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

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

The way in which WTO panels and the Appellate Body interpret the Antidumping ("AD") Agreement and the Subsidies and Countervailing Measures ("SCM") Agreement is, I submit, so vastly different from judicial review in the United States that even if U.S. law were not explicit in stating that no provision of any WTO agreement that is inconsistent with U.S. law shall have effect, there still would be very good reason for U.S. courts to disregard WTO dispute settlement decisions. The better turn of events by far would be for the WTO to take a leaf from U.S. jurisprudence.

As a threshold matter, the standard of judicial review in the WTO accords little or no deference to discretion "reasonably" exercised by administrators of national AD and

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countervailing duty ("CVD") laws. U.S. courts could not give weight to WTO decisions without sacrificing a standard of review that is required by statute and memorialized by decades of controlling precedent. But beyond this core standard of review question, the mindset with which WTO panelists and Appellate Body members approach judicial review is too far removed from the way in which U.S. judges approach their cases to permit WTO dispute settlement decisions to influence CIT or CAFC decision-making. I have already written critically about the propensity of WTO panels and the Appellate Body to "legislate" their preferred policy outcomes, at least in the trade remedy area.[2] Since then, I have gone through the interview process as a U.S. nominee for a seat on the Appellate Body (a friend and fellow private practitioner, Tom Graham, was deservedly appointed). The Appellate Body nomination experience convinced me that the WTO dispute settlement process is even less rigorous an exercise in the neutral application of the text of WTO agreements, and more of an exercise in arriving at results that meet the prevailing sense of "trade policy correctness," than I had thought.

The reasons for this, in my view, include (1) the backgrounds of panel and Appellate Body members, (2) their dependency on the WTO or Appellate Body Secretariat for support (including legal research and analysis), (3) a difficult -to-understand sense of institutional fragility that discourages dissent,[3] (4) a belief rooted in civil law tradition that law must be unambiguous and, therefore, there is, in each case, a single correct interpretation of it, (5) a predisposition (also, I believe, rooted in civil law tradition) to adjudicate disputes with broad pronouncements on the meaning of the governing agreement rather than decisions that are based

[2] The discussion in this paper on the WTO zeroing decisions draws extensively from a previously published article, "WTO Dispute Settlement: An Exercise in Trade Law Legislation?" Volume 6, *Journal of International Economic Law*, Issue 1 (2001) at 113-124.

[3] *See* Meredith K. Lewis, "The Lack of Dissent in WTO Dispute Settlement: Is There a "Unanimity" Problem?," Paper 1286, bepress Legal Series (2006).

narrowly on the specific facts under review, and (6) a sense of diplomatic gentility that values civility of discourse over hard-edged argument. On this last point, what one might call the spirited give and take of oral argument at the CIT, both from the bench and between counsel, would be unthinkable in a WTO context.

I have chosen two WTO cases, *European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linens from India*, adopted March 12, 2001 ("*Bed Linens-Zeroing*"), *United States-Definitive Antidumping and Countervailing Duties on Certain Products from China*, adopted March 25, 2011 ("*China-CVD*"), to illustrate these various points. Both cases focus on the Commerce side of AD and CVD proceedings. They provide a clear contrast between the analysis behind the WTO decisions and how the CIT and/or the CAFC have analyzed or would analyze substantially the same issue under U.S. law.

A. Bed Linens-Zeroing

The CIT and the CAFC have consistently held that the plain language of the antidumping statute gives the U.S. Department of Commerce ("Commerce") the discretion to "zero" negative dumping margins if it chooses to do so. The WTO, by contrast, has decided in a series of cases that zeroing is prohibited by the AD Agreement. *Bed Linens-Zeroing* was the first in that series. After losing successive zeroing cases involving both investigations and administrative reviews, Commerce has now complied with these decisions by abandoning zeroing (at least outside the context of "targeted dumping").

Because the antidumping statute does not direct Commerce to treat transactions with "negative" antidumping margins in any particular way and its zeroing methodology is a "reasonable" interpretation of the statute, U.S. courts have deferred to Commerce's expertise, as required by the Supreme Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837

(1984). In *Corus Staal BV and Corus Steel USA, Inc. v. the Department of Commerce*, 395 F.3d 1334 (Fed. Cir. 2005) ("*Corus Staal*"), the CAFC rejected out of hand Corus' argument that Commerce:

> "unreasonably refused to interpret the statute in a manner consistent with U.S. international obligations under the *Charming Betsy* doctrine of claim construction which states that courts should interpret U.S. law whenever possible, in a manner consistent with international obligations." *Murray v. The Schooner Charming Betsy*, 6. U.S. (2 Cranch) 64, 118 (1804).[4]

It is difficult to quarrel with the CAFC's decision. As noted, the antidumping statute is silent on how to factor transactions with negative dumping margins into a dumping margin calculation and, therefore, the Court properly deferred to Commerce on the question. And as to the *Charming Betsy* doctrine, the CAFC correctly gave "no deference to the cited WTO cases," noting (1) that WTO dispute settlement decisions are not binding on the United States, (2) that, by statute, no provisions of any WTO agreement that is inconsistent with U.S. law "shall have effect," and (3) that if U.S. statutory provisions are inconsistent with a WTO dispute settlement decision, it is strictly a matter for Congress. *Corus Staal* at 1349.

The CAFC, therefore, had no cause to explore the reasoning that led the Appellate Body to rule that Commerce's zeroing policies were inconsistent with obligations of the United States under the AD Agreement — but had it done so, it might well have been troubled by what it would have found. The WTO Appellate Body dismissed the idea that the text of the AD Agreement can admit to more than one possible interpretation or that it allows any room for national agency discretion. In doing so, it read out of the AD Agreement a provision on the standard of

[4] *Corus Staal* at 1347.

WTO review of AD Agreement complaints that the U.S. negotiators had insisted on because, in their view, it required deference to the reasonable exercise of agency discretion.[5]

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

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

In the hands of WTO panels and the Appellate Body, however, Article 17.6 has become a dead letter because they have concluded that "customary rules of interpretation of public international law" never permit more than one, *i.e.*, their own, "permissible interpretation.[6]

The conclusions that the text of the AD Agreement is clear on the zeroing issue, *i.e.*, that it does not "admit of more than one permissible interpretation," and that its plain meaning precludes a dumping margin calculation that "zeroes" negative margins, is difficult to defend. Article 2.4.2, the relevant provision, states that dumping margin calculations are to be based "on the basis of a comparison of a weighted average normal value with a weighted average of all

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[5] The Statement of Administrative Action submitted to the Congress along with the Uruguay Round Agreements Act, the Administration explained that "Article 17.6 contains a special standard of review, which is analogous to the deferential standard supplied by U.S. courts in reviewing actions by Congress and the Commission." The Uruguay Round Agreements Act, Statement of Administrative Action at 148 published in Message from the President of the United States transmitting the Uruguay Round Trade Agreements, texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, House Document 103-316, Vol. 1, 103d Congress 2d Sess. (Sept. 27, 1994) at 818.

[6] *See* Vermulst/Graafsma, "WTO Dispute Settlement with Respect to Trade Contingency Measures," 35(2) *Journal of World Trade* (2001) at 211-12.

prices of all *comparable* export transactions… ." The key to interpreting this clause is the meaning of the term "comparable export transactions." The WTO Appellate Body ruled that the ordinary meaning of "comparable" is "able to be compared" and, therefore, that Article 2.4.2 requires national authorities to calculate dumping margins by comparing the weighted average export price of all sales subject to investigation to the weighted average normal value of those sales:

> "We are mindful that Article 2.4.2 provides for a 'comparison' of a weighted average normal value with a weighted average price of all comparable export transactions. In our view, the word 'comparable' in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of a comparison of the weighted average normal value with the weighted average prices of all comparable export transactions.
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> The ordinary meaning of the word 'comparable' is 'able to be compared.' 'Comparable export transactions' [within] the meaning of Article 2.4.2 are export transactions that are able to be compared … Having defined the product at issue as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types were not 'comparable.' All types or models falling within the scope of a 'like' product must necessarily be 'comparable,' and export transactions involving those types or models must therefore be considered 'comparable export transactions' within the meaning of Article 2.4.2."[7]

The Appellate Body's habit of finding a single ordinary meaning of a word that has several dictionary definitions should be seen for what it is — a vehicle that can easily be, and is, used and abused to interpret agreements to suit the Appellate Body's policy purposes. The idea that the ordinary meaning of the word "comparable" as used in the AD Agreement is "able to be compared" is, frankly, ludicrous. Any two things can always be compared, if only to point out their differences. The word "comparable" also means "suitable for comparison," as well as

[7] *Bed Linens* at paragraph 56-58.

"equivalent" and "similar." These meanings of the word "comparable" are a far better fit for an agreement in which export price and normal value comparisons are always based on the similarity of products. Had the negotiators of the AD Agreement been able to agree on language requiring dumping margin calculations based on the average export price of all transactions under investigation and the average normal value of those transactions, it would have been a simple matter to say so. The choice of a different formulation that expressly contemplates a focus on the "comparability" of the different export transactions within the universe of products under investigation cannot properly be written out of the AD Agreement by claiming "clarity" in a text where it does not exist.

Be that as it may, the combined weight of repeated WTO decisions that zeroing is impermissible under the AD Agreement has settled the zeroing issue. What matters now are the broader implications of *Bed Linens-Zeroing* and the succeeding WTO zeroing decisions. Specifically, in future cases, should the United States refuse to comply with bad Appellate Body decisions? The WTO Agreements are, after, all, meant to give the parties to them a balance (or "reciprocity") of benefits. The United States is not bound to abide by WTO dispute settlement decisions; if we choose not to comply, our trading partners are free to take "retaliatory" action. There is no shame in inviting them to do so; to the contrary, it is the way the WTO system is meant to work. Bad decisions that distort the balance of WTO benefits that U.S. negotiators reasonably expected ought not be passively accepted, especially where the reasons for the decision are systematic in nature and, therefore, are likely to be repeated. In fact, the problems behind the *Bed Linens-Zeroing* decision have been at play in other trade remedy decisions and, without a sharp U.S. reaction, will continue to shape future WTO dispute settlement decisions in this area.

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

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

The other revelation from seeing the inside of the WTO dispute resolution process is how uneven the quality and work habits of the panelists and Appellate Body members can be. Although there are seven Appellate Body members, each decision is made by a "Division" composed of three of the seven, randomly selected. When weaker members are on a Division, it

means the Appellate Body decisions are often shaped by the Appellate Body Secretariat along with a single energetic member. In principle a "bad decision," for example, the narrow definition of a "public body" in *China-CVD*, should be easily corrected as there is no "stare decisis" under WTO law. As a practical matter, however, the Appellate Body is fond of citing its prior decisions as if they were binding precedent.[8]

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

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

Returning to the string of WTO zeroing decisions, the appeal in the first WTO zeroing decision was heard by three Appellate Body Members, Mr. Bacchus of the United States (who chaired the Division), Mr. Feliciano of the Philippines and Mr. Abi-Saab of Egypt. Each of them had distinguished bureaucratic, political and/or public international law credentials — but not one of them could claim real antidumping law expertise. Add to the mix an antipathy to

[8] Even a casual read of a sample of Appellate Body decisions shows how frequently prior decisions are cited as "precedent."

antidumping measures within the Appellate Body Secretariat and, more generally, in "right-thinking" trade policy circles, and it becomes much easier to understand why the Appellate Body decided the *Bed Linens-Zeroing* case the way it did.

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

B. China-CVD

The Appellate Body, the CIT and the CAFC all have addressed the basic questions of whether Commerce can legitimately impose countervailing duties on imports of subsidized goods from China and, if so, under what conditions. In my opinion, the CIT (Judge Restani) and the WTO Appellate Body got the applicability of countervailing duty law to China and other non-market economy countries right, while the CAFC got it wrong. This, however, is not the China subsidy issue I want to explore. Rather, I want to address the Appellate Body's decision in *China-CVD* to define narrowly the term "public body" in the SCM Agreement.

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

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

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

The reasoning behind the Appellate Body decision is almost comically contorted. Article 1.1(a)(1) of the SCM Agreement states that "a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member" and then, in a parenthetical, proceeds to define the term "government" as used in the SCM Agreement as referring to both "government or any public body." The Appellate Body ruled that the inclusion of "public body" within the definition of the term "government" *implicitly* limits the meaning of a public body to a public body "vested with authority to exercise governmental functions." The decision relies on an interpretation of the text of Article 1.1(a)(1) that incorporates a concept of public international law that would be entirely beside the point (1) if,

as the United States argued, defining the term "government" in the SCM Agreement as including a "public body" were simply a matter of drafting convenience, or (2) if the Appellate Body had a better grasp of the problems associated with the an effort to graft onto an international trade agreement concepts taken from areas of international public law that have nothing to do with international trade.

The implications of the Appellate Body's ruling are sweeping. A U.S. industry injured by imports from China that benefit from raw materials provided by one state enterprise to another at preferential prices would have to show that the provision of the inputs is an exercise of a "governmental function". How? What is the proof? It is impossible to reconcile the Appellate Body's decision with the core purpose of the SCM Agreement, *i.e.*, to discipline the use of trade distorting preferential treatment for selected enterprises.

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

Unlike the zeroing cases, the Appellate Body's decision on the meaning of "public body" in the SCM Agreement is a single decision by a single three member Appellate Body Division that does not yet have close to enough weight to become binding precedent. This part of the *China-CVD* decision can be, and should be, disregarded by the next Appellate Body Division that tackles the same issue. There is, however, a real question as to whether the Appellate Body's emphasis on consensus and collegiality, and its dislike of dissonance and dissent, will overrule a bad decision, if only because letting it stand is the path of least resistance. A CIT judge is perfectly willing to disagree with a colleague and the reach of bad CAFC decisions are easily limited in subsequent cases (as the sequence of decisions in *Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), *Nippon Steel Corp. v. USITC*, 345 F.3d 1379 (Fed. Cir. 2003) and *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867 (Fed. Cir. 2008) shows). By contrast, whether there is an equivalent willingness by the Appellate Body to limit the reach of its own bad decisions remains very much an open question.

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

The great benefit of an open international trading system comes not from this or that dispute settlement adjudication, but rather from a set of rules that are reflexively followed in

thousands upon thousands of transactions and by national governments in promulgating routine regulations. The lessons of decisions like *Bed Linens-Zeroing* and *China-CVD* are that (1) negotiators can no longer accept ambiguity in future trade agreements, thus greatly complicating the task of closing future agreements (deliberate ambiguity is mother's milk to the trade negotiating process), and (2) countries that rely heavily on trade remedies as part of their trade policy, rather than opaque forms of "administrative guidance," have little leverage to exact concessions from their trading partners. China, Japan, India, Korea or Brazil, all of which are looking for export led growth, are (or ought to be) very comfortable with the WTO system as it is. The United States, by contrast, with its enormous structural current account deficit, must press others for concessions. Our problem is one of leverage. As things now stand, why shouldn't the Chinas of the world simply rely on WTO dispute settlement to achieve their trade policy objectives?

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