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WHAT IS THE ROLE OF INTERNATIONAL DISPUTE RESOLUTION IN INTERPRETING DOMESTIC LAW?

*Mark A. Barnett*¹

MICHAEL SCHARF: All right. Good afternoon, everybody. Let's go ahead and get started. For those of you who don't know me, I am Michael Scharf, the Interim Dean here at Case Western Reserve University School of Law and also the director of its International Law Center, the Cox Center, and we have had a wonderful semester of events, and I see many people in the audience that we have had at our other events.

This is our last event of the semester. It seems like it has gone by really quickly, but I feel like we have saved the best for last in a lot of ways. If you have been here all semester, it kicked off with a huge international conference about high tech weaponry and super soldiers, so something a little bit, you know, outside the ordinary. We have had panels on the Foreign Corrupt Practices Act. We had Mark Ellis, the Executive Director of the International Bar Association, launch publicly for the first time ever his new app that will be used to record evidence of war crimes around the world. And we are going to end with a really, really special lecture by Judge Mark Barnett. Professor Juscelino Colares is going to introduce you to Mark, but I will say what makes this particularly special for me is that I have known some people for a long time, and yes, I am getting a little gray. I knew, for example, Madeline Albright when she was just a professor and Samantha Power who has spoken here when she was just a journalist.

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1. Mark A. Barnett is a judge on the United States Court of International Trade. He was appointed by President Barack Obama to the position on May 28, 2013. Prior to his judicial appointment, Judge Barnett practiced in the international trade group at Steptoe & Johnson before joining the Office of Chief Counsel for Import Administration at the Department of Commerce from 1998 to 2013, where he successively held the posts of staff attorney, senior counsel, and Deputy Chief Counsel. During his tenure at the Department of Commerce, Judge Barnett was a member of the United States negotiating teams for the United States-Morocco Free Trade Agreement, the World Trade Organization's Doha Round Rules Negotiating Group, and the Trans-Pacific Partnership and represented the United States before dispute settlement panels and the Appellate Body of the World Trade Organization and binational panels composed under the North American Free Trade Agreement. From 2008-09, Judge Barnett was detailed to the United States House of Representatives, Committee on Ways and Means, Subcommittee on Trade as a Trade Counsel.

But Mark I have known perhaps the longest. In college, we ran the national high school model UN conference together. I was the secretary general. He was the undersecretary general. We had 50 college students that were our staff and 2000 high school students at the real UN portraying the United Nations, and I think both of us would say that our careers in international law and our love for international law was launched way back then. And it is such a treat to have a friend from that long ago that has now become a Judge of the U.S. Court of International Trade. And please join me, first, in welcoming Juscelino Colares, who will give you the biographical information to introduce Judge Barnett.

(Applause)

JUSCELINO COLARES: Thank you all for being here. Again, my name is Juscelino Colares, and I teach here at Case. I have been here for three years. I teach international trade law and a bunch of other courses, but it is very rare that, as an academic former prior who has had, you know, some years of practice in D.C. in the trade area, that you actually meet experts that are as qualified as Mark, as Judge Barnett—sorry, Mark—as Judge Barnett.

He graduated with very high honors from Dickinson College, Michigan Law School, and he went from that to a career as a lawyer at Steptoe & Johnson, at one of the best firms, trade firms in D.C., which I appeared often as a guest in my old days. And from there, he served 18 years at the Department of Commerce doing all these trade investigations and also helping defend and prosecute cases before NAFTA and WTO panels. And from there, he served some time—a year I believe—on the Hill, on the Ways and Means Committee, and from there he got appointed to—and very deservedly so—to the United States Court of International Trade, an Article III Court that handles customs and trade remedy issues, trade remedy disputes, challenges to customs, orders, and trade remedy determinations by the United States Department of Commerce and the United States Trade Commission.

It is, indeed, a great honor, the Judge is going to be talking here today about the effect, the importance, the role of international decisions by tribunals on international trade matters on U.S. law, and I could not think of anyone better qualified to speak on the subject than Judge Barnett.

Please welcome Judge Mark Barnett.

(Applause)

MARK BARNETT: Good afternoon. I want to begin by thanking Dean Scharf for inviting me to speak with you here today. As one of two new judges on Court of International Trade,² I often get requests to spend some time visiting with foreign judges and other officials who come to see the Court and learn about our Court. But those invitations typically come with little notice and usually without an included tour of the Rock and Roll Hall of Fame. So I want to thank you, Michael, for that.

I am sure actually that the Dean is not aware of this, but I have a connection to Case Western's Law School. My late father-in-law, Stephen Franko, is an alum from the class of 1950 when it was still Western Reserve University, and the degree he received was a Bachelor of Laws. Interestingly, then, in 1968, after the University became Case Western Reserve University, they reissued his degree as a juris doctor. My wife recently showed me an article that was published in your alumni magazine back in 1985 about my father-in-law and, in part—in connection with my coming out here today. And so I appreciated that chance to get to know a little more about him and his career. And it was all as a result of my agreeing to come speak with you today. So I really do appreciate that; got to spend a little bit of time this afternoon wandering about University Circle and some of the campus buildings here, and I love the architecture. And I am sure he would be very impressed if he were to come see it all today. So thank you again for this opportunity.

Let me start off by giving you a little bit of background, first on myself, and then about the Court on which I sit. Primarily to give you a sense of the experience that forms my perspective on the interplay of international obligations with domestic law. Prior to being appointed to the bench, as Professor Colares told you, I spent 18 years in the General Counsel's Office at the U.S. Department of Commerce, and for the last eight years there I was the Deputy Chief Counsel for Import Administration. In that role, along with the chief counsel and a staff of roughly 30 attorneys, we provided legal advice to what was then called Import Administration, the agency within the Department of Commerce that's responsible for administering the U.S. Unfair Trade laws; in other words, the antidumping and countervailing duty laws. As the attorneys for Import Administration, we advise the agency on all aspects of its antidumping and countervailing duty, participating as members of Import Administration's team along with analysts, accountants, policy advisors, and others as they conducted their investigations and other

2. See 159 CONG. REC. S3877-78 (daily ed. May 23, 2013) (vote granting Senate advice and consent to the nominations of Mark A. Barnett and Claire R. Kelly to the United States Court of International Trade).

administrative proceedings. And we reviewed their determinations for legal sufficiency. Those determinations could then be challenged in several different fora, sometimes simultaneously. Within the U.S. legal system, any party that was involved in the administrative proceeding could challenge the determination before Court of International Trade, on which I now sit.

Attorneys from Commerce would work closely with the Department of Justice attorneys to defend the agency's determinations, drafting briefs, and preparing the DOJ attorneys for oral arguments. If the case involved imports from Canada or Mexico, the parties have the option of taking their case to a binational panel composed pursuant to Chapter 19 of the NAFTA, instead of Court of International Trade.³ In these NAFTA panels are ad hoc panels of experts, practitioners, and academics composed for hearing the individual case.⁴ By the terms of the NAFTA agreement, these panels apply the domestic law of the country in which the determination was made.⁵ In these cases, Commerce has its own litigating authority, and their attorneys draft and file the briefs, and they make the oral arguments directly to the binational panels.⁶

In addition to these challenges under domestic law, the government of the exporting country may elect to challenge Commerce's determination or its practice, its regulation, or even the statute before a dispute settlement panel at the World Trade Organization with, of course, the possibility of an appeal to the WTO's appellate body.⁷ In these cases, the Commerce attorneys work side by side with attorneys from U.S. Trade Representatives Office drafting the written submissions and arguing the cases in Geneva. I should note that in addition to providing legal advice during the administrative proceedings and defending the determinations in litigation, Commerce attorneys also work closely with senior officials in the client office in international negotiations. So whether it is a case specific suspension agreement, as was recently announced, for example, in the sugar dispute with Mexico Free Trade Agreement,⁸

3. North American Free Trade Agreement arts. 1901–11, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA], *available at* <http://www.worldtradelaw.net/fta/agreements/nafta.pdf>.

4. *Id.* art. 2009.

5. *Id.* art. 1904.

6. *Id.* art. 2013.

7. *See Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#appeals (last visited Apr. 17, 2015).

8. Ross Korves, *U.S.-Mexican Sugar Suspension Agreement*, TRUTH ABOUT TRADE & TECH. (Nov. 28, 2014), <https://truthabouttrade.org/2014/11/28/u-s-mexican-sugar-suspension-agreement/>.

negotiations such as the ongoing TransPacific partnership or TPP and TransAtlantic Trade Investment Partnership or TTIP that we are negotiating with Europe, or the WTO's Doha round negotiations to revise, among other things, the antidumping agreement and the subsidies in countervailing measures agreement;⁹ in these roles, I was fortunate enough to be able to combine my legal and litigation experience with my understanding of the policy concerns of our team in order to assist in achieving our negotiating objectives.

Now, as I turn to a quick bit of background on Court of International Trade, let me ask if anyone here knows what the first case tried before the first judge appointed to the first court that was organized in the United States?

(No response)

MARK BARNETT: The case was *United States v. Three Boxes of Ironmongery*.¹⁰ It was a case about the amount of customs duty charged on the imports of certain goods, and I am told "ironmongery" is the technical term for stuff made out of iron.¹¹ But this is your trivia part of the talk. The case was tried before Judge Duane of the District Court for the District of New York, and the courthouses now for both the Southern District of New York and Court of International Trade sit in lower Manhattan, sit on Duane Street named after Judge Duane. But the important thing about the little trivia option here is what we are talking about is a customs case, first case tried in the United States, and it was the first of what would become many.

You will recall, in the days before the income tax, customs duties were a critical source of revenue for the United States, and, even then, there were enough lawyers around challenging the duties assessed on imports to the point where it started to threaten to overwhelm the district courts. So, over time, the administrative appeals process developed, and a specialized Article I Court was created to relieve the burden on the district courts and provide judicial review in these customs cases. Fast forward now to 1980, Congress passed the Customs Court Act of 1980, and there what they did was clarify and expand the status, the jurisdiction, and the powers of the U.S. Customs Court, making it a full Article III Court and changing its

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9. World Trade Org., Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).
 10. See John D. Winter & Richard Maidman, *Retelling the History of the United States District Court for the Southern District of New York*, NYSBA NYLITIGATOR, Summer 2012, at 9.
 11. See *id.* "Ironmongery" is defined as "a hardware store or business" or alternatively, as "the stock of a hardware store; hardware." *Ironmongery*, DICTIONARY.COM, [http:// dictionary.reference.com/browse/ironmongery](http://dictionary.reference.com/browse/ironmongery) (last visited Apr. 17, 2015).

name to the U.S. Court of International Trade.¹² So Court of International Trade, or CIT, is a trial level court, like the district courts around the country, even though we have few trials, and most of our cases involve review of agency record and oral argument on written briefs more like what you will see at the circuit courts. Also unlike the district courts, we have national jurisdiction but limited subject matter jurisdiction.¹³

In these days, most of our cases, as Professor Colares talked about, fall into one of four categories: Appeals of Commerce decisions in antidumping and countervailing duty cases, appeals of injury determinations by International Trade Commission, appeals of protest determinations from customs and border protection, and cases involving things like classification and valuation on imports and penalty cases that are brought by customs and border protection, whether it is negligence, gross negligence, or fraud cases.¹⁴

Let me turn now to the main subject of my remarks, and that's the relevance of international trade agreements and dispute settlement findings in the domestic interpretation of our trade laws. In the practice of international trade law, parties may seek to raise international obligations in several ways. First, they might attempt to raise a WTO obligation during the administrative proceeding before Commerce. In that case, they typically receive little more than a one-sentence reply, something to the effect that "U.S. law as implemented through the Uruguay Round Agreements Act is fully consistent with our WTO obligations," and that's likely to be the response they get. Regardless of whether the party is questioning the consistency of the statute, a regulation, or a practice with the WTO agreements, Commerce has no authority to change the trade law statutes and, within the confines of a particular administrative proceeding, is no more able to rewrite its regulations.

While Commerce, like any other agency, has the ability to change an administrative practice, provided it articulates a rationale for the change, the agency's general position has been that its practices, which it has developed over time and in conformity with its governing statute and regulations, is WTO consistent. Period. And I should note, that while Court of International Trade often requires the exhaustion of administrative remedies in order to challenge some aspect of Commerce's determination before our Court, no such

12. Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

13. *See Jurisdiction of the Court*, U.S. CT. INT'L TRADE, <http://www.cit.uscourts.gov/AboutTheCourt.html> (last modified Feb. 27, 2015).

14. *See, e.g., Coal. of Gulf Shrimp Indus. v. United States*, No. 13-00386, slip op. 15-29 (Ct. Int'l Trade Apr. 3, 2015) (challenge to ITC's final injury determination).

requirement exists at the WTO.¹⁵ Similarly, while Court of International Trade typically disregards post-hoc reasoning that is offered in litigation where that reasoning cannot be traced back to the agency determination itself, again there is no similar practice in WTO dispute settlement.¹⁶ Consequently, neither the individual party that is appearing before Commerce, nor Commerce itself, has any need to preview any of its WTO arguments during the administrative proceeding.

Now, a party may also seek to raise a WTO argument before a domestic court or a NAFTA panel, and, as I noted in my introduction when reviewing Commerce determinations, NAFTA panels are required to apply U.S. law by the terms of article 1904 of the NAFTA.¹⁷ That provision requires the panel to determine whether the antidumping and countervailing duty determination is in accordance with the antidumping and countervailing duty law of the importing party. It goes on to say—and I will quote for this purpose—“the antidumping and countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedence to the extent that a court of the importing party would rely on such materials in reviewing a final determination of the competent investigating party.”¹⁸ Thus, when a NAFTA panel reviews a determination by Commerce, it stands in place of the U.S. Court that must apply U.S. law. That’s why I group NAFTA panel review with U.S. Court review. In going forward, I am going to focus on just U.S. Court review.

As a federal judge, a basic part of my duty is to interpret and apply U.S. law. However, we should keep in mind that the WTO agreements are not treaties. They were not ratified by the Senate, and, thus, as envisioned by the U.S. Constitution, they are not part of the supreme law of the land. Instead, what happened is Congress implemented the WTO agreements into U.S. law through the Uruguay Round Agreements Act, and, as part of that implementation, they also approved the statement of administrative action as the authoritative interpretation of the statute.¹⁹ Therefore,

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15. See Kevin C. Kennedy, *Parallel Proceedings at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?*, 39 GEO. WASH. INT’L L. REV. 47, 58 (2007).
 16. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].
 17. NAFTA, *supra* note 2, art. 1904.
 18. *Id.*
 19. Uruguay Round Agreements Act, Pub. L. 103-465, § 101, 108 Stat. 4809 (1994) [hereinafter URAA].

only the Uruguay Round Agreements Act, and not any provision of the WTO agreement, has any direct effect in the United States. In case there was any doubt about this, when they passed the URAA, Congress included an express provision confirming that when a conflict exists between any WTO provision and U.S. law, U.S. law prevails.²⁰ Having made clear that the WTO agreements themselves take a back seat to domestic law, it should come as no surprise that Congress and the executive branch also provided that dispute settlement reports do not override domestic law either.²¹

The statement of administrative action provides the reports issued by panels or the appellate body under the DSU have no binding effect under the law of the United States and do not represent an expression of the U.S., foreign, or trade policy. If a report recommends that the United States change federal law to bring it into conformity with the Uruguay Round Agreement, it is for the Congress to decide whether any such change will be made. It is not a great surprise there, right? Congress is simply saying, if a statute is found to be WTO-inconsistent, it is up to Congress to fix it. A dispute settlement report itself doesn't directly invalidate the statute.

Now, that deals with conflicts between dispute settlement reports and domestic statutes, but what about conflicts between those dispute settlement reports and U.S. regulations or agency determinations? There, too, the statement of administrative action provides that neither federal agencies nor state governments are bound by any finding or recommendation included in such reports.²² In particular, panel reports do not provide legal authority for federal agencies to change their regulations or procedures. Again, the SAA is simply making it clear that the dispute settlement reports are not self-executing. As we will see in a few minutes, this is not to say that agencies cannot alter their regulations or practices or procedures in response to an adverse WTO dispute settlement report. It just says that they have to have an independent authority under domestic law in order to make that kind of an alteration.

We may be able to draw some useful parallels between this situation and the one the Supreme Court looked at in the *Medellín v. Texas* case in 2008.²³ There the Court looked at the Vienna Convention on counselor relations along with a decision from the International Court of Justice.²⁴ While that international agreement

20. *Id.* § 102.

21. *Id.*

22. *Id.*

23. *Medellín v. Texas*, 552 U.S. 491 (2008).

24. *Id.* at 497 (discussing *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Judgment of Mar. 31)).

was a treaty and it was ratified by the United States, the Court found that neither the Vienna Convention nor the decision of the ICJ were self-executing.²⁵ In fact, it considered that the United Nations Charter provides that members undertake to comply with the ICJ decision in any case in which it is a party signaling the need to take some action in the future, and that recourse in the case of noncompliance is to the UN Security Council where they noted that the U.S. holds a veto.²⁶ The combination of these factors made it clear to the majority of the Supreme Court that compliance with the decision of the ICJ was a matter for the political branches in the exercise of their foreign relations powers and not one that should be enforced by the domestic courts.²⁷

While the United States doesn't hold anything close to a veto at the WTO, dispute settlement reports typically ask a party to bring their measure into conformity with the WTO agreement, a similar signaling of future action. The Dispute Settlement Understanding, the agreement that covers the dispute settlement system at the WTO, also contains provisions relating to the possibility of providing compensation rather than implementation and for the possibility of retaliation in the event of noncompliance. Similar to the situation examined in the *Medellín* case, I would suggest that these provisions provide a similar indication that compliance with adverse WTO decisions also is within the realm of the political branches and should not be enforced by the judicial branch.

While parties may accept that the WTO, the agreements, as well as panel and appellate body reports do not have direct effect in the United States, let's not stop them from arguing that WTO agreements and panel or appellate body reports interpreting those agreements should be used by the courts to construe U.S. law that is ambiguous. The authority cited for this proposition dates back to an 1804 Supreme Court case called *Murray v. The Schooner Charming Betsy*.²⁸ Therein the Court held that an act of Congress never been construed to violate the law of nations if any other possible construction remains.²⁹ This is consistent with current restatement in foreign relations law of the United States, which recognizes that while international obligations cannot override inconsistent requirements of domestic law, ambiguous statutory provisions should be construed, where possible, to be consistent with international obligations of the

25. *Id.* at 506.

26. *Id.* at 508.

27. *Id.* at 511.

28. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

29. *Id.*

United States.³⁰ So the argument is that when Commerce has interpreted an ambiguous provision of the antidumping and countervailing duty statutes in a way that is inconsistent with our WTO obligations, as determined by a dispute settlement panel or the appellate body, domestic courts should apply the Charming Betsy Doctrine to require Commerce to revise its interpretation to be consistent with that dispute settlement interpretation.

Now, there have been several responses offered to a Charming Betsy argument, some successful and others, at least directly speaking, less so. First, among the possible defenses is that the statutory provision in question is not ambiguous. Congress has clearly spoken on the issue, and if the statute is not ambiguous, then the Charming Betsy Doctrine cannot come into play. In such a case, domestic law prevails, and the contrary findings of the WTO settlement system must be resolved by Congressional action and not the courts.

A second argument that has been made in unfair trade cases is that reliance on the Charming Betsy Doctrine by private parties has been foreclosed by statute. Section 3512 Title 19 of the U.S. Code provides that only the United States shall have a cause of action under any of the WTO agreements or by virtue of Congressional approval of the WTO agreements.³¹ Moreover, no private party may challenge an agency action as inconsistent with the WTO agreement. Generally, the courts have been reluctant to rely on this provision to decline jurisdiction over a challenge to an agency determination in the unfair trade area. In rejecting this argument, what they found is that the parties' claim is being made under the domestic statute. In other words, it is a claim that is essentially a Chevron prong two type claim, which you probably learned about in administrative law; that the agency's interpretation is unreasonable because it leads to this inconsistency.³² You might consider that to be a fine distinction, but that's where the line has been drawn.

Now, let me insert a side note here: Section 3512, to which I made reference, is definitely one sided. It prohibits private parties from making claims based on WTO agreements, but it doesn't prevent the United States from relying on the WTO agreements and, to that extent, even relying on the Charming Betsy Doctrine. This is especially important when an agency takes action in order to implement an adverse WTO decision, and I will talk about that

30. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

31. Relationship of Agreements to United States Law and State Law, 19 U.S.C. § 3512 (2006).

32. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

process in just a minute. But when it does so, the agency must explain the reasoning for its change in interpretation of the domestic law, and, in that case, it may rely on its stated goal of compliance with the WTO dispute settlement decision.³³ To this end, in my previous career at Commerce, I have argued that while Charming Betsy cannot be used as a sword by private parties to force compliance by the United States, it can be used by the United States as a shield to defend their change in interpretation of the statute.

A third argument that has been raised is that WTO panel and appellate body reports do not constitute the law of nations within the meaning of the Charming Betsy Doctrine. Article III-2 of the Dispute Settlement Understanding states that the dispute settlement system is meant to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law.³⁴ In the earliest days of the dispute settlement system, the appellate body stated that because the purpose of the DSU is to settle the particular dispute between members, quote, “we do not consider that Article III-2 of the DSU is meant to encourage either panels or the appellate body to make law by clarifying existing provisions of the WTO agreement outside the context of resolving a particular dispute.”³⁵ Consistent with that, Article IX-2 of the Marrakesh Agreement that created the World Trade Organization sets forth that the ministerial conference and the general counsel of the WTO have the exclusive authority to adopt interpretations of the WTO agreements.³⁶ Article III-9 of the DSU reconciles the dispute settlement system with Article IX of the Marrakesh Agreement, providing that the provisions of the DSU are without prejudice to the right of the WTO member to seek an authoritative interpretation from the ministerial conference for the general counsel.³⁷ In short, a dispute settlement report only resolves the issue before the panel and as between the parties before the panel. Only the ministerial conference or general counsel can offer a broader binding interpretation.

Accordingly, dispute settlement reports not involving the United States as a party do not create implementation obligations on the part of the United States. And the United States is under no

33. See 19 U.S.C. § 3512.

34. DSU, *supra* note 15, art. 2.

35. *Scope of Appellate Review*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/repertory_e/s3_e.htm, (last visited Apr. 17, 2015).

36. Marrakesh Agreement Establishing the World Trade Organization art. 9 ¶, 2 Apr. 15, 1994, 1867 U.N.T.S. 154 (hereinafter Marrakesh Agreement)].

37. DSU, *supra* note 15, art. 3 ¶ 9.

obligation to alter its laws or methodologies in response to such WTO dispute settlement reports. Without such broader applicability, it is difficult to argue that such reports constitute the law of nations. It is also difficult to make the case that dispute settlement reports represent the law of nations when the terms of the Dispute Settlement Understanding recognize alternatives to implementation. In fact, as I mentioned earlier, a WTO member country may choose to respond to a panel or appellate body report without changing measure found to be inconsistent with the WTO agreements. To that end, the Dispute Settlement Understanding provides for alternative resolutions, including the provision of trade compensation and other negotiated settlements or the suspension of benefits equivalent to the nullification or impairment of benefits caused by the offending measure.³⁸ To return to the analogy I drew earlier with the Supreme Court's decision in *Medellin*, the structure of the Dispute Settlement Understanding, like the structure of the UN Charter, makes it clear that implementation or the manner in which non-implementation is addressed are issues that should be decided by the political branches, not the judicial branch.

Finally, let me return to the issue of ambiguity in the statute and address it from a slightly different angle. Now, I said earlier that one argument that might be made against the application of Charming Betsy was that the statutory provision in question was not ambiguous. Let's accept for the moment that the substantive provision at issue is ambiguous. Okay? But let's also say that in abundance of what I would call precognition, Congress anticipated the situation in which a WTO dispute settlement report finds an agency's discretionary interpretation or application of a statute to be WTO-inconsistent and that Congress laid out a non-ambiguous procedure for addressing that finding, including provisions that clearly leave the executive branch with the discretion not to come into compliance. That's, in fact, the situation that we have in the unfair trade area.

With respect to the antidumping and countervailing duty matters, Congress provided two procedures by which the United States could come into compliance with an adverse WTO report. Regardless of which option we are talking about, compliance is only possible when it would be consistent with existing law. As I said earlier, if the antidumping and countervailing duty statutes require the WTO-inconsistent action, it is up to Congress to take the necessary action to come into compliance. The first method for implementation was set out in Section 123 of the Uruguay Round Agreements Act, 19 U.S.C. Section 3533. It creates a procedure to amend, rescind, or modify an agency regulation or practice that is

38. *Id.* art. 22.

found to be inconsistent with the WTO agreement.³⁹ That change, however, cannot occur unless and until an elaborate consultation process has been undertaken. The steps include U.S. Trade Representatives Office and Commerce consulting with the appropriate Congressional committees along with private sector advisory committees, and providing an opportunity for public comment, all before determining whether and how to implement the WTO report. No implementation can become effective until relevant Congressional committees have also been given time to indicate their agreement or disagreement with the proposed implementation.

The second method for implementation was set out in Section 129 of the URAA, now 19 U.S.C. Section 3538. This process is narrower in scope, and it applies to the situation in which a dispute settlement report finds that a particular action or determination by Commerce was not in conformity with U.S. WTO obligations.⁴⁰ Like the earlier procedure, this one requires USTR and Commerce to consult with the relevant stakeholders before USTR determines whether to request Commerce to issue a new determination not inconsistent with the WTO report. Again, that's a discretionary determination by USTR. Moreover, even after Commerce issues a new determination that is not inconsistent with the WTO report, the statute provides that USTR may direct Commerce to implement the determination, and it may do so in whole or in part.⁴¹ Now, this is where it gets fun, for some of us at least. These so-called Section 129 determinations, if USTR directs Commerce to implement them, they can be challenged in domestic court.⁴² So that challenge in domestic court is only to ask whether the determination, this 129 determination, is based on substantial evidence and is otherwise in accordance with law; in other words, with U.S. law just like any other Commerce determination.

What makes it interesting is that Commerce's original determination may still be under review by the courts at the same time the Section 129 determination is being challenged. This is possible because the 129 determination only have prospective effect, so the original determination still covers imports made between the time of that original determination and the Section 129 determination, and the 129 determination governs into the future. The statement of administrative action refers to such a scenario stating that, and I will quote, "in such situations, the administration

39. URAA, *supra* note 18, § 123.

40. *Id.* § 129.

41. *Id.*

42. See MARK A. BARNETT, THE CIT IN THE MIDDLE—INTERNATIONAL TRIBUNALS: AN OUTLINE (2011), available at http://www.cit.uscourts.gov/Judicial_Conferences/16th_Judicial_Conference/16th_Jud_Conf_papers/Barnett%20Paper.pdf.

expects that courts and binational panels will be sensitive to the fact that the applicable standard of review that is set forth in statute and case law, multiple permissible interpretations of the law and facts may be legally permissible in any particular case, and the issuance of a different determination under Section 129 does not signify that the initial determination”—and I will put in brackets—“that was found to be WTO-inconsistent was unlawful.”⁴³

So how is that for a punch line in the area of the unfair trade laws, at least? Congress and the administration have pretty much put the Schooner *Charming Betsy* to rest at the bottom of the sea. So what’s the take-away from all this? Well, I would suggest that the take-away is that the unfair trade laws provide a helpful or at least an interesting case study if you face questions about the relevance of international law in a domestic setting. They can certainly be helpful to you in identifying questions to ask, analytical approaches to take regardless of the field of law in which you are considering the issue. If your career takes you to Capitol Hill or the executive branch, in some position where you might be developing implementing legislation relating to pretty much any kind of international agreement, regardless of whether it relates to the environment, human rights, terrorism, or any other field of law, there are lessons to be learned from here in terms of the scenarios that you might want to anticipate and account for so that you can make clear what happens when the inevitable conflicts arise between the implementing legislation and the international treaty agreement or law that you are seeking to implement.

Thank you, again, for the kind invitation to come speak here today, and I look forward to taking some questions. Thank you.
(*Applause*)

JUSCELINO COLARES: Thank you, Mark. Thank you very much for your remarks, Judge Barnett. We have 22 minutes. We would very much like to welcome questions to you. I would like to start with one observation and one quick question. The observation is all my students in my international trade law class who are here, you should thank Judge Barnett for giving you the perfect outline to my international trade law course, and you should all be glad that I start with international trade law, not WTO law.

Now, my question, Judge Barnett, is directed more to the former United States Department of Commerce official than to the Judge because the questions of law are pretty much settled, but I refer back to Mark Barnett, who used to work at the Department of Commerce, especially because of his interactions with the WTO appellate body and WTO panels, and the question is a simple one rather: If U.S.

43. *Id.*

trade courts, the Court of International Trade, which you now sit, and the Court of Appeals for the Federal Circuit tend to review U.S. trade remedy determinations, antidumping countervailing duty law determinations, and they tend to uphold these agency's decisions by about two thirds or upwards to two thirds of the time, why do you believe that NAFTA Chapter 19 panels, who have the same jurisdiction, tend to reverse U.S. agency decisions on the same law, applying or supposedly applying the same principles of administrative review of trade determinations at twice the rate, meaning U.S. courts tend to reverse Commerce and International Trade Commission decisions only thirty-two percent of the time; NAFTA panels tend to reverse Department of Commerce and International Trade Commission sixty-eight percent of the time, and why do you think that the same phenomenon seems to occur at the WTO panels and appellate body but not even at that rate, at the rate of around ninety percent? Thank you.

MARK BARNETT: Interesting question. I think my first response is, I haven't read your article yet, so I don't know the right answer to provide. But I mean, I would offer a couple.

JUSCELINO COLARES: Is it because you judges in the United States are biased?

MARK BARNETT: Of course not. Of course not. No, I think probably a couple of different answers. I mean, depending on the group of cases you might be talking about, I think one option is there is certainly some reality to the fact that in some cases panelists tend to vote the flag, and I don't want to overstate that. I mean, I start off with that because—I mean, we were talking for a while beforehand today. We were talking about one of the reasons, the biggest reason that Chapter 19 exists in NAFTA—I don't believe, I don't think anybody truly believes—is because the Canadians thought that U.S. Courts do not give an unbiased review of unfair trade cases because of lumber, one product, one big case, lots and lots and lots of money. I mean, we are talking billions of dollars at stake. I mean, you could pretty much add up, I suspect, all the other unfair trade cases that the United States has, and maybe they start to come close to what lumber is worth in terms of import values and duties that we had when the lumber cases, the lumber orders were in effect for a little while. So that's a huge interest for Canada. And I think if you look back and you separate out the lumber decisions, the lumber panel reports, I think there you are going to be hard pressed to find a Canadian panelist who votes against Canada.

But let's put that one aside because I don't want to be unfair to Canadian panelists or any other NAFTA panelist because I think for the most part, outside of that one context, I think NAFTA panels generally do a fairly decent job. That was our take on it at Commerce. To the extent that they are a little less forgiving of the agencies, I think that's probably in the nature of who you have as

panelists, and I don't mean this in a negative way; it is just you have ad hoc panels of experts, very often practitioners.⁴⁴ These are folks that have argued before these agencies on one side or the other, whether representing U.S. domestic parties or Canadian parties or Mexican parties as the case may be, and so they probably have been a little bit frustrated by the kinds of issues that they may be dealing with.

I mean, I am not suggesting that they have a direct conflict in terms of the issue they are addressing, but you know, they have been faced with Commerce decisions finding, oh, you didn't give us a good enough response, and now we are going to make this adverse inference against your client, and they are going to get this really bad decision out of Commerce. And so there is probably some interest there in pushing the agency to do a little better job, maybe be a little more forgiving in those kind of situations. I think the expectations they come in with are probably higher than what some of us who have the benefit of a lifetime appointment come to expect from the agencies and come to expect in our review of agency determinations, but that's my guess, and I look forward to reading your article and finding out the right answer.

(Laughter)

AUDIENCE MEMBER: You do a great job of outlining the ways in which Commerce apparently—thank you again for the presentation of a model in a very murky field—you do a great job of how this one gray area of Congress thinking through very clearly and consequentially, exactly how to respond and treat applicable law. And so my question goes to the second level, which is so beyond applicable law, can you elaborate a little bit on your view of how they treat the issue of sources of interpretation and how strongly they have limited the sources of interpretation that agencies could use in determining nature, scope, of particular terms, term of art within that framework? Do they do a similar job of being fairly limiting, or do they allow reference to things like the U.S. position and the negotiations doing the round and things like that?

MARK BARNETT: I mean, I was with you I think until the very end, and that is, let me say, the answer to your question is, I don't think they are very limiting in general. As a domestic judge, the standard of review that we apply, for example, for most of these agency determinations is a standard not quite APA standard of review, whether there is substantial evidence in the record and whether the decision is otherwise in accordance with law.⁴⁵ We apply Chevron all the time, and like I said, most of the decisions focus then

44. See generally NAFTA, *supra* note 2, arts. 2009-2010.

45. See Administrative Procedure Act, Pub. L. 79-404, § 10(e), 60 Stat. 237 (1946).

on substantial evidence.⁴⁶ There is not a lot more development of that standard than that in terms of looking at other sources of law, if you will. It is very much the practice of administrative law with the umbrella of international hanging over it. But otherwise, it is really review on an agency record that is sent up to us in most of these cases. So I mean, something like the U.S. position in the negotiations, it may be of interest to us in an academic sense, if you will, but I think it is rare that it comes into play in our decision-making process.

I will say there have been some judges, including some who were on the Court of Appeals for the Federal Circuit, who would talk a little more openly about, well, should we, since we are a specialized court in this area, be trying to think a little more about harmonizing U.S. law with our international obligations? And I mean, I wouldn't necessarily subscribe to that position because I think Congress has laid out what our role is in the statute. Establishing our Court and establishing our standard of review, and I think for all the reasons that I said here today, I don't know that the decision-making process in Geneva is necessarily something that should come to play in our interpretation of domestic law.

Maybe I will come back to you since the microphone is in the back there.

AUDIENCE MEMBER: What issues do you predict the international trade will be facing now that the OCS has published its notice that it will be limiting the "zeroing," the "zeroing methodology" in order to provide the WTO regulations? What do you think the main issues will be?

MARK BARNETT: Well, zeroing is going to continue to be an issue frankly. That's going to be one of them. And the reason I say that is, I mean, what Commerce has done so far is back in 2006, 2007, they said, all right. In investigations where we use this one comparison methodology, we are going to stop, and then they said a few other things about comparison methodologies, but that doesn't really come into play. Then after a couple of additional WTO decisions, they came out somewhat recently, about a couple years ago, and said in administrative reviews we are generally going to stop zeroing, and we have a default position. We are going to use an average-to-average comparison methodology and not zero.

Let me pause for a second because I don't want to assume that all of you know what I am talking about. You may be looking at me thinking what is he talking about in terms of zeroing? So the 30-second explanation of what zeroing is, we talk about dumping cases on particular products. Well, a dumping case on a product isn't a very specific thing. I mentioned lumber, Canadian lumber. So we had an order on the dumping of softwood lumber from Canada. Well, you

46. *Chevron*, 467 U.S. at 842-43.

know, all the lumber is not the same, and so when you do price comparisons on lumber, you look at U.S. sales of two-by-fours, compare it to Canadian sales of two-by-fours; you look at U.S. sales of six-by-sixes, compare it to Canadian sales of six-by-sixes. You make all those different comparisons. Maybe what you find out is, when you make those comparisons, the two-by-fours were dumped, they were sold in the United States too cheaply. They were sold for less than what they are sold for in Canada, and overall the U.S. industry is being hurt. The six-by-sixes, on the other hand, were sold for whatever reason at a higher price than normal value. The U.S. importer was paying more for those than what they would otherwise pay for them in Canada.

The question is, when you put all that together, how do you do it? Do you just focus on the dumping that occurred with regard to the two-by-fours and maybe spread that out over all the imports of lumber, or do you actually reduce that amount of dumping that you found in the two-by-fours to account by which the six-by-sixes were sold at higher prices? Do you provide an offset in that case? U.S. practice forever has been no offset.⁴⁷ That's it. We just take the amount of dumping in this case, say, on two-by-fours, and then the denominator in that calculation is all lumber. So we spread that out over everything, and the amount of dumping duties we collect would just get it to the amount by which the two-by-fours were dumped. Okay?

That became known as zeroing because what other countries argued. They got to name it because they came out and made the arguments first. If we had named it, we probably would have called it offsetting. We might have had better success if we had named it and named it offsetting. They called it "zeroing" though. They said what you are doing is, you are taking that negative dumping margin, and you are changing it. You are resetting it to zero, zeroing before you combine it all, and because you are changing it, that's wrong. Okay. Nobody agreed to get rid of zeroing; U.S. position. Nobody agreed to get rid of zeroing in the Uruguay Round.⁴⁸ Everybody who is really involved in negotiating it, not just the United States, Europe, Canada, Australia, everybody who had an active antidumping practice all did zeroing, even after the WTO agreement.⁴⁹ And despite

47. Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (adopted Jan. 27, 2003), available at https://www.wto.org/english/tratop_e/dispu_e/217_234_abr_e.pdf.

48. *The Implications of the Uruguay Round Agreement on Agriculture in Developing Countries*, U.N. FOOD & AGRIC. ORG., <http://www.fao.org/docrep/004/w7814e/w7814e04.htm> (last visited Apr. 17, 2015).

49. Appellate Body Report, *supra* note 46.

the fact that in other areas where they make big changes in the WTO, everybody made the changes to implement those changes in the agreement. So they put in this sunset provision; said okay. An order could live more or less forever. Now, with the WTO agreement, they said every five years you have got to review it. Nobody pretended that that didn't exist. They all faithfully implemented that. The only thing that, according to the appellate body, nobody faithfully implemented was this ban on zeroing.

In any case, to get back to the question now that we have a sense of what zeroing is, it is hard to answer it very precisely because then you get into comparison methodologies, you get into the stage of the proceeding, Commerce has gotten rid of it with one comparison methodology in investigations. They have gone as a default to a different comparison methodology in reviews where they have agreed not to use zeroing, but they have strengthened their practice with regard to what's called targeted dumping where you might see a pattern of prices by customer, by region, or by time period in the United States that gives a sense that, well, maybe there is something a little fishy going on here, and in that case, instead of aggregating everything in these broad averages, we are going to disaggregate all the U.S. prices. And we are going to look at it transaction by transaction where the dumping has occurred. And in those cases, a lot of folks, a lot of panels, WTO panels, if you can agree that it only makes sense to do zeroing because if you don't, think about it, mathematically, you end up as if you are just doing average-to-average comparisons and providing that offset.

So we are still zeroing in the targeted dumping context. That targeted dumping context has been changing, evolving over the last few years. They have just rolled out a new one within the last year-and-a-half, two years thereabouts. The parameters of that are going to continue to be explored. I think it is Korea in their WTO challenge to either washers or the refrigerators' determination, they are challenging at the WTO our targeted dumping methodology in investigations.⁵⁰ So zeroing is going to continue to play out.

What are the other big issues? The other big issue, frankly, is going to be China. It continues to be China. In the countervailing duty context subsidies, you can countervail subsidies where there is a financial contribution that provides a benefit, and it is specific based on region, industry, company, et cetera. For the longest time, the approach of the United States was in the context of a nonmarket economy like, you know, the Soviet Union, China, et cetera. The concept of a subsidy can't really exist. You have got a centrally

50. Scott Flaherty, *S. Korea Brings WTO Case Over US Washing Machine Duties*, LAW 360 (Aug. 29, 2013, 3:31 PM), <http://www.law360.com/articles/468769/s-korea-brings-wto-case-over-us-washing-machine-duties>.

planned economy. The fact that they are directing resources to one industry over another doesn't really make any sense. It was affirmed back in the 1980s in *Georgetown Steel* that you didn't apply the countervailing duty law to nonmarket economies.⁵¹

In 2006, Commerce changed its position with regard to China. They said we think China, it is not really an on-or-off switch. They have evolved enough that, at least while we still consider them a nonmarket economy, you can – the concept of a subsidy has meaning within China, and they started applying a countervailing duty law. There were a number of cases in that area, how that has gone back and forth, and now while Congress has confirmed the ability to use the countervailing duty law with regard to China,⁵² they have also provided that where there is a demonstration that applying both the antidumping law and the countervailing duty law constitutes sort of a double remedy, overcounting, if you will, that Commerce should make an adjustment for that.⁵³

Well, this is, again, it all comes down to money because every dollar you don't adjust for is an extra dollar that is collected at the border in a duty. So that methodology, as it is going to continue to be developed, is going to be fought over tooth and nail because that's where all the cases are. I took a look—I think ninety-seven out of about two hundred and fifty antidumping cases are against China. Twenty-seven out of fifty-two, I think it is countervailing duty cases are against China. We have about three hundred orders. Almost half of them are against China. That's where the money is going to be. That's where the money is going to be, and that's where the issues are going to be, I think, going forward to a large degree.

Sorry, that was a long answer to a straightforward question.

AUDIENCE MEMBER: But it is perfect as to my question, which is on double remedies and in the context of a customs penalty, gross negligence, or negligence penalty case where the penalty is typically a multiple of the loss of duties, the unpaid duties, or underpaid duties. Are you aware or can you perhaps comment on what type of reception the Court might give to an argument that an inconsistency with WTO obligations, which I believe double remedies has been determined as such, may be a mitigating factor in a penalty case?

MARK BARNETT: I mean, I am not aware of any decision that has addressed that. So I mean, I certainly wouldn't want to be prejudging

51. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315-18 (Fed. Cir. 1986).

52. *See generally* JOHN M. ANDERSEN, COUNTERVAILING DUTY INVESTIGATION ON CERTAIN WELDED AUSTENITIC STAINLESS PRESSURE PIPE FROM THE PEOPLE'S REPUBLIC OF CHINA (2009), available at <http://enforcement.trade.gov/frn/summary/prc/E9-1829-1.pdf>.

53. *See id.*

anything in terms of where it goes. I mean, I will say I am not sure—you may be using sort of the concept of a double remedy and maybe combining two things together that don't really belong together, because, at least in terms of the double remedy in the context of the application of antidumping and countervailing duty law, that's a specific issue that arises, because of the nonmarket economy methodology that applies to China. And it is only because of that that you can have that concept of a double remedy. The fact that a penalty in a customs case might be a doubling of the duty, I don't think that has the same concept, and I think even within the WTO I would be surprised if there is not enough authority in the WTO agreements, whether it is the customs valuation agreement or some of the other agreements there, to allow authorities in their sort of role to police imports to impose penalties in the case of noncompliance with domestic requirements. But you know, how many of those arguments, WTO type arguments, might play out in a customs, I don't know that it has come up directly, so I really couldn't speak to it there.

MICHAEL SCHARF: Mark, we are out of time, but I want to invite the audience to join us for a reception in the rotunda where we have appetizers and drinks, and we can get a chance to talk one on one with you, but before we leave please join me again in thanking Judge Barnett.

(Applause)

