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# Russia in the WTO: Will It Give Full Direct Effect to WTO Law?

Elena A. Wilson

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## Russia in the WTO: Will It Give Full Direct Effect to WTO Law?

Elena A. Wilson\*

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*Neither entirely vertical nor entirely horizontal in essence, resembling an intergovernmental cooperation organization in certain respects while closer to an international integration organization in others, the WTO represents a unique legal order or system of law.<sup>1</sup>*

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1. Pascal Lamy, Dir. Gen., WTO, Address Before the European Society of International Law: The Place and Role of the WTO (WTO Law) in the International Legal Order (May 19, 2006), *available at* [http://www.wto.org/english/news\\_e/sppl\\_e/sppl26\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm).

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### I. INTRODUCTION

Consider a situation where the United States, the European Union, and Russia introduced a fee for patent registration that is seven times higher for foreign than for domestic inventors. All three countries are members of the World Trade Organization (“WTO”), which prohibits such discrimination.<sup>2</sup> The affected foreign inventor brings a suit in domestic courts in all three countries: in the United States, the European Union, and Russia, claiming violation of WTO law. What results? It could be predicted with a great degree of certainty that the U.S. court would dismiss the complaint as prohibited by U.S. law.<sup>3</sup> The E.U. court would also dismiss the complaint because WTO law, absent a very narrow exception, does not have direct effect within the European Union.<sup>4</sup> As for the Russian court, it would likely refer to WTO law and invalidate the Russian government’s regulation providing for the offending requirement.<sup>5</sup> Why is there such a striking difference in the treatment of WTO obligations by the domestic courts among the member states of the same international organization? The key to this riddle is in the way that each of the WTO members treats WTO law within its domestic legal order.<sup>6</sup> One major question in this regard is whether WTO law will be given direct effect within the WTO member state’s domestic system.<sup>7</sup> This question is yet to be settled in Russia, one of the recent members of the WTO.<sup>8</sup>

Russia joined the WTO in 2012 and became its 156th member after 18 years of negotiations.<sup>9</sup> The protocol on Russia’s accession to the WTO was signed in Geneva on December 16, 2011 and took effect on August 22, 2012.<sup>10</sup> The

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2. The WTO is the successor to the General Agreement on Tariffs and Trade, an international agreement that had regulated international trade since 1947. General Agreement on Tariffs and Trade, Oct.30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. See *infra* Part II.

3. See *infra* Part III.B.1.

4. See *infra* Part III.C (discussing the U.S. and E.U. approaches to WTO law).

5. See *infra* Part IV.

6. See generally *infra* Part III (discussing the U.S. and E.U. approaches to WTO law).

7. “Direct effect” or “direct application” in the context of this comment means that WTO law would be treated by domestic courts and government bodies as a direct source of domestic law. Direct effect could be given to only the WTO agreements themselves or could be extended to WTO Dispute Settlement Panel and Appellate Body rulings, or could apply to both. See *infra* Part III.A.

8. *EU Welcomes Russia’s WTO Accession After 18 Years of Negotiations*, EUR. COMMISSION (Aug. 22, 2012), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=827>.

9. *Id.*

10. Federal’nyi Zakon RF o Ratifikatsii Protokola o Prisoedinenii Rossiiskoi Federatsii k Marrakeshkomy Soglasheniyu ob uchrezhdenii Vsemirnoi Torgovoy Organizatsii ot 15 Aprelya 1994 g. No. 126-FZ [Federal Law of the Russian Federation on Ratification of the Protocol of Accession of the Russian Federation to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994], SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 30, Item 4177; *Accessions: Russian Federation*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_russie\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm) (last visited Mar. 13, 2014).

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Russian Supreme Arbitrazh Court (“SAC”)<sup>11</sup> decided the first case based on WTO law on April 11, 2012 and invalidated a regulation imposed by the Russian government, which established higher patent registration fees for foreigners in Russia.<sup>12</sup> A second similar case was decided on August 28, 2012,<sup>13</sup> only six days after Russia became a WTO member.<sup>14</sup>

At the same time, in Section 151 of the Working Party Report on Russia’s Accession to the WTO,<sup>15</sup> a Russian representative stated that once Russia ratifies the Protocol of Accession it will become an integral part of her legal system and “[t]he judicial authorities of the Russian Federation would interpret and apply its provisions.”<sup>16</sup> This statement and the recent jurisprudence of Russian courts resulted in a heated debate among Russian legal scholars and practitioners, including justices of its highest courts, as to whether the Russian representative “meant what he said, [a]nd he said what he meant”<sup>17</sup> in the Working Party Report,

11. Until 2014, the Russian federal court system consisted of the Constitutional Court of the Russian Federation (Constitutional Court), the Supreme Court of the Russian Federation (Supreme Court), the SAC, along with corresponding lower courts of general jurisdiction and lower arbitrazh courts. Federal’nyi Konstitutsionnyi Zakon RF o Sudebnoi Sisteme Rossiiskoi Federatsii ot 31.12.1996 N 1-FKZ [Federal Constitutional Law of the Russian Federation on Judicial System of the Russian Federation of Dec 31, 1996 N1-FKZ] art. 4(3) SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1997, No.1, Item. 1 (amended 2014). In this system the SAC was the highest court with jurisdiction over economic and commercial disputes. See KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 127 (Russ.) (Repealed 2014). On February 5, 2014, President Vladimir Putin signed into law amendments to the Russian Constitution and relevant constitutional laws which reformed this system by consolidating the functions and jurisdiction of the Supreme Court and the SAC. The reform abolished the SAC and established a new consolidated Supreme Court of the Russian Federation with jurisdiction over criminal, civil, administrative, and economic cases. See Zakon RF o Popravke k Konstitutsii Rossiiskoi Federatsii o Verkhovnom Sude Rossiiskoi Federatsii ot 05.02.2014 N 2-FKZ [Law of the Russian Federation on Amendment to the Constitution of the Russian Federation on Supreme Court of the Russian Federation of Feb 5, 2014 N 2-FKZ] art. 1(6)-(8), SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No.6, Item. 548; Federal’nyi Konstitutsionnyi Zakon RF o Vnesenii Izmenenii v Federal’nyi Konstitutsionnyi Zakon RF o Sudebnoi Sisteme Rossiiskoi Federatsii ot 05.02.2014 N 4-FKZ [Federal Constitutional Law of the Russian Federation on Amendments to the Federal Constitutional Law of the Russian Federation on Judicial System of the Russian Federation of Feb 5, 2014 N 4-FKZ] art. 1, SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No.6, Item. 551. Given that the majority of commercial disputes that could involve WTO law would be heard by lower arbitrazh courts, and, until recently, by the SAC, this paper will mostly focus on past jurisprudence of the SAC. However, the analysis of the opinions and directives of the Supreme Court are also highly relevant.

12. Reshenie Vysshego Arbitrazhnogo Suda RF No.VAS-308/12 ot 11 aprelya 2012 g. [Decision of the Supreme Arbitrazh Court of the Russian Federation No.VAS-308/12 of Apr. 11, 2012].

13. See Reshenie Vysshego Arbitrazhnogo Suda RF No. VAS-5123/12 ot 28 avgusta 2012 g. [Decision of the Supreme Arbitrazh Court of the Russian Federation No. VAS-5123/12 of Aug. 28, 2012] (invalidating another IP related tariff).

14. *Accessions: Russian Federation*, *supra* note 10.

15. See WORLD TRADE ORGANIZATION WORKING PARTY REPORT ON THE ACCESSION OF THE RUSSIAN FEDERATION, ¶ 15, WT/ACC/RUS/70 WT/MIN(11)/2 (Nov. 17, 2011) [hereinafter WTO WORKING PARTY REPORT].

16. *Id.* at para. 151.

17. DR. SEUSS, HORTON HATCHES THE EGG 51 (2004).

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and whether Russia thus made a commitment to give WTO law direct effect.<sup>18</sup> Some of the questions regarding the application of WTO law include whether private parties can bring suits in Russian domestic courts based on WTO law, whether the courts can invoke WTO law to decide such cases, whether WTO law can be used to invalidate Russian law or regulations and decisions of administrative agencies, whether private parties can be awarded damages for violation of WTO decisions by Russia, and whether courts can invoke WTO decisions to interpret WTO law and Russian domestic law.<sup>19</sup> Thus, Russia entered a debate that has been continuing since the inception of GATT—what role GATT/WTO law should be given in domestic legal systems?<sup>20</sup> Some commentators believe that granting domestic legal effect to WTO law might give greater protections to the rights of private persons and compel greater compliance with WTO norms by the states.<sup>21</sup> Others believe that giving direct effect to WTO law and opening domestic courts to WTO-based litigation could be dangerous to democracy and will put a country applying WTO law directly at a significant disadvantage vis-à-vis other WTO members and impinge on its sovereignty due to added regulations and obligations under the treaty.<sup>22</sup> In addition, direct application of WTO law by domestic courts might lead to inconsistent implementation of WTO norms.<sup>23</sup> This could displace the WTO from its role as principle interpreter of WTO norms and produce a body of confusing and conflicting doctrine,<sup>24</sup> thus weakening the WTO legal system.<sup>25</sup>

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18. Press Release, SAC Dept. of International Law and Cooperation, News of Int'l Legal Cooperation: The Implementation of WTO Legal Standards in Judicial Practice (Dec. 17, 2012), available at [http://www.arbitr.ru/int\\_law\\_coop/cooperation/72790.html](http://www.arbitr.ru/int_law_coop/cooperation/72790.html) (providing a summary of a conference hosted by the SAC to discuss application of WTO law by national courts following Russia's accession to the WTO).

19. See *infra* Parts IV-V.

20. See Peter Van den Bossche & Werner Zdouc, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 67-68 (3rd ed. 2013) (describing ongoing academic debate on whether WTO law should be given direct effect); see also Antonis Antoniadis, *The European Union and WTO Law: A Nexus of Reactive, Coactive and Proactive Approaches*, 6(1) *WORLD TRADE REV.* 45, 45 (2007); Jacques H. J. Bourgeois, *The European Court of Justice and the WTO: Problems and Challenges*, in *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 71, 104-06 (J.H.H.Weiler ed., 2000); Marco Bronckers, *The Domestic Law Effect of the WTO in the EU—A Dialogue with Jacques Bourgeois*, in *TRADE AND COMPETITION LAW IN THE EU AND BEYOND* 240, 240 (Inge Govaere, et al. eds., 2011); Jeffrey L. Dunoff, *Less than Zero: The Effects of Giving Domestic Effect to WTO Law*, 6 *LOY. U. CHI. INT'L L. REV.* 279, 279-80 (2008); Alessandra Arcuri & Sara Poli, *What Price for the Community Enforcement of WTO Law?* (Eur. Univ. Inst. Dep't of Law, EUI Working Papers LAW 2010/01, 2010), available at [http://cadmus.eui.eu/bitstream/handle/1814/13534/LAW\\_2010\\_01.pdf](http://cadmus.eui.eu/bitstream/handle/1814/13534/LAW_2010_01.pdf) (discussing various issues focused on the varying applications and effects of WTO law on domestic systems).

21. Van den Bossche & Zdouc, *supra* note 20, at 67.

22. *Id.* at 67-68; see also Case C-149/96 Portugal v. Council, 1999 E.C.R. I-8395, ¶ 46 (stating that direct application of WTO law would in effect “deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners.”).

23. Dunoff, *supra* note 20, at 282; see also Portugal, 1999 E.C.R. I-8395, ¶ 45 (stating that giving the WTO agreements direct effect in the absence of reciprocity from other WTO members could “lead to disuniform application of the WTO rules.”).

24. Dunoff, *supra* note 20, at 282.

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The WTO does not require its members to give direct effect to WTO law and leaves it up to the members to decide how they will fulfill their WTO obligations.<sup>26</sup> How any particular member incorporates WTO law in its domestic system depends on its constitution, tradition, and a number of political considerations.<sup>27</sup> While both the European Union and the United States allow some of their international treaties to have direct application in their domestic legal systems, they both have denied direct effect to WTO law.<sup>28</sup> This is generally a result of the structure and unique nature of the WTO in the system of international law, mainly the leeway left to the participating states.<sup>29</sup>

This Comment will explore the reasons and justifications for the United States' and the European Union's reserved treatment of WTO law within their domestic legal systems, and discuss whether Russia should give WTO law full direct effect.<sup>30</sup> Part II of the Comment briefly describes the WTO system, the law, and its dispute settlement mechanism.<sup>31</sup> Part III reviews monism versus dualism as an approach to international law, and its application to the WTO law using the European Union and the United States as examples.<sup>32</sup> This section also examines how the U.S. courts and the European Court of Justice ("ECJ") treat WTO law and WTO rulings.<sup>33</sup> Part IV sets out the Russian constitutional approach to international law and examines the approaches Russia could take in applying

25. *See id.*

26. Marrakesh Agreement Establishing the World Trade Organization art. XVI(4), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. Paragraph 7.72 of December 22, 1999 Panel Report WT/DS152/R makes it clear that WTO system does not create rights and obligations for individuals and there is no requirement for direct effect of the WTO law:

Under the doctrine of direct effect, which has been found to exist most notably in the legal order of the [European Community] but also in certain free trade area agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. (internal citation omitted). Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.

PANEL REPORT, UNITED STATES— SECTIONS 301– 310 OF THE TRADE ACT OF 1974, ¶ 7.72, WT/DS152/R (DEC. 22, 1999) [hereinafter SECTION 301 PANEL REPORT].

27. *See* John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 310-13 (1992) (discussing various treaty implementation considerations).

28. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 99 (2d ed. 2006).

29. Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395 (ruling that only those WTO measures adopted by the EC institutions can be invoked); *see also* Marco Bronckers, *From "Direct Effect" to "Muted Dialogue:" Recent Developments in the European Courts' Case Law on the WTO And Beyond*, in *VIEWS OF EUROPEAN LAW FROM THE MOUNTAIN* 403, 415 (M. Bulterman et al. eds., 2009) (discussing the relationship between the European Community and WTO provisions, where the European Community refuses to give direct effect to WTO law).

30. *See infra* Part VI.

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part III.

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WTO law to its domestic system.<sup>34</sup> Part V then discusses advantages and disadvantages of giving direct effect to WTO law in Russia.<sup>35</sup> Part VI concludes that although Russia's Constitution recognizes international treaties as an integral part of the Russian legal system, direct application of WTO law and WTO rulings in Russia are not fully justified.<sup>36</sup> Russia should find a middle ground in its approach to reception of WTO law that would allow it to comply with the WTO commitments but would not give WTO law blanket direct effect.<sup>37</sup>

### II. THE WTO, THE LAW, AND THE DISPUTE SETTLEMENT MECHANISM

The WTO was established in 1995, replacing GATT, in order to provide “a forum for negotiating agreements aimed at reducing obstacles to international trade.”<sup>38</sup> It currently includes 159 member states.<sup>39</sup> Discussions and decisions of WTO member states regarding the prospects for further liberalization of world trade are held in the framework of multilateral trade negotiations (rounds).<sup>40</sup> To date, eight rounds of negotiations, including Uruguay round, were conducted under GATT and the WTO, and in 2001 the ninth round started in Doha, Qatar.<sup>41</sup> Thus, the WTO body of legal rules is comprised of agreements and decisions taken in the years 1986-1994 in the Uruguay Round and earlier GATT agreements.<sup>42</sup> These include the Marrakesh Agreement and the series of annexed agreements and legal instruments dealing with trade in goods, services, and intellectual property rights.<sup>43</sup>

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34. See *infra* Part IV.

35. See *infra* Part V.

36. See *infra* Part VI.

37. See *infra* Part VI.

38. Pascal Lamy, Dir. Gen., WTO, Statement: About the WTO, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm) (last visited Jan. 20, 2014). The WTO was created by a series of treaties known as the Uruguay Round Agreements and under the terms of the “Final Act” signed in Marrakesh the WTO replaced the GATT on 1 January 1995. See Marrakesh Agreement, *supra* note 26 (Marrakesh Agreement is also known as the WTO Agreement).

39. *Members and Observers*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jan. 20, 2014).

40. See *Understanding the WTO*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (last visited Jan. 20, 2014).

41. See *Timeline: World Trade Organization*, BBC NEWS, [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/2430089.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/2430089.stm) (last modified Feb. 15, 2012) (listing the chronology of GATT and WTO events).

42. See Pascal Lamy, *supra* note 1.

The WTO is a treaty comprising some 500 pages of text accompanied by more than 2,000 pages of schedules of commitments. Moreover, 50 years worth of GATT practice and decisions—what we call the “GATT acquis”—have been incorporated in what constitutes the new WTO treaty. WTO rules are regularly renegotiated.

*Id.*

43. The annexed agreements include the Multilateral Agreement on Trade in Goods, consisting of the GATT and twelve substantive agreements, such as the Agreement on Agriculture and the Agreement on Safeguards; the General Agreement on Trade in Services; and the Agreement on Trade Related Aspects of

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Article XVI(4) of the WTO Agreement stipulates that “[e]ach Member shall ensure the conformity of its laws, regulations[,] and administrative procedures with its obligations as provided in the annexed Agreements.”<sup>44</sup> However, as mentioned above, WTO rules do not require members to give WTO law direct effect in their domestic legal systems, such that it is applicable to domestic courts and citizens.<sup>45</sup>

The WTO Agreement declares that principle functions of the WTO include (1) providing “the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the [WTO] agreements” and (2) administration of the Understanding on Rules and Procedures Governing the Settlement of Disputes referred to as “Dispute Settlement Understanding” (“DSU”), which regulates dispute settlement under all covered WTO agreements.<sup>46</sup> The DSU is set out in Annex 2 to the WTO Agreement.<sup>47</sup> The DSU states that the dispute settlement system “is a central element in providing security and predictability to the multilateral trading system.”<sup>48</sup> Ultimate responsibility for settling disputes lies with the Dispute Settlement Body (“DSB”), which is comprised of representatives of the member states’ governments.<sup>49</sup> The majority of WTO litigation relates to trade remedies, including anti-dumping, countervailing duties, and safeguards.<sup>50</sup> Although these issues often concern interests of an individual or a company, the dispute settlement system of the WTO Agreement is available only to the member states and not private parties.<sup>51</sup> WTO dispute settlement proceedings, with a few exceptions, are confidential.<sup>52</sup> Therefore, the only way for private parties to contribute to the dispute resolution process at this stage is to submit *amicus curiae*<sup>53</sup> briefs.<sup>54</sup> This practice is becoming popular, especially in cases of

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Intellectual Property Rights (TRIPS). *See generally* Marrakesh Agreement, *supra* note 26, at Annex 1. While the GATT covered only trade in goods the WTO also includes rules covering provision of services and intellectual property which were included in the WTO Agreement as Annexes 1B and 1C. *See id.*

44. *Id.* at art. XVI(4).

45. *See supra* note 26 and accompanying text.

46. Marrakesh Agreement, *supra* note 26, art. III(2-3).

47. *Id.* at art. III(3).

48. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

49. *See generally id.* at art. 3 (listing several general provisions concerning the DSB).

50. *See* H.E. Elin Østebø Johansen, Chairperson, WTO DSB, Speech on WTO Dispute Settlement Body Developments in 2011 (Mar. 13, 2012), *available at* [http://www.wto.org/english/tratop\\_e/dispu\\_e/speech\\_johansen\\_13mar12\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm) (stating that in 2010 and 2011 the majority of the requests for consultation were related to trade remedies).

51. *See* DSU, *supra* note 48, at art. 2.1 (stating that with respect to disputes under covered agreement only Members can participate in decisions taken by the DSB); *see also* Sections 301 Panel Report, *supra* note 26, at ¶ 7.72. (“[T]he GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.”).

52. Johansen, *supra* note 50.

53. “[A]micus curiae, noun” (Latin: “friend of the court”) “A professional person or organization that is

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considerable public interest, such as disputes concerning issues of public health and safety, protection of animals, and environmental protection.<sup>55</sup>

WTO litigation can proceed through two forums: before *ad hoc* dispute settlement panels (“DSP”) and, on appeal, before the standing Appellate Body (“AB”).<sup>56</sup> After DSB adopts DSP or AB rulings they become a binding legal force within the WTO.<sup>57</sup> If a country does not implement a WTO DSP or AB ruling, the winning party may in some cases exercise pressure to induce compliance by the losing party by taking countermeasures.<sup>58</sup> One of these countermeasures is to introduce retaliatory trade restrictions on imports from the other country.<sup>59</sup>

According to Article 3(7) of the DSU, a main goal of the DSB is to secure the withdrawal by the offending member state of the measures found to be inconsistent with WTO rules.<sup>60</sup> However, it is important to note that judgments of WTO DSP or AB do not automatically result in invalidation of offending domestic laws.<sup>61</sup> Unlike rulings of domestic courts which can strike domestic laws and regulations, the WTO DSP and AP reports can only recommend that the offending state bring its laws into conformity with its WTO obligations.<sup>62</sup> If the state finds that immediate withdrawal of the measures, such as repealing, amending, or replacing offending domestic law, is impracticable, it may instead provide temporary compensation pending the withdrawal of the inconsistent measure.<sup>63</sup> Article 22(2) provides that if the offending member state fails to fulfill its obligation to implement WTO recommendations and rulings within a reasonable period of time, then it will be required to enter into negotiations with any party that invoked the dispute settlement procedures.<sup>64</sup> This process is intended to provide a mechanism for negotiating mutually acceptable compensation.<sup>65</sup>

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not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question.” MERRIAM-WEBSTER COLLEGIATE DICTIONARY 40 (11th ed. 2004).

54. See Johansen, *supra* note 50.

55. See *id.*

56. See DSU, *supra* note 48, at art. 3 (discussing the structure for dispute resolution).

57. See *id.* (discussing adoption and implementation of DSB rulings).

58. See CRAIG VANGRASSTEK, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* 239 (2013).

59. John J. Barcelo III, *The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law*, 21 TUL. EUR. & CIV. L.F. 147, 171 (2006).

60. DSU, *supra* note 48, at art. 3(7).

61. VANGRASSTEK, *supra* note 58, at 238-39.

62. *Id.*

63. DSU, *supra* note 48, at art. 22(1).

64. *Id.* at art. 22(2).

65. *Id.*

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### III. WTO LAW IN DOMESTIC LEGAL ORDERS OF WTO MEMBER STATES

#### A. *Monism v. Dualism in International Law*

Whether any particular international treaty, including the WTO, should have direct effect in a member state's legal order depends on the constitutional requirements, policies, and tradition of the reception of international law by that member state.<sup>66</sup> There are two major approaches to the reception of international law: monistic and dualistic.<sup>67</sup> The dualistic approach views international law and domestic law as completely different systems and does not allow the norms of international treaties to become a part of the domestic legal system.<sup>68</sup> Hence, there is no direct application or direct effect.<sup>69</sup> Instead, it requires transformation of international law into national law, usually through the act of its legislative body.<sup>70</sup> When a state accepts a treaty, it has to create national laws explicitly incorporating the state's obligations under the treaty into domestic order.<sup>71</sup> Only these newly created domestic laws will give rise to rights and obligations assumed under the treaty within the domestic legal system and only they can be invoked by private parties and applied by domestic courts.<sup>72</sup> Thus, treaty obligations cannot be directly enforced by domestic courts.<sup>73</sup> If the state's domestic laws or acts violate provisions of the treaty, the enforcement could come only via international processes available under the treaty.<sup>74</sup> The monistic approach, on the other hand, allows international laws to integrate directly into domestic legal system and even to prevail where domestic laws would be inconsistent.<sup>75</sup> Even if domestic laws are adopted, international law can still be directly applied and adjudicated in national courts.<sup>76</sup>

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66. MATSUSHITA ET AL., *supra* note 28, at 90. For a thorough discussion of the place of international treaties within domestic systems and the policy considerations associated with different models of treaty implementation see Jackson, *supra* note 27, at 311.

67. MATSUSHITA ET AL., *supra* note 28, at 89; JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 123 (2006). See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31-34 (7th ed.2008).

68. MATSUSHITA ET AL., *supra* note 28, at 89-90; Jackson, *supra* note 27, at 313.

69. Jackson, *supra* note 27, at 314.

70. Bourgeois, *supra* note 20, at 90-91; JACKSON, *supra* note 67, at 123; Jackson, *supra* note 27, at 315.

71. Jackson, *supra* note 27, at 314.

72. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 68 (7th rev. ed. 1997).

73. See Jackson, *supra* note 27, at 314.

74. *Id.* at 318.

75. MATSUSHITA ET AL., *supra* note 28, at 89.

76. *How Does International Law Apply in a Domestic Legal System?*, THE PEACE AND JUSTICE INITIATIVE, <http://www.peaceandjusticeinitiative.org/implementation-resources/dualist-and-monist> (last visited Jan. 20, 2014).

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Each of these approaches has its pros and cons in facilitating states' relations with international law.<sup>77</sup> The dualistic approach is thought to support the notion that international law should not interfere with the internal affairs of a sovereign state through direct application.<sup>78</sup> This approach gives the state more freedom and flexibility in dealings with international obligations.<sup>79</sup>

The monistic approach, on the other hand, is believed to promote supremacy, effectiveness, and respect for international law and supports authority of international treaties.<sup>80</sup> However, in the context of multinational organizations, monist countries may often find themselves in significant disadvantage vis-à-vis dualist countries.<sup>81</sup> For example, monist countries, by giving direct effect to the treaty norms, would allow individuals to rely on these norms in bringing actions in their domestic courts in order to invalidate domestic laws or seek damages.<sup>82</sup> However, this option would not be available in the countries taking a dualist approach under the same treaty.<sup>83</sup> Direct application may restrict the flexibility of monist countries' governments and reduce their bargaining power in international negotiations or lead to significant restrictions in the ability of the government to implement desired domestic policies.<sup>84</sup> At the same time, none of these restrictions would exist for other members of the same international organization if they belong to the dualist group of countries that do not give direct effect to international law within their domestic systems.<sup>85</sup> According to Professor John

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77. See Jackson, *supra* note 27, at 310.

78. See JACQUES BOURGEOIS & ORLA LYNSEY, *The Extent to Which the EC Legislature Takes Account of WTO Obligations: Jousting Lessons from the European Parliament*, in LAW AND PRACTICE OF EU EXTERNAL RELATIONS 202, 205 n.10 (Alan Dashwood & Marc Maresceau eds., 2008) (stating that the European Parliament assumes that denying direct effect to WTO law protects interests of the European community).

79. It allows the state to interpret and tailor the language of the treaty through the act of transformation for domestic usage or even "preserve the option to breach the treaty in its method of application." See Jackson, *supra* note 27, at 323-26.

80. See Dunoff, *supra* note 20, at 281.

81. Jackson, *supra* note 27, at 326-27. Jackson notes that although direct application creates significant constraints on the state government and creates certain disadvantages, it could be useful in some cases. *Id.* For example, this would provide for an effective mechanism to create a strong union of independent states or for incorporation of international human rights norms into domestic legal systems. *See id.* It also could be argued that the monistic approach could help put necessary checks on the state government in order to preserve the market-oriented economic system of a state with new market economy. *See id.*

82. *See id.* at 323-27.

83. According to John Jackson the monistic approach can also result in other difficulties, such as (1) the power of interpretation of international treaties can shift from the government to the courts, (2) international interpretations of treaty norms may become binding on domestic legal institutions of these countries, including their courts, (3) this could create a sort of a supervisory review power by the international organization over domestic application and interpretation of the treaty norms, (4) the state may find itself bound not only by the norms of international treaty to which the state subscribed upon accession but also by numerous other regulations or decisions of adjudicatory bodies of the international organization. These restrictions would be exacerbated for the states which constitutions require not only direct application of international law but also provide for supremacy of international norms within domestic legal system. *See id.*

84. See Arcuri & Poli, *supra* note 20, at 4.

85. See Jackson, *supra* note 27, at 315.

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Jackson, this creates an unfair asymmetry in the positions of member states, which could only be avoided by requiring reciprocity or by restricting direct application of the treaty by the monist member states.<sup>86</sup> Jackson suggests that requirement of reciprocity could be a solution but might create uncertainty.<sup>87</sup> Furthermore, for some members of multinational organizations it would be impossible to achieve direct application of international treaties without significant constitutional changes.<sup>88</sup> On the other hand, experience demonstrates that a monist state faced with the problem of unfair asymmetry is more likely to make adjustments.<sup>89</sup> This can be achieved either via constitutional changes, through action of domestic courts or other domestic institutions by restricting invocability<sup>90</sup> of the treaty, or by distinguishing between self-executing and non-self-executing treaties.<sup>91</sup>

Thus, many states have employed a “mixed” monist-dualist approaches to international law, including the European Union and the United States.<sup>92</sup> After the dissolution of the Soviet Union, Russia took a strict monist position towards international law,<sup>93</sup> but it appears to be slowly moving towards a more balanced approach.<sup>94</sup> After becoming a WTO member, Russia is facing the same important policy considerations as other monist WTO member states.<sup>95</sup> These policy concerns should be carefully examined and evaluated in arriving at a conclusion as to whether WTO law should or would have direct application in Russia.

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86. *See id.* at 326.

87. *Id.* at 320.

88. *Id.* at 328 (stating that some states can never permit direct application of international treaties).

89. *See id.* at 317, 327-28.

90. *Id.* (stating that invocability can be restricted by a court’s determination as to who is entitled to rely on the treaty and for what purpose or by establishing requirements for particular parts of the treaty to apply ,e.g., specific and precise language).

91. In most cases direct application of a treaty is possible only for “self-executing” treaties. *See* Jackson, *supra* note 27, at 320.

92. *See id.* at 320-21.

93. Art. 15 (4) of the Russian Constitution states that “the universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system.” KONST. RF art. 15(4).

94. 1995 Law on International Treaties of the Russian Federation distinguishes between self-executing and non-self-executing treaties. *See* Federal’nyi Zakon RF o Mezhdunarodnykh Dogovorakh Rossiiskoi ot 15 Iulya 1995 g. [Federal Law of the Russian Federation on International Treaties of the Russian Federation], Sobranie Zakonodatel’stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] Apr. 15, 1994], July 17, 1995, No.29, Item 2757. 5.

95. *See infra* Parts IV-V.

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### B. The U.S. Approach to WTO Law

#### 1. Domestic Effect of WTO Agreements

While the United States allows for some international treaties to have direct effect,<sup>96</sup> it declared WTO law non-self-executing and took a dualistic approach in implementing WTO obligations into the domestic legal system.<sup>97</sup> WTO law is implemented in the United States via “amending existing federal statutes that would otherwise be inconsistent with the [WTO] agreements and, in certain instances, by creating entirely new provisions of law.”<sup>98</sup> The Uruguay Round Agreements Act (“URAA”)<sup>99</sup> sets out the relationship of the WTO agreements to the U.S. domestic law.<sup>100</sup> This relation consists of three main principles:<sup>101</sup> (1) the WTO agreements are not self-executing and require implementing legislation such that only the implementing legislation has the effect of the law in the United States;<sup>102</sup> (2) the U.S. law has supremacy over the WTO agreements and no provision of the WTO trade agreements inconsistent with the U.S. law will have any effect in the United States<sup>103</sup> and (3) the WTO trade agreements are not a basis for any private right of action<sup>104</sup> and may not be referred to in order to

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96. Restatement (Third) of the Foreign Relations Law § 111(1) (1987) (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”); *id.* (“Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a “non-self-executing” agreement will not be given effect as law in the absence of necessary implementation.”).

97. Patrick C. Reed, *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality*, 38 GEO. J. INT’L L. 209, 214-15 (2006), available at <http://www.thefreelibrary.com/Relationship+of+WTO+obligations+to+U.S.+international+trade+law%3a...-a0159280330>. Although WTO law was expressly pronounced non-self-executing by the Act of Congress, it is possible that the courts would come to the same conclusion because they could find that WTO agreement “manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation” or that “implementing legislation is constitutionally required.” Restatement (Third) of Foreign Relations Law § 111.

98. Reed, *supra* note 97, at 215.

99. The Uruguay Round Agreements Act is a domestic statute implementing the U.S.’s WTO obligations arising out of the Uruguay Round agreements. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4808 (1994) (codified in scattered sections of 19 U.S.C.).

100. Uruguay Round Agreements Act §102(a), 19 U.S.C. §3512(a) (1994).

101. Reed, *supra* note 97, at 214.

102. MATSUSHITA ET AL, *supra* note 28, at 94.

103. Uruguay Round Agreements Act §102(a)(1), 19 U.S.C. § 3512(a)(1) (“No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”). The Statement of Administrative Action, which is the “authoritative expression of the United States” on the domestic interpretation and application of the Uruguay Round Agreements, further emphasize the meaning of section 102(a) as following: “[t]he WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round agreements . . . U.S. law will take precedence . . .” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040.

104. Uruguay Round Agreements Act § 103(c)(1), 19 U.S.C. § 3512(c)(1)(A) (“No person other than the United States—(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement”).

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“challenge . . . any action or inaction by any federal department [or] agency” as inconsistent with the WTO trade agreement.<sup>105</sup> Clarification of this provision by the Statement of Administrative Action (“SAA”) accompanying the URAA is particularly instructive, stating that:

[S]ection 102(c) represents a determination by the Congress and the Administration that private lawsuits are not an appropriate means for ensuring state compliance with the Uruguay Round agreements. Suits of this nature may interfere with the President’s conduct of trade and foreign relations and with suitable resolution of disagreements or disputes under those agreements.<sup>106</sup>

*2. Domestic Effect of WTO Dispute Settlement Reports*

The URAA explicitly determines that WTO dispute reports have no automatic effect on the U.S. law.<sup>107</sup> U.S. Congress will have to act pursuant to normal legislative processes before any change to the WTO-inconsistent law can be made.<sup>108</sup> Practices of administrative agencies are also shielded from automatic compliance with WTO DSP or AB reports.<sup>109</sup> Instead of immediate correction of its practice in accordance with the WTO DSP report, the offending agency is not to make any modifications unless and until the head of the agency and the U.S. Trade Representative complete consultations with congressional committees and relevant private sector actors.<sup>110</sup>

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105. Uruguay Round Agreements Act § 103(c)(1), 19 U.S.C. § 3512(c)(1)(B) (“No person other than the United States—. . . (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.”).

106. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103-316, (1994) reprinted in 1994 U.S.C.C.A.N. 4040, 4055.

107. Dunoff, *supra* note 20, at 284.

Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

*Id.* at 4318.

108. Dunoff, *supra* note 20, at 284.

109. According to the SAA, “panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations” and “neither federal agencies nor state governments are bound by any finding or recommendation included in such reports.” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103-316.

110. 19 U.S.C. § 3533(g)(1) (2000).

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### 3. Application of WTO Law by the U.S. Courts

Thus, URAA disallows direct application of WTO law in the United States.<sup>111</sup> Accordingly, the U.S. courts are precluded from directly relying on WTO law, including WTO DSP and AB rulings.<sup>112</sup> U.S. courts must apply unambiguous U.S. law that clearly violates WTO norms and disregard WTO agreements and rulings.<sup>113</sup> As discussed earlier, private litigants may not bring actions based on WTO law.<sup>114</sup> Relevancy of WTO law in U.S. domestic litigation then may only arise in situations where domestic law is ambiguous and allows for several different interpretations.<sup>115</sup> In such situations, two doctrines of statutory interpretation come into play, the so called *Chevron* and *Charming Betsy* doctrines.<sup>116</sup> Generally, under *Murray v. The Charming Betsy* (“*Charming Betsy*”),<sup>117</sup> the U.S. courts should interpret ambiguous federal statutes in a way that would make them compliant with U.S. international obligations, thus giving international law indirect effect.<sup>118</sup> As it was stated by Chief Justice Marshall in *Charming Betsy*, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>119</sup> Thus, once the court has determined that the statute can have more than one interpretation, it should give preference to the interpretation that is consistent with U.S. international obligations in accordance with *Charming Betsy*.

However, the *Charming Betsy* doctrine is almost never applied when U.S. courts interpret statutes that could be in violation of WTO law, and particularly WTO dispute settlement rulings.<sup>120</sup> This is in part because U.S. domestic courts cannot order a U.S. agency to change its interpretation of domestic law or its practice in accordance with WTO DSP or AB rulings.<sup>121</sup> U.S. agencies are explicitly prohibited from making such changes, outside of specific political process specified by URAA where the Executive Branch alone has the power to

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111. See discussion *supra* Parts II.B.1-2

112. See Barcelo, *supra* note 59, at 148-49.

113. *Id.* at 151; Jane A. Restani, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 *FORDHAM INT’L L.J.* 1533, 1544 (2001) (“[I]f the domestic statute is clear, the U.S. court must apply it as written, whatever the consequences to international considerations and the views of international organizations”).

114. 19 U.S.C. § 3512(c)(1).

115. Barcelo, *supra* note 59, at 151. Most such cases would entail challenges to the interpretation of U.S. trade laws by executive agencies responsible for implementation of these laws. See Dunoff, *supra* note 20, at 285.

116. Restani, *supra* note 113, at 1544 (addressing interrelationship between the *Chevron* and *Charming Betsy* doctrines).

117. See generally *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

118. Barcelo, *supra* note 59, at 155.

119. *Murray*, 6 U.S. (2 Cranch) at 118.

120. Barcelo, *supra* note 59, at 153.

121. See *id.* at 164; see Restani, *supra* note 113, at 1544 (citing 19 U.S.C. § 3533(g) (1994); 19 U.S.C. § 3538(a)-(b) (1994)).

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decide whether to implement WTO rulings.<sup>122</sup> This can only occur after consultations with certain Congressional committees and interest groups in the private sector.<sup>123</sup> At this point then, the *Chevron*<sup>124</sup> doctrine of statutory interpretation comes into play. Once the court determines that the statute is ambiguous as to the intent of the legislator, *Chevron* requires the court to defer to any interpretation stated by the federal agency charged with its implementation that the court can find reasonable, even if it is contrary to WTO law.<sup>125</sup> Thus, where a federal agency interprets a statute in accordance with WTO law, the court may use *Charming Betsy* to confirm that the agency's interpretation is reasonable and should prevail.<sup>126</sup> Yet, where the agency's interpretation of the statute and its practice implementing such interpretation are in violation of WTO law, *Chevron* will usually trump *Charming Betsy*, and the court will defer to the agency's interpretation of a domestic statute.<sup>127</sup>

*Chevron* and many subsequent decisions emphasized that respect for separation of powers requires that courts leave interpretation of ambiguous statutes to executive agencies.<sup>128</sup> This is so because agencies operate under the President, who is accountable to the voters, and thus are more suitable than the courts to make required policy decisions.<sup>129</sup> Additionally, the courts should not impinge on the power of Congress vested in administrative agencies.<sup>130</sup> This position of U.S. courts is well demonstrated as is seen by the numerous decisions on the use of "zeroing" by Commerce, where courts found time after time that a domestic statute<sup>131</sup> was ambiguous and deferred to Commerce's reasonable interpretation of that statute.<sup>132</sup> These decisions uphold use of the "zeroing" method in calculation of antidumping duties to be imposed on U.S. importers,

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122. See 19 U.S.C. § 3533(g).

123. *Id.*

124. See generally *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

125. *Chevron* established a two-step test in order to decide whether the agency interpretation of the statute in questions should be sustained. *Chevron*, 467 U.S. at 842-3. The first step requires determination of "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the court finds that Congress had a clear intention "on the precise question at issue", that intention is the law and must be given effect. *Id.* at 842-43. If the court finds that the statute is silent or ambiguous with respect to the specific question at issue, then the court has to decide "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

126. See, e.g., *Fed. Mogul Corp. v. Unites States*, 63 F.3d 1572, 1581-82 (Fed. Cir. 1995).

127. Barcelo, *supra* note 59, at 156.

128. Reed, *supra* note 97, at 212.

129. *Chevron*, 467 U.S. at 864-66.

130. *Id.* at 865-66.

131. 19 U.S.C. § 1677(35)(A) (2006).

132. See *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (applying *Chevron* analysis to determine that the Dept. of Commerce's practice of using zeroing in administrative reviews was a reasonable interpretation of the statute); see *Corus Staal BV v. Dep't. of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (extending *Timken* to encompass Commerce's practice of zeroing in investigations and emphasizing that Congress provided for a political process to decide whether to conform U.S. law to a WTO ruling).

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even where the WTO AB found that use of zeroing was inconsistent with U.S. WTO obligations.<sup>133</sup> Two additional considerations provide rationale for keeping the decisions about WTO compliance within the executive branch and away from domestic courts. First, as many commentators including Professor John J. Barcelo III have noted, the WTO DSU provides political mechanisms for member states to respond to an adverse WTO ruling and is rather ambiguous about whether a member state has an international law obligation to actually change its domestic law in order to comply with such a ruling.<sup>134</sup> As long as such uncertainty exists, domestic courts should not interfere with political decisions of the executive branch in its dealings with the WTO.<sup>135</sup>

Second, the wisdom of giving direct or indirect effect to WTO rulings by domestic courts, particularly those that do not directly involve the United States, has been questioned by some U.S. commentators on the grounds that WTO dispute settlement rulings do not have firm *stare decisis* effect.<sup>136</sup>

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133. See, e.g., Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004); see also Panel Report, *United States—Anti-Dumping Act of 1916—Complaint by the European Communities*, WT/DS136/R and Corr.1 (Sept. 26, 2000); Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (Aug. 23 2001); Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11 2004).

134. Barcelo, *supra* note 59, at 165.

135. See *id.* at 165-67.

136. E.g., John D. Greenwald, *A Comparison of WTO and CIT/CAFC Jurisprudence in Review of U.S. Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings*, 21 TUL. J. INT'L & COMP. L. 261, 268 (2013); see DSU, *supra* note 48, at art. 3(2). For discussion of cases where WTO panels did not follow Appellate Body decisions, so called “vertical dissent” see Meredith Kolsky Lewis, *Horizontal and Vertical Disagreement in WTO Dispute Settlement*, 48 STAN. J. INT'L L. 1, 44 (2012) and Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETT. 5, 12 (2011).

*Global Business & Development Law Journal / Vol. 27**C. The European Union Approach to WTO Law*

Although the European Union is relatively open to international law, WTO law does not have direct effect in the European Union.<sup>137</sup> In the absence of a statute, similar to the United State's URAA limiting direct application of WTO law within the domestic legal system, the role of the WTO law within the European Union became determined under the jurisprudence of the ECJ.<sup>138</sup>

The ECJ, the highest court in the European Union, developed tests on whether and when WTO law would have direct effect within the European Union as it considered cases brought by private litigants attempting to use WTO law to invalidate E.U. law,<sup>139</sup> or to obtain damages under the E.U.'s non-contractual liability provision.<sup>140</sup> With a few narrow exceptions, the ECJ has continually stated that WTO law does not have direct effect within the European Union and declined to invalidate E.U. law on the basis of WTO law or to award damages to private entities.<sup>141</sup> This is true even in cases where the WTO DSB declared the European Union's behavior inconsistent with WTO obligations.<sup>142</sup> An analysis of ECJ jurisprudence in WTO related cases will help elucidate the reasoning the ECJ has used in limiting direct application of WTO law in the European Union.

The ECJ first invoked a theory of direct effect in the case of *Van Gend*<sup>143</sup> in 1963, when it decided that certain provisions of European Communities law<sup>144</sup> could be directly applied in the courts of member states to invalidate their law or actions.<sup>145</sup> This case was decided at the beginning of the modern European Union and allowed the ECJ to pronounce "a new legal order" and set up an initial test

137. See PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL 301 (2005) (stating that there is often a presumption in favor of direct effect of international agreements, with the exception of the GATT and the WTO agreements); see also Antoniadis, *supra* note 20, at 45-46.

138. For discussion of ECJ jurisprudence on WTO law see *infra* notes 152-71 and accompanying text.

139. Joined Cases 21-4/74, *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit (International Fruit)*, 1972 E.C.R. 1219.

140. *E.g.*, Joined Cases C-120/06 & C-121/06, *FIAMM and Fedon v. Comm'n and Council (FIAMM)* 2008 E.C.R. I-6513. For analysis of ECJ WTO related cases, including cases brought under non-contractual liability provisions see generally Bourgeois, *supra* note 20; Arcuri & Poli, *supra* note 20; John Errico, *The WTO in the EU: Unwinding the Knot*, 44 CORNELL INT'L L.J. 179 (2011).

141. See, *e.g.*, Case C-149/96 *Portugal v. Council*, 1999 E.C.R. I-8395; see, *e.g.*, *FIAMM*, 2008 E.C.R. I-6513.

142. See Errico, *supra* note 140, at 184.

143. Case 26/62, *NV Algemene Transport-en Expedite Onderneming van Gend en Loos NV v. Nederlands Administratie der Belastingen (Van Gend )*, 1963 E.C.R. 1.

144. At that time the European Coal and Steel Community ("ECSC"), established by the ECSC Treaty in 1952; the European Economic Community ("EEC") and the European Atomic Energy Community ("Euratom"), created under the Treaties of Rome in 1958. See Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11[hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167.

145. See *Van Gend*, 1963 E.C.R. 1.

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for when the provisions of the EEC Treaty of Rome<sup>146</sup> could be invoked directly before the courts of the member states.<sup>147</sup> In *Van Gend*, the plaintiff attempted to use Article 12 of the EEC Treaty to invalidate an action of a member state.<sup>148</sup> He complained that the member state increased tariffs on a chemical—urea-formaldehyde—by reclassifying it into a different category, and that this action violated the provisions of Article 12.<sup>149</sup> The ECJ ruled that provisions of Article 12 created individual rights enforceable in national courts because they established a “clear” and “unconditional” “negative” obligation of the member states where no further legislative enactment by the member state was required.<sup>150</sup>

Nine years later in *International Fruit* the ECJ explored whether certain provisions of GATT law could also have direct effect, or be invoked in a case against the Community, before the ECJ.<sup>151</sup> The court answered in the negative.<sup>152</sup> The ECJ declared that international law, including GATT, could invalidate Community law only if it satisfied two conditions: first, the provision of international law must bind the Community; and second, it must be “capable of conferring rights on citizens of the Community, which they can invoke before the courts.”<sup>153</sup> The Court found that GATT provisions were binding on the European Community but, after examining “the spirit, the general scheme and the terms” of the GATT, the ECJ declared that the provisions of the GATT did not confer rights on citizens of the Community “on which they can rely before the courts in contesting the validity of a Community measure.”<sup>154</sup> This was because the GATT was “based on the principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements” and due to “great flexibility” of GATT provisions, “in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the

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146. This case was decided only five years after the creation of the EEC in 1958. See EEC Treaty, *supra* note 144.

147. *Van Gend*, 1963 E.C.R. 1; see Errico, *supra* note 140, at 184.

148. *Van Gend*, 1963 E.C.R. 1.

149. Article 12 of the EEC Treaty states that “[m]ember States shall refrain from introducing between themselves any new customs duties on imports and exports or any charges having equivalent effect, and from increasing those which they already apply in trade with each other.” EEC Treaty, *supra* note 144, art. 12.

150. *Van Gend*, 1963 E.C.R. 1. The rights created by Article 12 could have direct effect because, after examining “the spirit, the general scheme and the wordings” of the Treaty of Rome, the ECJ found that the EEC created by the Treaty constituted a new legal order of international law where member states limited their sovereign rights and intended for the Treaty to have direct authority in the member states. *Id.*

151. *International Fruit*, 1972 E.C.R. I-1219. In this case, an importer of apples challenged several regulations of the European Commission as violating GATT Article XI which provides that “[n]o prohibitions or restrictions other than duties, taxes or other charges, . . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party. GATT, *supra* note 2, at art. XI.

152. *Id.*

153. *Id.* at ¶¶ 7-8.

154. See *id.* at ¶¶ 18, 27.

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settlement of conflicts between the contracting parties.”<sup>155</sup> Thus, individuals could not invoke GATT provisions before national courts to examine the validity of the Community regulations restricting the importation of apples from third countries.<sup>156</sup> In the first case of *Bananas*, the court confirmed its position in *International Fruit*, stating that because the provisions of the GATT did not have direct effect, they could not serve as a criterion for legality of Community law.<sup>157</sup>

After the GATT was transformed into the WTO upon conclusion of the Uruguay Round of Multinational Trade Negotiations, the question about whether WTO law could have direct effect had to be revisited. The opportunity presented itself in the case of *Portugal v. Council*.<sup>158</sup> In this case Portugal complained that the Council’s decision concluding the Memoranda of Understanding with India and Pakistan on market access for textile products during the Uruguay Round violated certain provisions of the GATT, the Agreement on Textiles and Clothing, the Agreement on Import Licensing and general principles of Community law such as the principle of transparency, the principle of cooperation, and the principle of legitimate expectations.<sup>159</sup> Although the court acknowledged that the WTO dispute resolution system was an improvement compared to the GATT, the Court concluded that it still gave considerable importance to the negotiations between the parties, allowing for a possibility of compensation or retaliation against the party whose legislation was found to be inconsistent with the WTO agreements.<sup>160</sup> Thus, the Court held that:

[H]aving regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.<sup>161</sup>

In this opinion, the Court further explained its main concerns with the WTO structure and operations: (1) the lack of reciprocity and (2) the freedom of the political institutions.<sup>162</sup> Reciprocity was a concern because the most important commercial partners of the Community did not allow their domestic courts to review the legality of their legislation according to WTO law.<sup>163</sup> The freedom of the political institutions, the other concern of the Court, would be compromised in two ways had the Court given WTO law direct effect within the Community. First, “the external aspect”—it would weaken the negotiating strength of the

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155. *See id.* at ¶ 27.

156. *Id.*

157. Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973, at ¶¶ 105–109; *see Antoniadis, supra* note 20, at 47.

158. *Portugal*, 1999 E.C.R. I-8395.

159. *Id.* at ¶¶ 53 et seq.; *see Antoniadis, supra* note 20, at 48.

160. *Portugal*, 1999 E.C.R. I-8395, at ¶¶ 35-37.

161. *Id.* at ¶ 47.

162. *See id.* at ¶¶ 40, 46.

163. *See id.* at ¶ 45.

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institutions within the WTO and among the trading partners—and second, “the internal aspect”—it would shift the institutional balance in external trade matters from the Council and the Commission to the Court.<sup>164</sup>

The Court took a different approach with bilateral agreements. In *Kupferberg*<sup>165</sup> the Court held that the EEC—Portugal Free Trade Agreement (“FTA”) had direct effect and could invalidate Community law.<sup>166</sup> After discussing the purpose and international origin of the agreement, the ECJ stated that Article 21 of the FTA was sufficiently unconditional and precise and therefore “directly applicable and capable of conferring upon individual traders rights which the courts must protect.”<sup>167</sup>

Although the Court generally refused to find that GATT/WTO law has direct effect within the Community system, including its more recent cases such as *FIAMM*<sup>168</sup> in 2008, it did establish two important exceptions: the *Nakajima*<sup>169</sup> and *Fediol*<sup>170</sup> doctrines. According to these exceptions, the Court may review the legality of Community measures in the light of WTO rules only when the Community intended to implement a particular obligation assumed within the context of the WTO, or where the Community measure expressly refers to the precise provisions of the WTO agreements.<sup>171</sup>

Thus, similarly to the United States, the European Union rejected direct effect of WTO law.<sup>172</sup> However, the ECJ’s approach to WTO law appears to be more flexible and allows for more opportunities for indirect application of WTO law.<sup>173</sup>

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164. See Antoniadis, *supra* note 20, at 49.

165. Case 104/81, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A. (*Kupferberg*) 1982 E.C.R. 3641.

166. *Id.* at ¶¶ 90-91.

167. *Id.* at ¶ 23.

168. Joined Cases C-120/06 and C-121/06, *FIAMM and Fedon v. Comm’n and Council (FIAMM)* 2008 E.C.R. I-6513.

169. Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council (Nakajima)* 1991 E.C.R. I-2069.

170. Case 70/87, *Fediol v. Comm’n*, 1989 E.C.R. 1781.

171. See generally *MATSUSHITA ET AL.*, *supra* note 28; see generally Errico, *supra* note 140.

172. See generally *MATSUSHITA ET AL.*, *supra* note 28.

173. See *id.* In addition to the exceptions allowing for direct application of certain WTO laws, European courts apply WTO law indirectly when interpreting domestic laws and regulations via principle of consistent interpretation. This principle requires that the laws of both E.U. and E.U. member states receive interpretations that are consistent with international obligations. See Antonello Tancredi, *EC Practice in the WTO: How Wide is the ‘Scope for Manoeuvre’?*, 15 EUR. J. INT’L L. 933, 940 (2004).

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## IV. WHAT IS THE PLACE OF WTO LAW IN RUSSIA?

A. *Constitutional Approach to International Law*

Russia rejected the traditional dualist approach to the implementation of international law in a domestic legal system that was prevalent during the Soviet period and proclaimed international law to be part of its domestic law.<sup>174</sup> International treaties and commonly recognized principles of international law have supremacy within Russian legal system.<sup>175</sup> Russian courts “usually rely on international law as an additional argument in support of their conclusions based on the applicable constitutional provisions.”<sup>176</sup> In addition, “if there is a real gap in domestic law, courts may apply international law directly in order to make up for the deficit.”<sup>177</sup> However, application of international law by Russian courts has been difficult.<sup>178</sup> The courts often “encountered serious difficulties in clarifying methods to be used for ascertaining applicable international law rules,” which often resulted in arbitrary and sometimes unjustified use of international norms.<sup>179</sup>

Until 1995, the courts made no distinction between self-executing and non-self-executing treaties and often directly applied even vague and broad treaty rules or principles of international law to justify invalidation of Russian domestic law.<sup>180</sup> In 1995, the Russian legislature took initiative and passed the Law on International Treaties, which differentiated two types of norms.<sup>181</sup> It established

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174. See KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 15(4) (Russ.) (states that “the universally-recognized norms and principles of international law and international treaties of the Russian Federation shall be a component part of its legal system”); see also GRAZHDANSKII KODEKS ROSSIYSKOI FEDERATSII [GK RF][Civil Code] art.7 (Russ.) The Russian Civil Code also provides that the generally recognized principles and norms of international law and the international treaties of the Russian Federation shall be an integral part of the Russian legal system and the norms of the treaties should be applied directly, except in cases where an international treaty requires national legislation. *Id.*

175. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 15 (4) (Russ.) (establishing the superiority of the terms of Russian international treaties over the Russian domestic law: “if an international treaty of the Russian Federation establishes rules different from the rules prescribed by law, the rules of the international treaty shall be applied.”). For a thorough analysis of the motivation which Russia and many other newly formed democracies in Eastern Europe had for favoring direct application and supremacy of international law see generally Jackson, *supra* note 27 (arguing that the historical experiences of some countries could create such a distrust in their governments that the constitution makers would want to abandon a dualistic approach to international law in order to constrain their government through supremacy and direct application of international norms, thus securing protection of human rights and implementation of market-oriented economic system).

176. Gennady M. Danilenko, *Implementation of International Law in CIS States: Theory and Practice*, 10 EUR. J. INT’L L. 51, 62 (1999).

177. *Id.*

178. *Id.* at 51.

179. *Id.* at 62.

180. *Id.* at 51, 58.

181. See generally Federal’nyi Zakon RF o Mezhdunarodnykh Dogovorakh Rossiiskoi ot 15 iulya 1995 g. [Federal Law of the Russian Federation on International Treaties of the Russian Federation], Sobranie

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that there are “self-executing” and “non-self-executing” norms, stating that only provisions of international treaties that do not require domestic legislation in order to be applied will operate in Russia directly.<sup>182</sup> “[F]or the other provisions of international treaties domestic acts would have to be adopted.”<sup>183</sup> However, the 1995 law did not provide any guidance on how to identify the non-self-executing treaties, other than if they expressly require adoption of domestic laws.<sup>184</sup> The Supreme Court then instructed lower courts that self-executing treaties can be applied directly, while a non-self-executing treaty should “apply, along with the international treaty . . . the relevant domestic legal act that was enacted for effectuating the provisions of the said international treaty.”<sup>185</sup> This created additional confusion by requiring the simultaneous application of both domestic and international law.<sup>186</sup>

The next significant step to understanding when international treaties can be invoked by Russian courts came in 2003 when the Russian Supreme Court issued a ruling “[o]n Application by the Courts of General Jurisdiction of the Generally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation.”<sup>187</sup> The ruling for the first time formulated the attributes of a treaty that can be applied by the courts directly: (1) the treaty has come into force; (2) it is binding for Russia; (3) it is officially published; (4) its provisions do not require adoption of domestic laws; and (5) it establishes rights and obligations for the subjects of national law.<sup>188</sup> The ruling also clarified that a treaty should not be directly applied when, *inter alia*, the treaty contains any instructions directing member states to amend national laws.<sup>189</sup> In other words,

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Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1995, No.29, Item 2757.

182. *Id.* at art. 5(1).

183. *Id.*

184. *Id.*; see Danilenko, *supra* note 176, at 65-66.

185. Postanovleniye Plenuma Verkhovnogo Suda RF “O Nekotorykh Voprosakh Primeneniya Sudami Konstitutsii Rossiyskoy Federatsii Pri Osushchestvlenii Pravosudiya” ot 31 ortyabria 1995 g., N 8 [The Supreme Court of the Russian Federation Plenary Ruling “On Selected Issues of Application of Constitution of the Russian Federation by the Courts in the Administration of Justice” Nov. 31, 1995, N 8], ROSSIISKAYA GAZETA [Ros. Gaz.] Dec. 28, 1995, No. 247. See Danilenko, *supra* note 180, at 66.

186. Danilenko, *supra* note 180, at 66.

187. Postanovlenie Plenuma Verkhovnogo Suda RF o Primenenii Sudami Obstchey Jurisdiktсии Obshepriznanykh Printsipov i Norm Mezhdunarodnogo Prava i Mezhdunarodnykh Dogovorov Rossiiskoi Federatsii ot 10 oktyabrya 2003 g., No. 5 [Russian Federation Supreme Court Plenary Ruling on Application by the Courts of General Jurisdiction of the Generally Recognized Principles and Norms of International Law and International Treaties of the Russian Federation of Oct. 10, 2003, No. 5], ROSSIISKAIA GAZETA [ROS. GAZ.] Dec. 2, 2003, No. 244 [hereinafter Supreme Court Plenary Ruling No. 5]. Explanations provided in Supreme Court Plenary Ruling No. 5 are used by both by the Supreme Court and the SAC in their decisions regarding applicability of specific treaties and norms. See Sergei Yu. Marochkin, *International Law in the Courts of the Russian Federation: Practice of Application*, 6 CHINESE J. OF INT'L L. 329, 330 (2007), available at <http://intl-chinesejil.oxfordjournals.org/content/6/2/329.full.pdf+html>.

188. Supreme Court Plenary Ruling No. 5, *supra* note 187.

189. *Id.*

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the courts concluded that the constitutional provision, placing international law and treaties as an integral part of the Russian legal system and giving them supremacy over national laws, has limitations, and that not all treaties can be applied directly.<sup>190</sup> At least three of these limitations are similar to the tests imposed by the ECJ in deciding whether a particular treaty can have direct effect in the European Union: (1) the treaty is binding, (2) establishes rights and obligations for the subjects of national law, and (3) the norm in question is not conditioned on adoption of domestic law.<sup>191</sup> The rule that only the treaties that do not require adoption of domestic laws can be applied by the courts directly is also somewhat similar to the test applied by the U.S. courts in deciding whether a law is self-executing.<sup>192</sup>

Supreme Court Plenary Ruling No. 5 also shed some light on the status of decisions of adjudicatory bodies of some international organizations.<sup>193</sup> It confirms that the European Convention on Human Rights (“ECHR”) is an integral part of Russian legal system in accordance with Article 15 of the Constitution; therefore, the decisions of the ECHR are binding for Russia.<sup>194</sup> The ruling then instructs the courts to consider the decision of the ECHR when interpreting the norms of European Convention.<sup>195</sup> This general understanding of how and when Russian courts will apply provisions of international treaties is helpful in the discussion of whether WTO law will have direct effect in Russia.

*B. Possible Approaches to Application of WTO Law in Russia*

Two recent cases decided by the SAC in 2012 (the Patent Fees Cases) may help shed some light on how Russian courts see the role of WTO law within the Russian legal system.<sup>196</sup> Both cases were brought by the same businessman from the Czech Republic who complained that Russia’s patent agency discriminated against foreign inventors by charging them related to patent registration that were seven times higher than the fees paid by Russian citizens.<sup>197</sup> The SAC found in

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190. See Marochkin, *supra* note 187, at 337.

191. See *International Fruit*, 1972 E.C.R. at ¶¶ 7-8.

192. Jackson, *supra* note 27, at 320 (“When [treaty] language is sufficiently precise and indicates that no further government action is needed to apply the treaty norms, a U.S. court will be willing to conclude that the treaty is self-executing”); see also Restatement (Third) of the Foreign Relations Law of the United States § 111(1) (1987).

193. Supreme Court Plenary Ruling No.5, *supra* note 187.

194. *Id.*

195. *Id.*

196. Reshenie Vysshego Arbitrazhnogo Suda RF No. VAS-308/12 ot 11 aprelya 2012 g. [Decision of the Supreme Arbitrazh Court of the Russian Federation No. VAS-308/12 of Apr. 11, 2012] [hereinafter SAC Decision No.VAS-308/12]; Reshenie Vysshego Arbitrazhnogo Suda RF No. VAS-5123/12 ot 28 avgusta 2012 g. [Decision of the Supreme Arbitrazh Court of the Russian Federation No. VAS-5123/12 of Aug. 28, 2012] [hereinafter SAC Decision No.VAS-5123/12].

197. SAC Decision No.VAS-308/12, *supra* note 196; SAC Decision No.VAS-5123/12, *supra* note 196.

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favor of the plaintiff in both cases and invalidated the Russian law that created different rates for foreigners and citizens.<sup>198</sup>

The first case invalidating one of the fees was decided in April of 2012,<sup>199</sup> three months before Russia ratified its WTO accession protocol.<sup>200</sup> The second case invalidating several other fees was decided in August of 2012,<sup>201</sup> just a few days after Russia became a WTO member.<sup>202</sup> What is particularly interesting about these opinions is the SAC's reasoning and reference to international law, including the WTO law. While the SAC primarily relied on the provisions of a bilateral treaty between the E.U. and Russia in both cases,<sup>203</sup> it also invoked provisions of the WTO law.<sup>204</sup> The Partnership and Cooperation Agreement<sup>205</sup> ("PCA") between the European Union and Russia served as a framework for the E.U.-Russia economic and political relations since 1997.<sup>206</sup> The PCA promotes and regulates trade and investment between the two parties and provides for some specific rights for the citizens of the member states.<sup>207</sup> The court reasoned that section 98(1) of this treaty, requiring equal access to the administrative dispute resolution bodies for the citizens of all member states, "clearly" established "specific" obligations of member states to provide for protection of

198. SAC Decision No.VAS-308/12, *supra* note 196; SAC Decision No.VAS-5123/12, *supra* note 196.

199. SAC Decision No.VAS-308/12, *supra* note 196.

200. See Federal'nyi Zakon RF o Ratifikatsii Protokola o Prisoedinenii Rossiiskoi Federatsii k Marrakeshkomy Soglasheniyu ob uchrezhdenii Vsemirnoi Torgovoy Organizatsii ot 15 Aprelya 1994 g. No. 126-FZ [Federal Law of the Russian Federation on Ratification of the Protocol of Accession of the Russian Federation to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994], SOBRANIE ZAKONDATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 30, Item 4177.

201. SAC Decision No.VAS-5123/12, *supra* note 196.

202. Federal'nyi Zakon RF o Ratifikatsii Protokola o Prisoedinenii Rossiiskoi Federatsii k Marrakeshkomy Soglasheniyu ob uchrezhdenii Vsemirnoi Torgovoy Organizatsii ot 15 Aprelya 1994 g. No. 126-FZ [Federal Law of the Russian Federation on Ratification of the Protocol of Accession of the Russian Federation to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994], SOBRANIE ZAKONDATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2012, No. 30, Item 4177.

203. Agreement on Partnership and Cooperation Establishing a Partnership Between the European Communities and their Member States, of one side, and the Russian Federation, of the other side, *OJ* 1997 L 327/3 [hereinafter Agreement on Partnership and Cooperation].

204. See SAC Decision No.VAS-308/12, *supra* note 196; see also SAC Decision No.VAS-5123/12, *supra* note 196.

205. The EU-Russia PCA uses a unique model that is different from the rules for FTAs set forth in Article XXIV of the GATT and Article V of the GATS. See PETER VAN ELSUWEGE, THE FOUR COMMON SPACES: NEW IMPETUS TO THE EU-RUSSIA STRATEGIC PARTNERSHIP? 334, 335-41 (Alan Dashwood & Marc Maresceau eds., 2008).

206. *Regions and Countries: Russia*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/> (last updated May 3, 2013). ("The new EU-Russia Agreement—currently under negotiation—should provide a comprehensive framework for bilateral relations with stable, predictable and balanced rules for bilateral trade and investment relations. It will focus on improving the regulatory environment by building upon the WTO rules and strengthen bilateral trade relations.")

207. *Id.*

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the rights of the citizens of both countries without discrimination.<sup>208</sup> Therefore, the court determined that the PCA had direct application in Russia.<sup>209</sup> Because Russia's offending regulation required higher fees for foreigners to bring their grievances to the Chamber of Patent Disputes, it was in direct conflict with provisions of Russian international treaty and was therefore held invalid.<sup>210</sup>

It should be noted that the same treaty was directly applied by the ECJ several years earlier in the *Simutenkov* case, brought by Russian citizens alleging discrimination in the workplace.<sup>211</sup> In that case, the ECJ concluded that Russian workers legally employed in an E.U. member state could directly invoke the PCA's non-discrimination provision regarding conditions of their employment, remuneration, or dismissal as provided in Article 23 of the PCA.<sup>212</sup> Thus, both the Russian SAC and the ECJ directly applied the norms of this bilateral treaty in the domestic legal systems.<sup>213</sup> Both courts focused their analysis on whether the invoked provision was sufficiently clear and precise, and whether it conferred a specific right upon which a citizen may base a claim.<sup>214</sup> This approach appears to be similar to the ECJ's approach in *Van Gend*,<sup>215</sup> resulting in direct application of the provision of the Treaty of Rome (European Community Treaty) in the court of a European Community member state to invalidate the actions of another member state. It is also similar to the ECJ's approach in *Kupferberg*,<sup>216</sup> which resulted in direct application of the norms of a bilateral agreement.<sup>217</sup> The SAC also specifically addressed the reciprocity of the obligations provided for in the PSA article 98(1).<sup>218</sup> The SAC noted that Russian citizens will be provided the same level of protection in the European Union under this section as the citizens of the E.U. members are given in Russia.<sup>219</sup> This appears to be an important consideration in the SAC's decision that the PSA article 98(1) has direct effect in

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208. "Clearly and specifically" [chetko i konkretno]. SAC Decision No.VAS-308/12, *supra* note 196.

209. *Id.*; SAC Decision No.VAS-5123/12, *supra* note 196.

210. *See* SAC Decision No.VAS-308/12, *supra* note 196; *see also* SAC Decision No.VAS-5123/12, *supra* note 196.

211. Case C-265/03, *Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol*, 2005 E.C.R. I-2579. *See generally* Christophe Hillion, *Competence Distribution in EU External Relations After ECOWAS: Clarification or Continued Fuzziness?*, 46 COMMON MARKET L. REV. 815 (2008) (providing an annotation of this judgment).

212. *See* VAN ELSUWEGE, *supra* note 205, at 340.; *see* FRANCIS C. JACOBS, DIRECT EFFECT AND INTERPRETATION OF INTERNATIONAL AGREEMENTS IN THE RECENT CASE LAW OF THE EUROPEAN COURT OF JUSTICE, LAW AND PRACTICE OF EU EXTERNAL RELATIONS 13, 19-21 (Alan Dashwood & Marc Maresceau eds., 2008).

213. *Simutenkov*, 2005 E.C.R. I-2579; SAC Decision No.VAS-308/12, *supra* note 196.

214. *Id.*

215. *Van Gend*, 1963 E.C.R. 1.

216. *Kupferberg*, 1982 E.C.R. 3641.

217. *Van Gend*, 1963 E.C.R. 1; *Kupferberg*, 1982 E.C.R. 3641.

218. Agreement on Partnership and Cooperation, *supra* note 203.

219. SAC decision No.VAS-5123/12, *supra* note 196.

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Russia.<sup>220</sup> Again, this consideration of reciprocity corresponds with ECJ jurisprudence on whether WTO law can be given direct effect in the domestic legal system.<sup>221</sup> Neither the reciprocity requirement nor the clarity of the specific rights conferred by the treaty represent criteria for direct application of international law as it has been discussed in Russian laws or past explanations of higher courts.<sup>222</sup> This appears to be a new line of reasoning surprisingly similar to that of the ECJ when dealing with WTO law.<sup>223</sup>

What is even more surprising is that the SAC did not stop its analysis with applicability of the PSA in the patent fee cases.<sup>224</sup> Rather, the SAC went further and invoked the WTO law.<sup>225</sup> The court stated:

In addition, one of the fundamental principles of the WTO . . . is a prohibition of discrimination, which follows from the provisions of the GATT 1947 (preamble and paragraph 1 Article 3), and, in relation to intellectual property, from the TRIPS agreement, adopted in 1994 during the Uruguay Round of the GATT. Article 3 of the TRIPS Agreement provides that the state should provide the citizens of other countries with the same level of rights in relation to the protection of intellectual property, which it provides to its own citizens.<sup>226</sup>

This may appear diametrically different from the ECJ's position in cases involving WTO agreements where the ECJ continually refused to directly apply WTO norms.<sup>227</sup> However, at closer examination, the position of the ECJ and the SAC may be not very different. First, at the time the SAC invoked WTO law it was clearly not binding for Russia, as Russia's accession to the WTO was not yet ratified.<sup>228</sup> This discussion of WTO law by the SAC may be seen more as a

220. *Id.*

221. *See e.g., Portugal*, 1999 E.C.R. ¶¶ 43-45; *see* Arcuri & Poli, *supra* note 20, at 3; Marco Bronckers, *The Effect of the WTO in European Court Litigation*, 40 *TEX. INT'L L.J.* 443, 444 (2005).

222. *See* Federal'nyi Zakon RF o Mezhdunarodnykh Dogovorakh Rossiiskoi ot 15 Iulya 1995 g. [Federal Law of the Russian Federation on International Treaties of the Russian Federation], *SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF]* [Russian Federation Collection of Legislation] Apr. 15, 1994] 1995, No.29, Item 2757.5; *see* Supreme Court Plenary Ruling No. 5, *supra* note 187.

223. *See supra* Part III.C.

224. *See* SAC Decision No.VAS-308/12, *supra* note 196; *see also* SAC Decision No.VAS-5123/12, *supra* note 196.

225. *See* SAC Decision No.VAS-308/12, *supra* note 196.

226. *Id.*

227. *See supra* Part III.A.

228. *Compare* SAC Decision No.VAS-308/12, *supra* note 196 *with* Federal'nyi Zakon RF o Ratifikatsii Protokola o Prisoedinenii Rossiiskoi Federatsii k Marrakeshkomy Soglasheniyu ob Uchrezhdenii Vsemirmoi Torgovoy Organizatsii ot 15 aprelya 1994 g. No. 126-FZ [Federal Law of the Russian Federation on Ratification of the Protocol of Accession of the Russian Federation to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994] *SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF]* [Russian Federation Collection of Legislation] 2012, No. 30, Item 4177. The SAC decision in this case was issued on Apr. 11, 2012, but Russia's protocol of accession to WTO came into force only on Aug. 22, 2012. *See supra* note 10.

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gesture indicating that Russia is willing to be bound by its WTO commitments, rather than a real basis for the decision in this case.<sup>229</sup> Second, invoking the WTO law in this case allowed the SAC to reveal one of the new tests for direct application of WTO law, which is similar to the test used by the ECJ in *Nakajima*.<sup>230</sup> At the time the SAC was deciding this case, the Russian government had already published a new version of the regulation on patent registration fees that was in compliance with Russia's WTO obligations and eliminated all discriminating fees.<sup>231</sup> The regulation was to take effect upon Russia's ratification of the WTO accession protocol.<sup>232</sup> The SAC referred to this regulation as evidence that the Russian government explicitly intended to implement its particular WTO obligation.<sup>233</sup> Just as the ECJ decided in *Nakajima*, the SAC reasoned that the WTO law was directly applicable because there was an explicit intent by the Russian government to implement a specific WTO obligation.<sup>234</sup>

It remains to be seen what importance this argument will play in future cases. It is probably too early to conclude that the WTO law will not have direct effect where there is no indication of direct intent by the government in regard to a particular WTO norm.<sup>235</sup> However, it is clear that in this case the court avoided discussing whether the WTO agreement was self-executing and whether it conferred specific rights on individuals.<sup>236</sup> Had this discussion taken place, the court would probably have found that Russia in fact adopted numerous new laws in the process of WTO accession negotiations in order to bring national law in compliance with its WTO obligations.<sup>237</sup> This could then be the end of the analysis because the Court could find that obligations of member states to amend national laws would "deem direct application of that treaty impossible."<sup>238</sup> Why then did the Court invoke the WTO law but avoided any discussion of whether it required adoption of domestic laws or conferred the rights on individuals?<sup>239</sup> Finding WTO law non-self-executing would completely divest Russian courts of the ability to directly apply any of the WTO law provisions.<sup>240</sup> However, the court appears to be eager to pronounce that it supports the principles of the WTO law

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229. SAC Decision No.VAS-308/12, *supra* note 196.

230. *See id.*; *see Nakajima*, 1991 E.C.R. I-2069.

231. Postanovlenie Pravitelstva Rossiiskoi Federatsii of Sept. 15, 2011, No 781[Regulation of the Government of the Russian Federation] SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 39, Item 5487.

232. *Id.*

233. SAC Decision No.VAS-308/12, *supra* note 196.

234. *Id.*

235. Press Release, SAC Dept. of Int'l L. and Cooperation, *supra* note 18.

236. *See generally* SAC Decision No.VAS-308/12, *supra* note 196.

237. *See* WTO Working Party Report, *supra* note 15.

238. *See* Supreme Court Plenary Ruling No. 5, *supra* note 187.

239. SAC Decision No.VAS-308/12, *supra* note 196.

240. *See supra* Part IV.A.

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and is ready to promote Russia's image as a compliant state.<sup>241</sup> Its initial rulings on the topic indicate that it is steering away from the U.S. approach of complete bar for direct application of WTO law.<sup>242</sup> Instead, it appears to be paving the way towards the model where the courts could analyze specific provisions of WTO law; they then could pick and choose which of them would be directly or indirectly applicable in Russia.<sup>243</sup> This model resembles the ECJ's, approach to WTO law—generally rejecting it direct application, but allowing for exceptions.<sup>244</sup>

### V. ADVANTAGES AND DISADVANTAGES OF GIVING DIRECT EFFECT TO WTO LAW IN RUSSIA

This Section discusses the policy considerations that Russia will have to address in deciding how to apply WTO law within its domestic legal order.

#### A. Disadvantages of Direct Effect

The dangers of giving direct effect to WTO law are extensively described in literature.<sup>245</sup> One of the major concerns includes lack of reciprocity.<sup>246</sup> The ECJ, in rejecting direct effect to WTO law on numerous occasions, stressed that none of the E.U.'s major trading partners<sup>247</sup> gave WTO law direct effect, and that giving direct effect unilaterally would be detrimental to the E.U.'s interests.<sup>248</sup> As A.G. Tesouro put it:

[I]n the absence of reciprocity, to recognize that the provisions in question have direct effect would place Community traders in a disadvantage compared with their foreign competitors. While the latter would be able to invoke provisions in their favour directly before the courts of the Member States, Community traders would be unable to do

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241. SAC Decision No.VAS-308/12, *supra* note 196.

242. *See supra* note 198-242 and accompanying text.

243. *See* Bronckers, *supra* note 29, at 406.

244. Professor Marco Bronckers has noted that European Courts apply the principle of “treaty-consistent interpretation” to WTO agreements, which allows them to interpret national regulations “as much as possible in conformity with WTO law” without giving it direct effect. *Id.*

245. *See, e.g.*, Arcuri & Poli, *supra* note 20, at 3-8; *see also supra* Part II.A. *See generally* Dunhoff, *supra* note 20.

246. *See supra* Part III.A.

247. The European Union's major trade partners include the United States and Japan. Directorate General for Trade. *Client and Supplier Countries of the EU27 in Merchandise Trade (value %) (2012, excluding intra-EU trade)*, EUROPEAN COMMISSION (May 12, 2013), [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_122530.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf).

248. *See supra* Part III.C.

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likewise in the States that refused to recognize that the provisions of the WTO agreement may have direct effect.<sup>249</sup>

The same concern would apply in the case of Russia.<sup>250</sup> If Russian courts would allow foreign businesses to bring suits based on direct application of WTO law and award damages in cases of Russia's incompliance with WTO rules, Russia would find itself compensating competitors of Russian businesses, thus giving them competitive advantage.<sup>251</sup> At the same time, Russian businesses would never be able to protect their interests against violations by other WTO member states in their domestic courts since they do not give direct effect to WTO law.<sup>252</sup> This would create an uneven playing field for Russian businesses.<sup>253</sup>

A second important consideration involves the nature of the WTO agreements and its Dispute Settlement System. This system is political in nature and accords considerable importance to negotiations between the governments.<sup>254</sup> Domestic courts could interfere in the settlement process by providing remedies inconsistent with those envisioned by the Russian government, potentially hindering the use of negotiated arrangements to remedy alleged violations within the WTO system.<sup>255</sup> Direct application would then cause the Russian government to have less bargaining power and flexibility than other WTO members in negotiating its policies and finding appropriate and mutually acceptable solutions.<sup>256</sup> Furthermore, WTO law might encroach upon the decision making power of the Russian state with regard to many Russian regulations and policies, thus, interfering with Russia's autonomy.<sup>257</sup>

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249. See Arcuri & Poli, *supra* note 20, at n.28 (citing AG Tesauro opinion in Case C-53/96, *Hermes Int'l v. FHT Mktg. Choice BV*, 1998 E.C.R. I-3603).

250. *Id.*

251. See *supra* Part III.A. It is also important to consider that WTO rulings, as opposed to domestic court rulings, are prospective in nature and do not award any compensation for past misconduct of the offending state. See ECKHOUT, *supra* note 137, at 305.

252. For example, the United States does not allow private lawsuits based on WTO law. See Barcelo, *supra* note 59, at 148-49.

253. See ECKHOUT, *supra* note 137, at 305.

254. See, e.g., *Portugal*, 1999 E.C.R. at ¶¶ 36-42.

255. See, e.g., *id.*

256. Schwartz and Sykes point to three aspects of the DSU which allow Member states to deviate from their commitments under the WTO: (1) provisions giving states a reasonable time to correct WTO-inconsistent problems, (2) provisions permitting compensation or the suspension of concessions instead of changing behavior, and (3) compensatory nature of sanctions for non-compliance. See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System* 15 (Law Sch. U. Chi. John M. Olin Law & Economics, Working Paper No. 143 (2d Series)), available at [http://www.law.uchicago.edu/files/files/143.AOS\\_wto\\_.pdf](http://www.law.uchicago.edu/files/files/143.AOS_wto_.pdf). If Russia was to give WTO law direct effect it would be more bound by this law than other WTO Member states. See generally *id.*

257. See Bronckers, *supra* note 29, at 405 (discussing similar concerns in the E.U.); see also JACKSON, *supra* note 67, at 70-76 (providing a more detailed discussion of sovereignty and policy concerns in the US); see also Paul G. Hare, *Russia and the World Trade Organization* 14 (Russian-European Centre for Economic Policy, Working Paper Series, July 2002), available at <http://www.recep.ru/phase4/en/rp/harewtoe.pdf> (noting that Russian population perceives WTO accession as "foreign interference in Russian economic policies"). See

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Finally, if WTO law is given direct effect, then the many hundreds of courts in the Russian court system would be involved in the process of application and interpretation of WTO law.<sup>258</sup> Because most Russian judges do not have experience in or knowledge of WTO law, these courts would likely produce a volume of inconsistent interpretations.<sup>259</sup> In addition, domestic courts would often be confronted with issues that had not yet been addressed by the WTO DSB.<sup>260</sup> For example, there are few cases addressing disputes on trade in services.<sup>261</sup> Cases such as these would require that domestic courts interpret WTO law ahead of the WTO DSB.<sup>262</sup>

These concerns cannot be disregarded.<sup>263</sup> Some observers and scholars argue that “the supposed benefits of giving domestic effect to WTO dispute reports are largely illusory, while the potential costs are substantial.”<sup>264</sup>

### B. Advantages of Direct Effect

Illusory or not, there are advantages to having WTO law directly enforceable in Russia by Russian courts. First, it is expected that Russia’s accession to the WTO will help improve business climates within the country and attract foreign

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generally Jackson, *supra* note 27.

258. In 2012, there were 2,198 district courts and 83 regional courts within the system of the courts of general jurisdiction. See A.V. Gusev, *Otchetnyy Doklad General’nogo Direktora Sudebnogo Departamenta pri Verkhovnom Sude Rossiyskoy Federatsii Guseva A.V. VIII Vserossiyskomu s’yezdu Sudey*, SOVET SUDEY RF, <http://www.ssrj.ru/page/9253/detail> (last visited Mar.11,2014). There are also 81 courts of the first instance, 20 appellate courts, 10 regional courts, and one Intellectual Property Court within the system of the arbitrazh courts. *Struktura Srbitrazhnoy Sistemy RF*, VYSSHIY ARBITRAZHNYIY SUD RF, <http://arbitr.ru/as/assys/struct> (last visited Mar.11,2014).

259. A few decisions of lower courts that addressed applicability of WTO law so far have pointed in different directions. Some courts decided that WTO law should be applied but came to the opposite conclusions while applying the same WTO norms. Other courts refused to apply WTO law concluding that relevant norms were not directly applicable because they required further domestic legislation. See e.g. *Postanovleniye FAS Moskovskogo Okruga ot 05.12.2013 N F05-15399/2013 po delu N A40-22353/2013* [Decision of the Federal Arbitrazh Circuit Court for Moscow Circuit N F05-15399/2013 in case N A40-22353/2013 of Dec. 5, 2013 (finding that increase of price on Apatite by the seller was justified in accordance with the new government regulation promulgated in order to comply with Russia’s WTO commitments and confirming reversal of the decision of the court of first instance which concluded that WTO law precluded such an increase); *Postanovleniye Suda po intellektual’nym pravam ot 06.09.2013 po delu N A41-24588/2012 “O zashchite iskluchitel’nykh prav ispolniteley i izgotoviteley fonogramm, vzysskaniy kompensatsiy”* [Decision of the Intellectual Property Court in case N A41-24588/2012 “About Exclusive Rights of Performers and Phonogram Producers, Award of Compensation” of Sept. 6, 2013] (finding that Russia’s WTO commitment to change its system of collective management of copyright and related rights to eliminate non-contractual management of these rights by collecting societies did not have direct effect). At this point there is no official source for WTO law in Russian language. See Press Release, SAC Dept. of Int’l L. and Cooperation, *supra* note 18.

260. See, e.g., *Disputes by Agreement*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A8#selected\\_agreement](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A8#selected_agreement).

261. To date there were only 23 cases which cited GATS in the request for consultations. See *id.*

262. See, e.g., *id.*

263. E.g., Dunoff, *supra* note 20, at 282.

264. *Id.*

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investment.<sup>265</sup> The Russian government has long stressed the need for Russia to make the transition from commodity-based to innovation-based development<sup>266</sup> by introducing targeted reforms.<sup>267</sup> Yet, Russia's business climate remains poor.<sup>268</sup> The World Bank reported that, while conditions have improved over the past few years, Russia remains among the lower-ranked countries for doing business—at number 120 out of 183 countries.<sup>269</sup> As was noted by many observers, failure by a state to establish a predictable rule-based system will halt investment and trade.<sup>270</sup> By becoming a WTO member, Russia has committed to bring its trade laws and practices into compliance with WTO rules.<sup>271</sup> Improving business climate and transparency, as required by the WTO, would not only help to promote trade and bring Russia much needed foreign investments, but would also benefit Russian businesses and the foreign investors.<sup>272</sup> The trade system promoted by the WTO is composed “mostly of individual economic operators” and therefore “[i]t is through improved conditions for these private operators that Members benefit from WTO disciplines.”<sup>273</sup>

Giving the courts a greater role in monitoring government actions and enforcing WTO rules that benefit private operators would help improve the business climate in Russia and would give a clear signal to investors that Russia is now a better place for business.<sup>274</sup> Giving direct effect to the WTO law within Russia would empower individuals to invoke WTO law in Russian courts to recover damages or to invalidate inconsistent domestic regulations.<sup>275</sup> These actions could serve as a vehicle to enhance compliance with WTO norms.<sup>276</sup>

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265. See Karel De Gucht, European Commissioner for Trade, *After WTO Accession: Reform and EU-Russia Trade Relations*, Address at the Seminar of the Alliance of Liberals and Democrats for Europe/ Brussels (Dec. 5, 2012), available at [http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc\\_150139.pdf](http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150139.pdf) (stating that a more predictable regulatory environment will help the many European companies who trade with, and have invested in Russia).

266. See Robert Bridge, *Putin Releases Manifesto for Economic Revival*, RT (Jan. 30, 2012, 6:49 PM), <http://rt.com/politics/putin-russia-new-economy-005/>.

267. Mario Cervantes & Daniel Malkin, *Russia's Innovation Gap*, OECD OBSERVER, [http://www.oecdobserver.org/news/archivestory.php/aid/554/Russia\\_92s\\_innovation\\_gap.html](http://www.oecdobserver.org/news/archivestory.php/aid/554/Russia_92s_innovation_gap.html). (last visited Jan. 20, 2014).

268. *Id.*

269. Stefan Wagstyl, *World Bank to Russia: Reform or Lose Full Benefits of WTO Membership*, FINANCIAL TIMES (Mar. 27, 2012, 3:56 PM), <http://blogs.ft.com/beyond-brics/2012/03/27/world-bank-to-russia-reform-or-lose-out-on-the-full-benefits-of-wto-membership/#axzz2HWLMtcCP>.

270. See, Stuart S. Malawer, *The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance*, VIRGINIA LAWYER 15 (Apr. 2003), available at <http://www.vsb.org/publications/vlawyer/apr03/malawer.pdf>.

271. See WTO Working Party Report, *supra* note 15 (discussing the changes and amendments to Russian law in compliance with WTO obligations).

272. Alexey Portansky, *Rossia Dolzhna Stat Aktivnym Igrom v VTO*, PROMROS (Dec. 2012), <http://www.promros.ru/magazine/2012/dec/aleksej-portanskij-rossiya-dolzha-stat-aktivnym-igrom-v-vto.phtml>.

273. Appellate Body Report, *supra* note 26, at ¶ 7.77; see Errico, *supra* note 144, at 200-01.

274. Press Release, SAC Dept. of Int'l L. and Cooperation, *supra* note 18.

275. *Contra* Dunoff, *supra* note 20, at 281;.

276. *Contra* Dunoff, *supra* note 20, at 281.

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Furthermore, it could advance predictability and certainty of business climate in Russia.<sup>277</sup>

Giving WTO law direct effect would give Russian national courts a greater role in the system of government.<sup>278</sup> Although such reallocation of power to courts with regard to WTO law is often viewed as disadvantageous,<sup>279</sup> it could have some positive effect in Russia by injecting a body of WTO law and WTO DSB cases and doctrines directly into the Russian courts.<sup>280</sup> This might bring a new framework and more sophisticated tests for resolution of business disputes by Russian courts.<sup>281</sup> On the other hand, Russian courts have been repeatedly accused of “telephone justice” and corruption.<sup>282</sup> The high-stakes WTO-related trade disputes could push them further into overtly political or policy-based decision-making mode by making them more susceptible to the pressure from the government.<sup>283</sup> This would be particularly damaging to Russia’s reputation if resolution of WTO law based disputes in Russia’s national courts comes to be seen as politically motivated and unjust. Various WTO member states, such as the United States, would most certainly use Russian courts as a means of bringing Russia into compliance.<sup>284</sup> There are other, more benign, options for Russia to uphold WTO principles and norms and improve the quality of its domestic courts without pronouncing direct effect of WTO law.<sup>285</sup> As discussed earlier, the ECJ’s approach to WTO law would probably work best for Russia.<sup>286</sup> In addition, Russia also should consider the U.S. model of employing a vigorous political process for compliance with WTO law.<sup>287</sup>

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277. *See id.*; see Alberto Alemanno, *Private Parties and WTO Dispute Settlement System*, Cornell Law School Inter-University Graduate Student Conference Papers, CORNELL LAW SCHOOL (Apr. 3, 2004), [http://scholarship.law.cornell.edu/lps\\_clacp/1](http://scholarship.law.cornell.edu/lps_clacp/1).

278. Bronckers, *supra* note 20, at 240.

279. For discussion of the U.S. position as to the allocation of power between the branches of government in regard to WTO law see *supra* Part III.B.3. For discussion of the ECJ approach see *supra* Part III.C.

280. *See, e.g.*, WTO Working Party Report, *supra* note 15.

281. *See* Malawer, *supra* note 270, at 15-16.

282. *See, e.g.*, Kathryn Hendley, ‘Telephone Law’ and the ‘Rule of Law:’ *The Russian Case*, 1 HJRL 241, 241 (2009), available at [https://media.law.wisc.edu/m/nmytc/telephone\\_law\\_and\\_rol.pdf](https://media.law.wisc.edu/m/nmytc/telephone_law_and_rol.pdf).

283. Bronckers, *supra* note 20, at 240.

284. The United States law repealing Jackson-Vanik and extending permanent normal trade relations (“PNTR”) to Russia also serves as a tool to monitor Russia’s compliance with U.S. conditions. *See* Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, 19 U.S.C. § 2101 (2012); U.S. Senator Orrin Hatch, Speech on the Senate floor, December 5, 2012. It requires inter alia that the U.S. Trade Representative report annually on Russia’s compliance with its WTO intellectual property rights obligations and that the Representative and the Secretary of State report to Congress annually on their efforts to promote the rule of law and U.S. investment in Russia. It also requires that the Secretary of Commerce assist U.S. business to battle corruption in Russia and “to devote a phone hotline and secure website to allow U.S. citizens and business to report on corruption, bribery and attempted bribery in Russia and to request the assistance of the U.S. Government if needed.” *See id.*

285. *See supra* Part III.C.

286. *See supra* Part III.C.

287. *See supra* Part III.B.

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## VI. CONCLUSION

The unique structure and distinct dispute resolution system of the WTO involves diplomatic methods and applies to member states rather than to particular individuals or organizations.<sup>288</sup> This makes it difficult to apply WTO law directly within a domestic legal system without causing a disturbance in the delicate balance of trade policies and uniformity of the WTO law, or without creating an unequal playing field for businesses in the competing states.<sup>289</sup>

After joining the WTO, Russia is facing a dilemma with regard to the applicability and effects of the WTO law within its legal system.<sup>290</sup> The Russian Constitution generally prescribes that international treaties become an integral part of the Russian legal system.<sup>291</sup> However, whereas the other WTO members do not give WTO law direct effect, and while the WTO itself does not require direct application of its law by the signatory states, such unconditional and unilateral direct application of WTO law in Russia is not justified.<sup>292</sup> To address these concerns, Russian courts should further develop already existing legal mechanisms that would bar blanket unilateral direct application of WTO law in Russia.<sup>293</sup>

Although direct application of WTO values and principles would have certain advantages for Russia that could prove beneficial for the development of the Russian legal system, and for improvement of its business climate and image, Russia should be mindful of the real disadvantages that come with direct application of WTO law.<sup>294</sup> Russia's higher courts should proceed very carefully and draw from the experience of older WTO members as they develop mechanisms and tests for sorting out how and when to apply WTO law.<sup>295</sup>

The U.S. and the E.U. models represent two different approaches toward domestic application of WTO law.<sup>296</sup> While the U.S. dualistic approach almost completely precludes any direct application of WTO law, and relies almost exclusively on the political process for implementation of the WTO obligations within the United States, the E.U. model functions slightly differently.<sup>297</sup> Although it generally denies direct effect of WTO law, the E.U. model allows the

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288. *See supra* Part II.

289. Jackson, *supra* note 27, at 312; Barcelo, *supra* note 59, at 148-49.

290. *See supra* Parts IV.B, V.

291. *See supra* Part IV.A.

292. *See* Jackson, *supra* note 27, at 338-40; *see* Barceló, *supra* note 59, at 148-49. As noted by Jacques Bourgeois at least one proposal was made during Uruguay Round to require members to give WTO law direct effect but the proposal was not supported by major negotiating parties and was dropped. *See* Bourgeois, *supra* note 20, at 109.

293. *See supra* Part IV.A.

294. *See supra* Part V.

295. *See supra* Parts IV.B-C.

296. *See supra* Parts III.A-C.

297. *See supra* Parts III.B-C.

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courts to review specific WTO norms and decide whether an exception for direct effect of WTO law could be applicable.<sup>298</sup>

The experience of the ECJ could be particularly helpful as the European Union is Russia's main trade partner and Russia shares a monistic approach and civil law tradition with many of the E.U. members.<sup>299</sup> Russia should consider following the ECJ approach by denying direct effect to the WTO norms with some exceptions, such as ECJ's *Nakajima* exception.<sup>300</sup> On the other hand, Russia should also borrow from the U.S. experience in developing a more robust political process for implementation of WTO obligations and the protection of Russian business interests.<sup>301</sup> This approach would allow Russia to reap the benefits of WTO law within the domestic system without opening itself to disadvantages of giving it full direct effect.<sup>302</sup>

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298. *See supra* Part III.C.

299. "Russia is the third trading partner of the E.U. and the E.U. is the first trading partner of Russia." *Regions and Countries: Russia*, *supra* note 206.

300. *See supra* Part IV.B.

301. *See supra* Part III.B.

302. *See supra* Part III.B.