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Judicial Review in the United States and in the WTO: Some Similarities and Differences

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JUDICIAL REVIEW IN THE UNITED STATES AND IN THE
WTO: SOME SIMILARITIES AND DIFFERENCES

CARLOS MANUEL VÁZQUEZ*

I. Introduction

Among international organizations, the World Trade Organization (WTO) is widely credited with having the most effective dispute settlement system. Its highly developed dispute settlement system, which is one of the few in international law to include a standing appellate body, invites comparisons to the institution of judicial review in the United States under the paradigm of *Marbury v. Madison.* Such a comparison yields insights about both the WTO dispute settlement system and *Marbury*-style judicial review.

This Article first notes an important parallel between the two systems: like the WTO, judicial review in the United States began as the refinement of a flawed treaty-based system. After describing how the two institutions developed from flawed treaty regimes, this Article examines some important structural differences between how the two institutions exercise “judicial review,” as well as one feature of the WTO that is sometimes thought to distinguish it from other legal regimes, but in fact does not. The Article concludes with some reflections on what the differences between the two systems tell us about the necessary elements of an effective legal system.

II. Judicial Review in the United States and the WTO as the Refinement of Flawed Treaty-Based Regimes

A. The Treaty-Based Origins of Judicial Review in the United States

The Articles of Confederation (Articles)—the constitutive document in force in the United States between independence and the adoption of the Constitution—were basically a treaty among the thirteen states. The Articles operated on the states as political bod-

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ies, and not directly on the individuals in the states. They imposed obligations on the states, but lacked a mechanism for enforcing those obligations. In enumerating the flaws of the Articles, the framers of the Constitution compared the Articles to a "mere Treaty" because they depended on the good faith of the parties for their efficacy.\textsuperscript{2} The states failed to meet their federal obligations, however, and the federal government lacked the power to compel them to comply. Their experience under the Articles convinced the framers that a government comprised of separate states could not depend on "good faith" to secure the states' compliance with their federal obligations.\textsuperscript{3}

To address this problem, the framers replaced the Articles' treaty regime with a true federal government. Their most important modification of the treaty regime was to empower the federal government to direct its legislation to the individuals in the nation.\textsuperscript{4} The federal government was given the power to regulate commerce among the states and with foreign nations, among other legislative powers, and to tax the people to provide for the general welfare.\textsuperscript{5} The federal government would no longer depend on the states to provide it with necessary funds or to implement and enforce federal directives. The Constitution operated directly on individuals, and could be enforced through the courts.\textsuperscript{6} The Constitution also provided for federal courts, establishing a Supreme Court to review decisions of state courts regarding federal law, and granting Congress the power to establish lower federal courts.\textsuperscript{7} The Constitution imposed certain obligations directly on the states, such as the prohibition of ex post facto laws and bills of attainder.\textsuperscript{8} To ensure compliance with federal obligations, the federal courts were given jurisdiction in cases arising under federal law.\textsuperscript{9}

\begin{itemize}
\item \textsuperscript{2} \textit{The Federalist} No. 33, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
\item \textsuperscript{5} \textit{U.S. Const.} art. I, § 8.
\item \textsuperscript{6} See \textit{The Federalist} No. 22, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Laws are a dead letter without courts to expound and define their true meaning and operation."); \textit{The Federalist} No. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts.").
\item \textsuperscript{7} \textit{U.S. Const.} art. III, § 1.
\item \textsuperscript{8} \textit{Id.} art. I, § 9.
\item \textsuperscript{9} \textit{Id.} art III, § 2.
\end{itemize}
Some of the framers were worried that the new federal government would become too powerful, usurping powers not delegated to it and eventually obliterating the state governments. The framers adopted certain safeguards to prevent such an eventuality. Prominent among them was the institution of judicial review. If the federal government exceeded its legislative powers, the framers assured skeptics, the courts would refuse to enforce the non-conforming legislative acts, thus protecting the citizenry and the states from the federal government's expansive tendencies. The power to nullify legislative acts that exceed the constitutional powers of the federal government is, of course, the type of judicial review later affirmed in Marbury v. Madison.

B. The Development of the WTO's Dispute Settlement System

The WTO's current dispute settlement system is likewise the result of the refinement of a seriously flawed treaty-based regime. The centerpiece of the WTO is the General Agreement on Tariffs and Trade (GATT). That treaty was originally intended to be administered by an international organization, the International Trade Organization (ITO). The ITO was conceived as the third branch of the Bretton Woods system, the trade counterpart to the World Bank and the International Monetary Fund. The ITO never came into existence, however, largely because the United States failed to ratify its constitutive treaty, the Havana Charter. Even the GATT never came into force for all members. For some, including the United States, the provisions of the GATT became legally binding obligations by virtue of the Protocol of Provisional Application, which provided for the "provisional" application of the GATT for the four-plus decades of its existence.

Without the contemplated organization to administer it, major GATT decisions were taken by the CONTRACTING PARTIES, which when spelled in all caps signified the parties to the GATT acting jointly. Although technically not an organization, the CON-
TRACTING PARTIES had the power to make decisions by majority vote. In practice, however, a decided preference for decision by consensus developed. This preference for consensus played a particularly important role in GATT dispute settlement. The GATT included rather skeletal provisions addressing dispute settlement. Article XXXIII provided simply that any Member State that believed another State's conduct violated the GATT's provisions could "make written representations or proposals to the other contracting party or parties . . . concerned," and the other party or parties were to "give sympathetic consideration to the representations or proposals made to it." If the matter was not resolved through this mechanism within a reasonable time, it could then be referred to the CONTRACTING PARTIES, which were instructed to "promptly investigate any matter so referred to them and . . . make appropriate recommendations to the contracting parties . . . concerned, or give a ruling on the matter, as appropriate." If they considered the circumstances "serious enough to justify such action, they could authorize a contracting party to suspend the application to any other contracting party or parties of such obligations or concessions under this Agreement as they determine to be appropriate in the circumstances." The party whose concessions had been suspended would then be "free [to] . . . withdraw from th[e] Agreement."

Although not expressly authorized by the agreement, the CONTRACTING PARTIES developed the practice of referring disputes that had been referred to them under Article XXIII to an arbitral panel:

At the beginning of GATT's history, disputes were generally taken up by the plenary semiannual meeting of the contracting parties. Later they would be brought to an "intercessional committee" of the CPs, and even later [they] were delegated to a working party set up to examine either all disputes or only particular disputes brought to GATT. Around 1955 a major shift in the procedure occurred . . . . It was decided that rather than using a working party composed of nations . . . , a dispute would be referred to a panel of experts. The three or five experts

17. JACKSON, supra note 14, at 63.
18. Id. at 65.
19. GATT, supra note 13, at 266. This procedure was also contemplated for claims by a party where "any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or [where] . . . the attainment of any objective of the Agreement is being impeded." Id.
20. Id. at 268.
21. Id.
22. Id.
would be specifically named and were to act in their own capacities and not as representatives of any government.25

Because the panels were the delegates of the CONTRACTING PARTIES, which alone had the power to make decisions under Article XXIII, panel decisions had no legal force unless adopted by the CONTRACTING PARTIES. Adoption of a panel report effectively required a unanimous agreement of the States-Parties, and the losing party could always decline to agree to adoption of the report. Perhaps surprisingly, the CONTRACTING PARTIES adopted numerous panel reports,24 and satisfaction of complaints under the GATT was regarded as quite good.25 Nevertheless, the requirement of consensus was regarded as a serious deficiency of the pre-WTO dispute settlement system.

Among the most significant achievements of the Uruguay Round agreements was the Dispute Settlement Understanding (DSU),26 which formalized and refined the process of initiating complaints before panels. The DSU declared the dispute settlement system to be “a central element in providing security and predictability to the multilateral trading system, . . . to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”27 Considered by some to be the “linchpin of the whole trading system,”28 the DSU is widely credited (or blamed) for “legalizing” the GATT, just as Chief Justice Marshall’s decision in Marbury v. Madison is said to have transformed the U.S. Constitution into a truly legal document.29

The DSU creates a Dispute Settlement Body (DSB) with the power to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and

23. JACKSON, supra note 14, at 115-16.
24. One hundred one reports were adopted. See http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm (last visited Apr. 8, 2004).
27. Id. art. 3.2.
28. JACKSON, supra note 14, at 124.
other obligations under the covered agreements." If a dispute is not resolved through consultations and good offices, conciliation, and mediation, the DSB is required to establish a dispute settlement panel to adjudicate the dispute upon the request of the complaining party. The panel must "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Most importantly, the DSU provides that the panel’s final report must be adopted by the DSB, unless within sixty days of the report’s circulation to members, a party notifies the DSB that it intends to appeal or the DSB by consensus decides not to adopt the report. Such consensus can be blocked by any Member State, including Member States that prevailed before the DSB. Adoption of the report is thus, for all practical purposes, automatic.

The DSU also establishes a standing Appellate Body (AB). The AB is composed of seven persons who sit in divisions of three. Members of the AB serve four-year terms and may be reappointed once. According to the DSU, those serving on the AB must be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." Only "issues of law covered in the panel report and legal interpretations developed by the panel" may be appealed. The AB must address all of the legal issues raised by the parties, and it may "uphold, modify or reverse the legal findings and conclusions of the panel." The AB report is automatically adopted by the DSB unless the DSB by consensus decides otherwise within thirty days of the report’s circulation.

The DSU also provides for monitoring of the parties’ compliance with the recommendations of the panels and the AB. Member States whose measures have been found to be inconsistent with a covered agreement are given a “reasonable period of time” to

30. DSU, supra note 26, art. 2.1
31. Id. art. 6.1.
32. Id. art. 11.
33. Id. art. 16.4.
34. Id. art. 17.1.
35. Id. art. 17.2. Initially, three of the seven were selected by lot to serve a two-year term, so that turnovers of the Body would be staggered. Id.
36. Id. art. 17.3.
37. Id. art. 17.6.
38. Id. art. 17.12.
39. Id. art. 17.13.
40. Id. art. 17.14.
bring their measures into compliance. In the event of a disagree-
ment about whether a Member State's efforts to comply with the
decision are adequate, the dispute is to be decided by a panel
(known as an Article 21.5 panel), which is to have the same compo-
sition as the original panel whenever possible.

Although the DSU expresses an affirmative preference for com-
pliance with DSU rulings and recommendations, it also delineates
procedures for compensation or the suspension of concessions in
the event of non-compliance. If a measure has been found
inconsistent with a covered agreement, and the member fails to
bring the measure into conformity with the agreement within the
determined reasonable period of time, then the member must, if
requested, enter into negotiations with the prevailing parties "with
a view to developing mutually acceptable compensation." The
remedy of compensation is available only with the consent of the
parties concerned. If no agreement is reached on compensation,
then the prevailing party may seek authorization from the DSB to
suspend trade concessions that it would otherwise be obligated to
grant the non-complying Member-State. The DSU provides that
the level of authorized suspended concessions "shall be equivalent
to the level of nullification or impairment." It also specifies that
both compensation and suspension of concessions are temporary
measures available only pending full compliance by the member
concerned with the recommendations of the DSB.

With the exception of a few regional systems, the WTO's dispute
settlement system is in several respects far better developed and
more intrusive than other international dispute settlement
regimes. Dispute settlement panels have compulsory jurisdiction

41. Id. art. 21.3.
42. Id. art. 21.5.
43. Id. art 22.1.
44. Id. art 22.2. "Compensation" in this context has a different meaning than in inter-
national law generally. While "compensation" is ordinarily thought of as a retrospective
remedy designed to compensate for past harm, in the WTO, the term refers to a purely
forward-looking remedy: the granting of a trade benefit to the prevailing party in order to
compensate prospectively for the nullification or impairment caused by the nonconform-
ing measure. See, e.g., Christopher F. Corr, Trade Protection in the New Millennium: The Ascen-
compensation as prospective relief in the WTO).
45. DSU, supra note 26, art. 22.2.
46. Id.
47. Id. art. 22.4. Again, this remedy is purely prospective; it does not compensate for
losses already suffered, but rather "rebalances the playing field" for the future. See Corr,
supra note 44, at 71.
48. DSU, supra note 26, art. 22.1.
over all disputes between Member States involving covered agreements. The procedures set up under the DSU are considerably more detailed than those that exist in most other international adjudicatory regimes. Very few other international dispute settlement regimes include a standing appellate tribunal to review all issues of law decided by first-level panels. Still fewer regimes establish a mechanism for monitoring compliance with the decisions of panels.

III. THREE STRUCTURAL DIFFERENCES (AND ONE NON-DIFFERENCE) BETWEEN JUDICIAL REVIEW IN THE UNITED STATES AND IN THE WTO

A. The Addressees of the System's Norms

Despite having a highly developed dispute settlement system, the WTO remains a treaty-based international organization, in many respects like the United States under the Articles of Confederation. The obligations imposed by the agreements enforced by the WTO panels and the AB operate on the member states as political bodies, not directly on the individuals in the states. Under the DSU, claims are brought by member states against other member states. By contrast, in the United States, adjudication occurs largely in suits between individuals. Even when the validity of an act of a state or federal government is at issue, the challenge often arises in the context of a suit between private individuals.49 Even in direct challenges to official acts or omissions, the defendant is typically a state or federal official rather than the state itself.50

The framers believed that giving the federal government the power to legislate directly on individuals was essential to giving efficacy to the directives of the federal government. They appear to have believed that norms addressed to states as political bodies had to rely on good faith for their efficacy or else they could only be enforced through military force. The former option had been shown to be ineffective, and the latter was undesirable for the same reason that war is generally regarded as undesirable: it harms the innocent as well as the guilty. While judicial enforcement of the law was preferable, the framers appear to have believed that judicial enforcement was available only against individuals. Their views

49. See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (suit between private parties concerning title to land which raised the question of the validity of both a state law and a federal law).

50. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
in this regard may have stemmed from the lack of precedents for international adjudicatory tribunals.

B. The Forms of Review

Unlike the United States under the Articles, and like the United States under the Constitution, the WTO has a judicial branch empowered to resolve disputes arising under the system's legal rules.\textsuperscript{51} The "judicial review" exercised by the panels and AB, however, only corresponds to the least controversial type of U.S. judicial review.

The U.S. Constitution divides power between a federal government and the governments of the several states. It also divides the powers of the federal government among three branches: the legislative, executive, and judicial branches. The least controversial form of judicial review in which the U.S. courts engage is review of the acts of the states—legislative, executive, and judicial—for conformity with federal law. Article VI of the Constitution provides that:

\begin{quote}
[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\textsuperscript{52}
\end{quote}

This provision is regarded as express authority for judicial review of state acts for conformity with federal law. Even scholars who claim that other forms of judicial review were not contemplated by the framers or authorized in the constitutional text concede that the framers contemplated judicial review of the validity of the acts of the states.\textsuperscript{53} This Article refers to this form of judicial review as "vertical" review because the organ of a hierarchically superior government is reviewing the acts of a subordinate government for conformity with the laws of the higher entity.

A slightly more controversial form of judicial review, at least initially, was the power of the courts to invalidate the acts of federal executive officials that violate federal law. When \textit{Marbury v.}

\begin{footnotesize}
\begin{enumerate}
\item Although the DSU does not denominate the dispute settlement panels or the AB "courts" or "judicial" bodies, they clearly function as the WTO's judiciary. \textit{See} Steve Charnovitz, \textit{Judicial Independence in the World Trade Organization, in International Organizations and International Dispute Settlement} 219, 223-24 (2002).
\item \textit{U.S. Const. art. VI.}
\item \textit{See Larry D. Kramer, The Supreme Court 2000 Term Foreword: We the Court, 115 Harv. L. Rev. 4, 60-61} (2001).
\end{enumerate}
\end{footnotesize}
Madison was rendered, its more controversial holding was to affirm the power of the courts to entertain a mandamus action against a federal official.54 Today, however, this power is well-settled and widely accepted. This Article refers to this form of judicial review as "horizontal" because the courts are reviewing the acts of a coordinate branch of the same government to determine their conformity with the laws of that government.

Another form of horizontal judicial review is the most controversial: judicial review of the acts of the federal legislative branch for conformity with the Constitution. The textual support for this form of judicial review is less direct than for vertical review, and some scholars maintain that this form of review was an innovation of Chief Justice Marshall not authorized by the Constitution.55 This Article does not examine that claim. Despite the scholarly objections, even this form of judicial review is well entrenched in the United States and is unlikely to be abandoned any time soon.

Judicial review in the WTO is almost exclusively vertical judicial review. The purpose of the dispute settlement system, according to the DSU, is to resolve cases "in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member."56 Judicial review in the WTO thus consists of the enforcement of superior norms by the organ charged with administering them (the WTO, which sits in a position analogous to that of the federal government in the United States), against the entities subject to those norms (the Member States, which in this respect are in a position analogous to that of the U.S. states).

Horizontal review is largely unknown in the WTO system. It is difficult to conceive how such review might develop. The most controversial form of such review—review of the legislative acts of a coordinate branch—is possible only if the legal system includes a legislative power and if that power is subject to limits. Limits can be of either a substantive or procedural nature. Procedural limits are the rules specifying the number and distribution of votes necessary to pass an act of legislation. Substantive limits are those that

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54. Marbury, 5 U.S. (1 Cranch) at 174-76; see Jonathan R. Siegel, Suing the President: Nonstatutory Review Revisited, 97 COLUM. L. REV. 1612, 1630 n.102 (1997) ("Marbury . . . was most controversial . . . for its assertion that the Court could issue an order to a cabinet official acting under presidential instructions."); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 232, 245-46, 248-49 (1922).
55. See Kramer, supra note 53; Snowiss, supra note 29.
56. DSU, supra note 26, art. 3.5.
render particular acts of legislation invalid because of their content.

The WTO allocates what might be regarded as legislative powers to certain bodies. First, it specifies how trade agreements can be amended. Different supermajorities are required depending on which provision is sought to be amended. For example, an amendment of Article I or II of GATT 1994 requires the agreement of all Member States. 57 Other provisions, apparently including the provision specifying the requirements for amendment, may be amended by a two-thirds vote, and such amendments would be binding on the states that have accepted them. 58 It is possible that a dispute could arise as to whether an attempted amendment properly required a unanimous agreement of the Member States or merely a two-thirds vote. If such an issue were to arise in the context of a dispute between two Member States, the panel, and later the AB, would have to decide whether they have the power to review the decisions of the other pertinent organs of the WTO on that question. They may very well decide that they must defer to the other organs' decision. In the United States, questions relating to the amendment process are generally considered non-justiciable. 59 In any event, this sort of judicial review, if it occurred at all, would be quite narrow, although potentially important.

The Ministerial Conference and the General Council hold a quasi-legislative power "to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." 60 Such interpretations require a "three-fourths majority of the [m]embers." 61 This power is also apparently subject to a substantive limit, as the provision

58. The Ministerial Conference, however, "may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference." Id. art. X, para. 5. With respect to some such amendments, a two-thirds vote suffices only if the amendment is "of a nature that would not alter the rights and obligations of the Members." Id. art. X, para. 4.
59. See Coleman v. Miller, 307 U.S. 433 (1939) (holding that only Congress—not the courts—may decide questions of how long a proposed amendment to the Constitution can remain open to ratification). The U.S. courts also decline to review questions about whether a statute duly proclaimed actually received the number of votes required by the Constitution. See United States v. Munoz-Flores, 495 U.S. 385, 409 (1990) (Scalia, J., dissenting).
60. WTO Agreement, supra note 57, art. IX, cl.2.
61. Id.
according the power specifies that it “shall not be used in a manner that would undermine the amendment provisions in Article X.”62 The agreement thus contemplates a distinction between “interpretations” and “amendments,” which presumably corresponds to the distinction between explicating existing obligations and establishing new ones.

Although disputes could occur about whether an “interpretation” duly propounded by the Ministerial Conference or the General Council crossed the line between interpretation and amendment, the issue would likely be regarded as non-justiciable. The line between law-interpreting and law-making is a notoriously difficult one to draw. The requirement of a three-fourths majority for such determinations would likely be regarded as an adequate safeguard against abuse of this power. For this reason, it is likely that neither the panels nor the AB would regard it as within its power to review whether a duly certified interpretation exceeds the bounds of interpretation.63

In short, there are very few situations in which a quasi-legislative power is granted to any organ of the WTO subject to substantive limits. There are accordingly very few possible occasions for the panels or the AB even potentially to engage in what in the United States is regarded as the most controversial type of horizontal judicial review: review of legislative acts for conformity with the substantive limits imposed by the constitutive instrument.

On the other hand, it is possible that a form of judicial review may arise in the WTO context that does not exist in the United

62. Id. A similar quasi-legislative power subject to substantive limitations is the power of the Ministerial Conference, by three-fourths vote, to waive an obligation imposed on a Member State by the WTO agreements “in exceptional circumstances.” Id. art. IX.3. A dispute between Member States could thus raise the question whether “exceptional circumstances” justified a waiver granted to one of the States.

63. On the other hand, when a similar argument was made in the famous U.S. case Bush v. Gore, five justices apparently found it justiciable. In a concurring opinion joined by Justices Scalia and Thomas, Chief Justice Rehnquist concluded that the Florida Supreme Court’s requirement that the improperly-marked ballots be counted “significantly departed from the statutory framework” put in place by the Florida legislature—a departure that crossed the line between interpreting and making law. Bush v. Gore, 531 U.S. 98, 111-22 (2000) (Rehnquist, C.J., concurring). Justice Stevens, however, noted that the Supreme Court did not make any substantive changes to Florida law; it simply “did what courts do”—i.e., stated what the law is. Id. at 128 (Stevens, J., dissenting) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Justice Souter agreed. See id. at 133 (Souter, J., dissenting) (“[T]he interpretations by the Florida court raise no substantial question under Article II.”). These five justices thus apparently regarded the distinction between law-interpretation and law-amendment to be justiciable. None of the other Justices addressed the issue.
States: review of legislation for conformity with external norms limiting the legislative power, norms having their source outside the constitutive instruments of the WTO. The instruments establishing the WTO and imposing obligations on the Member States are treaties. General international law imposes certain substantive limitations on what States may agree to by treaty. Specifically, there are certain norms of international law that have the status of *jus cogens.* Although there is much debate about which norms fit into this category, there is wide agreement that States may not contract out of such norms through treaties. In other words, a treaty provision that conflicts with a *jus cogens* norm is invalid. A dispute before a WTO panel or the AB could thus raise the question whether a provision of the WTO agreements is invalid because it conflicts with a *jus cogens* norm.

Whether such an issue would be cognizable before a panel or the AB is the subject of some uncertainty. Some scholars take the position that the panels, and the AB, can and must decide whether a treaty obligation is invalid because it violates a *jus cogens* norm. Other scholars, however, maintain that the duty of WTO panels and the AB is to adjudicate disputes under the provisions of the covered agreements and not to enforce norms outside the WTO system. The latter position is closer to how the U.S. courts approach the analogous issue. The United States, as a sovereign State, is subject to obligations imposed by international law, including the WTO agreements. The domestic courts, however, are not empowered to invalidate laws passed by the legislature on the ground that they violate international law. The courts will seek to avoid conflicts with international law by interpreting statutes to be consistent with such law if at all possible. If a conflict is unavoidable, however, the courts will enforce the statute passed by the legis-

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65. General international law also specifies that a later treaty supersedes an earlier one between the same parties. See id. art. 30. If two Member States enter into a later treaty that is inconsistent with a WTO provision, the later treaty would supersede the WTO provision under general rules of international law. Whether WTO panels and the AB may decline to enforce such WTO provisions under such circumstances is also a matter of debate. Compare Gabrielle Marceau, *WTO Dispute Settlement and Human Rights,* 13 EUR. J. INT’L L. 755, 753 (2002) (concluding that they may not), with Joost Pauwelyn, *The Role of Public International Law in the WTO,* 95 AM. J. INT’L L. 535, 553 (2001) (concluding that they may).

66. See Marceau, supra note 65.


68. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).
lature, even if it conflicts with the United States' obligations under international law.\textsuperscript{69}

The question whether WTO panels or the AB have the power to decline to enforce WTO provisions that conflict with \textit{jus cogens} norms may be largely academic, however, as conflicts between a WTO provision and a \textit{jus cogens} norm will be rare. Commentators have suggested that there is a conflict between the GATT provisions requiring member states to allow imports of products made with indentured child labor and the \textit{jus cogens} norm prohibiting indentured child labor.\textsuperscript{70} The existence of this conflict, however, is highly debatable. First, it is not altogether clear that the WTO agreements disable States from prohibiting the importation of products made with indentured child labor.\textsuperscript{71} Even if they do, such a disability may not conflict with any \textit{jus cogens} norm. Although there does exist a \textit{jus cogens} norm prohibiting indentured child labor, it is not clear that there is a norm in international law requiring States to prohibit the importation of products made with indentured child labor. Even if there were a norm requiring the prohibition of such importation, it is far from clear that that norm has the status of \textit{jus cogens}. In the absence of a \textit{jus cogens} norm requiring States to prohibit the importation of products made with indentured child labor, there would not be a conflict that would invalidate the (assumed) WTO norm prohibiting members from barring the importation of such goods.\textsuperscript{72}

In short, the opportunities for WTO panels and the AB to engage in judicial review of WTO legislative action seem to be few and far between, and, if the opportunities present themselves, it is likely that the panels and the AB would decline to exercise such review.

Nor does there appear to be much room in the WTO for judicial review of executive action. The WTO's executive arm—the Secretariat—has functions of a bureaucratic nature. It is difficult to imagine an exercise of power by the Secretariat that could affect a

\textsuperscript{69} See Edye v. Robertson, 112 U.S. 580 (1884).


\textsuperscript{72} For further discussion, see Vázquez, supra note 71.
Member State's rights under the covered agreements in such a way as to create a dispute between Member States before a WTO panel. The closest a panel has come to confronting a "separation of powers" question was in "India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products."73 This dispute presented the question whether the panel had competence to review a Member State's justification for a restrictive import measure taken for balance-of-payments purposes in the light of the competence given to the Committee on Balance of Payments Restrictions (Committee) by the Balance of Payments Understanding74 to conduct consultations on such matters. The panel decided that the power given to the Committee did not deprive it of competence in such matters, and the AB agreed. This conclusion was not surprising given the footnote in the Balance of Payments Understanding specifically providing that “[t]he provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.”75

Thus, judicial review in the WTO differs from judicial review in the United States in that it is mostly, perhaps entirely, vertical in nature. The failure to notice this difference has led to the adoption of provisions in WTO agreements based on a flawed analogy between judicial review in the WTO and in the United States. The Anti-Dumping Agreement76 contains a standard-of-review provision that transplants to WTO dispute settlement a doctrine developed in the United States in the context of judicial review of administrative interpretations of certain statutes. Under the so-called Chevron doctrine,77 U.S. courts will defer to an administrative agency's


75. Id. at 29 n.1.


interpretation of a statute that it is responsible for administering.\textsuperscript{78} If a statute is unambiguous, the courts will strike down conflicting administrative interpretations. If, after using the "traditional tools of statutory construction,"\textsuperscript{79} the court concludes that the statute is silent or ambiguous on a given point, the court will uphold the agency's interpretation of the statute as long as it is reasonable.\textsuperscript{80}

The \textit{Chevron} doctrine was apparently used as a model for Article 17.6 of the Anti-Dumping Agreement.\textsuperscript{81} Article 17.6 provides that, in examining certain anti-dumping matters:

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.\textsuperscript{82}

The standard of review set forth in this provision differs from the \textit{Chevron} doctrine in at least two obvious ways. First, rather than requiring the panel to employ "traditional tools of statutory construction" to determine if the provision is ambiguous, it directs the panel to apply "customary rules of interpretation of public international law." This was meant as a reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties.\textsuperscript{83} Second, the provision requires deference if the authorities' interpretation is "permissible," a seemingly less deferential standard than \textit{Chevron}, which calls for deference to "reasonable" agency interpretations. Both

\textsuperscript{78} Id. at 844-45; see also Steven P. Croley & John H. Jackson, \textit{WTO Dispute Procedures, Standard of Review, and Deference to National Governments}, 90 AM. J.' INT'L L. 193, 199 (1996).

\textsuperscript{79} Chevron U.S.A., Inc., 467 U.S. at 843 n.9.

\textsuperscript{80} Id. at 843.


\textsuperscript{82} Anti-Dumping Agreement, supra note 76, art. 17.6(ii).

\textsuperscript{83} See Croley & Jackson, supra note 81, at 195-96. Article 31 of the Vienna Convention, headed "General Rule of Interpretation," provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 provides for "supplementary means of interpretation . . . in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties, Apr. 24, 1970, arts. 31-32, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 18,232.
aspects of the provision were the result of a compromise between proponents and opponents of adopting *Chevron* deference in this context. According to some commentators, the first sentence of Article 17.6 renders the second sentence moot, as international rules of interpretation will always yield only one permissible interpretation.\textsuperscript{84} Others disagree.\textsuperscript{85} The AB treatment of Article 17.6 thus far suggests that the attempt to import *Chevron* deference into WTO adjudication has not been entirely successful, as the AB has resisted the standard.\textsuperscript{86}

Deference to Member State authorities in the context of the Anti-Dumping Agreement may or may not be wise. The analogy to *Chevron* deference, however, is decidedly inapt. *Chevron* deference takes place in the context of horizontal judicial review, whereas WTO adjudication is vertical judicial review. If Article 17.6 required deference to Member State authorities, it would be analogous to a requirement that federal courts defer to state court interpretations of federal law. There is no such deference in the United States.

Deference in the context of horizontal judicial review differs from deference in the context of vertical judicial review in three important ways. First, when a U.S. court defers to the administrative agency charged with the enforcement of a given law, it is deferring to a single entity. Accordingly, there will be a single interpretation of the law throughout the legal system, albeit one rendered by an agency rather than a court. When a WTO panel or the AB defers to the interpretations of the Anti-Dumping Agreement by the Member States, it is deferring to 135 potentially different interpretations of the same instrument. Deference in the vertical context thus produces the possibility of a multiplicity of interpretations.

Second, when a U.S. court defers to an administrative agency's interpretation of a statute, it is deferring to the judgment of a branch of the same government that enacted the law. The effective interpretation is one that is rendered by an agency that represents the interests of all the states. By contrast, when a WTO panel or the AB defers to a Member State's interpretation of a WTO agreement, an agreement that binds all Member States is being construed by an entity that represents only one Member State. As Chief Justice Marshall said in another of his famous opinions:

\textsuperscript{84} See Croley & Jackson, supra note 81, at 197.
\textsuperscript{85} See Tarullo, supra note 81, at 150-52.
\textsuperscript{86} See id.
Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state would be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? The . . . Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. 87

Similar reasons call into question the wisdom of leaving the interpretation of a WTO provision to one Member State.

Third, when a U.S. court defers to an administrative agency charged with administering a statute, it defers to a coordinate branch that is acting as a regulator. The agency's role is to enforce the statute against the regulated parties. By contrast, when a WTO panel or the AB defers to a Member State's construction of a WTO agreement provision, it is deferring to the interpretation placed upon the treaty by the regulated party. For the AB to defer to a Member State's interpretation of a WTO agreement would be like a U.S. court deferring to a state's construction of the takings clause or a private party's construction of the securities laws. Such deference is not irrational, but it is not Chevron deference. Mandating deference to the construction placed on a law by the regulated party is the same as calling for the weakest reasonable interpretation. 88 By contrast, when a U.S. court defers to a U.S. agency's interpretation of a statute, it may be deferring to an interpretation that is more stringent than the one that the court would have given the statute.

The foregoing analysis does not mean that the deference contemplated by Article 17.6 is necessarily undesirable or that Article 17.6 should be disregarded by dispute settlement panels or the AB. 89 The point is simply that, to the extent that Article 17.6 was modeled on the Chevron doctrine, it was based on an inapt analogy. Deference under Article 17.6 is more like the rule of lenity, under which the interpretation favoring the regulated party is preferred, 90 or "the customary international law interpretive principle

88. This insight alleviates somewhat the first objection discussed above. Although Article 17.6 would appear to require the AB to defer to numerous disparate interpretations of the same provision, the effective interpretation would be the weakest permissible one.
89. Cf. Tarullo, supra note 81, at 153 (arguing persuasively that the AB has read Article 17.6 out of the Anti-Dumping Agreement).
90. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). The rule initially developed in response to conditions in nineteenth-century England, where many crimes were
of *in dubio mitius* [which] holds that, where a treaty provision is ambiguous, 'that meaning is to be preferred which is less onerous to the party assuming the obligation.'

*Chevron* deference operates in a different context and has a different effect.

C. A Non-Difference: The "Binding" Nature of the Decisions

Before turning to the third major structural difference between dispute settlement in the WTO and in the United States, this Article addresses a feature of WTO dispute settlement that some commentators claim distinguishes WTO panel and AB decisions from the decisions of U.S. courts and other international organizations. Closer analysis reveals that the distinction has been overstated.

Under the DSU, when a panel determines that a Member State's measures do not conform with the covered agreements, it is required to "recommend that the Member concerned bring the measure into conformity with that agreement." The DSU provides that, if the losing party does not conform its measures to its obligations under the covered agreements (as interpreted by the panel or AB decision), and if the parties do not agree on mutually satisfactory compensation, the prevailing party may request authorization to suspend concessions toward the losing party. In the parlance of international law, it may seek authority to take countermeasures. An Article 21.5 panel may approve suspension of concessions in an amount "equivalent to the level of the nullification or impairment" of the prevailing party's rights under the covered agreements resulting from the losing party's breach.

In the light of these provisions, some scholars have taken the position that the losing party in a WTO case has the legal option to bring its nonconforming measure into compliance with the requirements of the covered agreements, as interpreted by the panel and AB, or instead to suffer a suspension of concessions by punishable by death. Courts often went to great lengths to discover statutory ambiguities that could be construed strictly in order to "relieve a defendant of the death penalty." WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 2.2(d) n.25 (1986). The modern view is that criminals (i.e., those to whom the law is addressed) should be given fair warning regarding prohibited behavior and severity of punishment. *Id.* § 2.2(d).

91. *Tarullo*, *supra* note 81, at 152 (quoting 1 OPPENHEIM'S INTERNATIONAL LAW 1278 (Sir Robert Jennings & Sir Arthur Watts eds., 1992)).
93. *Id.* art. 22.2.
94. *Id.* art. 21.5.
95. *Id.* art. 22.4.
the prevailing party. The claim, in other words, is that there is no legal obligation to bring measures into conformity, and that the losing party may legally accept the sanctions if that would be economically more efficient. If so, then the decisions of the panels and AB would differ significantly in their legal effect from the decisions of U.S. courts, and indeed of most, if not all, courts. The decisions of U.S. courts are, of course, considered legally binding on the parties, as are the decisions of international tribunals. The Charter of the United Nations states specifically that a Member State has a legal obligation to "comply with the decision of the International Court of Justice in any case to which it is a party."

The claim that the WTO agreements provide the losing party with this legal option, however, is mistaken. As noted above, the DSU expressly provides that:

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.

Although the DSU describes the panel’s judgment as a "recommendation" that measures be brought into conformity with the covered agreements, the term appears to be a euphemism for "order."

The provisions specifying the prevailing party’s option to suspend concessions are not inconsistent with the existence of a legal obligation of the losing party to comply with the "recommendations" of the panel or AB. The provisions concerning suspension of concessions merely set forth the manner in which the prevailing party may seek to enforce its right to full compliance by the losing party in the event compliance is not forthcoming. These are, in fact, quite similar to the options generally available to prevailing parties under international law for responding to the losing party’s

100. DSU, supra note 26, art. 22.1.
101. Id. art. 19.1.
breach of its international obligation to comply with judgments rendered against it by international tribunals.102 Under general international law, such measures concern the "implementation" of another State's international responsibility.103 They do not negate the existence of the obligation to comply or suggest that, as a legal matter, a State is free to decline to comply and suffer the consequences, any more than a person is legally free to persist in an unlawful activity as long as she is willing to suffer the legal punishment.

International judicial tribunals typically rely on countermeasures to give efficacy to their judgments because, unlike national legal systems, they lack an executive branch with control over an armed force that can require compliance with the judgments on pain of incarceration. (The International Court of Justice is an exception, in that its judgments are potentially backed by the force of the United Nations Security Council, which may authorize "measures."104) That the judgments of WTO panels and the AB are not enforceable by force by an executive branch is the third major structural difference between WTO dispute settlement system and judicial review in the United States.

D. Enforcement of the Decisions

Although there is a legal obligation to comply with the "recommendations" of WTO panels upheld by the AB, there is no executive branch in the WTO with the power to employ force to enforce that obligation against recalcitrant states. At first blush, this seems to be a major difference between WTO dispute settlement and judicial review in the United States. On closer inspection, however, the difference is not as great as it first appears.

To be sure, vertical judicial review in the WTO differs significantly from vertical judicial review in the United States. When the Supreme Court renders a judgment that a state is legally required to do something (or to refrain from doing something), the state's obligation to comply with the judgment is enforceable by force. While the judicial branch does not control a military force that can

103. See id. pt. III.
104. The U.N. Charter provides that, "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." U.N. CHARTER art. 94, para. 2.
enforce its decisions, the executive branch of the federal government controls such a force and is obligated to "take Care that the Laws be faithfully executed." The judiciary's dependence on another branch to enforce its decisions poses the risk that its judgments against the states will go unenforced, and indeed there have been episodes in our history in which such judgments have gone unenforced. President Jackson is reputed to have stated, in response to the Supreme Court's judgment against Georgia in Worcester v. Georgia, "John Marshall has made his judgment, now let him enforce it." Similarly, enforcement of the judgments of the International Court of Justice depends on the willingness of the Security Council to take enforcement measures, which at least in the case of the five permanent members is very unlikely. The grant of a power in a coordinate branch to enforce a judicial judgment is no guarantee that judicial judgments will be satisfied. Nevertheless, in the United States the power does exist, and for many years the executive branch has faithfully executed even unpopular judicial judgments against the states, such as those of the U.S. Supreme Court mandating desegregation in the South. The existence of this power is a significant difference between vertical judicial review in the WTO and in the United States.

Not all U.S. judicial review, however, is effectively backed by force. The pertinent comparison is between vertical judicial review in the WTO and horizontal judicial review in the United States. When the courts strike down a statute enacted by the legislature, the judgment is enforceable by force by the executive branch. Because both the executive and the legislative branches are majoritarian branches, and both are involved in the legislative process and likely approved the law, it is likely that the executive will disagree with a court judgment striking down the law. Relying on the executive branch to enforce such judgments thus seems problematic. The problem is even more acute when the judgment is against the executive branch. Is a judgment against the executive branch that depends for its efficacy on the willingness of that branch to enforce it truly backed by force?

Consider two episodes in U.S. history. During the Civil War, Chief Justice Taney ordered President Abraham Lincoln to release

105. U.S. Const. art. II, § 3.
106. 18 U.S. 515 (1832).
108. U.N. Charter art. 27, para. 3.
from custody John Merryman, whom Taney found was being held in violation of the Constitution. President Lincoln had suspended the privilege of the writ of habeas corpus in response to secessionist violence in Maryland. Concluding that the Constitution grants Congress, not the President, the power to suspend habeas corpus in an emergency, Chief Justice Taney issued the writ, commanding General George Cadwalader to release Merryman, and General Cadwalader requested a postponement of the order until he could receive further instructions from President Lincoln. Chief Justice Taney "would have nothing of it," and directed that an "attachment be issued against [the General] for contempt." Chief Justice Taney had his opinion delivered to President Lincoln. Lincoln responded in a public speech in which he stated that "it was not believed that any law was violated." Although Lincoln did not directly address the question whether a president may disregard a judicial order, he did "suggest" that the president may violate a single law in order to preserve the Constitution as a whole. He also pointed out that the situation in which he acted was a "dangerous emergency," for which the provision allowing suspension of the writ of habeas was "plainly made." He declined to release Merryman.

During the Watergate crisis, the U.S. Supreme Court ordered President Richard Nixon to turn over certain incriminating audiotapes. Despite initial suggestions from President Nixon's lawyer that he might not comply, President Nixon complied with the order and turned over the incriminating tapes—ultimately at the cost of his presidency. He resigned shortly thereafter.

What do these episodes reveal about the need for an external force to compel compliance with judicial judgments? There is no doubt that such force is quite important in municipal law to

110. See Ex parte Merryman, 17 F. Cas. 144 (C.C.Md. 1861) (No. 9487).
112. Id. at 91.
113. Id.
114. Id. (citing Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), reprinted in 11 COLLECTED WORKS OF ABRAHAM LINCOLN 332 (1953)).
115. Paulsen, supra note 111, at 95.
116. Id. at 94.
117. Id. at 95 (citing Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, 421, 421-40 (1953) (internal quotation marks omitted)).
enforce judicial judgments involving private parties. Even persons who are generally law-abiding and predisposed to comply with judgments against them would likely lose that disposition if they discovered that others were getting away with violating judgments. The same is true more broadly of compliance with law—that is why effective law enforcement is essential to law’s efficacy, and hence why force is necessary for effective law. In any legal system, however, ultimate control over an armed force must reside somewhere. Whoever possesses control over such force will not be effectively subject to such force. Judicial decisions against the possessor of that power will not be realistically backed by force.

Does that mean that judicial judgments against that person or persons are meaningless? Far from it. President Nixon ultimately complied with the order against him, and other Presidents also comply daily with less-notable judicial judgments against them. While in some cases such obedience may be a matter of principle, in other cases (including President Nixon’s) the more likely reason for compliance is that the public expects Presidents to comply and they would lose public support by refusing to do so. (The President may also fear impeachment if he fails to comply, but this is a realistic prospect only if both houses of the legislature are controlled by the opposite party. In any event, impeachment and conviction are likely to occur only if the general public regards the failure to comply with the judicial judgment as an offense warranting impeachment.) The efficacy of judicial judgments against the executive branch thus ultimately depends on public support for the institution of judicial review. If the President disagrees with a Supreme Court judgment and regards the consequences of compliance to be grave enough, even the most virtuous President will likely refuse to abide by the judgment, very likely with public support. The circumstances of Ex parte Merryman were, of course, extreme; a civil war was raging and public support for the Court was at a low ebb in light of its then-recent decision in Dred Scott.120 In the end, the efficacy of a judicial judgment against the executive branch depends on public support for the norms of the system and the courts’ role in enforcing them.

In international systems, control over enforcement power lies at the level of the States rather than at the level of the international institution. Even in the United Nations, in which the Security Council in theory possesses the power to authorize the use of force,

120. See Merryman, supra note 110; see also Dred Scott v. Sanford, 60 U.S. 393 (1856).
the actual control over the force lies with Member States. The organization must rely on its members to provide the force when it has been authorized. Moreover, in light of the realities of world politics and the existence of the veto power, States will rarely authorize such force. States could theoretically create an international organization with control over a military force that could effectively enforce the judgments of its judicial bodies against the States. Such an organization would be similar to the United States' federal executive branch, which enforces the U.S. courts' judgments against the states. The States that make up the international community, however, especially those that currently control such force, are loathe to do so, and that situation is unlikely to change. For this reason, international legal systems are unlikely for the foreseeable future, or ever, to have judicial bodies whose judgments are backed by force controlled by a coordinate branch.

Under such circumstances, the efficacy of the judgments of such tribunals must be secured by other means. The traditional means provided by international law has been enforcement through countermeasures initiated by one or more States. Suspension of concessions is a form of countermeasure. Although the WTO is widely regarded as having among the most effective dispute settlement systems in international law, it is unlikely that its effectiveness is a result of its regime of countermeasures. Indeed, the DSU significantly regulates the use of countermeasures, subjecting a prevailing party's ability to use them to limits not found in general international law. For example, in general international law an injured State has recourse to countermeasures that would compensate it for losses incurred as a result of the breach that provoked the countermeasure.121 Under the DSU, a State may suspend concessions equivalent to the loss it expects to suffer prospectively; losses occurring before the judicial decision are not part of the calculation.122

If the level of countermeasures does not account for the efficacy of the WTO's dispute settlement system, then what does? The quality of its decisions deserves some of the credit. The most likely reason, however, is the same reason the U.S. courts' exercise of horizontal judicial review has been effective: the relevant public (primarily Member States) support the norms of the system and the role of the panels and the AB in maintaining the system. As the author of this Article has written elsewhere about Member

121. Draft Articles on State Responsibility, supra note 102, art. 51.
122. See Vázquez & Jackson, supra note 99.
State compliance with the judgments of WTO dispute settlement panels:

The effectiveness of the regime for enforcing international trade law may . . . be attributable to the Member states’ strong desire to maintain the trade system and their recognition that the benefits of that system can be achieved only if all of the system’s rules are generally complied with. Because of the interdependence of the system’s rules and the reciprocal nature of the duties and benefits, self-interested states rationally subordinate the short-term interests that might otherwise lead them to violate their international trade obligations in order to attain the long-term benefits afforded by that system. They fear that a violation of the rules will not only lead other states to retaliate, but could also bring the entire system down. And they are convinced that they have more to gain than to lose from the existence of the system. This sort of rational self-interest is, in fact, what has always led states to observe rules of international law in the absence of an external force able to enforce the rules. 123

The same thing could be said of the effectiveness of U.S. courts’ exercise of horizontal judicial review. The public generally supports the notion of limited government—that is, a government in which the legislative and executive branches are subject to legal limits on their powers—and it recognizes that such limits can be efficacious only if a third branch is allocated the power to interpret them and adjudicate violations. While the public may not agree with every interpretation the courts give the norms, it recognizes that the courts play a crucial role in the maintenance of the system, and it strongly supports that role. That is why the public would strongly object if the political branches failed to enforce the courts’ judgments against them.

In the end, the WTO and U.S. systems of judicial review are not as different as they at first appear. In both cases, the explanation for the efficacy of judicial review (horizontal in the case of the United States; vertical in the case of the WTO) is public support for the system and the role of the tribunals in maintaining it.

IV. Conclusion

The WTO’s current dispute settlement system, like the institution of judicial review in the United States, is a refinement of a seriously flawed treaty regime. WTO dispute settlement remains different from judicial review in the United States in at least three important structural respects. First, unlike the laws of the federal

123. See Vázquez, supra note 71.
government, the obligations imposed by WTO agreements are imposed only upon States as political bodies, and the litigants in WTO dispute settlement proceedings are exclusively States. Second, the U.S. courts engage in two forms of review of governmental acts: they engage in horizontal review when they review the acts of coordinate branches of the federal government, and they engage in vertical review when they review the acts of state governments. Judicial review in the WTO is almost exclusively vertical in nature. Third, the rulings of WTO panels and the AB are not backed by armed force, whereas the rulings of the U.S. courts are enforceable by a federal executive branch with control over an armed force. This last noted difference, however, is largely a difference between vertical judicial review in the United States and vertical judicial review in the WTO. Horizontal review in the United States, especially judicial review of executive action, suffers from a comparable deficiency. In both cases, the fact that judicial review is generally effective is the result of broad support among the relevant publics for the norms of the system and the tribunals' role in maintaining the system.