Northwestern Journal of International Law & Business

Volume 17
Issue 1 *Winter*

Winter 1997

Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?

Matt Schaefer

Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?

*Matt Schaefer**

INTRODUCTION

The term constitutionalism is increasingly discussed in the context of international trade agreements. A prominent example is Professor Petersmann's writings on the constitutional functions that trade agreements could serve by limiting governmental discretion to take welfare-reducing protectionist measures against the long-term interests of a nation and contrary to individual economic liberty.[1] The absence of such protectionist constraints and foreign trade rights in domestic constitutions can be mitigated (and already is mitigated somewhat) through the development of international trade rules and institutions. One such institution[2] frequently analyzed is providing for direct effect of international trade rules into domestic legal systems or otherwise

* Assistant Professor of Law, University of Nebraska College of Law. The author served as a consultant to the National Governors Association and Western Governors Association during the development of the U.S. implementing legislation of the NAFTA and Uruguay Round agreements. The views expressed are those of the author alone. The author would like to thank Professor John H. Jackson, University of Michigan Law School, for his guidance during my LL.M and S.J.D. research, some of which has been utilized in this article.

1 ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991).

2 The announcement for the American Society of International Law's International Economic Law Interest Group Meeting on Regional Economic Integration explicitly listed direct effect as an institution. *See* Joel P. Trachtman, *Revolution of International Economic Law*, 17 U. PENN. J. INT'L ECON. L. 33, 55 (1996) (defining institutions as "any device that constrains future

establishing private remedies for violation of international trade rules in domestic courts.[3] Indeed, the unavailability of private remedies in domestic courts of powerful economic nations such as the United States and Canada is often cited as hindering the constitutional function that such agreements perform.

Simultaneously, sub-national government behavior is increasingly under discussion in international trade negotiations.[4] This is a direct result of the increased emphasis in trade negotiations on non-tariff barriers and the expanded scope of trade agreements into new areas such as trade-in-services and investment. Agreements on non-tariff barriers and new areas such as services and investment require constraining not only central government behavior but also sub-national government behavior because of the significant regulatory activity at the sub-national level in these areas. The negotiation of a Free Trade Agreement of the Americas (FTAA) is the most recent and visible example of trade negotiations focusing on non-tariff and new area topics. The FTAA will likely build upon commitments that nations of the Americas have recently undertaken within the World Trade Organization and may use the North American Free Trade Agreement (NAFTA) as a model for expanded commitments. Both the Uruguay Round Agreements, which created the World Trade Organization (WTO), and the NAFTA place great emphasis on non-tariff and new area topics.

The behavior of sub-national governments in nations with a federal system of government that guarantee some sphere of regulatory autonomy for their sub-national governments causes particular concern to the international and regional trading systems. This concern is furthered because many of the most powerful economic nations in the world are federal states. While domestic constitutions in federal nations often constrain sub-federal governments from enacting tariffs

---

choice, that constrains some component of politics over some period of time, including rules that have some binding effect . . . ").

3 In the United States, whether an international agreement has direct effect or is "self-executing" is an analytically distinct question from whether the agreement can be invoked by a particular private party. *See* John H. Jackson, *United States*, *in* THE EFFECT OF TREATIES IN DOMESTIC LAW (Francis G. Jacobs & Shelley Roberts eds., 1987); RESTATEMENT (THIRD) OF FOR. REL. LAW OF THE UNITED STATES, § 111 cmt. g (1987). For purposes of this article, the assumption is made that if a trade agreement is given direct effect that it will be invocable by private parties whose trading interests would be affected by a particular government action.

4 *See* Matt Schaefer, *Federalism and Regional Free Trade in the Americas: Searching for Pareto Gains* (forthcoming) (manuscript on file with author); Matt Schaefer & Thomas Singer, *Multilateral Trade Agreements and U.S. States-An Analysis of Potential GATT Uruguay Round Agreements*, 26 J. WORLD TRADE 31 (1992).

and other border barriers to trade, these instruments do not completely or sufficiently constrain protectionist government behavior in the form of discriminatory internal regulatory measures. Thus, international trade agreements, both multilateral and regional, are needed to perform constitutional functions with respect to sub-federal government behavior. This paper focuses on federal states within the Americas in light of the importance of the United States and Canada to the international trading system and the initiative launched in December 1994 to create a Free Trade Agreement of the Americas (FTAA).

The extent to which private remedies in domestic courts for rule violations are considered essential to this constitutional function likely depends on the operating conception of constitutionalism. One conception of constitutionalism in the context of trade agreements focuses on effectiveness. Effectiveness depends on whether international rules are complied with by governments and whether compliance with the norms actually has a constraining influence on protectionist measures and thereby furthers the goals of the rules. In the case of trade agreements, the goal is to maximize national and world welfare. Another conception of constitutionalism focuses on the enforceability of individual rights. These two conceptions are harmonious in that both ultimately seek or prefer private remedies in domestic courts. Private remedies in domestic courts are perhaps the most persuasive means of ensuring compliance by sub-federal governments with international trade norms. Indeed, private remedies are in certain respects better suited to perform constitutional functions vis a vis sub-federal governments as compared to central governments. However, the two conceptions likely differ in terms of the timing at which they prefer the creation of such remedies. An effectiveness-based conception of constitutionalism must balance any compliance gained by private remedies in domestic courts against the possibility that premature creation of such remedies will hinder the development of strengthened substantive obligations with respect to sub-federal governments. Thus, an effectiveness proponent may recommend a delay in the creation of private remedies while a rights-based advocate will recommend immediate creation of such remedies.

Part I of this article examines existing domestic constitutional constraints on sub-federal governments in the United States and contrasts these with constraints found in Canada. It concludes that international trade rules are needed to perform constitutional functions with respect to sub-federal government actions just as with central government actions. Part II further explores the notions behind con-

stitutionalism. It defines the concept of effectiveness and distinguishes it from a rights-based concept of constitutionalism. A classic debate within political science literature is utilized to help compare these two conceptions of constitutionalism. Part III examines possible enforcement mechanisms[5] for ensuring compliance with international trade rules. In this context, it explores options for requiring nations to provide private remedies within their national courts for international trade rule violations. Part IV analyzes the domestic law effect, including the availability of private remedies in U.S. courts, of past and current trade agreements from the perspective of U.S. states. The Canadian approach with respect to private remedies for provincial violations is analyzed for comparative purposes. Part V examines the current method of correcting sub-national government violations of international trade rules and reflects upon the current compliance record of sub-federal governments. Part VI proceeds to examine whether emphasis on private remedies in domestic courts in the short term might hinder the development of strengthened substantive obligations. Part VII concludes that proponents of an effectiveness-based conception of constitutionalism, in contrast to a rights-based conception, will likely recommend delaying the introduction of private remedies in domestic courts until substantive international trade rules applied to sub-federal governments are strengthened.

I. Existing Domestic Constitutional Constraints on Sub-Federal Government Protectionist Measures From a Comparative Perspective: Are International Trade Agreements Needed to Serve a Constitutional Function?

Central or federal governments are generally unconstrained by domestic constitutions when regulating foreign trade.[6] Central governments are given explicit power to conduct such regulation but are not required to establish an open market or to pursue trade liberalization.[7] In other words, central governments have great discretion in deciding what trade policy to pursue and correspondingly are subject

5 "Enforcement mechanisms" in this article is used in a very broad sense as referring to mechanisms that seek to enhance compliance with international trade rules. This definition is in accord with the common understanding of enforcement found in Black's Law Dictionary. However, this definition encompasses international dispute settlement mechanisms. Enforcement mechanisms has also been used in the more limited sense of devices (such as trade sanctions) used to achieve compliance with rulings of the dispute settlement process itself.

6 Petersmann, *supra* note 1, at 139-209.

7 *See, e.g.*, U.S. Const., Art. 1, § 8, cl. 3.

to a host of protectionist pressures. Public choice theory[8] as well as impressions based on empirical evidence[9] suggest that governments may pursue protectionist policies despite the fact that such a policy is injurious to national and world welfare. Thus, it is accepted that international trade agreements are needed to serve constitutional functions with respect to federal government behavior.[10]

An initial review of the U.S. constitution and other federal constitutions might lead one to be skeptical as to whether international trade agreements are needed to constrain the discretion of sub-federal governments. U.S. states are explicitly prohibited under the U.S. Constitution from imposing tariffs or duties on imports or exports.[11] The Canadian constitution places similar restraints on its provinces.[12] Moreover, one can find similar limitations on sub-federal governments in many other domestic constitutions establishing a federal system of government.[13] However, border measures such as tariffs are not the only trade barriers erected that reduce national and world welfare.

Recognizing that tariff barriers had already been substantially reduced, international trade negotiations added an emphasis on non-tariff barriers as early as the 1970's Tokyo Round multilateral trade negotiations, the seventh major negotiating round under the auspices of the General Agreement on Tariffs and Trade (GATT).[14] Non-tariff barriers subject to negotiation included discriminatory product standards and government procurement practices. International trade negotiations subsequently expanded in scope to include trade-in-services

---

8 *See, e.g.*, Alan O. Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, 16 INT'L REV. LAW & ECON. 5, 18-21 (1996) ("Public choice theory ... posits that national and multilateral trade policies alike are the result of interest group politics. National governments are viewed as politically sophisticated actors ... each pursuing self-interested agendas such as the maximization of votes, campaign contributions and the like. Well-organized and well-financed interest groups will influence political outcomes successfully, while poorly organized or financed interest groups will have little influence.").

9 *See, e.g.*, Frieder Roesller, Remarks at the Meeting of the American Society of International Law (Apr. 18, 1991), *in Comparative Analysis of International Dispute Resolution Institutions*, 85 AM. SOC'Y INT'L L. PROC. 64, 73 (1991).

10 PETERSMANN, *supra* note 1, at 210-44.

11 U.S. CONST., Art. 1, § 10, cl. 2.

12 CAN. CONST. (Constitution Act of 1867) pt. VIII, § 121 ("All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces"), § 122 (stating that provincial customs laws would only continue until altered by the Federal Parliament).

13 *See, e.g.*, AUSTRL. CONST., § 90 (granting federal parliament exclusive power over customs and duties); SWITZ. CONST., ch. I, art. 28 (stating that all matters relating to customs are a federal concern).

14 JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND 12-17 (1984).

during the Uruguay Round multilateral trade negotiations of the late 1980's and early 1990's, recognizing the importance of services to the international economy.[15] Talks are currently underway on a multilateral investment agreement within the Organization of Economic Cooperation and Development (OECD) with hopes to expand any such agreement to WTO membership.[16] Similarly, regional free trade agreements of the United States and Canada have dealt with non-tariff barrier issues, trade-in-services and investment.[17] The negotiation of the Free Trade Agreement of the Americas (FTAA) will continue this trend since it involves negotiations on non-tariff barriers, including government procurement, as well as the new area topics of trade-in-services and investment.[18]

These non-tariff and new area topics of negotiation are matters in which sub-federal governments are active regulators. Constraining sub-federal actors in the United States, Canada, and other economically powerful federations may be more important to world welfare than constraining central government action in smaller nations.[19] Thus, it is important to examine whether domestic constitutional constraints on sub-federal government protectionism exist outside the area of tariffs and other border measures.

---

15 FEKETEKUTY, INTERNATIONAL TRADE IN SERVICES: AN OVERVIEW AND BLUEPRINT FOR NEGOTIATIONS (1988); JOHN H. JACKSON, INTERNATIONAL COMPETITION IN SERVICES: A CONSTITUTIONAL FRAMEWORK (1988); Office of the United States Trade Representative, U.S. National Study on Trade in Services: A Submission by the U.S. Government to the General Agreement on Tariffs and Trade (1984); Organization for Economic Cooperation and Development, OECD Member Countries' Data on Trade in Services (1987).

16 Gary G. Yerkey, *OECD Trade Ministers Agree to Launch Talks on Multilateral Investment Pact*, 12 INT'L TRADE REP. (BNA) 939 (May 31, 1995).

17 *See generally*, North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993), *reprinted in* H.R. DOC. NO. 103-159, 103d Cong., 1st Sess. 713 (1993) [hereinafter NAFTA]; United States-Canada Free Trade Agreement. Jan. 2, 1988, 27 I.L.M. 281 (1988), *reprinted in* H.R. DOC. NO. 100-216, 100th Cong., 2d Sess. 297 (1988).

18 The initial seven working groups that were established at a ministerial meeting in Denver, Colorado in July 1995 were the following: 1) market access; 2) customs procedures and rules of origin; 3) investment; 4) standards and technical barriers to trade; 5) sanitary and phytosanitary measures; 6) subsidies, antidumping and countervailing duties; and 7) smaller economies. *See Ministerial Meeting Adopts Hemispheric Trade Declaration*, 12 INT'L TRADE REP. (BNA) 1137 (July 5, 1995). Four additional working groups were created at the March 1996 ministerial meeting in Cartagena, Columbia. They are the following: 1) intellectual property rights; 2) competition policies; 3) services; and 4) government procurement. *See FTAA Ministers Agree to Establish a Dispute Settlement Working Group*, 13 INT'L TRADE REP. (BNA) 516 (March 27, 1996). Another working group on dispute settlement will be established at the next ministerial meeting in 1997. *Id. at* 510.

19 Schaefer, *supra* note 4. For instance, California and New York have economies larger than all but a handful or two of nations in the world. Earl H. Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives*, 20 CANADA-U.S. L.J. 303, 308 (1994).

A. United States

In the United States, the U.S. Constitution's Commerce Clause provides a constitutional constraint on state regulatory and taxation authority exercised for protectionist purposes.[20] The United States Constitution explicitly grants the federal government the power to regulate interstate and foreign commerce.[21] However, the Supreme Court has interpreted the provision not only as enabling the federal government, but also as disabling the states.[22] The dormant Commerce Clause, so-called because it operates as a constraint on states even in the absence of action by the federal government, prevents states from discriminating against or unreasonably burdening interstate and foreign commerce. The history of the Commerce Clause suggests that a central purpose behind the clause was to eliminate the protectionist battle between the states that occurred under the Articles of Confederation.[23] However, even greater scrutiny is given to measures burdening foreign commerce.[24] Private parties are allowed to bring actions against the states based on the dormant Commerce Clause.

Nevertheless, the constraints provided by the dormant Commerce Clause are not comprehensive. At least two, and perhaps three, major gaps in the constraints of the dormant Commerce Clause exist. First, the Supreme Court has elaborated a market participant exception to the dormant Commerce Clause.[25] This exception allows a state to discriminate against out-of-state or foreign interests when it acts as a market participant (buyer or seller) rather than a market

---

20 U.S. CONST., Art. 1, § 8, cl. 3. *See generally*, RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW § 11.1 (2d ed. 1992). The Equal Protection Clause provides separate but related constraints on state protectionist behavior. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881-82 (1985) ("[U]nder the circumstances of this case, promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose [under Equal Protection Clause analysis].").

21 U.S. CONST., art. 1, § 8, cl. 3.

22 Dormant aspects of the Commerce Clause have been recognized by the Supreme Court since Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). *See* NOWAK & ROTUNDA, *supra* note 20. The doctrine appears to have been formally adopted by the Supreme Court in State Freight Tax, 15 Wall. 232, 21 L.Ed. 146 (1873). *See also* West Lynn Creamery, Inc. v. Healy, 114 S.Ct. 2205, 2228 (1994) (Scalia, J., concurring).

23 Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1125 (1986).

24 Japan Line v. County of Los Angeles, 441 U.S. 434, 446-51 (1979).

25 *See, e.g.*, White v. Mass. Council of Constriction Employers, Inc., 460 U.S. 204, 206-11 (1983); Reeves v. Stake, 447 U.S. 429, 436-40 (1979); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806-10 (1976).

regulator.[26] Thus, state government procurement practices discriminating against out-of-state and foreign interests have been held valid under dormant Commerce Clause scrutiny.[27] Second, subsidies in the form of direct payments generally are not subject to dormant Commerce Clause scrutiny even though they might be just as distortive of trade as discriminatory regulation.[28] Thus, international trade rules can play a constitutional function by constraining protectionist behavior by state governments in these two gaps left by the dormant Commerce Clause.

A third possible and significant gap involves state practices that have been discussed in trade negotiations or during the development of federal legislation which ultimately the federal government chose not to curb in either an international agreement or federal legislation. In such instances, the courts have found a strongly inferred toleration of the state practice and chosen to find that such practices do not interfere with U.S. foreign trade relations.[29] Therefore, consideration of state practices in international trade negotiations without ultimate action can potentially weaken domestic constitutional constraints.

---

26 *See* Hughes, 426 U.S. at 810. The Supreme Court has never directly addressed whether the exception applies to the dormant foreign Commerce Clause in which foreign rather than interstate commerce is implicated. Reeves, 447 U.S. at 438 n.9. However, most lower courts have held it should apply in such instances. *See, e.g.*, Carll v. South Carolina Jobs-Economic Dev. Auth., 327 S.E.2d 331, 448-49 (1985); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21 (2d ed. 1988).

27 *See, e.g.*, Trojan Tech. v. Pennsylvania, 916 F.2d 903 (3rd Cir., 1990).

28 New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988) (direct subsidization of domestic industry does not ordinarily run afoul of the Dormant Commerce Clause). *But see* West Lynn Creamery, 114 S.Ct. 2205 (invalidating subsidy to in-state milk producers paid directly from tax on all sales of milk, including out-of-state milk, to retailers). The Court notes that it has never squarely addressed the question of direct subsidization. *Id.* at 2214 n.15. The Court did reiterate its quote from New Energy, however, and it appears the case would have turned out differently if the subsidy were paid from general revenue funds rather than from the tax on sales of milk to retailers.

29 *See* Barclays Bank v. Franchise Tax Bd., 114 S.Ct. 2268, 2281-85 (1994) ("Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential.' ... Given these indicia of Congress' willingness to tolerate States' worldwide combined reporting mandates, even when those mandates are applied to foreign corporations and domestic corporations with foreign parents, we cannot conclude 'the foreign policy of the United States—whose nuances ... are much more in the province of the Executive Branch and Congress than this Court—is [so] seriously threatened.'"). *See also* Wardair Canada, Inc. v. Florida Dept. of Rev., 477 U.S. 1, 106 (1986); Container Corp. V. Franchise Tax Bd., 463 U.S. 159, 196-97 (1982); Trojan Tech., 916 F.2d at 912 ("[T]he record in this case shows that Congress is aware of state activity to restrict procurement of foreign goods ... and yet has not imposed a policy of national uniformity. Thus, state procurement policy fits comfortably within the Supreme Court's observation that nothing in 'the Foreign Commerce Clause insists that the Federal Government speak with any particular voice.'").

B. Canada

In Canada, the federal government does not have a broad commerce power such as in the United States.[30] Correspondingly, the Canadian Constitution has no equivalent to the dormant Commerce Clause doctrine under U.S. Constitutional jurisprudence. Therefore, significant barriers to internal trade have long existed in Canada.[31] Some constitutional reform proposals would have granted greater power to the federal government to act for the benefit of economic union.[32] However, in light of the failure of these constitutional proposals, the federal and provincial governments entered into an agreement on internal trade seeking to liberalize some of the nearly 500 barriers to such trade.[33] Recent trade agreements such as the NAFTA provided some impetus for the internal barriers agreement because foreign interests may have received better access to provincial markets than out-of-province Canadian interests in certain respects.[34] However, negotiators used extreme caution to ensure that benefits of the internal trade agreement would not be extended to traders from foreign nations.[35] Thus, international trade agreements can serve an important constitutional function in Canada by constraining protectionist action by provinces against foreign interests and by pressuring further elimination of internal barriers to trade.

II. CONSTITUTIONALISM: EFFECTIVENESS-BASED VERSUS RIGHTS-BASED CONCEPTIONS

The term constitutionalism is used in many ways, but central to the notion of constitutionalism is limited government or government subject to the rule of law.[36] But for what purpose do people seek to

30 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 439 (2d. ed. 1985) (noting that this is a result of judicial interpretation).

31 *Canada's Provincial-Federal Legislation Harms Foreign Trade, GATT Report Says*, 11 INT'L TRADE REP. (BNA) No. 46, at 1800 -01 (Nov. 23, 1994) ("Inter-provincial trade barriers have become a major problem for Canada, hampering economic growth and job creation, as well as reducing competitiveness of Canadian-based firms.").

32 *See* THE CHARLOTTETOWN ACCORD, THE REFERENDUM, & THE FUTURE OF CANADA, (Kenneth McRoberts & Patrick Monahan eds., 1993).

33 Agreement on Internal Trade, entered into force July 1995. The agreement has been subject to much criticism as being weak, however. *See, e.g.*, Jay Bryan, *Ottawa Must Finally Act on Slashing Internal Trade Barriers*, MONTREAL GAZETTE, June 18, 1996 at F1.

34 James Stanford, *Trade Barriers Within Canada Divide Us in More Ways than One*, THE FINANCIAL POST, June 22, 1996, at 19.

35 *See NAFTA: Canada's Federal-Provincial Pact Not Accessible to Foreign Firms*, 11 INT'L TRADE REP. (BNA) 1129 (July 20, 1994).

36 WILLIAM GEORGE ANDREWS, CONSTITUTIONS AND CONSTITUTIONALISM 13 (3d ed. 1968).

limit their government? There appears to be at least two discreet although related conceptions behind the term constitutionalism as used in international trade circles. The first relates to the general welfare; the second relates to individual rights.

Constitutionalism is often gauged in international trade circles by the effectiveness of international norms. This effectiveness-based concept is itself subject to some vagaries. For instance, sometimes the term is used as a substitute for compliance. Specifically, under this usage, an international norm is effective if it is complied with by governments. However, the use of effectiveness in this paper will refer to something broader. Compliance is better thought of as one element of effectiveness.[37] An effectiveness-based conception of constitutionalism needs to focus not only on whether international norms are complied with by governments but also on whether compliance with the norms achieves the goals of the norms. In the case of international trade rules, the goal is to maximize national and world welfare gains by constraining governments from enacting protectionist measures.[38] An effectiveness-based conception of constitutionalism is properly concerned not only with the degree of compliance but also with the strength or constraining effects of the substantive rules if governments do in fact comply. If the substantive rules only purport to minimally constrain protectionist behavior, then compliance with such rules will not serve to increase welfare very much.[39]

The second conception of constitutionalism discussed in international trade circles relates to the integration of the international legal system with domestic legal systems. Specifically, it gauges the degree of constitutionalism by whether international norms enter the domestic legal system and whether private parties are otherwise granted the ability to make claims against their government in domestic courts

---

37 *See* AM. SOC'Y INT'L L. NEWSLETTER 1 (June-Aug. 1996) (recognizing that compliance and effectiveness are related but analytically distinct). *See also* Edith Brown Weiss, Remarks at the Meeting of the American Society of International Law, *in* 90 PROC. AM. SOC'Y INT'L L. 210, 211-12 (1995) ("Implementation and compliance differ from effectiveness. The agreement may be complied with but still be ineffective in attaining its stated objectives. Even if the agreement is sufficient for its stated objectives, it may still not be effective in addressing the targeted problem.").

38 *See* JOHN H. JACKSON, THE WORLD TRADING SYSTEM 8-17 (1989); PETERSMANN, *supra* note 1, at 12-16.

39 For instance, consider two hypothetical international trade agreements. One limits tariffs on all products to 250%. The other agreement limits tariffs on all products to 2%. The first agreement is complied with all of the time. The second agreement is complied with all of the time except occasionally on a particular widget. Under an effectiveness-based conception of constitutionalism the second agreement is the more desirable, despite the fact that compliance is not as uniform as with the first.

based on the international norms. This rights-based concept maintains that international trade rules are intended to or at least by implication do create private rights in the name of economic liberty and that enforcement of such rights through the availability of private remedies in domestic courts is a necessary element of such rights.[40] Of course, the rights-based conception of constitutionalism elaborated above derives from the traditional American view of rights, or at least legal or constitutional rights, that assumes enforceability of those rights by the individual against the government.[41]

Political science literature discussing theories of political morality is useful in framing the overlap as well as the differences between these two conceptions of constitutionalism. Ronald Dworkin has distinguished between a goal-based and rights-based theory of political morality.[42] Indeed, there is a classic debate in political science literature as to whether (individual) rights can be supported from a utilitarian perspective.[43] Rights are often thought of as a trump held by an individual to a (government) action that injures the individual but that would increase general welfare.[44] Others argue that the existence of the trump itself is justifiable under a utilitarian perspective. First, all individuals in the community may have their welfare increased knowing that a particular individual's rights have not been violated.[45] This justification will be termed the benevolence justification. Second, notions of rule-utilitarianism may support protecting rights even though in a particular instance the general welfare might be inhibited.[46] In other words, following the rule (protecting the right) in all instances enhances general welfare because of the certainty provided and the lack of transactions costs in constantly assessing the benefits of the

---

40 PETERSMANN, *supra* note 1, at 400-03.

41 *See* LOUIS HENKIN, CONSTITUTIONALISM AND RIGHTS 9, 15 (Louis Henkin & Albert J. Rosenthal eds., 1990), Constitutionalism and Rights 9, 15 (1990) ("The U.S. idea of rights implies the availability of remedies to vindicate them.... The role of courts in maintaining constitutional limitations was seen as the hallmark of U.S. constitutionalism and was credited with ... the security of individual rights."); Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 Am. U.J. Int'l L. & Pol'y 1233, 1235 (1995) ("Americans are taught to think that constitutional rights depend on judicial enforceability almost by definition."). Minnow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860, 1866-67 (1987).

42 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 169-73 (1977).

43 *See* David Lyons, *Utility and Rights*, *in* THEORIES OF RIGHTS 110 (Jeremy Waldron ed., 1984); T.M. Scanlon, *Rights, Goals, and Fairness*, *in* THEORIES OF RIGHTS, *supra*, at 137.

44 Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS, *supra* note 43, at 153.

45 This line of argument is explored and rejected from a utilitarian perspective by Dworkin, *id.* at 155.

46 This line of argument is explored and rejected from a utilitarian perspective by Lyons, *supra* note 43, at 123-32.

individual right versus the gains to the community of an action violating the right. However, critics have questioned whether these are truly utilitarian justifications.[47] These critics claim that a utilitarian would always seek to weigh the net welfare gains of any particular action.

A comparison of the effectiveness concept and rights-based concept of constitutionalism can be viewed through the lens this classic debate in political science literature provides. The effectiveness concept is concerned with maximizing national and world welfare by constraining governments' ability to take protectionist actions. It is analogous to the goals-based version of political morality. The rights-based concept focuses on the ability of the individual to make claims against his government for actions violating international rules which implicitly form rights. However, international trade rules put a new twist on the debate.

If one assumes that international trade rules are static with no possibility for further development, then one would have little trouble reconciling the two conceptions' recommendations regarding the time at which to create private remedies in domestic courts. Allowing individual claims in domestic courts would depoliticize the enforcement process and likely maximize compliance with the international rules. Again, public choice theory as well as impressions based on empirical evidence indicate that violations of international trade rules are often taken in response to consolidated protectionist forces rather than to increase the general welfare. Therefore, upholding individual trading rights implicit in international trade agreements through private remedies is justifiable from a rights-based as well as effectiveness-based conception of constitutionalism. In this context, a rights-based proponent need not rely on the analogues to the utilitarian justifications for a rights-based notion of political morality to convince an effectiveness-based proponent of the desirability of immediate creation of private remedies in domestic courts.

However, divergent results under the two conceptions of constitutionalism in terms of the timing at which to introduce private remedies in domestic courts are possible once the assumption of a static system of rules is eliminated. International trade agreements are still at the beginning stages of constraining sub-national government behavior in certain non-tariff and new area matters.[48] Thus, further development or strengthening of the rules liberalizing trade is necessary

47 *See* Dworkin, *supra* note 44; Lyons, *supra* note 43.

48 Schaefer, *supra* note 4.

to achieve maximum national and world welfare gains.[49] If the possibility of individual claims of right before national judicial bodies has a chilling effect on the development of strengthened substantive rules, then a proponent of the effectiveness conception of constitutionalism would need to weigh this adverse effect against any compliance gains. If a chilling effect will occur and outweighs any welfare gains through enhanced compliance, then one may need to choose whether to grant the implied rights in trade agreements a trumping status even though welfare gains may be reduced. This will likely create a split between rights-based proponents and effectiveness-based proponents. If the chilling effect outweighs the compliance gains, then a rights-based proponent will need to argue for immediate creation of private remedies in domestic courts to the effectiveness-based proponent under a benevolence or rule-utilitarian justification. As with the debate in political science literature, such arguments will likely fail before a staunch proponent of the effectiveness-based conception of constitutionalism.

Of course, if the working definition of the rights-based conception of constitutionalism were broadened to include non-enforceable rights that were still useful tools of persuasion,[50] then the possible differences between the two conceptions as to when to introduce the institution of private remedies in domestic courts might be eliminated once again. A rights-based conception that moves away from the traditional American view of legal rights would no longer insist on enforceability through private remedies in domestic courts. Such a rights-based conception might instead be willing to see the expansion of implied rights through strengthened substantive rules even though such rights would only be tools of persuasion within domestic political systems. This paper, however, will define the rights-based conception of constitutionalism from an American perspective.

Thus, the extent to which one highlights private remedies in domestic courts as essential to the constitutional function of trade agreements may depend on which conception of constitutionalism is chosen (and, of course, how one defines each conception). Private remedies in national courts are central to a rights-based conception of constitutionalism, but are only a possible element of an effectiveness-based conception of constitutionalism. The time at which an effectiveness-based conception of constitutionalism demands the existence of pri-

---

49 *Id.*

50 Lyons, *supra* note 43, at 3-4. This second possible definition of rights is also discussed in Minnow, *supra* note 41, at 1866-67; Schwartz, *supra* note 41, at 1239.

vate remedies depends on how successful current enforcement mechanisms are at achieving sub-federal government compliance and whether the existence of private remedies would have a chilling effect on the strengthening of substantive rules applicable to sub-federal governments.

III. Possible Enforcement Mechanisms for International Trade Agreements

As noted above, maximizing compliance with international trade agreement rules is important for both the effectiveness-based and rights-based conceptions of constitutionalism. In order to maximize compliance, enforcement mechanisms are necessary.[51] Professor Jackson has described two types of diplomacy that could be utilized by the international system: a power-oriented mechanism and a rule-oriented mechanism.[52] Indeed, one can view possible enforcement mechanisms along a continuum with power-orientation at one end and rule-orientation at the other end.[53] The power-orientation model focuses on negotiation while the rule-orientation end of the spectrum focuses on adjudication.[54] Current enforcement mechanisms within the WTO and NAFTA, the two major trade agreements to which the United States and Canada are parties, involve third-party dispute settlement mechanisms at the international level available only to governments. Such enforcement mechanisms fall somewhere in the middle of this continuum involving considerable elements of both negotiation and adjudication. Current enforcement mechanisms of the WTO and NAFTA are analyzed below, followed by an examination of possible future enforcement mechanisms.

A. Current Enforcement Mechanisms: NAFTA & WTO Dispute Settlement Processes

The first step in any dispute under the NAFTA or WTO is consultations between a complaining nation's central government and the alleged offending nation's central government.[55] If consultations fail to resolve the dispute, then the complaining government may request

---

51 For the operative definition of enforcement mechanism see *supra* note 5.

52 Jackson, *supra* note 38, at 85-88.

53 *Id.* at 85 ([I]n practice the observable international institutions and legal systems involve some mixture of both.").

54 *See* William J. Davey, *Dispute Settlement in the GATT*, 11 Fordham Int'l L.J. 51 (1987).

55 General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes art. 4, 33 I.L.M. 112, 116-17 (1993) [hereinafter DSU]; NAFTA art. 2006.

the establishment of an arbitral panel.[56] Under the WTO, the complaining government's request for a panel will be automatically granted unless the Dispute Settlement Body, comprised of central government representatives of the members of the WTO, decides by a consensus to reject the request.[57] Since the government requesting the panel can simply refuse to join any potential negative consensus, the right to a panel under the WTO is guaranteed. This is considered an improvement from the old General Agreement on Tariffs and Trade (GATT) system where an alleged offending nation could "block" the establishment of a panel.[58] Under NAFTA, the right to a panel is also guaranteed.

Under both NAFTA and the WTO, dispute settlement panelists serve in their individual capacity and may not take instructions from any government.[59] NAFTA panels consist of five members selected from a roster maintained by the three countries.[60] The disputing nations first seek to agree on a chair of the panel.[61] If they fail to agree on a chair, one of the disputing nations chosen by lot selects as chair an individual who is not one of its citizens.[62] The remaining four panelist are chosen through "cross-selection." In other words, the complaining nation must select two panelists who are citizens of the alleged offending nation.[63] Similarly, the alleged offending nation selects two panelists who are citizens of the complaining nation. This cross-selection process helps ensure the independence of the panelists.

Panels under the WTO will usually consist of three members as under the old GATT system.[64] Unless otherwise agreed, the panelists can not be citizens of the parties involved in the dispute.[65] The WTO Secretariat proposes individuals to serve on the panels and parties are only to object to such nominations for "compelling reasons."[66]

---

56 DSU art. 4(7); NAFTA art. 2008. Under NAFTA, the NAFTA Commission, comprised of federal trade ministers from the three countries, meets to attempt to resolve the dispute prior to the establishment of an arbitral panel. NAFTA art. 2007(4).

57 DSU art. 6.

58 The DISC Case Between the United States and the European Community in the mid-1970's was the worst example of delay in establishment and selection of a panel. It took the parties nearly three years to agree on composition of the panel. *See* John H. Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747, 762-63 (1978).

59 DSU art. 8(9); NAFTA art. 2009(2)(b).

60 NAFTA arts. 2009, 2011(1), 2011(3).

61 NAFTA art. 2011(1)(b).

62 *Id.*

63 *Id.* art. 2011(1)(c).

64 DSU art. 8(5).

65 *Id.* art. 8(3).

66 *Id.* art. 8(6).

The duty of dispute settlement panels is to determine whether the measure at issue is inconsistent with the agreement or otherwise causing nullification or impairment of benefits, and to make recommendations for resolution of the dispute.[67] Both the NAFTA and WTO processes allow parties to comment on interim reports of dispute settlement panels.[68] NAFTA panelists are entitled to furnish separate opinions on matters not unanimously agreed.[69] Additionally, under both the NAFTA and the WTO, parties to the dispute may continue to negotiate a solution to the dispute even after a panel has been comprised (and even after a panel has issued a report).[70]

WTO panel reports are automatically adopted unless the DSB decides by consensus not to adopt the report or the losing nation decides to appeal the report.[71] Again, the winning nation can simply refuse to join any potential negative consensus and thus adoption of the report is guaranteed. This "automaticity" provision deviates from the practice under the old GATT in which a losing nation could "block" adoption of the report by the GATT Council and thus prevent an international legal obligation from being incurred.[72] The WTO has established an appeals process for panel reports.[73] The ability to appeal panel reports is also seen as a significant improvement of the old GATT system. Three members of a standing seven member appellate body will review only issues of legal interpretation.[74] The appellate body has the power to uphold, modify or reverse legal findings in the original panel report.[75] Appellate reports, like original panel reports, are automatically adopted unless the DSB decides by a consensus not to adopt the report.[76]

---

67 *Id.* arts. 7, 11; NAFTA art. 2016(2).

68 *Id.* art. 15; NAFTA art. 2016(4).

69 NAFTA art. 2017(1).

70 In other words, there is no legal point at which the parties to the dispute are prohibited from settling the dispute. Of course, any negotiated solution that affects the interest of another member can be protested by that other party using the dispute settlement system. The DSU explicitly requires that solutions reached between parties be consistent with covered agreements and demands notification to the DSB of such solutions. DSU art. 3(2)-(6).

71 *Id.* art. 16(4).

72 The possibility of blocking was seen as a weakness in the old GATT system by proponents of a rule-oriented system. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 BROOKLYN J. INT'L L. 11, 20-22 (1992); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1991); Jackson, *supra* note 38, at 97.

73 DSU art. 17.

74 *Id.* art. 17(1) & (6).

75 *Id.* art. 17(13).

76 *Id.* art. 17(14).

The WTO dispute settlement rules provide for continuous surveillance of the implementation of panel reports and denotes a strong preference for having the offending measure brought into conformity with the relevant agreement rather than resorting to other remedies.[77] The NAFTA also prefers a change in a non-conforming measure as a solution "wherever possible."[78] Under both the WTO and NAFTA, where a measure has not been removed and compensation or a solution can not be agreed upon by the nations, then concessions may be suspended.[79] Compensation is where the offending nation would agree to lower tariffs on a product (or increase access to its market of a service) of importance to the aggrieved nation. Suspension of concessions is where the aggrieved nation raises tariffs on a product (or limits market access for services) of importance to the offending party. Under the WTO, suspension of concessions will be automatically approved by the DSB, in the absence of a negative consensus, upon the request of the aggrieved nation if the inconsistent measure is not removed within a reasonable time and compensation cannot be agreed upon by the parties.[80] Both agreements allow for "cross sectoral retaliation," e.g. suspension of concessions in the goods sector for a violation of an obligation concerning services,[81] in certain circumstances.

The world trading system has moved towards a more rule-oriented approach with the conclusion of the Uruguay Round multilateral trade agreements and the establishment of a strengthened dispute settlement system under the new World Trade Organization.[82] As noted earlier, the ability of a single nation to block the process at various stages under the old GATT dispute settlement system has been eliminated. However, private parties cannot complain against foreign government rule violations within the new dispute settlement system. Instead, a private party must persuade its government to bring a complaint against the foreign government violating the international rule. Therefore, despite reforms and movement along the continuum, the

---

77 *Id.* art. 21.

78 NAFTA art. 2018(2).

79 *Id.* art. 22(2); NAFTA art. 2019.

80 DSU art. 22(6).

81 *Id.* art. 22(3)(c); NAFTA art. 2019(2)(b).

82 John H. Jackson, *The World Trade Organization: Watershed Innovation or Cautious Small Step Forward?*, THE WORLD ECONOMY 11, 20 & 25 (1995) ("The new [dispute settlement agreement] solves many, although not all, of the issues that have plagued the GATT dispute settlement system."). Jackson notes, however, that some larger nations will be tempted to undermine results of the new procedures and that if these nations succumb to such temptations the dispute settlement procedure will lose credibility and "fail in its primary purpose of establishing and maintaining a creditable 'rule-oriented' system.").

dispute settlement system still allows for considerable control by governments over the resolution of disputes and maintains a degree of power-orientation in the enforcement of international norms. Similarly, the North American Free Trade Agreement which may serve as a model for the hemispheric-wide Free Trade Agreement of the Americas (FTAA) also does not allow for private party access to the general dispute settlement mechanism.[83] Private parties can bring complaints against governments under NAFTA in only two limited areas: review of anti-dumping and countervailing duty determinations and investment disputes.[84] This leads to an analysis of possible future enforcement mechanisms, one that would allow for private party access to the international dispute settlement process and one that would provide for private remedies in domestic courts.

B. Possible Future Enforcement Mechanisms

1. Establish the Capacity of Private Parties to Bring Claims Against Governments Under International Dispute Settlement Processes

As noted above, the capacity of private parties to bring claims against governments within international dispute settlement processes exists even in the trade context, although in a very limited form. It exists in a more general way in the context of international agreements on other topics, including international human rights[85] and investment.[86] However, expanding the ability of private parties to make claims against governments within the dispute settlement processes of the WTO or even regional arrangements such as NAFTA faces strong resistance. The United States made proposals at the end of the Uruguay Round to increase the access of private parties to the dispute settlement process. These proposals did not go so far as to allow private parties the ability to make claims but merely sought to make the

83 *See generally* NAFTA ch. 20.

84 *Id.* art. 1115-38, 1904.

85 *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966 (entered into force Mar. 23, 1976), U.N. GAOR, 21st Sess., Supp. No. 16 59, U.N. Doc. A/6316 (1966).

86 International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* March 18, 1965, 17 U.N.T.S. 159 [hereinafter ICSID]. However, some ICSID claims may not involve a governmental violation of international law but rather a contractual violation.

process more transparent.[87] However, even these proposals were initially rejected or watered-down.[88]

One might question whether establishing such a capacity for individuals and corporations would advance the constitutional function of trade agreements under either the effectiveness-based or rights-based conception of constitutionalism. Such a system would certainly enhance the degree of rule-orientation. Governments would no longer be able to filter (sometimes based on political considerations) which claims are brought before international dispute settlement processes.[89] However, without further changes, the process after a panel report would remain in government control and subject to some degree of power-orientation. This is not to say that giving the capacity to bring claims within international dispute settlement processes to private parties would be meaningless in the post-panel report phase. The existence of a panel report finding a government measure to be inconsistent with international obligations would itself bring some pressure on the offending government to change that measure and any negotiated solution between governments would likely be influenced by such a finding.[90] Thus, a rights-based conception would appear to support such an international dispute settlement mechanism allowing the ability of private parties rather than governments to bring claims. This would move the current WTO and NAFTA mechanisms further towards the rule-orientation end of the spectrum. An effectiveness-based conception of constitutionalism might also be attracted to the creation of this capacity for private parties because it is likely to enhance compliance. However, an effectiveness-based conception would need to weigh any such compliance gains against a possible chilling effect that such a mechanism might have on the development of strengthened substantive rules.

2. *Private Remedies in Domestic Courts*

Under the current WTO and NAFTA systems, enforcement is focused on the international level between governments. International

---

87 *See, e.g., U.S. to Urge Other Nations to Open Proceedings of New WTO to Public*, 11 INT'L TRADE REP. (BNA) 815-16 (May 25, 1994).

88 There has been recent movement in increasing transparency, however. *See WTO to Make Most Documents Available to Public Immediately*, INSIDE U.S. TRADE, July 26, 1996 at 17; *United States Welcomes WTO Decision to Improve Public Access to Proceedings*, 13 INT'L TRADE REP. (BNA) 1208 (July 24, 1996).

89 Maintaining, initially, some sort of government filter may be one means of obtaining government consent to such a mechanism. JACKSON ET AL., *supra* note 14, at 208.

90 *Id.* at 209.

law contains no general rule as to whether or how international obligations must enter a nation's domestic legal system.[91] This is based on the principle that international law does not interfere with the internal legal system of nations. Instead, the reception of international legal rules is left to the domestic law of each nation. The basic categorical division is between monist countries and dualist countries.[92] In monist countries, international obligations are considered a part of the domestic legal system with no act of transformation required.[93] In other words, international agreements have what is termed direct effect. In dualist countries, international legal obligations do not enter the domestic legal system unless an act of transformation occurs, either through a statute incorporating the treaty or through separate implementing legislation or regulation. In dualist countries, direct effect of international agreements is not possible.[94] Some countries are a mixture of monism and dualism. In these countries, certain international obligations will enter the domestic legal system directly while others will require an act of transformation.

Of course, a particular treaty could specify a particular way in which the treaty is to be given effect in domestic law.[95] For instance, a treaty might require that each signatory nation provide for private causes of action to enforce the treaty within its domestic law. A broad multilateral treaty could not require direct effect, however, because of the existence of dualist nations that could not possibly meet such an obligation. In any event, few treaties contain provisions specifying a certain method by which the treaty must enter the domestic legal system or even a manner in which it must be enforced domestically. Instead, international law concerns itself with the observance of treaty obligations and the responsibility for the failure to perform obligations.

One proposal in the Uruguay Round would have moved the WTO enforcement mechanism much further towards the rule-orientation end of the spectrum by requiring nations to provide for private causes of action in their domestic courts for government violations of

91 J.A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law*, 9 COMMON MRKT. L. REV. 425, 426 (1972).

92 See THE EFFECT OF TREATIES IN DOMESTIC LAW, *supra* note 3; John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 313-14 (1992); Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-34 (4th ed. 1990).

93 Jackson, *supra* note 92, at 314-15.

94 *Id.*

95 Jackson, *supra* note 3, at 154.

WTO agreements. The proposal was rejected, however.[96] The adoption of such a proposal would diminish governments' monopoly control over the dispute settlement system and virtually eliminate the possibility of negotiated solutions that stray from agreed rules. Thus, it would appear that compliance with obligations would be maximized as private actors with fewer political motivations and more direct economic concerns would be granted the opportunity to bring claims and domestic courts would ultimately enforce trade rules.

A rights-based conception of constitutionalism prefers an immediate move to the far rule-oriented end of the continuum through the creation of private remedies in domestic courts. This may be particularly so with respect to sub-federal government behavior because private remedies in domestic courts either through direct effect (if this is possible within the nation) or by providing a private right of action through federal implementing legislation is better able to serve a constitutional function with respect to sub-federal governments than central governments. This is a result of the hierarchy of sources of law within federations. Constitutional norms are often thought to have higher status than simple legislative acts.[97] International agreements with direct effect or federal legislation providing for a cause of action based on an international agreement have superior status over sub-federal laws and thus are more analogous to constitutional norms.[98]

For instance, in the United States, federal law, including international agreements with direct effect and federal statutes, prevail over conflicting state statutes by virtue of the Supremacy Clause.[99] While federal law does not prevail over the Constitution, an international agreement with direct effect or federal implementing legislation providing for private rights of action would maintain a higher status than

---

[96] It should be noted that the renegotiated GATT Government Procurement Agreement does require parties to establish expeditious bid challenge procedures for alleged breaches in their domestic legal systems that are accessible by foreign bidders. *See* GATT Procurement Agreement art. XX. However, the Government Procurement Agreement is not part of the largely "single package" approach to the Uruguay Round and thus only 23 countries are parties to the Agreement. *See* Agreement Establishing the World Trade Organization art. II(2)(3) (government procurement agreement does not apply to all WTO members, only to those who have accepted it).

[97] *See* CONSTITUTIONALISM 191 (J. Roland Pennock & John W. Chapman eds., 1979) (noting that constitutional norms generally in the contemporary world have the force of higher or fundamental law).

[98] It is a common feature of federations that valid federal law prevails over inconsistent sub-federal laws. *See, e.g.*, U.S. CONST. art. VI, § 2; British N. Amer. Act of 1867 § VI, pt. 91; AUSTRL. CONST. ch. V § 109.

[99] U.S. CONST. art. VI, § 2.; *See also* United States v. Pink, 315 U.S. 203, 230-31 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

state law, thus making the vindication of rights in trade agreements more certain in the long-term. A later-in-time act of a state would not prevail over the implied rights secured via the agreement or the federal statute. Conversely, as between an international agreement with direct effect and a federal statute or as between two federal statutes the later-in-time prevails in the U.S legal system if the two conflict.[100] Therefore, a federal statute violating foreign trading rights implicit in a previously approved international agreement with direct effect or in a previous federal law providing for private rights of action based on a trade agreement would prevail under the later-in-time rule. Thus, private remedies for violations of trading rights can be eviscerated by the mere enactment of a subsequent federal law in conflict with such rights.

For these reasons, private remedies in domestic courts may seem particularly attractive in performing a constitutional function with respect to sub-federal government behavior. Moreover, sub-national governments in many nations, including federations such as the United States, are subject to domestic constitutional or federal legislative constraints with respect to trade matters and private parties maintain remedies for violations of these constraints. It should be noted that significant complications in providing private remedies for sub-federal government violations may exist in some federal systems such as Canada. Generally, however, actions by private parties are not an entirely new means of restraining protectionist measures by sub-national governments.

Additional considerations enter the debate from the perspective of an effectiveness-based conception of constitutionalism. On the one hand, an effectiveness-based conception is also attracted towards the rule-orientation end of the continuum, including the establishment of private remedies in domestic courts, because of the likelihood of enhanced compliance. However, an effectiveness-based conception must examine current enforcement mechanisms to gauge the likely gains in compliance and also account for any chilling effect private remedies in domestic courts might have on the development of strengthened substantive rules.

---

100 Whitney v. Robertson, 124 U.S. 190, 194-95 (1888); RESTATEMENT, *supra* note 3, § 115.

IV. Private Remedies in Domestic Courts: Possibilities and Practice within the United States and Canada

The United States could uphold an obligation in an international agreement to provide for private remedies in domestic courts for violations of the agreement in two ways. First, U.S. courts (likely following the intent expressed by the Congress and President) could hold the international trade agreement to have direct effect (or be "self-executing" under traditional U.S. terminology).[101] Second, the United States could create a private right of action in federal implementing legislation.

In the absence of such an international obligation, the United States has chosen not to make recent international trade agreements "self-executing" or otherwise provide for private rights of action against either the federal or state government. This is unsurprising because nations are reluctant to provide for direct effect, or otherwise provide private remedies in their domestic courts, unless other nations also provide for reciprocal private remedies in their domestic courts. (Indeed, lack of reciprocity has in the past been a basis for the European Court of Justice denying direct effect to GATT obligations within the European Community).[102] Canada's constitutional system does not allow for direct effect of international agreements and it has chosen not to provide for private rights of action based on international trade agreements through federal implementing legislation. Indeed, Canada may face constitutional constraints in providing for a private right of action to secure provincial compliance in certain areas.

A complete analysis of United States practice with respect to private rights of action based on international trade agreements against state governments follows. The Canadian possibilities and practices are explored for comparative purposes.

---

101 Jackson, *supra* note 92, at 328; Restatement, *supra* note 3, § 111 cmt. h; Jackson, *supra* note 3, at 150-56.

102 The approach of the European Court of Justice, however, has been somewhat inconsistent. *See* Brand, *Direct Effect of International Economic Law in the United States and the European Union*, 17 N.W. J. Int'l Bus. 556 (1997).

A. Relationship of the Trade Agreements and Dispute Settlement Panel Reports to State Laws Within the U.S. Domestic Legal System

1. State Laws and International Agreements Generally

The United States is perhaps best categorized as "mixed" with regard to the direct effect of international agreements.[103] Some international agreements (those that are "self-executing") enter the domestic legal system without an act of incorporation while others require such an act. Courts will look at the language of a treaty, the intent of the parties to the treaty, and the intent of the Executive and Congressional branches in deciding whether a treaty is "self-executing."[104] The Supremacy Clause provides that treaties (including Congressional-Executive agreements, the method used for trade agreements) and federal legislation prevail over inconsistent state law. However, the issue of self-executing has relevance to whether an agreement prevails over state law at least when private parties seek to rely on such an agreement in U.S. courts. A non-self-executing agreement is not part of domestic law and thus could not be relied on by a private party.[105]

The relationship between state laws and trade agreements has a few additional wrinkles. First, the issue of self-execution does not seem to be as important when it is the U.S. Executive Branch that seeks to enforce a treaty against a state.[106] The Executive Branch could base its claim against a particular state action as an interference with foreign commerce or foreign affairs. Additionally, the U.S. Executive Branch may apparently bring claims against the states for violation of an international agreement without regard to whether the agreement is self-executing. The now famous *Belmont*[107] and *Pink*[108] cases appear to support this notion. In these two cases, the U.S.

---

103 Jackson, *supra* note 3, at 146.

104 *Id.*

105 As above, I do not mean here to merge the separate but related issues of self-executing and invocability. *See supra* note 3. Rather, the proposition is that if an agreement is non-self-executing, the issue of invocability is not raised.

106 An alternative way of thinking of this issue is that some agreements are self-executing and invocable by the executive branch even if they might be held non-self-executing and non-invocable if relied on by private parties. However, the cases cited below do not even raise these issues while allowing the executive branch to make claims against states based on treaty violations. This seems to indicate that treaties of a mandatory nature (i.e., not involving norms of aspiration) are implicitly self-executing and invocable by the executive branch for purpose of correcting state violations.

107 301 U.S. 324 (1937).

108 315 U.S. 203 (1942).

Supreme Court upheld the validity of sole executive agreements and their supremacy over state laws in actions brought by the U.S. Executive Branch without examining whether such agreements were self-executing. The question arises as to whether the Executive Branch has the ability to bring a claim against a state that violates an international agreement which is not within the Executive's sole or inherent powers. The Supreme Court has apparently recognized the ability of the U.S. Attorney-General to enjoin state action based on a violation of an international agreement itself in such instances even in the absence of Congressional approval and without regard to whether the agreement was self-executing.[109]

Second, private parties could try to use a non-self-executing international agreement in dormant foreign Commerce Clause cases[110] and dormant foreign affairs doctrine cases.[111] The Restatement 3d seems to hint at such a possibility stating, "[e]ven a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding state law or policy."[112] In such cases, private parties would argue that the state action is interfering in foreign commerce or foreign affairs, relying in part on a violation of the treaty. Such attempts have generally failed because the treaty relied upon did not prohibit the state action in question. As mentioned before, in those instances in which the federal government has considered a particular state action and chosen not to prohibit the action by international agreement or federal legislation, the Supreme Court will infer toleration of the state action and be unwilling to find the state action interferes with federal uniformity in an area in which it is essential (i.e., the "one voice" standard).[113] In matters affecting foreign commerce, inferred toleration or acquiescence by the Congress cannot

---

109 *See* FRANK W. SWACKER ET AL. WORLD TRADE WITHOUT BARRIERS: THE WORLD TRADE ORGANIZATION AND DISPUTE RESOLUTION 183 (1995); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 167 (1972). *See also* Sanitary District v. United States, 266 U.S. 405, 425 (1925) ("This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce . . . . It has standing in this suit not only to remove obstruction to interstate and foreign commerce, the main ground, . . . but also to carry out treaty obligations to a foreign power . . . . The Attorney General by virtue of his office may bring this proceeding and no statute is necessary to authorize the suit.").

110 On the dormant Commerce Clause see *supra* notes 20-28 and accompanying text.

111 The so-called dormant foreign affairs doctrine was established by the Supreme Court in Zschernig v Miller, 389 U.S. 429 (1968).

112 RESTATEMENT, *supra* note 3, § 115 cmt. e.

113 See *supra* note 29.

be overcome by Executive Branch pronouncements to the contrary.[114] Additionally, courts may even find toleration evinced where Congress has explicitly prohibited private causes of action based on such agreements even though the state action at issue violates the treaty. This would accord with the policy behind such a ban: private causes of action themselves might be an interference with foreign commerce or foreign affairs.[115]

2. *Private Remedies Against Protectionist State Actions Based on International Trade Agreements: A Chronology*

An examination of the implementation of major U.S. trade agreements shows a clear trend to eliminate the availability of private remedies in U.S. courts against the states. There is also a trend to subject the U.S. Executive Branch to greater procedural hurdles when bringing an action against the states for violation of an international trade rule. This section begins with an examination of the ability of private parties to make claims against states based on the GATT 1947 in U.S. courts. It proceeds to examine approaches undertaken with respect to private remedies against state actions in the 1979 implementation of the GATT Tokyo Round Agreements, the 1987 implementation of the Canada-United States Free Trade Agreement (CUSFTA), the 1993 implementation of the NAFTA and the 1994 implementation of the Uruguay Round WTO Agreements.

It is also important to note before this chronology that the NAFTA and Uruguay Round implementing acts are essentially the operative approaches today with respect to the availability of private remedies against state actions. The Uruguay Round package of agreements contains an amended GATT agreement, the so-called GATT 1994, that incorporates and supersedes the GATT 1947, and also contains revised non-tariff barrier agreements that supersede many of the Tokyo Round agreements. The CUSFTA was suspended upon entry into force of the NAFTA.

---

114 Barclays, 114 S.Ct. at 2285-86 ("Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit state-mandated worldwide combined reporting. That the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation's ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others. . . . The Executive Branch actions—press releases, letters, and amicus briefs—on which Colgate here relies are merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting.").

115 NAFTA Statement of Administrative Action, at 13.

a. GATT 1947

The original GATT 1947 was proclaimed into U.S. law by the President on delegated authority from the Congress.[116] As a pre-approved Congressional-Executive agreement the Congress never considered the issue of whether the GATT 1947 should be self-executing or whether to provide private remedies in U.S. courts for state violations of the agreement. Nonetheless, private parties have sued states (on a few occasions) based on the GATT 1947 and courts have held the GATT 1947 to apply to and bind the states. Indeed, several state courts have struck down state laws based on the fact the laws violated GATT 1947.[117] Furthermore, it appears that no state court has ever held that the GATT 1947 did not apply to and supersede state legislation.[118] Rather, courts rejecting challenges based on the GATT 1947 held that the specific acts challenged did not violate the GATT.[119] Most of these cases dealt with state government procurement restrictions and GATT Art. III, prohibiting discriminatory treatment of imported products, contains an explicit exception regarding purchases for governmental purposes. Professor Hudec claimed that, as of the time of his study in the mid-1980's, there were examples of dicta in state court opinions questioning the applicability and superiority of GATT obligations which made "the conclusion that GATT is superior to state law a bit less secure than it was when Professor Jackson wrote in 1967."[120] Professor Hudec relied in particular on dicta from a 1983 New Jersey State Tax Court Decision.[121] However, as Professor

116 John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 250, 291 (1967).

117 In Springfield Rare Coin Galleries v. Johnson, 503 N.E. 2d 300, 304 (Ill. 1986), the Illinois Supreme Court upheld a lower court determination that a state statute excluding South African Kugerands from an exemption on sales taxes of currency and gold coins as an unconstitutional interference in foreign affairs. The lower court also found the measure to violate GATT but the Supreme Court did not find it necessary to reach the argument.

118 *But see* Am. Inst. for Imported Steel, Inc. v. Cty. of Erie, 297 N.Y.S.2d 602 (1968) (holding GATT inapplicable because of the government purchasing exception to Article III).

119 *See, e.g.*, K.S.B Technical Sales Corp. v. North Jersey Water Supply Comm'n, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978); Delta Chemical v. Ocean County Utilities Authority, 554 A.2d 1381, 1384 (N.J. Super. Ct. 1988). Some state courts seemed to be confused about the coverage of the GATT, however. While not denying the status of GATT as federal law, one state court indicated that GATT would not cover a state sales tax (which the court found to be nondiscriminatory in any event). Ass'n of Alabama Prof. Numismatists, Inc. v. Eagerton, 455 So.2d 867, 870 (Ala. 1984). GATT Art. III clearly covers internal taxes on goods including a sales tax.

120 Robert E. Hudec, *GATT Legal Status in Domestic Law*, *in* THE EUROPEAN COMMUNITY AND GATT 187, 221 (Meinhard Hilf et al. eds, 1986).

121 Armstrong v. Taxation Division Director, 5 N.J. Tax 117 (N.J. Tax Ct. 1983), *aff'd* 6 N.J. Tax 447 (N.J. Super. Ct. App. Div. 1984).

Hudec noted, the N.J. Tax Court ignored the view expressed in dicta of a prior opinion of the New Jersey Supreme Court.[122] Moreover, it made statements showing a lack of comprehension of U.S. constitutional law and international law such as "[t]here is some question as to whether the GATT is binding on the states since the states are not signatories to the agreement."[123] In any event, the N.J. Tax Court went on to dispose of the GATT arguments on the merits. Moreover, statements made by a New Jersey state court in a more recent case support the initial view of the New Jersey Supreme Court that the GATT 1947 did apply to and supersede inconsistent state legislation.[124]

These state courts did not address the question of how GATT 1947 was part of domestic law. Specifically, the courts did not state whether GATT 1947 was domestic law as a result of the presidential proclamation under delegated authority from Congress or whether the GATT 1947 was "self-executing." However, the better view appears to be the former.[125]

b. 1979 Tokyo Round Agreements Implementing Act

The 1979 implementing legislation of the GATT Tokyo Round non-tariff barrier agreements or so-called codes only contained one explicit provision with respect to state laws.[126] Again, however, it was clear that none of the codes negotiated with respect to non-tariff barrier measures were intended to be self-executing.[127] No explicit provision was included in the implementing legislation with respect to the state laws generally because very few of the Tokyo Round Codes related to or applied to state measures. The two with the most relevance to the states were the Technical Standards Code and the Subsidies Code. The Technical Standards Code was interpreted as only requiring Parties to "use their best endeavors" or "make polite requests" to local governments to comply with its obligations.[128]

122 K.S.B. Technical Sales Corp. 381 A.2d 774.

123 Armstrong, 5 N.J. Tax at 133.

124 Delta Chem., 554 A.2d at 1384.

125 *See* Jackson, *supra* note 116, at 280-92. *But see* 36 Op. Att'y Gen. 147 (Cal. 1960).

126 *See infra* note 129 and accompanying text.

127 See Jackson et al., *supra* note 14, at 169-71.

128 See Ernst-Ulrich Petersmann, *Strengthening the Domestic Legal Framework of the GATT Multilateral Trade System: Possibilities and Problems of Making GATT Rules Effective in Domestic Legal Systems*, *in* THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL & ECONOMIC PROBLEMS 96-97 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1988); Hudec, *supra* note 6, at 233; Louis, *Implementing the Tokyo Round in the European Community*, *in* JACKSON ET AL., *supra* note 14, at 51.

Thus, the U.S. implementing legislation of the code only gives the "sense of Congress" that no State should engage in standards-related activities that create unnecessary barriers to trade and directs the President to take such reasonable measures as may be available to him to promote observance of the code by states.[129] The Subsidies Code did apply to the states,[130] however, it only had stringent obligations with respect to export subsidies.[131] No provision was made in the U.S. implementing legislation specifically with respect to state export subsidies.

c. 1987 Canada-United States Free Trade Agreement Implementing Act

In the case of the CUSFTA, the implementing legislation of the agreement declared that the provisions of the agreement prevail over any conflicting state law.[132] The agreement was still not self-executing with respect to state governments. However, the implementing legislation incorporated the agreement into U.S. law to the extent state law conflicts with it. The U.S. Attorney-General was given explicit power by the implementing legislation to bring actions against states for maintaining or applying laws inconsistent with the CUSFTA.[133] However, private persons were denied the right to challenge in U.S. courts state laws that may be inconsistent with the CUSFTA.[134]

d. 1993 NAFTA Implementing Act

The 1993 NAFTA implementing legislation has no provision, like that found in the CUSFTA, stating that the provisions of the agree-

---

129 Trade Agreements Act of 1979, § 403, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. 2533 (1996)).

130 *See* 1979 Tokyo Round Agreement on the Interpretation and Application of Articles VI, XVI, & XXIII of the GATT [hereinafter Subsidies Code], Apr. 12, 1979, 31 U.N.T.S. 513, 530 n.22 (1979) ("subsidy" shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory. However, it is recognized that for signatories with different federal systems of government, there are different divisions of powers. Such signatories accept nonetheless the international consequences that may arise under this Agreement as a result of the granting of subsidies within their territories.").

131 *Cf.* Subsidies Code art. 11 (covering domestic subsidies) with Subsidies Code art. 9 (prohibiting export subsidies on non-primary products, i.e., products other than certain farm, forest or fishing products). Some states do maintain export subsidy programs. There has never been any determination of whether these programs violate the Code. For a discussion see Matt Schaefer & Thomas Singer, *supra* note 2, at 51-52.

132 U.S.-Canada FTA Implementation Act of 1988 § 102(b), Pub. L. No. 100-449, 102 Stat. 1851, 1853 (1988) [hereinafter CUSFTA Implementation Act] (codified at 19 U.S.C. sss 2112 (1996)).

133 *Id.* § 102(b)(3).

134 *Id.* § 102(c).

ment prevail over state law to the extent of any conflict. Such a provision was seen as unnecessary for federal government enforcement in light of specific authorization for such a suit. It is possible that even this explicit Congressional authorization of an Executive Branch cause of action is unnecessary.[135] However, even if Congressional authorization is unnecessary as a legal matter, the explicit authorization serves an important role in clarifying the Executive Branch power in this regard. The NAFTA implementing act does follow the approach of the CUSFTA implementing act in prohibiting private causes of action. It states that:

> "No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid."[136]

Thus, only the federal government can bring suit against a state for maintaining a law inconsistent with NAFTA. Prior to bringing a suit the Executive Branch would have to work on a cooperative basis with offending states, including direct consultations between the President and the respective state Governors.[137] Should the U.S. Attorney-General decide to bring suit against a state, a court would decide the case on the basis of the NAFTA text in light of the negotiating and legislative history of the agreement, including the Statement of Administrative Action.[138] The Statement of Administrative Action contains many clarifications of the intent of certain provisions of the agreement regarding state laws and practices.

Such clarifications would assist the states in any future suit over relevant NAFTA provisions. While not law, the Statement of Administrative Action contains interpretations of the Executive Branch and is formally approved by Congress in the implementing law.[139] Therefore, the Statement of Administrative Action should be accorded more weight than traditional sources of legislative history such as committee reports. Moreover, the President, at least for purposes of domestic law, apparently does not have the power to change an interpretation of an agreement if the interpretation would conflict with the

---

135 *See supra* notes 107-09 and accompanying text.

136 North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182 § 102(b)(2), 107 Stat. 2057, 2062 (1993) [hereinafter NAFTA Implementation Act] (codified at 19 U.S.C. § 3301 (1994)).

137 North American Free Trade Agreement Statement of Administrative Action, *reprinted in* H.R. Doc. No. 159, 103d Cong, 1st Sess. 450, 461 (1993) (codified at 19 U.S.C. § 3311 (1994)).

138 *Id.* at 13.

139 NAFTA Implemention Act § 101(a)(2).

Congress' understanding of the agreement at the time it was approved.[140] In essence, to change an interpretation of the agreement in such a way would be an attempt by the President to make a new trade agreement but the President has no constitutional authority to conclude a trade agreement without the approval of Congress.[141]

Additionally, it is important to note that NAFTA dispute settlement panel reports under the general dispute settlement mechanism do not have any self-executing effect and do not bind federal or state courts. Moreover, such reports in no way represent U.S. foreign policy since the United States can respond to such reports in several ways.[142]

The ban on private causes of action represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with NAFTA or its two supplemental agreements. Private suits, it was feared, would themselves interfere with the conduct of foreign trade relations by the Administration (in consultation with Congress) and appropriate solutions to disputes under the NAFTA.[143]

e. 1994 Uruguay Round Agreements Implementing Act

Private parties can no longer sue states in U.S. courts based on the GATT 1947 as a result of the Uruguay Round agreements. The Uruguay Round agreements contain a revised GATT 1994, which incorporates the GATT 1947. The U.S. Uruguay Round implementing legislation largely follows the approach of the NAFTA implementing legislation and prohibits private causes of action.[144] However, it adds a few additional procedural clarifications regarding an Executive Branch suit.

First, the implementing legislation states that, in a suit by the United States against a state, dispute settlement panel reports "shall not be considered as binding or otherwise accorded deference."[145] This generally clarifies what has been the case under previous trade agreements and would be the case under the Uruguay Round agreements even in the absence of the explicit legislative provision. Dispute settlement panel reports are clearly not intended to be "self-

140 *See* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 134-45 (1990).

141 *See id.* (discussing parallel argument regarding treaties approved by two-thirds of the Senate).

142 NAFTA Statement of Administrative Action at 13.

143 *Id.*

144 *See generally*, Uruguay Round Implementation Act, § 102.

145 *Id.* § 102(b)(2)(B)(i).

executing" and thus cannot bind U.S. courts. The language "or otherwise accorded deference" may have some impact although it appears a court could still, at the very least, take judicial notice of a dispute settlement panel report.[146]

Second, the United States maintains the burden of proving that a state law is inconsistent with the trade agreement.[147] The United States would bear the burden of proof in such a case anyway. Essentially, this provision attempts to deal with a concern that in the area of foreign affairs and foreign commerce courts give too much deference to views of the Executive Branch.[148] However, even in a future case against the states, it seems that courts will continue to give "great weight" to Executive Branch interpretations of provisions in the agreement provided these do not conflict with interpretations contained in the Statement of Administrative Action.

Third, other states are given the unconditional right to intervene in such a suit as a party.[149] The United States is entitled to amend its complaint to include a claim or cross-claim against the law of the intervening state.[150]

Fourth, any state law declared invalid in such a case is only deemed invalid prospectively from the date all timely appeals, including discretionary review, are exhausted.[151] The ban on retroactivity was seen as important particularly in the area of direct taxation. Otherwise, the states could have potentially large refund liability accruing as a case advanced through the courts.[152]

The fifth procedural addition in the Uruguay Round implementing legislation is a declaration that the Statement of Administrative Action "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round agreements" in any case concerning interpretation of

146 The impact of this language is minimized if the Executive Branch agrees with the interpretation in the panel report. The Executive Branch's interpretations will be given "great weight" by courts. See *infra* note 147 and accompanying text.

147 Uruguay Round Implementing Act, § 102(b)(2)(B)(ii).

148 RESTATEMENT, *supra* note 3, § 112 cmt. c.

149 Uruguay Round Implementing Act, § 102(b)(2)(B)(iii).

150 *Id.*

151 *Id.* § 102(b)(2)(B)(iv).

152 It should be noted, however, that broad reservations were taken in the U.S. schedule to the General Agreement on Trade in Services (GATS) for state direct taxation measures, and thus the chance a state taxation measure would be at issue in such a case is extremely remote. Additionally, the GATS text itself contains a broad exemption for direct taxation measures. *See* General Agreement on Trade in Services art. XIV(d), 33 I.L.M. 44 (1994).

the agreement.[153] As the discussion of the NAFTA implementing act above revealed, interpretations contained in its statement of administrative action should also be considered as determinative at least for purposes of domestic law. The Uruguay Round explicitly clarified the status of the Statement of Administrative Action because of lingering concerns that a future Administration could change an interpretation found in the Statement of Administrative Action for purposes of domestic law to the detriment of state interests.

As noted above, clarifications within the Statement of Administrative Action can provide significant protection to states in this regard. For instance, the Statement of Administrative Action which accompanies the implementing legislation of the Uruguay Round adds additional clarifications on General Agreement on Trade in Services (GATS) impact on state taxation measures. One fear of state officials was that GATS would somehow affect unitary taxation measures or apportionment formulas. However, the Statement of Administrative Action clearly states that the GATS national treatment obligation will not require "any change in unitary taxation measures or the apportionment formulas applied in connection with such measures."

The sixth addition was an attempt to prevent parties from using Uruguay Round agreements to prove an interference with foreign commerce under the dormant Commerce Clause. This provision states Congress' intent to occupy the field with respect to private causes of action based on the Uruguay Round agreements.[154] Such an intent could be inferred from the ban on private causes of action itself and the policy behind such a ban declared in the statement of administrative action.

One criticism of the arrangements created by the NAFTA and Uruguay Round implementing acts that lingers is that state laws have a different status than federal laws.[155] Federal laws held inconsistent with a trade agreement can only be overturned through an act of Congress whereas state laws can ultimately be overturned through a suit

153 Uruguay Round Implementing Act, § 102(d).

154 *Id.*, § 102(c)(2).

155 This criticism first arose at the international level after the GATT Beer II case where it was held that only federal laws were eligible to be grandfathered under the Protocol of Provisional Application (PPA). (The GATT was never entered into force but instead was applied through the PPA.). *See* Protocol of Provisional Application to the GATT, Oct. 30 1947, 55 U.N.T.S. 308. The GATT 1994 in the package of Uruguay Round Agreements largely eliminates grandfather rights maintained under the PPA and thus this particular aspect of the criticism is no longer valid. *See* GATT 1994 art. 3(a), *reprinted in* H.R. Doc. No. 316 , 103d Cong., 1st Sess. 1340 (1993) (providing the only remaining "grandfather right"). However, the criticism is now maintained at the level of domestic law.

by the U.S. Attorney-General. During the Uruguay Round implementing process, some state officials criticized this disparate treatment as placing state laws at a lower status. While the use of devices within international agreements to limit the exposure of state laws and the procedural protections described above largely eliminated such concerns, one must also look at federal and state laws from the perspective of U.S. Executive negotiating credibility to see the policy behind the arrangements. The Executive is given "fast-track" authority to present Congress with a bill that achieves all the changes necessary to make U.S. laws consistent with a trade agreement.[156] The bill is subject to a simple up or down vote with no possibility for amendments. This gives the U.S. Executive negotiating credibility with respect to federal laws. Unlike the federal government, the states are not required to make any up front changes to their laws.[157] Instead, the Executive (after consultations with the Congress and numerous other hurdles are passed) is granted as a last resort the ability to sue a state to force compliance with a trade agreement. This gives the U.S. Executive negotiating credibility with respect to state laws. More importantly, requiring pre-emption of state violations of international trade agreements through specific pieces of legislation would move enforcement away from the rule-orientation end of the spectrum and thus further impede the constitutional functions of trade agreements.

3. Canada

Under Canadian law, treaties do not have direct effect in domestic law. In other words, an act of transformation is required to incorporate international trade agreement rules into the domestic legal system.[158] Thus, Canada is considered a strictly "dualist" nation with respect to treaties. No provision of the Constitution states the rule that a treaty will not be directly applicable, rather the rule was derived from the United Kingdom.

Additionally, the Canadian federal government may have constitutional difficulties in providing for private remedies against the provinces through federal implementing legislation. Under the long-standing and famous *Labor Conventions* case, the federal government does not have the power to implement treaty obligations within the

156 JACKSON ET AL., *supra* note 14, at 162-68.

157 This has been acceptable and consistent with U.S. international obligations because existing state legislation inconsistent with major obligations in NAFTA and the GATS has been grandfathered. *See* Schaefer, *supra* note 4.

158 *See* Edward G. Lee, *Canadian Practice in International Law*, 1986 CANADIAN Y.B. INT'L L. 386, 401.

domestic legislative jurisdiction of the provinces. With neither the federal government nor the provinces anxious for a court case testing the exact extent of *Labor Conventions* and the federal government's trade and commerce power, the approach in trade agreement implementing bills has been to reject the possibility of private causes of action against the provinces based on trade agreements without the consent of the federal Attorney-General.[159] The federal government merely included a statement retaining the power to pass legislation necessary to implement the CUSFTA and maintaining the ability to issue regulations necessary to implement international obligations regarding the marketing and sale of beer and alcoholic beverages under both CUSFTA and NAFTA implementing laws. These minimalist approaches were considered the least confrontational with respect to the provinces' jurisdiction.[160] Thus, with respect to certain matters constitutional amendment or reinterpretation may be necessary before the federal government can provide for private remedies against provincial governments as a legal matter.

V. Enforcement through International Dispute Settlement Processes and Possible Federal Government Action: The Modus Operandi and How Successful is it in Achieving Compliance?

Since private causes of action in domestic courts are not provided for in either the United States or Canada, sub-federal compliance with NAFTA and WTO obligations is left to the dispute settlement systems under these agreements and to possible federal government action. As a result, the modus operandi of correcting sub-national government violations is a process containing elements of rule-orientation and power-orientation at both the international and domestic levels.

It is generally recognized that the federal governments of the United States and Canada are unlikely to attempt to sue their states and provinces, respectively, unless the relevant state or provincial action is first subject to an adverse international dispute settlement panel finding. While U.S. federal government authority does not depend on the existence of an adverse panel report, political considerations almost certainly make an adverse panel report a precondition to

159 Steger, *Canadian Implementation of the Agreement Establishing the World Trade Organization, in* Implementing the Uruguay Round (John H. Jackson ed., 1996) (forthcoming).

160 *See* Anonymous, *Issue of Constitutional Jurisdiction, in* Canada: The State of the Federation 39, 45-46 (1987-88 ed.).

a federal suit. Constitutional as well as political considerations will caution the Canadian federal government against taking court action in the absence of an adverse panel report and, depending on the subject matter, may prevent the federal government from taking court action altogether. Thus, violations by states or provinces of international trade rules is likely to arise in a legal context at the international level first. The U.S. modus operandi for obtaining state compliance in case of a violation by a state of an international trade rule is analyzed below. The Canadian process is briefly analyzed for comparative purposes. It should be noted that states and provinces generally comply on a voluntary basis. This may be for a variety of reasons: the substantive rules do not provide many constraints (or only politically approved constraints),[161] a realization of the welfare gains from compliance, and/or the existence of a culture of compliance[162] within sub-federal governments.

A. Securing U.S. State Compliance in Cases of Rule Violation

As noted before, dispute settlement panel reports under the WTO or NAFTA do not have self-executing effect within the United States. Instead, adopted WTO reports establish an international legal obligation to remove the offending measure and NAFTA reports are generally to be the basis for an agreement to resolve the relevant dispute.

The Office of the United States Trade Representative in its testimony before Congress has highlighted the fact that, under NAFTA or the WTO, a nation cannot be forced to change its measures in response to an adverse panel report, although the removal of the measure is clearly preferred.[163] Nonetheless, the political and/or economic pressures placed on a state to remove a measure held inconsistent with the NAFTA or WTO by a dispute settlement panel may be significant depending on the circumstances.

The U.S. Executive has not been granted compensation negotiating authority and is unlikely to be granted such authority. The U.S.

161 For instance, U.S. States only voluntarily joined the Government Procurement Code.

162 I borrow this term from Louis Henkin, *International Law: Politics, Values & Functions, in* 1989-IV RECEUIL DES COURS (1989) (discussing the term with respect to nations rather than sub-national governments).

163 *The Role of Science in Adjudicating Trade Disputes Under the North American Free Trade Agreement: Hearing Before the House Committee on Science, Space, and Technology of the U.S. House of Representatives*, 102d Cong., 2d Sess. 70 (1992) (statement of Charles E. Roh, Jr., Assistant U.S. Trade Representative); Letter from Ambassador Mickey Kantor, U.S. Trade Representative, to Congress, Apr. 29, 1994 (on file with author).

Executive can make requests in specific instances for such authority. However, it is highly unlikely that the U.S. Executive would ask for such authority if a state measure is held inconsistent with the NAFTA or a Uruguay Round agreement because any compensation is likely to affect economic interests in other states besides the one that has refused to change its measure.

If no compensation is granted, the aggrieved country can suspend concessions.[164] However, the political and economic power of the United States within the NAFTA and WTO should not be underestimated. Most nations are not anxious to retaliate against the United States. The procedural and legal protections granted to the states in the respective implementing laws and statement of administrative actions (as well as political considerations) provide a substantial assurance that U.S. power on the international scene will be exercised on the behalf of states. Additionally, retaliation is not an effective option for most smaller nations.[165] Lastly, as the United States itself has found in the past, the interdependence of the international economy often makes it tough to craft sanctions that only impact a foreign country without harming businesses (such as industrial imported input users) and workers in the domestic economy.[166]

However, if a large trading partner proceeds with retaliation, it is likely to target suspended concessions in sectors of importance to the state that refuses to change its NAFTA-inconsistent or WTO-inconsistent measures. This will create economic pressures on the state to change its law. Moreover, even if the aggrieved country is unable to target suspended concessions solely at a particular state or states (i.e., spillover effects are created that adversely impact other states), such a scenario would put pressure on the U.S. government to ensure that the state whose measures were held to be inconsistent with NAFTA or WTO commitments changes its laws.

The exact scenario will depend on a number of factors including the number of states having laws found in violation of the agreement, the apparent legitimacy of the law, and the impact on trade of the state measures. For example, in the 1992 GATT Beer II case over 40 states' laws were found in violation of the GATT 1947 by a GATT panel.[167] Only a few states have changed their laws so as to conform

164 DSU art. 22(2); NAFTA art. 2019.

165 Davey, *supra* note 54, at 102.

166 Judith H. Bello & Alan F. Holmer, *Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAWYER 1095, 1103 (1994).

167 United States-Measures Affecting Alcoholic and Malt Beverages, June 19, 1992, 39 Supp. BISD 206 (GATT Pan. 1993).

with the panel report and the federal government has not brought suit against the remaining states.

In light of the (lack of) implementation of the Beer II panel report, one might conclude that the current enforcement mechanism consisting of the international dispute settlement process followed by executive branch persuasion with the possibility of a suit needs improvement. However, several factors involved in the case suggest some caution is needed in drawing such a conclusion. First, Canada has not retaliated and the state measures are thought to have little impact on trade, so any retaliation would be quite small.[168] The claim by Canada in the Beer II case was thought to be a retaliatory claim brought primarily for political rather than economic reasons. The United States previously brought a successful case within the GATT against Canadian provincial measures affecting the marketing and distribution of beer (the so-called GATT Beer I case).[169]

Second, the GATT Beer II panel based part of its decision on an interpretation of the U.S. Constitution of the relationship between the Commerce Clause and the 21st Amendment regarding an issue never specifically and definitively addressed before by the U.S. Supreme Court.[170] Thus, ultimate federal authority to successfully sue the states in this area is not absolutely assured.

Third, the states were largely dissatisfied with their participation in the Beer II case. However, a more elaborate form of cooperation provided for in the NAFTA and Uruguay Round implementing acts may increase the likelihood of implementation by the states of any future adverse panel reports. The NAFTA implementing law requires that states be "involved (including involvement through the inclusion of appropriate representatives of the states) to the greatest extent practicable at each stage of the development of United States positions regarding matters [that directly relate to, or will potentially have a direct impact on, the states] that will be addressed . . . through

168 *See* Roh, *supra* note 163, at 84 (in response to question).

169 Canada Import, Distribution, & Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, Feb. 18, 1992, 39 Supp. BISD 206 (GATT Pan. 1993).

170 *See* U.S. Statement on GATT Beer Panel, *reprinted in Special Report*, INSIDE U.S. TRADE, June 26, 1992 at S-2 ("the panel incorrectly extrapolates from one line of U.S. Supreme Court cases concerning state tax issues to conclude that state issues under consideration in this portion of the panel report—which concern the distribution of alcoholic beverages—would be governed by the Commerce Clause of the U.S. Constitution, despite explicit state authority under the 21st Amendment of the Constitution, and hence, would not be eligible for coverage under the [Protocol of Provisional Application]. These, indeed, involve weighty and complex issues of U.S. domestic Constitutional law.").

dispute settlement processes provided for under the agreement."[171] The Uruguay Round implementing law provides for similar inclusion of the states but adds specific time deadlines for notification and includes certain language from the NAFTA Statement of Administrative Action in the implementing law.[172] The Uruguay Round also changes the language "involve states ... to the greatest extent practicable" to "make every effort to ensure that the state concerned is involved."[173]

State involvement in the process will increase state awareness and therefore may expedite state adjustment to panel decisions ruling against state measures. In this respect, state involvement may also have benefits from the perspective of the federal government and the international trading system. States are less likely to view any results of a dispute settlement proceeding as originating from a "federal sell-out"[174] or "faceless bureaucrats."

The states will not make separate representations before dispute settlement panels. Therefore, the United States will continue to "speak with one voice" before international panels. As a general rule, it will be federal actors that do the actual speaking before dispute settlement tribunals.[175] States are allowed to appoint a representative or representatives that will participate in internal discussions of the U.S. dispute settlement delegation to ensure that state expertise and a

---

171 NAFTA Implementation Act § 102(b)(1)(B)(v).

172 Uruguay Round Implementation Act § 102(b)(1)(C). The time deadlines in the Uruguay Round implementing act would have to be complied with even in a NAFTA dispute because states have the right to be involved at each stage of the development of U.S. positions. In fact, by insisting on the inclusion of notification and consultation time deadlines in the implementing law that nearly correspond with the end of deadlines for various stages of the dispute settlement process, certain state representatives may have (accidentally) given the federal government more flexibility than the NAFTA implementing law approach.

173 *Id.* § 102(b)(1)(C)(iii).

174 *See, e.g.*, Penelope Lemov, *Can States Live Happily Ever NAFTA?*, GOVERNING 20, 21 (Dec. 1992).

175 Uruguay Round Agreements Act Statement of Administrative Action, H.R. DOC. No. 103-316 vol. 656, 673 (1994) [hereinafter URAA Statement of Administrative Action]; NAFTA Statement of Administrative Action, at 12. It should be noted that States potentially have standing under NAFTA Chapter 19 (establishing review by international panels of countervailing duty and antidumping duty determinations of national authorities) for state subsidy programs. *See* NAFTA art. 1904(7) ("[O]ther persons, who pursuant to the law of the importing Party, otherwise would have the right to appear and be represented in a domestic judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel."). Countervailing duty cases do not involve a claim that the subsidy violates international law but rather that the subsidy is causing injury to a domestic industry in the importing country. Since Canada and Mexico rarely use countervailing duties it is unlikely that States will become involved in cases under this Chapter.

state voice is incorporated into the U.S. defense.[176] This state representative would also have the ability to attend dispute settlement panel hearings on the issue.[177] The representative will be able to provide on the spot advice and information to the federal representatives arguing the case. Additionally, the state representative will make part of the actual presentation where it is determined to be appropriate.[178] The federal government, because of its constitutional responsibility for foreign affairs, had some concerns in granting the state representative a guaranteed right to make a presentation to a panel. Indeed, the states themselves were concerned about granting an individual state a guaranteed right to make presentations before a dispute settlement panel. A state representative unfamiliar with trade obligations and proceedings could damage the case to the detriment of the states' interests as a whole. In any event, the doomsday scenario of the federal government "selling a state down the river" will be prevented by the states' participation throughout the dispute settlement process and by their presence at the panel hearings. Since a federal government suit would be politically difficult in some circumstances, it is important to increase the likelihood of voluntary change by states of any measure found to violate international trade obligations through state participation in the dispute settlement process.

B. Securing Canadian Provincial Compliance in Cases of Rule Violation

The Canadian federal government faces constitutional difficulties in mandating provincial compliance in certain areas. Thus a federal government suit in Canada might not be a legal option, let alone a politically feasible option, in certain instances. However, the threat of trade retaliation, particularly by the United States, is a greater concern for Canada due to the size of its economy and its reliance on the U.S. market.[179] Indeed, after the GATT "Beer I" case in which Canadian provincial laws concerning the marketing of alcoholic beverages were held inconsistent with GATT obligations, the United States imposed a tariff of 50% on beer brewed and bottled in Ontario because

176 *See* Schaefer & Singer, *supra* note 4, at 33.

177 *See* URAA Statement of Administrative Action, at 17.

178 *Id.*

179 *Fact Sheets: Canada*, Report of the Bureau of Public Affairs, U.S. State Department 165 (1995) ("Canada sent 84% of its 1994 exports to the United States.").

that province refused to change its practices sufficiently.[180] Ontario subsequently changed its practices sufficiently to have the retaliatory tariff removed. However, provincial practices regarding the marketing and distribution of alcoholic beverages were complained about as early as the late 1980's by the European Community in the so-called GATT Wine Case.[181]

With respect to disputes under the WTO and NAFTA the provinces have no guaranteed right to participate. Despite provincial demands,[182] neither the Canadian implementing legislation for these trade agreements nor an intergovernmental agreement exists elaborating a cooperative procedure with respect to trade disputes.[183] Nonetheless, as a practical matter provinces have been involved in the preparation of cases and have even attended panel proceedings. This lack of formal cooperative procedures contrasts with the intergovernmental agreement establishing federal-provincial cooperation with respect to disputes under NAFTA's side environmental and labor agreements. The federal government more carefully guards control of trade disputes due to the federal government's trade and commerce power (in spite of uncertainties over its extent). With respect to labor matters and environmental matters, near exclusive and partial provincial jurisdiction, respectively, is well established and recognized.

VI. WOULD A PRIVATE PARTY ENFORCEMENT MECHANISM IN DOMESTIC COURTS HAVE A CHILLING EFFECT ON THE ESTABLISHMENT OF STRENGTHENED SUBSTANTIVE RULES?

While obligations within international trade agreements generally apply to sub-federal governments, many techniques are used to limit constraints on discriminatory or protectionist behavior. One technique is to "grandfather" or reserve existing state and provincial measures inconsistent with services and investment obligations within NAFTA and obligations under the General Agreement on Trade in

180 *See U.S., Canada Reach Agreement on Access for U.S. Beer Sold in the Ontario Market*, 10 INT'L TRADE REP. (BNA) No. 32, 1319 (Aug. 11, 1993) (noting the removal of the duty on Aug. 5, 1993).

181 Canada Import, Distribution & Sale of Alcoholic Drinks by Provincial Marketing Agencies, Mar. 22, 1988, 35 Supp. BISD 37 (GATT Pan. 1988).

182 *See, e.g.*, Manitoba's Position on the NAFTA, position paper of the Manitoba Provincial Government 14 (Dec. 1992) (on file with author).

183 *See* World Trade Organization Agreement Implementation Act ch. 47, 1994 S.C. 1 (Can.); An Act to Implement the North American Free Trade Agreement ch. 44, 1993 S.C. 1921 (Can.).

Services (GATS) within the WTO.[184] Another technique is to allow states and provinces to voluntarily choose whether to become bound to an agreement and tailor the extent to which they will be bound. This technique was employed for state and provincial involvement in the GATT Government Procurement Code renegotiated during the time of the Uruguay Round.[185] A third technique is to fully apply the rules to sub-federal governments but negotiate rules that do not sufficiently constrain protectionist behavior. For example, some believe the Uruguay Round Subsidies Agreement will have little impact on state subsidy wars attracting out-of-state or foreign investors. Thus, strengthening the application of rules or the rules themselves is necessary to constrain protectionist behavior of sub-federal governments and maximize welfare gains from liberalization.[186] The question arises as to whether the existence of private causes of action to enforce the rules would have a chilling effect on the strengthening and development of the rules?

States and provinces have fought vehemently against private rights of action based on international trade rules. Private party remedies with respect to sub-federal government behavior is politically difficult in the United States. Questions of the relationship of the WTO Uruguay Round agreements to state laws created one of the greatest controversies during the development of the U.S. implementing legislation.[187] U.S. states generally are not willing to be subject to private causes of action if federal laws cannot be challenged in such a fashion. A letter from Governors Thompson and Richards to USTR Ambassador Kantor during the Uruguay Round implementing legislation notes that such a situation would be an "intolerable inequality." Granting private causes of action raise political as well as possible constitutional difficulties (depending on the area) in Canada. Indeed, such an approach might lead to an immediate constitutional challenge over the respective jurisdictions of the federal and provincial governments.

184 NAFTA arts. 1108(1)(a)(ii), 1206(1)(a)(ii), 1409(1)(a)(ii); GATS, 33 I.L.M. at 60. *See also* Schaefer, *supra* note 4; Schaefer & Singer, *supra* note 4, at 54-55.

185 *See* Schaefer, *supra* note 4; Schaefer & Singer, *supra* note 4, at 56-57.

186 *See* Schaefer, *supra* note 4.

187 *State Attorneys General Reach Agreement with USTR on GATT Concerns*, 11 INT'L TRADE REP. (BNA) No. 31, at 1201 (Aug. 3, 1994); *State Groups, Lawmakers Oppose Pre-emption of State Law Under GATT*, 11 INT'L TRADE REP. (BNA) No. 29, at 1136 (July 20, 1994); *State Officials to Ask Clinton for Trade Consultation Summit*, 11 INT'L TRADE REP. (BNA) No. 26, at 1028 (June 29, 1994).

Thus, it is likely that the political hurdles that federal government negotiators must overcome in strengthening substantive constraints on sub-federal governments will only be raised if private remedies in domestic courts are utilized as an enforcement mechanism. In light of the political sensitivity (and possible constitutional constraints in Canada) of creating such an enforcement mechanism, a proponent of the effectiveness-conception of the constitutional function trade agreements are to perform might well conclude that political capital might be better spent strengthening the applicability of the substantive rules to sub-federal governments. The current enforcement mechanism that relies in part on negotiation at the international level and between sub-federal governments and the federal government at the domestic level may enhance the likelihood that sub-federal governments will give the necessary political consent to be bound to strengthened substantive rules.

VII. Conclusion

Constitutions of federal nations lack comprehensive or sufficient constraints on sub-federal government discretion exercised for protectionist purposes. While the U.S. Constitution's dormant Commerce Clause, along with other constitutional provisions, provides many limitations on state protectionist behavior, large "gaps" in these constraints remain. The Canadian constitution provides even fewer limits on provincial discretion exercised for protectionist purposes. International trade agreements, however, can perform constitutional functions by limiting sub-federal government discretion exercised for protectionist purposes. Indeed, it is essential in non-tariff barrier and new areas of trade negotiations to constrain sub-federal governments in order to increase world welfare. International trade agreements are only at the beginning stages of developing these constraints.

The question arises as to whether the creation of private remedies in domestic courts for sub-federal violations of international trade rules is essential for international trade agreements to perform a constitutional function. The answer to this question likely depends on the operative conception of constitutionalism. The immediate creation of such remedies is recommended by an American rights-based notion of constitutionalism. Indeed, the attraction for such remedies is greater with respect to sub-federal government violations than for federal government violations as a result of the hierarchy of norms in federal nations.

Another conception of constitutionalism frequently discussed in international trade circles focuses on effectiveness. An effectiveness conception is ultimately attracted to private remedies in domestic courts because it is likely to maximize compliance with international trade rules. However, an effectiveness conception is also concerned with the chilling effect such remedies might have on the development of stronger substantive international trade rules applicable to sub-federal governments. If a proponent of the effectiveness conception views the sub-federal government compliance record and current mechanisms to correct sub-federal violations as relatively successful, then the proponent will likely recommend delaying the introduction of private remedies in domestic courts until strengthened substantive rules applicable to sub-federal governments have been negotiated.