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A Comparison of WTO and CIT/CAFC Jurisprudence in Review of U.S. Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings

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This Article addresses the differences between decisions by World Trade Organization (WTO) panels and the Appellate Body, on the one hand, and, on the other, by the United States Court of International Trade (CIT) and the United States Court of Appeals for the Federal Circuit (CAFC or Federal Circuit) in appeals involving issues of antidumping and subsidies/countervailing measures law. More specifically, it explores differences of consequence between the way in which WTO panelists and Appellate Body members interpret and apply the provisions of the governing WTO Antidumping and Subsidies Countervailing Measures Agreements and the way CIT and Federal Circuit judges interpret and apply substantially similar provisions of U.S. antidumping and countervailing duty law that purport to implement those agreements. To the extent there are differences, the question becomes whether there is any room or reason for the twain to meet.

I. INTRODUCTION 261
II. *BED LINEN—ZEROING*.. 263
III. *CHINA—CVD*.. 269
IV. CONCLUSION 272

I. INTRODUCTION

The way in which World Trade Organization (WTO) panels and the Appellate Body interpret the Antidumping Agreement (AD Agreement) and the Subsidies and Countervailing Measures Agreement (SCM Agreement) is, I submit, so vastly different from judicial review in the United States that even if U.S. law were not explicit in stating that no provision of any WTO agreement that is inconsistent with U.S. law shall

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have effect,[1] there still would be very good reason for U.S. courts to disregard WTO dispute settlement decisions. The better course by far would be for the WTO to take a leaf from U.S. jurisprudence.

As a threshold matter, the standard of judicial review in the WTO accords little or no deference to discretion reasonably exercised by administrators of national antidumping (AD) and countervailing duty (CVD) laws.[2] U.S. courts could not give weight to WTO decisions without sacrificing a standard of review that is required by statute and memorialized by decades of controlling precedent.[3] But beyond this core standard of review question, the mindset with which WTO panelists and Appellate Body members approach judicial review is too far removed from the way in which U.S. judges approach their cases to permit WTO dispute settlement decisions to influence United States Court of International Trade (CIT) or United States Court of Appeals for the Federal Circuit (CAFC or Federal Circuit) decision making. I have already written critically about the propensity of WTO panels and the Appellate Body to legislate their preferred policy outcomes, at least in the trade remedy area.[4] Since then, I have gone through the interview process as a U.S. nominee for a seat on the Appellate Body (a friend and fellow private practitioner, Tom Graham, was deservedly appointed). The Appellate Body nomination experience convinced me that the WTO dispute settlement process is less a rigorous exercise in the neutral application of the text of WTO agreements than it is an exercise in arriving at results that meet the prevailing sense of "trade policy correctness."

The reasons for this, in my view, include (1) the backgrounds of WTO panel and Appellate Body members, (2) their dependency on the WTO or Appellate Body Secretariat for support (including legal research and analysis), (3) a difficult-to-understand sense of institutional fragility

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1. 19 U.S.C. § 3512(a)(1) (2006); *see also id.* § 2504(a); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348-49 (Fed. Cir. 2005).

2. *See* Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶¶ 93-94, WT/DS264/AB/RW (Aug. 15, 2006).

3. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("[C]onsiderable weight should be accorded [by courts] to an executive department's construction of a statutory scheme it is entrusted to administer. . . . [T]he principle of deference to administrative interpretations 'has been consistently followed by [the United States Supreme] Court.'" (footnote omitted)).

4. The discussion in this Article on the WTO zeroing decisions draws extensively from a previously published article, John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113 (2003).

that discourages dissent,[5] (4) a belief rooted in civil law tradition that law must be unambiguous and yield a single correct interpretation, (5) a predisposition (also, I believe, rooted in civil law tradition) to adjudicate disputes with broad pronouncements on the meaning of the governing agreement rather than decisions that are based narrowly on the specific facts under review, and (6) a sense of diplomatic gentility that values civility of discourse over hard-edged argument. On this last point, what one might call the spirited give-and-take of oral argument at the CIT, both from the bench and between counsel, would be unthinkable in a WTO context.

I have chosen two WTO Appellate Body Reports, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India* (*Bed Linen—Zeroing*)[6] and *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China* (*China—CVD*),[7] to illustrate these various points. Both focus on the United States Department of Commerce (Commerce) side of AD and CVD proceedings. They provide a clear contrast between the analysis behind the WTO decisions and how the CIT and/or the Federal Circuit have analyzed or would analyze substantially the same issue under U.S. law.[8]

II. *BED LINEN—ZEROING*

The CIT and the Federal Circuit have consistently held that the plain language of the AD statute gives Commerce the discretion to "zero" negative dumping margins if it chooses to do so.[9] The WTO, by contrast, has decided in a series of cases that zeroing is prohibited by the AD Agreement.[10] *Bed Linen—Zeroing* was the first in that series. After losing successive zeroing cases involving both investigations and

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5. *See* Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement: Is There a "Unanimity" Problem?* (Berkeley Elec. Press Legal Series, Working Paper No. 1286, 2006).

6. Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001).

7. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

8. 19 U.S.C. §§ 1671-1671(h) (2006) (U.S. CVD statute); *id.* §§ 1673-1673(h) (U.S. AD statute).

9. *See, e.g.*, Grobest & I-Mei Indus. (Viet.) Co. v. United States, 853 F. Supp. 2d 1352, 1365 (Ct. Int'l Trade 2012); U.S. Steel Corp. v. United States, 621 F.3d 1351, 1361-62 (Fed. Cir. 2010).

10. *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter AD Agreement].

administrative reviews, Commerce has now complied with these decisions by abandoning zeroing (at least outside the context of targeted dumping).[11]

Because the AD statute does not direct Commerce to treat transactions with negative AD margins in any particular way and because U.S. courts have held that its zeroing methodology is a reasonable interpretation of the AD statute, the CIT and the Federal Circuit have deferred to Commerce's expertise, as required by the United States Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[12] In *Corus Staal BV v. Department of Commerce*, the Federal Circuit rejected out of hand Corus' argument that Commerce "unreasonably refused to interpret the statute in a manner consistent with U.S. international obligations under the *Charming Betsy* doctrine of claim construction, which states that courts should interpret U.S. law, whenever possible, in a manner consistent with international obligations."[13]

It is difficult to quarrel with the Federal Circuit's decision. As noted, the AD statute is silent on how to factor transactions with negative dumping margins into a dumping margin calculation, and therefore the Federal Circuit properly deferred to Commerce on the question.[14] As to the *Charming Betsy* canon, the Federal Circuit correctly gave "no deference to the cited WTO cases," noting that (1) WTO dispute settlement decisions do not bind the United States, (2) by statute, no provisions of any WTO agreement that are inconsistent with U.S. law "shall have effect," and (3) "if U.S. statutory provisions are inconsistent with [a WTO dispute settlement decision], it is strictly a matter for Congress."[15]

The Federal Circuit, therefore, had no cause to explore the reasoning that led the Appellate Body to rule that Commerce's zeroing policies were inconsistent with obligations of the United States under the AD Agreement[16]—but had it done so, it might well have been troubled by what it would have found. The Appellate Body dismissed the idea that the text of the AD Agreement can admit to more than one possible

11. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 77 Fed. Reg. 8101, 8102 (Dep't of Commerce Feb. 14, 2012) (final modification).

12. 467 U.S. 837, 843-44 (1984).

13. 395 F.3d 1343, 1347-48 (Fed. Cir. 2005) (citation omitted).

14. *Id.*

15. *Id.* at 1348-49 (citation omitted) (internal quotation marks omitted).

16. *Id.* at 1349.

interpretation or that it allows any room for national agency discretion.[17] In doing so, it read out of the AD Agreement a provision on the standard of WTO review of AD Agreement complaints that the U.S. negotiators had insisted on because, in their view, it required deference to the reasonable exercise of agency discretion.[18]

Article 17.6(i) of the AD Agreement states, "If the establishment of the facts was proper and the evaluation was unbiased and objective, even though [a WTO] panel might have reached a different conclusion, the evaluation shall not be overturned."[19] Article 17.6(ii) adds that panels

> shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[20]

In the hands of WTO panels and the Appellate Body, however, article 17.6 has become a dead letter because they have concluded that "customary rules of interpretation of public international law" never permit more than one—i.e., their own—"permissible interpretation."[21]

The conclusion that the text of the AD Agreement is clear on the zeroing issue, i.e., that it does not "admit[] of more than one permissible interpretation" and that its plain meaning precludes a dumping margin calculation that zeroes negative margins,[22] is difficult to defend. Article 2.4.2, the relevant provision, states that dumping margins are to be calculated "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions."[23] The key to interpreting this clause is the meaning of the term "comparable export transactions." In *Bed Linen—Zeroing*, the Appellate Body ruled that "[t]he ordinary meaning of . . . 'comparable' is 'able to be compared,'" and, therefore, article 2.4.2 requires national

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17. *See* Appellate Body Report, *supra* note 6, ¶¶ 64-65.

18. In the Statement of Administrative Action submitted to Congress along with the Uruguay Round Agreements Act, the Administration explained, "Article 17.6 contains a special standard of review, which is analogous to the deferential standard supplied by U.S. courts in reviewing actions by Commerce and the Commission." H.R. DOC. NO. 103-316, at 818 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4159.

19. AD Agreement, *supra* note 10, art. 17.6(i).

20. *Id.* art. 17(6)(ii).

21. *See* Edwin Vermulst & Folkert Graafsma, *WTO Dispute Settlement with Respect to Trade Contingency Measures*, 35 J. WORLD TRADE 209, 211-12 (2001).

22. Appellate Body Report, *supra* note 6, ¶¶ 63, 66 (quoting AD Agreement, *supra* note 10, art. 17.6(ii) (internal quotation marks omitted)).

23. AD Agreement, *supra* note 10, art. 2.4.2 (emphasis added).

authorities to calculate dumping margins by comparing the weighted average export price of all sales subject to investigation to the weighted average normal value of those sales.[24]

The Appellate Body's habit of finding a single ordinary meaning of a word that has several dictionary definitions should be seen for what it is—a vehicle that can easily be, and is, used and abused to interpret agreements to suit the Appellate Body's policy purposes. The idea that the ordinary meaning of the word "comparable" as used in the AD Agreement is the equivalent of "able to be compared" is, frankly, ludicrous. Any two things can always be compared, if only to point out their differences. "Comparable" also means "[a]dmitting of comparison with another," as well as "equivalent" and "similar."[25] These meanings of "comparable" are a far better fit for an agreement in which export price and normal value comparisons are always based on the similarity of products. Had the negotiators of the AD Agreement been able to agree on language requiring dumping margin calculations based on the average export price of all transactions under investigation and the average normal value of those transactions, it would have been a simple matter to say so. The choice of a different formulation that expressly contemplates a focus on the comparability of the different export transactions within the universe of products under investigation cannot properly be written out of the AD Agreement by claiming clarity in a text where it does not exist.

Be that as it may, the combined weight of repeated WTO decisions that zeroing is impermissible under the AD Agreement has settled the zeroing issue.[26] What matters now are the broader implications of *Bed Linen—Zeroing* and the succeeding WTO zeroing decisions. Specifically, in future cases, should the United States refuse to comply with bad Appellate Body decisions? The WTO Agreements are, after all, meant to give the parties to them a balance (or "reciprocity") of benefits.[27] The United States is not bound to abide by WTO dispute settlement decisions; if we choose not to comply, our trading partners are

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24. Appellate Body Report, *supra* note 6, ¶¶ 56-57 (footnote omitted).

25. *Comparable Definition*, THE AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, http://ahdictionary.com/word/search.html?q=comparable&submit.x=24&submit.y=28 (last visited Feb. 13, 2013).

26. *See* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 190, WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, *supra* note 2, ¶ 147.

27. Kyle Bagwell & Robert W. Staiger, *The WTO: Theory and Practice* 19-20 (World Trade Org., Econ. Research & Statistics Div., Staff Working Paper 2009), http://www.wto.org/english/res_e/reser_e/ersd200911_e.pdf.

free to take retaliatory action.[28] There is no shame in inviting them to do so; to the contrary, it is the way the WTO system is meant to work. Bad decisions that distort the balance of the WTO benefits that U.S. negotiators reasonably expected ought not be passively accepted, especially where the reasons for the decision are systematic in nature and, therefore, likely to be repeated. In fact, the problems within the *Bed Linen—Zeroing* decision have been at play in other trade remedy decisions. Without a sharp U.S. reaction, they will continue to shape future WTO dispute settlement decisions in this area.

The problems begin with the backgrounds of WTO panelists and Appellate Body members who are, more often than not, drawn from a pool of former diplomats, government officials, and academics who are not used to the rigorous, case-specific analysis of issues of fact and trade law that is the mark of good judicial decision making. They are, moreover, decision makers for whom judicial restraint and deference to national authorities have never been guiding principles. To make matters worse, Appellate Body members depend heavily on an Appellate Body Secretariat that, I suspect, thinks of itself as a guardian of free trade orthodoxies. In fact, one of the biggest surprises to me during the Appellate Body vetting process was how dependent the Appellate Body members are on institutional staff to prepare briefing materials, legal research, and drafts of opinions.

Because of the way in which Appellate Body members are paid, few, if any, live in Geneva. Instead, they fly into Geneva to meet and review issues, hold the hearing, discuss the case with their Appellate Body colleagues, and finalize the decision. They do much of their prep work at home, often thousands of miles away, relying on papers summarizing the facts, legal issues, and arguments of the parties prepared in their absence by the Secretariat, which then sits in, and speaks out at, Appellate Body deliberations.[29] It is difficult, if not impossible, for an Appellate Body member based in, say, Tokyo, Johannesburg, or Washington D.C. to shape the materials prepared for the Appellate Body's deliberations or, when those deliberations occur, trump the Secretariat's claim to knowledge of the facts and law of the case.

The other revelation from seeing the inside of the WTO dispute resolution process is how uneven the quality and work habits of the

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28. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

29. *Id.* arts. 17.7, 27.1.

panelists and Appellate Body members can be. Although there are seven Appellate Body members, each decision is made by a "Division" composed of three of the seven, randomly selected.[30] When weaker members are on a Division, it means the Appellate Body decisions are often shaped by the Appellate Body Secretariat along with a single energetic member. In principle a "bad decision"—for example, the narrow definition of a "public body" in *China—CVD*—should be easily corrected because there is no stare decisis under WTO law.[31] As a practical matter, however, the Appellate Body is fond of citing its prior decisions as if they are binding precedent.[32]

The problem of an uneven distribution of energy and ability among Appellate Body members is compounded by a practice that discourages dissent. WTO panels and the Appellate Body place great weight on decision making by consensus.[33] The stated reason dissent has been discouraged is to protect the institution (although from what is unclear),[34] but for an institution that regularly cites to its prior decisions as authority, it is a disservice to convey a public sense that there is only one side to issues that are often difficult and contentious.

The institutional emphasis on decision making by consensus came through loud and clear from my meetings in Geneva with the various delegations that weigh in on the Appellate Body appointment process. In making my rounds, I was asked repeatedly various iterations of the "do you play well with others" question. This does not necessarily mean that deliberations among Appellate Body members sacrifice precision and force of expression for gentility, but I suspect that is, in fact, often the case.

Returning to the string of WTO zeroing decisions, the appeal in the first WTO zeroing decision was heard by three Appellate Body members: James Bacchus of the United States (who chaired the Division), Florentino Feliciano of the Philippines, and Georges-Michel Abi-Saab of Egypt.[35] Each of them had distinguished bureaucratic,

30. *Id.* art. 17.1.

31. *Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm (last visited Feb. 13, 2013).

32. Even a casual read of a sample of Appellate Body decisions shows how frequently prior decisions are cited as controlling precedent.

33. Appellate Body, *Working Procedures for Appellate Review*, ¶ 3.2, WT/AB/WP/6 (Aug. 16, 2010).

34. Lewis, *supra* note 5, at 12-13.

35. *Appellate Body Members*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Feb. 4, 2013); Appellate Body Report, *supra* note 6.

political, and/or public international law credentials, but not one of them could claim real AD law expertise. Add to the mix an antipathy to AD measures within the Appellate Body Secretariat and, more generally, in "right-thinking" trade policy circles, and it becomes much easier to understand why the Appellate Body decided the *Bed Linen—Zeroing* case the way it did.

If *Bed Linen—Zeroing* and its progeny were isolated instances of decisions driven by trade policy preference rather than an evenhanded interpretation of the text of the AD Agreement, it would not much matter. However, other decisions, like the Appellate Body's ruling that the Byrd Amendment violated the AD Agreement,[36] suffer from exactly the same failings. More problematic still is a recent decision challenging Commerce's treatment of subsidies given by "public bodies" in China.[37]

III. *CHINA—CVD*

The Appellate Body,[38] the CIT,[39] and the Federal Circuit[40] have all addressed the basic question of whether Commerce can legitimately impose CVDs on imports of subsidized goods from China and, if so, under what conditions. In my opinion, the CIT (Judge Restani) and the Appellate Body got the applicability of CVD law to China and other nonmarket economy countries right, while the Federal Circuit got it wrong. This, however, is not the China subsidy issue I want to explore. Rather, I want to address the Appellate Body's decision in *China—CVD* to define narrowly the term "public body" in the SCM Agreement.[41]

Article 1.1(a)(1) of the SCM Agreement states that "a subsidy shall be deemed to exist if . . . there is a financial contribution by a government or any public body" that confers a benefit on the recipient.[42] Among the financial contributions contemplated by the SCM Agreement is the provision of goods or services, other than general infrastructure, or the purchase of goods at preferential prices.[43] The broader the definition of public body, the broader the reach of countervailing measures under

36. Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶¶ 2 & n.2, 318, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).
37. *See* Appellate Body Report, *supra* note 7.
38. *Id.* ¶ 591.
39. *See* GPX Int'l Tire Corp. v. United States, 645 F. Supp. 2d 1231, 1251 (Ct. Int'l Trade 2009).
40. *See* GPX Int'l Tire Corp. v. United States, 666 F.3d 732, 745 (Fed. Cir. 2011).
41. Appellate Body Report, *supra* note 7, ¶ 317.
42. Agreement on Subsidies and Countervailing Measures art. 1.1(a)(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].
43. *Id.* art. 1.1(a)(1)(iii).

the SCM Agreement. The panel decision from which China appealed found that government control of an enterprise established through majority ownership is sufficient to make that enterprise a public body.[44] There is a legitimate question about the sufficiency of government control of an enterprise through majority ownership *in and of itself* to make an enterprise a public body. The WTO panel decision, which upheld Commerce on this basis,[45] could easily have been overturned by an Appellate Body ruling that Commerce's decision was inconsistent with the SCM Agreement on its specific facts.

That, however, is *not* what the Appellate Body did. Instead, the Appellate Body reversed the panel and found Commerce's decision inconsistent with the SCM Agreement on much broader grounds.[46] The Appellate Body ruled that an entity controlled by government is a public body only if it "*is vested with authority to exercise governmental functions*."[47] Why would an Appellate Body Division choose to pronounce on the meaning of the term public body in so sweeping a way when a much narrower decision could have resolved the specific complaint before it? The answer must be that the Appellate Body Division that decided *China—CVD* did not feel the least bit constrained to decide cases narrowly on their specific facts.

The reasoning behind the Appellate Body decision is almost comically contorted. The decision relies on an interpretation of the text of article 1.1(a)(1) that incorporates a concept of public international law that would be entirely beside the point (1) if, as the United States argued, defining the term "government" in the SCM Agreement as including a public body were simply a matter of drafting convenience or (2) if the Appellate Body had a better grasp of the problems associated with the effort to graft onto an international trade agreement concepts taken from areas of public international law that have nothing to do with international trade.

The implications of the Appellate Body's ruling are sweeping. A U.S. industry injured by imports from China that benefits from raw materials provided by one state enterprise to another at preferential prices would have to show that the provision of the inputs is an exercise of a governmental function.[48] How? What is the proof? It is impossible to

44. Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 8.94, WT/DS379/R (Oct. 22, 2010).
45. *Id.* ¶ 8.135.
46. Appellate Body Report, *supra* note 7, ¶ 591.
47. *Id.* ¶ 318 (emphasis added).
48. *See id.* ¶¶ 317-318.

reconcile the Appellate Body's decision with the core purpose of the SCM Agreement, i.e., to discipline the use of trade distorting preferential treatment for selected enterprises.

The force behind the Appellate Body decision to limit the definition of a public body for purposes of the SCM Agreement and national CVD laws was Peter Van den Bossche, a Belgian academic nominated to the Appellate Body by the European Union who had previously served as Acting Director of the WTO Appellate Body Secretariat.[49] With him on the Appellate Body Division were Ricardo Ramírez-Hernández and Lilia R. Bautista.[50] My own guess is that the Appellate Body Division did what it did because Van den Bossche, with Appellate Body Secretariat support, has an academic interest in injecting concepts taken from public international law into WTO agreements *whether or not they lend themselves to practical application in laws specifically meant to regulate international trade*. I cannot imagine that a serious U.S. court would be comfortable deciding cases with the same sort of sweeping pronouncements on the meaning of the governing statute. This is yet another reason for the CIT and the Federal Circuit to ignore WTO dispute settlement decisions in its own jurisprudence.

Unlike the zeroing cases, the Appellate Body's decision on the meaning of public body in the SCM Agreement is a single decision by a single three-member Appellate Body Division that does not yet have close to enough weight to become binding precedent. This part of the *China—CVD* decision can be, and should be, disregarded by the next Appellate Body Division that tackles the same issue. There is, however, a real question as to whether the Appellate Body's emphasis on consensus and collegiality and dislike of dissonance and dissent will overrule a bad decision, if only because letting it stand is the path of least resistance. A CIT judge is perfectly willing to disagree with a colleague, and the reach of bad Federal Circuit decisions is easily limited in subsequent cases.[51] By contrast, whether there is an equivalent willingness by the Appellate Body to limit the reach of its own bad decisions remains very much an open question.

49. *Appellate Body Members: Biographical Notes*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#vandenbossche (last visited Feb. 13, 2013).

50. Appellate Body Report, *supra* note 7.

51. As the sequence of decisions in *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), *Nippon Steel Corp. v. International Trade Commission*, 345 F.3d 1379 (Fed. Cir. 2003), and *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008) shows.

IV. CONCLUSION

If this Article is harsh in its assessment of WTO dispute settlement decisions in the area of trade remedies, it is by design. There is a tendency among international trade lawyers and trade policy professionals alike to applaud a system of international trade law adjudication because any system of international law that functions must be a very good thing. That sets the bar far too low. My hope (but not expectation) is that over time, WTO panels and the Appellate Body will come to realize that their penchant for legislating WTO law from the bench does more harm than good.

The great benefit of an open international trading system comes not from this or that dispute settlement adjudication, but rather from a set of rules that is reflexively followed in thousands upon thousands of transactions and by national governments in promulgating routine regulations. The lessons of decisions like *Bed Linen—Zeroing* and *China—CVD* are that (1) negotiators can no longer accept ambiguity in future trade agreements, thus greatly complicating the task of closing future agreements (deliberate ambiguity is mother's milk to the trade negotiating process) and that (2) countries that rely heavily on trade remedies as part of their trade policy, rather than opaque forms of administrative guidance, have little leverage to exact concessions from their trading partners. The United States, with its enormous structural current account deficit, must press others for concessions. Our problem is one of leverage. As things now stand, why shouldn't the Chinas of the world simply rely on WTO dispute settlement to achieve their trade policy objectives?