Trade Litigation Before the WTO, NAFTA, and U.S. Courts: A Petitioner's Perspective

Kathleen W. Cannon*

* © 2009 Kathleen W. Cannon. Ms. Cannon is a Partner in the International Trade and Customs Practice Group at Kelley Drye & Warren in Washington, D.C. She has practiced international trade law for over twenty-five years. Her practice focuses on assisting domestic industries that are experiencing injury due to unfairly traded imports, primarily through the use of antidumping and countervailing duty laws. She has been involved in a wide range of trade matters, including escape clause actions, section 301 challenges, and WTO international dispute settlement challenges and negotiations. She regularly appears before the United States Department of Commerce, the United States International Trade Commission, and the United States Trade Representative, and she litigates before the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit. Ms. Cannon serves on the Court of International Trade's Advisory Committee and is on the Board of the Customs and International Trade Bar Association.

I. INTRODUCTION

Trade litigation of agency determinations in antidumping and countervailing duty cases is not limited to disputes before the courts, but may also encompass disputes before the World Trade Organization (WTO) and where trade with Canada and Mexico is involved, before a binational panel constituted under chapter 19 of the North American Free Trade Agreement (NAFTA). Variations in the rules that apply and the results that flow from litigation in these different venues have significant repercussions to parties depending on the forum selected for the litigation.

From the perspective of a petitioner or a domestic industry involved in antidumping or countervailing duty cases, the forum options are much more limited than for a respondent or foreign producer/importer. As discussed further below, the WTO is not an option for a petitioner to challenge an agency decision. While the NAFTA chapter 19 process is technically available, it is rarely the choice of the domestic industry for litigation. Domestic industry petitioners almost always choose to pursue judicial action before the U.S. courts if they wish to appeal an agency's decision. Nonetheless, domestic industries often become involved in litigation before the WTO and NAFTA binational panels defensively, supporting the U.S. Government decision, and on occasion offensively before NAFTA panels, even where they did not choose that forum.

The role of petitioners in these various fora, the relevant standards of review, and the pros and cons of the procedural rules and substantive decision making applicable in each of these venues, from a petitioner's perspective, are considered below.

II. WTO DISPUTE RESOLUTION

A. Role of Petitioners/U.S. Industry

The domestic industry has no ability to pursue a trade remedy before the WTO or even to participate directly in a WTO dispute settlement body challenge filed by a foreign government contesting a U.S. antidumping or countervailing duty decision. In WTO cases, only

Member States may file challenges at the WTO, not private parties.[1] Where the United States Department of Commerce (Commerce) or United States International Trade Commission (ITC) has issued a decision, whether favorable or unfavorable to the domestic industry, the United States would not bring an action at the WTO challenging its own decision. Thus, the only WTO challenges to U.S. agency decisions in these trade cases are filed by the governments of the parties' against which the U.S. findings were issued. The parties to the WTO dispute are the United States and the challenging country government; private parties are not and cannot be parties to these disputes.[2]

As such, there is no opportunity for the domestic industry to participate directly in the WTO process or to select this forum for litigation. Once a challenge against the United States is filed, U.S. Government attorneys will handle the litigation. The private parties are not permitted to file briefs, to present arguments at WTO hearings, or to attend the WTO hearings.[3] This limited role for the domestic industry in litigation that often raises the same issues that would otherwise be raised before the U.S. courts or a NAFTA panel is a significant disadvantage to this forum choice from the domestic industry's perspective.

Technically, the United States Trade Representative (USTR) is required to consult with the petitioner "at each stage of the proceeding before the panel or the Appellate Body," as well as "consider the views of representatives of appropriate interested private sector and nongovernmental organizations concerning the [respective] matter."[4] The only official comment opportunity for the domestic industry or other interested U.S. parties, however, is in response to a notice in the *Federal Register* whenever a panel is selected in which the United States is a

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1. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, arts. 6, 10, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter DSU].

2. Member governments that have a "substantial interest in a matter before a panel" may also participate in the proceeding as third parties including the right to file written submissions. *See id.* art. 10.

3. *See id.* arts. 6 (Establishment of Panels), 10 (Third Parties).

Although the historical WTO practice has been to conduct these dispute settlement body hearings behind closed doors, the WTO has recently permitted those expressing an interest in the hearing to observe the hearing on a closed-circuit television in a separate room in certain cases when neither of the member countries to the dispute objected. *See* Notice of Opportunity To View Non-Confidential Session of Dispute Settlement Panel's First Meeting with the Parties, 72 Fed. Reg. 61,409 (U.S. Trade Rep. Oct. 30, 2007).

4. 19 U.S.C. § 3537(a) (2006).

party.[5] The notice details the nature of the dispute and allows for written comment.[6] Although domestic industries may and occasionally do submit comments in response to these notices, those comments tend for the most part to be fairly simple, setting forth a position but without providing a great deal of detailed legal or factual argumentation. Strategically, because briefs will later be submitted to the WTO dispute settlement bodies, the U.S. industry may not find it useful to provide a roadmap to likely arguments so early in the process. It is generally more productive to work with the U.S. attorneys on the case to develop detailed arguments for presentation in the U.S. Government's brief, rather than putting them on the public record in response to this initial USTR notice.

Although there is no direct role for petitioners in WTO litigation, petitioners are often involved in assisting the U.S. Government attorneys with the preparation of the case. This involvement is at the discretion of the U.S. attorney, and thus varies from case to case. In some cases, petitioners assist in drafting sections of briefs, providing substantive edits and input to briefs or responses to panel questions, working with U.S. attorneys in preparatory moot courts, and traveling to Geneva when the WTO hearings take place to discuss issues with U.S. Government counsel. Again, however, the extent of domestic industry participation in this process and the degree to which any of the petitioner's drafts, suggested edits, or responses are accepted is purely within the discretion and control of the U.S. attorneys handling the case.

The WTO dispute settlement body has also shown some receptivity to submissions of amicus briefs, generally by nongovernmental organizations (NGOs).[7] Even where these briefs are accepted, however, the role of amici is limited and does not extend even to observer status at the hearing. Further, depending on the perspective of the U.S.

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5. *Id.* § 3537(b).

6. *See* WTO Dispute Settlement Proceeding Regarding Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, 69 Fed. Reg. 34,413 (U.S. Trade Rep. June 21, 2004) (seeking comment on Korea's request for a dispute settlement body on the *DRAMS* investigations); WTO Dispute Settlement Proceeding Regarding Final Dumping Determination on Softwood Lumber from Canada, 70 Fed. Reg. 36,685 (U.S. Trade Rep. June 24, 2005) (seeking comment on whether the United States implemented the dispute settlement body recommendations in *United States—Softwood Lumber from Canada Under Article 21.5 of the DSU*).

7. *See* Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 1.7, WT/DS294/R (Oct. 31, 2005) (accepting arguments in the amicus curiae brief by the Committee To Support U.S. Trade Laws "to the extent that the parties reflected those arguments in their written submissions and/or oral statements").

Government and that of amici, the U.S. Government may not support or encourage submission of amicus briefs on its behalf.

While counsel for domestic industries have a very limited role in WTO cases, the same cannot be said of counsel for respondent parties in trade cases. Although WTO cases are brought by foreign governments and not by the private respondent parties, it is often the case that the foreign government includes as part of its delegation U.S. counsel who were representing the respondents at the agency level. Respondents' counsel generally have a direct and, indeed, often the lead role in drafting briefs and presenting arguments in hearings to the WTO panels and Appellate Body.

Thus, from a domestic industry's vantage, the WTO dispute settlement process is not an advantageous forum in terms of the rights of participation or the role permitted for domestic parties. Notably, however, there is nothing in the WTO rules that precludes the U.S. Government from including as part of its delegation attorneys representing the U.S. parties to the case as other countries do.[8] Even were the U.S. Government attorneys to retain the lead role in these WTO disputes, it would be a major step forward for counsel of domestic industries to be officially included in this process as part of the U.S. delegation, including being permitted into the room to witness and, as appropriate, contribute to the presentation of arguments defending the U.S. decision in the case that they originally filed and in which they are heavily invested.

B. Standard of Review by Dispute Settlement Understanding (DSU) Panels and Appellate Body

The application by WTO dispute settlement bodies of the standard of review set forth in the Antidumping Agreement[9] has been the subject of extensive debate and analysis. Article 17.6 of the Antidumping Agreement sets forth the applicable standard of review as follows:

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8. *See* Panel Report, *Korea—Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, ¶ 7.11 & nn.100-101, WT/DS312/R (Oct. 28, 2005) (citing World Trade Org. [WTO], Working Procedures for Appellate Review, ¶ 15, WT/AB/WP/5 (Jan. 4, 2005), *available at* http://www.wto.org/english/tratop-e/dispu_e/ab0e.htm).

9. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1141 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Antidumping Agreement].

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
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> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[10]

Where the Appellate Body is concerned, its role is to review whether panels have interpreted and applied the standard of review properly and to uphold, modify, or reverse panel actions.

The article 17.6(ii) standard is similar to the deferential standard of review articulated by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[11] Indeed, during the Uruguay Round of trade negotiations, the United States sought inclusion of a deferential standard of review to limit the ability of the WTO dispute settlement body to substitute its own judgments for that of the Member States.[12] Upon adoption of the article 17.6(ii) standard, the United States indeed believed that it had succeeded in imposing a *Chevron*-type deferential analysis on the review to be used in WTO dispute settlement proceedings. Indeed, the Statement of Administrative Action promulgated in conjunction with passage of the Uruguay Round Agreements Act[13] described the article 17.6 standard of review as "analogous to the deferential standard applied by U.S. courts in reviewing actions by Commerce and the Commission."[14]

Unfortunately, from the vantage of the U.S. negotiators who "succeeded" in obtaining adoption of the review standard set forth in article 17.6(ii) of the Antidumping Agreement, as well as from the

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10. *Id.* art. 17.6.

11. 467 U.S. 837, 842-43 (1984). See *infra* Part IV.B for further discussion of the *Chevron* standard as applied by U.S. courts.

12. *See* Gary N. Horlick & Peggy A. Clarke, *Standards for Panels Reviewing Anti-Dumping Determinations Under the GATT and WTO*, *in* INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 315-24 (Ernst-Ulrich Petersmann ed., 1997).

13. Pub. L. No. 103-465, 108 Stat. 4809 (1994).

14. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 818 (1994).

vantage of U.S. industries that are parties to antidumping cases, the deference anticipated by application of this standard has not been true in practice under the WTO dispute settlement system. Despite the seemingly deferential standard, WTO panels and the Appellate Body do not defer to a national authority's legal interpretation of the Antidumping Agreement.[15] Indeed, "no adopted panel or Appellate Body decision has ever found that there is more than one permissible construction [of the Antidumping Agreement], even if they are selecting the seventh dictionary definition as the 'sole' permissible construction."[16] Instead, WTO panels and the Appellate Body consistently determine, even where the Antidumping Agreement is completely silent on an issue, that they can interpret the legal requirements of the Agreement from other language of the Agreement or by applying customary rules of international law.[17]

As a result, on a wide range of issues for which there was no agreement among negotiating members during the Uruguay Round and, therefore, no mention of the issue in the Antidumping Agreement, WTO panels and the Appellate Body have nonetheless "interpreted" the Agreement to permit only one outcome. Findings based on alternative and, arguably, permissible interpretations of the international agreements by the administrating authorities in the Member States are consistently rejected by the WTO dispute settlement body. 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' interpretations.[18] Under this approach, the Appellate Body is essentially legislating a new body of law to which the members never agreed.[19]

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15. "[R]egarding legal interpretations, Article 17.6(ii) ADP has not yet led any Panel or the [Appellate Body] to defer to a national authorities' interpretation. The practical impact of Article 17.6 ADP has thus been rather small." Holger Spamann, *Standard of Review for WTO Panels in Trade Remedy Cases: A Critical Analysis*, 38 J. WORLD TRADE 509, 511 (2004).

16. 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).

17. Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 119-20, 150 (2002).

18. Stewart, Dwyer & Hein, *supra* note 16, at 254-55, 257-58, 278-79.

19. *See* Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶¶ 65, 92, WT/DS213/AB/R (Nov. 28, 2002).

Most notable in this regard are the numerous WTO dispute settlement decisions finding that the U.S. practice of "zeroing" is not permitted by the Agreement.[20] The United States expressed serious concern that the Appellate Body's decision on zeroing was being "applauded" for achieving something the negotiators could not achieve—the elimination of zeroing.[21] As such, the Appellate Body's decision "has added to or diminished rights and obligations actually agreed to by Members."[22] In a communication from the United States to the WTO addressing the Appellate Body's decision in the *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* case, the United States expressed grave concern with the Appellate Body's development and imposition of new rights and obligations never agreed to by the negotiating member governments: "The Division's casual dismissal of the negotiating history and imputing into the agreed text obligations that do not appear there should give every Member pause, particularly at a time when Members are negotiating a new set of rights and obligations . . . ."[23] The United States further noted with concern the Appellate Body's decision in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* that, for the first time, suggested a panel must follow the Appellate Body reasoning or be operating at odds with the "'promotion of security and predictability' and the 'prompt settlement of disputes.'"[24]

Where subsidy issues arise under the Agreement on Subsidies and Countervailing Measures (SCM),[25] the applicable WTO standard of review is even less deferential. The WTO applies article 11 of the DSU in resolving subsidy disputes arising under the SCM Agreement.[26]

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20. *See, e.g.*, Communication from the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/16 (May 17, 2006).

21. *Id.* ¶ 29.

22. Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statements at the WTO Dispute Settlement Body Meeting (May 9, 2006), http://geneva.us-mission.gov/Press2006/0509DSB.html.

23. Communication from the United States, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 65, WT/DS344/11 (June 12, 2008), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/344-11.doc.

24. *Id.* ¶ 12 (quoting Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 160-161, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter *United States—Stainless Steel from Mexico*].

25. Agreement on Subsidies and Countervailing Measures, Jan. 1, 1995, 33 I.L.M. 403, *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Jan. 10, 2009) [hereinafter SCM Agreement].

26. *See* Panel Report, *Japan—Countervailing Duties on Dynamic Random Access Memories from Korea*, ¶ 4.208, WT/DS336/R (July 13, 2007) (citing Appellate Body Report,

Article 11 states: "[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[27]

The Appellate Body has observed that in a panel's review under article 11 of facts established by an investigating authority, "a panel may not conduct a *de novo* review of the evidence or substitute its judgement for that of the competent authorities."[28]

The United States had taken the position that based on the negotiations during the Uruguay Round as well as the WTO Ministerial Declaration, the standard of review applied in article 17.6 of the Antidumping Agreement should apply as well to disputes arising under the SCM Agreement.[29] The WTO Appellate Body disagreed, setting forth its view of this issue in the *United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* case as follows:

> The Panel and both participants have recognized that the Appellate Body has in the past elaborated on the standard of review mandated by Article 11 with respect to factual and legal issues in the context of claims under the *Agreement on Safeguards*. The standard of review articulated by the Appellate Body in the context of agency determinations under that Agreement is instructive for cases under the *SCM Agreement* that also involve agency determinations. Nevertheless, we recall that an "objective

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United States—Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, ¶ 182, WT/DS296/AB/R (June 27, 2005) [hereinafter *United States—DRAMS from Korea*]). Article 3.2 of the DSU is also cited on occasion by panels and the Appellate Body regarding the principles applicable to interpreting the WTO, even though it is not identified as a standard of review. Article 3.2 recognizes that the dispute settlement system is intended "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law [but not to] add or diminish the rights and obligations provided in the covered agreements." DSU art. 3.2.

27. DSU art. 11.

28. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 299, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003) (citing Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 121, WT/DS121/AB/R (Dec. 14, 1999)).

29. Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶¶ 9-10, WT/DS138/AB/R (May 10, 2000) (citing WTO, Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures (1994), http://www.sice.oas.org/trade/ur_round/UR40E.asp).

> assessment" under Article 11 of the DSU must be understood in the light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review. In this respect, we are especially mindful, in this appeal, of Articles 12, 19, and 22 of the *SCM Agreement*.[30]

Although the United States and domestic industries initially perceived it to be a significant setback that the deferential article 17.6(ii) standard of review from the Antidumping Agreement was not being extended and applied to disputes arising under the SCM Agreement, in practice there has not been any appreciable difference in outcomes based on the varying standards applied. Given the lack of deference accorded to members' decisions by panels and the Appellate Body in disputes arising under the Antidumping Agreement, the effect of applying a supposedly more rigorous review standard of article 11 to SCM Agreement disputes has not been significant.

From a petitioner's vantage, the manner in which the WTO dispute settlement bodies have interpreted and applied the standards of review in both antidumping and countervailing duty cases is of great concern. Given that domestic industries involved in WTO proceedings reviewing antidumping or countervailing duty cases are there to help defend the U.S. Government position, they only stand to lose from application of a standard of review that does not accord deference to the U.S. Government.

C. Procedural Pros and Cons of WTO Process

When weighing the pros and cons of participating in the WTO process as opposed to other fora from a domestic industry perspective, one benefit is that the findings of the WTO panel or Appellate Body are not self-implementing. Implementation of WTO decisions in U.S. law is addressed in section 129 of the Uruguay Round Agreements Act.[31] It is up to each member country, whose decision has not been sustained, either to attempt to bring its measures into compliance with the WTO ruling or be subject to possible retaliation for not doing so.[32] In a best-case scenario for the U.S. industry, the WTO dispute settlement body will sustain a U.S. decision in favor of a domestic industry and preserve the

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30. *United States—DRAMS from Korea*, *supra* note 26, ¶ 184 & nn.345-346 (citations omitted).

31. 19 U.S.C. § 3538 (2006).

32. *See* Lawrence R. Walders, *Citation by U.S. Courts to Decisions of International Tribunals in International Trade Cases*, 69 ALB. L. REV. 817, 820-21 (2006).

status quo. In a worst-case scenario, the WTO will reject a U.S. decision in whole or in substantial part, potentially leading to revocation of the order. Accordingly, it is useful for a U.S. industry to have some ability to work with the U.S. Government in either implementing the WTO holding in as positive a way as possible from the industry's perspective or in urging the U.S. Government not to implement the decision. In practice, however, the U.S. Government has almost always implemented WTO dispute settlement body decisions, in an attempt to ensure similar acceptance of the WTO rulings by its trading partners, even in instances in which the United States has expressed disagreement with the holding.

Another positive procedural aspect of WTO decisions is that they have prospective effect only.[33] Section 129(c)(1) states that if Commerce or the ITC revise an antidumping or countervailing duty decision as a result of a WTO case, the revised determinations have prospective effect only.[34] Thus, as the Statement of Administrative Action recognizes, relief available from the WTO differs from relief available from the U.S. courts or a NAFTA panel, both of which may provide retroactive relief.[35]

Given that WTO decisions will either merely preserve the status quo or will overturn some aspect of a U.S. decision in the petitioner's favor, the absence of retrospective relief is important and helpful. Even where orders are found by the WTO dispute settlement body to be unlawfully imposed, their revocation has been prospective, consistent with U.S. law rather than being void ab initio.[36] Further, because equitable measures such as injunctions are not possible in WTO litigation, the prospective relief generally only applies to future, and not past, entries.

A final positive is that the timetable for procedural consideration for WTO dispute settlement can be fairly prompt. The WTO dispute settlement system is designed to conclude cases brought before a panel

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33. *Id.* at 825 (citing NSK Ltd. v. United States, 358 F. Supp. 2d 1276, 1287 (Ct. Int'l Trade 2005) ("[R]etroactivity is not favored in the law.")).

34. 19 U.S.C. § 3538(c)(1).

35. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 1026 (1994).

36. *See* Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities, 68 Fed. Reg. 64,858-59 (Dep't of Commerce Nov. 17, 2003) (announcing that Commerce applied modified privatization methodology consistent with Appellate Body findings with respect to twelve countervailing duty determinations involving certain steel products from various Member States of the European Communities "only with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the USTR direct[ed] the Department to implement that determination [because] 'such determinations have prospective effect only'" (quoting URUGUAY ROUND AGREEMENT ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 1026)).

within roughly one year, beginning with a sixty-day consultation period, forty-five days for a panel appointment, roughly six months for the panel to conduct hearings and issue its report, and a further sixty days for adoption of the panel's report.[37] In addition, the countries can settle their dispute themselves at any stage.[38] In practice, however, delay often occurs, and extensions may be taken by the panel, so that actual resolution of the matter takes longer.

Where a challenge to the Appellate Body is initiated in an antidumping case, the timelines are very abbreviated as compared to judicial appeals. Notice of appeal must be filed within sixty days of the final panel decision, appellant's written submissions within merely seven days of the notice, and a hearing generally within thirty-five to forty-five days of the notice.[39] The Appellate Body report is then due within ninety days of notice, and adoption is to take place within thirty days.[40] While delays and extensions can occur, the Appellate Body timeline is designed to add only another three to four months to the review process, quite impressive when compared to other trade fora.

In the end, however, there is often a lengthy period before any change to a legal measure or administrative decision is in fact implemented. Extensive delays occur as members determine whether, when, and how to implement a decision or as chosen methods of implementation are further contested. Thus the potential benefits of the abbreviated briefing and initial dispute settlement body decision periods are undermined by delays in implementation.

There are also a number of negative procedural aspects to litigation at the WTO from the domestic industry's vantage. The WTO does not have specific procedures for handling proprietary business information.[41]

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37. *See* WTO, Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 10, 2009).

38. *Id.*

39. *See* WTO, Dispute Settlement: Appellate Procedures, http://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm#fntext3 (last visited Jan. 10, 2009); *see also* WTO, *supra* note 8, ¶ 20; Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, ¶ 5.383, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) ("Under Article 4.8 of the SCM Agreement, . . . the [dispute settlement body] must adopt the report (or one of the parties must notify its decision to appeal) within 30 days, as opposed to the standard period of 60 days under Article 16.4 of the DSU.").

40. WTO, Dispute Settlement: Appellate Procedures, *supra* note 39.

41. The rule on treatment of confidential information in antidumping litigation at the WTO is set forth in article 17.7 of the Antidumping Agreement as follows:

> Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by

Although members have in certain cases and upon agreement used confidential information in arguments presented, there is no protective order process at the WTO and the ability to use this type of information is somewhat limited. Inability to rely on confidential information may, in turn, impede the ability to present arguments.[42] Because domestic industries are not parties to the case, counsel no longer may retain proprietary business data under an agency protective order during the WTO process, severely limiting data analysis by domestic industries seeking to assist the U.S. attorneys handling the matter.

A further negative procedural aspect of the WTO process is the absence of any real limit on the number or types of issues raised. Unlike the limitations imposed under the United States Federal Rule of Civil Procedure 12(b)(6), precluding frivolous causes of action, WTO complainants have no such limitation. Although one might anticipate that member nations would only raise before the WTO dispute settlement body issues of the most egregious concern and would exercise restraint in raising more minor issues, the opposite appears to be true. When a WTO challenge is filed, often a wide variety of issues are raised, causing parties, panels, and the Appellate Body to address many factual and legal arguments, no matter how far-fetched. The absence of any page limitations on briefs submitted to the WTO is not helpful in discouraging parties from raising a multitude of issues rather than winnowing down their challenges to a select few.

A final negative aspect of the WTO dispute settlement body process from a U.S. petitioner's perspective is the issue of potential disagreement between the U.S. Government and U.S. petitioners in these challenges. Even when a U.S. petitioner is aligned with and defending a U.S. decision, it may disagree with the approach and arguments presented by the Government. Having no role in the WTO process, however, petitioners can do little but express their concerns to the U.S. attorneys.

These different positions, however, may have real effects on WTO litigation and remedies. In the steel privatization cases discussed further in Part V.C., the United States took the position that the statute did not

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the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided.

42. *See* Panel Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, Annex C-1, ¶ 52, WT/DS268/RW (Nov. 30, 2006) ("[T]he Panel affirmed that it had the right to seek, and the United States had an obligation to provide, data designated as business proprietary information. . . ." (quoting Panel Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶¶ 6.4-.7, at WT/DS138/R (June 7, 2000))).

require the methodology it had adopted. The WTO Appellate Body agreed, but nonetheless found the U.S. change-in-ownership methodology in violation of the international agreement.[43] The United States was thus free to change its privatization practice under section 123, to the detriment of the U.S. industry, merely after consultations and providing comment opportunities, and did so. The new policy adopted by the United States basically presumed that subsidies were eliminated once a change in ownership occurred, quite the opposite of the previous policy, and all to the disadvantage of U.S. producers harmed by these subsidized imports.

Although this result may have been preferable from the vantage of the administration, which could implement a new methodology without Congress approving new legislation, it was not a positive outcome for the domestic industry. Obtaining a legislative change by Congress to a statutory provision it had recently adopted, stating that changes in ownership did not automatically lead to elimination of subsidies, would likely have been difficult to achieve, thus preserving the status quo for U.S. industries. By bypassing Congress and the need for a legislative amendment and instead unilaterally altering its methodology, the administration implemented a WTO decision that hurt U.S. industries without any real opportunity for Congress or the U.S. industry to intercede in the process.

D. Substantive Results/Effect on Domestic Industry

The substantive effect of WTO dispute settlement decisions in the antidumping and countervailing duty context, as applied to domestic industries, has generally been negative. Any WTO challenge in which a domestic industry is involved can at best lead to preservation of the status quo, if the United States succeeds on all counts. More often, however, these decisions lead to a diminution of dumping margins or subsidies, if not outright revocation of an order or rejection of an injury finding by the ITC. The track record of the WTO dispute settlement body is not good for domestic industry petitioners. The WTO dispute settlement body rules far more frequently in favor of complainants and against member nations (whether the United States or other countries) that are applying antidumping or countervailing measures.[44] As a result, when confronted

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43. Appellate Body Report, *United States-Countervailing Measures Concerning Certain Products from the European Communities*, ¶¶ 159-161, WT/DS212/AB/R (Dec. 9, 2002).

44. Stewart, Dwyer & Hein, *supra* note 16, at 251-52, 255.

with a WTO challenge, domestic industries are justifiably concerned that no matter how legally sound and factually supported a decision might be, there is a high likelihood the WTO panel or Appellate Body will find some failure to comply with the international agreements.[45]

Why this pattern has emerged at the WTO dispute settlement body has been the subject of much debate and analysis. One commentator suggested the WTO dispute settlement body employs a "results-oriented exercise of discretion" raising concerns as to "an institutional bias against the use of WTO-consistent measures."[46] Another commentator has found that the Appellate Body paid little attention to the standard of review in at least one case in order to produce an "even-handed" outcome.[47] The U.S. agencies involved in trade remedy actions have said that the WTO has improperly applied article 17.6(ii) because it "has not applied the article in a way that allows for upholding permissible interpretations of WTO members' domestic agencies."[48]

Notably, the former Chairman of the WTO Appellate Body was quite candid in stating that he viewed it as his role to resolve through dispute settlement what had not been resolved by consensus during the negotiations:

> We also need a better understanding—and a stronger consensus—among *all* of the Members of the WTO on the balance they are seeking in the WTO treaty between their right to apply trade remedies and their right to benefit from trade concessions through market access.
>
> We need more and better rules as part of the WTO treaty on the appropriate interrelationship between trade and the environment, trade and labor, trade and health, trade and human rights, trade and intellectual property, trade and bribery, and trade law and other international law.
>
> Ideally, *none* of these issues should be resolved in WTO dispute settlement. Ideally, *none* of them should be resolved by panels or by the Appellate Body. As I see it, *all* of these procedural and substantive issues—and many more of similar significance and sensitivity—should,

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45. *See* Michael J. Shumaker, Comment, *Tearing the Fabric of the World Trade Organization: United States—Subsidies on Upland Cotton*, 32 N.C. J. INT'L L. & COM. REG. 547, 577-78 (2007) ("As one commentator stated, '[s]ince complainants win the vast majority of cases in which they are involved, it is expected that complainants will continue to bring disputes to the WTO.'" (quoting Sue Mota, *The World Trade Organization: An Analysis of Disputes*, 25 N.C. J. INT'L L. & COM. REG. 75, 104 (1999))).

46. Stewart, Dwyer & Hein, *supra* note 16, at 254.

47. Tarullo, *supra* note 17, at 140.

48. U.S. GEN. ACCOUNTING OFFICE, WORLD TRADE ORGANIZATION: STANDARD OF REVIEW AND IMPACT OF TRADE REMEDY RULINGS 7 (2003), *available at* http://www.gao.gov/new.items/d03824.pdf.

> ideally, be resolved by negotiations that result in a consensus and an agreement by the Members of the WTO on rules that take the form of WTO treaty obligations.
>
> But, again, the Members of the WTO should be mindful that the world will not wait. The world will keep turning. If these issues are not resolved, clearly, through negotiations, then many of them will be resolved, necessarily, through dispute settlement.[49]

Where matters are not resolved in the negotiations, however, and the international agreements are silent, the fundamental principles of the Vienna Convention,[50] as well as the plain language of article 17.6(ii), indicate that the absence of consent to the imposition of new obligations should lead to deference by the WTO dispute settlement body to the members' interpretation. That the world will "keep turning" does not mean that the WTO Appellate Body must step in to replace a negotiated agreement between Member States with its own view of the law. Instead, if the plain language of article 17.6(ii) were properly being applied by the WTO dispute settlement body, an issue that was not resolved by negotiations or addressed in the international agreements would be precisely an area in which deference to the Member State's decision was in order.

Of further substantive concern from a domestic industry's vantage is the precedential effect many of these WTO dispute settlement decisions are having. Technically, WTO dispute settlement decisions are to apply only in the context of the specific dispute in which they were raised.[51] Although panels and the Appellate Body have cited to and relied upon the reasoning of prior decisions particularly of the Appellate Body, until this year there was no indication that the Appellate Body viewed its decisions as precedential. In the *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* case, however, the Appellate Body chastised a panel for failing to follow an earlier holding by the Appellate Body in the zeroing context, stating:

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49. James Bacchus, Remarks to the National Foreign Trade Council, *Open Doors for Open Trade: Shining Light on WTO Dispute Settlement* 6 (Jan. 29, 2004) (transcript *available at* http://www.worldtradelaw.net/articles/bacchusopendoors.pdf).

50. Vienna Convention on the Law of Treaties arts. 11-17, 31, May 23, 1969, 1155 U.N.T.S. 331.

51. *See* Corus Staal BV v. U.S. Dep't of Commerce, 259 F. Supp. 2d 1253, 1264 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005) ("WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future WTO panels.").

> The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU. . . .
>
> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement systems, as explained above.[52]

This finding by the Appellate Body is a highly disturbing new development in the jurisprudence of the WTO. As reflected by the United States in a recent communication to the WTO on the Appellate Body's decision in the *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* case: "Suggesting, as this Division did, that panels are required blindly to follow erroneous Appellate Body conclusions in the name of security and predictability is simply inconsistent with Article 3.2."[53]

The nature of WTO litigation is also substantively different from other litigation because it directly involves attorneys with the USTR's Office and, thus, is subject to a different level of analysis with respect to certain policy issues. The USTR considers the ramifications of various arguments and issues not simply within the context of the immediate case or even the implementation of U.S. antidumping or subsidy laws, but more broadly with respect to how certain arguments by the United States could affect other WTO cases or potential cases. Although this approach is understandable, the domestic industry may find that issues that were otherwise straightforward in their favor and supported by Commerce or the ITC are now subject to a different type of scrutiny and not always ultimately supported by USTR attorneys due to broader policy considerations.

III. NAFTA PANELS AND THE ECC

A. Role of Petitioners/U.S. Industry

Unlike the WTO, where domestic industry petitioners are permitted no direct role in the litigation, domestic parties are given full rights to

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52. *United States—Stainless Steel from Mexico*, *supra* note 24, ¶¶ 161-162.

53. Communication from the United States, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, *supra* note 23, ¶ 12.

participate in challenges brought before a NAFTA panel.[54] Domestic parties may file a challenge and seek a NAFTA panel or may intervene formally in a NAFTA challenge brought by a Mexican or Canadian party to support the U.S. Government decision being challenged.[55] As complainants or intervenors in a NAFTA case, domestic industries enjoy the rights and obligations of the other parties.

While U.S. industries have the right to bring a challenge before a NAFTA panel, it is almost never the case that domestic petitioners opt for NAFTA litigation over litigation before a U.S. court.[56] The main reason for this forum choice is that, as discussed below, NAFTA panels have tended to overturn the U.S. Government's imposition of antidumping or countervailing duty measures much more frequently than is true of the courts. For this same reason, where a respondent in a U.S. trade action involving Mexico or Canada wants to challenge a U.S. decision, it is far more likely to bring the action to a NAFTA panel rather than to seek U.S. judicial review.

The unique aspect to NAFTA litigation, however, is that domestic industries do not have a unilateral choice of forum where cases involve imports from Canada or Mexico. By law, in cases involving imports from a NAFTA country, binational panel review was intended to be the rule, subject to limited exception.[57] Similar to court appeals, parties are given thirty days to file a request for panel review of an agency action involving NAFTA imports.[58] The law also provides, however, that judicial review in a U.S. court of agency action on NAFTA cases is possible in limited circumstances. Specifically, if a party is interested in judicial review by a U.S. court of an agency decision in a NAFTA

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54. 19 U.S.C. § 1516a(g)(9) (2006) (codifying representation in panel proceedings and "interested parties" right to appear).

55. *Id.*; *see also* North American Free Trade Agreement: Rules of Procedure for Article 1904 Binational Panel Reviews, 59 Fed. Reg. 8686 (Feb. 23, 1994), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=190/. Pay particular attention to Rule 3 (Interested Person) and Rule 40 (Notice of Appearance).

56. Indeed, the only time, to the author's knowledge, that a U.S. petitioner has affirmatively requested a NAFTA panel is in a recently filed case, Panel Decision, *Certain Welded Large Diameter Line Pipe*, USA-MEX-2007-1904-03, in which petitioners are challenging a negative decision of the International Trade Commission. *See* North American Free Trade Agreement, Article 1904 Binational Panel Reviews, 72 Fed. Reg. 68,860 (Dep't of Commerce Dec. 6, 2007).

57. 19 U.S.C. § 1516a(g).

58. *Id.* § 1516a(g)(8)(A)(i).

country, it must provide notice of its intent to file such appeal within twenty days of the date of the determination being challenged.[59]

The notice of intent provides other parties to the case with the opportunity to opt for NAFTA binational panel review in lieu of court review if they so choose within the ten days remaining in which to request a chapter 19 panel. Any party that would prefer NAFTA binational panel review over judicial review, therefore, has the right to select that forum. Article 1909(11) of NAFTA forecloses U.S. court review if any party requests a binational panel. Moreover, where the twenty-day notice of intent to file an appeal in a U.S. court has not been properly provided, the U.S. courts have dismissed appeals for failing to comply with these statutory requirements.[60]

Accordingly, by law, even if domestic parties prefer U.S. judicial review to NAFTA binational panel review, they are not able to select this forum if an opposing party prefers the binational panel alternative, as is generally the case.[61] Although some NAFTA-country challenges have been raised in U.S. courts, it has been more often the case that reviews of U.S. trade decisions involving Canada or Mexico take place before NAFTA binational panels rather than before U.S. courts. Thus, although domestic industries can seek U.S. court review if they so choose in a NAFTA-country case, they cannot prevent an opposing party from replacing judicial review with NAFTA binational panel review.

B. Standard of Review

1. Binational Panel Review

NAFTA binational panels are to apply the standard of review that would be applied by a national court reviewing an antidumping or countervailing duty decision.[62] In U.S. law, therefore, panels are to apply the standard of review that would be applied by the courts under 19

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59. *Id.* § 1516a(g)(3)(B). The statute also provides an exception to binational panel review for appeals involving constitutional issues. *Id.* § 1516a(g)(4).

60. *See, e.g.*, Desert Glory, Ltd. v. United States, 368 F. Supp. 2d 1334, 1340-44 (Ct. Int'l Trade 2005). In *Desert Glory* and other cases involving scope determinations, issues have also arisen regarding when notice has been provided to trigger the statutory deadlines.

61. *See, e.g.*, Panel Decision, *In re: Pure Magnesium and Alloy Magnesium from Canada (CVD)*, at *34-36, *38-39, USA-CDA-00-1904-07 (Mar. 27, 2002); Panel Decision, *In re: Oil Country Tubular Goods from Mexico; Final Determination of Sales at Less Than Fair Value*, at *3-4, *100-02, USA-95-1904-04 (July 31, 1996); Panel Decision, *In re: Live Swine from Canada*, at *1-2, *28-29, USA-94-1904-01 (May 30, 1995).

62. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, ch. 19, art. 1904(3) [hereinafter NAFTA]; *see also id.* annex 1911.

U.S.C. § 1516a(b). For final decisions by Commerce or the ITC, that standard asks whether the agency's determination is supported by substantial evidence of record or is otherwise consistent with law.[63]

The definition of the standard of review for NAFTA panels, therefore, is the same as for U.S. courts. One would anticipate, accordingly, that the same or similar results would occur irrespective of the venue selected. That has not, however, been the case. Almost from the outset of implementation of the binational panel process, questions have been raised and panel decisions criticized for failing to apply the proper U.S. standard of review.[64] In particular, NAFTA panels have frequently not deferred to agency decision making under circumstances where a U.S. court would likely have done so.[65]

The manner in which the standard of review has been applied and the deference accorded by NAFTA panels to U.S. agency decisions has varied widely and appears largely to reflect the composition of the particular panel at issue. In a recent case involving a sunset review of an antidumping order on stainless steel sheet and strip from Mexico, the NAFTA panel sustained a finding of the ITC in full, finding the decision to be "supported by substantial evidence and otherwise in accordance with law."[66] Notably, at the end of its decision, the panel set forth a general conclusion emphasizing that, under U.S. law, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" and that a NAFTA panel is not to "substitute its judgment for that of the [agency]."[67] Were all NAFTA panels to adhere to the standard of review that this stainless steel sheet panel applied the very different

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63. 19 U.S.C. § 1516a(b)(1)(B).

64. *See* JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER NAFTA CHAPTER 19, at 67 (1994).

65. *See* Extraordinary Challenge Committee, *In re: Softwood Lumber Products from Canada*, at *81, ECC-94-1904-01 USA (Aug. 3, 1994). One member of an Extraordinary Challenge Committee questioned the degree of deference that a dissenting colleague urged was appropriate in these cases, stating: "In my opinion, however, he is demanding almost absolute deference leaving almost no breathing space for a reviewing tribunal. If this is the correct law to apply then there is no need for a binational panel under the [NA]FTA." *Id.*

66. *See* Panel Decision, *In re: Stainless Steel Sheet and Strip in Coils from Mexico: U.S. International Trade Commission Final Affirmative Determination in the Five-Year Review of the Antidumping Order*, at *20, USA-MEX-2005-1904-06 (Sept. 10, 2008), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/ua2005060e.pdf [hereinafter Panel Decision, *Stainless Steel Sheet and Strip in Coils from Mexico*].

67. *Id.* at *10-11 (quoting Matsushita Elec. Indus. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); Am. Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom.* Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985)).

pattern of results between the U.S. courts and NAFTA panels that has occurred likely would not exist.[68]

Unfortunately, most NAFTA panels appear to have merely applied lip service to the U.S. standard of review, while substituting their own judgment for that of the U.S. agencies. In the first softwood lumber challenge, the panel essentially found that there was more than one reasonable interpretation of the evidence, preferred its own interpretation to that of the United States, and remanded the matter to the agency for reconsideration.[69] Similarly, in the *Memorandum Opinion and Remand Order, In re: Fresh, Chilled or Frozen Pork from Canada* case, the panel found conflicting evidence regarding underselling by imports but did not defer to the ITC's conclusions on the issue, rather substituting its own judgment.[70] Following a remand determination in which the ITC further discussed the evidence and the panel's concerns but nonetheless again issued an affirmative injury finding, the panel continued to find fault with the agency's decision.[71]

At this point, the panel did not simply remand yet again to the ITC but directed the ITC to find no injury.[72] Other NAFTA panels in more recent cases have similarly directed the agencies to issue final decisions without giving any real opportunity to address the issues on remand. In *Certain Softwood Lumber Products from Canada*, for example, a binational panel remanded to the ITC with explicit instructions to issue a negative determination on threat of injury.[73] Following the panel's determination, the ITC issued a negative threat determination but noted:

> [W]e disagree with the Panel's view that there is no substantial evidence to support a finding of threat of material injury and we continue to view the

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68. *See infra* Part III.D.

69. Panel Decision, *In re: Certain Softwood Lumber Products from Canada*, at 43-44, USA-92-1904-01 (May 6, 1993), *available at* http://www.worldtradelaw.net/cusfta19/lumber-cvd-cusfta19.pdf; *see also* Cannon, *supra* note 64, at 175-76.

70. Memorandum Opinion and Remand Order, *In re: Fresh, Chilled or Frozen Pork from Canada*, at 2, USA 89-1904-11 (Aug. 24, 1990), *available at* http://www.worldtradelaw.net/cusfta19/pork-injury-cusfta19.pdf.

71. Memorandum Opinion and Order, *In re: Fresh, Chilled and Frozen Pork from Canada*, at 24-34, No. USA-89-1904-11 (Jan. 22, 1991), *available at* http://www.worldtradelaw.net/cusfta19/pork-injury-remand-cusfta19.pdf.

72. *Id.* at 28.

73. *See* Second Panel Decision, *In re: Certain Softwood Lumber Products from Canada*, at 7, 11-13, USA-CDA-2002-1904-07 (Aug. 31, 2004), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02072e.pdf (issuing third remand panel decision "preclud[ing] the Commission on remand to undertake yet another analysis on the substantive issues" and directing it to enter a negative threat determination).

> Panel's decisions throughout this proceeding as overstepping its authority, violating the NAFTA, seriously departing from fundamental rules of procedure, and committing legal error.[74]

In a request for Extraordinary Challenge Committee (ECC) review in the lumber case, the ECC recognized first that the panel's power is similar to that of the Court of International Trade, which is "*normally* limited to remanding" the matter to the agency for reconsideration but "does not authorize the court to, in effect, reverse the agency's decision."[75] Nonetheless, the ECC found that the panel had not "manifestly exceed[ed] its powers, authority or jurisdiction" because it had remanded the matter to the Commission "to enter a negative threat determination."[76] How, precisely, one draws the line between a conclusion that reversal of an agency decision is improper but that a remand with express instructions to issue a particular result is permissible is difficult to fathom. Indeed, the ITC found it had no choice in response to the panel's instructions but to issue a negative decision in the lumber case.[77]

Although the U.S. appellate court has not expressly held that the lower court may not reverse the agency as opposed to remanding, it has in dicta stated: "Section 1516a limits the Court of International Trade to affirmances and remand orders; an outright reversal without remand does not appear to be contemplated by the statute."[78] The ECC conclusion that the NAFTA panel may permissibly dictate a result rather than permitting the Commission to come to its own conclusion raises grave concerns as to potential panel overreaching and supplanting of agency decision-making.

Perhaps most notable, however, in terms of the proper legal standards to be applied by NAFTA panels, are the conflicting views

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74. *See* Final Decision, *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414 and 731-TA-928, USITC Pub. 3815, at 13-14 (Sept. 2004) (views on remand).

75. *See* Extraordinary Challenge Committee, *In re: Certain Softwood Lumber Products from Canada*, at 44-45, ECC-2004-1904-01 USA (Aug. 10, 2005) (citations omitted), *available at* http://www.dfait-maeci.gc.ca/eicb/softwood/pdfs/august10.pdf.

76. *Id.* at 67.

77. *See* Final Decision, *Softwood Lumber from Canada*, *supra* note 74, USITC Pub. 3815, at 13-14.

78. Altx, Inc. v. United States, 370 F.3d 1108, 1111 n.2 (Fed. Cir. 2004). *But see* Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1561 (Fed. Cir. 1994) (indicating in dicta, ten years before *Altx*, that an absence of substantial evidence would lead to either reversal or remand). In *Nippon Steel Corp. v. United States*, the appellate court reversed the lower court's decision that had ordered a particular result, but did so based on a lack of substantial evidence rather than based on a finding that the statute does not permit the court to reverse agency decisions. 458 F.3d 1345, 1347-48, 1358-59 (Fed. Cir. 2006).

NAFTA panels have issued on the question of whether they are required to apply as precedential holdings of the United States Court of Appeals for the Federal Circuit. When this issue was reviewed by the panel examining *Corrosion-Resistant Carbon Steel Flat Products from Canada* in 2004, the panel found that it was "bound by judicial precedents of the Court of Appeals for the Federal Circuit ('CAFC') and by the United States Supreme Court."[79] Similarly, the ECC observed in *In re: Live Swine from Canada* that "[a]lthough Panels substitute for the Court of International Trade in reviewing Commerce's determinations, they are not appellate courts" and "must show deference to an investigating authority's determinations."[80] These conclusions seemed unremarkable and rather obvious at the time, given the mandate under NAFTA chapter 19 that panels must apply the law of the subject country.[81]

Subsequently, however, in a decision handed down in 2007, *Carbon and Certain Alloy Steel Wire Rod from Canada: 2nd Administrative Review* (*Steel Wire Rod from Canada*), the NAFTA panel majority determined that it was not bound to apply holdings by either the Court of International Trade or the Federal Circuit in reaching its decision.[82] While acknowledging that the issue of whether binational panels must follow Federal Circuit decisions "may not be free from doubt," the panel concluded that it was "replac[ing] judicial review" and, as such, need not follow U.S. appellate court precedent:

> We conclude that NAFTA Article 1904.2's specification of "a court" of the importing Party, the United States here, means neither the CIT nor the Federal Circuit. Perforce it means a generic or virtual United States court reviewing final Commerce determinations, as described in NAFTA Chapter 19. This generic or virtual court is not situated within the regime of, or bound by, decisions of the CIT or the Federal Circuit.

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79. Full Sunset Review, *In re: Corrosion-Resistant Carbon Steel Flat Products from Canada*, at 7, USA-CDA-00-1904-11 (Oct. 19, 2004), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua00110e.pdf.

80. Extraordinary Challenge Committee, *In re: Live Swine from Canada*, at 15-16, ECC-93-1904-01 USA (Apr. 8, 1993), *available at* http://www.worldtradelaw.net/cusftaecc/swine-cvd-cusftaecc.pdf.

81. NAFTA, *supra* note 62, art. 1904(3) ("The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.").

82. Panel Decision, *Carbon and Certain Alloy Steel Wire Rod from Canada: Second Administrative Review*, at 21, USA-CDA-2006-1904-04 (Nov. 28, 2007), *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua06040e.pdf [hereinafter Panel Decision, *Steel Wire Rod from Canada*].

> We further conclude that such a generic, virtual court (and this binational Panel) in determining whether the final determination before us is supported by substantial evidence and in accordance with law, would and must first determine, applying judicial standards, the extent to which such virtual United States court would rely on relevant decisions and other materials. In particular, in deciding questions of law of first impression in its jurisdiction, the virtual court should and would give full, thoughtful and respectful consideration to the decisions of the CIT and Federal Circuit. Such a virtual court should nonetheless look on those precedents like another United States Court of Appeals or a state supreme court would look upon them or another state supreme court decision. A decision whether to adopt a CIT or Federal Circuit decision should be primarily based on how relevant, well thought through and persuasive the decision appears to be in the context of the factual record presented.[83]

Two members of the panel dissented, finding that binational panels are not permitted to depart from Federal Circuit precedent:

> [W]e disagree with the majority in the capacity of Panels to depart from established CAFC [Federal Circuit] precedent. In our view such precedents ought to be followed unless there are exceptional circumstances to the contrary. It would be so even if we stood in the shoes of the CAFC itself. It is particularly so given the political history that attended the establishment of the Panels (ably described by the majority subject to our comments about motivation above) and the caution expressed by the Extraordinary Challenge Committee in the Live Swine case.[84]

The failure of a panel to follow holdings by the Federal Circuit based on its perception that the NAFTA article 1904.2 language applies only to a "virtual" court[85] and not the Court of International Trade or the Federal Circuit is a disturbing development. Prior to the *Steel Wire Rod from Canada* decision, although questions were raised as to whether panels had afforded sufficient deference to an agency decision under the standard of review, no panel had affirmatively stated that it was refusing to follow, and did not believe it was required to apply, judicial precedent of the Federal Circuit.[86] Although the decision was not subject to an ECC review, it appears that this holding, more than any other holding by a panel to date, was of sufficient gravity to invoke even the very high standards required for an ECC review, as turned to next.

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83. *Id.* (footnotes and citations omitted).
84. *Id.* at 73 (Barr & Liebman, JJ., dissenting).
85. *See id.* at 21.
86. *See* Panel Decision, *Steel Wire Rod from Canada*, *supra* note 82, at 71-72.

2. ECC Standard

Unlike the WTO Appellate Body and U.S. appellate court, which essentially apply the same standard of review as the WTO panel or the Court of International Trade, respectively, a very different standard of review applies to review of NAFTA panel decisions. The ECC is charged with determining only whether such gross misconduct or aberrant decision making by a NAFTA panel has occurred such that the integrity of the process is threatened.[87] The applicable standard for an ECC requires first that there be gross misconduct or a serious conflict of interest by a panelist, a serious departure by a panel from a fundamental procedural rule, or that the panel manifestly exceeded its authority, "for example by failing to apply the appropriate standard of review."[88] In addition, even where any of these factors exist, the ECC must further find that the actions both "materially affected the panel's decision and threatens the integrity of the binational panel review process."[89]

Although the strong language of this provision makes clear that the ECC process is not to function as a routine appeal, it must also be questioned whether the provision was intended to serve as no check whatsoever on panel decisions. To date, no ECC panel has found this standard satisfied. In some cases, the ECC has found various aspects of the standard met, but never the final aspect regarding a threat to the integrity of the process. For example, in *In re: Pure Magnesium from Canada*, the ECC found that the panel had "manifestly exceeded its powers by failing to apply the correct standard of review" and that this "action materially affected the Panel's decision."[90] Nonetheless, the ECC concluded that this behavior did not threaten the integrity of the process because the panel's decision was consistent with a decision of the Court of International Trade at the time, even though that decision was later overturned by the Federal Circuit.[91]

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87. NAFTA, *supra* note 62, art. 1904(13).

88. *Id.* art. 1904(13)(a)(iii).

89. *Id.* art. 1904(13)(b).

90. Extraordinary Challenge Committee, *In re: Pure Magnesium from Canada*, ECC-2003-1904-01USA, ¶¶ 34, 42 (1994), *available at* http://www.worldtradelaw.net/naftaecc/magnesium-dumping-naftaecc.pdf.

91. *Id.* ¶ 34; *see also* Extraordinary Challenge Committee, *In re: Gray Portland Cement and Clinker from Mexico: Fifth Administrative Review (8/15/94-7/31/95)*, at 6, ECC-2000-1904-01USA (Oct. 30, 2003), *available at* http://www.worldtradelaw.net/naftaecc/cement-dumping-naftaecc.pdf [hereinafter Extraordinary Challenge Committee, *Gray Portland Cement from Mexico*] (sustaining the panel decision even though it noted that, in its view, the dissenting opinion reflected the "better-reasoned approach").

Notably, the ECC emphasized that NAFTA article 1904(2) requires consideration of judicial precedents to the extent a reviewing court of the importing party would rely on such precedents and, as such, could not fault the panel for failing to apply U.S. law or for threatening the integrity of the process.[92] The clear import of the ECC's decision, however, suggests that were a panel to flagrantly disregard judicial precedents of the importing party, that action could lead to a finding of a threat to the integrity of the process.[93] Such a finding surely would have been justified with respect to the panel's decision in the *Steel Wire Rod from Canada* case.[94]

C. Procedural Pros and Cons of NAFTA Challenges

In terms of procedures, a challenge before a binational panel has both pros and cons from the vantage of the domestic industry. On the plus side, domestic industries are given full rights of participation, may have access to confidential information under protective orders, and may submit briefs and participate in the hearing. Hearings challenging U.S. decisions are generally held in Washington, D.C., so the venue is convenient. Where Commerce decisions are involved, attorneys from the Commerce Department present the arguments rather than Justice Department attorneys. Given the probing and detailed nature of many of the panelists' questions at the often lengthy hearings and the need for a high level of familiarity with the record, participation of Commerce attorneys who were involved in the agency proceeding and know the record well is generally a plus.[95] Further, although NAFTA panels do not have equitable powers, suspension of liquidation of entries subject to a NAFTA challenge is possible in certain contexts based on a request by an interested party to the administering authority pursuant to 19 U.S.C. § 1516a(g)(5)(C).

On the negative side, the NAFTA procedures for filing of various documents and processing basic papers, such as applications for protective orders, are often cumbersome. Numbers of copies required vary without particular reason, and a lack of electronic filing or

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92. *See* Extraordinary Challenge Committee, *Gray Portland Cement from Mexico*, *supra* note 91, at 6.

93. *See id.*

94. *See* Panel Decision, *Steel Wire Rod from Canada*, *supra* note 82.

95. Where decisions of the ITC are challenged, ITC attorneys defend those decisions before the WTO, the NAFTA panels, and the courts, so there is no difference in U.S. attorneys in ITC cases among the various trade fora.

electronic docket makes the process less user-friendly than the Court of International Trade. Often there is a significant delay in establishing a panel, which leads to motions languishing with no ruling for extended periods of time in some cases. No page limits are imposed on briefs, and hearings often take many hours if not all day, as panelists ask a wide range of questions. Although this extensive process might be viewed as a plus by some, it also leads to forays by panelists into issues of only tangential importance to a case or long discussions of issues or laws that have no real bearing on the topic at issue, depending on the experience of each of the panelists and familiarity with the laws and facts of the case.

In terms of timing, the NAFTA system was intended to result in a speedier resolution of cases than the courts or the WTO.[96] And, to a large extent, the deadlines established under NAFTA have led to fairly prompt submissions of pleadings, the record, and briefs. Delays frequently occur, however, in the formation of the panel, in the scheduling of the hearing, and in the issuance of the panel's decision.[97] In 2005, it was reported that: "NAFTA panel disputes now take on average 700 days to resolve (Lumber IV is in its fourth year). This is more than twice as long as they were supposed to, and longer than those settled at the U.S. Court of International Trade, the very process the NAFTA panels replaced."[98]

It does not appear that this lag time between filing of a NAFTA challenge and issuance of a decision has improved. In a recent case, *Stainless Steel Sheet and Strip from Mexico*, the ITC issued its final decision in July 2005.[99] ThyssenKrupp Mexinox filed a timely request for panel review in August 2005.[100] While briefs were thereafter promptly filed by all parties in the first half of 2006, a significant delay occurred

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96. Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, COMMENTARY (C.D. Howe Institute, Toronto, Ont.), Sept. 2002, at 17, 22.

97. *Id.* at 17. Although chapter 19 was "in theory, a good deal faster than WTO proceedings," the process "has been seriously delayed in the last few years by failure to appoint panellists [sic] in a timely fashion." *Id.*

98. Bruce Campbell, *Time To Draw a Line in the Sand: NAFTA and the Softwood Lumber Dispute*, BRIEFING PAPER: TRADE AND INVESTMENT SERIES (Can. Ctr. for Pol'y Alternatives, Ottawa, Ont.), Mar. 2005, at 3, *available at* http://www.policyalternatives.ca/documents/National_Office_Pubs/2005/brief6_1.pdf.

99. Panel Review, *Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom*, Inv. Nos. 731-TA-381-382, 731-TA-797-804, USITC Pub. 3788 (July 2005), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3788.pdf [hereinafter Panel Decision, *Stainless Steel Sheet and Strip in Coils from Mexico*].

100. Panel Decision, *Stainless Steel Sheet and Strip in Coils from Mexico*, *supra* note 66, at 4.

in constituting the panel.[101] Once the panel was formed, a hearing was held in July 2007.[102] The panel's final decision was then issued in September 2008.[103] While the panel's decision sustained the ITC's decision, thus affirming the status quo, a delay of over three years occurred between the filing of the panel request and issuance of the panel decision in this matter.[104] Had a remand to the agency occurred, this matter would still be unresolved.

Thus, to the extent that speedy resolution of cases before NAFTA panels was an intended purpose of the binational panel process, that goal has not been accomplished.

D. Substantive Results/Effect on U.S. Industry

From the perspective of the domestic industry, the NAFTA binational review process is not a preferred choice of forum for trade litigation. As discussed above, parties in NAFTA litigation often face cumbersome procedural hurdles and delays, incur significant costs in addressing multiple issues in lengthy briefs and in participating in extensive hearings, and are subject to a review process that often does not apply the proper standard of review. Even more concerning than all of these factors, however, is the track record of the NAFTA binational panels in trade remedy cases. Domestic industries, which are usually in the role of defending decisions by Commerce and the ITC in their favor, and occasionally in the role of challenging those decisions themselves, simply do not fare well in litigation before NAFTA panels as compared to litigation before U.S. courts.[105]

It has long been recognized by most domestic industry trade practitioners that the NAFTA binational review process is not the optimal forum for review of U.S. decisions to impose antidumping or countervailing duties against imports from Canada or Mexico.[106] This perception appears to have a solid basis in fact. In a study issued this year comparing U.S. judicial review and NAFTA panel review in trade remedy cases, the authors concluded:

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101. *Id.* at 5.
102. *Id.*
103. *Id.* at 1.
104. *Id.* at 20.
105. *See* Juscelino F. Colares & John W. Bohn, *A Comparison of U.S. Judicial and NAFTA Panel Review of Trade Remedy Cases*, 1 INT'L J. PRIVATE L. 69, 77 (2008) (emphasis added).
106. *Id.* at 69-70.

> A striking feature of the data analysed above is the *sustained asymmetrical pattern of review results between NAFTA and CIT/[Federal Circuit] adjudication*. Looking in different ways at the agency-determined rates prevailing before and after adjudication, *U.S. agencies consistently 'lose' on NAFTA appeals at a greater rate than when those challenges are raised before U.S. courts*. Similar results would normally be interpreted as uncontroversial if they emanated from parallel review systems where the substantive law or guiding principles of administrative review (or both) were different. That is not the case with review before NAFTA and the CIT/[Federal Circuit] systems.[107]

Thus, statistically it has been the case that U.S. agencies more often lose in challenges brought before NAFTA panels than in judicial appeals. And because domestic industries are generally appearing before a NAFTA panel in support of an agency decision, they lose as well.

Moreover, when domestic industries have challenged U.S. agency decisions under the NAFTA chapter 19 process (not generally because they chose to do so but because respondents opted for that forum), they have not been successful in overturning the agency. A study conducted of challenges by U.S. petitioners (as opposed to respondents) before NAFTA panels found that:

> [I]n only three instances in Chapter 19's history have U.S. petitioners persuaded a Chapter 19 panel that an agency has made any material error that the agency had not itself admitted. Another way of putting it is that of the more than eighty published Chapter 19 opinions reviewing U.S. agency action, totaling some 5000 pages, fewer than ten pages favorably dispose of petitioners' claims against an agency.
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> . . . .
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> Overall, no petitioner has ever succeeded in having a U.S. agency determination overturned, even on a single claim, as a result of a Chapter 19 proceeding. This disparity is particularly noticeable with respect to injury determinations: NAFTA panels have forced three ITC decisions involving Canada to go from affirmative to negative since NAFTA's inception, something that U.S. courts have done only once, even though orders involving Canada are only a small fraction of the ITC's case load.[108]

Given these results, it is little wonder that domestic industries do not affirmatively seek NAFTA panel review instead of U.S. judicial review.

Where panelists have rejected a particular U.S. decision as lacking evidentiary support, the NAFTA decision is of concern to the parties to

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107. *Id.* at 77 (emphasis added).

108. Juscelino F. Colares & John W. Bohn, *NAFTA's Double Standards of Review*, 42 WAKE FOREST L. REV. 199, 212-14 (2007).

the case, but not necessarily to the trade community at large due to the lack of precedent these decisions are intended to have. More broadly, however, the lack of deference by panels generally to the U.S. agencies and the asymmetrical results are of concern to U.S. petitioners. Moreover, where NAFTA panels issue decisions on matters of law and do not respect the holdings of the U.S. appellate court, that is an even greater cause for concern. Trepidation that domestic industries may have had with NAFTA panel holdings in the past and the lack of deference to agency decision making have only been heightened by the panel decision in the Canadian wire rod case.[109]

IV. LITIGATING BEFORE THE COURT OF INTERNATIONAL TRADE AND FEDERAL CIRCUIT

A. Role of Petitioners/U.S. Industry

The preferred forum for litigation by petitioners or U.S. industries is almost always the U.S. judicial system. The role of domestic industries in this process is significant. Where domestic industries seek to challenge an agency decision, they have full rights to file a cause of action, submit briefs, and participate in oral argument before the court. Where domestic industries seek to intervene in a court appeal to support an agency decision in their favor, again they have full rights equivalent to the rights of other parties.

B. Standard of Review

The standard of review applicable to litigation before the U.S. courts is also the most straightforward and well-defined (as compared to WTO or NAFTA review standards). As recently articulated by the Court of International Trade:

> When reviewing the final results in antidumping administrative reviews, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. Section 1516a(b)(1)(B)(i) (2000).
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> Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the

109. *See* Panel Decision, *Steel Wire Rod from Canada*, *supra* note 82.

> evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[110]

When a legal question is presented, U.S. courts apply the *Chevron* doctrine, which

> first looks at whether Congress has spoken directly to the issue and second, where Congressional intent is unclear, "the court does not simply impose its own construction on the statute . . . [r]ather . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute."[111]

Although this deferential standard of review is also to be applied by NAFTA panels, and a similar standard was to be applicable to WTO dispute settlement under article 17.6(ii), the U.S. courts have generally exhibited a much greater willingness to defer to the U.S. agencies than either NAFTA panels or the WTO dispute settlement body. This deference may reflect not only a better understanding of the U.S. standard of review but also a recognition of the expertise the agencies bring to the process. As the Federal Circuit stated in describing the role of the International Trade Commission in *Nippon Steel Corp. v. United States*:

> Commissioners are appointed by the President, and confirmed by the Senate, because of their expertise in recognizing, and distinguishing between, fair and unfair trade practices. They presumably are selected to be Commissioners based on their expertise in, *inter alia*, foreign relations, trade negotiations, and economics. Because of this expertise, Commissioners are the factfinders in the material injury determination: "It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process."[112]

Based on this recognition, U.S. courts, and in particular the Federal Circuit, are significantly more willing to defer to agency decisions on issues involving substantial evidence challenges as well as on issues involving legal interpretations under *Chevron* as compared to other trade fora.

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110. Ningbo Fiber Co. v. United States, No. 07-00236, slip op. at *2-3 (Ct. Int'l Trade Sept. 2, 2008) (quoting Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

111. Allegheny Ludlum Corp. v. United States, 475 F. Supp. 2d 1370, 1375 (Ct. Int'l Trade 2006) (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

112. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1350 (Fed. Cir. 2006) (quoting U.S. Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996)).

Where Federal Circuit review of a decision by the Court of International Trade is at issue, the appellate court has stated: "We apply anew the standard of review applied by the Court of International Trade in its review of the administrative record. We therefore uphold the Commission's determination unless it was arbitrary and capricious or unsupported by substantial evidence on the record, or otherwise not in accordance with law."[113] Thus the U.S. appellate court essentially repeats the same review process under the same standard of review as the Court of International Trade—arguably, an inefficient process for appeal.

Another factor likely affecting the manner in which the standard of review is applied by U.S. courts, as opposed to NAFTA or WTO panels, is the different roles of U.S. judges and NAFTA/WTO panelists. Judges, with their unique background, training and experience, as well as their understanding of the rules of U.S. law, approach decision making through a particular prism consistent with their experience as independent members of the U.S. judiciary. Panelists, on the other hand, not only lack the judicial training and background but often are practitioners serving as part-time adjudicators, with a bias toward certain legal interpretations or outcomes consistent with their backgrounds. NAFTA panelists, moreover, are not subject to any real appellate review, given the very high ECC standard. These fundamental differences in the nature of the decision-makers in the various trade fora undoubtedly account to a large extent for the different ways in which a seemingly similar, if not identical, standard of review is applied.

That U.S. courts generally understand and apply the standard of review properly, however, does not mean that in all cases judges do not substitute their own views or even create entirely new law, not found in the statute, based on their perceptions as to how the law should operate. In response to the appellate court's decision in *Bratsk Aluminum Smelter v. United States*, for example, the ITC applied an entirely new "replacement/benefit" test that is not set forth in the statute and that, in fundamental terms, conflicts with other long-standing legal principles recognized by the court.[114] This creation of an extrastatutory test could

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113. Bratsk Aluminum Smelter v. United States, 444 F.3d 1369, 1372-73 n.2 (Fed. Cir. 2006) (quoting Timken U.S. Corp. v. United States, 421 F.3d 1350, 1354 (Fed. Cir. 2005)).

114. *Id.* at 1375. As then-Commissioners Aranoff and Hillman stated, the *Bratsk* test "misconstrues the purpose of the statute, which is not to bar subject imports from the U.S. market." Final Decision, *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, Inv. No. 731-TA-961 (Remand), USITC Pub. 3903, at 16 (2007), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3903.pdf. They further noted that "had the Commission applied

certainly be considered a failure to apply the law and the proper standard of review by the appellate court. Fortunately, a recent decision has significantly narrowed and limited the *Bratsk* holding, with the appellate court expressly stating that it did not intend to require the ITC to use a specific methodology or to apply an entirely new test.[115]

C. Procedural Pros and Cons of Court Litigation

From the domestic industry's vantage and, indeed, from most parties' vantage, there are a number of positive procedural aspects to litigation before the courts as opposed to NAFTA or the WTO. Most importantly, U.S. law provides detailed rules and procedures to be followed, ranging from the extensive Federal Rules of Civil or Appellate Procedure to the specific rules applicable to litigation at the Court of International Trade and the Federal Circuit. Although there are some general procedural rules and guidelines in both the WTO and NAFTA processes, neither comes close to the level of detail set forth in U.S. court rules and procedures. For example, if a motion were filed in an unassigned case before the Court of International Trade, a motions judge would rule on it rather than permitting it to languish as is often true in a NAFTA challenge. If a frivolous claim is filed by a party, an objection can be made under Rule 12(b)(6),[116] an option not available in WTO or NAFTA challenges.

Other procedural approaches by the courts are also more beneficial to the parties than those existing in other fora. Applications for retaining confidential information under protective orders before the court have been streamlined. Page limits are established for briefs, limiting parties from raising every issue possible. Time limits are generally imposed on oral arguments at the Court of International Trade of only an hour or two, requiring a focused discussion of the issues. Judges at the court are also well prepared in advance of the argument, having read the briefs and knowing the law and the facts. In other fora, much time may be spent simply educating the panelists on these matters. In addition, questions about particular procedures, filing requirements, or respective case status are readily available at the Federal Circuit and Court of International Trade via the clerks' offices as well as the assigning of individual case

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what we believe to be the proper standard" for injury determinations rather than the Bratsk-court's replacement/benefit test, an affirmative determination would have resulted. *Id.* at 3.

115. *See* Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 878-79 (Fed. Cir. 2008).

116. FED. R. CIV. P. 12(b)(6) (failure to state a claim for which relief can be granted).

managers to each Court of International Trade judge. Further, the electronic nature of the Case Management/Electronic Case Files (CM-ECF) process at the Court of International Trade and the Federal Circuit's Electronic Pacer Docket are significantly more sophisticated and helpful to practitioners than the systems used by NAFTA or WTO panels.

On a more substantive level, the U.S. courts have powers in law and in equity, and thus are able to provide injunctive relief. Imposition of preliminary injunctions to maintain the status quo while litigation progresses may be an important factor in the ultimate remedy a party attains. Further, the remedies the court provides are not limited to prospective relief, but may be implemented retroactively with respect to entries that are unliquidated, depending on the facts, if the court finds it appropriate.

On the negative side, litigation before the courts can take a very long time, although there has been improvement in the timing of resolution of cases at the Court of International Trade in recent years. While the filing of pleadings and briefs generally tracks the deadlines set forth in the court rules, there may be a long delay before an oral argument is held and an even longer delay before a decision is issued. Further, because decisions often lead to one or more remands, these delays can diminish the effectiveness of any relief provided to the prevailing party. Statistics indicating the length of time for resolution of cases before the courts often fail to recognize the total time to conclude the litigation following multiple remands as opposed to simply the time to issue one decision.[117]

In a recent case in which there was a six-year delay between the filing of the complaint and the latest ruling in plaintiffs' favor,[118] the court stated that such a "timewarp" had occurred that the parties were instructed to attempt to settle the case given its "extraordinary procedural posture."[119] Another case involving a challenge to an ITC decision on

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117. Between fiscal years 1999 and 2007, the Federal Circuit reported a median time of 12.4 months to dispose of cases appealed from the Court of International Trade. *See* United States Court of Appeals for the Federal Circuit, Median Time to Disposition in Cases Terminated After Hearing or Submission, *available at* http://www.cafc.uscourts.gov/pdf/MedianDispTime (table)99-07.pdf (last visited Jan. 10, 2009).

118. Plaintiffs' summons and complaint in the Court of International Trade, Court No. 01-00955, were filed on October 30, 2001. The most recent court decision was issued in November 2007. Gerdau Ameristeel U.S. Inc. v. United States, No. 01-00955, 2007 WL 3306718 (Ct. Int'l Trade Nov. 8, 2007).

119. Co-Steel Raritan, Inc. v. U.S. Int'l Trade Comm'n, No. 01-00955, slip op. at *31-32 (Ct. Int'l Trade Jan. 17, 2007). In that case, the ITC on remand was charged with reassessing a preliminary finding that certain imports would not imminently exceed the statutory negligibility

grain-oriented electrical steel also spanned "more than six years and include[d] four determinations by the Commission and six opinions from the Court of International Trade" before it was resolved in 2007.[120] Yet a third case involving an appeal from an ITC decision in an *original* investigation on wire rod has been before the courts (including twice before the Federal Circuit) for almost six years; indeed, the most recent argument before the Federal Circuit took place on the same day that the ITC issued its decision in the five-year "*sunset*" review of the order at issue.[121]

Although each of these cases involved some complex issues, the lengthy time in which the appeals remain pending before the courts is of concern. These delays often deny parties the benefits of prevailing due to the extended passage of time. Further, costs to all parties are significant when the litigation is so protracted. Although litigation in other fora is subject to many negatives as discussed above, and can also be delayed in terms of ultimate decision and remedy, the one major drawback to judicial litigation remains the delay in final resolution of these appeals.

D. Substantive Results/Effect on U.S. Industries

When faced with a choice of fora, for the reasons noted above, domestic industries are best advised to pursue litigation before the U.S. courts when they have the opportunity to make that choice. Not only are the procedural facets of court appeals generally preferable for domestic litigants, but substantive aspects of this process are also positive. For example, there is the benefit of judicial precedent, with courts affirmatively acknowledging and citing decisions issued in the past on similar issues. Unlike NAFTA panels and the WTO, where decisions are not to be precedential, there is a value in having a wide and detailed body of precedential law to draw from when presenting cases to the courts.

Further, given that judges generally understand far better than panelists the standard of review applicable in U.S. law, judicial review of agency decisions best ensures that the standard will be properly applied. Although parties may disagree with the outcome, and believe that the standard was misapplied in some cases, overall it cannot be doubted that

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standard; the court properly observed, "this entails a perception of the future, which is now past." Co-Steel Raritan v. U.S. Int'l Trade Comm'n, No. 01-00955, 2005 WL 1367272, at *1 (Ct. Int'l Trade June 7, 2005).

120. Nippon Steel Corp. v. United States, 494 F.3d 1371, 1373 (Fed. Cir. 2007).

121. Mittal Steel Point Lisas Ltd. v. United States, 542 F.3d 867, 867-72 (Fed. Cir. 2008).

judges on both the Court of International Trade and Federal Circuit well understand *Chevron* and the standard of review set forth in 19 U.S.C. § 1516a(b).[122]

V. INTERPLAY OF CHALLENGES BEFORE VARIOUS FORA

A. Statutory Rules

The interrelationship of litigation that occurs before the various trade fora and the effects of decisions by one trade body on another have likely been more complex than was envisioned by Congress and the trade bar initially. Although certain statutory provisions are explicit in addressing how, if at all, a decision by one trade body will affect litigation on the same case or other cases before other trade bodies, the cross-over effects of these decisions have been significant.

Two statutory provisions in U.S. law address the manner in which implementation of WTO decisions at odds with agency determinations can occur. Section 123(g) of the Uruguay Round Agreements Act provides that an agency practice or regulation that has been found by the WTO dispute settlement body to be inconsistent with the WTO may not be modified until a number of procedural steps are taken by the Administration.[123] These steps include consulting with various congressional committees, soliciting public comments on the proposed change and advice from private sector advisory committees, and generally participating in a sixty-day consultation period.[124] Section 129 of the Uruguay Round Agreements Act, on the other hand, addresses implementation of adverse WTO dispute settlement body decisions as they relate to specific antidumping or countervailing duty cases.[125] Depending upon the WTO decision, implementation may require modification of an agency practice under section 123 as well as implementation of the determination in a specific case under section 129.

The Statement of Administrative Action explains the Administration's intent with respect to section 129 as follows:

> Subsection 129(e) amends section 516A of the Tariff Act of 1930 to provide for review by the courts and NAFTA binational panels of new Title VII determinations made by Commerce or the ITC under section 129 that are implemented. The subsection also establishes the time available for

122. 19 U.S.C. § 1516a(b) (2006).
123. *Id.* § 3533(g).
124. *Id.*
125. *Id.* § 3538.

> filing an appeal with the court or with a binational panel. Section 129 determinations that are not implemented will not be subject to judicial or binational panel review, because such determinations will not have any effect under domestic law.
>
> In some cases, implementation of section 129 determinations may render moot all or some issues in pending litigation in connection with the agency's initial determination. For example, should the Trade Representative direct Commerce to implement a section 129 determination that changes the cash deposit rate, such action could render moot any pending domestic litigation solely involving the amount of the cash deposit rate, as opposed to the validity of the underlying antidumping or countervailing duty order. If, by contrast, the litigation also involved the validity of the original determination, the court or binational panel would still have to render an opinion on that subject.
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> Since implemented determinations under section 129 may be appealed, it is possible that Commerce or the ITC may be in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under section 129 does not signify that the initial determination was unlawful.[126]

As one commentator observed, "[i]t was never seriously considered that a WTO dispute settlement decision would apply directly in U.S. law."[127] Further, under the Uruguay Round Agreements Act Supremacy Clause, Congress made clear that if there is an inconsistency between U.S. law and a provision in the Uruguay Round international agreement, U.S. law takes precedence.[128] Certainly, any dispute settlement finding that rejects a statute cannot be implemented except by legislation.

Where NAFTA binational panel decisions are at issue, the statute is more precise: U.S. courts may consider NAFTA decisions, although they are not binding.[129] As a practical matter, however, NAFTA decisions have

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126. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, at 1027 (1994).

127. 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, 217 (2006) (quoting David W. Leebron, *Implementation of the Uruguay Round Results in the United States*, *in* IMPLEMENTING THE URUGUAY ROUND 175, 219 (John H. Jackson & Alan O. Sykes, Jr. eds., 1997)).

128. 19 U.S.C. § 3512(a)(1).

129. *Id.* § 1516a(b)(3).

not been particularly influential in judicial decisions. The lack of deference by the courts has been suggested to reflect the "arbitral nature of the proceedings and the lack of precedential effect" of those decisions, thus giving them but a limited role.[130]

B. Judicial Analysis of Relevance of NAFTA/WTO Decisions

The interrelationship between the laws and decisions of the various international trade fora and the effects of a decision in one venue on another have been the subject of extensive analysis and discussion by U.S. courts and by commentators. Although it is recognized that U.S. courts must give effect to U.S. law when there is any conflict with an international agreement, where ambiguity in U.S. law exists or where the international ruling being considered is a decision handed down by the WTO dispute settlement body, the relationships are murkier.

In particular, courts have struggled with how the statutory requirements interface with the *Charming Betsy* precept. Under the *Charming Betsy* doctrine, "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains."[131] The question remains, however, whether decisions of the WTO dispute settlement body comprise the "law of nations" for purposes of invoking *Charming Betsy*. Although some commentators have argued that WTO dispute settlement body decisions should be recognized under *Charming Betsy*, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act states that decisions of WTO panels and the Appellate Body have no binding effect under U.S. law.[132] Similarly, the U.S. courts have recognized that an interpretation of the international Antidumping Agreement by a WTO panel or Appellate Body has "no binding effect on the Court."[133]

In *Corus Staal BV v. U.S. Department of Commerce*, the court rejected the suggestion that WTO dispute settlement body decisions should be given any legal effect outside of the WTO: "While commentators argue that there is de facto *stare decisis* within the WTO . . . the fact remains that these decisions have no express legal effect

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130. Jane A. Restani & Ian Bloom, *Interpreting International Trade Statutes: Is the* Charming Betsy *Sinking?*, 24 FORDHAM INT'L L.J. 1533, 1544 n.63 (2001).

131. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

132. URUGUAY ROUND AGREEMENTS ACT: STATEMENT OF ADMINISTRATIVE ACTION, H.R. Doc. No. 103-316, at 1032 (1994).

133. Hyundai Elecs. Co. v. United States, 53 F. Supp. 2d 1334, 1343 (1999).

beyond the boundaries of the particular [WTO] case."[134] Similarly, in *Tembec, Inc. v. United States*, a three-judge panel of the Court of International Trade recognized that under the WTO, the United States is free to disregard decisions by a WTO panel or Appellate Body.[135] Specifically, *Tembec* recognized that under the international agreements, while compliance with a WTO dispute settlement body decision is encouraged, parties are expressly given the right to substitute a compensatory trade agreement or accept retaliation while leaving the practice in place.[136] Although the WTO Appellate Body has now indicated that it expects its decisions to have precedential effect for future WTO dispute settlement body reviews,[137] in fact WTO decisions were never intended to have stare decisis effect and are simply decisions that a member country may choose to, but need not, implement.[138]

On the other hand, in *SNR Roulements v. United States*, the court reiterated the importance of interpreting U.S. law so as not to conflict with international obligations, although it did not expressly address the question of whether WTO dispute settlement body decisions comprise international obligations.[139] Similarly, the *Usinor v. United States* court held that despite the absence of stare decisis on WTO decisions, they may still be a source of "persuasive rationale."[140] Most notably, the *Allegheny Ludlum v. United States* court found that its decision to adopt a narrow interpretation of the statute avoided an "unnecessary conflict between domestic law" and the WTO agreement, citing the *Charming Betsy* doctrine in support of its conclusion.[141]

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134. Corus Staal BV v. U.S. Dep't of Commerce, 259 F. Supp. 2d 1253, 1264 n.17 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005).

135. 441 F. Supp. 2d 1302, 1328 (Ct. Int'l Trade 2006), *vacated*, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007).

136. *Id.*

137. *See supra* Part II.D.

138. *Corus Staal*, 259 F. Supp. 2d at 1264 ("WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved. They are not binding upon other signatory countries or future WTO panels."); *see also* John D. Greenwald, *After* Corus Staal*—Is There Any Role, and Should There Be—For WTO Jurisprudence in the Review of U.S. Trade Measures by U.S. Courts?*, 39 GEO. J. INT'L L. 199, 207-09 (2007). Indeed, the author questions whether a U.S. court should ever pay any attention to WTO decisions or accord them weight, given the limited legal status of these decisions in U.S. law. Greenwald, *supra*, at 207-08.

139. SNR Roulements v. United States, 341 F. Supp. 2d 1334, 1343-44 & n.6 (Ct. Int'l Trade 2004), *aff'd*, 29 Ct. Int'l Trade 85 (2005), *aff'd mem.*, 2006 WL 3782907 (Fed. Cir. Dec. 8, 2006) (per curiam).

140. Usinor v. United States, 342 F. Supp. 2d 1267, 1279 n.13 (Ct. Int'l Trade 2004).

141. Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1345, 1348 (Fed. Cir. 2004).

C. Three Case Studies

Three cases provide interesting examples of the intersection between the various international trade fora: the zeroing cases, the privatization appeals, and the lumber litigation addressing the ITC threat decision.

With respect to zeroing, in the *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* case, the WTO Appellate Body first held that the practice of zeroing was not consistent with the international Antidumping Agreement.[142] In reviewing the relevance, if any, of this holding to its determination of whether the U.S. zeroing practice was lawful, the Federal Circuit in *Timken* found the practice to be reasonable regardless of the WTO decision.[143] Rather than finding that the WTO holding was simply irrelevant to its decision as a WTO dispute settlement body holding, however, the Federal Circuit found that the decision was distinguishable because it did not address the U.S. zeroing practice and applied in the context of an investigation not an administrative review.[144] In *Corus Staal*, the court also reviewed the zeroing methodology and the *Bed Linens from India* holding, and found that the WTO Appellate Body decision was a "non-binding interpretation of an international agreement" and that even if the domestic statute is ambiguous, the court should defer to the domestic interpretation in the face of ambiguities.[145]

Subsequently, however, there were a number of WTO dispute settlement body decisions that explicitly struck down the U.S. practice of zeroing in all contexts. In April 2006, the WTO Appellate Body found that the zeroing methodology applied by the United States in administrative reviews was inconsistent with WTO obligations.[146] In *United States—Measures Relating to Zeroing & Sunset Reviews*, the Appellate Body found zeroing inconsistent with various articles of the Antidumping Agreement.[147] Finally, the Appellate Body recently

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142. Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 66, WT/DS141/AB/R (Mar. 1, 2001), *available at* http://www.worldtradelaw.net/reports/wtoab/ec-bedlinen(ab).pdf.

143. Timken Co. v. United States, 354 F.3d 1334, 1342-45 (Fed. Cir. 2004).

144. *Id.* at 1343-45.

145. Corus Staal BV v. U.S. Dep't of Commerce, 259 F. Supp. 2d 1253, 1263-64 (Ct. Int'l Trade 2003), *aff'd upon remand*, 395 F.3d 1343 (Fed. Cir. 2005).

146. *See* Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶¶ 132-135, WT/DS294/AB/R (Apr. 18, 2006).

147. *See* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶¶ 137-138, 147-169, 182-186, 190(b), WT/DS322/AB/R (Jan. 9, 2007).

reversed the panel's determination that the U.S. zeroing practice in administrative reviews was allowed under WTO rules.[148]

The Federal Circuit, however, did not alter its determination that the practice of zeroing was lawful under the U.S. statute irrespective of express WTO holdings to the contrary.[149] Indeed, the court has made increasingly clear in its decisions that the holdings of the WTO dispute settlement body are not binding on nor even particularly relevant to its analysis and decision.[150]

The zeroing issue has also arisen in NAFTA binational panel reviews. In the *Steel Wire Rod from Canada* case discussed *supra* Parts III.B.1 and III.D, the NAFTA panel concluded in reviewing the U.S. practice of zeroing that it need not follow Federal Circuit decisions addressing this exact issue and sustaining the Commerce Department's zeroing methodology.[151] While ignoring U.S. appellate court law, the NAFTA panel cited to and relied upon the reasoning in several WTO dispute settlement body decisions that struck down the U.S. zeroing methodology.[152] Ignoring the holding of the U.S. appellate courts while citing and following decisions by the WTO dispute settlement body is a disturbing development, to say the least, from the vantage of the domestic industry.

Unfortunately, despite consistent decisions by the U.S. appellate court sustaining the Commerce Department's zeroing methodology, the U.S. Administration determined that it would eliminate its longstanding practice of zeroing to comply with the WTO Appellate Body decision.[153] As Congressman Rangel observed: "That practice [zeroing] had been in place for more than eighty years in the United States and many other countries. The administration ended this practice to comply with a WTO ruling that the administration itself described as 'very troubling,' 'fatally flawed,' and 'devoid of legal merit.'"[154] Thus, despite the U.S. courts'

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148. *See United States—Stainless Steel from Mexico*, *supra* note 24, ¶¶ 67-70.

149. *See* SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (Fed. Cir. 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007).

150. *SKF USA*, 537 F.3d at 1382; *NSK Ltd.*, 510 F.3d at 1380.

151. Panel Review, *Steel Wire Rod from Canada*, *supra* note 82, at 21-28.

152. *Id.* at 36.

153. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 11,189 (Mar. 6, 2006).

154. Charles B. Rangel, *Moving Forward: A New, Bipartisan Trade Policy that Reflects American Values*, 45 HARV. J. ON LEGIS. 377, 411-12 (2008) (quoting Communication by the United States, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 25, WT/DS 332 (Feb. 20, 2007); Communication from the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 3, WT/DS294/18 (June 19,

consistent affirmance of the zeroing practice as lawful, that practice has been abrogated based on rejection by the WTO dispute settlement body—a major loss for U.S. petitioners.

In the steel privatization appeals, challenges were advanced before the WTO to the change-in-ownership methodology applied by Commerce. The WTO panel found that the U.S. practice as well as the U.S. statutory provision in section 1677(5)(F) addressing change in ownership[155] violated the SCM Agreement.[156]

In response to arguments by the United States that the statute did not require the change-in-ownership methodology it adopted, the WTO Appellate Body found that section 1677(5)(F) "as such" did not require use of this methodology.[157] The Appellate Body concluded that while the U.S. methodology violated international obligations, the U.S. statute on its face was not unlawful.[158] In response to this decision, the United States conducted proceedings under section 123 and section 129 and adopted a new and, from the domestic industry's perspective, unlawful and unhelpful change-in-ownership test, designed to reflect the Appellate Body holding.[159]

In an appeal that occurred on privatization after the WTO Appellate Body decision was issued, the Federal Circuit noted that the WTO dispute settlement body decision was not binding on the court, but nonetheless cited to and relied upon the Appellate Body's holding to harmonize what it characterized as an ambiguous U.S. statute with the "international obligations" of the United States.[160] As one commentator recognized:

> While vociferously declaring that WTO Appellate Body decisions are not binding on United States courts, the Federal Circuit and the CIT are quietly giving those same decisions acknowledged deference in their determinations of law. In a contrary vein, the courts avoid mentioning the URAA Supremacy Clause, which is binding on the courts, while using

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2006); Roger Alford, *Reflections on US-Zeroing: A Study of Judicial Overreaching by the WTO Appellate Body*, 45 COLUM. J. TRANSNAT'L L. 196 (2007)).

155. 19 U.S.C. § 1677(5)(F) (2006).

156. Panel Report, *United States—Countervailing Measures Concerning Certain Products from European Communities*, ¶¶ 7.155-.158, WT/DS212/R (July 31, 2002).

157. Appellate Body Report, *United States—Countervailing Measures Concerning Certain Products from European Communities*, *supra* note 43, ¶¶ 159-161.

158. *Id.* ¶¶ 158-161.

159. *See supra* Part II.C.

160. Allegheny Ludlum Corp. v. United States, 367 F.3d 1334, 1348 (Fed. Cir. 2004).

> WTO Appellate Body decisions to harmonize the statutory interpretations and WTO agreements in question.[161]

Perhaps the most interesting interplay between a NAFTA decision and a WTO decision occurred in the challenge to the ITC's decision in the *Softwood Lumber from Canada* case. As discussed above, the NAFTA binational panel found that there was no record evidence to support the ITC's threat of injury finding and ordered the ITC to issue a determination "that the evidence on the record does not support a finding of threat of material injury."[162] Pursuant to the panel's order, and despite expressing strong disagreement with the panel's view and its ordered result, the ITC issued a negative determination.[163]

At the same time, however, Canada had also filed a challenge to the ITC's injury determination before the WTO dispute settlement body. The WTO dispute settlement body, although questioning some aspects of the ITC's decision, did not direct that it be overturned. On remand by the WTO, the ITC issued another affirmative threat finding.[164] The ITC's negative determination in response to the NAFTA panel occurred in September 2004, while the ITC's affirmative determination in response to the WTO decision was issued in November 2004. Ultimately, the WTO sustained the new ITC affirmative ruling.[165] The United States then took the position that the WTO decision essentially prevailed over the NAFTA ruling and did not revoke the lumber order at issue.[166]

As a result, at least one commentator has questioned the value of using a dual-venue challenge to an antidumping decision, citing the outcome in the lumber case:

> Ironically, the Canadian decision to follow a two-track strategy of appealing the initial ITC determination to both the WTO and a Chapter 19 panel has—at the end of the day—seemed to have backfired. After all, if the ITC decision had only been challenged pursuant to NAFTA Chapter

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161. Filicia Davenport, *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the* Charming Betsy *Standard with Respect to WTO Agreements*, 15 FED. CIR. B.J. 279, 310 (2005/2006).

162. *See* Second Panel Decision, *In re: Certain Softwood Lumber Products from Canada*, *supra* note 73, at 7.

163. *See* Final Decision, *Softwood Lumber from Canada*, *supra* note 74, at 13-14.

164. *See id.*

165. *See* Jeffrey L. Dunoff, *The Many Dimensions of Softwood Lumber*, 45 ALTA. L. REV. 319, 345-46 (2007).

166. *See id.*

19, there would be no basis for imposing duties since the ITC's negative injury determination would be the last word.[167]

D. Other Considerations in Choice of Trade Fora

The different natures of the challenges presented in a WTO, NAFTA, or court appeal may in themselves lead to different results and, thus, affect the choice of fora. In a NAFTA chapter 19 challenge and in a U.S. court appeal, the issue is whether the agency decision is in accordance with applicable U.S. law. In a WTO appeal, however, the issue is whether the agency decision, policy, or law is in accordance with the WTO international agreements. Based on these different questions, it is certainly plausible that different results may ensue.

Further, it is not the case that the NAFTA chapter 19 process and the WTO dispute settlement body process are alternative options to challenging agency actions. Both NAFTA and WTO venues may be and often are pursued. Similarly, parties may pursue an appeal before the U.S. courts at the same time they are pursuing a WTO dispute settlement body challenge. Although these challenges could potentially reflect the presentation of issues based on domestic law as opposed to international law, in fact most of the challenges presented in the various trade fora reflect largely the same issues.[168]

The reasons why a party may choose to pursue simultaneous challenges before more than one forum vary. As noted above, only member nations may bring actions before the WTO. If private litigants wish to directly challenge agency action, they must pursue a NAFTA or court appeal.[169] Although respondent parties may attempt to persuade

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167. C. Verill, *Canada—U.S. Lumber Dispute Threatens NAFTA Extraordinary Challenge Process*, 15 N. AM. FREE TRADE & INVESTMENT REP., Sept. 2005, at 1, 4.

168. For example, the Korean Government and Korean producer Hynix challenged both Commerce's finding of subsidies and the ITC's injury determination involving DRAMS from Korea. Both the WTO dispute settlement body and the U.S. court sustained the affirmative finding by Commerce and the ITC. *See generally United States—DRAMS from Korea*, *supra* note 26; Hynix Semiconductor, Inc. v. United States, 474 F. Supp. 2d 1338, 1347 (Ct. Int'l Trade 2006); Hynix Semiconductor Inc. v. United States, 425 F. Supp. 2d 1287, 1288 (Ct. Int'l Trade 2006). Further, the issues raised at the WTO and the courts were largely the same. Thus, the costs and resources of pursuing dual venues were significantly higher with no ultimate difference in result.

169. Although petitioners do not have a choice of fora between the WTO and NAFTA/U.S. courts, respondents may opt to pursue a NAFTA challenge and/or court appeal in addition to a WTO appeal to preserve their right to present their own arguments rather than having to defer to the foreign government as to which arguments it will pursue. *See* Macrory, *supra* note 96, at 16. Respondents also may opt to pursue WTO litigation in some cases because they can file the challenge simply in reaction to a particular policy, without respect to implementation of that

foreign governments to pursue a WTO challenge on their behalf, that course of action does not preclude them from also pursuing a NAFTA challenge. As a practical matter, pursuit of remedies in more than one forum may lead to a quicker remedy, depending on the fora. Further, by using more than one forum, respondents may obtain an additional bite at the apple. Even if a U.S. court sustains the agency's decision, if a WTO panel rejects that decision, the United States must still implement the WTO dispute settlement body decision or accept retaliation. On the other hand, as the Canadian lumber industry discovered, pursuit of relief before both NAFTA and the WTO may backfire.[170]

Moreover, because the WTO dispute settlement body has no equitable remedies available to it, respondents may opt to pursue both an appeal before a U.S. court as well as a challenge at the WTO. By appealing a decision to a U.S. court, respondents are able to obtain a preliminary injunction preventing liquidation of entries. Even though they may ultimately lose their U.S. appeal, by delaying liquidation of the entries, if they succeed in their WTO challenge, the relief provided may in fact have broader effect and apply as well to the unliquidated entries. Indeed, it appears that the continued court appeals challenging the Commerce's zeroing methodology, despite the appellate court's strong and repeated findings in favor of the agency on the zeroing issue, are simply a means of obtaining this injunctive relief while respondents simultaneously pursue a WTO challenge on zeroing.[171]

VI. CONCLUSION

From the perspective of domestic industry petitioners, therefore, there is little "choice" in the trade venue to pursue but much consequence to the venue chosen by respondents. Domestic petitioners will and should pursue litigation before the U.S. courts in virtually all instances when challenging a U.S. agency decision in an antidumping or countervailing duty case. Pursuit of litigation before the U.S. courts provides the most optimal procedures, precedent, and proper application

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policy in a specific case as is required for a NAFTA challenge or court appeal. *See, e.g.*, Panel Report, *United States—Measures Treating Export Restraints as Subsidies*, ¶ 3.1, WT/DS194/R (June 29, 2001) (assessing Canada's complaint that a certain U.S. policy is "inconsistent with the SCM agreement").

170. *See supra* Part V.C.

171. *See, e.g.*, SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (Fed. Cir. 2008) ("We have reviewed SKF's arguments regarding zeroing and find them unpersuasive. SKF fails to raise any argument not fully resolved by our established precedent . . . . Accordingly, we need not revisit this issue today.").

of the standard of review as compared to WTO dispute settlement body or NAFTA binational panel review. On the other hand, when respondents opt for challenges in other venues, the domestic industry is well advised to participate in the proceeding as actively as possible to protect its interests, as its interests will not always align with those of the U.S. Government. Close coordination with Government counsel in respondent challenges before the WTO and NAFTA panels will best ensure the strongest presentation of arguments in the U.S. industry's favor.