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**International Trade Law  
and Domestic Policy**  
Canada, the United States,  
and the WTO



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# Abbreviations

<i>1916 Act</i>	<i>Revenue Act of 1916 (US)</i>
<i>1991 Guidelines</i>	<i>Turtles in Shrimp Trawl Fishing Operations Protection; Guidelines (US)</i>
<i>AJCA</i>	<i>American Jobs Creation Act of 2004 (US)</i>
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
<i>API</i>	<i>American Petroleum Institute</i>
<i>ATC</i>	<i>Agreement on Textiles and Clothing</i>
<i>Auto Pact</i>	<i>Agreement Concerning Automotive Products between the Government of Canada and the Government of the United States</i>
<i>Berne Convention</i>	<i>Berne Convention for the Protection of Literary and Artistic Works</i>
<i>CAP</i>	<i>Common Agriculture Policy</i>
<i>CBO</i>	<i>Congressional Budget Office</i>
<i>CDC</i>	<i>Canadian Dairy Commission</i>
<i>CDMA</i>	<i>Canadian Drug Manufacturers Association</i>
<i>CEM</i>	<i>Commercial Export Milk System (Canada)</i>
<i>CGC</i>	<i>Canadian Grain Commission</i>
<i>CIRRs</i>	<i>commercial interest reference rates</i>
<i>CIT</i>	<i>Court of International Trade (US)</i>
<i>Continued Dumping Act</i>	<i>Continued Dumping and Subsidy Offset Act of 2000 (US)</i>
<i>COP</i>	<i>cost of production</i>
<i>CVA</i>	<i>Canadian value added</i>

CVDs	countervailing duties
CWB	Canadian Wheat Board
DFAIT	Department of Foreign Affairs and International Trade (Canada)
DOC	Department of Commerce (US)
DRAMs	dynamic random access memory semi-conductors
DSB	Dispute Settlement Body
DSM	dispute settlement mechanism
<i>DSU</i>	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EC	European Communities
ECJ	European Court of Justice
EDC	Export Development Canada
EPA	Environmental Protection Agency (US)
ESC	United Nations Economic and Social Council
<i>ETI Act</i>	<i>FSC Repeal and Extraterritorial Income Exclusion Act (US)</i>
EU	European Union
<i>Farm Security Act</i>	<i>Farm Security and Rural Investment Act of 2002 (US)</i>
<i>Final Act</i>	<i>Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations</i>
FSCs	foreign sales corporations
<i>FTA</i>	<i>Free Trade Agreement between the Government of Canada and the Government of the United States</i>
<i>Gasoline Rule</i>	<i>Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline (US)</i>
GATS	<i>General Agreement on Trade in Services</i>
<i>GATT 1947</i>	<i>General Agreement on Tariffs and Trade</i>
<i>GATT 1994</i>	<i>General Agreement on Tariffs and Trade 1994</i>
ICJ	International Court of Justice
IIEL	Institute of International Economic Law
ILM	International Legal Materials
IMF	International Monetary Fund
IMRO	Irish Music Rights Organization
ITC	International Trade Commission
ITO	International Trade Organization

<i>ITO Charter</i>	<i>Havana Charter for an International Trade Organization in the United Nations Conference on Trade and Employment</i>
JASA	Jose Arechabala, S.A.
JCPC	Judicial Committee of the Privy Council
MFN	most-favoured nation
MP	Member of Parliament
NAFTA	<i>North American Free Trade Agreement</i>
NDP	New Democratic Party (Canada)
NGO	non-governmental organization
NZ	New Zealand
OECD	Organisation for Economic Co-operation and Development
<i>Paris Convention</i>	<i>Paris Convention for the Protection of Industrial Property</i>
PDVSA	Petroleos de Venezuela, SA
SA	<i>Agreement on Safeguards</i>
SAA	<i>Statement of Administrative Action and Required Supporting Statements (US)</i>
SCC	Supreme Court of Canada
<i>SCM Agreement Section 609</i>	<i>Agreement on Subsidies and Countervailing Measures Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (US)</i>
SPB	<i>Sunset Policy Bulletin (US)</i>
SSHRC	Social Sciences and Humanities Research Council
STEs	state trading enterprises
<i>Tax Increase Act</i>	<i>Tax Increase Prevention and Reconciliation Act of 2005 (US)</i>
TEDs	turtle excluder devices
TPC	Technology Partnerships Canada
<i>TRIMs Agreement</i>	<i>Agreement on Trade-Related Investment Measures</i>
<i>TRIPs Agreement</i>	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
UES	United Engineering Steels
UN	United Nations

<i>Unlawful Internet Act</i>	<i>Unlawful Internet Gaming Enforcement Act of 2006 (US)</i>
UNTS	United Nations Treaty Service
US	United States
URAA	<i>Uruguay Round Agreements Act (US)</i>
USSC	Supreme Court of the United States
USTR	United States Trade Representative
VCLT	<i>Vienna Convention on the Law of Treaties</i>
WTO	World Trade Organization
<i>WTO Act</i>	<i>World Trade Organization Agreement Implementation Act (Canada)</i>
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
WWF	World Wildlife Fund (also known as the World Wide Fund for Nature)



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# Preface

I began thinking about this project while reviewing the debates about the ups and downs of the Judicial Committee of the Privy Council (JCPC). This tribunal was, in effect, a standing committee of the House of Lords that acted as a final appellate body for the British Empire. It routinely heard Canadian and Irish appeals, among many others. In fact, prior to the Declaration of Independence, American colonists also appealed their legal disputes to this tribunal, then known as the Plantations Committee. This London court rendered hundreds of final appellate decisions affecting North American colonists dealing with an array of issues ranging from real property to criminal law to voting rights.

The nature and scope of this imperial tribunal evolved over the centuries, but its purpose remained the same. Not only did it provide British subjects with the “benefit” of royal justice, but it also acted as a mechanism by which the British government could safeguard its trade and commerce beyond its borders. Decisions rendered by the appellate body ensured that the laws governing the business community were uniform and legally enforceable anywhere in the Empire. Consequently, the interests of British merchants were protected in the colonies, which at times, had minds of their own.

The colonial court was, in other words, established by the hegemonic power of the day and was used, in part, as a tool of British imperial policy in order to protect the country’s political and economic interests overseas. In the process, it had a significant impact around the globe, greatly influencing the laws and constitutional arrangements of varying parts of the British Empire.

As I undertook my research, the parallels between the British tribunal and the relatively new dispute settlement process at the World Trade Organization (WTO) were both evident and striking. I found it intriguing that Canada, which had led the movement to abolish appeals to the London-based tribunal, initiated the establishment of a similar international body in Geneva. Why did the government in Ottawa propose to create another foreign-based

tribunal akin to the JCPC? Were government officials not concerned about its potential impact on policy making in the domestic arena? Canada, like other former colonies in the British Empire, had spent so much time and effort to rid itself of the JCPC. Why was it now willing to submit to the jurisdiction of a similar court-like mechanism? While it was clear that the Canadian government wanted to engage the Americans in a multilateral trade framework in order to temper their influence, it was not apparent why a binding international dispute settlement process was necessary to achieve such a result, particularly given the Canadian experience with the JCPC.

Nor could I fully understand the American government's rationale for participating in such discussions. Given its relative power in the international arena, why would it agree to subject itself to a binding court-like process? The British government created the appellate body in London to render decisions for the colonies, but it was never subject to its jurisdiction. Were officials in Washington not concerned about the impact of the new tribunal on American politics? Or did representatives of the United States believe that the new so-called trade court would serve as a tool to promote its interests as the hegemonic power in the international arena just as the JCPC had done for Britain?

This project addresses these issues by contrasting some of the concerns in Canada and the US regarding the adoption of the WTO dispute settlement mechanism with the impact of its jurisprudence. At issue is the extent to which this new international dispute settlement process is shaping domestic politics. Under what conditions does the WTO case law influence legislative arrangements? Has policy making shifted from the local to the global with the adoption of a more robust form of international law? And are foreign judges now setting the legislative agenda in Washington and Ottawa?

As I thought about these questions, I was cognizant of the debates surrounding the creation of the WTO and its legal system. I was struck by the fact that scholars in the field of international relations have seemed to dominate the conversation. Although this tendency was, in part, understandable, as state actors created the WTO and its legal processes to facilitate global trading relations – it also was a bit surprising. It seemed to me that analyses of the potential impact of the trade “court” would benefit from the wealth of scholarly literature in the field of law and politics. This area of study has a rich history that examines the relationship between legal regimes and policy change. Although traditionally scholars in this field have focused on the nature and extent of judicial policy making by national high courts, their approaches seemed to be a good starting point to examine the nature and impact of international courts on national policies.

By situating this analysis in the field of law and politics, I both adopt and modify approaches undertaken by scholars who examine the dynamic inter-relationship between the judicial review powers of courts and their impact

on domestic policy. I use varying aspects of their normative and empirically based methodologies to examine the relationship between national courts and legislative outcomes, but I undertake my analysis at the point where the international and domestic levels intersect. I also draw on literature from international relations and international law to the extent that it provides valuable insights into the relationship between international and domestic institutions. Although traditionally scholarship in these fields has tended to be analytically distinct, examined in combination they provide a useful platform for analyzing questions surrounding the dispute settlement mechanism. In the process, they provide us with insights into the conditions in which international judicial decision making effects change in the domestic arena.

# 1

## Judicial Review and the WTO

On 11 June 1998 at the National Ocean Conference in Monterey, California, then Vice-President Al Gore announced a multi-million dollar initiative to address a number of environmental issues. Instead of simply receiving a warm welcome from the scientists and activists present, he also found himself facing some angry protestors sporting signs that read “WTO Stop Killing.”<sup>1</sup> A small group had gathered to express its outrage over a decision released by the World Trade Organization (WTO) just weeks earlier.<sup>2</sup> It held that an American measure enacted to protect sea turtles from extinction constituted a violation of international law. For many, the attack on legislation designed to save 150,000 sea turtles from drowning annually was not only disconcerting but also “an affront to U.S. sovereignty.”<sup>3</sup>

Environmental groups around the world also mobilized to express their anger over the WTO’s findings. The international body was deemed to be protecting and promoting corporate interests at the expense of the public interest. A statement issued by the World Wildlife Fund announced that “the WTO is badly off course,” while a representative of the Center for International Environmental Law declared that “the WTO is broken and needs to be fixed.”<sup>4</sup> Bill Snape of the Defenders of Wildlife explained that “[t]his shrimp-turtle decision is just the beginning,” arguing that “[w]e have a tremendous global problem today, and it’s called the WTO.”<sup>5</sup> The hostility to this decision was so fierce, in fact, that the then head of the WTO, Renato Ruggiero, was forced to publicly defend it. In a highly unusual statement that bordered on the surreal, Ruggiero found himself exclaiming that the trade organization was “not against endangered species.”<sup>6</sup>

The broad public backlash that occurred as a result of this decision reflected society’s general concerns over the establishment of a robust legal system operating under the new trade regime. Even prior to this judgment, many questioned whether the WTO had the capacity to influence the nature and direction of domestic politics and, in the process, circumvent democratic decision making within states. Real concern existed about the domestic

consequences of a potent dispute settlement mechanism operating in the global arena. At issue was the extent to which the new international legal order would restrict the ability of domestic actors to independently determine the nature and direction of national policy.

### **Judicial Review in the Twenty-First Century**

Traditionally, judicial review of domestic legal arrangements has fallen under the exclusive purview of national courts. With the cessation of hostilities between the Cold War powers and the advancement of globalization, however, a more potent form of international law has emerged.<sup>7</sup> Not since the end of the Second World War has there been such an emphasis on courts to resolve conflicts in the global arena. Dozens of international tribunals are now dealing with disputes pertaining to an array of issues ranging from environmental matters to language rights to criminal activities. Such a change in the character and strength of international law has had significant implications for government actors as it has the capacity to affect their behaviour not only in the international arena but also in the domestic context.<sup>8</sup> Although there are significant variations in the nature and scope of these types of international dispute settlement mechanisms, many are charged with the responsibility of determining whether national laws conform to standards set out in treaties. In this respect, we are witnessing a new era of judicial review, one that is effectively operating beyond state borders.

While there is a large body of scholarship that examines the extent to which domestic courts shape national legislative and policy arrangements, comparatively, there has been relatively less scholarly attention examining the influence of legal tribunals operating in the international realm. The emphasis on the jurisprudence of national courts, and the relative neglect of international ones, largely reflect the fact that for most of the twentieth century international law was considered to be both weak and ineffective. Few international cases were pursued, and even fewer decisions were ever implemented. Power politics – not international law – effectively governed interstate relations. The sovereignty of national governments was, at least in theory, considered to be sacrosanct. Any attempt to use international law to intrude on the legislative autonomy of state authorities was met with fierce resistance.<sup>9</sup>

Now, however, there is not only a proliferation in the number of legal tribunals operating in the international arena, but their jurisdiction and potency also appears to have been enhanced. International law is increasingly institutionalized, and there is a corresponding emphasis on international courts to deal with issues of global concern. Treaties are addressing a wider array of issues than in the past, and, in many cases, they are now

deemed binding on their signatories. Judith Goldstein, Miles Kahler, Robert Keohane, and Anne-Marie Slaughter have characterized this shift in both the scope and substance of international law as a process of legalization. Legal powers are being delegated to international institutions authorizing them to oversee detailed and precise international laws. Increasingly, these agreements are binding on state actors.<sup>10</sup>

Many are beginning to question both the nature and the consequences of legalization.<sup>11</sup> What is the domestic effect of this new form of institutionalized judicial review at the international level? To what extent are we witnessing a shift in the policy-making capacity of governments from national elected officials to appointed international judiciaries? The issue under consideration is the same one that law and politics scholars traditionally have analyzed in the national context: to what extent does the judiciary shape legislative and policy arrangements? Now, however, the analysis is taking place where international and domestic laws intersect.

There is no better place to consider the influence and effect of international courts than in the context of international trade. In 1995, the *Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement)* created a broad and comprehensive international legal system to replace the one used under the 1947 *General Agreement on Tariffs and Trade (GATT 1947)*.<sup>12</sup> Not only were several substantive agreements put in place to govern trade in goods, services, and intellectual property, but an elaborate judicial process was also developed in order to deal with disputes that arose under the new provisions.

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* in the *WTO Agreement* established a panel process to hear complaints in the first instance, an Appellate Body to review panel decisions, and a permanent secretariat to administer the new legal system on behalf of the agreement's signatories.<sup>13</sup> It also created the Dispute Settlement Body (DSB), which is tasked with adopting each decision issued by either the panel or Appellate Body. The DSB is composed of one representative from each WTO Member. Collectively, these branches of the WTO's new legal system are often referred to as the dispute settlement mechanism.

Arguably, the most significant aspect of the new dispute settlement mechanism is its binding nature. Unlike the decisions issued by panels under the *GATT 1947*, governments that fail to implement the dispute settlement mechanism's findings may be subject to some form of sanction.<sup>14</sup> This shift from a non-binding to a binding legal process was designed to ensure that national governments would no longer be able to ignore the international trade law regime or its decisions. And it is this mandatory compliance to the dictates of an international body that has left many observers questioning the appropriateness of its binding jurisdiction and, more specifically,



the domestic effects of this new and more potent form of international law. Real concern exists as to whether the pillars of good governance – democracy, accountability, and legitimacy – remain structurally sound.

Critics of the dispute settlement mechanism characterize the institution as being exceptionally powerful and able to exert considerable influence on the day-to-day affairs of its member states. Some contend that it facilitates a democratic deficit because it has the authority to render significant legal decisions without any meaningful input from the public. Others emphasize that the institution is entrenching market interests at the expense of the public interest and, in the process, dismantling social programs. Still others argue that the court-like mechanism limits the capacity of national governments to address the needs of their citizenry when they conflict with their international trade obligations.

Appearing before the United States (US) Congress during the debates about the new trade organization, Ralph Nader argued that the WTO and its dispute settlement mechanism would affect the country's sovereignty and restrict its capacity to adopt policy initiatives to promote the public welfare. He posited that the new trade rules, enforced by a binding legal process, effectively created an international constitution. For him, the *WTO Agreement* was nothing short of a "Corporate Bill of Powers" that would promote world government in the interests of big business over the interests of the public.<sup>15</sup> The new dispute settlement mechanism would be able to "determine the WTO-legality of U.S. laws and to exert enormous pressure on the United States to alter laws" as well as to create a policy chill that would effectively bar congressional leaders from enacting measures to address the social and economic needs of Americans.<sup>16</sup>

Canadian critics echoed these sentiments. Under the leadership of Maude Barlow, the Council for Canadians stated that "the WTO ha[d] both the legislative and judicial authority to challenge laws, policies and programs of countries that do not conform to WTO rules and strike them down." Particular disdain was heaped on the new trade law process for its lack of accountability and transparency since "[c]ases are decided – in secret – by a panel of three trade bureaucrats." The advocacy organization expressed real concern for the security of the country's welfare state, explaining that when "a WTO ruling is made, world-wide conformity is required; a country is obligated to harmonize its laws or face the prospect of perpetual trade sanctions or fines."<sup>17</sup>

Activists, however, were not the only ones who raised questions about the new institutional arrangements at the WTO. Legislators and business leaders, among others, also expressed considerable unease regarding the capacity of the dispute settlement mechanism to operate outside the reach of governments and their citizenry. At issue was the extent to which the new court-like body would be able to limit the policy options of democratically elected

legislators by effectively dismantling otherwise validly enacted legislation. This issue was of particular concern because, out of the 123 disputes whose reports were adopted by the DSB between 1 January 1995 and 31 May 2011, it was determined in approximately 88 percent of the cases that at least one of the laws, regulations, or practices being challenged constituted a violation of international trade.<sup>18</sup>

This manuscript addresses these issues by focusing on the consequences of legalization in the context of what is arguably the most robust international court – the dispute settlement mechanism at the WTO. More specifically, it evaluates the impact of the decisions of the court-like body on policy frameworks in Canada and the US by analyzing the extent to which the new international body has been able to effectively mandate changes to domestic measures via its judicial decision-making processes.

In the past, dispute settlement mechanisms that operated beyond state borders played little or no role in domestic policy making. Now, however, the rules of the game have changed. Not only does a more potent form of international trade law exist, but a binding legal process is also tasked with enforcing it. By examining the capacity of the dispute settlement mechanism to influence national laws and policies, this analysis not only enhances our understanding of the nature, scope, and reach of the new trade law regime, but it also provides insights into the conditions that need to exist for global legal arrangements to affect domestic regulatory frameworks.

### **Political Science and the Study of International Legal Regimes**

Traditionally, political scientists who examine issues in international law undertake their analyses separately and apart from those pursuing research on domestic law and politics questions. The discipline of political science is effectively compartmentalized into a series of area groups that are often conceptualized and studied with little reference to one another. Scholars tend to approach the field of international relations as analytically distinct from the fields of Canadian or American government. International law is deemed to be a sub-field of international relations and is often framed as a subject matter that is independent and distinguishable from political science research involving public law in the domestic context.

Political science research that focuses on international courts, therefore, tends to fall under the purview of scholars in the field of international relations, while research pertaining to domestic courts is dominated by political scientists specializing in the field of law and politics. Law and politics scholars focus primarily on the relationship between national high courts and domestic public policy, or to a lesser extent, that of regional high courts and public policy. They rarely, however, consider the nature and role of international courts or international law. Instead, law and politics scholars tend to examine courts as an institution of governance within a specific domestic

legal system operating under one constitution. Students of Canadian or American government who are interested in law and politics research rarely enter into discussions regarding international courts, international judicial decision making, or international legal jurisprudence.

The change in the nature and potency of international law, combined with the fact that domestic courts are increasingly incorporating principles of international law into their domestic decisions, requires us to re-examine the traditional disciplinary boundaries of the past. It is readily apparent that the historical division in political science between the study of international law and the study of domestic law is outdated. Arguably, it limits research on the influence of international law on issues of national governance and domestic policy making. In an era of globalization, those interested in the field of law and politics must begin to analyze how both national and international courts influence policy and legislative arrangements within the domestic context.

This analysis of the domestic effects of the WTO dispute settlement processes on the US and Canada is informed by scholarship in international relations but is situated in the field of law and politics. The established theoretical and methodological frameworks rooted in this literature, although conventionally applied to domestic legal systems, provide us with a foundation in which to undertake analyses of international judicial policy making. By building on the existing scholarship in this area, we will enhance our knowledge of the domestic impact of tribunals that operate in the global context as well as develop a better understanding of the dynamic relationship between international and national legal frameworks.

### **The WTO Debate**

In order to frame the analysis of the impact of the WTO's legal processes, we must first consider some of the broader debates regarding the emergence of the WTO as well as the corresponding shift from a non-binding to a binding dispute settlement mechanism in the international trade arena. To a large extent, analyses about the nature and effect of the international trade regime have been framed by paradigms in the field of international relations. Although there are some exceptions, by and large the focus of these discussions assesses the appropriate characterization of the relationship between the international institution and the state. Does the WTO have sufficient influence or power to moderate the behaviour of state actors? Will states adhere to international laws in order to develop a secure and predictable international legal regime even though this may, on occasion, hurt their own interests? Or do state actors behave in ways that promote their own interests, effectively ignoring so-called binding international rules if they are contrary to their own goals and objectives?

International relations scholars who are critical of the WTO largely address these questions through a political economy, or neo-Marxist, lens and portray the institution as a powerful body with considerable influence over the state that is designed to promote the needs of the market. From this perspective, commercial interests are being entrenched at the international level via the WTO in order to effectively override democratic processes within states. Consequently, the emerging international legal order is framed as a form of “new constitutionalism” that institutionalizes the tenets of neo-liberalism at the international level in order to safeguard and prioritize the rights and interests of corporate capital within the domestic realm.<sup>19</sup> Although there are variations in these types of analyses, there is an acceptance that the establishment of a robust global legal order limits the traditional democratic decision-making mechanisms within the national arena. Governments are bound by the international institution to implement neo-liberal directives that are designed to shore up capitalist markets with little to no regard for public welfare. In the process, critics assert that the WTO limits the capacity of national governments to act in the best interests of their citizenry.

A second perspective accepts that the WTO is a kind of supranational body with considerable influence in the domestic realm but characterizes this change as potentially more positive and constructive. Those individuals adhering to such a view envision closer integration among states as both useful and valuable because it enhances political and economic security around the world. Although government actors may have less control over the direction of their own domestic policy and legislative arrangements, this approach to governance is deemed to be a small price to pay for the relative economic prosperity and international peace that will ensue. From this perspective, multilateralism strengthens the prevailing international order by reducing interstate conflict at the global level. Inherent in this vision is an acceptance that states are willing to modify their mode of law making in order to exercise power on a collective basis and to promote the interests of all nations rather than just their own.<sup>20</sup> Although this approach to governance means that national governments may have to adjust some of their legislative and policy frameworks to adhere to international obligations, such changes are viewed as acceptable because their overall economic and security interests are better protected within a stable and secure international system.

On the other side of the discussion are those observers who suggest that the WTO and its new court-like mechanism will not constrain the traditional government decision-making processes. This third view of the nature and effect of the dispute settlement mechanism has two variants, but both emphasize the significance of the state and power politics over market forces and international institutions. The first posits that national authorities retain

considerable autonomy over their own domestic politics. This neo-realist perspective contends that government actors pursue policy priorities that reflect their own needs and interests relatively unfettered by the forces of the international system. State actors adhere to findings of dispute settlement mechanisms operating in the international context if these decisions promote their self-interest. Otherwise they will be ignored. As Robert Gilpin explains, such a characterization of the WTO and its legal processes means that “it is more likely that the WTO will be ineffective than that it will threaten the national sovereignty of the United States or any other country.” He emphasizes that “[t]here is no way to compel a state, especially a powerful one like the United States, to comply with WTO decisions.”<sup>21</sup> In many respects, this vision of the dispute settlement mechanism as one with only limited power and influence mirrors the arguments set out by those scholars who challenge the notion that the forces of globalization are dismantling the role and capacity of state actors.<sup>22</sup>

A second variant of this approach underscores the significance of the relative power imbalance among states and is housed in the field of critical international law. These researchers challenge the positivist assumptions underpinning international law and demonstrate that it is often simply a tool used by hegemonic powers to superimpose their world view on less powerful nations and actors and to justify, as well as legitimize, their own behaviour.<sup>23</sup> From this perspective, international law is viewed as a discursive construct that serves particular interests in the international arena at the expense of others.

This debate regarding the nature, status, and potential impact of the WTO and its legal regime on the national agenda is not a new one. Under the GATT panel process, several significant public policy issues were addressed that provoked considerable controversy around the world.<sup>24</sup> In fact, the question of the extent to which international tribunals influence domestic public policy arguably first gained attention in 1991 with the *GATT 1947* decision in *United States – Restrictions on Imports of Tuna (Tuna-Dolphin case)*.<sup>25</sup>

In this case, a GATT panel considered whether an American environmental measure violated international trade law. The national regulatory scheme required the use of dolphin-friendly fishing equipment to catch any tuna exported into the US. The panel found that the American environmental measure was a violation of international trade law. It held that the US could neither discriminate against tuna because of the process by which the fish were caught nor adopt extra-territorial legislation that restricted such trade.<sup>26</sup>

The public response to the GATT decision was nothing short of outrage. Nina Young of the Center for Marine Conservation in Washington argued that it was “quite a blow” to wildlife conservation as it “undermines everything the United States has done,”<sup>27</sup> while Lori Wallach, attorney at Public

Citizen's Congress Watch, called for GATT and other trade agreements to "be modified to allow for legitimate consumer and environmental protections."<sup>28</sup> In fact, the media coverage of the decision was so negative that hearings in both the US Senate and the House of Representatives were held to effectively condemn the trade tribunal's decision.<sup>29</sup> House of Representatives' Henry Waxman, chair of the health and environmental subcommittee of the Energy and Commerce Committee, referred to the decision as a "worst-case scenario." Congressman Ron Wyden echoed these sentiments, arguing "[w]e have to change GATT to deal with environmental and health concerns."<sup>30</sup> The issue was particularly thorny as negotiations were underway for a North American free trade agreement, and environmental issues were already high on the agenda.<sup>31</sup>

However, under the GATT process, the panel's decisions had no effect on domestic legislative and policy arrangements without the consent of the affected government. Judgments issued under the *GATT 1947* were never binding in any legal sense, nor did the public accept them as legitimate. In effect, governments could completely ignore trade law decisions and pursue national objectives without the threat of international sanctions or a public backlash. As Ralph Nader explained, under the GATT regime, state actors had the legal capacity to apply a kind of "emergency brake" to avoid implementing its findings. If a GATT panel rendered a decision that inappropriately intruded on the authority of a government to set and determine its own domestic policy initiatives, it would simply refuse to implement the findings.<sup>32</sup> No American ever seriously considered that his or her government would repeal environmental policies protecting fish and wildlife because of a decision rendered by an international legal tribunal. Any such notion would have been deemed ridiculous.

Twenty years later, however, the idea is no longer considered so absurd. With the establishment of the WTO and the shift from a non-binding to a binding dispute settlement process, there is a real sense that the political compromise known as "embedded liberalism" is being dismantled.<sup>33</sup> This so-called package deal has allowed the welfare state to emerge in tandem with a liberal international economic order. It has been credited with fuelling the advancement and prosperity of Western industrialized states in the aftermath of the Second World War. Government intervention at the domestic level took place alongside the development of international institutions such as the GATT, the International Monetary Fund, and the World Bank. Now, however, with the establishment of a more potent legal order in the global arena, many believe that the space created for governments to intervene in their domestic economies is being threatened, jeopardizing not only the maintenance of the welfare state but also society as we know it today.

Nor are such types of views considered extreme or reactionary. Michael Sandel, for example, argues that society's concerns about these types of issues

are both real and legitimate as international organizations do not have any kind of responsibility to represent, much less consider, the interests of governments or their citizens:

Those in America who worry about the loss of sovereignty to GATT, or those in England who worry about a loss of sovereignty to the European Union, may seem at times like the King who stood on the beach and tried to stop the tide ... But those who are worried have a point. These global markets are not accountable to any citizens. They don't necessarily reflect decisions that we have made on the basis of our collective values.<sup>34</sup>

Questions arise particularly in the context of the WTO because there is a sense that unelected trade officials in Geneva are setting policy parameters for national governments but have no corresponding obligation or duty, either formally or informally, to the citizenry whose lives they are shaping.

While it is true that the "dark side" of representative democracy has always been that citizens "delegate enormous discretionary authority over decisions of extraordinary importance" to political elites, this approach to decision making in the domestic arena is accepted as one of the inherent costs of the system.<sup>35</sup> Elections at fixed intervals are, in effect, the ultimate check on any form of abuse in the system. Although not ideal, such arrangements are accepted as the best alternative to a kind of pure democracy that, in practice, could never realistically be achieved. Regular voting for positions of office ensure that political leaders are always accountable, even if it only occurs every four or five years.

However, when power is transferred to international institutions, the issue becomes considerably more complicated. There is no equivalent at the global level for elections to ensure a kind of formal accountability between the general public and international institutional decision makers. Consequently, a direct link between the citizenry and organizations that operate in the global realm does not exist. As Robert Dahl has recognized, on occasion the democratic process within states may "set the outside limits within which the elites strike their bargains" in the international arena. Dahl emphasizes, however, that to refer to such "political practices of international systems [as] 'democratic' would be to rob the term of all meaning."<sup>36</sup>

In his analysis of the democratic deficit in the context of the WTO, Robert Howse underscores the difficulties governments face in amending the WTO rules and their legal interpretations. Once these decisions are made, they are very hard to change. For him, one of the most troubling aspects of the new trade arrangements pertains to the "costs of and constraints on reversibility, combined with the impact of new era trade rules in freezing or limiting regulatory choices in many policy areas." Howse compares this inflexibility to the same kind that public officials face in amending constitutions in the

domestic arena.<sup>37</sup> Unlike judgments issued by national high courts or laws adopted by government, the capacity of government to seek changes is limited.

Thus, with the emergence of binding court-like mechanisms operating in the global arena, questions surrounding the relationship between policy making and democracy have become both serious and complex. The fact that state actors enter into these new binding treaty agreements enforced by international courts is a considerable shift from the recent past. Although the authority to delegate decision making to international bodies has always existed, the extent to which governments have transferred such decision-making authority has been relatively bounded.<sup>38</sup> In the past, the capacity of international institutions to intervene in domestic politics without the consent of the governments involved was limited to very specific and narrow issues. This limitation ensured that decision making remained firmly in the control of democratically elected officials even though some narrow and relatively well-defined issues were delegated to intergovernmental and non-governmental organizations.

The question at issue now is one of degree – has the locus of power been shifted too far with the emergence of a more robust international legal order? Do foreign judges effectively influence, or even determine, the parameters in which democratically elected legislators can initiate and implement national policies? Tribunals operating in the international arena have always been present in one form or another, but has the creation of a “binding” dispute settlement process at the WTO crossed the proverbial line, so to speak, by transferring decision making from the local to the global level? Are we experiencing a new form of judicial policy making that effectively operates in the international realm? As David Held has explained, the implications for key elements about democracy are serious if “many socio-economic processes, and the outcomes of decisions about them, stretch beyond national frontiers.”<sup>39</sup>

### **Adopting Approaches in the Field of Law and Politics to Examine the Impact of International Tribunals on Public Policy**

Although traditionally political scientists studying the field of law and politics have focused on high courts in the domestic context, scholarship in this area is both useful and well suited for an analysis of the domestic impact of international courts for three interrelated reasons. First, using approaches developed in the field of law and politics to analyze the impact of the dispute settlement mechanism on public policy will facilitate the process of both explaining and predicting the consequences of the legalization. Analyses of this nature will provide scholars with insights into the conditions necessary for international courts to influence policy and legislative arrangements.



Second, building on the law and politics literature in the international context advances comparative research on courts that were not traditionally contrasted with one another. In this sense, it not only creates an opportunity for scholars in this field to expand their knowledge of the judiciary as an institution of governance, but it also further develops their understanding of judicial decision making. By undertaking such an examination, we will gain a better sense of the overall nature and influence of courts on public law, whether it be in the domestic or international arena.

Third, the existing law and politics literature provides a well-tested approach to analyze the effects of judicial decision making on policy arrangements. In order to ascertain the impact of courts and to measure change in the aftermath of a legal decision, scholars in the law and politics field employ a variant of a technique known as process tracing. This approach assists researchers who want to understand how institutions of governance respond to legal outcomes when certain variables are held constant. By undertaking a kind of “before and after” snapshot of the domestic regulatory framework at issue in a dispute, followed by a qualitative assessment of the response of the public officials, one can gain insights into the extent to which public officials have altered policy frameworks in order to implement a legal decision. What did regulatory and legislative arrangements at the national level look like before a legal decision and what did they look like afterwards? In what contexts did governments ignore the legal decisions rendered and in what contexts did they implement them? What explanations were given by public officials to explain why policies were (or were not) modified to respond to the findings of a court? Addressing these questions will provide us with insights into the conditions that are necessary for an international dispute settlement mechanism to influence domestic legislative and policy frameworks. It also will enhance our understanding of what factors effectively block an international tribunal’s capacity to effect change in the national arena.

That said, there are two interrelated challenges for scholars undertaking such an analysis. First, it is not always easy to ascertain how and why changes to impugned measures are implemented. Amendments are often made to regulatory practices rather than written laws or regulations. By its very nature, therefore, this social science research necessitates the use of reasoned judgment based on evidence when assessing cause-and-effect correlations. It is not a scientific process, nor can it ever be. Consequently, and second, this approach to undertaking research on the dispute settlement process cannot measure future implications with complete accuracy. It allows us to anticipate what might likely happen in the near future, but we cannot determine its effects going forward with complete precision, particularly over the long term. Despite these challenges, however, this type of analysis remains both a useful and valuable tool for scholars. It provides researchers with insights

into the contexts in which judicial decisions affect national policy measures and what factors will potentially impede their influence in future.

### **The WTO Dispute Settlement Mechanism and Its Domestic Effect**

Beth Simmons has argued that “[m]uch more work needs to be done to understand the relationship between international law and domestic legal systems.”<sup>40</sup> This book helps to address this issue. It adopts the research methods traditionally used to study the policy reach of domestic courts and applies them to the international trade regime in order to assess the capacity of the dispute settlement mechanism to effect policy change in the national context. It argues that despite its highly legalized nature, the dispute settlement mechanism has had a relatively narrow and limited impact on national politics. From the perspective of a law and politics scholar, the dispute settlement mechanism functions as a highly constrained court whose ability to influence policy matters is effectively narrow and contained. To date, the court-like body has had a relatively limited effect on domestic issues.

Three factors have operated in conjunction with one another to limit the capacity of the dispute settlement mechanism to influence the nature and direction of policy in the domestic arena. First, national governments have responded to international legal findings strategically in order to minimize their impact on domestic matters. The WTO releases legal decisions, but only national governments can implement them. Political elites have adopted a series of avoidance techniques to minimize the potential impact of WTO findings on their national policy frameworks. This type of strategic response to decisions issued by the dispute settlement mechanism allows governments to temper potential domestic consequences.

Second, members of the dispute settlement mechanism have shown considerable restraint in carrying out their duties, particularly in regard to cases involving contested social policy issues. They appear to be cognizant of the political fallout that might result from their decisions. It seems they try to avoid rendering findings that have the potential to significantly influence policy matters that are highly controversial. Arguably, their deferential approach to decision making is to ensure the continued legitimacy and viability of the WTO legal regime and to protect their own long-term career interests.

Third, the *WTO Agreement* was crafted in such a way as to ensure that a number of institutional constraints existed. Several procedural rules that govern the operation of the dispute settlement mechanism limit its capacity to become involved in matters of public policy. Those individuals who drafted the *WTO Agreement* were well aware of the potential implications of an international legal regime with too much power, and they built in mechanisms to constrain its ability to become a policy-making body.

That said, there is a potential for the WTO to become more active in policy making in some contexts. More specifically, it appears that in the area of trade remedy law, the dispute settlement mechanism has taken an aggressive stance in interpreting its duties and carrying out its responsibilities. Although it is too early to predict, it is possible that the dispute settlement mechanism might effect significant change in regard to the long-standing policy of the US government to incorporate zeroing methodologies into dumping calculations. Only time will tell, however, how this issue will play out. However, it does have the potential to be a significant policy loss for the US as well as an ominous indicator for the future. If American trading partners are successful in bringing an end to zeroing practices, it may bolster their confidence in working together to use the dispute settlement mechanism as a vehicle to dismantle other US trade practices as well.

### **Organization of Book**

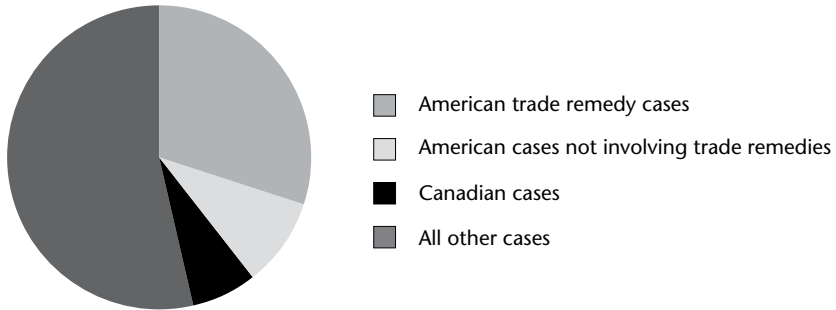
As of 31 May 2011, the dispute settlement mechanism had released 321 decisions in 129 disputes.<sup>41</sup> Canada was the respondent in nine of the disputes. The US was the respondent in fifty-one of them, thirty-nine of which addressed trade remedy matters (see Figure 1). Five of the fifty-one US disputes were in progress as of 31 May 2011 and will not be included in this analysis. They were on appeal, were potentially being appealed, or were waiting for an implementation period to be finalized.<sup>42</sup> Prior to 31 May 2011, therefore, the dispute settlement mechanism had concluded fifty-five disputes, involving 151 decisions, against Canada and the US.

This analysis focuses on the major WTO disputes brought against Canada and the US that were concluded prior to May 2011.<sup>43</sup> It assesses their nature, scope, and effect on domestic policy frameworks in order to ascertain the policy reach of the WTO's dispute settlement process. The US was selected as a case study for this analysis for two reasons. First, almost 40 percent of all of the disputes addressed by the dispute settlement mechanism involve complaints pertaining to American measures. No other WTO Member has been subject to as many challenges. Second, the hegemonic influence of the US in the global arena provides insights into the ability of a binding international legal process to influence relatively powerful national actors. Given its wealth and status in the global arena, many individuals had anticipated that the US would be the country least affected by the dispute settlement mechanism.

Canada was chosen as a second case study in this analysis for two reasons. First, the country, which is often referred to as a "middle power," provides an interesting comparison to the US. Does the legalization of an international dispute settlement process have more influence on the policy frameworks of powers that lack so-called "super-power" status? Second, Canada has been

Figure 1

**Challenges against Canada and the United States in which the dispute settlement mechanism has released at least one decision, January 1995 to May 2011**



involved in a disproportionately large number of WTO challenges relative to its population base. As of 31 May 2011, Canada (with approximately one-tenth of the US population) initiated thirty-three complaints at the WTO, while the US initiated only ninety-seven. And sixteen complaints were brought against Canada, nine of which resulted in decisions by the WTO dispute settlement mechanism.

In order to undertake this analysis, Chapter 2 provides an overview of the varying approaches that have been used in the field of law and politics to study the relationship between public policy and domestic courts. It not only demonstrates the usefulness and suitability of this field to analyze the effect of WTO decisions on Canadian and American domestic measures, but it also provides us with a foundation to begin to develop and contextualize the relationship between domestic policy and international tribunals.

Chapters 3 and 4 examine the evolution of the dispute settlement mechanism under the international trade law regime. Chapter 3 focuses on the GATT practices, while Chapter 4 assesses the establishment of the WTO legal process. Between 1947 and 1994, the legal system used by countries to address trade law disputes evolved from one that emphasized diplomacy to one that was highly legalized in nature. In fact, in many respects, the new dispute settlement mechanism at the WTO is akin to domestic courts in that it is governed by a strict set of procedural rules, which are deemed binding on its litigants. These chapters provide us with insights into the rationale for moving toward a binding international trade law system as well as a basis to begin to assess the policy effects of the WTO dispute settlement process.

Chapter 5 provides an overview of the American and Canadian responses to the establishment of the WTO and its new court-like body. An examination of the debates in both countries reveals that legislators in Ottawa and Washington have accepted the new trade regime on the basis of different understandings and assumptions about its potential impact. Each government has constructed its perception of the WTO in such a way as to frame the new institution as having numerous trade benefits with little to no domestic effect.

In contrast to Chapter 5, which focuses on the anticipated impact of the new trade regime, Chapters 6, 7, and 8 assess the effect of the dispute settlement mechanism on domestic legislative, regulatory, and policy frameworks in Canada and the US. How did governments respond to a defeat before the dispute settlement mechanism? To what extent did judicial decision making shift legislative priorities and influence domestic policy arrangements in the aftermath of a WTO dispute? The US is the focus of Chapters 6 and 7, while Canada is the focus of Chapter 8. The analysis in these chapters demonstrates that the domestic consequences of the dispute settlement mechanism on the US and Canada have been relatively constrained. At the same time, it recognizes that this situation may well change in future. The US trade remedy measures have been the focus of a considerable number of WTO disputes in which American officials have been unable to successfully make their defence. The dispute settlement mechanism appears to be taking an aggressive stance toward US anti-dumping measures, particularly involving the practice of zeroing.

The conclusion employs the approaches developed by scholars in the field of law and politics to examine the policy-making reach of national courts in order to explain why a highly legalized dispute settlement process in the international arena has had only a limited impact on domestic politics. It also considers why the Appellate Body may well have a greater effect on trade remedy measures in the US going forward.



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