ZEROING IN ON *CHARMING BETSY*: HOW AN ANTIDUMPING CONTROVERSY THREATENS TO SINK THE SCHOONER

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I. INTRODUCTION

Antidumping law has been referred to as the "third rail" of United States trade policy.[1] With American political rhetoric overwhelmingly equating the imposition of harsher antidumping duties with the expansion of fair trade,[2] dumping issues have played a major role in the negotiation of virtually every modern international trade agreement.[3] In most circumstances, the

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1. N. Gregory Mankiw & Philip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, 84 For. Affairs 107, 107 (2005). Because of the extremely complex nature of antidumping statutes and disputes, few economic or political leaders are willing to address the problems within this highly volatile area of international trade law. *Id.*

2. *Id.* at 107–108. For example in 2005, seven of nine newly elected United States Senators publicly endorsed antidumping lawsuits, claiming that antidumping statutes guarantee fair and competitive international trade. *Id.*

3. *See* William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. Intl. Econ. L. 17, 26 (2005) (recognizing the importance the United States placed on making sure that the WTO dispute settlement system would not "impinge on the discretion of administrative authorities" in the imposition of antidumping duties).

United States has succeeded in protecting the power of its administrative agencies, particularly the Department of Commerce, to investigate instances of alleged dumping and to levy antidumping duties on those foreign producers that sell goods in the United States for less than fair value.[4] However, in recent years the conflict over zeroing, a controversial methodology the Department of Commerce uses in the calculation of dumping margins, has garnered increasing attention in both United States courts and international dispute resolution fora.[5]

In the United States, the source of domestic antidumping law is the Tariff Act of 1930.[6] Dumping is defined as "the sale or likely sale of goods at less than fair value."[7] The Department of Commerce[8] determines whether a product is being dumped on the United States market by calculating a dumping margin, defined as "the amount by which the normal value exceeds the export price . . . of the subject merchandise."[9] In other words, under United States law, dumping occurs when a product is sold in the United States for less than it is sold for in its home market, or if it

4. *E.g. id.* at 26 (noting that the United States does not yet appear to have been "noticeably constrained" in the exercise of administrative discretion under the WTO).

5. *See* Gregory Husisian, *When a New Sheriff Comes to Town: The Impending Showdown between the U.S. Trade Courts and the World Trade Organization*, 17 St. John's J. Leg. Comment. 457, 465–466 (2003) (highlighting the zeroing controversy as one of the contemporary issues in which the free trade principles of the World Trade Organization (WTO) are on a "collision course" with United States protectionism). For a detailed discussion of how the issue has been treated by United States courts, the WTO Dispute Settlement Body, and NAFTA dispute resolution panels, see *infra* Part II(B).

6. 19 U.S.C. §§ 1202–1677n (2000). For a complete discussion of United States antidumping law, see generally Peter D. Ehrenhaft, *Remedies against Unfair International Trade Practices* (ALI-ABA Course of Study Materials, Fundamentals of Intl. Bus. Transactions Course No. SL037, Sept. 29–Oct. 1, 2005) (available at Westlaw, SL037 ALI-ABA 177). The author outlines the process by which antidumping duties are imposed under United States law. *Id.*

7. 19 U.S.C. § 1677(34).

8. Authorities other than the Department of Commerce may have power to investigate antidumping claims but, for purposes of simplicity, the Author will refer to all United States antidumping investigations as being undertaken by the Department of Commerce. *See* 19 U.S.C. § 1673a(a)(1) (providing that an antidumping duty investigation may be initiated by an "administering authority"); 19 U.S.C. § 1677(1) (defining "administering authority" as "the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out duties of the administering authority under this subtitle are transferred by law").

9. 19 U.S.C. § 1677(35)(A).

has no home market, for less than its otherwise determined "normal value."[10]

Though a foreign producer may engage in dumping for various semi-legitimate reasons,[11] "predatory dumping" is the target of current antidumping laws.[12] By selling a product at a very low price in a market, a foreign producer can drive out its domestic competition and then raise its originally low price to a much higher price with impunity.[13] Other seemingly unaffected sectors of the domestic economy may also be negatively impacted by the "false economic signals" being sent by the influx of high-volume, low-priced goods into a previously stable market.[14] Therefore, while the availability of low-priced goods may be advantageous to the consumer for at least a while, it is inexorably detrimental to competing domestic industry. To protect domestic industry from

10. *See* 19 U.S.C. § 1677b(a)(1)–(3) (setting forth specific criteria for the calculation of normal value in antidumping investigations); 19 U.S.C. § 1677b(a)(4) (allowing for the use of a mathematically calculated "constructed value" if the investigating authority cannot determine normal value by employing any of the other methods listed).

11. Short-term dumping may be an attempt by the foreign producer to relieve itself of a temporary oversupply and long-term continuous dumping may be an attempt to reap the benefit of a larger-scale industry, market, or economy. Frances Chang, Student Author, *Arguing Both Sides: Positional Conflicts of Interest in Antidumping Proceedings*, 19 Geo. J. Leg. Ethics 583, 584 (2006) (citing Joseph E. Pattison, *Antidumping and Countervailing Duty Laws* §§ 1:2–1:5 (West 2005)).

12. *Id.* However, in application, antidumping law can rarely distinguish between predatory and other forms of dumping, leading some commentators to argue that antidumping laws are "economically inefficient." *E.g.* Alice Vacek-Aranda, *Sugar Wars: Dispute Settlement under NAFTA and the WTO as Seen through the Lens of the HFCS Case, and Its Effects on U.S.–Mexican Relations*, 12 Tex. Hispanic J.L. & Policy 121, 127–128 (2006).

13. Chang, *supra* n. 11, at 584–585. The ideas of monopoly and price discrimination that have their origin in antitrust law are often implicated in the international trade arena and, as such, have led to domestic antidumping law being described as a "curious hybrid of traditional tariff ideas and price discrimination theories of the antitrust laws." Louis Altman & Rudolf Callmann, *Callmann on Unfair Competition, Trademarks, and Monopolies* § 7:30 (West 2006) (quoting Jacob Viner, *Dumping: A Problem in International Trade* (U. Chi. Press 1923)). However, any attempt to analogize antidumping and antitrust law breaks down because, according to an Ohio federal court, the "whole premise" of antitrust law "is that low prices are the healthy, driving mechanism of fair competition," while dumping is a "practice which may, through *government*, as opposed to market-driven action, cause sharp increases in imported goods, to the detriment of domestic producers." *Id.* (quoting *Wheeling-Pitts. Steel Corp. v. Mitsui & Co.*, 35 F. Supp. 2d 597, 604 (S.D. Ohio 1999)).

14. *See* Vacek-Aranda, *supra* n. 12, at 128 (highlighting the view of many United States practitioners that antidumping laws are an effective trade management tool because they act as an "economic barometer" that "provide signals as to how to respond to allow companies to engage in strategic planning").

this type of harm at the hands of foreign manufacturers, antidumping laws allow for the imposition of a duty on dumped goods, theoretically compensating for the lower price at which the goods are being sold.[15]

Most international trade agreements also contain antidumping provisions and regulations. For World Trade Organization (WTO) member nations, the provisions of the WTO agreements[16] expressly condemn dumping that "causes or threatens material injury to an established industry . . . or materially retards the establishment of a domestic industry" in another member nation.[17] These agreements also provide specific criteria for member nations to follow in order to determine the existence of an unfair trade practice[18] and to impose and collect compensatory duties.[19] The North American Free Trade Agreement (NAFTA) takes a slightly different approach and states that "[e]ach Party reserves the right to apply its antidumping law . . . to goods imported from the territory of any other Party."[20] As both a WTO member nation

15. *Fed. Mogul Corp. v. U.S.*, 63 F.3d 1572, 1575 (Fed. Cir. 1995). It is important to note that, despite the language used in many discussions of unfair trade practices, under United States law, dumping is not "illegal." Rather, it merely triggers "the imposition of equalizing customs duties, although these added duties may be so high as to effectively prevent further imports." Ehrenhaft, *supra* n. 6, at 181.

16. The body of international law generally referred to as the "WTO agreements" encompasses many multilateral trade agreements that have arisen out of multiple rounds of trade negotiations. The WTO was officially formed in 1995 and its founding document incorporated by reference the provisions of multiple existing agreements related to various facets of international relations. *Agreement Establishing the World Trade Organization* annex 1 (Apr. 15, 1994) (available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) [hereinafter *WTO Agreement*]. The General Agreement on Tariffs and Trade 1994 governs trade in goods. *The General Agreement on Tariffs and Trade 1994* (Apr. 1994) (available at http://www.wto.org/English/docs_e/legal_e/06-gatt.pdf) [hereinafter *GATT 1994*] (specifically incorporating the provisions of the original GATT, *The General Agreement on Tariffs and Trade* (Oct. 30, 1947) (available at http://www.wto.org/English/docs_e/legal_e/gatt47_e.pdf) [hereinafter *GATT 1947*]). A separate agreement also governs antidumping issues specifically. *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* arts. 2–3 (Apr. 1994) (available at http://www.wto.org/English/docs_e/legal_e/19-adp.pdf) [hereinafter *Antidumping Agreement*]. All of these agreements are binding on all WTO member nations. *WTO Agreement*, *supra* n. 16, at art. II(2).

17. *GATT 1947*, *supra* n. 16, at art. VI(1).

18. *Antidumping Agreement*, *supra* n. 16, at arts. 2–3.

19. *Id.* at art. 9.

20. *North American Free Trade Agreement* art. 1902 (Dec. 17, 1992) (available at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78) [hereinafter *NAFTA*]. NAFTA also provides that dumping by third-party nations should be addressed by member nations in accordance with the terms of the WTO Antidumping Agreement. *Id.* at art. 317(1).

and a NAFTA signatory, the United States must consider the applicable provisions of those agreements and satisfy the statutory requirements of domestic antidumping law. It is within this context of "interlocking domestic and international [antidumping] legal regimes"[21] that the zeroing controversy has developed.

In general, zeroing is a methodology used by the Department of Commerce[22] in the calculation of the weighted average dumping margin for a foreign producer's exports to the United States.[23] The defining characteristic of a zeroing scheme is that sales in the domestic market made at or above fair value are treated as having a zero percent dumping margin rather than a negative dumping margin.[24] Thus, when those sales are averaged with other sales by the same foreign producer made at less than fair value (dumped sales or sales with a positive dumping margin), the overall margin of dumping is significantly higher and usually results in the imposition of antidumping duties.[25]

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21. James Thuo Gathii, *Insulating Domestic Policy through International Legal Minimalism: A Re-Characterization of the Foreign Affairs Trade Doctrine*, 25 U. Pa. J. Intl. Econ. L. 1, 3 (2004).

22. Zeroing is a "common practice of investigating authorities" and is utilized by investigating authorities other than the United States Department of Commerce. Jon R. Johnson, *Harmonization of Rules of Origin and Developments in Antidumping*, 16 SPG Intl. L. Practicum 74, 76 (2003); *see generally European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *E.C.–Bed Linen* (AB Report)] (reviewing the European Communities' use of zeroing in the assessment of antidumping duties).

23. The specific mathematical methodology employed under a zeroing scheme varies according to the factual circumstances of a particular antidumping investigation and the characteristics of the products under investigation. *See European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, WT/DS141/R ¶ 3 (Oct. 30, 2000) [hereinafter *E.C.–Bed Linen* (Panel Report)] (describing the zeroing methodology at issue as a comparison between product models); *United States—Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R ¶ 64 (May 18, 2004) [hereinafter *U.S.–Softwood Lumber*] (describing the zeroing methodology at issue as a comparison between "sub-groups of identical, or broadly similar, product types"). Ordinarily, a reviewing body reviews a particular methodology as applied in the antidumping investigation at issue. *See id.* at ¶ 63 (noting that the Appellate Body's determination reaches only the particular methodology at issue and not the question of whether zeroing may or may not be used in the context of other methodologies). For purposes of this Comment, the author will refer to all methodologies applying the defining characteristics of a zeroing scheme as "zeroing" generally.

24. *SNR Roulements v. U.S.*, 341 F. Supp. 2d 1334, 1344 (Ct. Intl. Trade 2004).

25. *See* James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization's DSB Decisions*, 34 Ga. J. Intl. & Comp. L. 1, 10 (describing the zeroing methodology as having the effect of "inflating the margin of dumping"); Ehrenhaft, *supra* n. 6, at 188 (noting that "zeroing has the effect of increasing dumping margins

For example,[26] if a foreign manufacturer has one sale that is ten percent above normal value (the product at issue is *not* being dumped) and one sale that is ten percent below normal value (the product at issue *is* being dumped), ordinary mathematics would suggest that the two margins would cancel each other out and yield a net dumping margin of zero percent. However, under a zeroing methodology, the sale made above normal value is assigned a zero margin rather than a margin of negative ten percent. The averaging process then yields a net dumping margin of five percent. This positive margin triggers the imposition of antidumping duties,[27] perhaps requiring the exporter to pay a cash deposit on all shipments into the investigating authority's domestic market.[28]

Proponents of the zeroing methodology point to numerous policy arguments to justify its introduction of a potentially significant statistical bias into the calculation of dumping margins.[29] Most notably, they argue that without zeroing, a foreign producer who exports multiple products to the United States would be able to "mask" significant dumping of one product simply by making other sales at fair value in the hope that the respective dumping margins of both products would cancel each other out.[30] Opponents of the practice decry it as inherently unfair and, in some cases, the functional equivalent of the punitive imposition of a trade duty.[31]

This Comment will begin by tracing the history of the zeroing controversy in both domestic and international dispute resolution fora and highlighting the disparity between its treatment by

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on almost every case").

26. For a graphical example of the potential consequences of employing a zeroing methodology, see Ehrenhaft, *supra* n. 6, at 177–178.

27. 19 U.S.C. § 1673.

28. *See* 19 U.S.C. § 1673(e)–(f) (detailing the process by which antidumping duties are imposed and deposits collected).

29. *E.g. Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. U.S.*, 926 F. Supp. 1138, 1150 (Ct. Intl. Trade 1996) (discussing the policy implications of the statistical bias inherent in zeroing).

30. *Serampore Indus. v. U.S. Dept. of Com.*, 675 F. Supp. 1354, 1361 (Ct. Intl. Trade 1987) (holding that zeroing is permissible under United States antidumping law because it does prevent masked dumping). These and other policy justifications for zeroing are discussed in more detail in Part IV(A) *infra*.

31. *E.g. SNR Roulements*, 341 F. Supp. 2d at 1347 (discussing and rejecting the exporter's argument that zeroing is impermissible as a punitive measure).

United States courts and its treatment by the WTO and NAFTA dispute settlement regimes. This Comment will then examine the relevance of the *Chevron* and *Charming Betsy* standards[32] to the issue of zeroing. Finally, this Comment will conclude that a proper application of these principles of domestic law dictates that the United States Department of Commerce abandon its practice of zeroing negative dumping margins, in order to bring its trade practices into compliance with its international obligations under the WTO Antidumping Agreement and NAFTA. However, this Comment will also point out that, in light of the policy arguments in favor of the continued use of zeroing and the lack of enforcement power inherent in the international bodies that have condemned zeroing, the United States is likely to continue to employ a zeroing methodology in its antidumping proceedings in the future.

II. THE CONTEXT AND HISTORY OF THE ZEROING CONTROVERSY

Key to understanding the controversy surrounding the Department of Commerce's use of the zeroing methodology is an understanding of the international context in which the issue is debated. Since 1987, zeroing has been a topic of litigation in both domestic and international dispute resolution fora.[33] As a general rule, United States courts have consistently upheld the practice,[34] despite the fact that all other international bodies considering the issue have concluded that zeroing is an impermissible interpretation of international agreements.[35]

32. *Infra* pt. III(A)–(B).

33. *E.g. Serampore Indus.*, 675 F. Supp. at 1360–1361 (addressing the Department of Commerce's practice of offsetting sales made at less than fair value with sales made at fair value, though not referring to the practice as "zeroing"); *E.C.–Bed Linen* (Panel Report), *supra* n. 23 (addressing the European Communities' use of a zeroing methodology).

34. *E.g. Serampore Indus.*, 675 F. Supp. at 1360–1361 (holding that zeroing is a permissible interpretation of domestic antidumping law).

35. *E.g. U.S.–Softwood Lumber*, *supra* n. 23 (holding that zeroing, as applied by the United States Department of Commerce in the assessment of antidumping duties against imported Canadian lumber, was inconsistent with the Antidumping Agreement).

A. An Overview of Domestic and International Dispute Resolution Systems

In litigating any trade dispute, including contesting an agency decision in an antidumping case, the filing party has a choice of various fora in which to resolve the dispute.[36] These fora include (1) traditional judicial review in the United States Court of International Trade (CIT); (2) binational panels established under Chapter 19 of NAFTA[37] (assuming that the dispute involves nations that are parties to NAFTA); and (3) international panels convened under the dispute settlement provisions of the WTO Agreement[38] (assuming that the dispute involves WTO member nations).[39] A petitioner may also choose to litigate simultaneously before both a WTO panel and either the CIT or a NAFTA panel.[40] Litigation in each of these fora has specific advantages and disadvantages for the litigant[41] and, in most cases, the choice of forum dictates the body of law applicable to the resolution of the dispute.[42]

1. Judicial Review by the Court of International Trade

The Court of International Trade has exclusive jurisdiction over antidumping disputes that involve the United States.[43] An

36. For a comprehensive examination of choice-of-forum issues in antidumping disputes, see generally Elizabeth C. Seastrum & Myles S. Getlan, *The Globalization of International Trade Litigation: AD/CVD Litigation—Which Forum and Which Law?* 26 Brook. J. Intl. L. 893 (2001).

37. *NAFTA*, *supra* n. 20, at ch. 19.

38. *Understanding on Rules and Procedures Governing the Settlement of Disputes* (Apr. 1994) (available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm) [hereinafter *Dispute Settlement Understanding*].

39. In the WTO dispute resolution system, claims must be brought by member governments, not private parties. *Id.* at art. 1.

40. Once a party initiates review before a NAFTA panel, the CIT no longer has jurisdiction over the matter and can no longer adjudicate the "same administrative determination that is the subject of the NAFTA panel review." Lawrence R. Walders & Neil C. Pratt, *Trade Remedy Litigation—Choice of Forum and Choice of Law*, 18 St. John's J. Leg. Comment. 51, 53 (2002).

41. For a more detailed discussion of these consequences, see generally *id.*

42. For example, the CIT and NAFTA panels both apply United States law to the dispute. *NAFTA*, *supra* n. 20, at art. 1904.3. A WTO panel, however, does not apply domestic law but rather interprets the WTO Agreements. *Dispute Settlement Understanding*, *supra* n. 38, at art. 3.2.

43. 28 U.S.C. § 1581 (2000).

opinion issued by the CIT can be appealed to the Court of Appeals for the Federal Circuit (CAFC).[44] Both the CIT and the CAFC apply United States law and review an agency's determination to see if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law."[45] A final judgment from either the CIT or CAFC can result in direct relief for the prevailing party in the form of, for example, the revocation or reinstitution of an antidumping order or the reduction or increase in a dumping margin.[46] However, like most litigation in American courts, litigating a dispute in the CIT system takes a great deal of time.[47] The court itself is not subject to any statutory deadlines, and the process of appeal and remand at the judicial and administrative levels can take years.[48]

2. Dispute Resolution under NAFTA

If the dispute involves nations that are parties to NAFTA, the dispute may be resolved under the provisions of Chapter 19.[49] A NAFTA panel consists of five panelists, two of whom are selected by each party and one of whom is agreed upon by the parties.[50] The panel applies the "general legal principles" and standard of review that a court of the importing nation would apply to the review of a domestic regulatory agency decision.[51] In the case of imports to the United States, the standard of review is the same as that applicable to judicial review in the CIT—to "hold unlawful

44. 28 U.S.C. § 1295(a)(5) (2000).

45. 19 U.S.C. § 1516a(b)(1)(B)(i).

46. Walders & Pratt, *supra* n. 40, at 54.

47. *Id.* at 54–55.

48. *Id.*

49. *NAFTA*, *supra* n. 20, at ch. 19.

50. *Id.* at annex 1901.2(2)–(3). Each party may exercise four peremptory challenges to the opposing party's selection and if the parties are unable to reach agreement as to the panel roster, the panelists are selected by lot. *Id.* Panelists are chosen from a standing roster of candidates provided by each nation. *Id.* While nations are encouraged to include judges or former judges on the roster "to the fullest extent practicable," there is still a preference for attorney panelists, indicated by the requirement that "a majority of the panelists on each panel shall be lawyers in good standing." *Id.* The rosters for NAFTA panels are available online at http://www.nafta-sec-alena.org/DefaultSite/index_e/aspx?DetailID=615. *See also* Gustavo Vega-Canovas, *Disciplining Antidumping in North America: Is NAFTA Chapter Nineteen Serving Its Purpose?* 14 Ariz. J. Intl. & Comp. L. 479, 491–492 (1997) (discussing the potential for conflicts of interest created by the reliance on private individuals to serve as panelists).

51. *NAFTA*, *supra* n. 20, at art. 1904.3.

any determination, finding, or conclusion . . . unsupported by substantial evidence on the record, or otherwise not in accordance with the law . . . ."[52] Despite applying domestic law, the opinions of NAFTA panels have no formal precedential value in domestic courts.[53] In addition, the panel does not have the power to vacate agency determinations.[54] Rather, the panel can only "uphold a final determination, or remand it for action not inconsistent with the panel's decision."[55] This system often results in multiple remands although, in theory, the agency will eventually be forced to come into compliance with the panel decision.[56]

Panel decisions cannot be appealed in the absence of actions by the panel that threaten "the integrity of the binational panel review process."[57] Such misconduct triggers an Extraordinary Challenge Procedure,[58] which has only been invoked three times in the history of NAFTA.[59]

Strict deadlines govern the NAFTA panel review, and the entire process from panel selection to the issuance of a panel decision should theoretically not exceed 315 days.[60] However, this rule is "more in the breach than in the observance."[61]

3. Dispute Resolution under the WTO Agreement[62]

The Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) governs dispute resolution among WTO member nations.[63] Similar to

52. 19 U.S.C. § 1516a(b)(1)(B)(i).

53. Walders & Pratt, *supra* n. 40, at 55.

54. *Id.* at 56.

55. *NAFTA*, *supra* n. 20, at art. 1904(8).

56. Walders & Pratt, *supra* n. 40, at 56.

57. *NAFTA*, *supra* n. 20, at art. 1904(13)(b).

58. *Id.* at annex 1904.13.

59. *In the Matter of Gray Portland Cement & Clinker from Mexico*, ECC-2000-1904-01USA (Oct. 30, 2003); *In the Matter of Pure Magnesium from Canada*, ECC-2003-1904-01USA (Oct. 7, 2004); *In the Matter of Certain Softwood Lumber Products from Canada*, ECC-2004-1904-01USA (Aug. 10, 2005).

60. *See NAFTA*, *supra* n. 20, at art. 1904(14)(a)–(g) (delineating specific deadlines for each stage of the panel review process).

61. Walders & Pratt, *supra* n. 40, at 55.

62. For a more complete discussion of WTO dispute settlement, as well as an overview of the structure and functions of the WTO, see World Trade Organization, *Understanding the WTO*, http://www.wto.org, *select* The WTO, *select* What is the WTO? (accessed Oct. 3, 2005).

63. *Dispute Settlement Understanding*, *supra* n. 38.

the NAFTA system, WTO dispute resolution begins with the appointment of a three-member panel.[64] In considering the case, a panel must make "an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[65] Panel reports can be, and routinely are, appealed to the seven-member Appellate Body, three members of which hear each particular case.[66] Once a panel or appellate report has been published to all member nations, the Dispute Settlement Body adopts it, unless there is a consensus not to adopt it.[67]

A WTO panel seeks merely to determine whether the domestic agency determination under review is consistent with the Antidumping Agreement and does not interpret or apply the domestic law of any member nation.[68] For this reason, the WTO has no real power to ensure that a member nation complies with a panel or Appellate Body decision.[69]

B. The Disparate Treatment of the Zeroing Issue by United States Courts and International Bodies

The issue of zeroing has been litigated in each of the dispute resolution fora discussed above.[70] The CIT first upheld the prac-

64. *Id.* at art. 8(5). Though WTO panels typically have three members, a five-member panel is permitted upon agreement of the parties. *Id.* Panel members should be "well-qualified governmental and/or non-governmental individuals," including individuals who have "taught or published on international trade law or policy." *Id.* at art. 8(1).

65. *Id.* at art. 11.

66. *Id.* at art. 17(1). Each member of the Appellate Body is appointed by the DSB and serves a four-year term. *Id.* at art. 17(2). In contrast to WTO and NAFTA panel members, Appellate Body members must be "unaffiliated with any government." *Id.* at art. 17(3).

67. *Id.* at art. 16(4). *See also* Michael P. Tkacik, *Post-Uruguay Round GATT/WTO Dispute Settlement: Substance, Strengths, Weaknesses, and Causes for Concern*, 9 Intl. Leg. Persps. 169, 181 (1997) (discussing how the change to consensus voting under the WTO Agreement has improved the adoption of panel reports by reducing a party's ability to avoid implementing adverse reports simply by vetoing adoption of the report at the Dispute Settlement Body level).

68. Walders & Pratt, *supra* n. 40, at 67. The Dispute Settlement Body serves to "preserve the rights and obligations of Members under the [WTO Agreement]" and not to "add to or diminish [those] rights and obligations." *Dispute Settlement Understanding*, *supra* n. 38, at art. 3(2).

69. Walders & Pratt, *supra* n. 40, at 61–62. The power of a WTO panel or the WTO Appellate Body is limited to "suggest[ing] ways in which the Member concerned could implement the agreement." *Id.*

70. *E.g. Serampore Indus. Priv. Ltd. v. U.S. Dept. of Com.*, 675 F. Supp. 1354 (Ct. Intl. Trade 1987) (litigating the dispute in the CIT); *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, Decision of the

tice of zeroing in *Serampore Industries v. U.S. Department of Commerce*[71] in 1987. The court concluded that zeroing was permissible because it was a reasonable interpretation of the United States antidumping statute.[72] This holding was reaffirmed nearly a decade later in *Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. U.S.*[73] Significantly, unlike in *Serampore*, the court in *Bowe Passat* explicitly found that zeroing introduced a statistical bias into the calculation of dumping margins,[74] yet found the practice permissible nonetheless.[75] The court reasoned that because zeroing allowed the Department of Commerce to combat the practice of masked dumping,[76] a goal "consistent with the antidumping statute,"[77] the court should defer to the Department of Commerce's discretion in selecting methodologies appropriate to achieving its goals.[78]

The WTO Dispute Settlement Body first addressed in 2000 the issue of zeroing in antidumping duty determinations.[79] In *E.C.–Bed Linen*,[80] a WTO panel examined the European Communities' use of a zeroing methodology and concluded that its appli-

Panel, USA-CDA-2002-1904-02 (June 9, 2005) [hereinafter *Softwood Lumber* (NAFTA Panel)] (litigating a zeroing dispute under the NAFTA dispute resolution provisions); *U.S.–Softwood Lumber*, *supra* n. 23 (litigating a zeroing dispute before the WTO Dispute Settlement Body).

71. 675 F. Supp. 1354 (Ct. Intl. Trade 1987).

72. *Id.* at 1360–1361.

73. 926 F. Supp. 1138, 1150 (Ct. Intl. Trade 1996) (noting that the courts grant considerable discretion to the Department of Commerce's interpretation and administration of the antidumping statute).

74. *Id.* at 1149.

75. *Id.* at 1150. The court did note, however, that it would only defer to the Department of Commerce's methodology "[u]nless and until it bec[ame] clear that such a practice is impermissible or unreasonable." *Id.* Arguably, the WTO and NAFTA panel decisions since *Bowe Passat* make it sufficiently clear that such a practice is unreasonable and therefore should motivate domestic courts to declare zeroing not in accordance with the law.

76. *Id.* In discussing masked dumping, the court was referring to the phenomenon whereby, under a non-zeroing system, an exporter could get away with dumping one product simply by selling another product at greater than fair value and expecting that the dumping margins would cancel each other out. *Id.*; *see also Serampore*, 675 F. Supp. at 1360–1361 (discussing the masked dumping phenomenon).

77. *Bowe Passat*, 926 F. Supp. at 1150.

78. *Id.*

79. *E.C.–Bed Linen* (Panel Report), *supra* n. 23.

80. *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, WT/DS141/R (Oct. 30, 2000).

cation violated the Antidumping Agreement.[81] Because the United States was not a party to this particular dispute, the panel's conclusions did not specifically address the United States' zeroing methodology.

In a series of cases beginning in 2002, the CIT attempted to justify its continued support for zeroing in light of the apparently contrary decision in *E.C.–Bed Linen*.[82] The court held that the Department of Commerce's use of zeroing was both a permissible interpretation of the domestic antidumping statute[83] and in technical compliance with the WTO Antidumping Agreement.[84] The court reasoned that *E.C.–Bed Linen* was not sufficient to invalidate the zeroing methodology because that decision did not specifically address the United States' methodology,[85] although the European Communities' methodology that was at issue was ad-

81. *Id.* at ¶ 6.119. Article 2.4.2 of the Antidumping Agreement provides that:

> [T]he existence of margins of dumping . . . shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.

Antidumping Agreement, *supra* n. 16, at art. 2.4.2. The panel concluded that while the language of article 2.4.2 does not explicitly prohibit zeroing, the practice was impermissible because it "produce[d] results inconsistent with the obligations set forth in that Article." *E.C.–Bed Linen* (Panel Report), *supra* n. 23, at ¶ 6.116. The zeroing of negative dumping margins did not take into account "*all* comparable export transactions" and therefore did not accomplish the goal of a fair comparison as envisioned by the Antidumping Agreement. *Id.* at ¶ 6.117 (emphasis added).

82. *Timken Co. v. U.S.*, 240 F. Supp. 2d 1228 (Ct. Intl. Trade 2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004) (finding the Department of Commerce's zeroing practice a reasonable interpretation of the statute despite the decision in *E.C.–Bed Linen*); *PAM S.p.A. v. U.S. Dept. of Com.*, 265 F. Supp. 2d 1362 (Ct. Intl. Trade 2003) (ruling *Bed Linen* was not a basis for striking the zeroing methodology); *Corus Staal BV v. U.S. Dept. of Com.*, 259 F. Supp. 2d 1253 (Ct. Intl. Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005) (concluding *E.C.–Bed Linen* cannot be a basis for striking the methodology since WTO decisions are not binding on Department of Commerce); *SNR Roulements*, 341 F. Supp. 2d 1334 (holding that the Department of Commerce's zeroing methodology was not invalidated by *E.C.–Bed Linen*); *NSK, Ltd. v. U.S.*, 358 F. Supp. 2d 1276 (Ct. Intl. Trade 2005) (finding the Department of Commerce's zeroing practice reasonable).

83. *Corus Staal*, 259 F. Supp. 2d at 1263. The court specifically held that the United States antidumping statute is silent as to the impact of negative margins. *Id.* Because of this statutory ambiguity, the court gave significant deference to the Department of Commerce's action and concluded that zeroing was permissible. *Id.* For further discussion of the level of deference due to an agency methodology, see the discussion of the *Chevron* standard in Part III(A), *infra*.

84. *Id.* Despite finding technical compliance, the court in *Corus Staal* questioned whether the practice was "in the spirit of" the Antidumping Agreement. *Id.*

85. *PAM*, 265 F. Supp. 2d at 1373.

mittedly similar.[86] In reaffirming its support of zeroing, the court also reasoned that zeroing made "practical sense"[87] and that the imposition of antidumping duties under a zeroing scheme was not a punitive measure.[88]

In the years since *E.C.–Bed Linen*, both the WTO Dispute Settlement Body[89] and a NAFTA panel[90] have specifically considered the United States' zeroing methodology. Each has held that the United States' use of zeroing was impermissible.[91] As in *E.C.–Bed Linen*, the WTO Appellate Body in *U.S.–Softwood Lumber*[92] held that zeroing as applied in that particular controversy violated the Antidumping Agreement[93] because it failed to take into account "all comparable export transactions."[94] Perhaps most important to the current zeroing controversy is the process by which the NAFTA panel resolved the same dispute, using the WTO decision to conclude that zeroing was prohibited under United States law.[95] The panel reasoned that the WTO decision represented a conclusive finding that zeroing was in conflict with an interna-

86. *Id.* at 1372. In support of its conclusion that the methodologies were indeed similar, the court pointed to the fact that the United States submitted third party briefs in support of the European Communities in the dispute. *Id.*

87. *Timken*, 354 F.3d at 1342. The court even went so far as to suggest that if zeroing were prohibited, the Department of Commerce would be required to grant a customer whose fair value sales offset dumped sales a credit as a reward for not dumping, a result which would clearly contradict the underlying goals of the antidumping laws. *Id.* at 1342–1343.

88. *SNR Roulements*, 341 F. Supp. 2d at 1347. Punitive imposition of duties is not within the purpose of antidumping law. *Id.* (quoting *Natl. Knitwear & Sportswear Assn. v. U.S.*, 779 F. Supp. 1364, 1373 (Ct. Intl. Trade 1991) (noting that "antidumping duty law . . . is intended to be remedial, not punitive")).

89. *U.S.–Softwood Lumber*, *supra* n. 23. The WTO first examined the United States' use of zeroing in *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R (Dec. 15, 2003) [hereinafter *U.S.–Corrosion-Resistant Steel*]. However, while finding that a zeroing methodology in general would be inconsistent with the Antidumping Agreement, the Appellate Body was unable to determine conclusively whether the methodology employed by the United States in that particular case constituted zeroing. *Id.* at ¶ 135. The factual findings in the panel report were not specific enough to evaluate accurately the United States' methodology. *Id.* at ¶ 137.

90. *Softwood Lumber* (NAFTA Panel), *supra* n. 70.

91. *U.S.–Softwood Lumber*, *supra* n. 23, at ¶ 117; *Softwood Lumber* (NAFTA Panel), *supra* n. 70, at 42–43.

92. *United States—Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R (May 18, 2004).

93. *U.S.–Softwood Lumber*, *supra* n. 23, at ¶ 117.

94. *Id.* at ¶ 86 (emphasis omitted).

95. *Softwood Lumber* (NAFTA Panel), *supra* n. 70, at 43–44.

tional obligation of the United States.[96] Under the canon of statutory interpretation known as the *Charming Betsy* doctrine,[97] zeroing would be therefore impermissible under United States law as well.[98] The panel remanded the case to the Department of Commerce, with instructions for the agency to recalculate the dumping margins without zeroing.[99]

A United States court has yet to respond to the NAFTA panel's contentious holding in *Softwood Lumber*. However, in October 2005, a WTO panel[100] issued an opinion that significantly modified the prior Dispute Settlement Body's approach to and conclusions regarding zeroing.[101] The panel concluded that the United States' zeroing methodology violated the Antidumping Agreement when applied in original investigations to establish dumping margins,[102] but held that zeroing did not violate the An-

96. *Id.* at 44.

97. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). The *Charming Betsy* doctrine states that ambiguous statutes should, whenever possible, be interpreted to be consistent with the international obligations of the United States. *Id.* at 118. The United States antidumping statute is indeed ambiguous with regard to zeroing, *Softwood Lumber* (NAFTA Panel), *supra* n. 70, at 43, and the WTO Antidumping Agreement is an international obligation of the United States, *Fed. Mogul Corp.*, 63 F.3d at 1581. For a more detailed discussion of the appropriate application of the *Charming Betsy* doctrine in zeroing cases, see Part III(B), *infra.*

98. *Softwood Lumber* (NAFTA Panel), *supra* n. 70, at 44.

99. *Id.* at 45. Unfortunately for Canadian lumber exporters, the United States did not immediately comply with the panel's order. In fact, the United States brought a claim before an Extraordinary Challenge Committee, alleging that the panel "manifestly exceeded its powers, authority or jurisdiction" and that a panelist "was guilty of bias or materially violated the rules of conduct." *In the Matter of Certain Softwood Lumber Products from Canada*, Op. & Or. of the Extraordinary Challenge Comm., ECC-2004-1904-01USA at ¶ 13 (Aug. 10, 2005). The Extraordinary Challenge Committee denied the challenge and affirmed the panel's decision but, as of this writing, the United States has yet to comply with the panel's remand order. *Id.* at ¶ 189.

100. *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Report of the Panel, WT/DS294/R (Oct. 31, 2005) [hereinafter *U.S.–Zeroing* (Panel Report)]. The panel's opinion in this case exceeded 150 pages and included an examination of the arguments of the parties (the European Communities and the United States) as well as those of ten third-party nations. *Id.*

101. Previously, zeroing had only been reviewed "as applied" and had not been reviewed "as such," or as a general methodology. *E.g. U.S.–Softwood Lumber*, *supra* n. 23, at ¶ 63 (clearly defining the scope of the opinion to reach only the specific methodology applied in the case and not zeroing in general). In *U.S.–Zeroing*, the panel examined fifteen specific instances in which the methodology was actually applied by the United States and considered the zeroing methodology to be a "norm." *U.S.–Zeroing* (Panel Report), *supra* n. 100, at ¶ 8.1(a)–(c).

102. *Id.* at ¶ 8.1(a)–(c).

tidumping Agreement when utilized in administrative reviews of such determinations.[103] Though this decision was dubbed a "partial victory" for the United States,[104] in that it allowed for the use of zeroing in certain circumstances, any celebration on the part of United States trade interests was decidedly premature. In an April 2006 decision (*U.S.–Zeroing*), the WTO Appellate Body partially upheld the panel's conclusions by ruling that the United States' zeroing methodology violated the Antidumping Agreement when used in initial dumping investigations.[105] However, the Appellate Body went one step further than the panel and held that the zeroing method, as applied in the sixteen specific administrative reviews being challenged, violated the Antidumping Agreement as well.[106] Though it declared that it was "unable to complete the analysis to determine whether the zeroing methodology, as it relates to administrative reviews, is inconsistent, as such,"[107] the Appellate Body seemed to make clear its intent to rule against the practice of zeroing in future decisions. Because the decision essentially condemns zeroing at both the initial investigative and administrative review stages, it has been described as a "death knell for the practice of zeroing."[108]

In March 2006, likely in anticipation of the adverse Appellate Body report in *U.S.–Zeroing*,[109] the Department of Commerce issued a Notice in the Federal Register seeking comments on a proposed change to its zeroing methodology.[110] The Notice specifically stated that, in light of the WTO panel decision in *U.S.–Zeroing*,[111] "the Department proposes that it will no longer make average-to-average comparisons without providing offsets for non-dumped

103. *Id.* at ¶ 8.1(d)–(h).

104. Daniel Pruzin, *U.S. Scores Partial WTO Victory in EU Complaint against 'Zeroing'*, 22 Intl. Trade Rep. 1599, 1599 (Oct. 6, 2005).

105. *United States—Law, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, Report of the Appellate Body, WT/DS294/AB/R at ¶ 263(b) (Apr. 18, 2006) [hereinafter *U.S.–Zeroing* (AB Report)].

106. *Id.* at ¶ 263(a).

107. *Id.* at ¶ 263(c)(ii).

108. *Appellate Body Rules against Zeroing in Administrative Reviews*, Inside U.S. Trade (Apr. 21, 2006) (available at 2006 WLNR 6690279).

109. *U.S.–Zeroing* (AB Report), *supra* n. 105.

110. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin during an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Mar. 6, 2006).

111. *U.S.–Zeroing* (Panel Report), *supra* n. 100.

comparisons."[112] However, this proposed change in methodology would apply only to antidumping duty investigations, the specific use found to be inconsistent with the Antidumping Agreement in the panel opinion, and does not address the Department of Commerce's use of a zeroing methodology in general.[113] The deadline for comments has long passed[114] and, as of this writing, the Department of Commerce has taken no subsequent steps to conform its methodologies to the demands of the international community.

III. WHY AN EXAMINATION OF ZEROING UNDER DOMESTIC AND INTERNATIONAL LAW REQUIRES THAT THE PRACTICE BE ABANDONED

An attempt to reconcile the inconsistent findings of United States courts and international bodies with regard to the use of zeroing in antidumping investigations requires the examination of three essential questions. First, what is the proper application of the *Chevron* standard in zeroing cases?[115] Second, is the *Charming Betsy* doctrine applicable to zeroing disputes and, if so, does it function to preclude zeroing?[116] Third, and finally, beyond these rules of statutory interpretation, what role does the growing international consensus disfavoring zeroing play in shaping United States trade policy?[117]

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112. 71 Fed. Reg. at 11189.

113. *Id.* It is also interesting to note that nowhere in its proposal did the Department of Commerce refer to the practice as "zeroing." Rather, it described the practice as follows:

> When aggregating the results of the comparisons of averaging groups in order to determine the weighted average dumping margin, the Department has not allowed the results of averaging groups for which export price exceeds normal value to offset the results of averaging groups for which export price is less than normal value.

Id.

114. In order to be considered, written comments were expected within the first thirty days of publication in the Federal Register. *Id.*

115. *Infra* pt. III(A) (arguing that while *Chevron* is applicable, it does not mandate absolute deference to the Department of Commerce's use of zeroing).

116. *Infra* pt. III(B) (arguing for the applicability of the doctrine).

117. *Infra* pt. III(C) (examining the international recognition that zeroing is prohibited by the Antidumping Agreement in the context of the rules applicable to customary international law).

A. The *Chevron* Standard of Deference[118]

Under United States law, actions taken by a government agency in the course of interpreting the statutes that it administers are given a great deal of deference, under the *Chevron* standard.[119] Under *Chevron*, if a statute is silent or ambiguous with respect to the specific issue in question, the agency's action must be upheld so long as it is "based on a permissible construction of the statute."[120] This principle is based on the assumption that in order for government to function properly, it is necessary for the legislature to make policy decisions, either through precise statutory mandates or through the commands of agencies that it has created and controls.[121] Under this standard, it is the role of the court merely to evaluate the reasonableness of the agency's interpretation, an exercise that need not decide whether the agency's construction is the only permissible interpretation of the statute or even the interpretation the court might prefer in order for the court to uphold the regulation.[122] It is not the court's place to impose its own construction of an ambiguous statute on the agency.[123]

While originally articulated in the context of environmental regulation,[124] the *Chevron* standard has been applied to countless administrative agency determinations since its inception. The CAFC has held that the Department of Commerce has broad dis-

118. The issue of the proper degree of deference afforded agency determinations under *Chevron* has generated a great deal of scholarly interest and literature. The Author's treatment of this issue will be limited to the standard's application and consequences for zeroing cases. For a more general discussion of the *Chevron* standard and its role in United States administrative law, see generally Cass R. Sunstein, *Law and Administration after* Chevron, 90 Colum. L. Rev. 2071 (1996) (examining both the rationale and the reach of *Chevron* deference).

119. *Chevron, U.S.A. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

120. *Id.* If the statute is not ambiguous, of course, the agency action must "give effect to the unambiguously expressed intent of Congress" and comply with the statute. *Id.*

121. *Id.* at 844. For a more detailed discussion of the justifications for the *Chevron* standard as a fundamental principle of United States administrative law, see generally Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am. J. Intl. L. 193, 206–208 (1996).

122. *Chevron*, 467 U.S. at 843 n. 11.

123. *Id.* at 843.

124. *Chevron* itself dealt with whether a regulation promulgated by the Environmental Protection Agency was based on a reasonable interpretation of a provision of the Clean Air Act Amendments of 1977. *Id.* at 840.

cretion in executing domestic antidumping law, and that such discretion is subject to *Chevron* deference.[125] This deference has been described as the deference due to the "masters of the subject."[126] Most importantly, the CAFC has specifically held that courts should afford *Chevron* deference to the Department of Commerce's determinations in antidumping investigations.[127] The court has also noted that such deference is due even when the agency action at issue is not a formal regulation, but a methodology.[128]

United States courts have universally held that the *Chevron* standard applies to judicial review of the Department of Commerce's use of zeroing in antidumping investigations.[129] Since *Bowe Passat*, the CIT has recognized that "[t]he statute is silent on the question of zeroing negative margins"[130] and has held that the plain meaning of the statutory language "neither requires nor prohibits" zeroing.[131] Repeatedly, the courts have used the *Chevron* standard to find that zeroing is a reasonable interpretation of the antidumping statute, and therefore, permissible under United States law.[132]

Clearly the *Chevron* standard is applicable to judicial review of the Department of Commerce's use of zeroing in antidumping investigations.[133] However, United States courts have generally

125. *Smith-Corona Group v. U.S.*, 713 F.2d 1568, 1571 (Fed. Cir. 1983). The court noted that the "intricate framework for the imposition of antidumping duties" created by the Tariff Act of 1930 "makes the enforcement of the antidumping law a difficult and supremely delicate endeavor." *Id.* For this reason, the Secretary of Commerce is granted wide latitude to implement the law, but nonetheless "some general standards" must limit the exercise of that discretion to ensure that the Secretary of Commerce does not "interpret [statutory provisions] out of existence." *Id.*

126. *Consumer Prod. Div. v. U.S.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985) (quoting *Natl. Muffler Dealers Assn. v. U.S.*, 440 U.S. 472, 477 (1979)).

127. *Pesquera Mares Australes Ltda. v. U.S.*, 266 F.3d 1372, 1381 (Fed. Cir. 2001). The court reached this conclusion based on the logic that antidumping proceedings are "'relatively formal administrative procedure[s]' that adjudicate parties' rights." *Id.* (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

128. *Id.* at 1382; *see also Am. Silicon Tech. v. U.S.*, 261 F.3d 1371 (Fed Cir. 2001) (holding that the Department of Commerce's methodology of establishing depreciation expenses in calculating constructed value in antidumping investigations should be reviewed under the *Chevron* standard).

129. *E.g. Corus Staal*, 259 F. Supp. 2d at 1261.

130. *Bowe Passat*, 926 F. Supp. at 1150.

131. *Corus Staal*, 259 F. Supp. 2d at 1261.

132. *E.g. id.*; *Timken*, 354 F.3d at 1341–1343.

133. Authorities other than United States courts have also recognized the applicability

applied the *Chevron* standard to the exclusion of other important principles of statutory construction and international law—particularly the *Charming Betsy* doctrine.[134] A more useful approach would be to consider the *Charming Betsy* doctrine as an integral part of the second prong of the *Chevron* test. Then, courts would consider an interpretation's consistency with international obligations as an indication of whether it is indeed a permissible interpretation of the statute. Support for this approach can be found in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,[135] in which the United States Supreme Court recognized that *Chevron* deference is not absolute and may, in certain cases, yield to other constitutional concerns.[136] The Court specifically mentioned the rationale underlying the *Charming Betsy* doctrine as one such "serious constitutional problem"[137] that might justify the invalidation of an agency action despite the fact that such action would ordinarily be entitled to *Chevron* deference.[138] This approach to the relationship between the *Chevron* and *Charming Betsy* standards is similar to the analysis undertaken by the NAFTA panel in *Softwood Lumber*.[139] The panel apparently viewed this analysis as consistent with United States law, stating that its decision did not "purport to change [United States] antidumping law" but rather merely "applie[d] [United States] antidumping law (as appropriately interpreted through *Charming Betsy*) to agency action."[140]

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of the *Chevron* standard in these circumstances. *Softwood Lumber* (NAFTA Panel), *supra* n. 70, at 25.

134. *See Unisor v. U.S.*, 342 F. Supp. 2d 1267, 1275 (Ct. Intl. Trade 2004) (noting that judicial precedent on the trade issue under consideration was mixed because some courts had applied the *Chevron* standard exclusively, while others had applied the *Charming Betsy* doctrine). For a more detailed discussion of the *Charming Betsy* doctrine, consult *infra* Part III(B).

135. 485 U.S. 568 (1988).

136. *Id.* at 574–575. In *DeBartolo*, the National Labor Relations Board's interpretation that 29 U.S.C.A. § 158(b)(4) prohibited handbilling did not receive *Chevron* deference because such a prohibition raises serious First Amendment issues. *Id.*

137. *Id.* at 575.

138. *Id.* at 574–575.

139. *Softwood Lumber* (NAFTA Panel), *supra* n. 70, at 42.

140. *Id.*

B. The *Charming Betsy* Doctrine

The canon of statutory interpretation known as the *Charming Betsy* doctrine was first advanced in 1804 by the United States Supreme Court in *Murray v. Schooner Charming Betsy*.[141] The canon states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[142]

At least one commentator has proposed that the *Charming Betsy* doctrine is a product of the period of history in which it was postulated and that subsequent historical changes have limited—or potentially eliminated—its usefulness.[143] First, at the time of the canon's formulation, the United States was a fledgling, "unproven" government that was extremely weak in comparison to European powers.[144] Therefore, the young nation had a significant interest in making sure its actions were consistent with international law.[145] At that time in history, warfare was a much more common form of dispute resolution,[146] and the government had to consider the very real possibility that a breach of international law would result in a military conflict.[147] Second, at that time the concept of the law of nations was drastically different from the modern understanding of international law.[148] Because the relatively few existing principles of international law were thought to have been derived from natural law,[149] it made logical sense for courts to consider international law as part of the "general common law"[150] and apply it to domestic decisions without as much

141. 6 U.S. 64 (1804).

142. *Id.* at 118.

143. Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 490 (1998).

144. *Id.* at 492.

145. *Id.*; *see also* Filicia Davenport, Student Author, *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the* Charming Betsy *Standard with Respect to WTO Agreements*, 15 Fed. Cir. B.J. 279, 279–280 (2005) (noting that the *Charming Betsy* doctrine "encouraged productive trade relationships between a young nation and its international contemporaries").

146. Bradley, *supra* n. 143, at 492.

147. *Id.* at 492–493.

148. *Id.* at 493.

149. *Id.* at 494.

150. *Id.* at 493.

emphasis on separation of powers concerns.[151] Based on these and other significant changes in the American judicial and political systems since the early nineteenth century, some commentators have cautioned against a blind application of the *Charming Betsy* doctrine to modern conflicts between domestic and international law.[152]

Undoubtedly, judicial understanding of the nature of the *Charming Betsy* doctrine has evolved over time. This evolution is particularly apparent when one examines the slightly different formulations of the canon advanced by the original case and subsequent black-letter formulations.[153] However, these shifts are not cause for abandoning the doctrine completely and failing to apply it to such an obvious conflict between statutory interpretation and international law as is present in the zeroing cases. Modern application of the *Charming Betsy* doctrine, particularly in the area of international trade, demonstrates that the canon is alive and well.[154]

United States courts have been extremely reluctant to apply the *Charming Betsy* doctrine in zeroing cases,[155] but have not shown similar reluctance when confronted with other question-

151. *Id.* at 495.

152. *E.g. id.* (arguing that the fact that "the *Charming Betsy* canon may have seemed appropriate to the Marshall Court does not mean that it should seem appropriate to us"); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 Hastings L.J. 185 (1993) (arguing for abandonment of the canon); *but see* Davenport, *supra* n. 145, at 280–281 (arguing that "the United States' shift from neophyte nation to world power has increased, rather than decreased, the need to apply" the *Charming Betsy* standard).

153. *See Restatement (Second) of Foreign Relations* § 3(3) (1965) (interpreting the canon to mean that "[i]f a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law"); *Restatement (Third) of Foreign Relations* § 114 (1987) (interpreting the canon to mean that "[w]here 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").

154. The *Charming Betsy* canon is applicable to disputes outside the arena of international trade regulation as well. *E.g. McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (applying the canon in interpreting the National Labor Relations Act); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (applying the canon in interpreting federal shipping laws); *Kane v. Winn*, 319 F. Supp. 2d 162, 195–203 (D. Mass. 2004) (applying the canon in determining whether the allegations contained in an inmate's habeas corpus petition constituted cruel and unusual punishment).

155. The courts generally justify their refusal to apply the canon by holding that zeroing is not in *direct* conflict with an international obligation because the Antidumping Agreement does not explicitly prohibit zeroing. *PAM*, 265 F. Supp. 2d at 1373.

able methodologies used, and determinations made, by the Department of Commerce.[156] In *Allegheny Ludlum Corp. v. United States*,[157] the CAFC applied the *Charming Betsy* canon in reviewing the Department of Commerce's use of the "same-person methodology" in calculating countervailing duty rates.[158] Although the Department of Commerce prospectively abandoned the methodology in question before the CAFC could rule on the appeal,[159] the court nonetheless ruled on the lawfulness of the methodology as applied retroactively.[160] While basing its decision to uphold the CIT judgment invalidating the methodology on a domestic statute[161] and precedent from United States courts,[162] the CAFC relied on a *Charming Betsy* analysis to lend further support to its conclusion.[163] The court held that permitting the methodology would contravene the international obligations of the United States because the WTO Appellate Body had concluded that the methodology violated the WTO Agreement.[164] Though the court also stated that "the *Charming Betsy* doctrine is only a guide,"[165] it nonetheless relied on the existence of the applicable WTO decision to support its holding in the case.[166]

The CIT also made a cursory application of the *Charming Betsy* doctrine to a dispute over the time period in which a party is required to give notice of an intent to seek judicial review under

156. This disinclination may be motivated by the economic and political concerns accompanying a discussion of zeroing or by a lack of respect for the power of international dispute settlement bodies. For a more thorough examination of these issues, consult *infra* Part IV(A)–(B).

157. 367 F.3d 1339 (Fed. Cir. 2004).

158. *Id.* at 1341. The "same-person methodology" was a method for determining whether changes in a corporate entity during the process of privatization were such that the corporation should be relieved of liability for previously imposed countervailable subsidies. *Id.* at 1342.

159. While the appeal in this case was pending, the WTO Appellate Body issued a report stating that the same person methodology violated the URAA and, in response, the Department of Commerce adopted a new methodology. *United States—Countervailing Measures Concerning Certain Products from the European Communities*, Report of the Appellate Body, WT/DS212/AB/R (Dec. 9, 2002) [hereinafter *U.S.–Certain Products from the EC*].

160. *Allegheny Ludlum*, 367 F.3d at 1342–1343.

161. 19 U.S.C. § 1677(5)(F).

162. *Delverde, SrL v. U.S.*, 202 F.3d 1360 (Fed. Cir. 2000).

163. *Allegheny Ludlum*, 367 F.3d at 1348.

164. *Id.* (citing *U.S.–Certain Products from the EC*, *supra* n. 159).

165. *Id.*

166. *Id.*

NAFTA.[167] Though the court based its decision primarily on statutory analysis, it did note that "to the extent that any argument can be made that there are two possible interpretations of the statute, one of which is consistent with the United States' international obligations and one of which is not [ ], the *Charming Betsy* doctrine is implicated."[168]

Though not addressing zeroing specifically, the CIT utilized the *Charming Betsy* doctrine in reviewing a methodology used by the Department of Commerce in an antidumping determination in *Hyundai Electronics Co. v. United States*.[169] In this case, the review involved the Department of Commerce's decision not to revoke an already existing antidumping order.[170] By statute, the Department of Commerce can revoke an antidumping order if, among other criteria, "[i]t is not likely that those persons will in the future sell the merchandise at less than foreign market value."[171] In this case, the Department of Commerce declined to revoke the antidumping order because it was not satisfied that the foreign manufacturers were "not likely" to dump in the future.[172] The petitioners, Korean manufacturers of dynamic random access memory semiconductors (DRAMs), argued that the Department of Commerce's "not likely" standard was in conflict with the United States' international obligations because of a recent WTO decision[173] holding that the "not likely" standard was more rigorous than the standard embodied in the Antidumping Agreement.[174]

In rejecting the petitioners' arguments, the court reasoned that because the statute failed to specify the mechanics of the procedure for revoking an antidumping duty, the Department of Commerce had acted to "fill the void" by adopting the "not likely" standard.[175] This type of agency action triggers the application of

167. *Desert Glory, Ltd. v. U.S.*, 368 F. Supp. 2d 1334, 1337 (Ct. Intl. Trade 2005).
168. *Id.* at 1341 n. 12.
169. 53 F. Supp. 2d 1334 (Ct. Intl. Trade 1999).
170. *Id.* at 1338.
171. *Id.* at 1337 (quoting 19 C.F.R. § 353.25(a)(2) (1996)).
172. *Id.* at 1337–1345.
173. *United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or above from Korea*, Report of the Panel, WT/DS99/R (Jan. 29, 1999) [hereinafter *U.S.–Korean DRAMs*].
174. *Hyundai*, 53 F. Supp. 2d at 1342.
175. *Id.* at 1344.

the *Charming Betsy* doctrine.[176] The court ultimately concluded that the "not likely" standard was promulgated "in consonance" with international obligations of the United States because an analysis of the likelihood of future dumping was inherently predictive and an administering authority has considerable discretion, under United States and international law, to engage in predictive analysis.[177] Notably, after stating its conclusion in the case, the CIT appeared to restate the *Charming Betsy* canon but, in doing so, actually imposed a higher standard on future analysis under the doctrine by noting that "unless the conflict between an international obligation and [the Department of] 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."[178]

While *Hyundai* is certainly a powerful authority on the issue of the application of the *Charming Betsy* doctrine to the review of methodologies used in antidumping investigations, it is distinguishable from the zeroing controversy in multiple ways. First, the WTO decision that prompted the *Charming Betsy* analysis in *Hyundai* stopped short of requiring that the United States revoke the antidumping order with respect to Korean manufacturers.[179] In the zeroing controversy, both WTO and NAFTA panels have issued decisions specifically requiring the Department of Commerce to change its ways.[180] Second, the standard in question in *Hyundai* related to the revocation of antidumping duties, whereas the zeroing methodology comes into play much earlier in the process, when dumping margins are originally calculated and duties initially assigned. According to the WTO panel decision in *U.S.*–

176. *Id.* Interestingly, the court focused exclusively on the *Charming Betsy* doctrine in this case, not on the *Chevron* test. Ordinarily, any discussion of agency action filling a statutory gap would implicate *Chevron*. 467 U.S. at 843. The court's use of the *Charming Betsy* doctrine without resort to *Chevron* in this case lends further support to the analytical approach advocated in notes 132–139 *supra* and accompanying text.

177. *Hyundai*, 53 F. Supp. 2d at 1344.

178. *Id.* at 1345 (emphasis added).

179. *U.S.–Korean DRAMs*, *supra* n. 173, at ¶ 7.4. The panel "decline[d] to make any suggestion" in light of the "range of possible ways in which . . . the United States could appropriately implement [the] recommendation." *Id.*

180. *U.S.–Softwood Lumber*, *supra* n. 23; *Softwood Lumber* (NAFTA Panel), *supra* n. 70.

Zeroing,[181] this distinction is an important one. The panel held that whether zeroing was permissible under the Antidumping Agreement was dependent upon whether the methodology was employed in an initial calculation of dumping margins or in an administrative review for the purpose of determining whether to revoke an existing antidumping duty.[182] The panel's decision was based on the recognition that a more stringent standard applies to original investigations than to administrative reviews.[183] While this distinction is logically consistent, the Appellate Body decision in *U.S.–Zeroing*[184] indicates that despite the differences between original investigative and administrative reviews, it is not proper to employ zeroing at any stage in the process.

As if a textbook-mechanical application of the *Charming Betsy* doctrine does not involve enough potential for confusion, one must also consider the possibility that the doctrine may require compliance with international agreements beyond the bounds of particular statutory or treaty language. In reviewing a challenge to the levying of countervailing duties in *Footwear Distributors & Retailers of America v. United States*,[185] the CIT suggested that the United States' compliance with international obligations under the *Charming Betsy* doctrine extends beyond the explicit terms of an international agreement.[186] In light of principles of international law requiring that the authority of nations

181. *U.S.–Zeroing* (Panel Report), *supra* n. 100.

182. *Id.* at ¶ 8.1.

183. Article 2 Sections 2.4 and 2.4.2 of the Antidumping Agreement require that in order to achieve a fair comparison in determining the existence of dumping, all comparable export transactions must be taken into account. *Antidumping Agreement*, *supra* n. 16, at arts. 2.2, 2.4.2. Zeroing was deemed to be in violation of this standard in *E.C.–Bed Linen* and *U.S.–Softwood Lumber*. Article 11 of the Antidumping Agreement regulates the circumstances under which an administrative review may be undertaken and the standards by which an antidumping order can be revoked. *Antidumping Agreement*, *supra* n. 16, at art. 11.2. This provision does not require that a fair comparison be made in order for an antidumping duty to remain in place, but only that the investigating authority determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping." *Id.* at art. 11.3.

184. *U.S.–Zeroing* (AB Report), *supra* n. 105, at ¶ 263(h) (holding that zeroing as applied in the administrative reviews being challenged was inconsistent with the WTO Antidumping Agreement but declining to officially condemn zeroing in general in administrative reviews). The significance of this decision is discussed in more detail in notes 104–107 and accompanying text.

185. 852 F. Supp. 1078 (Ct. Intl. Trade 1994).

186. *Id.* at 1091–1092.

within the "community of nations" be held "equal to the right and power of the other members of the international family," a nation should endeavor to "avoid any violation, *real or apparent*," of an international obligation.[187] Under this conception of the doctrine, the Department of Commerce would be required to abandon the practice of zeroing even if a precise legal argument cannot be made to justify acceding to the reasoning of the WTO and NAFTA panel decisions on the basis of precedent. Indeed, the CIT has already recognized the possibility that zeroing, while potentially complying with the technical requirements of the WTO Antidumping Agreement, may not be in the "spirit of the Agreement."[188]

In addition to these considerations, at least one commentator has advanced the argument that the application of the *Charming Betsy* doctrine to matters of treaty interpretation must address treaty language external to that which specifically addresses the agency behavior at issue.[189] When Congress adopted the WTO agreements, it did so via the enactment of the Uruguay Round Agreements Act (URAA).[190] Included in the URAA is a supremacy clause stating: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."[191] The strict application of this clause might seemingly preclude the consideration of the *Charming Betsy* doctrine when a court is faced with a direct conflict between the practice of a United States regulatory body and the terms of a WTO agreement, and would mandate that the conflict be resolved in favor of United States law.[192]

While this approach may be logically consistent, no United States court has yet embraced it and applied the URAA supremacy clause to preclude consideration of the *Charming Betsy* doctrine. In fact, most decisions do not even mention the clause, and those that do merely acknowledge that it may limit the court's

187. *Id.* (emphasis added) (quoting *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)).

188. *Corus Staal*, 259 F. Supp. 2d at 1263.

189. Davenport, *supra* n. 145, at 283–284.

190. 19 U.S.C. §§ 3501–3623 (1994).

191. 19 U.S.C. § 3512(a)(1).

192. Davenport, *supra* n. 145, at 283.

decision but decline to engage in further analysis.[193] In addition, in applying other seemingly preclusive provisions of the URAA, courts have universally found that those clauses do not bar the action at hand.[194] Therefore, although the URAA supremacy clause may be a factor in a United States court's attempt to harmonize a domestic regulation with the requirements of international obligations, it does not appear, as some have advocated, that "Congress' passage of the URAA Supremacy Clause is a death knell for any litigant's plea that a domestic statute should be interpreted to give deferential effect to the international agreements of the WTO."[195]

One commentator has noted that "the *Charming Betsy* may be more a wily seducer than an innocent charmer."[196] Indeed, because of the dualistic nature of the American legal system and the undetermined impact of the decisions of international bodies on domestic jurisprudence, an attempt to apply the *Charming Betsy* doctrine to the zeroing issue is liable to complicate an already contentious issue even further. However, its wiles aside, the *Charming Betsy* doctrine represents a rule of statutory construction that has played a major role in American judicial thought for over two centuries.[197] It cannot be abandoned at this point in history simply because its application may yield less-than-favorable results for the Department of Commerce.

C. The Relevance of Customary International Law and an International Consensus

Beyond the statutory construction arguments under a *Chevron* and *Charming Betsy* analysis, broader policy concerns dictate that the United States should abandon the practice of zeroing and comply with its obligations under the Antidumping Agreement. Regardless of their binding or non-binding nature or formal pre-

193. *Id.* at 284 (citing *Corus Staal*, 395 F.3d at 1348–1349).

194. *See e.g. Timken*, 354 F.3d at 1341 (holding that 19 U.S.C. § 3512(c)(1), the provision of the URAA stating that "[n]o person other than the United States" may challenge an agency action as inconsistent with a WTO agreement, did not bar the plaintiff's claim).

195. Davenport, *supra* n. 145, at 310.

196. Elizabeth C. Seastrum, Chevron *Deference and the* 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 (2003).

197. Bradley, *supra* n. 143, at 485–486.

cedential value, the ever-growing body of WTO and NAFTA panel decisions condemning the use of zeroing indicate that an international consensus is developing that disapproves of the practice. As this consensus grows and more nations begin to comply with the prohibition against zeroing, such a prohibition may become part of customary international law.

Courts—including the United States Supreme Court—have often considered the non-binding opinion of the international community in resolving particularly divisive contemporary issues, even when those issues are purely domestic in nature. For example, in *Thompson v. Oklahoma*,[198] the United States Supreme Court looked to the practices of other nations when considering whether the execution of an individual who was only fifteen years old at the time of his crime would constitute cruel and unusual punishment. The Court came to the conclusion that it would "offend civilized standards of decency" to execute an individual who was under sixteen years of age at the time of his or her offense.[199] The Court explained that such a conclusion was consistent with the views of "other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community."[200] The Court justified its reasoning on the basis that it had "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."[201]

The Supreme Court applied similar reasoning in *Atkins v. Virginia*,[202] in which it held that the Constitution placed a "substantive restriction" on the execution of mentally retarded offenders.[203] Specifically, the majority noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[204] Similar analysis also played a role in the Court's deci-

198. 487 U.S. 815 (1988).

199. *Id.* at 830.

200. *Id.* The Court specifically pointed to the complete abolition of capital punishment in many nations (including France, Portugal, and the Netherlands) and the fact that juvenile executions were permitted only in the Soviet Union. *Id.*

201. *Id.* at 830 n. 31.

202. 536 U.S. 304 (2002).

203. *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

204. *Id.* at 316 n. 21. The Court also relied upon a "widespread consensus among Americans" that such executions are morally wrong. *Id.*

sion in *Lawrence v. Texas*,[205] in which the Court overturned *Bowers v. Hardwick*[206] and invalidated a state law criminalizing intimate sexual conduct between two persons of the same sex.[207] The Court noted that the reasoning and holding in *Bowers* had been rejected by many other nations and that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."[208]

Of course, in none of these cases was the Court's decision based solely on the disapproval of the international community of the practice at issue. However, in each case, consideration of other nations' treatment of the matter supplemented a constitutional analysis and was used to support the Court's conclusion. In addition, each of the issues examined in these cases was purely domestic and did not deal with international relations except in an ancillary sense. However, when addressing an issue like zeroing, which, by definition, involves international parties and has international repercussions, it is even more imperative for courts to consider the influence of the international community. Recognizing that the stated purpose of both the WTO Agreement[209] and NAFTA[210] is, to some extent, to advance the interests of free trade within the global community, domestic decisions with regard to trade policy necessarily must take into consideration the perspective of the international community and how domestic action will impact that community.

IV. WHY THE DEPARTMENT OF COMMERCE IS LIKELY TO CONTINUE ZEROING

Since the first instance of judicial review of an antidumping determination based on zeroing, it has been established that zeroing introduces a statistical bias into the calculation of dumping margins and may, therefore, result in determinations of dumping

205. 539 U.S. 558 (2003).

206. 478 U.S. 186 (1986).

207. *Lawrence*, 539 U.S. at 585.

208. *Id.* at 577.

209. *GATT 1947*, *supra* n. 16, at preamble (recognizing that the signatories were directing their efforts toward "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce").

210. *NAFTA*, *supra* n. 20, at art. 1902(2)(d)(ii) (declaring the purpose of NAFTA to be "to establish fair and predictable conditions for the progressive liberalization of trade").

where none exist.[211] Courts have repeatedly recognized that by utilizing zeroing, the Department of Commerce is walking the thin line of offending the spirit of domestic and international law while maintaining technical compliance with applicable requirements.[212] Yet the Department of Commerce seems determined to defy the growing international consensus and continue to routinely employ zeroing in its calculation of antidumping duties. Its motivation for doing so is rooted in two interdependent assumptions: first, that zeroing is essential to achieving the goal of protecting United States industry from foreign competition,[213] and second, that failure to comply with the decisions of international bodies will have no detrimental effect.[214]

A. Zeroing as an Instrument of Protectionism

The policy arguments in favor of zeroing have been a vital part of practically every domestic and international decision regarding zeroing. The CIT in *Bowe Passat* quoted extensively from non-judicial commentary to highlight both the problems inherent in the zeroing methodology and the policy arguments for upholding its use.[215]

Perhaps most often cited is the masked dumping argument (used to justify zeroing in *Serampore*[216]), which contends that zeroing prevents dumped sales from being negated by "more profitable sales," ensuring that a foreign producer cannot "mask" dumping in one sector simply by making legal sales in another sector.[217] The fact that zeroing does indeed combat such masked dumping makes it theoretically consistent with the spirit of United States antidumping law, in that it prevents dumped merchandise from entering the United States market and undercutting domestic industry.[218]

211. *Bowe Passat*, 926 F. Supp. at 1149–1150.
212. *Corus Staal*, 259 F. Supp. 2d at 1263.
213. *Infra* pt. IV(A).
214. *Infra* pt. IV(B).
215. *Bowe Passat*, 926 F. Supp. at 1149–1150.
216. 675 F. Supp. 1354.
217. *Id.* at 1360–1361.
218. *Bowe Passat*, 926 F. Supp. at 1150.

International trade is big business in the United States and abroad.[219] Large industries, such as textiles and steel, depend on access to both foreign and domestic markets to maintain positions of supremacy, and they often bring significant pressure to bear on the political process in order to protect that interest.[220] The lobbying activities of such special interest groups can result in both reluctance on behalf of the legislature to implement new, more liberal trade policies, and reluctance on behalf of administrative agencies to enforce existing trade regulations.[221] Because of the nature of the political process, most nations—including the United States—find themselves in the position of proclaiming a message of free and fair trade while struggling to tailor those supposedly free-trade principles to protect domestic industry.

In addition to the political considerations inherent in trade policy decisionmaking, economic issues must be contemplated as well. Abandoning the practice of zeroing would no longer enable the Department of Commerce to find as many instances of dumping, and would deprive the economy of the revenue generated by millions of dollars in antidumping duties. Therefore, from a policy and monetary standpoint, the United States has a strong interest in maintaining its current methodology with regard to the calculation of dumping margins.

B. The Lack of Enforcement Power of International Bodies

Perhaps the biggest challenge presented by the WTO and NAFTA dispute settlement structures is the utter lack of enforcement power.[222] Though perhaps significantly improved over

219. In June 2006 alone, the United States exported a total of $120.7 billion and imported a total of $185.5 billion in goods and services. U.S. Census Bureau & U.S. Bureau of Econ. Analysis, Press Release, *U.S. International Trade in Goods and Services: June 2006* 1 (D.C., Aug. 10, 2006) (available at http://www.bea.gov/bea/newsrelarchive/2006/trad0606.pdf).

220. Robert E. Baldwin & Michael O. Moore, *Political Aspects of the Administration of the Trade Remedy Laws*, in *Down in the Dumps: Administration of the Unfair Trade Laws* 253, 253 (Richard Boltuck & Robert E. Litan eds., Brookings Inst. 1991).

221. *Id.*

222. Any discussion of enforcement of decisions rendered within the WTO and NAFTA dispute settlement systems presupposes that the offended nation sought to resolve the matter within the confines of those systems. However, one analysis of empirical data has concluded that various economic determinants affect whether an injured nation will even file a dispute against a trade remedy imposed by an economically-dominant country such as the United States. Chad P. Bown, *Trade Remedies and World Trade Organization Dis-*

the systems that preceded them,[223] neither the WTO Antidumping Agreement nor NAFTA has managed to create a dispute resolution forum which assures participating nations that they will be able to enforce their trade rights against other nations.[224]

Under the WTO Dispute Settlement Understanding, if a member nation fails to bring a measure found to be inconsistent with an agreement into compliance with that agreement, that nation faces retaliation in the form of compensation or suspension of concessions.[225] Retaliating nations are required first to seek compensation and then, if they cannot agree upon compensation, they may suspend concessions first in the sector that was the subject of the dispute and then in other sectors.[226] Under NAFTA, enforcement of a panel decision is left to an even less strict system. While a NAFTA panel may remand a determination to the Department of Commerce for action consistent with its decision, it has no ability to force the Department of Commerce to revise its findings.[227] While such remands are nominally binding on the in-

pute Settlement: Why Are So Few Challenged? 34 J. Leg. Stud. 515, 551–552 (2005). These factors include the size of the market affected and, most importantly, the adversely affected industry's capacity to retaliate via the imposition of a reciprocal antidumping measure of its own. *Id.* at 515. Based on the empirical data investigated, at least one commentator has concluded that powerful industries are foregoing resolving trade disputes through the WTO dispute resolution system and are opting instead for "vigilante justice" in the form of retaliatory trade remedies. *Id.* The problem of industry reluctance to pursue the resolution of trade disputes through the existing avenues is an issue separate from but nonetheless potentially related to the problem of enforcement as discussed in the accompanying text.

223. The WTO Dispute Settlement Understanding has been referred to as the "crown jewel" among international adjudicatory systems. John Ragosta, Navin Joneja & Mikhail Zeldovich, *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 Intl. Law. 697, 697 (2002); *see generally* Andrea K. Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 Mich. J. Intl. L. 697 (1999) (examining the evolution of dispute settlement regimes in light of five legal factors: direct effect on rights, standing, supremacy, transparency, and enforcement).

224. It is not uncommon for "major powers . . . [to] ignore . . . dispute settlement decisions which do not comport with their economic interests." Tkacik, *supra* n. 67, at 169.

225. *Dispute Settlement Understanding*, *supra* n. 38, at art. 22(1)–(2). While a provision for retaliation is included, the Dispute Settlement Understanding is very clear that such measures are not preferred (compared to full implementation of a WTO decision) and are temporary measures, only available until the action found to be inconsistent with the agreement is removed. *Id.* at art. 22(1), (8).

226. *Id.* at arts. 22(2), (3)(a)–(c).

227. Walders & Pratt, *supra* n. 40, at 56.

volved parties in the particular matter disputed,[228] there are no provisions for enforcement of compliance.[229]

The WTO compensation/retaliation system appears to have significantly more "teeth" than prior regimes, and therefore, in theory, should be at least relatively successful in forcing compliance with WTO decisions. However, there are some very practical problems with bringing that theory to life. First, when dealing with the question of compensation, what type and value of compensation is appropriate? It was arguably easier to quantify the effect of an offensive trade practice when international trade relations consisted primarily of a system of tariffs.[230] However, as nations have increasingly turned to non-tariff barriers to regulate trade with the global community, it has become more difficult to assign a verifiable value to the effect of a particular practice on future trade.[231] In the instance of zeroing and the United States, the measure found to be inconsistent with the Antidumping Agreement is the very methodology by which the existence of dumping was determined in the first place. Without its application, there would have been no antidumping duty to challenge in any dispute resolution system. Technically speaking, the concept of compensation would suggest that the exporting nation be reimbursed in full for all antidumping duties erroneously levied against it.[232] However, such a policy would completely nullify United States antidumping law if, after unsuccessfully defending a challenge before a WTO panel, the United States was required not only to revoke its duties but also to pay the exporting country that the Department of Commerce determined was dumping.[233] In addition, the discussion of compensation is plagued with problems of valuation. What formula for calculating damages can possibly

228. NAFTA, *supra* n. 20, at art. 1904.8.

229. This problem is highlighted by the NAFTA panel system's failure to bring closure to several high profile trade disputes, principally the Softwood Lumber dispute. Vega-Canovas, *supra* n. 50, at 487.

230. John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?* 98 Am. J. Intl. L. 109, 121 (2004).

231. This reality has led some commentators to argue that the concept of the WTO dispute resolution system as a means to "rebalance" the overall trade concessions and obligations of its members is no longer an important policy consideration. *See id.* at 118, 121.

232. This possibility was contemplated in *Timken* and used as a reason to reject the arguments in favor of zeroing. *Timken*, 354 F.3d at 1343.

233. *Id.*

take into account not only the money spent on antidumping duties but also the cost of trade diversion and the effect on domestic production?

The second problem with the WTO enforcement scheme is that, in reality, "retaliation is only as strong as the state that is retaliating."[234] Empirical studies examining data from the resolution of various disputes in the history of the WTO agreements have suggested that retaliation itself, as well as the characteristics of the retaliator, play a role in whether a trade dispute is resolved successfully.[235] However, these studies have focused on disputes between economic powers of relatively equal size.[236] One can only speculate how successful a less economically powerful nation could hope to be in retaliating against the United States or another more dominant player in the world trade arena.

In addition to formal retaliation, the United States must consider its "international obligation,"[237] or the stigma attached to its failure to comply with international rules or decisions.[238] The effect of this stigma may weaken the dispute settlement process, strain future trade relations with the opposing nation in the dispute, and diminish bargaining capacity at future bilateral or multilateral trade negotiations.[239] Though the results of this intangible cost are difficult to quantify,[240] in an age in which global trade

234. Schneider, *supra* n. 223, at 723 n. 95.

235. *See* Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 Rev. Econ. & Statistics 811, 822 (2004) (finding that the influence of a concern for retaliation on the successful resolution of trade disputes is empirically significant); Kishore Gawande & Wendy L. Hansen, *Retaliation, Bargaining, and the Pursuit of "Free and Fair" Trade*, 53 Intl. Org. 117 (1999) (examining empirical data to determine whether retaliation by the United States can successfully deter protectionism in its partner countries).

236. *See e.g.* Gawande & Hansen, *supra* n. 235, at 119 (outlining the scope of the study to include only trade relationships between the United States and five other developed nations—Japan, France, Germany, Italy, and the United Kingdom).

237. *See* Daniel Kovenock & Marie Thursby, *GATT, Dispute Settlement, and Cooperation*, 4 Econ. & Pol. 151 (1992) (coining the term "international obligation").

238. Bown, *supra* n. 234, at 814.

239. *Id.*; *see also* John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations*, 91 Am. J. Intl. L. 60, 61–62 (1997) (acknowledging that refusal to comply with an international legal obligation has "a number of 'diplomatic ripples'" and observing that the United States experienced this when, in the 1970s, its refusal to follow the results in a GATT subsidy case led it to have "trouble capturing meaningful attention from other major trading entities").

240. *See* Bown, *supra* n. 235, at 822 (finding little empirical evidence to suggest that the cost of international obligation alone is strong enough to compel a nation to comply with the decision of an international body).

is an important part of the American economy, it is certainly in the best interests of the nation as a whole to cultivate good international relations, a process that may be significantly impeded by failure to comply with international decisions.

Nevertheless, in light of the relative weakness of both economic retaliation and international obligation, it appears that the United States does not have a particularly strong motive to bring its practices into compliance with its international obligations under NAFTA and the WTO Antidumping Agreement. Despite the enforcement mechanisms contained within both of these dispute resolution regimes, the United States' strong policy interest in continued zeroing is likely to outweigh the forces attempting to compel it to abandon the controversial methodology.

V. CONCLUSION

The conflict over zeroing has been described as a "collision course" between the free trade principles enshrined in international trade agreements and the protectionist tendencies present in domestic antidumping law.[241] Unfortunately, there is no indication that this issue will soon be resolved. By continuing to resolutely reject the clear international consensus against the use of zeroing in antidumping investigations, United States courts are essentially advancing a trade policy that protects domestic industry at the expense of the nation's treaty obligations.[242] Should this trend continue, the zeroing controversy may become somewhat of a microcosm of all that is wrong with the modern international law system. Despite the proliferation of international trade agreements and the accompanying development of sophisticated structures of international dispute resolution, if nations have no intention of being bound by the terms of these agreements, the language of "free and fair trade" is no more than lofty rhetoric.

The mere fact that the United States cannot be forced to be a good citizen of the international community does not mean that the United States should continue to provoke its neighbors by allowing the Department of Commerce to employ a statistically bi-

241. Husisian, *supra* n. 5, at 463.

242. *See* Gathii, *supra* n. 25, at 42 (arguing that this judicial trend ultimately constitutes "acquiescing to the derogation and disregard of . . . treaty obligations by Congress and the executive branch" but ultimately concluding that such a result is not inevitable).

ased methodology in the calculation of antidumping duties. The practice of zeroing is contrary to important principles of both United States and international law and, as such, should be abandoned, regardless of what international consequences, or lack thereof, are likely to follow.