round Anti-Dumping Code); Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R (Feb. 21, 1997) ¶ 22 (supporting conclusions expressed by panels under the Tokyo Round Anti-Dumping Code).

¹¹⁰ Press Release, World Trade Organization, WTO Secretariat Reports Increase in New Anti-Dumping Investigations (May 7, 2009), available at http://www.wto.org/english/news_e/pres09_e/pr556_e.htm.

¹¹¹ See *id.* (noting that developing countries have been reporting a high number of initiations, including India and Brazil).

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

Against this alarming background, the AB has issued a series of zeroing decisions. In a total of six decisions since 2001, the AB has rendered a coherent and unwavering line of jurisprudence that unequivocally rejects this problematic practice. It is this

¹¹² See Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS. 315, 338-41 (2005) (describing the imposition of additional duties by the U.S. on Vietnamese catfish); Sungjoon Cho, *Beyond Doha's Promises: Administrative Barriers as an Obstruction to Development*, 25 BERKELEY J. INT'L L. 395, 400 (2007) ("Even if rich countries grant poor countries duty and quota-free market access in the Doha negotiation, the former can always impose prohibitively high tariffs on the latter's clothing or shoes on the ground that the latter *dump* these products in the former's markets.").

¹¹³ This developmentally fatal effect of rich countries' anti-dumping measures is well corroborated by trade statistics. For the last decade, the world's richest countries' anti-dumping measures have aimed primarily at low-income developing countries. Since the launch of the WTO, the United States has initiated a total of 366 antidumping investigations, 215 of which have targeted low-income developing countries. WTO AD Website, *supra* note 12. The EU follows the United States in this regard. During the same period, the EU initiated 345 antidumping investigations in total, 237 of which were directed to low-income developing countries. Unsurprisingly, most of these antidumping initiations have concentrated on primary commodities and labor-intensive manufacturing goods on which developing countries hold the main comparative advantages vis-à-vis developed countries. If left unchecked, this developmentally fatal trend might endure as the share of manufacturing products in developing countries' gross exports increases in the future. World Bank, *Global Economic Prospects: Realizing the Development Promise of Doha Agenda 2004* (2003), available at <http://siteresources.worldbank.org/INTRGEP2004/Resources/gep2004fulltext.pdf> (describing graphs that indicate that gross exports are steadily increasing and could continue to do so in the coming years).

¹¹⁴ Ikenson, *supra* note 16.

resoluteness that distinguishes the AB's teleological exegesis from an otherwise mere interpretive methodology. Silhouetted against the aforementioned topicality of zeroing, the judicial rulemaking on zeroing was the AB's purposeful mission of institutionalizing a "proper test"¹¹⁵ which would shrink the domestic government's administrative discretion and thus render a pro-zeroing interpretation "impermissible" under Article 17.6(ii) in this particular anti-dumping issue. In doing so, the AB activated a fundamental normative force field which would govern the behaviors of *all* members, not only those who were direct parties of the dispute, in a way that would herald a new policy in the zeroing field. It is fundamental in the sense that zeroing undermines the very *telos* of the WTO (free trade) and defies the very identity of the WTO as a *trade* organization.

This constitutional adjudication is inextricably linked to a string of developments that, in combination, may signify a certain "constitutional moment" in the WTO. What the AB struck down in its first zeroing decision (*EC—Bed Linen*) in 2001 concerned only a specific type of zeroing (zeroing in a weighted-average-to-weighted-average comparison). However, a group of seventeen WTO members states collectively coined "Friends of Anti-dumping," seized this moment to propose the prohibition of zeroing in *all* kinds of comparison methodologies in June 2003.¹¹⁶ The Friends of Anti-dumping proposal was vindicated by the AB's subsequent across-the-board invalidation of zeroing.¹¹⁷ However, the United States, the only defendant that has lost all zeroing cases,

¹¹⁵ Cf. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 203–04 (1985) (arguing that most of the U.S. Supreme Court's efforts have been directed toward preliminary matters such as determining the proper test to apply to the case, rather than "actual resolution of cases at hand," which "reflects and enhances a perspective that is regulatory, abstract, and adversarial").

¹¹⁶ 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) [hereinafter *The Anti-Zeroing Proposal*]:

Amend Article 2.4.2 to explicitly provide that regardless of the basis of the comparison of export prices to normal value (i.e. weighted average-to-weighted-average or transaction-to-transaction, or weighted average-to-transaction), all positive margins of dumping and negative margins of dumping found on imports from an exporter or producer of the product subject to investigation or review must be added up.

¹¹⁷ See *supra* Section 2.3.3. (establishing that there ought to be a prohibition on zeroing in the calculation of dumping margins).

proposed to reinstate the zeroing practice via amendment.¹¹⁸ On November 30, 2007, the Chair of the Negotiating Group on Rules circulated the “Drafted Consolidated Chair Texts of the AD and SCM Agreements,” which attempted to reach a compromise between the AB jurisprudence and the U.S. proposal, but dissatisfied both sides.¹¹⁹ In sum, those tensions and controversies engendered by the AB’s zeroing decisions are a testimonial to a constitutional moment as far as zeroing is concerned in that they, together with the AB’s constitutional adjudication, tend to shape the contours of an institutional identity of the WTO as an international organization that upholds free trade.

The AB has presented a “constitutional question” and promulgated an answer in response to recent anti-zeroing decisions, i.e., how we should understand and construct the WTO in the face of members’ policy options which could potentially compromise the very goal of the organization. Here, the AB chose a different interpretive path from the old GATT panel, thereby breathing a new life into the same old texts, such as “a fair comparison between the export price and the domestic price”¹²⁰ and “the amount of the anti-dumping duty must not exceed the margin of dumping.”¹²¹ This critical choice was based on the AB’s firm understanding of the immediate and powerful normative

¹¹⁸ See Communication from the United States, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 29, WT/DS294/16 [hereinafter The U.S. May 2006 Communication] (May 17, 2006) (explaining the United States’ proposal to reinstate the zeroing practice in opposition to the “Friends of Anti-dumping”); *Proposal from the United States on Offsets for Non-Dumped Comparisons*, TN/RL/GEN/147, Jun. 27, 2007 [hereinafter The U.S. June 2007 Proposal].

¹¹⁹ Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213 (Nov. 30, 2007) [hereinafter WTO AD Draft]. Regarding reactions to the Draft Texts, see the Office of the United States Trade Representative, Joint Statement by the Office of the United States Trade Representative and the Department of Commerce’s International Trade Administration, Nov. 30, 2007 (stating that the U.S. was “very disappointed with important aspects of this draft text”); WTO Negotiating Group on Rules, *Statement on “Zeroing” in the Anti-Dumping Negotiations*, *Statement of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Vietnam*, TN/RL/W/214/Rev.3 (Jan. 25, 2008) [hereinafter The Anti-Zeroing Statement] (emphasizing that zeroing as a “biased” method for calculating dumping margins risks “nullify[ing] the results of trade liberalization efforts.”).

¹²⁰ AD Agreement, *supra* note 9, art. 2.4.

¹²¹ *Id.* at art. 9.3.

consequences that its adjudication would bring in the future WTO. To wit, the AB was well aware that its adjudication would “constitute” the WTO, at least as far as the zeroing issue is concerned. This is why the nature of the AB’s hermeneutical shift on zeroing might be coined constitutional.

One important caveat is in order: constitutional adjudication, which is theorized in this Article, is entirely subject matter-specific as it exclusively refers to the zeroing practice. Therefore, the constitutional adjudication addressed here should not be unduly generalized and expanded to other WTO issues. Importantly, constitutional adjudication on zeroing does not fossilize in general Article 17.6(ii), which may still provide ample deference to domestic antidumping authorities on other anti-dumping issues. Moreover, constitutional adjudication might not make sense in non-antidumping contexts; and even if it does, it could feature entirely different patterns from what is described in this context. For example, if the AB were to adjudicate another important regulatory issue of reconciling trade value and non-trade value (legitimate policy objectives), such as the protection of public health and the environment, its judicial rulemaking in these areas would be aptly characterized as different types of constitutional adjudication.¹²²

3.2. Normative Ramifications of Global Constitutional Lawmaking

3.2.1. Could WTO Members Overturn Constitutional Lawmaking?

After losing a series of zeroing cases under the WTO dispute settlement mechanism, the United States proposed that zeroing be ultimately resolved through negotiations, instead of being left to adjudication.¹²³ Naturally, the United States suggested that

¹²² See generally SUNGJOON CHO, *FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM* (2003) (noting that the AB has “decided on a case by basis whether a given domestic regulation was applied consistently or whether it respected due process, rather than reinvestigating . . . whether the substance of the regulation itself is necessary”).

¹²³ See Communication from the United States, *Offsets for Non-Dumped Comparisons*, TN/RL/W/208 (Jun. 5, 2007) at 2 [hereinafter *The U.S. June 2007 Communication*] (noting that the United States’ view of the “proper resolutions to the issue requires clear text providing that the margins of dumping may be determined without offsets for non-dumped transactions consistent with the long-held concept of dumping”).

relevant provisions of the Antidumping Agreement, such as Articles 2.4 and 9.3, be amended in a way that explicitly endorses zeroing.¹²⁴ The United States drive for negotiation prompted the Chair of the Negotiating Group on Rules, the Uruguayan Ambassador Guillermo Valles Games, to circulate on November 30, 2007 the "Drafted Consolidated Chair Texts of the AD and SCM Agreements," which "[he] believe[d] could facilitate the negotiation of a balanced outcome."¹²⁵

The Chair's draft text on zeroing appears to be a compromise between the current WTO case law and the U.S. proposal. While the text prohibits zeroing in "multiple comparisons of a weighted average normal value with a weighted average of prices of all comparable export transactions," it permits zeroing "on a transaction-to-transaction basis or of multiple comparisons of individual export transactions to a weighted average normal value" as well as in case of administrative reviews.¹²⁶ A large group of countries opposing zeroing criticized the text. They emphasized that zeroing is a "biased" method for calculating dumping margins risks "nullify[ing] the results of trade liberalization efforts."¹²⁷ The Chair subsequently conceded that there simply existed "no hints on possible middle ground approaches nor suggestions for possible compromises or trade-offs."¹²⁸

Considering these diametrically opposite views on zeroing among major WTO members as well as the inchoate stage of WTO negotiations regarding this controversial issue, any pro-zeroing amendment to the Antidumping Agreement is highly unlikely, at least in the near future.¹²⁹ Nonetheless, if such an amendment

¹²⁴ The United States proposed adding the following paragraph: "Authorities are not required to offset the results of any comparison in which the export price is greater than the normal value against the results of any comparison in which the normal value is greater than the export price." The United States May 2006 Communication, *supra* note 118; The U.S. June 2007 Proposal, *supra* note 118.

¹²⁵ WTO AD Draft, *supra* note 119.

¹²⁶ *Id.*

¹²⁷ The Anti-Zeroing Statement, *supra* note 119.

¹²⁸ WTO Negotiating Group on Rules, *Working Document from the Chairman*, TN/RL/W/232, at 1, A-10, A-11 (May 28, 2008).

¹²⁹ See Jonathan Lynn, *Anti-Dumping Row Roils WTO, Isolates U.S.*, REUTERS, Jan. 10, 2008, <http://www.reuters.com/article/idUSL1044224620080110> (quoting Brenden McGivern who observed that "it's wildly optimistic of the U.S. to think they'll get this back through negotiations").

should ever transpire, would it trump the outcome of the AB's constitutional adjudication (constitutional jurisprudence)?

Purely from a normative standpoint, one might argue that it should not. According to this position, since constitutional jurisprudence on zeroing directly addresses the most essential value (*telos*) of the WTO system, such as anti-protectionism, even an amendment of WTO norms should not repeal this *fundamental* norm.¹³⁰ This preemptive, *per se* invalid position tends to distinguish constitutional jurisprudence from other WTO case law concerning more mundane trade disputes whose outcome may be altered by subsequent negotiations.

However, this position appears not only infeasible but also illogical. The existence of one constitutional norm (anti-zeroing jurisprudence) should not unduly block any future constitutional dynamics under the WTO. One might logically envision a situation in which WTO members might need to modify, if not repeal, even this jurisprudence via a constitutional amendment, such as a revision of the WTO Charter and/or the WTO Antidumping Agreement. Nevertheless, WTO members must not entertain any lax overriding of such paramount constitutional jurisprudence. An example would be repealing the constitutional jurisprudence through a soft norm, such as a decision or a declaration by Ministers¹³¹ simply as a result of mundane bargaining in the trade negotiation, as is currently conducted in the Negotiating Group on Rules.¹³² This lower threshold in nullifying constitutional norms risks over-politicizing the WTO's normative operation in this important area.¹³³ In this sense, the legal status of

¹³⁰ See The Anti-Zeroing Statement, *supra* note 119 (observing that the countries involved in drafting this statement seek to reduce protectionism).

¹³¹ See Mary E. Footer, *The Role of 'Soft' Law Norms in Reconciling the Antinomies of WTO Law* (July 14, 2008), SOCIETY OF INTERNATIONAL ECONOMIC LAW INAUGURAL CONFERENCE 12-13, available at <http://ssrn.com/abstract=1159929> (observing that soft norms, such as a "decision," are subject to a *hardening* process, such as an "amendment"). According to Footer, it is conceivable that a decision remains unamended. *Id.*

¹³² Currently, most WTO members approach this issue not even through "negotiation" but rather merely as "discussion." *Lamy Urges "Maximum Effort" for July Meeting of Ministers*, WTO: 2008 NEWS ITEMS, Jun. 27, 2008, http://www.wto.org/english/news_e/news08_e/tnc_dg_stat_june08_e.htm.

¹³³ Cf. Kathleen M. Sullivan, *What's Wrong with Constitutional Amendments, in GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE* 39 (1999) (warning that frequent constitutional amendments might be used as "a chip in short-run political games").

anti-zeroing jurisprudence might be analogous to a *strong* version of the U.S. “constitutional common law,” which survives an ordinary legislative challenge yet is still subject to a subsequent constitutional amendment.¹³⁴ In other words, procedural rigors built into Article X (Amendment) of the WTO Agreement, including a super majority rule,¹³⁵ must govern any modification of the zeroing jurisprudence. A simple decision or declaration engineered by a negotiation must not immediately overturn it without a formal amendment. On the contrary, under an ideal scenario, WTO members should “codify” the outcome of constitutional adjudication, i.e., the AB’s anti-zeroing case law.¹³⁶

3.2.2. *Could a Lower Tribunal (Panel) Reject Constitutional Lawmaking?*

Despite the well-established anti-zeroing jurisprudence, the recent panel in *U.S. – Zeroing (Mexico)* explicitly rejected the AB’s positions—in particular those in *U.S. – Zeroing (EC)* and *U.S. –*

¹³⁴ A *strong* version of constitutional common law, which I analogize here, refers to certain constitutional rules that are “elaborated by judges through precedent-based reasoning” and “not defensible by ordinary legislation.” See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (considering whether common law constitutional interpretation gives judges too much power and whether this is appropriate in a democracy). See also Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law* at 1 n.2 (Chi. Pub. Law and Legal Theory Working Paper No. 73). In contrast, a *soft* version of constitutional common law envisions being overturned by legislation. See generally Henry Paul Monaghan, *The Supreme Court, 1974 Term – Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

¹³⁵ See WTO Agreement, *supra* note 2, art. X, paras. 1 and 3 (“Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.”).

¹³⁶ A group of countries, such as Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore, Switzerland and Thailand, collectively called the “Friends of Antidumping,” proposed a prohibition of zeroing in *all* kinds of comparison methodologies in June 2003. They proposed an amendment of “[A]rticle 2.4.2 to explicitly provide that regardless of the basis of the comparison of export prices to normal value (i.e. weighted average-to-weighted average or transaction-to-transaction, or weighted average-to-transaction), all positive margins of dumping and negative margins of dumping found on imports from an exporter or producer of the product subject to investigation or review must be added up.” The Anti-Zeroing Proposal, *supra* note 117.

Zeroing (Japan)—and instead followed the line of reasoning that two previous panels had employed in these cases.¹³⁷ These cases concerned, *inter alia*, a “simple zeroing” in the administrative (periodic) review.¹³⁸ Although the *U.S. – Zeroing (Mexico)* panel admitted that the AB “*de facto* expects” the panel to respect adopted AB reports “to the extent that the legal issues are similar,”¹³⁹ it emphasized that panels “are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue.”¹⁴⁰ However, as long as constitutional adjudication in this matter is presumed, the panel’s stance is unacceptable for the following reasons.

First, the panel overstated the degree to which it is not bound by prior AB decisions. No matter how one labels WTO jurisprudence, the label itself has never actually bestowed compliance pull upon those decisions.¹⁴¹ Regardless of the label, Members *perceive* these precedents as well-established “jurisprudence” which they voluntarily observe: they cite, quote and refer to the AB’s precedents to substantiate and reinforce their own legal positions in the dispute. While not all Members abide by the WTO jurisprudence all the time, such breaches do not necessarily nullify the legal authority of the jurisprudence. In particular—if such jurisprudence concerns constitutional issues, such as zeroing—its compliance pull tends to be stronger than it would be in other situations since Members fully appreciate the normative weight of such jurisprudence. Perhaps this heightened compliance pull can explain the EC’s swift change of course the moment the AB struck down its own zeroing practice in 2001.¹⁴²

¹³⁷ Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.106, WT/DS344/R (Dec. 20, 2007) (“[W]e have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews.”) [hereinafter *U.S. – Zeroing (Mexico)*].

¹³⁸ *Id.* ¶¶ 7.106, 7.115.

¹³⁹ *Id.* ¶ 7.105.

¹⁴⁰ *Id.* ¶ 7.102.

¹⁴¹ Cf. Fabien Gélinas, *Dispute Settlement as Institutionalization in International Trade and Information Technology*, 74 *FORDHAM L. REV.* 489, 493 (2005) (observing that precedential effect in the WTO does not originate strictly from “*stare decisis*” but rather from a concern for “formal justice,” a concept concerned with preserving the “security and predictability” of the multilateral trading system).

¹⁴² See *supra* Section 2.3.

Second, as discussed above, constitutional adjudication on zeroing normatively prevails even over Members' attempts to modify its outcome through political bargaining or amendment. If constitutional adjudication should govern Members' behavior, it should also regulate panels' rulings. Otherwise, the normative superiority flowing from constitutional adjudication would be meaningless.

Third, the *U.S. – Zeroing (Mexico)* panel rationalized its defiance by invoking DSU Article 19.2, which prohibits both the panel and the AB from “add[ing] to or diminish[ing]” WTO Members' rights and obligations.¹⁴³ In other words, the panel implied that the AB diminished the United States' rights under the WTO norms by judicially enacting a new proscription on zeroing. However, the very idea of constitutional adjudication tends to prevent the panel from making such a self-assured determination. A WTO panel, as a lower tribunal, is not entitled to question the validity of a constitutional decision rendered by the AB—a constitutional tribunal. Moreover, the panel's justification for departing from the AB's constitutional jurisprudence is itself groundless: the AB's constitutional adjudication never diminishes Members' WTO rights and obligations; it simply “clarifies” them from the standpoint of a trade constitution.

Sharing the same position, the AB in *U.S. – Zeroing (Mexico)* rightly rejected the panel's position on this issue. It emphasized that the fact that AB reports may not be “binding” per se does not free panels from observing previous reports.¹⁴⁴ The AB reiterated its previous findings that adopted AB reports create “legitimate expectations” among WTO Members and that panels' observance of those reports would also be expected.¹⁴⁵ The AB justified its position with a critical observation on the value of “jurisprudence” within the WTO, which is arguably the most important dicta on this question.

Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition,

¹⁴³ *U.S. – Zeroing (Mexico)*, *supra* note 137, ¶ 7.102.

¹⁴⁴ *Panel Report, U.S. – Zeroing (Mexico)*, *supra* note 79, ¶ 158.

¹⁴⁵ *Id.* (citing Appellate Body Report, *Japan – Alcoholic Beverages II*, at 14, WT/DS8/AB/R (Oct. 4, 1996)).

when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports.¹⁴⁶

The AB did not forget to admonish the panel's unusual behavior. With a solemn tone, it emphasized that the panel's defiance is against the hierarchical division of labor in DSU under which only the AB can "uphold, modify or reverse" panels' legal interpretations.¹⁴⁷ The AB expressed its deep concern over the panel's rebellious behavior.¹⁴⁸

In the most recent zeroing dispute (*U.S. – Continued Zeroing*), the panel did follow the AB's well-established anti-zeroing jurisprudence, unlike previous panels, which had defied the AB. Yet the panel did so only reluctantly. The panel still viewed those decisions by defiant panels as "persuasive,"¹⁴⁹ although it eventually struck down the United States' zeroing practices for the sake of WTO jurisprudence.¹⁵⁰ In response, a rare concurring opinion tolled the eventual death knell for zeroing adjudication by declaring that:

In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come.¹⁵¹

¹⁴⁶ *Id.* ¶ 160.

¹⁴⁷ *Id.* ¶ 161.

¹⁴⁸ *Id.* ¶ 162.

¹⁴⁹ Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 251, WT/DS350/R (Oct. 1, 2008).

¹⁵⁰ *Id.* ¶ 257.

¹⁵¹ *Id.* ¶ 312.

4. RESISTANCE TO GLOBAL CONSTITUTIONAL LAWMAKING

4.1. *Challenges to Constitutional Adjudication on Zeroing*

The bold jurisprudence that the AB has crafted in striking down zeroing has invited a good deal of criticism on various fronts. Some contend that nowhere in the WTO and its Antidumping Agreement texts or their legislative histories—the Uruguay Round negotiation history—does an explicit prohibition on this practice exist. According to these critics, the AB is, therefore, “making up rules that the U.S. never negotiated.”¹⁵² Likewise, the U.S. government has observed that:

A prohibition of zeroing, or a requirement to provide offsets for non-dumped transactions, simply cannot be found in the text of the AD [Antidumping] Agreement The issue of zeroing, on which Members could not reach agreement in the Uruguay Round, should not be left to dispute settlement. We as Members should endeavour [sic] to reach an agreement on this issue through negotiation.¹⁵³

In fact, Article 17.6 (ii) of the Antidumping Agreement provides that in times of ambiguities (when a provision “admits of more than one permissible interpretation”) a WTO panel shall validate a domestic anti-dumping authority’s measure “if it rests upon one of those permissible interpretations.”¹⁵⁴ In light of this article, the AB’s invalidation of zeroing—which is not prohibited under GATT Article VI or the Antidumping Agreement—might be seen as “legislating to fill in the perceived gaps in the coverage of the Antidumping Agreement” and thus as violating the “standard of review contained in the Antidumping Agreement that calls for deference to national administrators of antidumping laws.”¹⁵⁵

¹⁵² News Release, U.S. Senate Committee on Finance, U.S. Trade Laws and the WTO 3 (Sept. 27, 2002), <http://finance.senate.gov/press/pr092702.pdf>.

¹⁵³ Communication from the United States, *Offsets for Non-Dumped Comparisons*, 2, TN/RL/W/208 (June 5, 2007).

¹⁵⁴ AD Agreement, *supra* note 9, art. 17.6 (ii).

¹⁵⁵ Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHI. J. INT’L L. 417, 421 (2001). See also Alford, *supra* note 23, at 199-202 (concluding “that the Appellate Body in *U.S. – Zeroing* circumvented the particularized standard of review required under the Antidumping Agreement”); Greenwald, *supra* note 49, at 114 (warning that “the promise of an effective international dispute settlement

The discontent over the AB's judicial activism is largely focused on what some have termed "judicial legislation."¹⁵⁶ Judicial legislation exercised by an overzealous trade tribunal would encroach upon member states' regulatory autonomy in certain policy matters that they believe have never been ceded to international organizations like the WTO. The way in which the DSU is written might attest to this position. Under the DSU, the formal mission of the WTO tribunal is merely to assist the Dispute Settlement Body (*i.e.*, the General Council) in settling disputes between WTO Members by delivering mere "recommendations."¹⁵⁷ As frequently understood, these recommendations are not permitted to *add to* or *diminish* the rights and obligations of member states.¹⁵⁸

Often, criticisms of the AB's judicial activism become rather emotional. Understandably, they originate from certain domestic producers who compete with foreign rivals. They contend that "'zeroing' is one of the sinews of U.S. anti-dumping law [and that] the [a]bandonment 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."¹⁵⁹

The U.S. Congress has been quite responsive to these anxious voices. In a recent statute renewing the President's trade promotion authority ("TPA"), Congress explicitly demonstrated its frustration over the AB's interpretation of Article 17.6 (ii) of the

system will never be realized if the WTO professionals are incapable of restraining their impulse to legislate under the guise of 'neutral' dispute settlement").

¹⁵⁶ See Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 247-48 (2004) (observing that a wide range of commentators, such as scholars, practitioners, politicians and NGOs have recently accused the WTO Appellate Body of judicial activism).

¹⁵⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, art. 19.1, at 1237 (1994) [hereinafter DSU].

¹⁵⁸ *Id.* arts. 3.2, 19.2. The U.S. May 2006 Communication, *supra* note 118 ("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.").

¹⁵⁹ HOUSE COMMITTEE ON WAYS AND MEANS, JOINT STATEMENT OF AD HOC SHRIMP TRADE ACTION COMMITTEE AND SOUTHERN SHRIMP ALLIANCE, *available at* <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=5468>.

WTO Antidumping Agreement, alleging that it deprived the U.S. regulatory agency (the Commerce Department) of its rightful deference secured under the article. The 2001 TPA Bill provides that “the 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.”¹⁶⁰ In December 2006 a group of ten U.S. senators with a similar intent sent a letter to the U.S. Trade Representative and the Commerce Department warning that the elimination of zeroing would lead to a “dramatic weakening of U.S. antidumping laws.”¹⁶¹ In light of these protests from Congress, some commentators warn that the AB’s disregard of the special standard of review might deter the United States’ generous trade concessions in the subsequent round of trade negotiations.¹⁶² According to them, the AB’s judicial activism might yield only a Pyrrhic victory for free-tradists.¹⁶³

4.2. *Defending Constitutional Adjudication on Zeroing*

4.2.1. *The Augmented Role of International Adjudication*

Despite the criticism of “judicial usurpation,”¹⁶⁴ it is widely recognized that judges, both international and domestic, do more than merely apply rules in a mechanical fashion. To some extent, judicial legislation is an innate, unavoidable function of

¹⁶⁰ Bipartisan Trade Promotion Authority Act of 2002 §3801(b)(3)(B), 19 U.S.C. §§3801–13 (2006).

¹⁶¹ Rossella Brevetti, *U.S. Zeroing Methodology Hit Again by WTO Appellate Body*, 24 INT’L TRADE REP. 52, 53 (2007).

¹⁶² See Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2 WORLD TRADE REV. 373, 374 (2003) (noting that the United States may adjust its negotiating strategy “to take account of this institutional usurpation of the [previous] negotiation results”); Steinberg, *supra* note 156, at 261 (claiming that the AB’s failure to give weight to members’ intent could risk “political repercussions”). *But see* U. S. GEN. ACCOUNTING OFFICE (GAO), GAO-03-824, WORLD TRADE ORGANIZATION: STANDARD OF REVIEW AND IMPACT OF TRADE REMEDY RULINGS (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”).

¹⁶³ Tarullo, *supra* note 162, at 374.

¹⁶⁴ See generally Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1892) (defending judicial legislation against its “sense of reproach”).

adjudication.¹⁶⁵ To deny this proposition would almost be akin to believing a myth.¹⁶⁶ As early as the end of the nineteenth century, Ezra Thayer emphasized that the “growth of law” via judicial legislation is not only “desirable” but also “necessary.”¹⁶⁷ Two decades later, Justice Oliver Wendell 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 by the most gifted of its begetters.”¹⁶⁸ More recently, Martin Shapiro observed that it would be “logically required” that any judicial discovery involves judicial lawmaking since no pre-existing norm completely covers future cases.¹⁶⁹ After all, any norms—if left unchanged—tend to become outmoded, and even anachronistic, as they fail to respond to altered realities with the passage of time.

The necessity for judicial progressive development, or updating, of fixated text is no less acute in the international law arena than in the domestic legal system. In fact, the need for judicial gap-filling may be stronger in the international law setting since deliberate ambiguities are often written into the text as necessary evils that allow 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 any (well-functioning) international tribunal to seek “consistency that connects past, present, and future.”¹⁷⁰ This is the very reason why international judges, in interpreting treaty texts, “must have regard to the

¹⁶⁵ See Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217, 1220-21 (1967) (articulating the presumption of general bias in decision making, though not placing a value judgment on it). See also Fabien Gélinas, *Dispute Resolution as Institutionalization in International Trade and Information Technology*, 74 FORDHAM L. REV. 489, 490 (2005) (observing a general trend of judicial legislation in the post-war era) (citing RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1 (2004)).

¹⁶⁶ See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 521 (2005) (noting that “this ideal type [of non-legislating judge] accurately describes almost no actual domestic court in existence”).

¹⁶⁷ See Thayer, *supra* note 165, at 178-79.

¹⁶⁸ *Missouri v. Holland*, 253 U.S. 416, 433 (1920).

¹⁶⁹ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 29 (1981).

¹⁷⁰ THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 335 (1995).

exigencies of contemporary life, rather than to the intentions of those who framed it.”¹⁷¹ In this sense, international adjudication, even more than domestic, engages in a “dynamic” process of judicial rulemaking, which produces jurisprudence or case law.¹⁷² The WTO tribunal is not an exception to this trend.¹⁷³

¹⁷¹ *Competence of the General Assembly for the Admission of a State to the UN*, 1950 I.C.J. 4, 17–18 (Mar. 1950) (quoted in Alvarez, *supra* note 166, at 96).

¹⁷² 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 118, 139 (Mary L. Volcansek ed., 1997) (arguing that the Standing Appellate Body of the WTO engages not only in dispute resolution but also in rulemaking and social control). Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884 (1996) (discussing the “prevalence and importance of nontextual amendments”); HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 155–226 (1958) (arguing that “judicial legislation” is particularly appropriate in the international sphere, and entirely “healthy and unavoidable”); EDWARD MCWHINNEY, *SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW* 168 (1986) (discussing the “imperative principles” of a novel *jus gentium*); RENÉ DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 3 (1985) (arguing that independent judges in international trade tribunals can develop a *jus gentium* free from the contingencies of the various states). See also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 937 (2005) (recognizing the inevitability of gap-filling and certain “minimal lawmaking” by independent international tribunals). Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1510 (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”).

¹⁷³ 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 rulemaking in the WTO dispute settlement system because he employs the “rules/standards” distinction and the economic approach of an “incomplete contract.” Trachtman, *The WTO’s Domain*, *supra* note 22, at 350–55. He argues 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.” *Id.* at 336. In a similar context, Kenneth Abbott views “legalization” as “delegation,” meaning that third parties are authorized to interpret and apply those rules as well as to 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. See also Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 547–48 (1994) (arguing that statutes, like contracts, are often intentionally left vague because it is too difficult to provide for all the possibilities and because future uncertainty means that it is best to allow courts to fill in the details later through a “quasi-legislative process”).

The WTO's unique institutional structure may further warrant judicial rule making. The WTO suffers, like many other international organizations, basic "positivist" predicaments stemming from the often stubborn and eccentric "wills" of states. The difficulty of converging more than 150 wills tends to make any legislation under the WTO extremely impracticable. Legislation in the WTO is also compounded by its daunting decision making mechanism—either a consensus or supermajority in any important matter.¹⁷⁴ Under these taxing circumstances, the WTO jurisprudence developed by the WTO panels and the AB should be given more weight in terms of the WTO's nuanced institutional balance than in terms of the Montesquiean separation of powers notion that are better suited to the domestic context.¹⁷⁵ After all, this is a useful manifestation of "judicial prudentialism,"¹⁷⁶ rather than reckless "judicial activism."

Critics of the AB might seize the textual semblance of Article 17.6 (ii) to the *Chevron* doctrine and argue that the Article is a specific "rule" which must be directly applied, not constructed, by the WTO tribunal in the same manner in which the *Chevron* doctrine is applied in the U.S. court.¹⁷⁷ However, if one categorizes

¹⁷⁴ See, e.g., John H. Jackson, *Appraising the Launch and Functioning of the WTO*, 39 GERMAN Y. B. INT'L L. 20, 39 (1996) ("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.").

¹⁷⁵ 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"); 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 156, at 260 (stating policy arguments for a less deferential Appellate Body). 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").

¹⁷⁶ Cf. Russell Gabriel & Louis B. Sohn, *Equity in International Law*, 82 AM. SOC'Y INT'L L. PROC. 277, 283-84 (1988) (discussing the limits of judicial discretion).

¹⁷⁷ Regarding the distinction between "rules" and "standards," see Trachtman, *The WTO's Domain*, *supra* note 22, at 350-51 (defining a rule as a law that is specified in advance as to what conduct applies, and a standard as a guideline without specifying the conduct required or prohibited).

the Article as a more flexible “standard,” the WTO tribunal can certainly fill in the gap of an incomplete treaty, i.e., the WTO Antidumping Agreement. In fact, considering the murky nature of negotiation history under the Uruguay Round over the anti-dumping issues in general,¹⁷⁸ it would be only logical to construe the Article as a standard whose real life applications have been delegated to the WTO tribunal.¹⁷⁹ According to game theory, the purpose of this interpretive flexibility is to enhance “allocative efficiency.”¹⁸⁰ One could reasonably speculate that the Antidumping Agreement would not have come to light if disagreeing negotiators had stubbornly clung to their own original preferences, which had been diametrically opposite.

Despite its strong merits, judicial rule making by the WTO tribunal manifests itself in a much-nuanced fashion. As José Alvarez observed, “[c]andid acknowledgment of judicial law-making . . . is a rarity in international decisions.”¹⁸¹ In fact, Judge Jennings, one of the most respected ICJ judges, once wrote that “the most important requirement of the judicial function” appears to be applying preexisting norms even when it “creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction”¹⁸² The WTO tribunal, like any other international tribunal, is rather reserved and circumspect in performing this inevitable judicial function.¹⁸³ This approach results from the fact that the AB is all

¹⁷⁸ See Stewart, *supra* note 48.

¹⁷⁹ See Trachtman, *The Domain of WTO Dispute Resolution*, *supra* note 22, at 351–52 (noting that a standard, as opposed to a rule, would rationally be placed in trade agreements because of less domestic scrutiny, and the ability for both sides to claim victory).

¹⁸⁰ *Id.*

¹⁸¹ ALVAREZ, *supra* note 166, at 532.

¹⁸² MOHAMED SHAHABUDDIN, PRECEDENT IN THE WORLD COURT 232 (1996) (quoting Sir Robert Y. Jennings, *The Judicial Function and the Rule of Law in International Relations*, in INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO 141, 142 (1987)). See ALVAREZ, *supra* note 166, at 532, n. 38 (quoting Judge Jennings); 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, 944 (2004) (observing that “judicial legislation at the international level is a well recognized occurrence, albeit within limits of judicial caution and restraint”).

¹⁸³ See Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25, 25 (1998) (discussing some early WTO decisions where the AB is measured in judicial law-making). See generally, Jeffrey L. Dunoff, *Constitutional*

too aware of members' anxieties over its potential judicial activism and the subsequent encroachment on their sovereignty. Therefore, the AB always endeavors to avoid implications that may lead some members to suspect that it overreaches its textually limited mandate under DSU, i.e., not adding to or diminishing members' rights and obligations. The AB's well-documented preoccupation with textual interpretation, even when it in fact adopts teleological interpretation, attests to this caution.¹⁸⁴

4.2.2. *The Ambiguous Nature of WTO Bargain*

As discussed above, critics of the AB seem to subscribe to a contractarian view on the multilateral trading system. They basically view that invalidating zeroing is not what members, especially those members which advocate zeroing, had bargained for in the Uruguay Round negotiations.¹⁸⁵ On the contrary, the real deal struck in the Uruguay Round, according to them, was one that bestowed considerable deference to domestic anti-dumping authorities, which is allegedly enshrined in Article 17.6 (ii) of the WTO Antidumping Agreement. Those critics appear to deem this Article as a sacrosanct *term* of the Uruguay Round contract. As a matter of fact, the Article was inserted at the eleventh hour in the Uruguay Round negotiation at the United States' 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 anti-dumping regime, which is a critical protectionist bulwark serving politically powerful domestic producers. To them, Article 17.6 (ii) would be a

Conceits: The WTO's 'Constitution' and the Discipline of International Law, 17 EUR. J. INT'L L. 647, 658 (2006) (observing "[t]here 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").

¹⁸⁴ See generally Henrik Horn & Joseph H. H. Weiler, *European Communities – Trade Description of Sardines: Textualism and its Discontent*, in THE WTO CASE LAW OF 2002 248 (H. Horn & P.C. Mavroidis eds., 2005). See also Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 617 (2002) (observing that the AB emphasized the textual interpretation so as to avoid criticism that it has modified WTO members' rights and obligations in the WTO treaty).

¹⁸⁵ See Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, Annex D-13, ¶ 34-36, WT/DS350/R (Oct. 1, 2008) (observing that there existed no consensus on zeroing at the time of Uruguay Round negotiations).

Trojan horse deliberately deployed in the middle of the multilateral trading system.

However, an anachronistic, contractarian understanding of the WTO may overstate the positivist/realist nature of the multilateral trading system and thus fail to fully capture its true aspects. Concededly, the prototypical construct of the post-war global trading system *was* a sovereign contract dealing mostly with tariffs, i.e., the *General Agreement on Tariffs and Trade*. The agreement was negotiated, signed and implemented by “contracting” parties. Under this originally positivist structure, both the formation and the operation of GATT would be determined by power disparity or the so-called “hegemony stability thesis” under which power is a main currency.¹⁸⁶ Perhaps this is the reason why most criticisms of judicial activism are staged by political scientists or politicians, whose main language is power, not norms.¹⁸⁷

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 that has transformed an erstwhile contract into a “system.”¹⁸⁸ 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.”¹⁸⁹ In the same vein, the nature of the WTO remedies is no longer obsessed with the “rebalancing” of their original negotiated matrices of gives-and-takes, but more attuned to norm-building.¹⁹⁰ In sum, the WTO as a system, or a

¹⁸⁶ 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) (noting that “the United Nations [has] not replaced power politics”).

¹⁸⁷ See, e.g., Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 *INT’L ORG.* 603, 603 (2000).

¹⁸⁸ See Sungjoon Cho, *The Nature of Remedies in International Trade Law*, 65 *U. PITT. L. REV.* 763, 769-71 (2004) [hereinafter Cho, *Remedies*].

¹⁸⁹ 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) (discussing “contracts” and “covenants” as two different ways to view international law).

¹⁹⁰ Cho, *Remedies*, *supra* note 188, at 792-95.

“trade constitution,”¹⁹¹ continuously transforms both the content of international trade law and state actors’ behaviors¹⁹² in a way that creates stability and predictability in the “multilateral trading system.”¹⁹³ From this perspective, the alleged *term* of the Uruguay Round contract, which is raised by the U.S. in a self-serving way, could (and should) not determine the legal destinies of measures in question.

Even if one *arguendo* adheres to a contract analogy in interpreting Article 17.6 (ii), the United States 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*, “[t]he 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.”¹⁹⁴ At the same time, “[a] proper interpretation also would

¹⁹¹ See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 339–51 (2d ed. 1997) (characterizing the policies of the world trading system as “trade constitution”); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 101–04 (1998) (referring to the “broad” WTO constitution); John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT’L ECON. L. 17, 25–28 (1996) (referring to the “constitutional law” of international trade organizations); John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL’Y INT’L BUS. 873, 873 (1996); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 573–83 (2000). Professor Cottier also notes “[w]hile 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.” Thomas Cottier, *The WTO and Environmental Law: Some Issues and Ideas*, Paper delivered at the WTO Symposium of Non-Governmental Organizations on Trade, Environment, and Sustainable Development, March 17–18, 1998, available at <http://www.ppl.nl/bibliographies/wto/files/2260.pdf>. 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 “[t]he 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”).

¹⁹² See ALVAREZ, *supra* note 166, at 588 (arguing 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).

¹⁹³ Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, ¶ 7.76, WT/DS152/R (Dec. 22, 1999).

¹⁹⁴ Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶84, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998).

have included an examination of the existence and relevance of subsequent practice,"¹⁹⁵ such as strong objections to the zeroing practice expressed by other parties (to the contract), for example, the Friends of Antidumping.¹⁹⁶

More importantly, Article 17.6 eventually fails to deliver what sovereigntists believe they have earned through a bargain. An alleged semblance of the Article to the *Chevron* doctrine does not necessarily accord this international norm the same doctrinal content as the putative domestic legal doctrine. To sovereigntists' disappointment, Steven Croley and John Jackson eloquently demonstrated why Article 17.6(ii) of the Antidumping Agreement must *not* be interpreted like the *Chevron* doctrine.¹⁹⁷ First, an explicit use of different languages in two situations, which are "permissible" in Article 17.6(ii) and "reasonable" in the *Chevron* doctrine, tends to oppose a similar pattern of interpretation between the two.¹⁹⁸ 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 United States' rules of statutory construction.¹⁹⁹ Finally, they aptly pointed out that certain underlying rationales in the *Chevron* doctrine, such as "agency expertise" and "administrative coordination" cannot find their places in the WTO context.²⁰⁰

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."²⁰¹ Like Croley and Jackson, he also

¹⁹⁵ *Id.* ¶ 90.

¹⁹⁶ *See supra* note 136.

¹⁹⁷ *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 205-06 (1996).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 206.

²⁰⁰ *Id.* at 206-11.

²⁰¹ 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 (2004) (emphasis added).

emphasized that the agency expertise rationale in the *Chevron* doctrine is no longer valid in the WTO context. He incisively observed that applying this doctrine to the WTO would be tantamount to a U.S. court deferring its statutory interpretation to those who are being regulated.²⁰²

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

[A] permissible interpretation for purposes of the second sentence of Article 17.6(ii) is not the result of an inquiry that asks whether a provision of domestic law is “necessarily excluded” by the application of the *Vienna Convention*. Such an approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member’s municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty.²⁰³

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

4.2.3. *The Enlightened Meaning of Sovereignty*

A central theme revealed by critics of the AB’s anti-zeroing jurisprudence is “sovereignty,” which carries a hallmark of the *Lotus* principle. Under the well-known principle of public international law, sovereign states are capable of doing whatever they desire as long as no explicit prohibition exists under international law.²⁰⁴ Following this logic, WTO members would be free to adopt the zeroing practice because the WTO Anti-Dumping Code does not expressly ban such practice.

Yet this “disarticulated” use of sovereignty may not do justice to the contemporary status of global market integration under the WTO system.²⁰⁵ There are plausible risks that protectionists may

²⁰² *Id.* at 604.

²⁰³ *U.S. – Continued Zeroing*, *supra* note 87, at ¶ 273.

²⁰⁴ *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7).

²⁰⁵ *Wendt*, *supra* note 25, at 393; *Pogge*, *supra* note 25.

seek refugee in an overarching claim of sovereignty. It might be too extensive and inferential to accuse the AB's decision on a regulatory issue such as zeroing of actually eroding the classical notion of sovereignty as "self-government."²⁰⁶ Zeroing does not concern the sanctity of self-determination and non-interference in the area of national security as stipulated and protected under the UN Charter. An "emotional appeal" through sovereignty hiding "a surrogate argument by opponents of some government proposal"²⁰⁷ risks foreclosing otherwise meaningful and constructive discourses on the allocation of regulatory competence between the WTO and its members.²⁰⁸

²⁰⁶ See Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 875-76 (2003) (challenging traditional views that international economic institutions are inherently "sovereignty-subverting").

²⁰⁷ 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 (1997) [hereinafter Jackson, *The Great 1994 Sovereignty Debate*]. See also Ronald A. Brand, *Semantic Distinctions in an Age of Legal Convergence*, 17 U. PA. J. INT'L ECON. L. 3, 6 (1996) (arguing that "theories of sovereignty borrowed from prior centuries can no longer accommodate economic and political reality at the end of the twentieth century"). Dan Sarooshi also documented a self-serving utilization of sovereignty as a surrogate argument for specific policy preferences. He emphasized the essentially "contestable" nature of sovereignty by submitting that "[t]he meaning of the concept of sovereignty is largely contingent upon the text in which it figures." Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship*, 15 EUR. J. INT'L L. 651, 652 (2004). In other words, the concept of sovereignty, despite its "prima facie categorical use," is subject to "conceptions and interpretations that should be evaluated and maybe amended in order to account better for the values encompassed by these concepts." *Id.*, at 654 (quoting Samantha 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 & C. Warbrick eds., 2004)). This view parallels that of Stephan Krasner who regarded sovereignty as "organized hypocrisy." STEPHAN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 9 (1999).

²⁰⁸ See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 784-85 (2003) (discussing how the WTO's jurisprudence "exemplifies the tension between internationalism and national governments' desires to govern and deliver to their demographic constituencies . . ."); see also Raustiala, *supra* note 206, at 843 (observing that "prevailing sovereignty-based critiques are instead usually disguised arguments about reallocations of power and the creation of incentives and disincentives for policy choices"). But cf. Philip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016, 1027 (1985) (reviewing JOHN H. JACKSON ET AL., *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984)) (arguing that "[t]he kind of international law-making envisioned by the authors cannot be easily reconciled with the American political tradition").

Gravely, an invocation of a Baroque version of sovereignty runs the risk of nurturing a culture of “veto” among members, especially powerful members such as the United States, and consequently poisoning the atmosphere of international cooperation. Those powerful countries tend to summon this ill-defined concept whenever they find compliance with international law and cooperation within an international organization politically inconvenient and cumbersome. This culture of veto may be spread to adventurous isolationism, which could provoke some governments to disconnect themselves from the WTO despite the prohibitively high cost.²⁰⁹ Undoubtedly, any of these consequences would be perilous both to the WTO and those countries which might self-excommunicate from the WTO in the name of sovereignty.

It is imperative that in this highly interdependent international environment, trading nations, even the most powerful ones, should embrace a novel concept of sovereignty. Trading nations should realize that all international solutions necessarily involve “a degree of intrusiveness into domestic governance,” which stresses the necessity of a cooperative mechanism, including “appropriate allocation of power” between international institutions and diverse national legal systems.²¹⁰ In other words, an altering international context requires a more flexible concept of sovereignty²¹¹ which departs from that which is symbolized by the preemptory exercise of unbridled power. Therefore, as Abraham Chayes and Antonia Chayes argued, nations should adopt the “new sovereignty” which is more mature, constructive, and participatory.²¹² For this purpose, trade norms should be “disaggregated” to make it possible to assess the relative advantages and disadvantages of reinforcing particular norms.²¹³ This approach will enable

²⁰⁹ Raustiala, *Rethinking Sovereignty*, *supra* note 206, at 849. He aptly viewed that states in fact join various international organizations to “lock-in desired policy outcomes” and thus make any exit difficult. *Id.*

²¹⁰ John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT’L ECON. L. 3, 6-11 (2000).

²¹¹ Cf. Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 966 (2000) (reviewing STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999)) (introducing the “contingent and plastic” view of constructivists on sovereignty).

²¹² See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

²¹³ Jackson, *The Great 1994 Sovereignty Debate*, *supra* note 207, at 187-88.

governments to identify and focus on important “policy” issues that confront the entire international community, such as anti-dumping and the zeroing practice, without any unnecessary rhetorical escalation.²¹⁴ Ironically, this new approach to sovereignty can actually help governments achieve their own policy objectives by taming parochialism in the name of international obligations.²¹⁵

5. THE LEGITIMACY OF GLOBAL CONSTITUTIONAL LAWMAKING

5.1. *An Exogenous (Political) Test*

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

For example, Jeffrey Dunoff found constitutional narratives unpersuasive in general. Dunoff discovered a “striking 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.”²¹⁶ He warned that constitutional

²¹⁴ *Id. Cf.* Arie Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 NW. J. INT'L L. & BUS. 775, 776 (1997) (asserting that nowadays more States wish to regulate trade relations by using norms, rather than through sovereignty and flexibility).

²¹⁵ McGinnis argued that the WTO, unlike many sovereigntists' lamentations, 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).

²¹⁶ Dunoff, *supra* note 96, at 647, 649. He observed that “[t]here is no constitutional court, no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment” and that “on their

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.²¹⁷ Dunoff might find the vindication of his warning in sovereigntists’ lambasting against the AB’s teleological interpretation.

In a similar fashion, one might submit that the very notion of trade constitution or trade constitutionalism as an apolitical discipline would be even undesirable. According to Jan 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.”²¹⁸ 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.”²¹⁹

These criticisms are not without merits. In a formal matter, the WTO panel or the AB is merely to “assist” the Dispute Settlement Body, *i.e.*, the General Council, to “settle” disputes between Members by delivering their “recommendations.”²²⁰ More importantly, these recommendations should not “add to or diminish” members’ rights and obligations.²²¹ Also, over-emphasizing this judicial governance in the WTO, especially through a constitutional lens, risks trivializing recognizable *political* checks against the WTO panel or the AB, such as WTO members’ “authoritative interpretation” which might potentially override any panel or AB decision.²²² These risks tend to invite more

face, the Uruguay Round texts lack a number of features often associated with constitutional entities.” *Id.* at 650–51.

²¹⁷ *Id.* at 649.

²¹⁸ Jan Klabbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. 31, 54 (2004) (quoted in Dunoff, *supra* note 96, at 665).

²¹⁹ See Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 227 (Roger B. Porter et al. eds. 2001).

²²⁰ DSU, *supra* note 157, art. 19.1.

²²¹ *Id.* arts. 3.2, 19.2 (stating that the Panel cannot augment or diminish states’ rights and obligations in the covered agreements).

²²² WTO Agreement, *supra* note 2, art. 9.2 (stating that the Ministerial Conference and General Council have exclusive authority to adopt interpretations of this Agreement and Multilateral Trade Agreements).

fundamental criticisms regarding the WTO tribunal's alleged lack of accountability or more broadly the democracy deficit. One of these critics contends that the WTO produces "quasi-constitutional" rules ("generativity") flowing from the confidential WTO tribunal ("insularity").²²³ According to this position, the WTO's substantive virtue—free trade—may become a potential threat to the democracy of its members, including (or especially) the United States in the absence of any democratic disciplines, such as those under the U.S. Administrative Procedural Act.²²⁴

One might suspect that those political risks come at a price that WTO members should willingly pay to secure the integrity of "an integrated, more viable and durable multilateral trading system."²²⁵ Yet these risks might not necessarily be high, especially as long as domestic political economy could accommodate the AB's constitutional adjudication. Judith Goldstein and Richard Steinberg insightfully observed that the U.S. Congress has recently tolerated "*de facto* delegation" of trade authority to the WTO's judicial law-making function.²²⁶ They attributed such domestic political tolerance to the WTO's judicial activism to certain

²²³ See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 415 (2000) (explaining the view that the WTO is factionalized, with one-sided factions using trade policy to their own business benefit).

²²⁴ *Id.* at 418–19. Ironically, the way in which certain Western countries administer anti-dumping measures domestically fails to meet their own democratic standards. For example, the U.S. Administrative Procedural Act does not apply to anti-dumping proceedings, raising due process questions in the anti-dumping administration. See 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); 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); see also *Elof Hansson, Inc. v. United States*, 48 C.C.P.A. 91 (1960) (ruling that the APA was not applicable to dumping investigations). Moreover, even if domestic industries' first attempt does not prevail in an anti-dumping complaint, they can refile the same complaint until they eventually prevail because unlike in other civil proceedings, the doctrines of *res judicata* and collateral estoppel do not apply to the anti-dumping proceeding. Procedure for Initiating a Countervailing Duty Investigation, 19 U.S.C. §§ 1671a(a), 1673a(a) (stating that a countervailing duty investigation is initiated by administering authority when the authority determines that a formal investigation is warranted). See also Josephs, *supra*, at 66.

²²⁵ WTO Agreement, *supra* note 2, pmbl.

²²⁶ See Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate?: Effects of WTO Judicial Delegation on U.S. Trade Politics*, UCLA SCH. OF LAW, LAW & ECON. RESEARCH PAPER SERIES, No. 07-14, at 36–37 (discussing how the Appellate Body may successfully push for trade openness in the United States and the EU).

transformative features in the U.S. trade politics.²²⁷ First, export-oriented producers have propped up their lobbying effects as they have witnessed “a clear and credible loss” from protection touted by import-competing groups.²²⁸ Second, trade liberalization tends to be “self-reinforcing” since these protectionist lobbies “peel off” as they become unable to sustain protection.²²⁹ Third, domestic “elites and leaders” tend to regard trade liberalization and market openness as advantageous to the national interest.²³⁰

5.2. *An Endogenous (Legal) Test*

In contrast to the aforementioned exogenous (political) test, an apolitical, i.e., normative, foundation for constitutional adjudication derives nowhere but from an “internal” dimension of law, namely, the way in which members interpret, react and respond to those constitutional decisions of the WTO tribunal, not as “one-time grudging compliance,” but as “habitual internalized obedience.”²³¹

This self-legitimizing osmosis of constitutional adjudication from the WTO level into the domestic legal realm does not remain a mere academic imagination. Empirical confirmations are legion as to real world examples of such legal osmosis. The reactions from the EU and the U.S. government to the AB’s anti-zeroing decisions provide cases in 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 that fully conforms to the AB’s ruling since it lost the very first case in *EC – Bed Linen*. Instead of resisting the AB’s decisions, it has elected to go after another main user, the United States.²³² Even the U.S. government (DOC) has recently modified, albeit only partially, its long-standing zeroing practice in the weighted-average-to-weighted-average comparison in an attempt to comply with the AB’s

²²⁷ *Id.*

²²⁸ *Id.* at 38.

²²⁹ *Id.*

²³⁰ *Id.* at 39.

²³¹ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2655 (1997) (discussing how institutional habits lead nations to compliance in order to avoid friction).

²³² See *supra* Section 2.3.1.

decisions, despite severe resistance from the special interest groups as well as the Congress which is captured by these groups.²³³

This legal osmosis or “internalization” of the WTO’s constitutional adjudication leads to a symbiotic co-existence between the WTO system and domestic legal regimes. In fact, trade constitution can contribute even to achieving domestic constitutional goals since the former can provide an effective check against a Madisonian failure (parochialism) in the domestic arena.²³⁴ Public choice theorists teach us that gains from trade are often underrepresented while its costs are overrepresented.²³⁵ Under these circumstances, constitutional adjudication tends to empower local voices for free trade and competition. For example, since the WTO rulings on zeroing, U.S. domestic consumer groups have stepped up their lobbying efforts to the government with a view to the elimination of all zeroing practices that serve the interests of certain domestic producers at the expense of U.S. consumers and consuming industries.²³⁶

²³³ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification 71 Fed. Reg. 77,722 (Dec. 27, 2006) (outlining the DOC’s modified antidumping investigation methodology); Rossella Brevetti, *Commerce Makes Change in Dumping Methodology to Comply with WTO Case*, 24 INT’L TRADE REP. 26 (Jan. 4, 2007) (showing an example of internalization through “executive action,” such as the change of administrative interpretation). See Koh, *supra* note 231, at 2657 (“Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.”).

²³⁴ See Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, UCLA SCH. OF LAW, LAW & ECON. RESEARCH PAPER SERIES, No. 07-15, at 2-3 (arguing that the WTO’s regulatory scheme shifted from the legislative to the judicial sector by “freeing member states from capture by entrenched domestic interests”).

²³⁵ See Sungjoon Cho, *Toward a New Economic Constitution: Judicial Disciplines on Trade Politics*, 42 WAKE FOREST L. REV. 167, 184-86 (2007) (discussing how protectionist trade practice can be detrimental to U.S. economics).

²³⁶ See Consuming Industries Trade Action Coalition (“CITAC”), Rebuttal Comments on the Commerce Department’s “Zeroing” Proposal, 71 Fed. Reg. 11189, May 4, 2006, available at http://www.citac.info/about/issues/zeroing/CITAC_On_Zeroing_2300285_1.pdf (urging the Department of Commerce to “eliminate zeroing from all antidumping calculation methodologies”) (emphasis added); Robin Lanier, A Letter to Secretary of Commerce (Re: “Zeroing” of Duties), Jan. 6, 2005 (proposing to “eliminate the practice of zeroing in all dumping cases”). Harold Koh defines this phenomenon as “legislative internalization” which “occurs when domestic lobbying embeds international law norms into binding domestic legislation or even constitutional law that officials of a noncomplying government must then obey as part of the domestic legal fabric.” Koh, *supra* note 231, at 2657.

Even if certain domestic producers may attempt to preserve the zeroing practice in the domestic court, which usually renders huge deference to agencies like 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 U.S. law should be interpreted consistently with international law.²³⁷ In other words, between two possible statutory constructions of the antidumping statute, i.e., one which does permit zeroing and the other which does not, the U.S. court could choose the latter since the WTO tribunal unambiguously ruled against zeroing. To this extent, any modicum of deference which the DOC would have enjoyed under the second prong of the *Chevron* doctrine is squeezed to nil.²³⁸

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 to the WTO’s constitutional adjudication. As WTO members repeat and regularize this process, and thus as domestic law becomes enmeshed with “sticky” international law,²³⁹ their compliance with the outcome of constitutional adjudication

²³⁷ This situation may fall within the rubric of “judicial internalization” which Harold Koh defines as an implicit incorporation of international law into the domestic legal system through interpreting existing statutes harmoniously with international law or as an explicit incorporation via “transnational public law litigation.” Koh, *supra* note 231, at 2657.

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

²³⁹ See Koh, *supra* note 227, at 2654–55 (“Domestic decisionmaking becomes ‘enmeshed’ with international legal norms, as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes.”).

becomes ever closer to a “default pattern.”²⁴⁰ Furthermore, in most cases trade constitution is firmly in harmony 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.²⁴¹ Under these circumstances, members’ “loyalty” to the WTO regime mitigates, or even replaces, their initial demand for “voice” or threat of “exit.”²⁴²

6. CONCLUSION

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

This mutually reinforcing dynamic between internalization and legitimacy of constitutional adjudication on zeroing may crystallize into a certain *cultural* phenomenon. In this regard, “constitutional culture” may be defined as the “cultural cohesion that habitually accepts the propriety and necessity of constitutional compliance.”²⁴³ In fact, internalization itself is “constitutive” and

²⁴⁰ *Id.* See also Helfer & Slaughter, *supra* note 172, at 935 (observing that some international tribunals’ rulings can “mobilize *compliance constituencies* to press governments to adhere to their treaty obligations”) (emphasis added).

²⁴¹ See ALVAREZ, *supra* note 167, at 618. Cf. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 272–73 (2008) (suggesting that inter-judicial coalitions could enhance democratic governance).

²⁴² See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 76–105 (1970) (exploring the impact of loyalty on the “voice” and “exit” dynamics).

²⁴³ Allan Ides, *The Emerging Transnational Constitution: Introduction*, 37 LOY. L.A. L. REV. 187, 188 (2003).

thus facilitative of constitutional culture.²⁴⁴ 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 a goal is pursued.²⁴⁵ 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 via a communitarian mechanism of habituation.

Importantly, the constitutional culture should also be didactic. The WTO's constitutional jurisprudence, no matter how much it has 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.²⁴⁶ With such a low level of comprehensibility, the legal force cannot overcome the short-term protectionist politics which is often well-organized and thus very effective in capturing trade policy-makers. Therefore, the public should become further educated in international trade law and trade constitution so that well-informed deliberation, not misleading protectionist banners, will guide their political choices.²⁴⁷ The necessity of public education and social marketing on the WTO's constitutional jurisprudence may be analogous to the reason why American citizens, not only legal scholars, are taught on certain paramount constitutional jurisprudence, such as *Marbury* and *Brown*. At this juncture, the academia bears a critical responsibility in framing and dispersing discourses on the trade constitution and constitutional adjudication.²⁴⁸ Such discourses will eventually provide the public with helpful heuristics with which to better comprehend

²⁴⁴ Koh, *supra* note 231, at 2646.

²⁴⁵ See, e.g., Lang, *supra* note 26, at 84-85, 95, 105-06 (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").

²⁴⁶ See Sungjoon Cho, *A New Agenda for Peace: International Trade Law as a Practical Discourse*, in *TRADE AS THE GUARANTOR OF PEACE, LIBERTY AND SECURITY?: CRITICAL, HISTORICAL AND EMPIRICAL PERSPECTIVES* 63 (Padideh Ala'i et al eds. 2006) (discussing the complexity of WTO jurisprudence).

²⁴⁷ *Id.*

²⁴⁸ I owe this insight to David Gerber.

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."²⁴⁹ Only this liberation can disabuse trading nations of their misguided mercantilist interests, which zeroing represents, and redefine their identities and interests within the global trading system from impervious sovereign entities to enlightened norm-builders.²⁵⁰

²⁴⁹ ALVAREZ, *supra* note 99, at 586-87.

²⁵⁰ See generally Cho, *Gemeinschaft*, *supra* note 26. 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).