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Interplay of WTO and U.S. Domestic Judicial Review:

When the Same U.S. Administrative Determinations Are Appealed Under the WTO Agreements and Under U.S. Law, Do the Respective Decisions and Available Remedies Co-Exist or Collide? *

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Interplay of WTO and U.S. Domestic Judicial Review: When the Same U.S. Administrative Determinations Are Appealed Under the WTO Agreements and Under U.S. Law, Do the Respective Decisions and Available Remedies Co-Exist or Collide?

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I. INTRODUCTION

A U.S. Department of Commerce ("Commerce") or U.S. International Trade Commission ("ITC" or "Commission") antidumping or countervailing duty determination may be appealed by interested party litigants to the U.S. Court of International Trade ("CIT"), or in its place, to a NAFTA binational panel. A WTO Member government may also request a WTO dispute settlement proceeding regarding the same determination.

This paper explores how the review of antidumping and countervailing duty determinations[1] can proceed on simultaneous tracks in multiple fora, compares the

[1] Determinations and fact-finding by governmental agencies normally are subject to WTO dispute settlement only in the context of trade remedies (antidumping, countervailing duties and safeguards). Trade remedies differ in this important respect from other WTO dispute settlement proceedings (a potential exception being some disputes under the WTO Agreement on Application of Sanitary and Phytosanitary Measures, see *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R at ¶ 590 (October 16, 2008)). While antidumping and countervailing duty determinations may be appealed simultaneously to domestic courts (or NAFTA binational panels) and the WTO, safeguard decisions are subject to very limited domestic judicial review, but comparatively rigorous WTO review. Domestic judicial review of safeguards is limited to issues of procedural fairness. *See Motion Systems Corp. v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006) (where the President of the United States has complete discretion whether to take an action in the first place, courts are without authority to review the validity of an agency recommendation to the President regarding such action); and *Corus Group PLC v. Int'l Trade Com'n*, 352 F.3d 1351 (Fed. Cir. 2003) (appeal as to the President dismissed; court review of ITC safeguard proceeding limited to procedural issues). In comparison, WTO dispute settlement proceedings have reviewed substantively four U.S. safeguard measures (*Lamb, Wheat Gluten, Line Pipe* and *Steel*) and found each one to be WTO-inconsistent. A review of the WTO reports concerning safeguard measures is beyond the scope of this paper.

standards of review applied to agency determinations, reviews the potential interaction of the reviewing bodies' decisions on each other, presents two case studies in which the same determinations were subject to extensive WTO review and domestic judicial review, and analyzes potential conflicts in the implementation of the WTO reports and agency remand determinations in domestic law.

The paper concludes that while potential conflicts may arise, the remedies available through WTO dispute settlement and domestic judicial review[2] can co-exist with a better appreciation of the respective roles of WTO reports and judicial decisions, greater adherence to principles of comity among the reviewing fora, and proper agency implementation of WTO reports.

II. REVIEW UNDER DOMESTIC LAW AND UNDER THE WTO AGREEMENTS ARE NOT MUTUALLY EXCLUSIVE

Domestic judicial review and WTO review dispute settlement proceedings are not mutually exclusive. While the CIT and NAFTA binational panels apply the same body of domestic law,[3] WTO dispute settlement proceedings review agency determinations for consistency with the obligations under the WTO Agreements,[4] primarily the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures. In domestic judicial review, parties have argued that commencement of WTO dispute

[2] Throughout this paper, "domestic judicial review" means court appeals or NAFTA binational panel reviews.

[3] North American Free Trade Agreement (NAFTA) Art. 1904.3 and Annex 1911.

[4] See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) Art. 3.3, 11, 19.

settlement proceedings precludes or limits the opportunity to challenge the same determination through domestic judicial review.[5] That contention has been rejected.

In *Canadian Lumber Trade Alliance v. United States*, the Federal Circuit held that a government's decision to enforce its rights under the WTO Agreements did not preclude enforcement of its rights under U.S. law.[6] The Federal Circuit reasoned that the Government of Canada did not seek to litigate the same claim in two fora. In the WTO, Canada contended that the Continued Dumping and Subsidy Offset Act (the so-called Byrd Amendment) violated a range of international agreements. By contrast, in domestic judicial review, the Government of Canada claimed that Customs' distribution of Byrd Amendment duties to domestic producers violated domestic law.

Similarly, in the WTO, parties have argued that WTO panels should decline jurisdiction when the same issue was subject to review under the NAFTA. In *Mexico – Taxes on Soft Drinks*, the WTO Appellate Body held that when a matter was properly brought before the WTO, a WTO panel had no discretion to decline jurisdiction, even when other fora may be considering a related or similar matter.[7]

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[5] *See, e.g.*, Defendant-Intervenor's Memorandum of Law in Response to Plaintiffs' Motions for Summary Judgment at 2, *Tembec., Inc. v. United States*, Consol. Ct. No. 05-00028 (Ct. Int'l Trade Feb. 6, 2006) ("Plaintiffs, having chosen to pursue these two separate litigation tracks [to a WTO panel and a NAFTA binational panel] . . . now ask the court to save them from the consequences of their own litigation strategy").

[6] *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1325 (Fed. Cir. 2008) ("The Court of International Trade was not deprived of jurisdiction over Canada's *statutory* claim merely because Canada had chosen to enforce international *agreements* in the WTO.").

[7] *See Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R at ¶ 57 (March 6, 2006) (upholding panel's decision that "under the DSU, it had no discretion to decline to exercise jurisdiction in a case that had been properly brought before it.").

A. Selection of Review Fora, Initiation and Duration of Review Proceedings.

1. CIT Appeal by Any Interested Party Within 30 days.

Any interested party may appeal an agency determination to the Court of International Trade by filing a summons and complaint within 30 days of the publication of the final determination.[8] The duration of CIT proceedings is not fixed by statute, but the model scheduling order generally contemplates that the Court's review of agency determinations on the record, such as antidumping and countervailing duty determinations, will be completed in about one year.[9] Of course, multiple remands to the agency to reconsider or amend a final determination, further appeals of the CIT's decision to the Federal Circuit, and remands from the Federal Circuit back to the CIT often prolong the appellate process. Not infrequently, several years may be required before final judgment is rendered.[10]

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[8] 19 U.S.C. § 1516a(a). In the case of final determinations involving Mexico or Canada, a CIT review may not be commenced until the 31st day after the final determination. The initial 30 day window is set aside to allow commencement of binational panel review. Practitioner's note – filing the summons and complaint prior to the 31st day can result in dismissal of the action. *See* 19 U.S.C § 1516a(a)(5), and *North Dakota Wheat Commission v. United States*, Court No. 03-00838, slip op. 04-93 (Ct. Int'l Trade July 29, 2004) (motion to dismiss granted where appellant filed summons and complaint on 29th day after publication of the ITC's final determination, i.e., two days before the time window for doing so began).

[9] CIT Rule 56.2(d).

[10] *See, e.g.*, *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't of Commerce Dec. 21, 2001); *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007), *cert. granted, United States v. Eurodif S. A.*, 128 S. Ct. 5054 (U.S. Apr. 21, 2008) (No. 08-1059), *and cert. granted, USEC v. Eurodif*, 128 S. Ct. 2056 (U.S. Apr. 21, 2008) (No. 08-1078) (appeal of original Commerce determination issued December 21, 2001 still pending review at the Supreme Court).

2. NAFTA Binational Panel Review, by Any Interested Party, Within 30 days

Chapter 19 of the North American Free Trade Agreement ("NAFTA") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a request for panel review is filed, a panel is established to act in place of national courts to review expeditiously the final determination and assess whether it conforms with the antidumping or countervailing duty law of the country that made the determination. For U.S. determinations, NAFTA binational panels stand in place of the Court of International Trade and the Federal Circuit, and review agency determinations for consistency with U.S. law.[11]

The appellant, or any other interested party, may request panel review in place of court review. The request for NAFTA panel review must be filed within 30 days following the date of publication of the final determination in question.[12] Generally, NAFTA binational panel review of U.S. agency determinations have been relied upon

[11] NAFTA Art. 1904.2 and 1904.3. NAFTA binational panels have followed the legal principle of *stare decisis* with respect to decisions of the Court of Appeals for the Federal Circuit. In an unusual development, a recent NAFTA binational panel strayed from this principle and found itself not bound by CAFC precedent. Instead, the panel declared itself a "generic or virtual United States court," which apparently meant something akin to a U.S. federal appeals court for its own virtual circuit. *See* Decision of the Panel, In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada, USA-CDA-2006-1904-04 (Nov. 28, 2007) at 21. Rather than adhere to CAFC precedents, the panel followed decisions of the WTO Appellate Body regarding the legality of the Commerce practice of "zeroing" in antidumping cases. *Id*. at 37. The dispute, however, was settled and the proceeding was terminated prior to final panel action. *See* North American Free Trade Agreement (NAFTA), Article 1904; Binational Panel Reviews: Notice of Consent Motion To Terminate Panel Review, 73 Fed. Reg. 23,183 (Dep't of Commerce Apr. 29, 2008).

[12] 19 U.S.C. § 1516a(a)(5), NAFTA Art. 1902.2.

primarily by Canadian and Mexican respondents, rather than petitioners or other U.S. producers.[13]

Speedy decision-making was a key concern in instituting binational panel review.[14] NAFTA binational panel review is "designed to result in final decisions within 315 days of the date on which a request for a panel is made."[15] Thus, a party challenging an adverse agency determination, particularly a respondent whose import entries are subject to antidumping or countervailing duty deposits pending the outcome of the appeal, may take advantage of the relative speed of binational panel review. Nevertheless, delays in forming the panel,[16] and repeated remands to the agency may

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[13] Of the 32 conclusive NAFTA binational panel reviews of U.S. final determinations, 31 were initiated by respondents (i.e., foreign producers or importers) with one initiated by both respondent and petitioner (Brass Sheet and Strip from Canada, USA-CDA-98-1904-03 (July 16, 1999)). *See* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380 (last visited Sept. 28, 2008). But note in a recent case, a petitioner appealed an ITC negative determination to a NAFTA panel. *See* Request for Panel Review, 72 Fed. Reg. 68,860 (Dep't of Commerce Dec. 6, 2007) (requesting review of ITC final negative determination respecting *Certain Welded Large Diameter Line Pipe from Mexico*).

[14] *See* NAFTA Rules of Procedure for Article 1904 Binational Panel Review, 59 Fed. Reg. 8686 (Dep't of Commerce Feb. 23, 1994) (Statement of General Intent: "These rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews pursuant to Article 1904 of the Agreement and are designed to result in decision of panels within 315 days after the commencement of the panel review. The purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904."). Under Article 1904 of the NAFTA, the Government of the United States, the Government of Canada and the Government of Mexico established these Rules of Procedure.

[15] NAFTA Art. 1904.14.

[16] *See* Beatriz Leycegui and Mario Ruiz Cornejo, TRADING REMEDIES TO REMEDY TRADE: THE NAFTA EXPERIENCE, 10 SW. J.L. & TRADE AM. 1, 38 (2003-2004). ("In light of the serious problems associated with the integration of NAFTA's Chapter 19

significantly lengthen the review process.[17] However, further review of final binational panels by Extraordinary Challenge Committees under NAFTA Art. 1904.13 is relatively infrequent, and where requested, have been concluded within the 90-day time limit.[18]

3. WTO – Request for Dispute Settlement at the Discretion of the WTO Member, Any Time After the 60-day Consultation Period.

Only the WTO Member government can commence dispute settlement in the WTO. Though private parties and their counsel are critical to moving their interests forward at the WTO and persuading their government to request WTO dispute

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binational panels, it is urgent that parties agree on the following: i) a roster of panelists; ii) improving the benefits and payments offered to the panelists; iii) strengthening the role of the Secretariat (exerting functions similar to those of the WTO Secretariat); and iv) substituting the present ad hoc panels by a permanent tribunal if necessary.").

[17] For example, the International Trade Commission's affirmative decision regarding Softwood Lumber from Canada was issued on May 16, 2002, and the negative determination resulting from binational panel review following three panel decisions and three ITC remand determinations was not completed until October 25, 2004. *See Softwood Lumber from Canada*, Inv. Nos. 701-TA-414, 731-TA-928 (Final), USITC Pub. 3509 (May 2002), and *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 69,584 (Dep't of Commerce Nov. 30, 2004) (affirming ITC negative determination on third remand). The Extraordinary Challenge Committee proceeding dismissing the United States' challenge to the NAFTA Panel's third remand was completed on August 16, 2005. *See* NAFTA, Article 1904 Binational Panel Reviews, 70 Fed. Reg. 48,103 (Dep't of Commerce Aug. 16, 2005) (notice of decision and completion of Extraordinary Challenge Committee).

[18] NAFTA Annex 1904.13(2) (requiring an ECC decision within 90 days of the establishment of the committee). Only a NAFTA Party may request an extraordinary challenge. The standard of review is exceptionally high and limited to ensuring that the panel process was unbiased, and to maintaining the integrity of the binational panel review system. Of the 42 binational panel reviews completed regarding U.S. agency determinations, only six (including three challenged under the US-Canada FTA, NAFTA's predecessor) have been subject to extraordinary challenges, and in each case, the challenge was dismissed. No binational panel reviews of AD or CVD determinations issued in Canada or Mexico have been subject to ECC proceedings. ECC Decisions are available at http://www.nafta-sec-alena.org/DefaultSite/index.

settlement, in the end, the WTO Member government decides whether to request consultations and when to move forward with a request for establishment of a dispute settlement panel. The complainant WTO Member may request the establishment of a panel to adjudicate the dispute any time more than 60 days after the date of receipt by the respondent WTO Member of the request for consultations.[19] There is no further time limitation on commencement of proceedings in the WTO Dispute Settlement Understanding.

The WTO Dispute Settlement Understanding contemplates completion of a dispute settlement proceeding at the panel level within six months from the date of the request for the establishment of a panel.[20] In practice, however, panel proceedings take an average of 12 months. If the panel decision is appealed to the Appellate Body, an additional 90 days will be required before a report may be adopted by the Dispute Settlement Body. The Appellate Body does not have remand authority to send appealed decisions back to the panel for further proceedings. Due perhaps in large part to this lack of remand authority, the Appellate Body has developed a practice of trying to "complete the analysis" of the panel based on the factual findings of the panel.[21] When the record is insufficient to allow the Appellate Body to complete the panel's analysis, however, the

[19] DSU Art. 4.7.

[20] DSU Art. 12.8.

[21] *See, e.g.*, *United States - Subsidies on Upland Cotton, Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (June 20, 2008); *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Feb. 1 2002).

appellant may be left with little choice other than to resume the proceedings with a new request for establishment of a panel.[22]

Upon completion of the dispute settlement proceeding, the panel report or Appellate Body report is adopted by the WTO Dispute Settlement Body. If trade measures of the respondent WTO Member are found to be inconsistent with the WTO Agreements, the Member is instructed to bring itself into compliance within a reasonable period of time, generally not to exceed 15 months. If the rulings and recommendations of the WTO Dispute Settlement Body (issued upon adoption of a panel or Appellate Body Report) find that an agency practice or decision is inconsistent with a WTO Agreement, section 129 of the Uruguay Round Agreements Act ("URAA")[23] provides the mechanism by which the United States may bring its measures into conformity. Under this mechanism, USTR asks the International Trade Commission whether it would be able to implement the WTO panel or Appellate Body ruling in a manner consistent with the statute. If the agency advises that it can, USTR requests that the Commission do so within 120 days. In the case of practices or determinations by the Department of

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[22] *See, e.g., United States – Investigation Of The International Trade Commission in Softwood Lumber From Canada, Recourse to Article 21.5 Of The DSU By Canada,* WT/DS277/AB/RW (Apr. 13, 2006); *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse to Arbitration under Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW (Dec. 3, 2001); *European Communities – Selected Customs Matters*, WT/DS315/AB/R (Nov. 13, 2006); *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (May 9, 2006).

[23] Uruguay Round Agreements Act, Pub. L. No. 103-465, § 129, 108 Stat. 4809, 4836-39 (1994), codified at 19 U.S.C. § 3538 (2000) ("section 129").

Commerce, upon a request USTR, Commerce is required to implement the WTO panel or Appellate Body ruling within 180 days.[24]

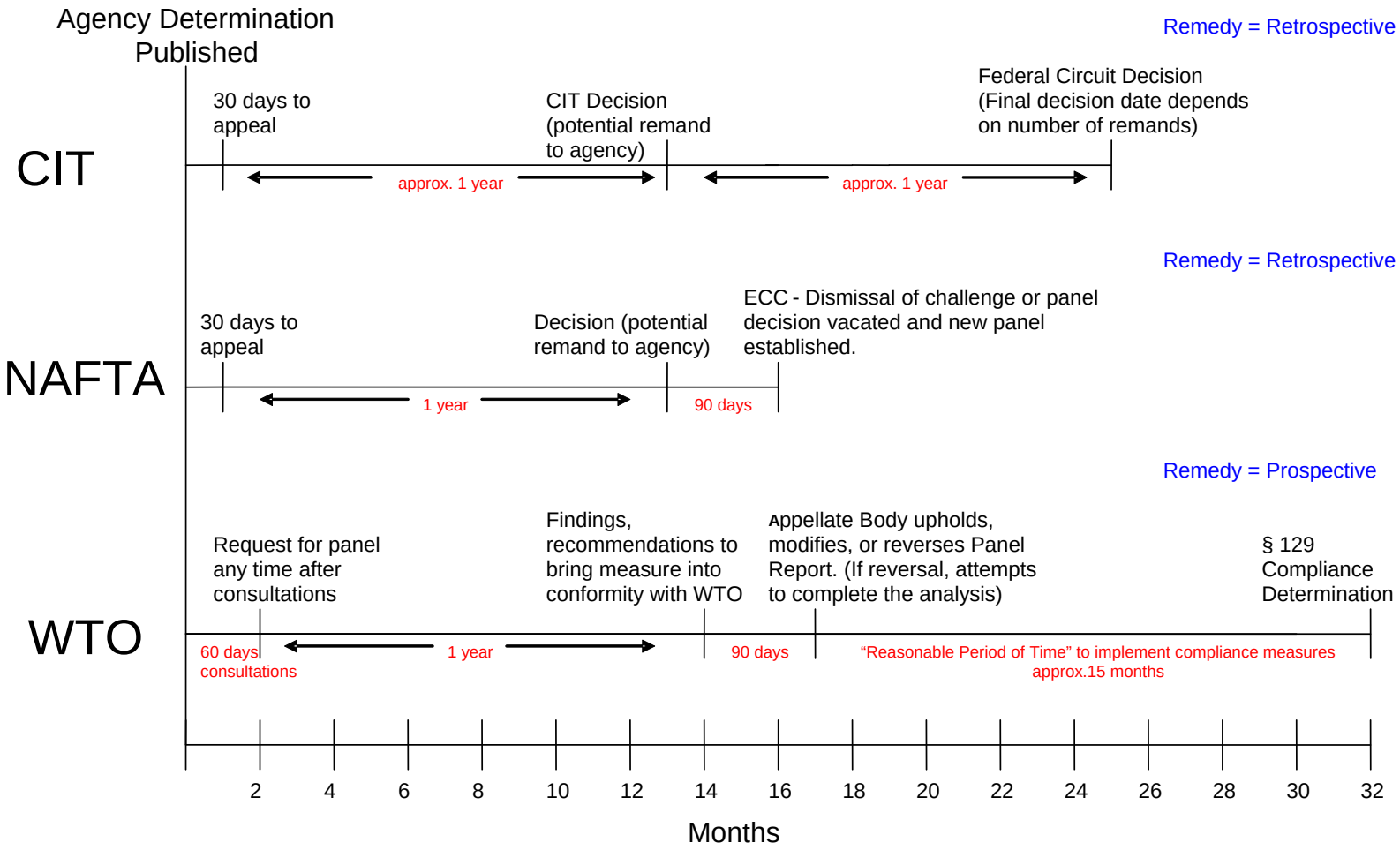
Once the respondent Member has taken action that it considers brings itself into compliance, the complainant Member may initiate further dispute settlement proceedings if it disagrees. Art. 21.5 of the DSU provides that such compliance reviews take 90 days to complete (but in practice they normally take substantially longer), and a further 90 days if the 21.5 panel report is appealed to the Appellate Body.

B. Sequence of WTO or Domestic Judicial Review Decisions Is Uncertain – a Variety of Sequences Is Possible.

As noted above, domestic judicial review must be initiated within a short (30-60 day) time period from the publication of the final determination at issue. In comparison, the WTO dispute settlement proceedings may be requested at any time after the 60-day consultation period. The duration of each of these proceedings depends on a number of factors, including remands (in the case of domestic judicial review) and compliance proceedings under DSU Art. 21.5 and section 129 of the URAA. Thus, which proceeding will be completed first will vary from case to case. What is certain is that a variety of sequences of decisions and remedial actions are possible, and perhaps probable. The sequencing of decisions is important to how the decisions may affect one another, and how the ultimate remedies may interact, coincide, or conflict, as discussed further below.

[24] Section 129(a)(4), (b)(2), 19 U.S.C. §§ 3538 (a)(4), (b)(2).

Timelines for Commerce/ITC AD or CVD Determination Appeals



III. STANDARD OF REVIEW – COMPARISON OF WTO REVIEW WITH DOMESTIC JUDICIAL REVIEW.

A. CIT and WTO Panel Review – Similarities in Review of Factual Issues.

The Court of International Trade and the Federal Circuit[25] review agency determinations and "hold unlawful any determination, finding or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[26] Regarding factual findings of the agency, while the CIT assesses whether the findings are "unsupported by substantial evidence on the record," substantial evidence is not defined in the statute. The Court of Appeals for the Federal Circuit offered the following guidance regarding the substantial evidence standard:

> "Substantial evidence" is difficult to define precisely. However, the Supreme Court, Congress, and prior panels of this court have provided some guidance. In *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660 (1939), the Court explained that "[s]ubstantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." A reviewing court must consider the record as a whole, including that which "fairly detracts from its weight", to determine whether there exists "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477-78 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)).[27]

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[25] In reviewing U.S. agency determinations, NAFTA binational panels apply the same body of law as the CIT and Federal Circuit. For ease of presentation, NAFTA binational panels are not referenced separately in this discussion.

[26] 19 U.S.C. § 1516a(b)(1).

[27] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

Although substantial evidence is not well defined, the Federal Circuit has found it to be a relatively deferential standard of review.[28]

It is the administrative agency that must assemble and assess the factual record, and the Federal Circuit has overturned CIT decisions for substituting the court's own assessment of the facts for that of the administrative agency.[29] In comparison, WTO panels review agency determinations to "make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[30] The meaning of "an objective assessment of the facts of the case" is not further defined in the WTO DSU.

The WTO Appellate Body has interpreted the meaning of DSU Article 11 on several occasions. The Appellate Body has found that DSU Article 11 must be

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[28] *Id.* at 1351 (in the hierarchy of the four most common standards of review, substantial evidence is the second most deferential, and can be translated roughly to mean "is [the determination] unreasonable?").

[29] *Id*. at 1358 ("The Court of International Trade engaged in an extremely thorough, careful examination of the record. Indeed, we can accept that the Court of International Trade may well have conducted a better analysis than did the Commission, and that we would have reached the same conclusion as the trade court if deciding the case in the first instance. However, even with the most generous interpretation of the Court of International Trade's conclusions, we cannot agree that the evidence before the Commission with respect to price effects and causation fell short of 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Universal Camera*, 340 U.S. at 477-78 (quoting *Consol. Edison*, 305 U.S. at 229)."

[30] DSU Art. 11. Art. 17.6 of the Anti-dumping Agreement provides a distinct agreement-specific standard of review. But the Appellate Body has found that Antidumping Agreement Article 17.6(i) and DSU Article 11 do not conflict and are complimentary. *See United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/AB/R at ¶¶ 55-56 (July 24, 2001) ("it is inconceivable that Article 17.6(i) should require anything other than that panels make an objective 'assessment of the matter.'").

interpreted in light of the substantive requirements of the WTO Agreement at issue.[31] Of particular relevance here is its interpretation in the context of antidumping and countervailing duty proceedings. In this context, the Appellate Body has held that:

> [W]e are of the view that the "objective assessment" to be made by a panel reviewing an investigating authority's subsidy determination will be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination. Such explanation should be discernible from the published determination itself. The explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions.[32]

The Appellate Body has concluded that "[s]o far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor 'total deference,' but rather the 'objective assessment of the facts.'"[33] The degree of deference accorded under this standard is less clear than the degree of deference under the *Chevron* standard.

Like the Federal Circuit, the WTO Appellate Body has admonished panels for substituting their own weighing of the evidence for that of the administrative agency.

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[31] *See, e.g.*, Appellate Body Report, *United States – Safeguard Measures On Imports Of Fresh, Chilled Or Frozen Lamb Meat From New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R at ¶ 105 (May 1, 2004); Appellate Body Report, *United States - Transitional Safeguard Measure On Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R at ¶¶ 75-78 (Oct. 1, 2001).

[32] *United States – Countervailing Duties on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS/296/AB/R at ¶ 186 (June 27, 2005).

[33] *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R at ¶ 119 (Dec. 14, 1999).

The Appellate Body has held that "a panel may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A failure to apply the proper standard of review constitutes legal error under Article 11 of the DSU."[34] In words remarkably similar to Federal Circuit decisions, the Appellate Body has found that "[a] panel may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself."[35]

With regard to factual issues, or more mixed issues of fact and law (which are common in international trade proceedings), the factors considered in domestic judicial review and WTO dispute settlement are nearly the same – this is notable considering the differences in the legal text from which the review standards are derived. Both domestic judicial appeals and WTO reviews consider: whether interested parties were allowed to submit evidence and be heard; whether the decision-maker reviewed the evidence and considered contrary evidence; and whether the agency issued a reasoned and adequate decision that gives the appellate tribunal sufficient ground to determine the basis for the decision.

B. WTO Appellate Body Standard of Review, Compared to Federal Circuit Standard of Review – Distinctions in Approach to Legal Issues.

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[34] *United States – DRAMs from Korea*, WT/DS/296/AB/R at ¶ 187 (June 27, 2005), *citing* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R at ¶ 162 (Jan. 19, 2001).

[35] *Id.* at ¶187; *compare Nippon Steel Corp.*, 458 F.3d at 1358.

The Federal Circuit reviews *de novo* whether the administrative agency's interpretation of a governing statutory provision is in accordance with law. The Court does so within the framework established by the U.S. Supreme Court in *Chevron*.[36] Under *Chevron*, "a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.'"[37] "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'"[38] It is only "[i]n the absence of clear direction from the statute," that the court will then "ask whether there is ambiguous statutory language that might authorize the agency to fill a statutory gap," and, in turn, whether the agency's "interpretation of ambiguous statutory language is based on a permissible interpretation of the statute."[39] However, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[40]

Like the Federal Circuit (with respect to CIT decisions), the WTO Appellate Body reviews *de novo* the legal interpretations of WTO dispute settlement panels.[41] Unlike the Federal Circuit, however, the Appellate Body does not apply a court-

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[36] *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

[37] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quoting *Chevron*, 467 U.S. at 842).

[38] *Id.* (*quoting Chevron,* 467 U.S. at 843).

[39] *FAG Italia, S.p.A. v. United States*, 291 F.3d 806, 815 (Fed. Cir. 2002).

[40] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994).

[41] *See* DSU Art. 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."); and *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R at ¶663 (March 3, 2005).

developed doctrine of statutory interpretation or of deference to the interpretations of administrative agencies. Instead, the Appellate Body interprets the WTO Agreements in accordance with the Vienna Convention on the Law of Treaties,[42] particularly Article 31 of that Convention.[43] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

When applying the Vienna Convention, the Appellate Body focuses on the particular terms of the relevant WTO Agreement in the context of the rest of that treaty and the other WTO Agreements. Accordingly, the Appellate Body's approach is to discern the meaning of the Agreement. [44] The Appellate Body's approach starts from the premise that the treaty is amenable to methodical interpretation. Through this methodical interpretation, the Appellate Body will discern the meaning of the disputed WTO text. It follows that the application of the Vienna Convention rarely, if ever, results in the

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[42] *See* DSU Art. 3.2, and *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) (first Appellate Body Report ever issued). The Appellate Body follows the same approach under the Antidumping Agreement, even though Article 17.6(ii) of the ADA provides that a measure is WTO-consistent if it rests upon one of the "permissible interpretations" of the ADA.

[43] *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[44] *See, e.g.*, *United States – Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R at ¶ 58 (Jan. 19, 2004) (when interpreting the term "goods" in Art. 1.1(a)(1)(iii) of the SCM Agreement, the Appellate Body noted that "[t]he meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used."); *United States – DRAMs from Korea* at ¶¶ 12-13 (Appellate Body interpreting the meaning of "entrusts or directs").

Appellate Body finding that the relevant text of a covered WTO Agreement is ambiguous or permits multiple interpretations.[45]

Thus, even where the WTO Appellate Body and the Federal Circuit are considering very similar or identical legal text (as occurs in antidumping and countervailing duty appeals when the U.S. statute mirrors the WTO Agreements), it is not surprising that the two approaches may lead to different results.

Of course, the different controlling "law" (WTO Agreement and Appellate Body Reports[46] or domestic statute and binding court precedents) may lead to different outcomes. But the approach to interpretation of the WTO Agreements (interpreted under the Vienna Convention) as compared to interpretation of the statute (*Chevron* approach) – is equally important in whether the agency determination will be upheld.

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[45] In the rare instance when the meaning of the text of the treaty itself cannot be discerned through a methodical application of Art. 31 of the Vienna Convention, the Appellate Body will turn to supplemental means of interpretation under VC Art. 32. *See United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R at ¶ 195 (Apr. 7, 2005) (finding the term "other recreational services (except sporting)" to be ambiguous, but discerning the meaning by resort to Art. 32 of the Vienna Convention).

[46] In an interesting recent development, the WTO Appellate Body has found that its own decision should be treated by WTO dispute settlement panels in a way very similar to the CIT's treatment of the Federal Circuit's controlling precedents. *See United States – Final Antidumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R at ¶ 161 (Apr. 30, 2008) ("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. Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.").

IV. INTERPLAY OR INFLUENCE OF DOMESTIC JUDICIAL DECISIONS AND WTO REPORTS.

Having posited that the standards of review for factual issues are very similar in domestic judicial appeals and in WTO dispute settlement, whereas the standard of review for legal issues differs considerably, it is useful to review in this regard some determinations that have been subject to appeal in both fora. When the factual issues are examined under similar principles, decisions issued in another forum may be seen to be of persuasive value in another forum considering the same factual record and agency determination. Indeed, it would behoove counsel in such cases to call attention to the decision issued in the other forum. On the other hand, when the standard of review on legal issues differs considerably, despite identical legal texts, a reasonable hypothesis would be that the two fora involved would pay less attention to each other's decisions.

A related issue is whether WTO Agreements, as interpreted by the Appellate Body, rise to the level of the "law of nations" and thus should be followed, if possible, in accordance with the *Charming Betsy* principle. The *Charming Betsy* principle indicates that when a U.S. statute can be interpreted to be consistent with U.S. obligations under international law, the statute should be so interpreted.[47] This principle has been the subject of much recent scholarly analysis.[48] The applicability of this principle with respect to the WTO Agreements, and WTO panel and Appellate Body reports, continues

[47] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

[48] *See, e*.g., THE CHARMING BETSY CANON, SEPARATION OF POWERS, AND CUSTOMARY INTERNATIONAL LAW, 121 Harvard Law Review 1215 (2008) (student note reviewing and critiquing recent legal analysis of the *Charming Betsy* principle); and Jane A. Restani & Ira Bloom, INTERPRETING INTERNATIONAL TRADE STATUTES: IS THE CHARMING BETSY SINKING?, 24 Fordham Int'l L.J. 1533, 1541 (2001) (stating that the *Charming Betsy* principle "continues to sail onward").

to evolve in U.S. jurisprudence.[49] Rather than re-examine the *Charming Betsy* principle, it is useful to assess how and under what circumstances decisions of one forum have had persuasive influence in the other.

Two case studies will be used. The first involves subsidies and whether privatization and sale of productive assets at fair market value through an arm's length transaction extinguishes the benefit (and thus countervailabilty) of a non-recurring subsidy received by the seller of the productive assets. The other involves antidumping and the so-called "zeroing" practice through which (simply stated) the antidumping margins of imported merchandise that was not dumped are set at zero, rather than factoring in a negative margin that would reduce the overall dumping calculation. Both issues have been subject to repeated domestic appellate litigation and WTO dispute settlement proceedings – but the end results and how the fora considered each other's decisions differ markedly.

A. Case Study No. 1 – *Privatization*

The subsidy issue in privatizations is a mixed question of law and fact. The question of whether a subsidy is passed through to the purchaser of productive assets after an arm's length sale at fair market value could have been resolved through *per se* rules – either that in all cases it was passed through, or that in all cases the subsidy was

[49] *Compare Delverde v. United States*, 202 F.3d 1360, 1369-70 (Fed. Cir. 2000) (reviewing a WTO panel report reviewing the same subsidy issue and noting that its decision was not inconsistent with a WTO panel report), *with Timken Company v. United States*, 354 F.3d 1334 (Fed. Cir 2004), *and Corus Staal v. United States*, 395 F.3d 1343 (Fed. Cir. 2005) (addressing the legality of "zeroing" under the antidumping statute, and finding irrelevant the WTO Appellate Body decisions holding the practice of "zeroing" to be WTO-inconsistent).

extinguished.[50] Or the issue could be resolved by reviewing the facts of each case. Both the Federal Circuit and the WTO Appellate Body rejected *per se* rules in favor of determinations tied to the facts of each case. In so doing, both tribunals looked favorably to the decisions of the other.

In resolving the issue under U.S. law, and finding that Commerce's *per se* rule was not permitted under the statute, the Federal Circuit in two cases looked favorably toward similar analysis of privatization issue methodology found in WTO dispute settlement reports. In its initial decision on privatization, *Delverde v. United States*, 202 F.3d 1360, 1369-70 (Fed. Cir. 2000), the Federal Circuit reviewed a WTO panel report that addressed Commerce's privatization methodology. Although the Federal Circuit stated that its review of the Commerce methodology was with regard to the U.S. statute, the court noted that its decision was not inconsistent with the WTO panel report.

In a later review of the privatization issue, *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339 (Fed. Cir. 2004), the Federal Circuit again looked favorably toward WTO dispute settlement findings, in this case a WTO Appellate Body decision that had reviewed Commerce's privatization methodology then before the Court. The Federal Circuit's discussion of the WTO Appellate Body's decision speaks for itself:

> The trial court correctly grounded its judgment in the statute and this court's precedent of *Delverde III*. . . . . The *Charming Betsy* doctrine further supports the statutory principle that treats sales of stock and sales of assets identically for the assessment of countervailing duties. In this case, disparate treatment under the same-person methodology would contravene the international obligations of the United States. As noted earlier, the WTO issued an appellate report stating that the same-person methodology violates § 123 of the URAA. The WTO specifically rejected

[50] *See Delverde v. United States*, 202 F.3d 1360, 1369-70 (Fed. Cir. 2000)

> the argument that sales of assets should be treated differently from sales of stock for assessing countervailing duties. *See United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R. Accordingly, where neither the statute nor the legislative history supports the same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel. In so doing, this court recognizes that the *Charming Betsy* doctrine is only a guide; the WTO's appellate report does not bind this court in construing domestic countervailing duty law. Nonetheless, this guideline supports the trial court's judgment.[51]

The WTO Appellate Body, in *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R (Dec. 9, 2002), reviewed several privatization determinations and rejected the WTO panel's decision that a *per se* rule was required. The Appellate Body reached its decision on grounds very similar to the Federal Circuit's own review.[52]

As both fora approach fact-based reviews similarly, one might expect a greater degree of conformity in outcomes and comity in decision-making than in appeals limited to legal issues. Other examples of fact-based reviews that have reached similar outcomes

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[51] *Allegheny Ludlum*, 367 F.3d at 1348.

[52] *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R at ¶ 158 (Dec. 9, 2002) ("[W]e have also found that, contrary to the Panel's understanding, the SCM Agreement permits an investigating authority to evaluate evidence directed at proving that, regardless of privatization at arm's length and for fair market value, the new private owner may nevertheless enjoy a benefit from a prior financial contribution bestowed on the state-owned enterprise. In the light of these earlier conclusions, we disagree with the Panel that Section 1677(5)(F) is inconsistent per se with the WTO obligations of the United States. The Panel's basis for this finding is incorrect."). In reviewing whether the statute mandates a particular privatization methodology, the Appellate Body relied upon the Federal Circuit's definitive interpretation of the statute as determinative. *Id*. at ¶ 159 (Dec. 9, 2002) ("[W]e also see nothing in the interpretation of Section 1677(5)(F) made by the United States Court of Appeals for the Federal Circuit that would prevent the USDOC from complying with its obligations under the *SCM Agreement.* ").

and displayed some degree of comity among the fora include WTO and NAFTA binational panel review of the ITC's injury determination regarding *Softwood Lumber from Canada*, and WTO review and CIT appeal of Commerce's CVD determination regarding *DRAMs from Korea*.[53] The very different outcomes in the zeroing cases, noted below, tend to support that hypothesis.

B. Case Study No. 2 – *Zeroing*

The Federal Circuit has reviewed Commerce's zeroing practice on several occasions, and consistently upheld the practice.[54] The Federal Circuit summarizes the issue as follows:

> Occasionally, the price charged for the subject merchandise in the United States is greater than the price charged for the same merchandise in the home market. This results in a negative dumping margin for that merchandise. In these situations, Commerce sets the negative dumping margins to zero when calculating the weighted average dumping margin. By doing so, the sum of the dumping margins calculated on the individual transactions is not reduced by the negative amount of the dumping

[53] *See, United States - Investigation of the International Trade Commission in Softwood Lumber From Canada*, (WT/DS277/R) (Apr. 26, 2004) *and* Decision Of The Panel, Certain Softwood Lumber Products From Canada Final Affirmative Threat Of Material Injury Determination, USA-CDA-2002-1904-07 (Sept. 5, 2003); *United States – DRAMs from Korea*, WT/DS/296/AB/R (June 27, 2005); *United States - Countervailing Duty Investigation on Dynamic Random, Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R (July, 20 2005) *and Hynix Semiconductor, Inc., v. United States*, 391 F. Supp. 2d 1337 (Ct. Int'l Trade 2005)(finding the "result of WTO proceedings has no bearing on the Court's review" but reaching similar conclusions to WTO review of Commerce's fact finding).

[54] *See, e.g.*, *SKF USA Inc., v. United States*, Case No. 2007-1502 (Fed. Cir. Aug. 25, 2008); *NSK Ltd. v. United States*, 510 F.3d at 1375, 1379 (Fed. Cir. 2007)*; Corus Staal v. United States*, 395 F.3d 1343 (Fed. Cir. 2005) (addressing the legality of "zeroing" under the antidumping statute, and finding irrelevant the WTO Appellate Body decisions holding the practice of "zeroing" to be WTO-inconsistent); *Timken Company v. United States*, 354 F.3d 1334 (Fed. Cir 2004).

> margins. This practice is referred to as "zeroing" and has been repeatedly upheld by this court.[55]

The issue is thus one of legal interpretation and not tied to the factual record of any particular antidumping case.

The Federal Circuit's decisions on this issue stem from its application of the *Chevron* standard, discussed above, and its finding that the statute is ambiguous with regard to the issue of zeroing.[56] After finding that the statute did not directly address the issue, the Federal Circuit upheld Commerce's interpretation of the statute as reasonable.

Litigants argued that the Federal Circuit should interpret the statute in a manner consistent with the WTO Agreements and the Appellate Body's several reports finding zeroing to be inconsistent with the Antidumping Agreement. In contrast to its approach to WTO dispute settlement decisions in the privatization context, the Federal Circuit unequivocally rejected the WTO reports as irrelevant to the court's decisions under U.S. law. The Federal Circuit found that, "[w]e will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme."[57]

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[55] *NSK*, 510 F.3d at 1379.

[56] *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (finding that "the statute does not directly speak to the issue of negative-value dumping margins," and holding that "Commerce based its zeroing practice on a reasonable interpretation of the statute").

[57] *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005).

For its part, the WTO Appellate Body reviewed Commerce's zeroing practice on several occasions in a variety of contexts,[58] and in each case has found it to be inconsistent with the Antidumping Agreement. The Appellate Body's findings stem from its interpretation in accordance with the Vienna Convention of the relevant terms of Article VI:2 of the GATT 1994 and Articles 2.4.2, 9.3, 9.5 of the Anti-Dumping Agreement.[59] Despite the variety of contexts in which the zeroing issue has arisen and the number of WTO Agreement terms that were important to the outcome of the disputes, the Appellate Body has not found that the relevant provisions of the WTO Agreements were ambiguous or allowed for more than one permissible interpretation. Rather, the Appellate Body interpreted the Agreements and, ascertaining the meaning of the provisions, found that Commerce's zeroing practice was inconsistent with these provisions.

Over the course of these many proceedings, the Appellate Body paid little or no heed to the several Federal Circuit decisions upholding zeroing as consistent with the U.S. statute, even though the Federal Circuit decisions were argued as relevant,[60] and key terms in both the statute and the Antidumping Agreement were identical.

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[58] *See United States – Stainless Steel from Mexico*, WT/DS344/AB/R at ¶ 66 (Apr. 30, 2008) ("The issue of 'zeroing' has been raised on appeal on numerous occasions in different contexts. The Appellate Body has examined the WTO-consistency of the zeroing methodology in original investigations, periodic reviews, new shipper reviews, and sunset reviews. In each context, the Appellate Body has held that zeroing is inconsistent with the relevant provisions of the GATT 1994 and the Anti-Dumping Agreement.").

[59] *Id.*

[60] *United States - Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R at ¶ 85 (Jan. 9, 2007) ("For the Panel, the USDOC "has repeatedly stated that '[it does] not

For both the Federal Circuit and the Appellate Body, the issue of zeroing has been strictly a legal question. The difference in approaches to legal questions largely dictated the difference in outcomes. And the lack of persuasiveness or influence the decisions of the two fora had on each other likely originates in this difference in approach to legal questions.

As noted above, which forum issues its decision first is largely a matter of chance for the litigant – controlled in part by timing of the request for establishment of the WTO dispute settlement panel. In any event, litigants can be expected to continue to cite WTO decisions in domestic judicial appeals, and vice versa, where the same administrative determination has been appealed under the WTO Agreements and domestic law. And on occasion, particularly with respect to fact-based issues rather than legal issues, the decisions of the other forum reviewing the same administrative determination will have some influence or persuasive value.

V. REMEDIES AVAILABLE FROM COURT APPEALS, NAFTA PANEL REVIEWS, AND WTO REVIEWS

Although the same administrative determination may be subject to appeal in domestic courts and to review in WTO dispute settlement proceedings, the same remedies are not available for the successful appellant or complainant.

A. CIT and Federal Circuit Appeals – Retrospective Remedy Applicable to All Unliquidated Import Entries.

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allow' export sales at prices above normal value to offset dumping margins on other export sales, has referred to its 'practice' or 'methodology' of not providing for offsets for non-dumped sales, has pointed out that the United States Court of Appeals for the Federal Circuit has ruled that the 'zeroing practice' ... is a reasonable interpretation of the law, that the US Congress was aware of [the] USDOC's methodology when it adopted the Uruguay Round Agreements Act . . . .")

When an original affirmative ITC or Commerce antidumping or countervailing duty determination is appealed to the Court of International Trade or further appealed to the Federal Circuit, the importers continue to pay duty deposits pending appeal. Liquidation of import entries (and thus final assessment of duties) may remain suspended by request for administrative review,[61] or in the alternative, by court injunction against liquidation.[62] If the court's final judgment is that the determination was not supported by substantial evidence or otherwise not in accordance with law, the antidumping or countervailing duty order must be revoked. Duty deposits on the unliquidated entries must be refunded, with interest.[63] Thus, the final remedy available to the successful appellant is the complete refund, with interest, of all duty deposits paid on the imports subject to the invalidated antidumping or countervailing duty order.

When a Commerce administrative review determination is appealed to the CIT or further to the Federal Circuit, liquidation of entries that were the subject of the administrative review remain suspended by court injunction, when requested.[64] Such

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[61] *See, generally*, 19 U.S.C. § 1675(a), and *Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990) (either a request for administrative review, or if not requested, an injunction against liquidation, operates to suspend liquidation of entries pending appeal of an antidumping order).

[62] 19 U.S.C. § 1516a(c).

[63] *Sonco Steel Tube Div., Ferrum, Inc. v. United States*, 698 F. Supp. 927, 930 (Ct. Int'l Trade 1988) ("Apparently, there is agreement that where requested annual reviews have not been completed before a court decision finding an affirmative antidumping determination invalid there is no basis for liquidation with antidumping duties. Therefore, a court order totally invalidating an [agency's] original determination, which order occurs in the midst of an annual review, will result in the suspended entries being liquidated with no antidumping duties, even without an injunction and even though they were entered prior to the court's decision.").

[64] 19 U.S.C. § 1516a(c).

court injunctions are routinely granted.[65] Thus, the remedy available to the successful appellant is a refund of duties paid plus interest (if the post-appeal administrative review determination resulted in a lower duty rate), or for the successful domestic industry appellant, a payment of additional duties.

Under the statute, if a negative sunset review determination is issued as a result of judicial review, the order is revoked as of the time of the invalidated affirmative sunset review determination. Prospective revocation of an antidumping order in this context is consistent with the prospective effect of the sunset review determination itself. [66]

B. NAFTA Binational Panel Review – No Injunctive Powers, But Retrospective Remedy Equivalent to Judicial Review and Applicable to All Unliquidated Import Entries.

NAFTA binational panel review of original ITC or Commerce determinations functions in a manner parallel with and equivalent to court review. NAFTA binational panels sit in place of the CIT and CAFC and have equivalent legal effect.[67] Unlike the CIT, however, NAFTA panels may not issue injunctions (due to constitutional

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[65] *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 811-12 (Fed. Cir. 1983) (reversing the denial of an injunction and finding that Zenith would suffer irreparable injury if liquidation of entries was not enjoined pending appeal of Commerce's administrative review determination). Since 1983, the CIT has regularly granted injunctions pending appeal of administrative review determinations. *See Int'l Bd. of Elec. Workers v. United States*, slip op. 05-11, 2005 Ct. Int'l Trade LEXIS 10, at *11 (Ct. Int'l Trade Jan. 27, 2005) ("Zenith has regularly been followed by this Court.").

[66] 19 U.S.C. § 1675(d)(2).

[67] *See* NAFTA Art. 1904, and 19 U.S.C. § 1516a(g). *See also, Canadian Wheat Board v. United States*, Consol. Ct. No. 07-00058, slip op. 08-112 (Ct. Int'l Trade Nov. 20, 2008) ("*Canadian Wheat Board*"); *Tembec Inc. v. United States*, 461 F. Supp. 2d 1355 (Ct. Int'l Trade 2006) ("*Tembec II*"). The court later vacated the judgment in *Tembec II* but explicitly refused to withdraw the decision. *See Tembec, Inc. v. United States*, 475 F. Supp. 2d 1393 (Ct. Int'l Trade 2007).

constraints).[68] But if the appellant maintains suspension of liquidation through other available means (including requesting administrative reviews), the legal effect will be equivalent as intended.[69]

NAFTA binational panel review of administrative review determinations and sunset reviews functions in a manner nearly identical to domestic court review, with the same effective remedies available. Again, because binational panels do not have injunctive powers, liquidation must remain suspended through other means. The statute provides for automatic administrative suspension of liquidation pending appeal upon request of the appellant.[70] Provided the appellant maintains suspension of liquidation through the available means, remedies available through binational panel review are equivalent to those available through court appeal.[71]

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[68] *See* The United States - Canada Free-Trade Agreement Implementation Act*:* Statement of Administrative Action, H.R. Doc. No. 100-216 (1988) at 265-66. ("Because panels will not have equity powers, the injunctive remedy provided by section [1516a(c)(2)] will not be available to prevent liquidation. Therefore, paragraph (5) of the new section [1516a(g)] sets forth rules authorizing [Commerce] to continue to suspend liquidation of entries subject to a binational panel review. These rules parallel current practice in AD/CVD litigation, and will allow duties to be refunded, when necessary, as required by the Agreement."). For the most part, "the Statement of Administrative Action accompanying the CFTA Implementing Act, H.R. Doc. 100-216, . . . fully describes the panel system that will be established under the NAFTA." North American Free Trade Agreement Act, Statement of Administrative Action, H.R. Doc. No. 103-159 (1993) at 643.

[69] *See id*., *and Tembec Inc.*, 461 F. Supp. 2d at 1360 ("Central to the court's conclusion is its finding that the "continued" suspension of liquidation provided for in § 1516a(g)(5)(C) acts as the equivalent of an injunction against liquidation and thus halts liquidation until the suspension expires.").

[70] 19 U.S.C. § 1516a(g)(5)(C).

[71] But, in the proceedings underlying *Tembec II*, and *Canadian Wheat Board,* Commerce revoked the orders and refunded duties only for imports entered after the *Timken* notice date of the NAFTA binational panel decision invalidating the respective antidumping or

C. WTO Dispute Settlement – Prospective Remedy, Multi-stage Implementation Process

WTO dispute settlement is a prospective system. It imposes no penalty and requires no compensation for infringement of obligations that occurs prior to a dispute settlement decision plus some reasonable period of time for implementation of that decision.[72]

Unlike litigation before the domestic courts or a NAFTA panel, WTO Members are not required to comply automatically with the rulings and recommendations of a WTO Panel or the Appellate Body. WTO Members may elect to bring its practices into

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countervailing duty orders. In both *Tembec II* and *Canadian Wheat Board*, the Court found Commerce's action to be contrary to law.

[72] *See, e.g.*, Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS/146/R at ¶ 6.57 (Dec. 21, 2001) ("The Panel has not sought, in its analysis, to determine the nature or modalities of remedies to be provided by India, beyond determining *whether* there was still a need to make a recommendation to the DSB in order to remedy an identified violation. What the Panel has sought to address in this section is what remains as of *today* of a measure found to be illegal. The Panel has said nothing of any *past* fulfillment of export obligations or of any need to compensate manufacturers for any such *past executions* of illegal obligations."); Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R at ¶ 6.106 (Jul. 17, 2000) ("The United States did not request retroactivity, and retroactive remedies are alien to the long established GATT/WTO practice where remedies have traditionally been prospective."); Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration under Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU at ¶ 6.105 (May 6, 1999) ("In framing this issue for consideration, we do not imply that the European Communities is under an obligation to remedy past discrimination. Article 3.7 of the DSU provides that '… the first objective of the dispute settlement is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.' This principle requires compliance ex nunc as of the expiry of the reasonable period of time for compliance with the recommendations and rulings adopted by the DSB."). *But see*, Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Art. 21.5 of the DSU by the United States*, WT/DS126/RW (Feb. 11, 2000) (the panel found that Australia should withdraw from a company a grant that had been found to be a prohibited export subsidy).

compliance with the WTO's rulings and recommendations.[73] WTO Members alternatively may elect to substitute compensatory trade measures while leaving the WTO-inconsistent practice unchanged. Finally, WTO Members may choose not to comply.

If the WTO Member has elected to comply and changed the practice found to be WTO-inconsistent, the complaining WTO Members may challenge whether the change in practice brought the offending member into compliance. The challenge process, under DSU Art. 21.5, provides for the formation of a new arbitral panel (composed of the panelists from the original panel, if possible) to assess whether the measures taken to comply have done so.

In the United States, WTO reports are implemented through a process provided for in section 129 of the URAA.[74] Section 129 establishes four sequential steps to be followed in the event of an adverse ruling by a WTO panel as to either an ITC or a Commerce determination: consultation prior to issuance of a determination; issuance of a determination; consultation prior to implementation; and implementation.

1. Consultation Prior to Issuance of a Determination.

The first step in responding to an adverse WTO decision regarding either a Commission or a Commerce determination is for the USTR to consult with the agency in question and with Congress. In the case of ITC determinations, USTR asks the

[73] *See* URAA SAA at 1008-1009. WTO panel and Appellate Body reports are adopted by the WTO Dispute Settlement Body by negative consensus – that is unless all Members vote against adoption, the report is adopted. DSU Art. 17.14. When adopted, the rulings and recommendations in the panel or Appellate Body report become the rulings and recommendations of the DSB.

[74] *See* Uruguay Round Agreements Act, as amended, 19 U.S.C. §§ 3501-3624 (2000).

Commission to determine whether U.S. law permits the Commission to take steps to render its action consistent with the WTO panel's decision.[75]

2. Issuance of a Determination.

Following such consultations, USTR may require that Commerce or the Commission "issue a determination . . . that would render the [agency's] action . . . not inconsistent with the findings of the panel or Appellate Body."[76]

3. Consultation Prior to Implementation.

After the agency in question has issued its determination, the statute requires that USTR again consult with Congress to determine whether the decision should be "implemented."[77]

4. Implementation.

Where a section 129 determination necessitates a change in the treatment of the subject imports, to give that determination effect USTR may direct "implementation" of the determination – by modifying the AD/CVD orders in question to change the treatment of the subject imports going forward. Implementation of determinations by Commerce and the Commission is different. With respect to Commerce, the statute provides:

> Implementation of determination
>
> The Trade Representative may . . . direct [Commerce] to implement, in whole or in part, the determination made under paragraph (2).[78]

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[75] *See* URAA, § 129(a)(1)-(3), 19 U.S.C. § 3538(a)(1)-(3) (Commission); URAA § 129(b)(1), 19 U.S.C. § 3538(b)(1) (Commerce).

[76] *Id.* § 129(a)(4) (Commission); 129(b)(2) (Commerce).

[77] *Id.* § 129(a)(5) (Commission); § 129(b)(3) (Commerce).

[78] URAA, § 129(b)(4), 19 U.S.C. § 3538(b)(4).

With respect to the Commission, on the other hand, the statute provides:

> Revocation of order
>
> If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 . . . or this subsection, the Trade Representative may . . . direct [Commerce] to revoke the antidumping or countervailing duty order in whole or in part.[79]

Because Commission and Commerce determinations differ – Commission determinations can only be affirmative or negative, while Commerce determinations also define the scope of AD/CVD measures and set cash deposit rates in particular amounts – the actions needed to bring them into compliance with WTO decisions also differ. Thus, while Commerce may take a variety of actions to "implement" its own section 129 determinations, the only action it may take to implement an ITC section 129 determination is to "revoke the antidumping or countervailing duty order" where the Commission has issued a negative determination.[80]

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where

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[79] URAA, § 129(a)(6), 19 U.S.C. § 3538(a)(6).

[80] *Tembec, Inc. v. United States*, 441 F. Supp. 2d 1302, 1327 (2006) ("*Tembec I*") ("[T]he court finds that section 129 cannot be read to imply authority for the USTR to order the implementation of a section 129(a) determination that does not result in at least partial revocation of a related AD, CVD, or safeguards order."). *See also, Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, slip op. 08-0072, 2008 Ct. Intll. Trade LEXIS 71, at 20 (Ct. Int'l Trade July 1, 2008) *citing Samsung Elecs. Am., Inc. v. United States*, 195 F.3d 1367, 1371 (Fed. Cir. 1999) (in denying the United States' motion to dismiss claim that USTR's section 129 implementation instructions were unlawful, the Court found that "there is no reason *Tembec I* should not be treated as persuasive authority.").

> determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries or merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retrospective relief may be available.[81]

In the United States, antidumping and countervailing duties are assessed retrospectively during administrative ("periodic" in WTO terms) review of imports during the preceding 12-month period.[82] Original determinations themselves, while setting initial AD or CVD duty deposit rates, do not establish final AD or CVD duty assessment rates. The issue thus arises whether implementation of WTO reports reviewing original Commission or Commerce determinations will apply to administrative reviews and thus give effect to the WTO report with regard to prior unliquidated entries subject to pending or impending administrative reviews.

In *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*,[83] the WTO panel accepted the U.S. argument that the statute and the Statement of Administrative Action ("SAA") to the URAA did not require that "prior unliquidated entries" would remain "subject to potential duty liability" in cases where an antidumping or countervailing duty order is revoked based on a new section 129 determination

[81] URAA SAA at 1026.

[82] *See* 19 C.F.R. § 351.212 (2008).

[83] Panel Report, WT/DS221/R (July 15, 2002) ("*United States – Section 129*").

implementing a WTO report.[84] In that proceeding, the United States pointed to its implementation of the WTO panel report in *United States – Antidumping Measures on Stainless Steel from Korea*,[85] to show that Commerce's administrative review determinations with respect to prior unliquidated entries were resolved in a manner consistent with the DSB rulings.

The issue arose again in a somewhat different context in *United States – CVDs on Softwood Lumber from Canada*.[86] The WTO Appellate Body in that case reviewed Commerce's section 129 CVD determination, through which the United States argued it had complied with the Appellate Body's earlier report reviewing Commerce's original final CVD determination. The United States argued that the Appellate Body's review was limited to the section 129 determination itself, and could not address the administrative review. The Appellate Body disagreed. The Appellate Body found that "[s]ome measures with a particularly close relationship to the declared 'measure taken to comply,' and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5."[87] The Appellate Body found that the first

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[84] *United States – Section 129* at ¶¶ 6.97, 6.114. The section 129 mechanism for implementation is discussed more fully in Section VI of this paper.

[85] *See United States – Section 129* at ¶¶ 6.116, 6.120, *citing United States – Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (Feb. 1, 2001), *and Stainless Steel Plate in Coils from the Republic of Korea*, 66 Fed. Reg. 64,017 (Dep't of Commerce Dec. 11, 2001) (admin. review).

[86] *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada, Recourse By Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW (Dec. 5, 2005) ("*United States – CVDs on Lumber from Canada, Art. 21.5*").

[87] *United States – CVDs on Lumber from Canada, Art. 21.5* at ¶ 77.

administrative review determination was within the scope of its review, and that such determination was not in compliance with the WTO Subsidies Agreement.[88] The Appellate Body did state, however, that not every assessment (*i.e.*, administrative) review will necessarily fall within the jurisdiction of an Art. 21.5 panel.[89]

WTO remedies are prospective – but the successful appellant need not be resigned to application of WTO-inconsistent determinations with respect to all prior unliquidated entries that are subject to pending or impending administrative reviews.

VI. CONFLICTS IN IMPLEMENTATION OF WTO DECISIONS AND COMPLIANCE WITH DOMESTIC JUDICIAL REVIEW – CAN REMEDIES COLLIDE, OR DO THEY NECESSARILY CO-EXIST?

When the same determination is subject to domestic judicial review and concurrently to WTO dispute settlement, the different fora may arrive at different conclusions due to a variety of factors, as discussed in Sections III and IV, above. As described in Section II above, the sequence of events regarding conclusion of concurrent domestic judicial review and WTO review of the same determination is uncertain. Let's first consider the case of conclusion of the WTO process before completion of domestic judicial review or binational panel review.

A. What Happens When WTO Reports Are Implemented Prior to the Conclusion of Domestic Judicial Review?

When Congress enacted the URAA, it considered how these potentially different outcomes might interact. Its primary consideration appears to have been to ensure that adverse WTO reports did not automatically result in a finding that the determination is

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[88] *Id.*

[89] *Id.*

unlawful in domestic judicial review as well. The URAA SAA states that "it is possible that Commerce or the ITC may be in the position of simultaneously defending determinations in which the agency reached different conclusions."[90] The SAA then notes that "[i]n 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 the 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."[91]

In addition to the effect of WTO reports on judicial decisions, Congress further considered whether implementation of a WTO report through the section 129 process could moot domestic judicial review. The URAA SAA delineates the potential circumstances under which a section 129 determination might "moot" domestic judicial review:

> 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 [USTR] 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.[92]

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[90] URAA SAA at 1027.

[91] *Id.*

[92] URAA SAA at 1027.

Accordingly, a section 129 determination cannot "moot" domestic judicial review challenging the validity an AD or CVD determination underlying an AD or CVD order. Congress' view of the operation of overlapping decisions is reasonable in light of the prospective remedial effect of WTO implementation, as contrasted with the retrospective effect of domestic judicial review. If an order is invalidated and a section 129 determination results in revocation of the antidumping order, that revocation will not have the same effect as revocation pursuant to domestic judicial review. There likely will be unliquidated entries for which AD or CVD duty deposits were required that would be covered by a court decision or binational panel decision invalidating the underlying order that are not covered by revocation pursuant to a negative section 129 determination.

As noted above, ITC section 129 determinations may be implemented only if they are negative, and for these determinations, this statutory construct works in a relatively straight-forward way. The AD or CVD order would be revoked prospectively, but domestic judicial review could nevertheless result in refunds of AD or CVD duty deposits not reached by the prospective revocation. And negative Commerce section 129 determinations would operate similarly. The negative determination would result in prospective revocation of the AD or CVD order, but the duty liability for earlier unliquidated entries would remain subject to domestic judicial review.[93] Indeed, in at least two cases, the Federal Circuit has rendered a decision in an appeal of an order even *after* it had been revoked, on a prospective basis pursuant to an implemented section 129 determination.

[93] *See* URAA, § 129(c), 19 U.S.C. § 3538(c)(1).

But what about changes in the AD or CVD margins as a result of WTO review? Changes in duty deposit rates as a result of domestic judicial review affect imports entered after the effective date of the decision – in much the same way that implementation of WTO reports affects imports entered after the date of implementation of the section 129 determination. "Mooting" could occur only on a prospective basis because section 129 determinations are prospective in their legal effect. If implementation of the section 129 report already addressed the error identified by domestic judicial review, there would be no need to re-remedy the same error.

> In many instances, such as those in which a WTO report merely implicates the size of a dumping margin or countervailable subsidy (as opposed to whether a determination is affirmative or negative), it may be possible to implement the WTO report recommendations in a future administrative review under section 751 of the Tariff Act.[94]

The U.S. statutory scheme works well if followed. The statutory scheme will not function properly if, for example, an affirmative ITC section 129 determination is "implemented" after a negative ITC remand determination issued pursuant to domestic judicial review.[95] But absent such misapplication of the statutory scheme, WTO reports can be given full prospective effect through the section 129 implementation process without undermining the efficacy of court or binational panel proceedings addressing the same AD or CVD determination.

B. What Happens When Domestic Judicial Review Is Completed Prior to Implementation of WTO Dispute Settlement?

[94] URAA SAA at 1025-1026.

[95] *See Tembec I.*

Congress, in the SAA to the URAA, considered potential problems in implementation of WTO reports prior to conclusion of domestic judicial review. Although in many cases, this might be the normal sequence of events, it is possible that domestic judicial review might be completed first, particularly if review is by a NAFTA binational panel. But the SAA to the URAA says little or nothing about this circumstance. That is because domestic judicial review would affect all unliquidated import entries, as well as future entries. Revocation of the AD or CVD order pursuant to court or binational panel review, or reduction of the AD or CVD duty deposit rate to correct the same error identified by the WTO report, would simply be notified to the WTO as compliance with the adverse WTO report.[96] No further action would be needed.

C. Avoiding Collisions

The U.S. Congress encouraged a flexible and understanding approach to concurrent litigation in multiple fora, and to domestic judicial or binational panel review

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[96] *See, e.g., United States – Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R (Feb. 1, 2001), and *Stainless Steel Plate in Coils from the Republic of Korea*, 66 Fed. Reg. 64,017 (Dep't of Commerce Dec. 11, 2001) (admin. review). At the DSB's meeting of September 10, 2001, the United States announced that it had implemented the DSB's recommendation on September 1, 2001. At that meeting, Korea acknowledged the implementation. *See also, United States – Imposition of Countervailing Duties on Certain Lead and Bismuth Carbon Steel Products from the United Kingdom*, WT/DS138/AB/R (May 10, 2000) (finding Commerce's privatization methodology to be contrary to the SCM Agreement). After adopting the new "change of ownership" privatization methodology in response to domestic judicial decisions, the United States announced at the DSB meeting on July 5, 2000, that it considered it had implemented the recommendations of the DSB with regard to the case concerning its countervailing duty order on certain hot-rolled lead and bismuth carbon steel products originating in the United Kingdom.

of the determinations that may result from concurrent reviews.[97] Recognition of the distinct role of WTO review, and its different standard of review – as applied to factual issues and as to legal issues – may promote a greater sensitivity in domestic implementation of WTO reports and in domestic judicial review of that implementation process.

Collisions are possible – but result not from a poorly designed implementation system or ineffective judiciary, but from a lack of due respect for (or perhaps understanding of) the statutory construct described above. If section 129 implementation determinations are used to increase AD or CVD margins, or to resurrect invalidated AD or CVD orders through affirmative injury determinations,[98] remedies available from the multiple fora will unavoidably collide. Failure to follow the statutory construct could result in the following:

- antidumping margins bouncing up and down depending on the timing of the implementation of WTO reports or effective date of court decisions;
- AD and CVD orders being revoked as a result of domestic judicial review, only to be reinstated to as a result of section 129 determinations issued to "comply" with adverse WTO reports;

[97] URAA SAA at 1027. ("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 the 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.").

[98] See *Tembec I* and *Tembec II*.

- court review of section 129 determinations that undermined the effectiveness of the court's own review of the underlying AD or CVD determination; and/or

- DSU 21.5 panel review of the Commerce or ITC section 129 determinations that were used to reinstate AD or CVD orders, or to increase AD or CVD margins.

None of the above is consistent with a predictable and reliable system that promotes adherence to international agreements and domestic law. Nor are such results consistent with the U.S. statutory scheme or U.S. obligations under the WTO Agreements.

While the results of the review in different fora will differ, the remedies need not collide. Indeed, the U.S. statutory scheme envisions a system that allows implementation of WTO reports that result in revocation of AD or CVD orders, or modifications of AD or CVD duty deposit rates, at the same time domestic courts or binational panels are reviewing the same AD or CVD determinations. The system is designed to allow remedies to co-exist.

VII. CONCLUSION

Appellants need not choose between review of an AD or CVD determination under domestic law or under the WTO Agreements. Review at the WTO and in domestic courts or NAFTA binational panels can proceed concurrently. While the interested private party litigant may choose between court review or binational panel review (if the goods involved are from Canada or Mexico), it is the choice of the WTO Member whether to pursue WTO review.

Domestic judicial review and WTO dispute settlement proceedings perform distinct, but equally vital, roles in promoting adherence to the rule of law. But when

reviewing the same agency determination, tensions may arise in the potentially competing decisions of reviewing fora and in potential conflicts in compliance with or implementation of their respective decisions.

In *Charming Betsy,* Chief Justice Marshall showed great wisdom. Courts would be wise to carefully consider that time-honored canon of statutory construction when assessing potential conflicts between domestic law and the WTO Agreements or WTO reports. And WTO panels would be wise to consider the persuasive value of domestic judicial decisions when reviewing the same agency determination (particularly when the issues are review of factual findings or mixed issues of fact and law – as are often the core issues in review of AD or CVD determinations). Despite differences in the standard of review and controlling law, there is much that can be learned by a thoughtful review of the decision of another tribunal reviewing the same agency determination.

The section 129 statutory scheme enacted by Congress is intended to allow compliance with U.S. obligations under the WTO Agreements. Good faith compliance with the WTO Agreement and adherence to U.S. law would indicate that when an adverse WTO report is implemented, it should not result in increased AD or CVD margins, or reinstatement of AD or CVD orders that otherwise would have been revoked. In keeping with Congressional intent, potential conflicts in implementation of WTO reports and in compliance with domestic judicial review are avoidable.

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