Between a Rock and a Hard Place: The Role of the U.S. Courts in Resolving Conflicts Between U.S. Law and WTO Dispute Settlement Reports in the Antidumping and Countervailing Duty Area

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I. INTRODUCTION

In April 1994, the Uruguay Round Agreements, which were designed to establish a more comprehensive regime to govern international trade among participants of these multilateral trade negotiations, were adopted by the United States and more than one hundred other nations.[1] As the text of the Uruguay Round Agreements indicated, they were "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in

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1. *See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 14.

international trade relations."[2] Among their other important achievements, the Uruguay Round Agreements established the World Trade Organization (WTO), which was designed to be "a permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated in the Uruguay Round."[3]

One important component of the Uruguay Round negotiations was the adoption of two agreements addressing the issuance of antidumping (AD) and countervailing duty (CVD) orders. These two agreements—the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement)—were intended to establish a more comprehensive and transparent set of rules governing the manner in which WTO members conducted AD and CVD investigations.[4] From the United States' point of view, the AD and SCM Agreements were beneficial components of the Uruguay Round Agreements because they "preserve[d] the ability of U.S. industries to obtain meaningful relief from [unfairly traded] imports into the U.S. market and ensure[d] U.S. exporters fair treatment in foreign antidumping [and countervailing duty] investigations."[5]

Another important component of the Uruguay Round Agreements was the establishment of a dispute settlement mechanism.[6] This mechanism was created in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[7] Among other things, the DSU authorized the establishment of dispute resolution panels to resolve

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2. Marrakesh Agreement Establishing the World Trade Organization pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154. Additionally, the Uruguay Round Agreements were intended "to develop an integrated, more viable and durable multilateral trading system" designed to "rais[e] standards of living, ensur[e] full employment and a large and steadily growing volume of real income and effective demand, and expand[] the production of and trade in goods and services." *Id.*

3. H.R. DOC. NO. 103-316, at 659 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4042; *see also* Marrakesh Agreement Establishing the World Trade Organization, *supra* note 2.

4. *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]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

5. H.R. DOC. NO. 103-316, at 807.

6. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]. According to the Statement of Administrative Action, the DSU provides the United States with a more "effective process to enforce U.S. rights" than existed under the General Agreement on Tariffs and Trade. H.R. DOC. NO. 103-316, at 1008.

7. DSU, *supra* note 6, art. 3.

disputes between WTO members arising under the Uruguay Round Agreements.[8] It also created the WTO's Appellate Body, which was given authority to act as an appellate review board for decisions issued by the panels.[9] Since the entry into force of the Uruguay Round Agreements, the WTO has issued a significant and growing number of dispute resolution reports addressing the meaning, scope, and implementation of the Uruguay Round Agreements, including the AD and SCM Agreements.[10]

Over the years, as the number of WTO reports in the AD and CVD arena has grown, commentators have addressed the advisability of U.S. courts attempting to reconcile their decisions with decisions of WTO panels and the Appellate Body when reviewing the AD and CVD determinations of the United States International Trade Commission (Commission) and the United States Department of Commerce (Commerce). Generally, commentators have expressed a range of views on this issue. Some commentators have suggested that, to the extent permitted under U.S. law, U.S. courts should reconcile their decisions with WTO decisions in order to ensure the consistency of the results between the two systems.[11] Other commentators have rejected this approach, arguing that WTO reports should not be given any weight by U.S. courts.[12] This Article argues that there are sound statutory and policy reasons for why U.S. courts should not give weight to adverse WTO reports when reviewing the AD and CVD determinations of the Commission and of Commerce.

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8. *Id.* arts. 6-8, 11.

9. *Id.* art. 17.

10. *See* Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001) [hereinafter *Hot-Rolled Steel*]; Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (Recourse to Article 21.5 of the DSU by India)*, WT/DS141/AB/RW (Apr. 8, 2003) [hereinafter *Bed Linen*]; Appellate Body Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R (July 22, 2003).

11. *See, e.g.*, Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the* Charming Betsy *Sinking?*, 24 FORDHAM INT'L L.J. 1533, 1540-41 (2001).

12. *See, e.g.*, Mary Jane Alves, *Reflections on the Current State of Play: Have U.S. Courts Finally Decided To Stop Using International Agreements and Reports of International Trade Panels in Adjudicating International Trade Cases?*, 17 TUL. J. INT'L & COMP. L. 299, 335, 352 (2009); Mark A. Barnett, *The United States Court of International Trade in the Middle—International Tribunals: An Overview*, 19 TUL. J. INT'L & COMP. L. 421, 422-23 (2011).

II. APPELLATE REVIEW OF COMMISSION AND COMMERCE DETERMINATIONS IN THE ANTIDUMPING AND COUNTERVAILING DUTY AREA

Commerce and the Commission are the agencies with the primary responsibility for implementing U.S. AD and CVD laws.[13] In AD and CVD investigations and reviews, Commerce determines whether imports are being "dumped" (that is, sold at unfairly low prices) in the U.S. market, or whether they are being unfairly "subsidized" by the country in question.[14]

The Commission is responsible for determining whether imports of the product under investigation are causing, or are likely to cause, material injury to the U.S. industry producing the like product.[15] In an original AD or CVD investigation, the Commission determines whether the domestic industry is being "materially injured, or . . . threatened with material injury," by reason of the dumped or subsidized imports.[16] In "sunset" reviews of existing AD or CVD orders, the Commission determines whether revocation of an AD or CVD order "would be likely to lead to [a] continuation or recurrence of material injury" to the domestic industry.[17]

In a typical year, the Commission and Commerce issue a number of appealable determinations. The Commission typically issues between twenty and forty appealable decisions in the AD or CVD area.[18] These decisions may be appealed in one of three venues. The Commission's final determinations in original investigations and sunset reviews and its negative preliminary determinations in original investigations may be appealed to the United States Court of International Trade (CIT), whose decisions may then be appealed to the United States Court of Appeals for

13. *E.g.*, 19 U.S.C. §§ 1671, 1673 (2006).

14. *Id.* §§ 1671(a), 1673. In five-year reviews of AD or CVD orders, Commerce determines whether dumping or subsidization of the subject imports is likely to continue or recur. *Id.* § 1675(c).

15. *Id.* §§ 1671d(b), 1673d(b).

16. *Id.* §§ 1671(a), 1671d(b), 1673, 1673d(b). Under the statute, the Commission may also determine whether development of an industry is being materially retarded by reason of the subject imports, although these types of determinations are rare. *Id.*

17. *Id.* §§ 1675(c), 1675a(a).

18. *See Trade Remedy Investigations—Completed Investigations: AD CVD Investigations*, U.S. INT'L TRADE COMMISSION, http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/completed/index.htm (last visited Mar. 5, 2013). These appealable decisions consist of either a single Commission determination, which occur when the investigation or review involves imports from one country, or multiple Commission determinations, which occur when the investigations or reviews involve multiple countries or reviews. *See, e.g.*, Shandong TTCA Biochemistry Co. v. United States, 710 F. Supp. 2d 1368, 1374 (Ct. Int'l Trade 2010).

the Federal Circuit.[19] If the Commission's determination involves imports from Canada or Mexico, the determination may be appealed to a binational dispute resolution panel under the North American Free Trade Agreement (NAFTA).[20] Finally, review of Commission determinations may be sought before a WTO dispute resolution panel.[21]

These three different forums of appellate review have distinct characteristics. In federal courts, for example, the agencies' determinations are reviewed by Article III judges sitting on the CIT and the Federal Circuit.[22] Federal Circuit and CIT judges are appointed for life and routinely perform, as a critical part of their duties, appellate review of agency actions and determinations.[23] These judges are required to assess whether the determinations of the Commission and Commerce comply with U.S. law and must apply the deferential standards of review contained in U.S. law.[24]

In appeals under the NAFTA, the Commission's and Commerce's determinations are reviewed by members of a NAFTA dispute settlement panel.[25] Like the Federal Circuit and the CIT, NAFTA panelists must review Commission injury determinations using the deferential standards of review under U.S. law.[26] Unlike Federal Circuit and CIT judges, however, NAFTA panelists are not appointed for life to judicial positions and do not routinely perform appellate review of agency action; instead, they are typically Canadian, Mexican, and U.S. nationals chosen from the private sector who have significant governmental, academic, or professional experience in the trade policy area.[27]

Finally, in the case of WTO appeals, review of the determinations is conducted by a WTO panel. Like NAFTA panelists, WTO panelists are typically nationals of WTO members who have significant governmental, academic, or professional experience in the trade area.[28] Unlike NAFTA panelists and CIT and Federal Circuit judges (who, as discussed *supra*,

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19. 19 U.S.C. § 1516a(a)(1)-(2); 28 U.S.C. §§ 1581(c), 2645(c) (2006).
20. 19 U.S.C. §§ 1516a(b)(3), 1516a(g)(2); North American Free Trade Agreement art. 1904, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].
21. DSU, *supra* note 6, art. 1; AD Agreement, *supra* note 4, art. 17; SCM Agreement, *supra* note 4, art. 30.
22. U.S. CONST. art. III, § 1; 28 U.S.C. § 1295(a)(5)-(6).
23. U.S. CONST. art. III, § 1; 28 U.S.C. § 1295(a)(5)-(6).
24. *E.g.*, 19 U.S.C. § 1516a(b)(1) (requiring the United States Court of International Trade (CIT) to review certain Commission determinations under the "substantial evidence" standard of review, and other Commission determinations under the "arbitrary [and] capricious" standard of review).
25. NAFTA, *supra* note 20, art. 1904.
26. *Id.* art. 1904(2)-(3).
27. *Id.* annex 1901.2, ¶¶ 1-2.
28. DSU, *supra* note 6, art. 8(1).

must determine whether the Commission's determinations comply with U.S. law and must apply U.S. standards of review), WTO panelists are required to assess whether the Commission's determinations are in conformity with the WTO's rules governing the issuance of AD and CVD measures using WTO standards of review.[29] Accordingly, when reviewing an injury determination of the Commission, a WTO panel has a different legal focus than Federal Circuit and CIT judges. Furthermore, WTO panelists differ from Federal Circuit and CIT judges because they are often not judges with significant experience in the area of appellate review of agency action.[30]

These distinctions are not insignificant because they can have an effect on the analysis contained in WTO reports. For example, WTO panelists are often not judges with extensive experience in appellate review and are required to apply WTO principles rather than U.S. law when reviewing U.S. AD and CVD determinations. As a result, they may not share the same legal and policy perspectives on issues arising in the area as U.S. judges. Furthermore, a WTO panelist's approach to legal issues can be influenced by linguistic or structural differences between the WTO agreements and the U.S. AD or CVD statute, or by differences arising from their experiences in civil versus common law legal jurisdictions. The U.S. courts should keep these distinctions in mind when assessing whether it is appropriate to consider WTO reports in their trade remedy decisions because, ultimately, these types of differences can lead to significantly different outcomes in the federal and WTO contexts.[31]

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29. *See id.* art. 11.

30. *Id.* art. 8(1)-(2).

31. This problem is most readily seen in the differing approaches of WTO panels and U.S. courts when reviewing Commerce's practice of "zeroing" positive dumping margins when calculating dumping margins. WTO panels, the Federal Circuit, and the CIT have reviewed the validity of Commerce's zeroing practice under the AD Agreement (in the case of the WTO panels) and the U.S. AD statute (in the case of the U.S. courts). The language of the AD Agreement and the relevant U.S. provision is, to a great degree, similar, and the AD Agreement and U.S. law are supposed to be consistent with one another. Nonetheless, the WTO and the two U.S. courts have come to different conclusions on the practice, with the Appellate Body consistently finding that Commerce's zeroing practice does not comply with the requirements of the AD Agreement and the Federal Circuit consistently holding the practice to be consistent with the U.S. statute. *Compare* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 191, WT/DS322/AB/R (Jan. 9, 2007), *with* Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005). When reviewing these decisions, U.S. commentators have concluded that they result from the distinct legal and policy perspectives influencing the choices made by WTO panelists and U.S. judges. *See, e.g.*, John 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 (2013).

III. STATUTORY AND OTHER LIMITATIONS ON THE USEFULNESS OF WTO REPORTS IN ANTIDUMPING AND COUNTERVAILING DUTY APPEALS

As noted, this Article addresses the issue of whether the Federal Circuit and the CIT should reconcile their decisions in the AD and CVD area with the decisions of WTO panels and the Appellate Body. Before addressing this issue, however, it is important to note that, in theory, there should be a significant degree of consistency between WTO reports and U.S. court decisions in the AD and CVD area. As previously indicated, the AD Agreement and the SCM Agreement were designed to establish the basic parameters that govern the issuance of AD or CVD orders by WTO members.[32] For example, article 1 of the AD Agreement states, "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."[33] The SCM Agreement contains similar language indicating that WTO members' CVD measures should be in conformity with it as well.[34]

Accordingly, WTO members must ensure that, when their investigating authorities issue AD and CVD measures, the measures comply with the minimum procedural and substantive requirements set forth in the AD and SCM Agreements. To ensure that U.S. AD and CVD procedures comply with these minimum requirements, Congress enacted the Uruguay Round Agreements Act (URAA) in 1994.[35] As the Statement of Administrative Action (SAA) for the URAA explains, the URAA was "intended to bring U.S. law fully into compliance with U.S. obligations under [the WTO Agreements],"[36] including the provisions of the AD and SCM Agreements.[37] Thus, in Congress's view, the URAA ensures that the Commission and Commerce will act fully in conformity

32. *See generally* AD Agreement, *supra* note 4, art. 1; SCM Agreement, *supra* note 4, art. 10.

33. AD Agreement, *supra* note 4, art. 1 (footnote omitted).

34. SCM Agreement, *supra* note 4, art. 10.

35. H.R. DOC. NO. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. Congress has declared, by statute, that the Statement of Administrative Action (SAA) is the authoritative expression of legislative intent for the statute. 19 U.S.C. § 3512(d) (2006) (declaring that the SAA is an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application").

36. H.R. DOC. NO. 103-316, at 669.

37. *Id.* at 819.

with the provisions of the AD and SCM Agreements when issuing their AD and CVD determinations.

Given this basic fact, it is entirely understandable that some commentators would suggest that the Federal Circuit and the CIT should seek to reconcile their decisions in the AD and CVD area with the findings of WTO panels and the Appellate Body. By doing so, it might be argued, the Federal Circuit and the CIT might provide the Commission and Commerce with a consistent line of federal and WTO guidance on a particular issue in the area, such as "zeroing."[38] Moreover, the courts might also help the Commission and Commerce issue decisions that are less likely to be called into question by the U.S. courts or the WTO. While such an approach might be laudable on a theoretical level, there are significant statutory and policy reasons that the Federal Circuit and the CIT should reject such an approach.

A. *Statutory Limitations on the Reconciliation of Judicial Decisions and WTO Reports*

In the URAA, Congress places significant statutory limitations on a U.S. court's ability to take WTO reports into account when reviewing agency action. Specifically, Congress made clear that the Federal Circuit and the CIT should not reject action by the Commission or Commerce in the AD or CVD area on the ground that it is inconsistent with the WTO Agreements.[39] 19 U.S.C. § 3512(a)(1) (sometimes referred to as section 102(a)(1) of the URAA) provides, "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*."[40] Similarly, § 3512(c)(1) states, "*No person* other than the United States . . . *shall have any cause of action or defense under any of the Uruguay Round Agreements* or by virtue of congressional approval of [the Uruguay Round Agreements]."[41] Section 3512(c)(1) further provides, "*No person* other than the United States . . . *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 . . . on the ground that such action or inaction is inconsistent with* [*any Uruguay Round Agreement*]."[42] Finally,

38. *See* discussion *supra* note 31.

39. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102(a), 108 Stat. 4809, 4815 (1994) (codified at 19 U.S.C. § 3512(a) (2006)).

40. 19 U.S.C. § 3512(a)(1) (emphasis added).

41. *Id.* § 3512(c)(1) (emphasis added).

42. *Id.* (emphasis added).

§ 3512(c)(2) explains, "It is the intention of the Congress through [§ 3512(c)(1)] to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements . . . ."[43]

Additionally, the SAA for the URAA, which constitutes an authoritative expression of congressional intent, makes clear that the U.S. courts should not give weight to WTO reports when reviewing agency action on appeal, especially if the reports are inconsistent with the statute, regulation, or established agency practice.[44] Among other things, the SAA explains, "Section 102(a)(1) [of the URAA] clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill."[45] Moreover, the SAA explains that the § 3512(c)(2)

> precludes any private right of action or remedy—including an action or remedy sought by a foreign government—against a federal, state, or local government, or against a private party, based on the provisions of the Uruguay Round agreements. This would include any such suit brought against a federal, state, or local agency or against an officer or employee of any such agency. A private party thus could not sue (or defend suit against) the United States, a state or a private party on grounds of consistency (or inconsistency) with those agreements. The provision also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Uruguay Round agreements.[46]

As can be seen, Congress has expressed its intent on these issues clearly. In an appeal of an agency action, including those involving Commission and Commerce determinations, a U.S. court may not allow a party to challenge an agency on the grounds that it violates the provisions of the Uruguay Round Agreements.[47] If the court did so, it would be acting in contravention of § 3512(c)(2).[48] Because the URAA and the SAA establish Congress's intent to preclude such action by the courts, the Federal Circuit and the CIT should be highly reluctant to give any weight in their analysis to arguments that the actions or inactions of

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43. *Id.* § 3512(c)(2).
44. H.R. DOC. NO. 103-316, at 659 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4042.
45. *Id.* at 670.
46. *Id.* at 676.
47. 19 U.S.C. § 3512(c).
48. *Id.* § 3512(c)(2).

the Commission or Commerce are improper because they are inconsistent with the AD or SCM Agreements as they have been interpreted by WTO panels or the Appellate Body.

Furthermore, the Federal Circuit and the CIT have both rejected the argument that it is appropriate for them to reconcile their review of agency action with WTO reports that reject Commerce and Commission practices as inconsistent with the WTO Agreements. In *Corus Staal BV v. Department of Commerce*, for example, the appellant argued that Commerce's practice of zeroing out positive dumping margins in its dumping calculations was inconsistent with the U.S. AD statute.[49] In making this argument, the appellant relied heavily on the Appellate Body's findings that zeroing these margins was inconsistent with the AD Agreement.[50]

The Federal Circuit rejected the appellant's request. In addition to citing the language of § 3512(a)(1) (providing that "[n]o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect"[51]), the Federal Circuit pointed out that WTO decisions are "not binding on the United States, much less this court."[52] The Federal Circuit explained, "Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the [AD Agreement]) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[53] Because Congress has established a process to determine whether to implement adverse WTO reports that did not involve the courts, the Federal Circuit explained that it would not "attempt to perform duties that fall within the exclusive province of the political branches, and [it] therefore refuse[d] to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme."[54] Other Federal Circuit and CIT judges have followed the same approach in recent decisions, correctly concluding

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49. 395 F.3d 1343, 1346 (Fed. Cir. 2005).
50. *Id.* at 1348.
51. 19 U.S.C. § 3512(a)(1).
52. *Corus*, 395 F.3d at 1348 (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004) (internal quotation marks omitted)).
53. *Id.* (citation omitted).
54. *Id.* at 1349.

that, as a matter of law, they may not rely on adverse WTO decisions to find action by the agencies to be inconsistent with the U.S. AD law.[55]

Given the statute's clear instructions on this issue, as well as the Federal Circuit's statements on the matter in *Corus*, the issue of whether the Federal Circuit or the CIT should give weight to WTO reports should be considered resolved. Under the statute, as interpreted by the Federal Circuit, U.S. courts may not give weight to WTO reports that are inconsistent with existing U.S. law or agency practice. As the Federal Circuit put it in *Corus*, these decisions are best left to the parts of the political branches of government that have been given the responsibility to determine whether WTO reports should be given full effect by the Commission and Commerce.[56]

B. Other Considerations

Several other considerations would counsel against the Federal Circuit and the CIT giving significant weight to adverse WTO reports in the AD and CVD area. First, as the Federal Circuit has noted, a final WTO report is not even binding on the WTO members involved in the dispute.[57] Under the Uruguay Round Agreements, even when a WTO panel concludes that a WTO member has acted in a manner that is not in conformity with one of the Agreements, the member is *not* required to implement the specific recommendations of the WTO report or change the measure under review by the panel.[58] In this situation, the WTO member may choose not to implement the panel's recommendations and may instead decide to provide another form of compensation to the complaining party.[59] As the Federal Circuit correctly reasoned, if WTO reports are not themselves binding on WTO members involved in a dispute covered by a particular report, it would be somewhat presumptuous for the U.S. courts to give significant weight to these reports in their own decisions. In effect, by giving significant weight to such a report, the U.S. courts might be seen to be giving an implementing

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55. *E.g.*, NSK Ltd. v. United States, 510 F.3d 1375, 1380 (Fed. Cir. 2007); SKF USA Inc. v. United States, 675 F. Supp. 2d 1264, 1279-80 (Ct. Int'l Trade 2009); Union Steel v. United States, 645 F. Supp. 2d 1298, 1308-09 (Ct. Int'l Trade 2009).

56. *Corus*, 395 F.3d at 1349.

57. *See id.* at 1348.

58. DSU, *supra* note 6, arts. 3.7, 22.

59. *Id.* As the SAA for the URAA explains, neither WTO panels nor the Appellate Body have the "power to change U.S. law." H.R. DOC. NO. 103-316, at 659 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4042. Instead, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Id.*

effect to a report that the Executive Branch or Congress would prefer not to implement.[60]

Second, the SAA makes clear that it is the province of the Legislative and the Executive Branches—and not the U.S. courts—to determine whether the United States should give implementing effect to a WTO report. In this regard, the SAA states that, when it enacted the URAA, Congress "intended to bring U.S. law fully into compliance with U.S. obligations under those agreements."[61] Moreover, the SAA explains, it was "the expectation of the Administration that no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the [URAA] and [the SAA would] be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements."[62] If such changes were required in the future, the SAA also explains, "the Administration would need to seek new legislation from Congress or, if a change in regulation is required, follow normal agency procedures for amending regulations."[63] Given this language in the SAA, it seems clear that Congress intended that, if future changes to U.S. law were necessitated by future WTO dispute panel decisions, all such changes would be effectuated by Congress and the Executive Branch, *not* by the courts.[64]

Third, a number of commentators have reasonably criticized the Appellate Body for not applying the negotiated standard of review under the AD Agreement to WTO members' AD determinations, which requires deference to reasoned factual and legal findings by a member's investigating authority.[65] For example, article 17.6(ii) of the AD Agreement provides that a WTO panel "shall interpret the relevant provisions of the [AD] Agreement in accordance with customary rules of interpretation of public international law."[66] It adds, "Where the panel

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60. In fact, the URAA makes clear that not even the Commission or Commerce can choose to implement on their own initiative WTO reports finding an agency determination to be not in conformity with the AD and SCM Agreements. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 129(a)-(b), 108 Stat. 4809, 4836-38 (1994) (codified at 19 U.S.C. § 3538(a)-(b) (2006)). Under the URAA, neither the Commission nor Commerce may implement an adverse WTO report without first undergoing a consultation and advice process involving the agency involved in the report, Congress, and the United States Trade Representative's Office (USTR). *Id.* Moreover, the Commission or Commerce may only take action to implement the report if the USTR specifically requests that the agency do so after completion of this consultation and advice process. *Id.*

61. H.R. DOC. NO. 103-316, at 669.

62. *Id.* at 670.

63. *Id.*

64. *Id.*

65. AD Agreement, *supra* note 4, art. 17.6(i)-(ii).

66. *Id.* art. 17.6(ii).

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."[67] As can be seen, this provision of the AD Agreement requires a WTO panel to accord deference to a member's dumping and injury determinations if they reflect any of several reasonable approaches under the pertinent provisions of the Agreement. Despite this language, a number of commentators have criticized the Appellate Body for not following this principle.[68] In the view of these commentators, the Appellate Body has consistently chosen to fill in the gaps in the AD Agreement with its own preferred approaches, even though the negotiating parties made clear that WTO panels should not impose their own views on members when more than one reasonable interpretation of the AD Agreement exists.[69] Given this approach by the Appellate Body, U.S. courts should be reluctant to give weight to WTO decisions that may reflect an overly narrow view of permissible action under the AD Agreement.

Finally, the decisions reached by WTO panels may not always reflect the soundest interpretation of the WTO agreements and may, in fact, conflict with U.S. statutes and/or judicial precedent. A good example of these issues is the Appellate Body's decision in *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India* (*Bed Linen*).[70] In that proceeding, the European Communities (EC) was initially found to have violated the AD Agreement by zeroing positive margins when calculating dumping margins for Indian bed linen producers.[71] When the EC issued a new dumping determination for India without zeroing, it found that two of five examined Indian producers were not dumping.[72] As a result, when performing its injury analysis, the EC did not include nondumped imports made by the two Indian producers in its analysis.[73] It did, however, include all of the imports made by the three other Indian producers for whom it calculated

67. *Id.*

68. *E.g.*, Kathleen W. Cannon, *Trade Litigation Before the WTO, NAFTA, and U.S. Courts: A Petitioner's Perspective*, 17 TUL. J. INT'L & COMP. L. 389, 394-95 (2009); Terence P. Stewart, Amy S. Dwyer & Elizabeth M. Hein, *Trends in the Last Decade of Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*, 24 ARIZ. J. INT'L & COMP. L. 251, 253-54 (2007).

69. *See* Cannon, *supra* note 68, at 395; Stewart, Dwyer & Hein, *supra* note 68, at 253-54.

70. *Bed Linen*, *supra* note 10, ¶ 184.

71. *Id.* ¶ 2.

72. *Id.* ¶ 103.

73. *Id.*

individual margins, as well as imports from any Indian producers or exporters covered by the EC's "all others" rate, that is, producers for whom the EC did not calculate a company-specific dumping margin.[74] In its re-redetermination, the EC once again found that the subject Indian imports from India caused material injury to the EC's industry.[75]

Upon review, the WTO panel affirmed the EC's approach with respect to including imports from nonexamined producers as dumped imports in its injury analysis.[76] The panel found that, under the specific provisions of the AD Agreement, all imports attributable to producers and exporters for whom an authority has made an affirmative dumping finding, including those producers who are subject to an all others dumping rate, could be considered dumped for injury purposes.[77] The panel rejected India's argument that the EC was required to treat unexamined producers' imports as either dumped or not dumped for purposes of the injury analysis based on the proportion of dumped imports found in the group of sampled producers.[78]

The Appellate Body reversed the panel's conclusion, finding that the EC acted inconsistently with the relevant articles of the AD Agreement when it included imports from nonexamined producers as dumped imports in its injury determination.[79] In its decision, the Appellate Body focused on the AD Agreement's language providing that an injury determination must be made on the basis of "positive evidence" and involve an "objective examination" of the dumped imports.[80] The Appellate Body acknowledged that the AD Agreement does not require investigating authorities to examine each producer and exporter for the purposes of determining margins of dumping and that AD duties may be imposed on unexamined producers and exporters.[81] Nonetheless, the Appellate Body concluded that, with respect to an authority's determination of what imports are dumped and may be included in the authority's injury analysis, the "'positive evidence' and . . . 'objective examination' . . . requirements are not ambiguous[] and . . . do not 'admit of more than one permissible interpretation'" under the AD Agreement.[82]

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74. *Id.*
75. *See id.*
76. *Id.* ¶ 105.
77. *Id.*
78. *Id.*
79. *Id.* ¶ 146.
80. *Id.* ¶ 137 (quoting AD Agreement, *supra* note 4, art. 3).
81. *Id.* ¶ 116.
82. *Id.* ¶ 118 (quoting AD Agreement, *supra* note 4, arts. 3, 17.6(ii)).

According to the Appellate Body, if an authority determines that some producers were not dumping during the period of investigation, the authority may not automatically include imports from all nonexamined producers in the volume of dumped imports in its injury analysis.[83] In the view of the Appellate Body, such an approach did not meet the positive evidence and objective examination requirement of the AD Agreement because the authority would be assuming that all of the unexamined producers were dumping, even though several examined producers were not found to be dumping.[84] In the Appellate Body's view, before including in its analysis import volumes attributable to producers or exporters that were not examined individually, an authority should have positive evidence establishing that the unexamined producers' imports could be considered dumped before including them in its injury analysis as "dumped" imports.[85] The Appellate Body added, however, that the AD Agreement does not require any specific methodology or approach to perform such an analysis.[86]

The *Bed Linen* decision is problematic in two significant respects. First, *Bed Linen* does not reflect a particularly sound interpretation of the AD Agreement. The AD Agreement expressly permits an investigating authority to choose not to calculate dumping margins for all subject producers[87] and allows the authority to impose AD duties on imports from producers for whom a dumping margin was not calculated.[88] Moreover, it does not contain any language explicitly or implicitly indicating that an investigating authority must demonstrate that imports from unexamined producers can be considered dumped before including those imports in its injury analysis.[89] In fact, at its core, the only basis for the Appellate Body's finding was the language of the AD Agreement requiring that an injury determination be based on positive evidence and involve an objective examination of the data. Thus, the *Bed Linen* decision appears to support one commentator's view:

> The Appellate Body has taken the view that, where the agreements are silent on an issue, the dispute settlement body can and should fill in gaps in the agreements based on its own views without deferring to members'

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83. *Id.* ¶ 133.
84. *Id.*
85. *Id.* ¶¶ 109, 133 (quoting AD Agreement, *supra* note 4, art. 3).
86. *Id.* ¶ 137.
87. AD Agreement, *supra* note 4, art. 6.10.
88. *Id.* art. 9.4.
89. *See id.* art. 3.

> interpretations. Under this approach, the Appellate Body is essentially legislating a new body of law to which members never agreed.[90]

Given this tendency on the part of the Appellate Body, the Federal Circuit and the CIT should be reluctant to treat the Appellate Body's readings of the AD Agreement and the SCM Agreement as being dispositive interpretations because they may not reflect the actual text of the Agreements or the negotiating intent of the parties who concluded the Uruguay Round Agreements.

Moreover, the *Bed Linen* decision is inconsistent with the language of the U.S. AD statute. Under the U.S. AD statute, the Commission must consider, as part of its injury analysis, *all* imports that are within the class or kind of merchandise for which Commerce has made an affirmative dumping determination.[91] Because Commerce includes all unexamined producers as subject imports in the scope of its affirmative determinations, imports from these producers must be treated as dumped imports within the scope of the investigation, whether or not there is positive evidence showing that they were dumped, as the Appellate Body concluded. Indeed, the Commission's consistent practice of including in its injury analysis all imports covered by an affirmative Commerce determination has been affirmed by the Federal Circuit in *Algoma Steel Corporation v. United States*, which found that the Commission's practice was consistent with the plain language of the statute.[92] Given these concerns about the nature and scope of WTO rulings, the Federal Circuit and the CIT should exercise great restraint when they are asked to remand a Commission or Commerce determination on the ground that the determination is inconsistent with the Appellate Body's reading of the AD and SCM Agreements.

Another example of these issues is the Appellate Body's decision in *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (*Hot-Rolled Steel*).[93] In that proceeding, Japan challenged the Commission's application of "the captive production provision" to Japanese hot-rolled imports in the AD investigation covering hot-rolled steel, arguing that the provision itself, as well as the Commission's application of it to Japanese imports, was not in conformity with the AD Agreement.[94] The captive production provision of the U.S. AD statute requires the Commission to "focus primarily" on

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90. Cannon, *supra* note 68, at 395 (footnote omitted).
91. 19 U.S.C. § 1673 (2006).
92. 865 F.2d 240, 242 (Fed. Cir. 1989).
93. *Hot-Rolled Steel*, *supra* note 10, ¶ 23.
94. *Id.* ¶¶ 23-24.

the impact of imports on the U.S. industry's merchant market operations in its injury analysis when certain conditions are met.[95] Because the Commission found that these conditions were satisfied in the hot-rolled steel investigation, the Commission performed a detailed examination of the impact of Japanese imports of hot-rolled steel from Japan on the industry, consisting of an examination of the impact of these imports on the industry's operations as a whole (including its captive and merchant market operations) and of their impact on its merchant market operations, considered separately.[96]

The WTO panel affirmed the Commission's findings, determining that the captive production provision and the Commission's application of it to Japanese hot-rolled imports were in conformity with the AD Agreement.[97] The Appellate Body did not agree. Although the Appellate Body affirmed the panel's finding that the captive production provision did not itself violate the AD Agreement,[98] the Appellate Body reversed the panel's finding that the Commission had applied the provision in a manner that was consistent with the AD Agreement.[99]

Once again relying on the broad language of the AD Agreement providing that an authority's injury analysis should be based on positive evidence and reflect an objective examination of the record evidence, the Appellate Body found that the Commission's analysis did not reflect an objective examination of the industry's condition because the Commission had not separately examined the industry's captive production operations of the industry, even though the Commission had examined the impact of imports on both the industry's merchant market operations and the industry's operations as a whole, which included its merchant market *and* captive production operations.[100] The Appellate Body concluded that, in light of its separate analysis on the impact of imports on the industry's merchant market operations, the Commission's analysis of the impact of imports on the industry could only be considered objective if it conducted a third analysis covering its captive production operations.[101]

Once again, the Appellate Body's analysis is problematic because it is not necessarily required by, nor implicit in, the language of the AD Agreement. In this regard, the AD Agreement explicitly requires only

95. 19 U.S.C. § 1677(7)(C)(iv).
96. *Hot-Rolled Steel*, *supra* note 10, ¶¶ 205-210.
97. *Id.* ¶ 187.
98. *Id.* ¶ 209.
99. *Id.* ¶ 215.
100. *Id.* ¶¶ 210-215.
101. *Id.*

that an investigating authority conduct its injury analysis by examining the impact of subject imports on the industry as a whole.[102] It does not preclude the more focused analysis of the impact of imports on the industry required by the captive production provision, nor does it contain any language at all addressing an authority's obligations when conducting a segmented market analysis. Instead, the sole textual foundation for the Appellate Body's finding was the very broad objective examination and positive evidence language of the AD Agreement. Thus, like the Appellate Body's decision in *Bed Linen*, *Hot-Rolled Steel* shows that the Appellate Body may, when it so chooses, fill in gaps in the Agreements with its own preferred approaches to dumping and injury issues.[103] Because this indicates, as one commentator stated, that the Appellate Body has a tendency to "legislat[e] a new body of law to which the members never agreed,"[104] the Federal Circuit and the CIT should treat the Appellate Body's readings of the AD Agreement and the SCM Agreement with great caution when performing their own analysis on appeal.

IV. CONCLUSION

In a world in which international trade has become an extraordinarily important part of the U.S. and global economies, it remains tempting for the Federal Circuit and the CIT to want to further the uniformity of legal theory and principles in the international trade arena. The Uruguay Round Agreements established an international trade regime that is designed to help reduce tariff and trade barriers and improve trade flows across national borders. They also established a WTO dispute resolution that was presumably intended to implement these goals. Nonetheless, as the WTO dispute settlement process matures, there continue to be legal and analytical problems in many of the WTO's dispute settlement reports. In fact, when Congress enacted the URAA, it took great pains to make clear that the U.S. courts should not take WTO reports into account when reviewing agency action on appeal precisely because it anticipated that these types of problems might arise out of the dispute settlement process. Given these considerations, the Federal Circuit and the CIT should be wary of giving weight to adverse WTO reports when reviewing agency action in the AD and CVD area.

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102. AD Agreement, *supra* note 4, arts. 3.1, 3.4, 4.1.
103. *See Hot-Rolled Steel*, *supra* note 10, ¶¶ 210-215.
104. Cannon, *supra* note 68, at 395.