

The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law

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I. INTRODUCTION

This Essay takes up both the *direct* and the *indirect* effect of WTO law within the U.S. legal system. It may not be surprising to learn that Congress has excluded *direct* effect for WTO law within the U.S. legal system, but that *indirect* effect has also been excluded is not generally understood. Many U.S. scholars seem automatically to assume that WTO law will have at least *indirect* effect within the United States,¹ but

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1. See, e.g., JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, *INTERNATIONAL ECONOMIC RELATIONS* 244 (4th ed. 2002) (“The Uruguay Round Agreements are not self-executing and thus have no direct “statute-like” effect in U.S. law, although the agreements can

that assumption is unfounded. The hermetic quarantine of WTO law from influence within the municipal U.S. legal system poses a paradox, because it was the United States Congress itself that demanded negotiation within the Uruguay Round of a higher order legal reliability for WTO law. I attempt in this Essay to explain that paradox from a political economic perspective.

The force of WTO rules within any country's domestic law depends on several concepts, the most basic of which are direct effect and supremacy.² The question of supremacy arises only if the rules at issue first have direct effect. For convenience and simplicity I will discuss direct effect as a single concept—meaning that for WTO rules to have direct effect a private person must have standing in a domestic court to base a legal claim directly on a WTO provision as a rule of decision.

In the United States even when an international agreement has direct effect it never has supremacy. A subsequent federal statute always overrides a prior self-executing (having direct effect) international agreement. The only way a form of supremacy could be given to an international agreement in the United States would be through a statute similar to the 1972 European Communities Act or the 1998 Human Rights Act, both in the United Kingdom.³ These acts rely essentially on an instruction to courts to interpret subsequent statutes as subordinate to European Community law and the European Human Rights Convention, respectively, unless the subsequent statute is explicit about its intent to contravene the relevant treaty. In today's world it is unimaginable that any such act concerning WTO law could be enacted in the United States. Thus for all practical purposes, WTO supremacy is excluded as an option for the U.S. legal system.

Several further distinctions will arise in the body of this Essay. Direct effect could attach either to the WTO agreements themselves or to WTO Panel and Appellate Body rulings, or to both. As we will see, it attaches to neither, but the analytical distinction is important.

Finally, even when an agreement does not have *direct* effect in U.S. law, it may be given *indirect* effect, by which I mean that it can be used as a controlling source for interpreting ambiguous domestic statutes. Once

and should have an indirect effect on U.S. courts and officials when they interpret provisions of U.S. law.”).

2. See generally JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO* 328-66 (2000); John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *AMER. J. INT'L L.* 310-40 (1992).

3. On the 1972 European Communities Act, see PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW—TEXT, CASES, AND MATERIALS* 301-12 (3d ed. 2003). On the 1998 Human Rights Act, see JOHN WADHAM & HELEN MOUNTFIELD, *HUMAN RIGHTS ACT 1998* (2d ed. 2000).

again the possibility arises of indirect effect attaching either to the WTO agreements themselves or to Panel and Appellate Body rulings, or to both. As we will see, it seems to attach to neither in the United States—or at least it does not do so in more than a highly qualified or muted sense concerning the WTO agreements and not at all, concerning dispute settlement rulings.

The Essay is divided into two parts. First (Part II) it describes the current status of WTO law within the U.S. legal system, a status of almost fire-wall-like separation between the international and domestic spheres. Second (Part III) it asks why this state of affairs exists, and seeks answers in political economy and public-choice theory.

II. THE APPLICABILITY OF WTO LAW WITHIN THE U.S. LEGAL SYSTEM

A. *Direct Effect*

Although international agreements sometimes have direct effect in U.S. law, it is not necessary to revisit this complex topic to conclude that no such effect attaches to the WTO agreements. The unambiguous provisions of the Uruguay Round Agreements Act (URAA)⁴ settle the matter. The URAA is the vehicle through which Congress amended U.S. law to implement the new obligations undertaken in the WTO and at the same time to give final authority for the United States to become a party to the WTO and its annexed agreements.

The URAA provides in section 102(a) that no provision of the WTO agreements will have effect within the United States if it is “inconsistent with any law of the United States.”⁵ This clearly refers to prior, as well as subsequent, U.S. law. Note that even were a WTO provision thought to have self-executing force, that force would immediately be overridden by the later-in-date URAA. Thus, no WTO provision can operate to change prior or subsequent U.S. law.

To drive the point home the URAA provides in section 102(c):

No person other than the United States (A) shall have any cause of action or defense under any of the [WTO] Agreements . . . or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States⁶

Thus, no private or other person, other than the United States, has standing within a U.S. court to invoke a provision of a WTO agreement to challenge actions of the federal government or its agencies.

4. Pub. L. No. 103-465, 108 Stat. 4809 (1994).

5. 19 U.S.C. § 3512(a)(1).

6. *Id.* § 3512(c)(1).

Turning to the effect of the WTO agreements on State law, we confront a slightly more complex situation. Recall that the URAA does not say that the WTO agreements are to have no effect whatsoever within the U.S. legal system. Rather it says that existing (and subsequent) federal law prevails over WTO law. The established understanding is that because of federal law supremacy, State law may not interfere with U.S. obligations deriving from international agreements. Thus, during the pre-WTO era even without much discussion of whether the 1947 GATT was or was not self-executing, a few decisions of state and federal courts struck down State law that clashed with the GATT.⁷

The URAA deals with the issue of State law by according to the federal government a complete monopoly on the right to bring an action against (or to raise any defense against the applicability of) any State law claimed to be inconsistent with a WTO provision.⁸ Thus, although the WTO agreements would prevail over inconsistent State law, this outcome can only be established if the federal government itself chooses to seek a judicial order to that effect.⁹ Thus, a political decision must be taken at the federal level before a State law inconsistent with a WTO agreement can be struck down.

The upshot then is that within the U.S. legal system private parties are completely barred from seeking to give direct effect to WTO provisions in court proceedings, whether the challenge is to federal or State law. Thus the URAA even nullifies the few cases in the pre-WTO era that had allowed private enforcement of GATT law against the States.

B. Indirect Effect

1. In General

If WTO law cannot be given direct effect in U.S. law, can it be given indirect effect? Should it operate as a controlling source for interpreting ambiguous federal statutes? If the answer is yes, then depending on the degree of interpretive deference applied, the WTO could play a potentially large role within U.S. courts.

7. See Ronald A. Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 *Nw. J. INT'L L. & BUS.* 556, 562-69 (1997). Brand notes one case where the court applied WTO law without considering its legal status in the United States. See, e.g., *United States v. Star Indus.*, 462 F.2d 557 (C.C.P.A. 1972); *Territory of Hawaii v. Hawaii*, 41 *Haw.* 565 (1957).

8. 19 U.S.C. § 3512(b)(1).

9. *Id.* § 3512 (b)(2)(A) (“No State law . . . may be declared . . . except in an action brought by the United States for the purpose of declaring such law or application invalid.”).

Of course, the potential significance of indirect effect should not be overstated. An unambiguous federal statute must be applied by U.S. courts even if doing so violates WTO law. For example, in the well-known GATT Superfund Case,¹⁰ the U.S. statute in question imposed a higher tax on imported than on domestic crude oil. This was a blatant violation of the non-discrimination rule of GATT article III(2), but the statute was unambiguous. No amount of indirect effect could have given force to WTO rules. Similarly the provisions of section 337 of the Tariff Act of 1930 did not allow for any significant interpretive maneuvering. That section provided for an additional border-enforced intellectual property rights regime for imports. No amount of interpretive legerdemain could have brought the statute into conformity with the GATT panel ruling that section 337 violated the GATT article III(4) non-discrimination principle.¹¹

Still, indirect effect is not a trivial doctrine. Anyone familiar with European Community law will immediately recognize the parallel between indirect effect and the *Marleasing*¹² doctrine and will acknowledge the latter's importance. The ECJ decided *Marleasing* against a background of recalcitrance on the part of Member States in implementing EC directives. In previous decisions the ECJ had held that directives could be given *vertical* direct effect on behalf of a private party claiming against the non-implementing Member State itself. *Vertical* direct effect prevented a Member State from relying on its own wrongdoing (failure to implement the directive) to defeat a private party's claim. Thus, for example, a Member State could not prosecute a private party for violating a national statute that the Member State should have revoked in compliance with an EC directive. That unclean-hands logic, however, did not apply to *horizontal* direct effect, allowing one private party to invoke a directive in a dispute with another private party.

Previously, the ECJ held explicitly that directives could not have horizontal direct effect. Nevertheless, in *Marleasing*, the ECJ ruled that directives have *indirect effect* and articulated the concept in such strong terms that it seemed the rough equivalent of *de facto* horizontal *direct effect*. The ECJ *required* Spanish courts to change their previous

10. United States Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136 (1988).

11. See United States—Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1989).

12. *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.*, 1990 E.C.R. I-4135 [1990].

interpretation of the Spanish Civil Code to conform to an EC directive.¹³ The new (compelled) interpretation effectively imposed new obligations on private parties—the essence of horizontal direct effect. However, in a later case, *Faccini Dori*,¹⁴ the ECJ backed away from *Marleasing*'s strong version of indirect effect by requiring national courts to interpret national law only “as far as possible” to be consistent with EC directives. In other words, the ECJ would not force national judges to make a mockery of “interpretation” in order to bring national law into conformity. In sum, despite the latent force and importance of indirect effect, it has implicit limits.

In the United States international agreements are given indirect effect¹⁵ based on the *Charming Betsy* canon of interpretation of federal statutes first articulated in the early Supreme Court case, *Murray v. The Charming Betsy*.¹⁶ Chief Justice Marshall declared that “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁷ Because the “law of nations” includes international agreements as well as customary law, the WTO agreements in principle fall within the scope of the *Charming Betsy* canon. Nevertheless, in the WTO context there are a number of reasons why the *Charming Betsy* doctrine is likely to be muted. Before turning to why this is so, I trace in the following Subpart how U.S. courts have actually treated the *Charming Betsy* doctrine in the context of WTO obligations.

2. Regulatory Protection and Indirect Effect

The indirect effect doctrine has surfaced most prominently in the United States in connection with trade remedy law, that is, antidumping,

13. The ECJ based its reasoning on article 10 of the EC Treaty: “Member States shall take all appropriate measures . . . to ensure fulfillment of the obligations arising out of this Treaty or resulting from the action taken by the institutions of the Community.” It held that courts are included in the concept of “Member State” and hence have an obligation to exercise their interpretive function consistent with Community law. *Marleasing*, 1990 E.C.R. I-4135, para. 8 (“Member States’ obligation arising from a directive . . . is binding on all the authorities of Member States including . . . the courts.”).

14. *Faccini Dori v. Recreb Srl.*, 1994 ECR I-3325, para. 4.

15. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

16. 6 U.S. (2 Cranch) 64 (1804). The Court cited *Charming Betsy* with approval most recently in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004).

17. 6 U.S. (2 Cranch) at 118.

countervailing duty, and safeguards (or escape clause) law.¹⁸ Outside this area, few litigated cases deal at all with GATT or WTO indirect effect, and with one exception, those that do so generally accord little, if any, consideration to the *Charming Betsy* doctrine.¹⁹

Trade remedy law invites controversy over indirect effect for several reasons. First, these regimes afford import-competing interests significant defense against foreign competition. Second, the relevant statutes are quite technical and hence present opportunities for administrative discretion in their application. Finally, the thrust of successive multilateral GATT and WTO negotiations, running from the 1967 Kennedy Round Antidumping Code to current WTO agreements on antidumping, countervailing duty and safeguards, has been to constrain administrative abuse of these proceedings.²⁰

18. The cases discussed below deal only with antidumping and countervailing duty law, but the URAA's constraints on indirect effect discussed in a later section include actions by the ITC under the safeguards law.

19. The one exception known to the author is *Caterpillar, Inc. v. United States*, 941 F. Supp. 1241 (CIT, 1996), though *Caterpillar* seems more *sui generis* than a telling decision. It concerned a customs valuation dispute in which the Customs Service sought to include in the dutiable value of imported merchandise an amount for value added taxes ultimately refunded by the foreign government. The GATT law requiring exclusion of such rebated taxes was quite clear, as was the U.S. government's intent, after multilateral negotiations, to accept this position. The case conveys the impression that the Customs Service made a bureaucratic decision without real deliberation over GATT requirements. The language of the Court of International Trade could be read as holding that the *Charming Betsy* doctrine supercedes *Chevron* and controls the outcome. I believe a more penetrating reading suggests that the case should be seen as unique and not pathbreaking. The court understood that the GATT rule was absolutely clear and that there was every intent on the part of Congress and the Executive Branch to conform to that GATT rule, even though the statute, as written, did not make that point clear. Against this background, the Customs Service, it seems without much reflection or evaluation, simply took a poorly analyzed, bureaucratic position inconsistent with good sense and the GATT rule. That assessment of the case is supported by its ultimate resolution. After the case was appealed to the Federal Circuit Court of Appeals, both parties agreed that it should be dismissed. The Federal Circuit followed their wishes by dismissing without an opinion. See 111 F.3d 143 (Table), 1997 WL 168479 (Fed. Cir.), unpublished disposition.

In other non-trade-remedy cases, the indirect-effect rule of *Charming Betsy* played no real role because the courts found the relevant federal statute clear and controlling. See *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282 (Fed. Cir. 2002) (recounting the long history of the State Department's effort to conform to the requirements of the Appellate Body decision in the famous *Shrimp/Turtle* case, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998)). In its final resolution of the dispute the Federal Circuit found the statute intended a shipment-by-shipment approach (rejecting the CIT's interpretation that the statute prohibited such an approach).

20. See generally John J. Barceló, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491 (1972); John J. Barceló, *A History of GATT Unfair Trade Remedy Law—Confusion of Purposes*, 14 THE WORLD ECONOMY 311 (1991).

This sets up a classic dynamic. Import competing interests press for trade-restrictive applications of trade remedy law. Foreign exporters push back by pressing their governments to challenge in the WTO system what they regard as excessive trade-remedy protectionism. And in deciding these cases WTO panels and the Appellate Body have a tendency to give a liberal trade reading to the WTO agreements.²¹ Importers have then urged these decisions on U.S. agencies and courts, through the indirect effect doctrine, to curtail trade remedy protectionism. Though this line of argument may have leverage with the Executive Branch, the courts have not been receptive whenever the Executive turns a deaf ear—as the discussion below demonstrates.

a. Case Law (*Charming Betsy* vs. *Chevron*)

The issue before U.S. courts in these cases can be restated as a contest between the *Charming Betsy* doctrine, which privileges international agreements, and a second canon of interpretation deriving

21. See Daniel Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POLY INT'L BUS. 109, 118 (2002) (noting that WTO panel and Appellate Body rulings often find “a single, unambiguous meaning for provisions of the Agreement that seem readily susceptible to multiple readings”). Tarullo argues that the WTO rulings have chosen outcomes that improperly curtail the import-blocking use of domestic trade-remedy law. See also Alan Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. INT'L ECON. L. 523 (2004) (noting that WTO rulings in safeguard cases have made it very difficult if not impossible for a country to meet the requirements for a safeguard remedy set out in those rulings).

The “zeroing” controversy in anti-dumping law illustrates the liberal trade tendency of WTO rulings while also showing that those rulings can sometimes cut the other way. The practice of “zeroing” (treating non-dumped sales as having a “zero” dumping margin—instead of a “negative” margin—for averaging purposes) yields a more protectionist administration of anti-dumping law—as compared with non-zeroing. Nevertheless, the Antidumping Code language can be reasonably read not to prohibit certain kinds of zeroing. See WTO Panel, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (13 Apr. 2004) (dissenting opinion). Even though Antidumping Agreement article 17.6 specifically allows a member to apply any one of several reasonable interpretations of agreement language, the Appellate Body has now firmly ruled that zeroing is inconsistent with the Antidumping Agreement when a member uses it in an investigation to determine the existence of dumping. Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted 12 Mar. 2001); Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (adopted 31 Aug. 2004). Thus, the Appellate Body chose the more liberal trade outcome—even in the teeth, some might say, of article 17.6. See WTO Panel, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/R (adopted 31 Oct. 2005) (dissenting opinion).

WTO rulings do not *always* choose the more liberal trade outcome. For a good counter example, even concerning zeroing, see the majority opinion in WTO Panel, *id.* (allowing the United States to use a “zeroing” methodology in administrative reviews to calculate the level of antidumping duties owing). On appeal the Appellate Body declared the Panel’s ruling on this point “moot” and left the issue unresolved. *Id.* WT/DS294/AB/R (18 Apr. 2006).

from the famous *Chevron* case,²² which privileges agency discretion. In *Chevron* the Supreme Court held that courts reviewing an agency's interpretation of an ambiguous statute should defer to the agency's view, as long as it is reasonable—no matter how the court on its own would interpret the statute. *Chevron* divides the review process into two stages. At the first stage, a reviewing court must decide whether the statute speaks so clearly that there is only one acceptable interpretation. If so, then that interpretation must prevail, and contrary agency action must be struck down. But if the statute is ambiguous, we move to stage two. Here the court must accept any agency interpretation that is reasonable. Why? Because this reflects Congress's intent in delegating power to the agency to administer the statute.

In the trade remedy area the *Charming Betsy* and *Chevron* doctrines can come into conflict whenever the agency's interpretation of a statute is arguably inconsistent with a WTO obligation. Where *Charming Betsy* and *Chevron* point in the same direction, the courts face no dilemma. This was the case in *Federal-Mogul Corporation v. Unites States*,²³ where the Department of Commerce had consistently taken a tax-neutral approach to tax adjustments in antidumping proceedings. Commerce had done so in part it seems because it wanted to conform to GATT requirements.²⁴ The plaintiffs nevertheless argued that the antidumping statute required non-tax-neutral adjustments that would have led to higher antidumping duties. In siding with Commerce, the Federal Circuit Court of Appeals read the GATT and WTO antidumping codes as requiring tax neutrality and strongly affirmed the *Charming Betsy* doctrine: "GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations."²⁵ But this was an easy case, because *Chevron* required the same result—deference to a reasonable agency interpretation.²⁶

The more important question is what courts will do when *Charming Betsy* and *Chevron* point in opposite directions—thus truly putting the

22. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

23. 63 F.3d 1572 (Fed. Cir. 1995).

24. *Id.* at 1582 ("Commerce's understanding of its duty under . . . international agreements . . . lends support to the position it has taken.")

25. *Id.* at 1581.

26. See also *George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), in which the D.C. Circuit Court of Appeals upheld an EPA rule allowing foreign refiners to petition the EPA to establish an individual baseline for gasoline purity. The EPA promulgated the rule in part to conform U.S. law to a WTO panel ruling that the prior EPA practice discriminated against imports. Thus, here again *Chevron* and *Charming Betsy* pointed in the same direction, and the Federal Circuit refused to interpret the relevant statute to prohibit the EPA's action.

indirect effect doctrine to the test. Under the most common form of analysis the *Charming Betsy* issue arises at *Chevron's* second stage. Consider, for example, an ambiguous trade remedy statute subject to two reasonable interpretations, *A* and *B*. Commerce chooses *A*, but WTO law would require *B*. Will a court apply *Charming Betsy* to force interpretation *B* on Commerce, or will it uphold Commerce's choice of interpretation *A*, as required by *Chevron*? In general the answer seems to be that *Chevron* trumps *Charming Betsy*. Commerce will prevail.

*Timken Co. v. United States*²⁷ closely tracks the hypothetical just stated. It concerns the controversial practice of "zeroing" in calculating a weighted average dumping margin. Suppose there are two home market sales at 10 each and two sales to the United States, one at 15 and one at 5. How is a weighted average dumping margin to be calculated? Article 2.4.2 of the WTO Antidumping Agreement provides: "the existence of margins of dumping . . . shall normally be established on the basis of a comparison of a weighted average normal value [the home price] with a weighted average of prices of all comparable export transactions." Under the article 2.4.2 approach, the average home price in the above example would be 10, as would the average export price. There would be a zero dumping margin. Commerce generally applies the average to average approach in deciding whether there is a dumping margin in the initial investigation.²⁸ It follows a different methodology, however, for annual administrative reviews.²⁹

For annual reviews used to keep the duty-determining dumping margin current, the U.S. antidumping statute requires Commerce to calculate (i) the normal value [home price] and export price . . . of *each entry* of the subject merchandise, and (ii) the dumping margin *for each such entry*.³⁰ The statute also defines "dumping margin" as "the amount by which the normal value [home price] *exceeds* the export price."³¹ On the basis of this statutory language Commerce computes a dumping margin for each entry (generally by comparing the export price to an average home price).³² If the export price is above the home price, Commerce treats this entry as occurring at a "zero" dumping margin. Where export price is below home price, Commerce calculates the difference as a positive dumping margin. It then totals all the positive

27. 354 F.3d 1334 (Fed. Cir. 2004).

28. 19 C.F.R. § 351.414(c)(1) (current through Mar. 23, 2005).

29. *See id.* § 351.414(c) (2)(current through June 16, 2004).

30. 19 U.S.C.A. § 1675 (a)(2)(A) (emphasis added).

31. 19 U.S.C. § 1677(35)(A) (emphasis added).

32. *See* 19 C.F.R. § 351.414(d)(1) (current through Mar. 23, 2005).

dumping margins and divides by the total value of all export sales from the individual manufacturer under investigation to achieve a weighted average dumping margin for that manufacturer. This is the percentage antidumping duty to be collected on each entry of the subject goods from that manufacturer. Under this methodology in our example the weighted average dumping margin would be 25% (the sum of positive dumping margins (5) divided by the total value of all imports of the subject merchandise (20)).

In *Timken* the Federal Circuit found Commerce's approach entirely reasonable in light of the statutory language.³³ It noted that Commerce calculated a dumping margin for *each* entry in accord with the statute (implying that using an average value for export sales would have been harder or impossible to square with the "each entry" statutory provision).³⁴ The court also noted that the statutory definition of a dumping margin (the amount by which the home price *exceeds* the export price) could reasonably be interpreted to refer only to positive numbers, not to negative ones. Thus, "zeroing" was a reasonable interpretation of the statute and *Chevron* required the court to accept it.

The *Charming Betsy* doctrine pointed in the opposite direction, however, because of the Appellate Body's decision in *Bed Linen*,³⁵ a dispute between India and the European Community over "zeroing." In *Bed Linen* the Appellate Body interpreted article 2.4.2 of the Antidumping Agreement together with article 2.4 (calling for a "fair comparison" of home price and export price) to prohibit zeroing. In making its initial antidumping determination in *Bed Linen*, the Community used a multiple averaging technique—averaging home prices and export prices for different categories of the subject merchandise. All of the sub-categories, taken together, constituted the subject merchandise, bed linen. The Community used this device because it claimed the goods were more comparable within each sub-category than across categories. To include all products within a single category—in other words, refusing to sub-categorize—would have required complicated price adjustments to account for product differences. When it came to aggregating the dumping margins for the different categories, however, the Community used the zeroing

33. 354 F.3d 1334, 1342 (Fed. Cir. 2004) (concluding "Commerce based its zeroing practice on a reasonable interpretation of the statute").

34. This implication is stronger in the lower court's opinion. See *Timken Co. v. United States*, 240 F. Supp. 2d 1228, 1243 (CIT 2002).

35. WTO Appellate Body, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001).

technique. Only positive dumping margins were included in the sum of dumping margins. The Appellate Body found this practice violated articles 2.4 and 2.4.2, in effect holding that the sum of dumping margins used in calculating a weighted average dumping margin should have included negative values whenever for a given sub-category the average export price was above the average home price.³⁶

The importer in *Timken* argued that in view of the *Bed Linen* ruling *Charming Betsy* required Commerce to abandon zeroing. The Federal Circuit, however, gave short shrift to this argument. The court concluded that it was bound by *Chevron* to accept Commerce's reasonable interpretation of the statute. It distinguished *Bed Linen* on technical grounds—namely (i) that the United States was not a party and therefore was not technically bound by the decision and (ii) that *Bed Linen* involved an initial antidumping decision, whereas *Timken* involved an administrative review.³⁷ The court also claimed that *Bed Linen* was not sufficiently persuasive,³⁸ but without offering any real explanation of that conclusion or itself explaining what better interpretation of the Antidumping Agreement would have supported a zeroing practice.³⁹ In short, when confronted with a *Chevron-Charming Betsy* clash, the Federal Circuit sided with *Chevron*.⁴⁰

36. For a detailed account of this case and the attendant WTO decisions, see Tarullo, *supra* note 21, at 132-35.

37. 354 F.3d at 1339.

38. *Id.* at 1344.

39. For such an interpretation supporting zeroing, see the dissenting opinion in the panel decision involving softwood lumber from Canada. WTO Panel, United States—Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/R (Apr. 13, 2004).

40. In a different case, the Court of International Trade also upheld Commerce's "zeroing" method, dismissing a *Charming Betsy* challenge based on the Appellate Body's *Bed Linen* decision. *PAM S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp. 2d 1362 (Ct. Int'l Trade 2003). Here at least the court did not simply refuse to apply *stare decisis* to *Bed Linen*, a point that it made and about which it is correct, but went on cursorily to interpret the Antidumping Agreement as not prohibiting zeroing. *Id.* at 1373.

Hyundai Electronics Co. v. United States, 53 F. Supp. 2d 1334 (CIT 1999), is another case in which the Court of International Trade refused to apply *Charming Betsy* to force Commerce to conform to a WTO panel ruling. The case concerned what finding was necessary for Commerce to continue to enforce an existing antidumping duty order. The panel found Commerce's "not likely" test (i.e., the duty would be terminated if it were "not likely" that dumping would continue) to be inconsistent with article 11.2 of the Antidumping Agreement, which requires authorities to determine whether dumping is "likely to continue or recur if the duty were removed." After claiming that "*Chevron* must be applied in concert with the *Charming Betsy* doctrine," the CIT rejected the WTO panel's interpretation of the Antidumping Agreement. *Id.* at 1344. Instead, the court interpreted the agreement itself, finding Commerce's "not likely" test acceptable. The only difference between Commerce's test and the panel's was the theoretically possible situation of a 50-50 split in the dumping continuance probability (dumping continuance would not be "not likely" but at the same time it would also not be "likely"), in which case Commerce would continue the duty but the panel would seemingly have required discontinuance.

The recent *Allegheny Ludlum*⁴¹ decision is the closest the Federal Circuit has come to giving force to the *Charming Betsy* doctrine in a trade remedy dispute. The *Allegheny Ludlum* court ruled that Commerce's "same person" approach to deciding the continued countervailability of a pre-privatization government subsidy was not allowed by the countervailing duty statute. In doing so, it cited the *Charming Betsy* as supporting this outcome and treated the Appellate Body ruling against the "same person" methodology as effectively defining the international law obligations of the United States. But the case is unique in a way that undercuts its importance. At the time of the *Allegheny Ludlum* decision Commerce had actually already decided to abandon the "same person" approach in deference to the Appellate Body decision⁴²—though the change operated only prospectively. Thus the court was not truly forcing on Commerce a WTO-required interpretation that Commerce rejected. Moreover, the *Allegheny Ludlum* court emphasized that its decision was based primarily upon its independent interpretation of the countervailing duty statute and that *Charming Betsy* was only a subsidiary consideration (a "guide").⁴³

The most forceful reliance on the *Charming Betsy* doctrine in a trade remedy dispute has come recently from not a court, but rather a NAFTA binational panel decision in *Softwood Lumber from Canada: Final Affirmative Antidumping Determination*.⁴⁴ Again the dispute concerned the zeroing methodology in a U.S. antidumping proceeding. The binational panel rendered its decision after (1) the WTO Appellate Body in the same case had ruled that zeroing was inconsistent with the Antidumping Agreement⁴⁵ and also after (2) the United States (acting through the U.S. Trade Representative) had decided to accept that

The court, clearly reluctant to give real force to the *Charming Betsy*, said, "[U]nless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the *Charming Betsy* doctrine." *Id.* at 1345.

41. *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339 (Fed. Cir. 2004).

42. *Id.* at 1342-43 ("Commerce changed its position because the World Trade Organization (WTO) issued an appellate report stating that the same-person methodology violates § 123 of the Uruguay Round Agreements Act (URAA). See United States—Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (Dec. 9, 2002).").

43. 367 F.3d at 1348.

44. In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination (NAFTA article 1904 Binational Panel Review; USA-CDA-2002-1904-02) (June 9, 2005), available at www.nafta-sec-alena.org.

45. United States—Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004).

decision and to eliminate zeroing in all *future* antidumping proceedings.⁴⁶ As a matter of specific statutory authority, the URAA had authorized the Trade Representative to implement an adverse WTO ruling only prospectively. The remaining issue was whether zeroing was unlawful in the case at hand—which had of course arisen when zeroing was still in effect—on the theory that Commerce’s zeroing methodology clashed with the Antidumping Agreement and hence was disallowed by *Charming Betsy*.

The binational panel, applying its interpretation of U.S. law, gave an affirmative answer. It reasoned that *Charming Betsy* was alive and well in U.S. law and that it came into play at the second stage of the *Chevron* analysis. In other words, *Chevron* and *Charming Betsy* were not strictly in conflict. Given that the statute was ambiguous, *Chevron* operated to filter out all unreasonable interpretations of it. *Charming Betsy* then functioned to disallow any otherwise “reasonable” interpretation that was nevertheless inconsistent with U.S. international law obligations. Read closely, it is clear that the panel’s decision found the international law obligation to derive from the Antidumping Agreement itself, and not from the Appellate Body ruling—a distinction that bears on the controversial issue (discussed below) of whether dispute settlement rulings (as opposed to the WTO agreements themselves) carry an international law obligation to conform national law. Again, however, the force of *Charming Betsy* seems muted. It operated only after the United States had formally accepted the Appellate Body’s interpretation of the Antidumping Agreement. Thus, as in *Allegheny Ludlum*, *Charming Betsy* did not truly force a result on a reluctant Executive Branch.

b. A Theory of Muted Indirect Effect

The upshot of the case law then is that only a muted *Charming Betsy* doctrine applies for WTO law where agency action is involved. There are at least three arguments that support this result, deriving respectively from: (i) the traditional deference courts give to the Executive Branch in foreign affairs;⁴⁷ (ii) the specific provisions of the URAA; and (iii) the failure of the WTO Dispute Settlement Agreement

46. International Trade Administration Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada, 70 Fed. Reg. 22,636 (May 2, 2005).

47. See, e.g., *Hyundai Co. v. United States*, 53 F. Supp. 2d 1343 (CIT 1999) (“The courts traditionally refrain from disturbing the ‘very delicate, plenary and exclusive power of the [executive] as the sole organ of the federal government in the field of foreign relations.’” (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936))).

to impose an *unambiguous* obligation on members to conform their law to panel or Appellate Body rulings.

i. The Executive's Role in Foreign Affairs

In discussions of separation of powers it is almost axiomatic that courts defer to the two political branches in the sensitive, politically charged field of foreign affairs. Typically, the Executive Branch has primacy in most aspects of foreign policy.⁴⁸ In particular the courts give "great weight" to the Executive Branch's interpretation of international agreements.⁴⁹ In trade remedy decisions this translates into the pattern we have seen of courts subordinating *Charming Betsy* to *Chevron*.⁵⁰

This is not to say that judicial review in trade remedy cases is meaningless. Rather, it is difficult to persuade a court to override an executive agency's interpretive policy by adopting its own or the WTO's interpretation of a WTO agreement. In fact, no case seems to have done so.

In a published article Judge Restani of the Court of International Trade has even suggested that if the court is unsure whether an agency has truly given careful consideration to the United States' international law obligations, then it should remand the case to the agency with appropriate instructions.⁵¹ But she concludes: "The court probably should avoid importing its interpretation of international law into its decision in derogation of deference to the agency."⁵²

ii. URAA

The Force of WTO Agreements. The specific provisions in the URAA seem even more important as justification for muting *Charming Betsy* in trade remedy cases. Given that *Charming Betsy* is only a canon of construction for interpreting federal statutes, Congress clearly has the power to override it and seems to have done so in the URAA. Two provisions are particularly relevant: Section 102(c)⁵³ (quoted

48. See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

49. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 326(2) (1987) (and the cases cited in the Comments thereto).

50. See, e.g., *Hyundai Electronics Co. v. United States*, 53 F. Supp. 2d 1334 (CIT 1999).

51. Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 FORDHAM INT'L L.J. 1533, 1544 (2001).

52. Restani & Bloom, *supra* note 51, at 1543.

53. 19 U.S.C. § 3512(c) (2000).

immediately below) and section 123(g)⁵⁴ (describing the mechanisms to handle agency compliance with WTO dispute settlement rulings; also quoted in part, further below).

URAA section 102(c)(1) provides:

No person other than the United States

- (A) shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
- (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.⁵⁵

Certainly Subpart (B) above could be read as barring all indirect effect for WTO agreements. The Statement of Administrative Action, which Congress endorsed as an authoritative interpretation of the URAA,⁵⁶ seems to support that conclusion. The SAA says of section 102(c):

The provision also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds *such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Uruguay Round agreements.*⁵⁷

This statement surely undercuts the *Charming Betsy* doctrine; Commerce, for example, does *not* have to exercise its "discretionary authority" to interpret the antidumping statute in line with the Antidumping Agreement. The SAA goes on to clarify that the Executive Branch does not interpret 102(c) to bar arguments to the *agencies themselves* urging that they conform their actions to WTO requirements.⁵⁸ What seems intended is that *courts* not *order* agencies to reach this result in the exercise of agency discretion.

54. *Id.* § 3533(g).

55. *Id.* § 3512(c)(1).

56. *Id.* § 3512(d).

57. H.R. Doc. No. 103-316, at 676 (1994) (emphasis added).

58. The SAA includes the following statement: "The prohibition of a private right of action based on the Uruguay Round agreements . . . does not preclude any agency of government from considering, or entertaining argument on, whether its action or proposed action is consistent with the Uruguay Round agreements although any change in agency action would have to be authorized by domestic law." *Id.* at 676. The last point concerning domestic law authority presumably means that the relevant statutory provision must be ambiguous and that an agency interpretation of such an ambiguous provision to conform to the requirements of a WTO agreement must be at least a reasonable interpretation of the statutory provision.

Despite the plausibility of this reading of the URAA and the SAA, the Federal Circuit Court of Appeals in *Timken* gave a narrower construction to section 102(c).⁵⁹ In *Timken* the government argued that 102(c) completely precluded all *Charming Betsy* claims. The *Timken* court disagreed and found in effect that 102(c) barred only claims based directly on WTO law as a rule of decision.⁶⁰ Thus, in principle the *Charming Betsy* indirect effect doctrine survived. In the end, however, as we have seen, the *Timken* court gave decisive force to *Chevron* deference and treated *Charming Betsy* as a relatively unimportant after thought. Thus it let stand an agency interpretation seemingly at odds with the WTO and reached the result, at least, that the government urged.

As long as the *Timken* construction of 102(c) holds,⁶¹ litigants may still try to persuade a court to employ *Charming Betsy* to override an agency's statutory interpretation, particularly if it contravenes a WTO agreement. Nevertheless, as we have seen, no litigant has yet succeeded.⁶²

The Force of WTO Panel and Appellate Body Decisions. URAA section 123(g) is arguably even clearer in rejecting any "adjudicatory" force within the U.S. legal system for WTO panel and Appellate Body rulings.

Section 123(g)(1) provides:

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until . . . [there follows a list of requirements including, among others, consultation with Congressional committees, non-federal government officials and private sector representatives respecting whether and, if so, in what manner to implement the decision.]⁶³

The statute plainly contemplates a political process in which the Executive Branch decides whether to implement WTO rulings based on

59. *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004).

60. *Id.* at 1341.

61. In a more recent decision, again involving "zeroing," *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (C.A. Fed. 2005), the Federal Circuit Court of Appeals upheld *Timken* and emphasized that Congress provided for a political process to decide whether to conform U.S. law to a WTO ruling. Although the *Corus* court did not rely on section 102(c), its reasoning seems indistinguishable from a holding that would have done so to bar a litigant from even raising an indirect effect argument.

62. Of course a litigant did succeed not in a court, but in the limited circumstances of the NAFTA binational panel *Softwood Lumber* decision. See *supra* note 44 and accompanying text.

63. 19 U.S.C. § 3533(g)(1) (2000).

consultations with the relevant Congressional committees and private sector interest groups. Implementation in any particular case could require new legislation or simply a change in agency interpretation of existing law. Any change in agency interpretation would have to be prospective, unless the President specifically determines that an earlier implementation date is in the national interest.⁶⁴ In the case of trade remedy law, specifically antidumping and countervailing duty law, a change can only be prospective.⁶⁵

Plainly these procedural requirements have substantive implications, namely that a court may not order an agency to adjust its interpretation of an ambiguous statute to conform to a WTO ruling. How could a court issue such an order in the face of an explicit statutory instruction *prohibiting* an agency from making such a change until a specific political process has been invoked? Moreover, in the case of antidumping and countervailing duty law, the URAA spells out the need for the Trade Representative's written request for change⁶⁶—an action implicitly predicated upon a politically motivated exercise of discretion.

Certainly if this is so for a WTO dispute settlement ruling specifically addressing a U.S. agency practice, *a fortiori*, the URAA would seem to disallow giving adjudicatory force to a WTO dispute settlement ruling not involving the United States as a respondent. Moreover, WTO dispute settlement rulings do not have strict *stare decisis* effect.⁶⁷ About the most one could argue for, I believe, is that a court could look to the reasoning and analysis of WTO panel and Appellate Body rulings to inform its own interpretation of a WTO agreement, if that were relevant, or of corresponding language in a federal statute.

64. *Id.* § 3533(g)(2).

65. *Id.* § 3538(b)-(c). 19 U.S.C. § 3538(a) also sets out a special procedure when an ITC determination is involved, presumably because of its status as an independent regulatory agency. First, if the Trade Representative so requests, the ITC must decide whether it has the statutory authority to conform its decision to the WTO panel or Appellate Body findings. If it decides that it does, and the Trade Representative further so requests, the ITC must bring its action into line with the WTO findings. Before making any such request for ITC compliance, however, the Trade Representative must consult with the congressional committees. *Id.* § 1338(a)(3)-(4). Again, a political decision is plainly contemplated.

66. *Id.* § 3538(b)(2).

67. *See* DSU art. 3(2); JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 265 (4th ed. 2002) (“While strict notions of ‘stare decisis’ do not apply in the WTO, it is clear that prior cases do play an important role in dispute settlement. . .”).

iii. Absence of an Unambiguous Obligation to Implement WTO Rulings

Finally, and most tellingly, the WTO Dispute Settlement Understanding (DSU) is extraordinarily ambiguous concerning whether a member has an international law obligation to bring its law into conformity with an adverse WTO ruling. Certainly, if there is no such conformity obligation, it would be strange indeed for a domestic court to rely on such a ruling to control agency interpretation of a U.S. statute. John Jackson has noted, that whether an agreement contains a conformity obligation is critical for legal systems that would give direct effect to international agreements.⁶⁸ It is also central to the question of *indirect effect*. If a member state has no international law obligation to conform its law to WTO rulings, why should that member's courts require agencies to interpret ambiguous domestic statutes to conform to such rulings?

On the question whether the DSU contains a conformity obligation, one can find thorough, insightful, and persuasive legal writing arguing both sides.⁶⁹ Without rehearsing all the arguments, I am personally inclined to the negative view (absence of a "hard law" conformity obligation) for several reasons.

One of the strongest arguments *for* the conformity obligation lies in the explicit DSU provision holding that there is no such obligation in a *non-violation* case.⁷⁰ While one might expect the converse to be true, i.e., that a conformity obligation emerges in a *violation* case, the DSU

68. See John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation To Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 117 (2004).

69. The legal literature contains an unusually thorough debate on whether member states must change domestic law to conform to WTO dispute settlement rulings. For arguments that international law requires members to conform local law to those rulings, see, e.g., Jackson, *supra* note 68, at 117; Marco C.E.J. Bronckers, *More Power to the WTO?*, 2001 J. INT'L ECON. L. 41, 60-61 (2001); John H. Jackson, *The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 62-3 (1997).

For the opposite view, see, e.g., Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organisation*, 31 J. LEGAL STUD. 179, 189 (2002) ("The system thus allows violations to persist as long as the violator is willing to pay that price."); Alan O. Sykes, *The Remedy for Breach of Obligations Under the WTO Dispute Settlement Understanding: Damages or Specific Performance?*, in MARCO BRONCKERS & REINHARD QUICK, *NEW DIRECTION IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 347, 357 (2000) ("The suggestion that this non-compliance option [i.e., with WTO rulings] is 'illegal,' in my view, is at odds with both the legal structure and the economic logic of the dispute settlement process."); Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AMER. J. INT'L L. 416 (1996).

70. See DSU art. 26(1)(b) ("[W]here a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure.").

nowhere states such a straightforward, “hard law” conclusion. Instead it seems studiously to avoid stating it. Assuming this omission was deliberate, as I think we should, what follows? Should we not then confine the implied converse conformity obligation to one that is at most hortatory, i.e., one intended to influence the exercise of political discretion but not one commanding “hard law” results.

One can point to other support in the DSU for this hortatory interpretation. After all, the DSU says that a member state is *recommended*, to bring its law into conformity, not *ordered* or *required* to do so.⁷¹ It is true that alternatives to full conformity, such as offering compensatory concessions or tolerating retaliation, are plainly stated to be “not preferred” and “temporary.”⁷² Nevertheless, the DSU nowhere says when this state of temporariness must end. Without such a “hard law” ending date for the permitted “temporary” measures, are we not left with a mere “hortatory” obligation to bring one’s law into conformity (at some indefinite point in the future).

True, WTO Agreement article XVI(4) says: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.” But the Dispute Settlement Understanding is itself one of those “annexed Agreements.” Hence the question remains what those “obligations” are. One can easily read the Dispute Settlement Understanding as imposing an “either-or” obligation. Either a member state must bring its law into conformity, or if it does not, then it must provide satisfactory compensatory concessions or tolerate retaliatory action. Perhaps it could be added that if a member state chooses not to bring its domestic law into conformity with the ruling, it faces a continuing “hortatory” obligation to end the temporariness of this “not preferred” state of affairs—but it is not under a “hard law” legal obligation to do so.

Again one can agree that panel and Appellate Body decisions are “binding” (in contrast to the previous GATT system) without at the same time equating “binding” with specific performance. The result could be

71. See *id.* art. 19(1) (“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall *recommend* that the Member concerned bring the measure into conformity with that agreement. . . .” (emphasis added)).

72. See *id.* art. 22(1) (“[N]either compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.”); *id.* art. 22(8) (“The suspension of concessions or other obligations shall be temporary and shall be applied only until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. . . .”).

binding in the sense that a contract is “binding,” but does not necessarily have to be performed as long as the obligor is willing to pay damages. A persuasive body of writing argues that WTO commitments are best understood as reciprocal and contingent and that notions of “efficient breach” infuse the understandings captured in the agreements⁷³—all the more so, in fact, if one reads the agreements in light of the understandings that prevailed under GATT.

What do I mean by this last point? GATT, the WTO’s predecessor institution, emphasized soft-law, political and diplomatic solutions to disputes, seeking to accommodate the *real politic* forces of member state internal politics.⁷⁴ With this in mind, one could argue that the WTO should be presumed to have retained the political-diplomatic “ethos” of GATT, except where the new agreement spells out *unambiguously* that it is breaking with the past in this respect. Thus, the very ambiguity of the DSU provisions seems to me to cut against the notion that there is now an international law obligation for a member state to conform its law to a WTO ruling—given that there never was such an obligation under the GATT. For the purposes of indirect effect, the point might be put more forcefully. Unless the agreement clearly demands that a member conform local law to a dispute settlement ruling, courts have no business inserting themselves into the political give-and-take to effect hard-law results where the political flexibility of soft-law was intended.

In sum, U.S. courts give no direct effect and little, if any, indirect effect to WTO law within the U.S. legal system. But this wall of separation between WTO law and the U.S. legal system is paradoxical. The next Part draws on political-economic and public choice theory to explain that paradox.

III. THE LACK OF WTO DIRECT EFFECT—A POLITICAL-ECONOMIC (PUBLIC CHOICE) EXPLANATION

Wherein lies the paradox? On one hand, political interest groups within the United States, presumably export-oriented industries and importers, had the organizational wherewithal, self-interest, and, most importantly, political clout to persuade Congress that a more “adjudicatory” and binding dispute settlement process was a top priority in negotiating the Uruguay Round agreements. These interest groups

73. See Schwartz & Sykes, *supra* note 69, at 179; Sykes, *supra* note 69, at 347.

74. Robert E. Hudec, *The New WTO Dispute Resolution Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 4 (2000) (“[D]uring the first thirty years of GATT history, roughly 1948-1978, the GATT disputes procedure did exhibit a distinctly diplomatic character.”).

were apparently dissatisfied with the GATT's largely exhortatory dispute settlement system, under which a respondent could block the formation of a panel or simply reject its final decision. The SAA in fact attributes the U.S. insistence on a more adjudicatory system to frustration within the country (particularly for agricultural exporters) over successful GATT panel decisions that were not implemented. In particular the SAA mentions cases against the European Community involving oilseeds, citrus, and pasta that led only to extended standoffs when the Community rejected GATT panel rulings.⁷⁵ Presumably, export-oriented industries concluded that market access commitments from foreign governments were undercut by the absence of binding, adjudicatory enforcement procedures.

On the other hand, as we have just seen, when the Congress approved the Uruguay Round Agreements, including the new, more adjudicatory, rules-oriented and binding dispute settlement system, it also insisted on an almost impenetrable barrier cordoning off the WTO from the domestic U.S. legal system: WTO agreements are given no direct effect; private parties in domestic litigation may not base claims or defenses on the WTO agreements; and even indirect effect is severely circumscribed and subordinated to political processes.

Though no one would have expected the United States to adopt direct effect unilaterally, certainly *mutual* direct effect could have been a valuable negotiating objective. If export-oriented private interests wanted meaningful rules, subject to adjudicatory enforcement, why did they not seek a regime of mutually agreed and implemented direct effect, whereby private beneficiaries of market-opening commitments can discipline breaches through rule-of-law procedures in local courts? Why did they settle instead for a toughened adjudicatory process at the WTO level alone that still provides no assurance the result will be honored? The discussion below offers three explanations: (i) dispersed exporter support for a direct effect regime; (ii) strong and focused import-competing opposition to any such regime; and (iii) elected-official preference for a flexible regime inclined more toward *managed* than unqualified *liberal* trade.

Turning first to exporters, they presumably share a generalized interest in giving direct effect to WTO agreements. Such a regime would encourage countries to honor their market opening commitments. At the same time, however, no individual exporter, or small group of exporters, has a particularized interest in this result. In other words, a collective

75. See H.R. Doc. No. 103-316, at 1034 (1994).

action problem emerges. No single or small group of exporters is willing to invest the necessary lobbying resources to achieve the collectively desired outcome, at least not when the costs would be high (because of the anticipated truculence of opposing interests).⁷⁶

Secondly, concerning the import competing opposition, experience shows that it would be vehement, especially in defending trade remedy laws against direct effect.⁷⁷ For import-competing interests, trade remedy laws are a front line of defense. Even were trade negotiators to bargain away all overt protectionism (zero tariffs, zero quantitative restrictions, and nondiscriminatory internal taxation and regulation), domestic industries could still fall back on antidumping, countervailing, and safeguard duties for protection. These trade remedy regimes are legal under WTO rules. And because the public does not understand such measures to be protectionist—to the extent that this matters—officials are permitted to favor free trade and “fair” trade in the same breath. WTO rules nevertheless pose a potential threat, at least to *robust* enforcement of trade remedy law. The basic thrust of the rules is to curtail excessively protectionist *administration* of these laws. But even this runs against the interest of import-competing industries. They are united in opposing that curtailment, and industries that are frequent users of trade remedy law have a strong and particularized interest in lobbying against such curtailment.

From that perspective import-competing industries are strongly opposed to direct effect for WTO rules that seek to cabin protectionism. The negotiated rules themselves inevitably contain ambiguities. If direct effect is excluded, those ambiguities can be exploited in the political process required for implementing legislation.

Direct effect for panel and Appellate Body decisions would pose an even greater threat to trade remedy law. Domestic application of trade remedy rules through agency action and deferential court review still holds open avenues for the exertion of political pressure—especially through the agencies. Panel and Appellate Body decisions at the WTO level would be insulated from such influence. Some commentators have complained that WTO decisions in this area have in fact failed to honor the carefully negotiated WTO rules requiring panel deference to

76. As one practicing trade lawyer described the situation to the author, direct effect is on the lobbying list of all major exporters, but it is “number 10” on their lists. It does not rise to the top priority category and hence is not really taken seriously. Interview with Gary Horlick, Wilmer Cutler, & Pickering, Washington, D.C.

77. Interview with Kenneth Freiberg, Deputy General Counsel in the Office of the United States Trade Representative.

domestic agency decisions.⁷⁸ Whether or not such claims are exaggerated, no one seems to doubt that the general thrust of WTO trade remedy rulings has been to curtail protectionism. Clearly, import competing industries would not want those rulings to have direct effect.

The importing competing opposition to direct effect would also be buttressed by other interests. Environmentalists, for example, ever distrustful of the WTO, would surely see direct effect as anathema and could be counted on to lobby mightily against it.

The third factor concerns the self-interest of elected government officials. Here public choice theorists have consistently noted the advantages elected officials gain from a flexible, soft-law, non-direct-effect WTO regime. Senators and Representatives will decry the loss of sovereignty brought about by direct effect, but sovereignty does not really seem at issue. In a number of settings U.S. courts apply law taken from other legal systems, including customary international and treaty law, as a rule of decision without sovereignty being compromised.⁷⁹ And even were Congress to grant the WTO direct effect, that grant would always be revocable through subsequent legislation. The same would hold for any legislation attempting to grant WTO law supremacy within the U.S. legal system—however inconceivable in today's world. Moreover, as John Jackson has pointed out,⁸⁰ the increasingly interdependent, globalized world itself impinges most severely on national sovereignty, because no one nation, no matter how powerful, can achieve its ends unilaterally. Bilateral and multilateral agreements—which entail constraint—are essential to national goals.

If not concern over loss of sovereignty, then what does motivate elected officials to oppose direct effect? Public choice theory points to the preference of officials for a flexible regime that allows them to maximize their own political support by being able to appeal to both sides of the liberal trade/protectionist divide. Thus, they can negotiate and vote for liberal trade agreements that advantage exporters, and at the same time insist on retaining the option to renege on their own reciprocal commitments in the face of intense protectionist pressure at home. The Dispute Settlement Understanding seems to capture this Janus-faced intent through provisions that do not spell out unequivocally an international law obligation to conform domestic law to WTO rulings.

78. See Tarullo, *supra* note 21, at 109.

79. See generally Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 *LOY. L.A. L. REV.* 239 (2003).

80. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 *AM. J. INT'L L.* 782, 802 (2003).

As Warren Schwartz and Alan Sykes have argued, this aspect of the WTO regime parallels the efficient breach concept in U.S. contract law theory.⁸¹ Their discussion suggests that the breach or failure to conform domestic law is efficient in the sense of maximizing the joint welfare of elected officials on both sides of the dispute.⁸² The obligation is still “binding” in the sense that a contract is binding. The breaching party must pay damages, in the form either of substituted, but equally valued, trade concessions, or a willingness to suffer retaliatory trade restrictions without counter-retaliating. Note that politicians’ support for vigorous trade remedy laws follows a similar logic in allowing regulatory escape from market access commitments through antidumping, countervailing, and safeguard protectionism.⁸³

Automatic internal applicability of WTO agreements and especially of rulings would thwart elected officials’ desire for flexibility. Presumably the stronger the direct-effect regime contemplated, the stronger would be the disinclination of officials to adopt it. A weak regime—for example, the current U.S. model (“binding” dispute settlement having no direct effect and only muted indirect effect)—invites less opposition and carries a number of other advantages. One would be the exhortatory usefulness of a large, elaborately reasoned, and sophisticated body of case law interpreting WTO rules, but not requiring immediate or strict compliance. For the sake of maintaining an effective world trading system member state executives face pressure to conform local law—or at least to seek that conformity from the legislature—but delay or complete refusal is acceptable when the political costs of compliance are too great—greater, for example, than the political costs of alternative trade concessions or retaliatory trade restrictions abroad. Another advantage is the encouragement such a system gives to negotiating officials to take risks on new liberalizing commitments.

81. Schwartz & Sykes, *supra* note 69, at 179. For a contrary view, see Jackson, *supra* note 68, at 117; Bronckers, *supra* note 69, at 59-61; see also Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 246-50 (2005) (arguing for specific performance as the proper WTO dispute settlement remedy).

82. For example, conforming domestic law in *A* could cost official *X* in country *A* (importing country) 10 units of lost political support while benefiting official *Y* in country *B* (exporting country) only 2 units. If country *A* fails to conform its law, official *X* gains 10 units of political support while official *Y* loses only 2. Thus, the joint welfare of the two officials taken together is higher in the second scenario than in the first.

83. Concerning the safeguard law in particular, see Alan Sykes, *Protectionism as a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

In sum, the paradoxical U.S. *support* for binding dispute settlement coupled with *opposition* to direct effect (even to indirect effect) can be explained by three factors: (i) collective action problems for exporters (ii) vehement opposition to direct effect from import-competing interests and environmentalists and (iii) preferences of elected officials for flexible “soft-law” commitments allowing them to optimize political support at home. If this analysis is correct, the prospects within a future multilateral negotiating round for loosening the U.S. quarantine of WTO law would not seem bright.⁸⁴

84. For further analysis and discussion of this last point, see John Barceló, *The Status of WTO Rules in U.S. Law*, in *RETHINKING THE WORLD TRADING SYSTEM* (John Barceló & Hugh Corbet eds., forthcoming 2006) (for a longer version of this Article).