Panel Discussion:
Choices, Choices: Domestic Courts Versus International Fora
A Commerce Perspective‡

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I. INTRODUCTION

While the Panel Discussion for which this paper is being prepared is titled "Choices, Choices: Domestic Courts Versus International Fora," from this author's perspective, the title is a misnomer: the U.S. Government has no choice in the matter. As the responding or defending party in these matters, the U.S. Government, in one form or another, must be prepared to defend its determinations before World Trade Organization dispute settlement panels ("WTO panels") and the WTO Appellate Body, before binational panels ("NAFTA panels") and Extraordinary Challenge Committees ("ECCs") composed pursuant to Chapter 19 of the North American Free Trade Agreement, and before the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit ("Federal Circuit").

Sometimes the U.S. Government must simultaneously defend a determination in multiple fora. Such parallel cases do not normally raise issues of consistency across cases because the determinations are being reviewed pursuant to different legal regimes and, as discussed below, the relief available differs. There may be a substantive concern with these parallel cases, however, to the extent that some parties seek to maintain domestic litigation solely to expand the relief to which they believe they are entitled as a result of WTO dispute settlement.

This paper is divided into two main sections. The first section discusses some of the "logistical" differences related to litigating in the different fora. In particular, the paper notes how the U.S. Government team handling the litigation differs, how deadlines and page limits differ, and how hearings differ in the three fora. The paper then turns to "substantive" issues that differ in the fora: standard of review, the role of precedent, and the type of relief available.

II. LOGISTICAL ISSUES RELATING TO THE CHOICE OF FORA

Before turning to the substantive differences that exist with respect to litigating in the three fora, it may be worth noting some of the logistical differences, particularly for those who have not practiced in each forum. In some cases, the differences are inherent in the forum, in other cases, the differences are specific to how the U.S. Government litigates in that forum.

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A. Litigation Team

While private litigants may be represented by the same counsel regardless of the forum in which they choose to litigate, that choice of forum will, to some degree, alter the litigation team representing the U.S. Government.

When a dispute regarding an antidumping or countervailing duty case is brought to the WTO and a dispute settlement panel is formed, this is a government-to-government dispute under the terms of an international agreement and the Office of the U.S. Trade Representative ("USTR") has the lead responsibility for the dispute. The antidumping and countervailing duty laws, however, are quite technical, and investigations or other administrative proceedings pursuant to those laws are highly fact specific. Thus, the team working on the dispute will always consist of attorneys from the Department of Commerce ("Commerce") and/or the International Trade Commission ("ITC"), as appropriate, to address the substantive, antidumping and countervailing duty issues that arise within their areas of expertise and to ensure that the positions taken are consistent with agency practice. These agency attorneys will also be most familiar with the factual record and will address any factual issues involved in the dispute. At the same time, USTR attorneys will handle broader, systemic issues, particularly those that will have an impact beyond the area of antidumping and countervailing duty disputes such as the interpretation of the Dispute Settlement Understanding and any procedural issues that arise. The same interagency team will also handle any appeal to the WTO Appellate Body.

In antidumping and countervailing duty cases involving Canada or Mexico, the individual private parties and/or governments involved in the case have an alternative to domestic courts for directly challenging a Commerce (or ITC) determination under domestic law – challenging the determination before a binational panel established under the NAFTA Agreement. In such a case, Commerce and the ITC, as appropriate, have direct litigating authority before a NAFTA panel.[1] If the results of the NAFTA panel are further challenged by one or more of the national government parties before an ECC, Commerce or the ITC and USTR work together with respect to that challenge which will ordinarily address both case specific issues and broader, systemic issues relating to, among other things, the impact of the panel's actions on the integrity of the NAFTA Agreement.

Before the Court of International Trade and the Federal Circuit, Commerce is represented by the Department of Justice.[2] Within the Civil Division at Justice, there is a relatively small

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[1] 19 U.S.C. § 1516a(g)(9) provides that in binational panel proceedings pursuant to chapter 19 of NAFTA, Commerce and the Commission "shall be represented by attorneys who are employees of [Commerce] or the Commission, respectively."

[2] "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under

group of attorneys for whom defending Commerce determinations in antidumping and countervailing duty cases represents a significant portion of their workload. For other attorneys in the Civil Division, defending Commerce determinations is a more limited part of their workload. In either case, as a result of the highly technical nature of the issues and the detailed record before Commerce, Commerce attorneys are heavily involved in drafting the briefs with Justice and assisting them in preparation for any oral argument.

It is probably worth noting that, from the Commerce perspective, representation by Justice has pluses and minuses: while the detailed nature of the determinations often requires the intimate knowledge of the record that the Commerce attorney may bring, Justice attorneys can bring a more detached perspective to the consideration of the issues (particularly legal issues that are not based on the trade laws). At the same time, we have observed that, at oral argument, the Court has occasionally been frustrated if the attorney arguing lacks sufficient familiarity with the history of the case and with parallel proceedings (both administrative and in litigation before NAFTA panels or the WTO) to be able to answer an unanticipated question.

B. Deadlines and Page Limits

Each of the three fora has its own history and role within a larger set of institutions. In some ways, aspects of that history and role manifest themselves in the extent to which deadlines and page limits apply to litigation or dispute settlement.

With respect to the WTO, within days of a dispute settlement panel being composed,[3] an organizational meeting is held and a draft timetable for the entire dispute is provided to the parties to the dispute. This timetable is usually reasonably consistent with the standard working procedures,[4] taking into account the schedules of the three panelists and, occasionally to some extent, anticipated and identified scheduling conflicts of the parties to the dispute. While it is difficult to have much influence over the panel's timetable during the drafting stage, once set, changes are even more difficult to obtain. This, however, may not be surprising because the schedule will have already accommodated the travel schedules of the three panelists, often coming from different parts of the globe.

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section 543 of this title in the discharge of their respective duties." 28 U.S.C. § 519.

[3] Technically a panel is "established" by the Dispute Settlement Body (DSU) based on a request (usually the second request) by a Member, however, the panel is composed several days/weeks later when individuals are identified to serve on the panel. See DSU, Articles 6 and 8. Panelists are selected on an *ad hoc* basis and are governmental or non-governmental individuals with significant trade experience. DSU, Article 8.1.

[4] World Trade Organization, The Working Procedures for Appellate Review (2005) available at: http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm, (last visited Oct. 15, 2008) providing a consolidated version of the Working Procedures, including all amendments.

With respect to page limits, there are none in WTO dispute settlement. When considered in connection with the lack of any limitations not only on the claims that may be brought in a single dispute, but also the number of determinations that may be combined in a single dispute, one can understand the need for submissions in excess of 100 single-spaced pages. However, given the fact that WTO dispute settlement is generally subject to the overall time limits contained in the Dispute Settlement Understanding and that some of these multi-claim disputes have run the gamut from critical issues to peripheral (at best) issues, it may not be to the advantage of a complainant to attempt to do too much in one dispute. This approach to dispute settlement certainly does not facilitate the work of a panel within their time-frames.

With respect to practice before a NAFTA panel, there are the standard rules, and there is reality. The Rules of Procedure for Article 1904 Binational Panel Reviews contain standard deadlines for briefs and certain motions, but no page limits.[5] Such deadlines, however, may be revised by the panel. However, it is not uncommon for the members of the panel not to be appointed until it is too late for them to be involved in adjusting any deadlines – leaving it to the parties to negotiate their deadlines through consent motions (to the not-yet-appointed panel).

At the Court of International Trade, the deadlines are generally managed through scheduling orders and orders regarding briefing issued in connection with remand orders. Each chambers will have some variation in its approach to scheduling and, regardless of the chambers involved, the schedules will reflect the number and complexity of issues in the case. One thing that has always been notable about the trade bar and the court has been the reasonableness with which requests for extensions or adjustments to schedules have been treated. While there is certainly a significant amount of self-policing involved so as to avoid unreasonable extension requests, it has been the rare situation in which legitimate scheduling issues have not been resolved amicably.

In addition to the Rules of the Court, the Court of International Trade has a set of "Standard Chambers Procedures" which provide, among other things, for a standard page limit for briefs.[6] While the norm is 40 pages in trade cases for movant's and respondent's briefs, the procedures provide that leave for additional pages "will be freely given upon good cause shown."[7] The Federal Circuit's Rules of Appellate Procedure also provide page limits, however,

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[5] North American Free Trade Agreement: Amendments to Rules of Procedure for Article 1904 Binational Panel Reviews, 73 Fed. Reg. 19458 (April 10, 2008), reprinting the full rules of procedure, as amended.

[6] United States Court of International Trade, Standard Chambers Procedures, (2008) available at: http://www.cit.uscourts.gov/Rules/new-rules-forms.htm (last visited October 15, 2008).

[7] Standard Chambers Procedures, ¶ 2(B).

the rules indicate that the court "looks with disfavor"[8] on motions for additional pages and will grant them only for "extraordinary reasons."[9] From an agency perspective, the author's experience has been that these page limits have tended to be effective in encouraging parties to focus their arguments and have not impeded any parties' ability to make its case.

C. Hearings

The manner in which hearings are conducted varies significantly between the three fora. In particular, the length of a hearing can vary from two or three days in a typical WTO dispute to as little as 30 minutes in a typical Federal Circuit argument.

At the panel stage in a WTO dispute, there are typically two meetings of the panel with the parties. The first meeting often lasts two to three days, with the second or third day involving a third party session at which other WTO Members may present their views with respect to the dispute. The second meeting normally lasts one or two days and does not involve the third parties. In each of the meetings, the parties make an initial presentation of their case. While these initial presentations are supposed to be premised on the assumption that the panel has read all the submissions, some of these presentations have lasted in excess of four hours. After each party has made its initial presentation, parties are normally given an opportunity to pose questions to each other, through the chairman of the panel. This is followed by questions from the panel to the parties. This process can continue for hours and can include back-and-forth between the parties in response to any question.

As noted above, the team representing the United States is composed of attorneys from both USTR and Commerce (and the ITC, as appropriate). The somewhat informal format of the hearings (compared to a domestic court hearing) is such that multiple team members will often be involved in arguing the case, normally with attorneys from each agency handling the issues for which they were responsible.

As a general matter, the United States has favored public hearings at the WTO and, when the other disputant agrees and the panel accepts, the panel meetings have been open to the public. This "openness" however, often means that the public is in a separate room watching the hearing on closed circuit televisions. Notably, there are still a number of countries which, even when participating as third countries in a dispute, refuse to make their statements or respond to questions from the panel in the open, public session. In such instances, that part of the hearing will be closed in accordance with the wishes of the Member participant.

Oral hearings before the Appellate Body tend to be more constrained. The Appellate Body gives the parties time limits for their opening and closing statements and they do not

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[8] Fed. Cir. R. 28(c).

[9] Fed. R. App. P. 32(a)(7).

provide for the parties to question each other. Otherwise, most of the time is devoted to questions from the division hearing the case to the parties and third parties, all of which may participate throughout the hearing. Most hearings before the Appellate Body are completed in one day, however, hearings in several significant or complicated cases have continued longer.

Hearings before a NAFTA panel might be best described as a hybrid between WTO dispute hearings and hearings at the Court of International Trade. In these cases, litigants usually are permitted to complete their opening statements before receiving questions from the panelists; however, the question period often continues longer than is the norm at the Court. This should not be surprising because there are multiple panelists, and some of these panelists may have less trade expertise than Court of International Trade judges and certainly less experience serving in a judicial role. In NAFTA cases, it is not unusual for the presentation of issues to be divided across more than one attorney depending on the number and complexity of the issues. This is most likely in a case involving many issues (e.g., softwood lumber from Canada) or where a particular attorney in the office may have a significant degree of expertise in one of several issues in the case.

Hearings before an ECC tend more towards the formality of the Court of International Trade or the Court of Appeals for the Federal Circuit. This would be expected because an ECC is composed of retired judges from the two countries involved in the dispute. This will be reflected in a greater willingness of ECC members to ask questions during a presentation and to establish tighter time limits on parties.

Hearings before domestic courts are certainly the most formal of the three fora, with the Court of Appeals for the Federal Circuit being even more structured than the Court of International Trade as a result of its time limits. In either court, attorneys should expect to receive questions shortly after commencing their presentation. While the questioning at the Court of International Trade may go on for some time, the challenge at the Federal Circuit is to weave the affirmative presentation into responses to the judges while mindful of the rather strict time limits applied in such arguments. While the attorney from the Department of Justice is normally the one to argue a case, Commerce always sends attorneys to hearings to assist Justice in responding to the Court.

Before moving on to the substantive issues, there is one additional thing to note with respect to WTO dispute settlement that cuts across several of these procedural points: the responding party may often be at a slight disadvantage in these disputes. There is no statute of limitations in WTO dispute settlement. Consequently, the complaining party may have as long as necessary to prepare its case prior to initiating formal dispute settlement. Moreover, many foreign governments will retain outside counsel to assist in drafting submissions, providing them with time and resources sometimes exceeding even those of the U.S. Government. With no page limits and tight deadlines, it sometimes appears to be part of a strategy to attempt to overwhelm the responding party as much as possible. It is not clear that such an effect has ever been

achieved, however, and such a strategy risks stretching the much more limited resources of the panel and the WTO Secretariat as they seek to meet their own deadlines.

III. SUBSTANTIVE ISSUES

While the "procedural" differences between the three fora may be interesting, the "substantive" differences are where the rubber meets the road. These are the differences that may influence a decision, for example, as to whether a foreign company encourages its government to seek dispute resolution at the WTO or the company pursues domestic litigation for its desired remedy (or both). This section of the paper will address three important issues that arise in any dispute or litigation: the standard of review; the role of precedent; and the available remedies. As appropriate, the discussion will provide a brief overview of how each forum handles the issue as well as some of the ways in which the fora overlap or "interplay" with one-another.

A. Standard of Review

On their face, the standards of review in all three fora would appear to be remarkably similar. As in many things, the devil is in the details and, in particular, the WTO standard of review has not worked as anticipated by many in the United States, as a minimum.

With respect to WTO disputes arising pursuant to the Antidumping Agreement, Article 17.6 of that Agreement contains a special standard of review.[10] Specifically, with respect to factual matters:

> the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though

[10] Note that dispute settlement involving countervailing duty cases was supposed to receive the same special standard of review as antidumping cases, but it has not. See, Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Art. VI of the GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, GATT B.I.S.D. (1993) ("Antidumping Agreement") (recognizing "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."); compare, Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 44-51, WT/DS138/AB/R (May 10, 2000), (upholding the panel's application of the standard of review in DSU Art. 11 and finding that the Declaration is merely hortatory and does not provide for the application of the special standard of review contained in Art. 17.6 of the Antidumping Agreement).

> the panel might have reached a different conclusion, the evaluation shall not be overturned.[11]

And, with respect to the application of the AD Agreement, it provides:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[12]

Application of the factual review standard has been less controversial than the legal review standard. With regard to the factual review standard, panels generally recognize that they are not to engage in a de novo review of the facts[13] and that they are to limit their review to the facts that were before the investigating authority.[14] Similarly, the Appellate Body has found that a panel's examination[15] must be based on information on the record and explanations provided by the investigating authority, whether there was information (positive evidence) supporting the authority's conclusions, and whether the conclusions are "reasoned and adequate" in light of the evidence.[16] Consequently, even where parties might disagree with a panel's factual finding, the degree of criticism has generally been limited.

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[11] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 17.6(I), 1867 U.N.T.S 187.

[12] *Id*. at Article 17.6(ii).

[13] Panel Report, *Egypt – Definitive Anti-dumping Measures on Steel Rebar from Turkey*, ¶ 7.8- ¶ 7.14, WT/DS211/R (Aug. 8, 2002).

[14] Panel Report, *Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico*, ¶ 8.19, WT/DS156/R (Oct. 24, 2000).

[15] Only issues of law and legal interpretations may be appealed to the Appellate Body. DSU, Art. 17.6. Factual findings may not be appealed. Consequently, when there is a concern with a panel's factual finding, the normal basis for appeal is whether the panel properly applied the standard of review in its examination of the facts.

[16] Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶ 89- ¶ 140, WT/DS277/AB/RW (April 13, 2006).

Turning now to the legal standard of review, since they first addressed the issue in 2000, panels and the Appellate Body have interpreted Article 17.6(ii) as first requiring the application of the customary rules of treaty interpretation, prior to making any finding that there may be multiple permissible interpretations.[17] Most U.S.-trained attorneys would look at Article 17.6(ii) and see the familiar imprint of the Supreme Court in *Chevron* - providing that when the statute is clear, it must be applied as written, however, when a statute is ambiguous, the courts are to defer to a reasonable agency interpretation, even if they would prefer another.[18] While Article 17.6(ii) may be drafted in somewhat parallel language, its application, particularly by the Appellate Body, has not paralleled domestic *Chevron* analysis.

The Appellate Body appears to start from the perspective that only if, through its application of the customary rules of treaty interpretation, it necessarily find that there is more than one interpretation will it consider whether the Member's interpretation is one of those permissible interpretations. Even where the Agreements do not expressly speak to an issue, the Appellate Body will apply the customary rules of treaty interpretation to see if it comes up with an interpretation that addresses the issue. If so, that is the end of its inquiry. By contrast, some would argue that the more appropriate analysis would have the panel/Appellate Body, upon determining that the Antidumping Agreement does not expressly address the issue, then determine whether the Member's interpretation is a permissible interpretation of the Agreement. Something closer to this approach has been taken by several panels in the "zeroing" disputes, but has always been rejected by the Appellate Body.[19]

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[17] See Panel Report, *United States – Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, ¶ 6.4, WT/DS179/R (Dec. 22, 2000); Panel Report, *United States – Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan*, ¶ 7.27, WT/DS184/R (Feb. 28, 2001); Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan*, ¶ 59-60, WT/DS184/AB/R (July 24, 2001) (finding that the second sentence of Art. 17.6(ii) "presupposes" that the application of the customary rules of treaty interpretation could give rise to multiple interpretations of some provisions, and that "a permissible interpretation is one which is found to be appropriate *after* application of the rules of the Vienna Convention").

[18] *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

[19] Panel Report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, ¶ 7.119 and ¶ 7.128, WT/DS344/R (Dec. 20, 2007), (finding that the panel was "precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations"); however, in each case, the panel was reversed by the Appellate Body, Appellate Body Report, *United States – Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (April 30, 2008). See also, Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, ¶ 7.141- ¶ 7.142, WT/DS322/R (Sept. 20, 2006); and Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Art. 21.5 of the DSU by Canada*, ¶ 5.65- ¶ 5.66,

For disputes brought pursuant to Chapter 19 of the NAFTA, the standard of review applied by panels generally is supposed to mirror that of domestic courts. Specifically, NAFTA Article 1904 provides:

> **Review of Final Antidumping and Countervailing Duty Determinations**
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> 1. As provided in this Article, each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.
> 2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.
> 3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

With one recent exception, NAFTA panels have generally understood that they stand in the shoes of the Court of International Trade in performing their review of antidumping or countervailing duty determinations. The recent exception involved the NAFTA panel in Steel Wire Rod from Canada.[20] In that case, because there was clear precedent of the Court of Appeals for the Federal Circuit directly opposite to the position of the panel majority, in order to adopt its position, the majority found that its role was not akin to the Court of International Trade or, for that matter, the Court of Appeals for the Federal Circuit. Instead, it found itself to be a

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WT/DS264/RW (April 3, 2006).

[20] In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada, 2nd Administrative Review, USA-CDA-2006-1904-04, p. 21, (November 28, 2007).

"virtual court" equal to, but not bound by, the Federal Circuit.[21] Because of the manner in which that panel linked the standard of review and the role of precedent, this issue is discussed further below in the discussion of the role of precedent.

ECC review of NAFTA panel decisions is not technically an appeal because only the national government parties may seek ECC review of a NAFTA panel decision. Moreover, the standard applied by an ECC is quite high. As provided in section 1904.13 of the NAFTA:

> Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:
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> (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
> (ii) the panel seriously departed from a fundamental rule of procedure, or
> (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and
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> (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,
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> that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

To date, ECC review of panel decisions has been ineffective as a result of the manner in which the ECCs have applied this standard of review. While some ECCs have found that the grounds for review set out in subparagraph (a) have been satisfied,[22] no ECC has found that the requirements of subparagraph (b), that the panel's actions threatened the integrity of the binational panel review process, have been satisfied.

In contrast to the WTO and NAFTA fora, the domestic courts have a long history of interpreting and applying the standard of review and, while incremental change in that interpretation may occasionally occur, there is often very little controversy with respect to the standard of review in domestic litigation – to the point where the recitation of the standard of review in many briefs is almost rote.

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[21] *Id.*

[22] In the Matter of Pure Magnesium from Canada, Article 1904 Extraordinary Challenge, ECC-2003-1904-01USA, ¶ 26 and ¶ 36, (October 4-5, 2004).

The basic standard of review for most domestic court review of antidumping and countervailing duty determinations is set out in 19 U.S.C. § 1516a(b)(1)(B)(1) which provides that a determination shall be held unlawful if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law...." This standard has been interpreted such that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[23]

As referenced earlier, in its determination of the lawfulness of an agency's construction of a statute, the court is guided by the *Chevron* opinion. Pursuant to that opinion, the court first examines "whether Congress's purpose and intent on the question at issue is judicially ascertainable."[24] "Only if, after this investigation, we conclude that Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear, do we reach the issue of Chevron deference."[25] In applying that deference, the wisdom of Commerce's legitimate policy choices is not subject to review[26] and the court would be in error if it substituted its own statutory construction for a reasonable interpretation made by Commerce.[27]

As discussed in more detail below in the "Available Remedies" section, there has been an effort by a number of private parties to have domestic courts take into account the rulings and recommendations of the WTO dispute settlement system when interpreting domestic law. While this has been suggested with respect to issues about which the substantive U.S. law may be ambiguous, as discussed below, there is no ambiguity as to the role of adverse WTO reports in the U.S. legal system. Congress has expressly vested the authority to determine whether and to what extent to implement an adverse WTO report with the Executive Branch in consultation with Congress and the courts have left this issue to the political branches.

B. Role of Precedent

The standard of review was noted for being facially similar, but practically different, across fora. The role of precedent, on the other hand, differs across fora, both facially and practically. Moreover, as discussed with respect to the WTO and NAFTA, there are again

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[23] *Univ. Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

[24] *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998) (citation omitted).

[25] *Id*.

[26] *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

[27] *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992) (*quoting* Chevron, 467 U.S. at 844).

situations in which the practical application of the role of precedent is nothing like what it appears on its face.

In WTO dispute settlement, adopted reports are only binding among parties to the dispute and with respect to the dispute.[28] Dispute settlement reports are not supposed to be precedential because only the Ministerial Conference and the General Council of the WTO have the authority to adopt binding interpretations of the agreements.[29] Otherwise, adopted reports only have persuasive value to the extent they are well-reasoned and, to that end, it has been said that adopted panel and Appellate Body reports ". . . create legitimate expectations among WTO Members and therefore should be taken into account when they are relevant. . ."[30] While such report may create legitimate expectations, they do not and cannot create additional rights and obligations. Article 3.2 of the Dispute Settlement Understanding speaks directly to this point, stating that "Recommendations and rulings of the [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements."

While Appellate Body reports should be taken into account by panels to the extent that the reasoning is persuasive, the Appellate Body itself has stated that its reports are not binding on panels.[31] However, the recent Appellate Body report in *US – Zeroing (Mexico)*, seeks to expand the role of adopted Appellate Body reports.[32] After reversing the panel's findings regarding the substantive issue, the Appellate Body went on to address Mexico's claim that the panel itself acted inconsistently with the WTO Agreements because it failed to follow prior Appellate Body decisions.[33] After reciting the usual views regarding the impact of adopted

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[28] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, p. 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

[29] Agreement Establishing the World Trade Organization, Art. IX:2, Apr. 15, 1994, 1867 U.N.T.S. 154, 159.

[30] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, p. 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996).

[31] See Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶ 111, WT/DS264/AB/R (Aug. 11, 2004), (citing Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, p. 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996), and Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Art. 21.5 of the DSU by Malaysia*, ¶ 109, WT/DS58/AB/RW (Oct. 22, 2001)).

[32] Appellate Body Report, *United States – Final Anti-dumping Measures on Stainless Steel From Mexico*, WT/DS344/AB/R (April 30, 2008).

[33] *Id*. at ¶ 154- ¶ 162.

Appellate Body reports, including recognizing that only the Ministerial Conference and the General Council may adopt binding interpretations of the WTO Agreements, the Appellate Body made the following statements:

> Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.[34]
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> * * *
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> 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.[35]

and

> We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.

This, however, was not a case in which the panel cavalierly disregarded a prior Appellate Body report. Instead, the panel expressly acknowledged the prior Appellate Body reports, analyzed them carefully, found errors in the Appellate Body's reasoning and then, considered that it had a duty to make an objective assessment of the matter before it, rather than blindly following Appellate Body reports which it considered erroneous.[36] For the Appellate Body to have criticized the panel in such a fashion notwithstanding the panel's detailed and respectful disagreement with the Appellate Body suggests that the Appellate Body has become increasingly frustrated with its inability to convince the trade remedy experts serving on the lower panels of the correctness of its reasoning.

In fact, to the extent that this represents an effort by the Appellate Body to influence future panels other than through the strength of its reasoning, it may already be paying off. In the most recent panel decision on the issue of zeroing, *US – Continued Zeroing*, the panel

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[34] *Id* at ¶ 160 (footnote omitted).

[35] *Id*. at ¶ 161.

[36] Panel Report, *United States – Final Anti-dumping Measures on Stainless Steel From Mexico*, ¶ 7.101- ¶ 7.106, WT/DS344/R (Dec. 20, 2007).

concluded that, while it was inclined to agree with the U.S. position and the findings of three prior panels that the Antidumping Agreement does not prohibit "zeroing" in administrative reviews,[37] the panel addressed the prior Appellate Body reports including, in particular, the recent report in *US – Zeroing (Mexico)*.[38] Notwithstanding the panel's stated agreement with the reasoning in the prior panel reports, in the end, the panel based its findings of inconsistency on the fact that the Appellate Body reversed those panel findings, creating a series of consistent reports on the issue of zeroing. The panel also considered that its role of assisting in a prompt resolution to the dispute was best served by following the Appellate Body's prior findings.[39]

NAFTA panel decisions, like WTO reports, are non-precedential, both with respect to future NAFTA panels and with respect to domestic courts. However, domestic judicial precedent is supposed to be binding on NAFTA binational panels. The recent Steel Wire Rod from Canada panel, however, saw things differently. As noted above, the majority declared themselves a "generic or virtual court [...] not situated within the regime of, or bound by, decisions of the CIT or the Federal Circuit."[40] To that end, on the role of the precedent of the Court of International Trade and the Court of Appeals for the Federal Circuit, the panel stated:

> in deciding questions of law of first impression in its jurisdiction, the virtual court should and would give full, thoughtful and respectful consideration to the decisions of the CIT and Federal Circuit. Such a virtual court should nonetheless look on those precedents like another United States Court of Appeals or a state supreme court would look upon them or another state supreme court decision. A decision whether to adopt a CIT or Federal Circuit decision should be primarily based on how relevant, well thought through and persuasive the decision appears to be in the context of the factual record presented.[41]

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[37] Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 7.162- ¶ 7.169, WT/DS350/R (Oct. 1, 2008), (concluding, in ¶ 7.169 that "we have generally found the reasoning of earlier panels on these issues to be persuasive." (footnote omitted)).

[38] *Id*. at ¶ 7.173-¶ 7.177.

[39] *Id*. at ¶ 7.182.

[40] In the Matter of: Carbon and Certain Alloy Steel Wire Rod from Canada, 2nd Administrative Review, USA-CDA-2006-1904-04, p. 21, (November 28, 2007).

[41] *Id*. The panel went on to reject the reasoning relied on by the Court of International Trade and the Court of Appeals for the Federal Circuit in a long series of cases on the identical legal issue and, instead, find that "this Panel's obligation to respect and apply the *Charming*

When Congress enacted NAFTA, however, it created NAFTA panel jurisdiction by specific reference to particular determinations reviewable only by the Court of International Trade.[42] In this way, NAFTA panels serve as an alternate venue to the Court of International Trade for seeking review in antidumping and countervailing duty cases involving Canada or Mexico, but the panels are bound by the same laws and precedent binding upon the Court of International Trade.

NAFTA panels and U.S. courts only have the jurisdiction that is granted by Congress and must operate within those jurisdictional grants. In 19 U.S.C. §1516a(g)(1), Congress explicitly provided that NAFTA panels would have *some* of the exclusive original jurisdiction granted to the Court of International Trade under 19 U.S.C.§1516a(a).[43] Congress was equally as explicit in section 1516a(g)(2)(A) when it replaced 19 U.S.C. §1516a(a) review by the Court of International Trade with panel review in cases involving Canada or Mexico. Pursuant to 19 U.S.C. §1516a(g)(3)(B), that jurisdiction is concurrent with the Court of International Trade's jurisdiction until such time as request for NAFTA panel review is made. If no request is made and a proper notice is filed indicating an intent to seek judicial review, the Court of International Trade retains jurisdiction over the action.[44] If a proper request for panel review is made, a NAFTA panel has exclusive jurisdiction over the action.[45] Significantly, no other U.S. federal district court or state court has original jurisdiction to determine cases arising under 28 U.S.C.§ 1581(c), i.e., antidumping and countervailing duty determinations made by Commerce.

Because only the Court of International Trade has exclusive, original jurisdiction over Commerce's antidumping and countervailing duty determinations, Congress did not borrow from the jurisdiction of the Federal Circuit or any other trial or appellate court in creating NAFTA panel jurisdiction. Consequently, there is no reference to the Federal Circuit jurisdictional statute, 28 U.S.C. § 1295(a)(5), in the NAFTA jurisdictional grant in 19 U.S.C. § 1516a(g). It is

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Betsy canon of statutory construction precludes approval" of Commerce's determination. *Id*. at p. 40.

[42] *Compare* 19 U.S.C. § 1516a(a) (listing the determinations over which the Court of International Trade has exclusive jurisdiction); *with* 19 U.S.C. § 1516a(g) (providing binational panels exclusive review of certain determinations over which the Court of International Trade would have exclusive review but for a proper request for NAFTA review).

[43] Not all decisions reviewable by the Court of International Trade are reviewable by NAFTA panels. For example, section 1516a(g)(3) describes exceptions to the exclusive jurisdictional grant to NAFTA panels. Those decisions remain reviewable by the Court of International Trade.

[44] 19 U.S.C. § 1516a(g)(3)(B).

[45] 19 U.S.C. § 1516a(g)(2).

significant that in creating NAFTA jurisdiction Congress borrowed from the Court of International Trade's jurisdiction and not from the jurisdiction of the Federal Circuit. NAFTA panels, having derived their jurisdiction from the original exclusive jurisdiction of the Court of International Trade, were intended by Congress to sit in place of the Court of International Trade.

NAFTA Article 1904(2) provides that, for purposes of binational panel review, the antidumping law consists of, among other things, "judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." When the importing Party is the United States, judicial precedent of the Federal Circuit is binding upon the panel. As noted above, in the United States, exclusive original jurisdiction to review antidumping and countervailing duty determinations rests with the Court of International Trade. Consequently, when determining "the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority," there is only one court that would ever "[review] a final determination of the competent investigating authority" and to which the panel may turn to answer this question – the Court of International Trade. No other court has original jurisdiction to review such a determination, and there is no question that the Court of International Trade is bound by judicial precedents of the Federal Circuit.[46]

NAFTA Article 1904.3 contains similar language referring to "the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." Again, when the importing Party is the United States, there is only one court that originally would conduct "a review of a determination of the competent investigating authority" and that court is the Court of International Trade.[47]

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[46] *See, e.g., Paul Muller Industrie Gmbh & Co. v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (citation omitted) (explaining that, "[u]nless the Supreme Court or the Federal Circuit expressly overrule *Timken* or *Corus Staal*, this court does not have the power to re-examine the issue of zeroing in administrative reviews"); and *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005) (citing *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed. Cir. 2000)) (explaining the Federal Circuit is bound by its own decision unless it overrules it *en banc*).

[47] That these provisions refer, in the case of the United States, to the Court of International Trade is further confirmed by the provisions of Annexes 1911 and 1904.15. In Annex 1911, the agreement specifies, in relevant part, that the standard of review means the standard set out in section 516A(b)(1)(B) (19 U.S.C. § 1516a(b)(1)(B)). That statutory provision refers to "[t]he court" applying the standard of review to actions specified in section 1516a(a). For all of the determinations specified in section 1516a(a) to which the standard of review applies, "the court" is the Court of International Trade, as specified in that provision. Thus, NAFTA Art. 1904.3, read in conjunction with the definition of standard of review in Annex 1911, demonstrates conclusively that the standard of review to be applied by the panel is that of

The legislative history further confirms this interpretation. In particular, the Senate Report confirms that "the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces" because "misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process."[48] The Senate expected binational panels to "properly apply U.S. law and the appropriate standard of review, giving broad deference to the decisions of both the Department of Commerce and the ITC."[49]

The clarity of this path directing NAFTA panels to the precedent binding on the Court of International Trade is further confirmed by the long series of *ad hoc* NAFTA panels, each of which properly considered themselves constrained by that precedent. That the panel in the Canadian Wire Rod case declared itself unconstrained by that precedent is nothing short of shocking. Whether such an extreme disregard of domestic law and precedent would have risen to the standard of threatening the integrity of the binational panel review process will remain

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the Court of International Trade.

Similarly, Annex 1904.15 identifies provisions of domestic law to be amended in conjunction with the implementation of the NAFTA. In the schedule of the United States, with respect to judicial review, paragraphs 8 through 11 refer to sections 516A, 516A(a), and 516(g) of the Tariff Act of 1930. While section 516(g) was the provision that provided for binational panel review of disputes involving Canada under the Canada-U.S. Free Trade Agreement, section 516A in general and 516A(a) in particular refer to judicial review by the Court of International Trade.

[48] Senate Report for the NAFTA Act, S. Rep. No. 103-189, 103d Cong., 1st Sess., (1993) at 44 (emphasis added).

[49] *Id*. at 43. At the time of the Senate Report, it was settled that panels would follow binding court precedent and Congress had no reason to be concerned that a panel would deviate from this settled expectation. For example, in April 1993 (seven months prior to the Senate Report), an ECC addressed the role of panels:

> Panels must follow and apply the law, not create it. FTA Article 1904.2 and 1904.3; Anderson House Testimony at 76. Although Panels substitute for the Court of International Trade in reviewing Commerce's determinations, they are not appellate courts. Anderson House Testimony at 76; Anderson Senate Testimony at 95. . . . Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law, but not create them. Panels may not articulate the prevailing law and then depart from it in a clandestine attempt to change the law.

In the Matter of: Live Swine from Canada, Article 1904.13 Extraordinary Challenge Committee, ECC-93-1904-01USA, April 8, 1993, at 15-16.

untested (unless another panel adopts similar reasoning) because the case was settled and the panel terminated before the panel issued a final decision.[50]

With respect to domestic courts, in the area of precedent, there does not appear to be any significant issue with respect to any interplay with WTO dispute settlement or NAFTA panel disputes. Because WTO disputes are applying a different body of law, there is no basis upon which to suggest that they establish relevant precedent under domestic law. While NAFTA panels do apply domestic law, Congress expressly declared that domestic courts are not bound by a final decision of a NAFTA panel or an ECC, although they may take it into consideration.[51] Otherwise, the relevant precedent for domestic courts is reasonably clear: the precedential decisions of the Court of Appeals for the Federal Circuit are binding on the Court of International Trade unless and until they are overturned *en banc* or by the Supreme Court;[52] and, similarly, Federal Circuit precedent is binding upon the Federal Circuit unless and until it is overruled by the Court sitting *en banc* or by the Supreme Court.[53] Within the Court of International Trade, as a general matter, judges generally have followed or distinguished each other's opinions, overall providing for a reasonably stable and predictable body of jurisprudence.

C. Available Remedies

In discussing the standard of review and the role of precedent, it was worth noting the distinctions between how these issues appeared on their face with respect to each forum, and how they appeared in practice. With respect to the available remedies, for both WTO and NAFTA panels, it is probably most accurate to say that it is not clear what the scope of available remedies is on its face, and there is similarly limited guidance in practice. To that end, it seems that for both WTO and NAFTA disputes, parties are seeking to use U.S. courts in an effort to enhance the relief they might obtain through those alternative fora.

In WTO dispute settlement, in most cases, the remedy available when a Member is found to have acted inconsistently with its WTO obligations is a recommendation that the Member

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[50] Carbon and Certain Alloy Steel Wire Rod from Canada: Notice of Amended Final Results of Antidumping Duty Administrative Review, 73 Fed. Reg. 29481 (May 21, 2008).

[51] 19 U.S.C. § 1516 a(b)(3).

[52] *Strickland v. United States*, 423 F.3d at 1338 n.3 (citing *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d at 1372).

[53] See *Hometown Fin. Inc. v. United States*, 409 F.3d 1360, 1365 (Fed. Cir. 2005) (holding "we are bound to follow our own precedent as set forth by prior panels") (citations omitted); *Kimberly Clark Corp. v. Ft. Howard Paper Co.*, 772 F.2d 860, 863 (Fed. Cir. 1985) (holding that a panel of the appellate court is bound by prior precedential decisions unless and until overruled *en banc*).

bring their measure into compliance with their WTO obligations.[54] Panels have the additional authority to make a suggestion regarding the manner in which the Member might come into compliance,[55] however, they rarely exercise that authority so as not to tread on the Member's right to select its method of implementation.

The commonly held view is that implementation of WTO reports must be prospective, however, there is a great deal of room to disagree as to what it means to implement something prospectively. The U.S. view is that, in the antidumping and countervailing duty area, prospective implementation means implementation with respect to entries of the subject merchandise occurring on or after the date of implementation (i.e., the date upon which USTR instructs Commerce to implement a new determination made pursuant to section 129 of the URAA).[56] Other WTO Members, however, take the view that any actions taken after the end of the implementation period must be WTO-consistent, even if they relate to entries that occurred prior to the end of the implementation period, or prior to the finding of WTO inconsistency, or even prior to the beginning of the dispute. Another level of disagreement regarding prospective implementation is whether it is limited to future acts affecting unliquidated entries or whether it would even include customs protests with respect to liquidated entries.

This is an issue that is particularly relevant to the United States because the United States operates a retrospective duty assessment system, whereby cash deposits are collected at the time of entry and the duties are assessed at a later time. Administrative reviews are conducted regularly and domestic litigation regarding the results of an administrative review can result in an injunction, keeping the entries unliquidated for years after the date of entry. By contrast, most other WTO Members operate prospective duty assessment systems, through which duties are assessed at the time of entry such that no subsequent action is necessary to close-out the entry. As a result, the resolution of the meaning of "prospective implementation" may have a disproportionate effect on the United States if it is extended to include any future action.

This situation has also created a significant "interplay" dynamic between WTO dispute settlement and domestic litigation. As a result of this outstanding issue as to the extent of prospective implementation required by the WTO Agreements, some foreign respondents have pursued domestic litigation apparently for the sole purpose of maintaining an injunction against liquidation. This has been particularly evident in the "zeroing" cases, discussed below, in which the issue is long and well settled by the Federal Circuit and no new arguments are being raised, yet parties continue to restate the same claims review after review and case after case. As of this

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[54] See DSU, Art.19.1. However, if a Member is found to have provided a prohibited subsidy inconsistent with the provisions of the SCM Agreement, the recommendation required is that the Member withdraw the subsidy without delay. SCM Agreement, Art. 4.7.

[55] *Id*.

[56] 19 U.S.C. § 3538(c)(1).

writing, there are two disputes on-going at the WTO regarding the implementation actions taken by the United States and its view of prospective implementation.

With respect to NAFTA panels, there are similar open issues with respect to the remedies available. Commerce's position has been that the relief available through NAFTA panels is both broader than that available from the WTO and narrower than that available from domestic courts. NAFTA relief is broader than WTO relief because Congress expressly provided for "administrative injunctions" when the results of an administrative review are challenged. It is narrower than that available from domestic courts because NAFTA panels have no equitable powers and, therefore, except where Congress provided for retroactive relief, NAFTA panel relief is prospective.

Binational panel review of antidumping and countervailing duty determinations was introduced with the U.S.-Canada Free Trade Agreement (CFTA).[57] As reflected in the Statement of Administrative Action accompanying the implementing legislation, the following assumptions underlie Congress's implementation of CFTA and NAFTA Chapter 19:

* "the general rule is that relief obtained from a judicial challenge to an AD/CVD determination is prospective in nature,"
* to permit a successful plaintiff to obtain the fruits of its victory, "the statute authorizes the CIT to enjoin the liquidation of entries of merchandise covered by certain types of challenged AD/CVD determinations,"
* "injunctive relief is granted automatically upon request in cases involving challenges to AD/CVD determinations made during the assessment stage of an AD/CVD proceeding," and
* "injunctive relief is rarely, if ever, granted in cases involving challenges to AD/CVD determinations made during the initial investigation stage of an AD/CVD proceeding."[58]

These assumptions were clearly reflected in the implementing legislation itself and continue to be reflected in the statute today. The statute contains both a general rule and a specific provision addressing the issue of challenges to administrative reviews.[59] The general rule provides that entries of merchandise covered by a challenged determination that enter for

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[57] As indicated in the Statement of Administrative Action (SAA) accompanying the NAFTA implementing legislation, "[e]xcept for certain innovations introduced in the NAFTA that are described below, [the CFTA SAA] fully describes the panel system that will be established under the NAFTA." NAFTA SAA, at 194.

[58] Statement of Administrative Action accompanying the CFTA Implementing Act, H.R. Doc. No. 100-216, at 265-66 (1988).

[59] 19 U.S.C. § 1516a(g)(5).

consumption on or before the date of publication of a notice of adverse panel decision are to be "liquidated in accordance with the determination of [Commerce or the ITC]."[60] The equivalent statutory provision for non-NAFTA cases begins with the phrase "[u]nless such liquidation is enjoined by the court...."[61]

Congress addressed the absence of such injunction language in the NAFTA context by providing what one might call an "administrative injunction." Specifically, Congress provided that, upon request of an interested party who was both a party to the underlying proceeding and who is a participant in the binational panel challenge, Commerce "shall order the continued suspension of liquidation of those entries of merchandise covered by the [challenged] determination...."[62] Such administrative injunctions, however, are only available, by the express terms of the statute, in the case of challenges to Commerce or ITC determinations made pursuant to 19 U.S.C. § 1675 or scope determinations described in 19 U.S.C. § 1516a(a)(2)(B)(vi).[63] Thus, while the SAA acknowledged that injunctions are rare, but could exist, in the context of domestic court challenges to final determinations in investigations, Congress did not provide for any equivalent mechanism in the context of a NAFTA challenge to an investigation determination. Moreover, Congress did provide that any action taken by Commerce or Customs under 19 U.S.C. § 1516a(g)(5)(C) (the "administrative injunction" provision) "shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise."[64]

Notably, the CIT has seen things differently. In the *Tembec* case, the CIT reviewed a claim that USTR improperly ordered implementation of the ITC's affirmative injury determination made pursuant to 19 U.S.C. § 3538(a) following an adverse WTO finding.[65] Having found that the USTR's instruction was *ultra vires*, the court held further proceedings to consider the appropriate remedy. Pursuant to those further proceedings, the court found that

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[60] 19 U.S.C. § 1516a(g)(5)(B).

[61] 19 U.S.C. § 1516a(c)(1).

[62] 19 U.S.C. § 1516a(g)(5)(C)(i).

[63] See 19 U.S.C. § 1516a(g)(5)(C)(i). The CFTA SAA explains that this "suspension of liquidation procedure parallels existing judicial practice in that it is limited to situations where the binational panel is reviewing an ITA determination made during the assessment stage of an AD/CVD proceeding." Statement of Administrative Action accompanying the CFTA Implementing Act, H.R. Doc. No. 100-216, at 265-66 (1988).

[64] 19 U.S.C. § 1516a(g)(5)(C)(iv).

[65] *Tembec v. United States*, 461 F.Supp. 2d 1355 (CIT 2006).

"Congress intended that the suspension of liquidation found in § 1516a(g)(5)(C), which substituted for a court-ordered injunction, would serve to prevent premature liquidation of pre-*Timken* notice entries."[66] The Court went on to say that "Congress, having intended parallel remedies, intended that the suspension of liquidation provided for in § 1516a(g)(5)(C) would provide the same result following a NAFTA panel decision, as would an injunction issued by this Court."[67] Thus, the Court held that any unliquidated entries, whether before, on, or after the date of the *Timken* notice must be liquidated in accordance with the final negative injury decision affirmed by the NAFTA panel.

As a result of the Softwood Lumber Agreement 2006, the *Tembec* case became moot before the United States could appeal the decision and, although the court vacated its judgment, the decision was not vacated.[68] These same issues are being litigated in the *Canadian Wheat Board* ("*CWB*") case.[69] While the *CWB* court issued an injunction on the basis of the reasoning developed in *Tembec*, the court has not yet decided the merits. Perhaps, in the course of addressing the merits, the court will answer some of the following questions that arise from the *Tembec* decision:

1. To the extent that the court concludes that §1516a(g)(5)(C) controls and § 1516a(g)(5)(B) is inapplicable, does the court, in fact, retain jurisdiction to hear the case in light of § 1516a(g)(5)(C)(iv) which provides that actions taken by Commerce and Customs under subparagraph (C) are not reviewable by any court of the United States?

2. Assuming jurisdiction, the *Tembec* court's reliance on its view of congressional intent suggests that it found the statute to be ambiguous. To that end, on what basis was Commerce's interpretation of the statute unreasonable? While it is clear that the court preferred a different interpretation of the statute, that is insufficient to overturn Commerce's interpretation if it is reasonable.

3. Finally, at a minimum, the legislative history supports both the general concept that Congress was attempting to create a parallel remedy, and the particular statements that Congress understood that the general rule is that relief is prospective unless retroactive relief is provided for. Why would the general

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[66] *Id*. at 1365.

[67] *Id*. at 1365-66.

[68] *Tembec v. United States*, 475 F.Supp. 2d 1393 (CIT 2007).

[69] *Canadian Wheat Board v. United States*, Consol. Court No. 07-0058, U.S. Court of International Trade.

> legislative intent be preferred over the more specific intent and the statutory language consistent with that more specific intent?

These are questions that arose solely as a result of the fact that the challenge to the injury determination in the softwood lumber investigation was brought before a NAFTA panel rather than the court. There is no question that, had the plaintiffs brought the case before the Court of International Trade, they could have sought an injunction that would have ensured that the fruits of their victory would have extended to all of the plaintiffs' imports covered by the investigation. Unlike a NAFTA panel, the Court of International Trade is an Article III court with the full arsenal of statutory and equitable remedies which provide for the possibility of full retroactive relief, where appropriate.

Naturally, this ability to obtain retroactive relief through the courts has caused parties to seek to have the courts recognize the findings of WTO dispute settlement panels and the Appellate Body in their domestic litigation. This has happened most frequently with respect to the disputes regarding the so-called "zeroing" issue. In short, the Appellate Body, contrary to the findings of the panels and the position of the United States, interprets the Antidumping Agreement as requiring Commerce to provide an offset for non-dumped sales when Commerce aggregates the total amount of dumping by an exporter.

A number of respondent parties have sought relief in U.S. courts using a 200-year-old Supreme Court case *Murray v. the Schooner Charming Betsy*.[70] *Charming Betsy* stands for the proposition that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains".[71] These parties argued that because the statute was ambiguous on the issue of "zeroing", and "zeroing" was inconsistent with the Antidumping Agreement, the courts should find "zeroing" to be an unreasonable interpretation of the statute.

For the *Charming Betsy* doctrine to apply, however, there would have to be, among other things, an absence of clear statutory language addressing the issue. Regardless of one's position with respect to the substantive issue of "zeroing," Congress has spoken rather clearly about the relationship of the WTO Agreements and domestic law. Congress expressly provided that "(n)o person may challenge any action on the ground that it is inconsistent with a WTO Agreement."[72] Instead, any alleged inconsistency with a WTO Agreement is addressed through the WTO dispute settlement process and where Commerce is found to have acted inconsistently with an agreement, the statute contains processes for bringing the Commerce decision into conformity.

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

[71] *Id*. at 118.

[72] 19 U.S.C. § 3512(c)(1)(b).

These processes, contained in sections 123 and 129 of the URAA,[73] involve consultation with and input from congressional, administrative, and private sector stakeholders in the issue.[74] Congress has also specified that a new determination made pursuant to section 129 applies prospectively to the covered product.[75] Thus, when parties seek to have domestic courts apply WTO cases, they are looking for relief beyond that for which Congress has expressly provided.

Furthermore, Congress provided for judicial review of section 129 determinations.[76] In the Statement of Administrative Action for the URAA, Congress addressed the situation in which Commerce may be defending both the original, WTO-inconsistent, determination and the new, implementation determination. In that case, the SAA states that the courts are expected to be sensitive to the fact that under the applicable standard of review, multiple permissible interpretations of the law may be legally permissible and the issuance of a different determination under section 129 does not signify that the initial, WTO-inconsistent determination is unlawful as a matter of domestic law.[77]

In sum, while some courts have indicated that *Charming Betsy* may be best viewed as a doctrine of comity[78] – the judicial branch will avoid statutory interpretations that would require action inconsistent with our international obligations – that is different from invalidating a permissible statutory interpretation because of concern about our international obligations. This later approach would either mire the judiciary in attempts to interpret the scope of U.S. international obligations or it would diminish the role of the judiciary, subsuming their role to that of the WTO Dispute Settlement Body. Either way, the Court of Appeals for the Federal Circuit properly rejected these views of the *Charming Betsy* doctrine in the *Corus* case.[79] Therein, the court held that WTO dispute settlement reports are not binding on the United States or the court and confirmed that Congress had spoken to the issue of WTO reports by establishing

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[73] 19 U.S.C. § 3533(g) and 3538, respectively.

[74] *Id*.

[75] 19 U.S.C. § 3538(c)(1).

[76] 19 U.S.C. § 1516a(a)(2)(B)(vii).

[77] Uruguay Round Agreements Act: Statement of Administrative Action, H.R. Doc. No. 103-316, at 1027 (1994).

[78] See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-815, 817 (1993) (Scalia, J., dissenting) (describing the *Charming Betsy* principle as one of "prescriptive comity," that "Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe).

[79] *Corus Staal BV v. DOC*, 395 F.3d 1343 (Fed. Cir. 2005).

statutory procedures and delegating responsibility for determining whether and to what extent WTO reports would be implemented.[80]

IV. CONCLUSION

As discussed with respect to the remedies available in the three fora, there remains some uncertainty with respect to how much relief a successful complainant will or should receive from bringing a WTO dispute or a challenge before a NAFTA panel. This uncertainty may bring two distinct consequences.

With respect to WTO disputes, it is likely that foreign respondent parties and their governments will continue to pursue a two-track approach to litigation – bringing both WTO disputes and, to the maximum extent possible, domestic litigation regarding the same administrative determinations. So long as injunctions against liquidation remain virtually automatic in cases involving the final results of administrative review, foreign respondent parties seem undeterred in their efforts to have domestic courts recognize the results of WTO disputes. While they may have consistently failed in these efforts, the fact that the claims continue to be entertained provides their governments with a basis for arguing that prospective relief at the WTO should include relief with respect to those past entries. Until there are clear lines regarding the extent of prospective relief, such use of the domestic court system is likely to continue.

With respect to NAFTA panels, even though domestic courts and NAFTA panels are supposed to be applying the same standard of review and precedent, there is some indication that a foreign respondent should receive less comprehensive relief by pursuing a NAFTA panel challenge with respect to an investigation. As a consequence, prudent foreign respondent parties may place greater weight on the use of domestic courts over NAFTA panels. Unlike the WTO situation, the opportunities to pursue both tracks in litigation are much more limited (recall that it was only because of the implementation of a decision responding to a WTO report that the issue of retrospective relief from the NAFTA panel decision came before the Court of International Trade in *Tembec*).

The 18th century philosopher Jeremy Bentham said, “The power of the lawyer is in the uncertainty of the law.” The uncertainty that exists with respect to how litigation in each of these fora impacts the relief available to a successful complainant will present interesting and challenging issues for counsel for the foreseeable future.

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[80] *Id*. at 1348-49.

‡ This is a draft of an article that is forthcoming in 17 Tul. J. Int'l & Comp. L. (2009). Reprinted with the permission of the Tulane Journal of International and Comparative Law.