Conflicts Between U.S. Law and the World Trade Organization's Dispute Settlement Reports: Should the Court of International Trade and the Federal Circuit Seek to Reconcile Their Decisions with the WTO's Reports in the Antidumping and Countervailing Duty Area? *

By

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I. Introduction

In April 1994, the Uruguay Round Agreements, which were designed to establish a more comprehensive regime governing international trade among member states, were adopted by the United States and more than one hundred other nations.[2] As the text of the Agreements indicated, they were "reciprocal and mutually advantageous arrangements {that were} directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations."[3] Among its other important achievements, the Uruguay Round established the World Trade Organization ("WTO"), which was designed to be a "permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise implementation of the trade agreements negotiated in the Uruguay Round."[4]

One important component of the Uruguay Round negotiations was the adoption of two

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[2] *See generally Final Act Embodying the Uruguay Round of Multilateral Trade Negotiations*, April 15, 1994.

[3] *Agreement Establishing the World Trade Organization*, Chapeau, April 15, 1994. Additionally, the Agreements were intended to "develop an integrated, more viable and durable multilateral trading system" designed to "rais{e} standards of living, ensur{e} full employment and a large and steadily growing volume of real income and effective demand, and expand{} the production of and trade in goods and services..." *Id*.

[4] *Statement of Administrative Authority for the Uruguay Round Agreements Act* ("*SAA*"), H. Doc. 103-316, Vol. 1, 103rd Cong., 2nd Sess. (1994) at 659; *see also Agreement Establishing the World Trade Organization*, April 15, 1994.

agreements addressing the issuance of antidumping and countervailing duty orders. Like the Uruguay Round Agreements themselves, these two agreements – the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement") and the Agreement on Subsidies and Countervailing Duty Measures (the "Subsidies Agreement") were intended to establish a more comprehensive and transparent set of rules governing the manner in which WTO members conducted antidumping and countervailing duty investigations.[5] From the United States' point of view, the Antidumping and Subsidies Agreements were beneficial components of the Uruguay Round Agreements because they "preserve{d} the ability of U.S. industries to obtain relief from {unfairly traded} imports into the U.S. market" and "ensure{} U.S. exporters fair treatment in foreign antidumping {and countervailing duty} investigations."[6]

Another important component of the Uruguay Round texts was the establishment of a dispute settlement mechanism under the Agreements.[7] This mechanism was created in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). Among other things, the DSU authorized the establishment of dispute resolution panels to resolve disputes between WTO members arising under the Uruguay Round Agreements.[8] It also created the WTO's Appellate Body, which was given authority to act as an appellate review panel for decisions issued by these panels.[9] According to the legislative history of the U.S. implementing legislation, the DSU process was intended to create a more effective resolution process for disputes between member states.[10] Since the entry into force of the Agreements, the WTO has issued a significant and growing number of dispute resolution reports addressing the meaning, scope and implementation of the Uruguay Round Agreements, including the Antidumping and Subsidies Agreements.[11]

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[5] *See generally Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Antidumping Agreement*"); *Agreement on Subsidies and Countervailing Duty Measures* (the "*Subsidies Agreement*").

[6] *SAA* at 807.

[7] *See generally World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"), Article 1 *et seq*. According to the SAA, the DSU provides the United States with a more "effective process to enforce U.S. rights" than existed under the General Agreement on Tariffs and Trade. SAA at 1008.

[8] *DSU*, Articles 6, 7, 8, & 11.

[9] *DSU*, Article 17.

[10] *SAA* at 1008.

[11] *E.g.*, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, AB-2001-2, WT/DS184/AB/R, July 24, 2001; *European Communities - Anti-*

Over the years, as the number of WTO reports in the antidumping and countervailing duty arena has grown, a number of commentators have addressed advisability of U.S. courts attempting to reconcile their decisions with decisions of WTO panels and the Appellate Body when reviewing the antidumping and countervailing duty determinations of the Commission and Commerce. Generally, commentators have expressed a range of views on this issue. Some commentators have suggested that, to the extent permitted under U.S. law, U.S. courts should reconcile their decisions with WTO decisions in order to ensure consistency of result between the two venues.[12] Other commentators have suggested that WTO reports should be used as guidance to help resolve ambiguous issues under U.S. law.[13] Other commentators have rejected both approaches, arguing that WTO reports should not be given any weight by U.S. courts in the area.[14] This paper argues that there are sound statutory and policy reasons U.S. courts should not give weight to adverse WTO reports when reviewing the antidumping and countervailing determinations of the International Trade Commission and the Department of Commerce.

II. Appellate Review of Commission and Commerce Determinations in the Antidumping and Countervailing Duty Area

The U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission (the "Commission") are the agencies with primary responsibility for implementing the U.S. antidumping and countervailing duty laws.[15] In antidumping and countervailing duty investigations and reviews, Commerce determines whether imports are being "dumped" (that is, sold at unfairly low prices) in the U.S. market, or whether they are being unfairly "subsidized" by

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Dumping Duties on Imports of Cotton-type Bed Linen from India (Recourse to Article 21.5 by India), AB-2003-1, WT/DS141/AB/RW (April 8, 2003); *European Communities - Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, AB-2003-2, WT/DS219/AB/R (July 22, 2003).

[12] *E.g.*, Judge Jane A. Restani and Professor Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?*, 24 Fordham Int'l L. J. 1533 (2000-2001).

[13] *E.g.*, John M. Ryan, *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 Coexist or Collide?*, 17 Tulane Journal of Int'l and Comparative Law 353 (Spring 2009).

[14] *E.g.,* Mary Jane Alves, *Reflections on the Current States of Play: Have U.S. Courts Finally Decided to Stop Using International Agreements and Reports of International Trade Panels in International Trade Cases?*, 17 Tulane J. Int'l & Comp. Law 299 (Spring 2009); Mark Barnett, *The United States Court of International Trade In the Middle – International Tribunals: An Overview*, 19 Tulane J. Int'l and Comp. Law 421 (Spring 2011).

[15] *E.g.*, 19 U.S.C. §1671 *et seq*.; 19 U.S.C. §1673 *et seq*.

the country in question.[16]

The Commission is responsible for determining whether imports of the product under investigation are causing, or are likely to cause, material injury to the U.S. industry producing the like product.[17] In an original antidumping or countervailing duty investigation, the Commission determines whether the domestic industry is being materially injured, or threatened with material injury, by reason of the "dumped" or "subsidized" imports.[18] In "sunset" reviews of existing antidumping or countervailing duty orders, the Commission determines whether revocation of an antidumping or countervailing duty order would be likely to lead to a continuation or recurrence of material injury to the domestic industry.[19]

In a typical year, the Commission and Commerce issue a number of appealable determinations. In the case of the Commission, the agency typically issues between twenty and forty appealable decisions in the antidumping or countervailing duty area.[20] These decisions may be appealed in one of three venues. In the case of the Commission's final determinations in original investigations and sunset reviews and its negative preliminary determinations in original investigations, the Commission's determinations may be appealed to the U.S. Court of International Trade ("CIT"), whose decisions may then be appealed to the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").[21] If the Commission's determination involves imports from Canada or Mexico, the determination may be appealed to a binational dispute resolution panel under the North American Free Trade Agreement ("NAFTA").[22] Finally, review of a

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[16] *E.g.*, 19 U.S.C. §1671(a); 19 U.S.C. §1673. In five year reviews of antidumping or countervailing duty orders, Commerce determines whether dumping or subsidization of the subject imports is likely to continue or recur. 19 U.S.C. §1675(c).

[17] 19 U.S.C. §§1671d(b) & 1673d(b); 19 U.S.C. §§1675(c) & 1675a(a).

[18] 19 U.S.C. §§1671d(b) & 1673d(b). Under the statute, the Commission may also determine whether development of an industry is being materially retarded by reason of the subject imports, although these types of determinations are rare. *Id*.

[19] 19 U.S.C. §§1675(c) & 1675a(a).

[20] These appealable decisions consist either of a single Commission determination, which occurs when the investigation or review involves imports from one country, or multiple Commission determinations, which occurs when the investigations or reviews involve multiple countries or reviews. *See e.g.*, *Shandong TTCA Biochemistry Co., Ltd., v. United States*, 710 F. Supp. 1368, 1374-75 (Ct. Int'l Trade 2010).

[21] 19 U.S.C. §1516a; 28 U.S.C. §1581(c); 28 U.S.C. §2645(c).

[22] 19 U.S.C. §1516a(f) & (g); *North American Free Trade Agreement* ("*NAFTA*"), Article 1904.

Commission determinations may be sought before a dispute resolution panel at the World Trade Organization ("WTO").[23]

The determinations of the Commission and Commerce are therefore subject to appellate review in three different fora, each of which has distinct characteristics. In the case of the Federal courts, for example, the agencies' determinations are reviewed by Article III judges sitting on the Court of International Trade and the Federal Circuit. Federal Circuit and CIT judges are appointed for life and routinely perform, as a critical part of their duties, appellate review of agency actions and determinations. When reviewing the determinations of the Commission and Commerce, they are required to determine whether the determinations comply with U.S. law and must apply the deferential standards of review contained in U.S. law.[24]

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

Finally, in the case of WTO appeals, review of the determinations is conducted by a WTO panel. Like NAFTA panelists, WTO panelists are typically nationals of WTO members who have significant governmental, academic or professional experience in the trade area.[28] Unlike NAFTA panelists and CIT and Federal Circuit judges, however, WTO panelists are not required to determine whether the Commission's injury determinations comply with U.S. law, nor are they required to apply the standards of review set forth in U.S. law. Instead, they must assess whether the Commission's determinations are in conformity with the WTO's rules

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[23] *DSU*, Article 1 *et seq*.; *Antidumping Agreement*, Article 17; *Subsidies Agreement*, Article 30.

[24] *E.g.*, 19 U.S.C. § 1516a(b)(1) (requiring the Court of International Trade and the Federal Circuit to review certain Commission determinations under the "substantial evidence" standard of review, and other Commission determinations under the "arbitrary and capricious" standard of review).

[25] *NAFTA*, Article 1904.

[26] *NAFTA*, Article 1904(2) & 1904(3).

[27] *NAFTA*, Article 19, Annex 1901.2(1) and 1901.2(2).

[28] *DSU*, Article 8.1.

governing the issuance of antidumping and countervailing duty measures using WTO standards of review.[29] Accordingly, when reviewing an injury determination of the Commission, a WTO panel has a different legal focus than Federal Circuit and CIT judges, that is, they must assess whether the Commission's determinations are consistent with the WTO Agreements and must applying WTO principles when doing so. Furthermore, WTO panelists differ from Federal Circuit and CIT judges because they are often not judges with significant experience in the area of appellate review of agency action.

These distinctions are not insignificant ones because they can have a significant bearing on the analysis contained WTO reports in the antidumping and countervailing duty area. For example, because WTO panelists are often not judges that have extensive experience in appellate review and because they are required to refer to apply WTO principles rather than U.S. law when reviewing U.S. antidumping and countervailing duty determinations, they may not share the same legal and policy perspectives on issues arising in the area as U.S. judges. Furthermore, a WTO panelist's approach to legal issues can be influenced by linguistic or structural differences between the WTO Agreements and the U.S. antidumping or countervailing duty statute, or by differences arising from their experiences in civil versus common law legal jurisdictions. These distinctions are issues the U.S. courts should keep in mind when assessing whether it is appropriate to consider WTO reports in their trade remedy decisions because, ultimately, they can lead to significantly different outcomes in the Federal and WTO contexts.[30]

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[29] *DSU*, Article 11.

[30] This problem is most readily seen in the differing approaches of WTO panels and the U.S. courts when reviewing Commerce's practice of "zeroing" our positive dumping margins when calculating dumping margins. In their decisions on the issue, WTO panels and the U.S. courts have reviewed the validity of Commerce's "zeroing" practice under the Antidumping Agreement (in the case of the WTO panels) or the U.S. antidumping statute (in the case of the U.S. courts). The language of the Antidumping Agreement and U.S. law bearing on this issue is, to a great degree, similar and the Agreement and U.S. law are supposed to be consistent with one another. Nonetheless, the WTO and the U.S. courts have come to different conclusions on the practice, with the Appellate Body consistently finding that Commerce's "zeroing" practice is not consistent with the requirements of the Antidumping Agreement and the Federal Circuit consistently holding the practice to be consistent with the U.S. statute. *Compare* Appellate Body Report, *United States - Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) *with Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005). When reviewing these decisions, U.S. commentators have concluded that they result from the distinct legal and policy perspectives influencing the choices made by WTO panelists and U.S. judges. *See, e.g.*, John Greenwald, *A Comparison of WTO and CIT/CAFC Jurisprudence in Review of U.S. Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings*, 2012 Court of International Trade Judicial Conference.

III. Statutory and Other Limitations on the Usefulness of WTO Reports in Antidumping and Countervailing Duty Appeals

As noted, this paper addresses the issue of whether the Federal Circuit and the CIT should reconcile their decisions in the antidumping and countervailing duty area with the decisions of WTO panels and the Appellate Body. Before addressing this issue, however, it is important to note that, in theory, there should be a significant degree of consistency between WTO reports and U.S. court decisions in the antidumping and countervailing area. As previously indicated, the Antidumping Agreement and the Subsidies Agreement were designed to establish the basic parameters that govern the issuance of antidumping or countervailing duty orders by WTO members.[31] For example, Article 1 of the Antidumping Agreement states that an "antidumping measure shall be applied only under the circumstances provided in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."[32] The Subsidies Agreement contains similar language indicating that WTO member's countervailing duty measures should be in conformity with the Agreement.[33]

Accordingly, WTO members must ensure that, when their investigating authorities issue antidumping and countervailing duty measures, the measures must comply with the minimum procedural and substantive requirements set forth in the Antidumping and Subsidies Agreements. To ensure that U.S. antidumping and countervailing duty procedures comply with these minimum requirements, Congress enacted the Uruguay Round Agreements Act ("URAA") in 1994. As the Statement of Administrative Action ("SAA") for the URAA explains,[34] the URAA was "intended to bring U.S. law fully into compliance with U.S. obligations under {the WTO Agreements}," [35] including the provisions of the Antidumping and Subsidies Agreements.[36] Thus, in Congress's view, the URAA ensures that Commission and Commerce will act fully in

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[31] *See generally Antidumping Agreement*, Article 1 *et seq*.; *Subsidies Agreement*, Articles 10 to 23; *see also Statement of Administrative Authority for the Uruguay Round Agreements Act* (hereinafter , the "SAA"), H. Doc. 103-316, Vol. 1, 103rd Cong., 2nd Sess. (1994) at 819-820 & 846-847.

[32] *Antidumping Agreement*, Article 1.

[33] *Subsidies Agreement*, Article 10.

[34] Congress has declared, by statute, that the SAA is the authoritative expression of legislative intent for the statute. 19 U.S.C. §3511(a)(the SAA is the "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and {the URAA} in any judicial proceeding in which a question arises concerning such interpretation or application").

[35] *SAA* at 669.

[36] *SAA* at 819-820.

conformity with the provisions of the Antidumping and Subsidies Agreements when issuing their antidumping and countervailing duty determinations.

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

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

In the URAA, Congress placed significant statutory limitations on a U.S. courts's ability to take WTO reports into account when reviewing agency action. Specifically, in the URAA, Congress has made clear that the U.S. courts should not reject action by the Commission or Commerce in the antidumping or countervailing duty area on the ground that it is inconsistent with the WTO Agreements.[37] Specifically, section 102(a)(1) of the URAA provides that: "{no} provision of any of the Uruguay Rounds Agreements, *nor the application of any such provision to any person or circumstance*, that is inconsistent with any law of the United States, *shall have effect*."[38] Similarly, section 102(c)(1) of the URAA provides that "*{n}o person* other than the United States ... *shall have any cause of action or defense under any of the Uruguay Round Agreements* or by virtue of congressional approval of {the Uruguay Round Agreements}..."[39] Section 102(c)(1) of the URAA further provides that "*[n]o person* other than the United States ... *may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States ... on the ground that such action or inaction is inconsistent with {any Uruguay Round Agreement}*."[40] Finally, section 102(c)(2) of the URAA explains that "{i}t is the intent to the Congress through {section 102(c)(1)} to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements ..."[41]

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[37] 19 U.S.C. §3512(a)(1), (c)(1) & (c)(2).

[38] 19 U.S.C. §3512(a)(1).

[39] 19 U.S.C. §3512(c)(1).

[40] 19 U.S.C. §3512(c)(1).

[41] 19 U.S.C. §3512(c)(1).

Additionally, the Statement of Administrative Action for the URAA, which constitutes an authoritative expression of Congressional intent on the URAA, makes clear that the U.S. courts should not give weight to WTO reports when reviewing agency action on appeal, especially if the reports are inconsistent with the statute, regulation or established agency practice. Among other things, the SAA explains that:

> Section 102(a)(1) {of the URAA} clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if its consistent with federal law, including provisions of federal law enacted or amended by the bill.[42]

Moreover, the SAA explains that the section 102(c)(2) of the URAA:

> precludes any private right of action or remedy -- including an action or remedy sought by a foreign government – against a federal, state, or local government, or against a private party, based on the provisions of the Uruguay Round Agreements. This would include any suit brought against a federal, state, or local agency or against an officer or employee of any such agency. *A private party thus could not sue (defend suit against) the United States, a state, or a private party on grounds of consistency (or inconsistency) with those agreements*. The provision also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Uruguay Round agreements.[43]

As can be seen, in the URAA, Congress expressed its intent on these issues clearly. In an appeal of an agency action, including those involving Commission and Commerce determinations, a U.S. court may not allow a party to challenge agency on the grounds that it violates the provisions of the Uruguay Round Agreements. If the court did so, it be acting in contravention of section 102(c)(2) of the URAA by permitting the party to challenge "action or inaction by ... {the} agency ... on the ground that such action or inaction is inconsistent with" the one of the Uruguay Round agreements. Since the URAA and the SAA establish Congress's intent to preclude such action by the Courts, the Federal Circuit and the Court of International Trade should be highly reluctant to give any weight in their analysis to arguments that the actions or inactions of the Commission or Commerce are improper because they are inconsistent with the Antidumping Agreement or the Subsidies Agreements, as those Agreements have been interpreted by WTO panels or the Appellate Body.

Furthermore, the Federal Circuit and the Court of International Trade have both rejected arguments that it is appropriate for them to reconcile their review of agency action in the

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[42] *SAA* at 670.

[43] *SAA* at 676.

antidumping area with WTO reports rejecting Commerce and Commission practices as inconsistent with the WTO Agreements. In *Corus Staal BV v. Department of Commerce,*[44] for example, the appellant argued that Commerce's practice of "zeroing" out positive dumping margins in its dumping calculations was inconsistent with the U.S. antidumping statute. In making this argument, the appellant relied heavily on the Appellate Body's findings that the practice of "zeroing" these margins was inconsistent with the Antidumping Agreement.[45]

The Federal Circuit rejected appellant's request. Citing the language of section 102(a)(1) providing that "{no} provision of any of the Uruguay Rounds Agreements ... nor the application of any such provision to any person or circumstance that is inconsistent with any law of the United States ... shall have effect,"[46] the Federal Circuit pointed out that "WTO decisions are 'not binding on the United States, much less this court."[47] The Federal Circuit explained that "{n}either the GATT nor any enabling international agreement outlining compliance therewith (e.g., the {Antidumping Agreement}) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[48] Noting that the decision to implement a WTO is statutorily given to the Congress and Executive Branch and that Congress has established a process to determine whether to implement adverse WTO reports that did not involve the courts, the Federal Circuit explained that it would not:

> {A}ttempt 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.[49]

Other panels of the Federal Circuit and the Court of International Trade have followed the same approach in recent decisions,[50] correctly concluding that, as a matter of law, they may not rely on adverse WTO decisions to find action by the agencies to be inconsistent with the U.S.

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[44] 395 F.3d 1343, 1347-49 (Fed. Cir. 2005).

[45] 395 F.3d at 1347-48.

[46] 19 U.S.C. §3512(a)(1).

[47] 395 F.3d at 1348 (*quoting Timken Co. v. United States*, 354 F.3d 1334, 1348 (Fed. Cir. 2004)).

[48] 395 F.3d at 1348.

[49] 395 F.3d at 1348.

[50] *E.g., NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007); *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1278-80 (Ct. Int'l Trade 2009); *Union Steel v. United States*, 645 F. Supp. 2d 1298, 1307-09 (Ct. Int'l Trade 2009).

antidumping law.

Given the statute's clear instructions on this issue, as well as the Federal Circuit's statements on the matter in *Corus Staal*, the issue of whether the Federal Circuit or the Court of International Trade should give weight to WTO reports should be considered resolved. Under the statute, as interpreted by the Federal Circuit, the U.S. courts may not give weight to WTO reports that are inconsistent with existing U.S. law or agency practice. As the Federal Circuit put it in *Corus Staal*,[51] these decisions are best left to the parts of the political branches of government who have given the responsibility for determining whether WTO reports should be given full effect by the Commission and Commerce.

B. Other Considerations

Several other considerations would counsel against the U.S. courts giving significant weight to adverse WTO reports in the antidumping and countervailing duty area. First, as the Federal Circuit has noted,[52] a final WTO report is not even binding on the WTO members involved in the dispute. Under the Uruguay Round Agreements, even when a WTO panel concludes that a WTO member has acted in a manner that is not in conformity with one of the Agreements, the member is *not* required to implement the specific recommendations of the WTO report or change the measure under review by the panel.[53] In this situation, the WTO member may choose not to implement the panel's recommendations and may instead decide to provide another form of compensation to the complaining member state.[54] As the Federal Circuit correctly reasoned, if WTO reports are not themselves binding on WTO members involved in a dispute covered by a particular report, it would be somewhat presumptuous for the U.S. courts to give significant weight to these reports in their own decisions. In effect, by giving significant weight to such a report, the U.S. courts might be seen to be giving implementing effect to a report that the Executive Branch or Congress would prefer not to implement.[55]

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[51] 395 F.3d at 1348.

[52] *Corus Staal*, 395 F.3d at 1348.

[53] *DSU*, Articles 3.7 and 22.

[54] *DSU*, Articles 3.7 and 22. As the Statement of Administrative Action for the URAA explains, neither WTO panels nor the Appellate Body have the "power to change U.S. law or order such a change." SAA at 659. Instead, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Id*.

[55] In fact, the URAA makes clear that not even the Commission and Commerce can choose to implement on their own initiative WTO reports finding an agency determination to be not in conformity with the Antidumping and Subsidies Agreements. 19 U.S.C. §3538(a) & (b). Under the URAA, neither the Commission nor Commerce may implement an adverse WTO report without first undergoing a consultation and advice process involving the agency involved

Second, the SAA makes clear that it is the province of the Congress and the Executive Branch – and not the province of the U.S. courts – to determine whether the United States should give implementing effect to a WTO report. In this regard, the SAA states that, when it enacted the URAA, Congress "intended to bring U.S. law fully into compliance with U.S. obligations under those agreements."[56] Moreover, the SAA explains, it was the "expectation" of Congress and the President that "no changes in existing federal law, rules, regulations, or orders other than those specifically indicated in the {URAA} and {the SAA would} be required to implement the new international obligations that will be assumed by the United States under the Uruguay Round agreements."[57] If such changes were required in the future, the SAA also explains, the "Administration would need to seek new legislation from Congress or, if a change in regulation is required, follow normal agency procedurals for amending regulations."[58] Given this language in the SAA, it seems clear that Congress intended that, if future changes to U.S. law were necessitated by future WTO dispute panel decisions, all such changes would be effectuated by Congress and the Executive Branch and not by the courts.[59]

Third, a number of commentators have reasonably criticized the Appellate Body for not applying the negotiated standard of review under the Antidumping Agreement to WTO members' antidumping determinations, which requires deference to reasoned factual and legal findings by a member's investigating authority.[60] For example, Article 17.6 of the Antidumping Agreement provides that a WTO panel may "interpret the relevant provisions of the {Antidumping} Agreement in accordance with customary rules of international law."[61] It adds that:

> 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 more of those permissible

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in the report, the Congress, and the United States Trade Representative's Office ("USTR"). *Id.* Moreover, the Commission or Commerce may only take action to implement the report if the USTR specifically requests that the agency do so after completion of this consultation and advice process. *Id.*

[56] *SAA* at 669.

[57] SAA at 670.

[58] SAA at 670.

[59] SAA at 669-670.

[60] Antidumping Agreement, Article 17.6(i) & (ii).

[61] Antidumping Agreement, Article 17.6(ii).

interpretations.[62]

As can be seen, this provision of the Agreement requires a WTO panel to accord deference to a members's dumping and injury determinations if they reflect any of several reasonable approaches under the pertinent provisions of the Agreement. Despite this language, a number of commentators have criticized the Appellate Body for not following this principle.[63] As these commentators note, even if an Agreement is silent or unclear on an issue, the Appellate Body has looked to other WTO Agreements or customary international law to find that there is only one reasonable interpretation of the Antidumping Agreement.[64] In the view of these commentators, the Appellate Body has consistently chosen to fill in the gaps in the Agreement with its own preferred approaches, though the negotiating parties made clear that WTO panels should not impose their own views on members when more than one reasonable interpretation of the Agreement exists.[65] Given this approach such an approach by the Appellate Body, the U.S. courts should reluctant to give weight to WTO decisions that may reflect an overly narrow view of permissible action under the Agreement.

Finally, the decisions reached by WTO panels may not always reflect the soundest interpretation of the WTO agreements and may, in fact, conflict with U.S. statutes and/or judicial precedent. A good example of these issues is the Appellate Body's decision in *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India* is an example of these issues.[66] In that proceeding, the European Community ("EC") was initially found to have violated the Antidumping Agreement by "zeroing" positive margins when calculating dumping margins for Indian bedlinens producers. When the EC issued a new dumping determination for India without using its "zeroing" methodology, it found that two of five examined Indian producers were not dumping. As a result, when performing its injury analysis, the EC did not include non-dumped imports made by

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[62] Antidumping Agreement, Article 17.6 (ii).

[63] *E.g.*, Kathleen W. Cannon, *Trade Litigation Before the WTO, NAFTA and U.S. Courts: A Petitioner's Perspective*, 17 Tulane J. Int'l & Comp. Law 389 (Spring 2009); Terence P. Stewart, Amy S. Dwyer & Elizabeth M. Hein, *Trends in the Last Decade of Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*, 24 Ariz. J. Int'l & Com. L. 251 (2007).

[64] *See* Cannon, *Trade Litigation Before the WTO, NAFTA and U.S. Courts*, 17 Tulane J. Int'l & Comp. Law at 395; Stewart, Dwyer & Hein, *Trends in the Last Decade of Trade Remedy Decisions*, 24 Ariz. J. Int'l & Com. L. at 253-54.

[65] *Id*.

[66] *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India ("Bed-Linens")*, WT/DS141/AB/RW (8 April 2003).

the two Indian producers in its analysis. It did, however, include all of the imports made by the three other Indian producers for whom it calculated individual margins, as well as imports from any Indian producers or exporters covered by the EC's "all others" rate, that is, producers for whom the EC did not calculate a company-specific dumping margin. In its re-redetermination, the EC once again found that the subject Indian imports from India caused material injury to the EC's industry.[67]

Upon review, the WTO panel affirmed the EC's approach with respect to including imports from non-examined producers as dumped imports in its injury analysis. The Panel found that, under the specific provisions of the Antidumping Agreement, all imports attributable to producers and exporters for whom an authority has made an affirmative dumping finding, including those producers who are subject to an "all others" dumping rate, could be considered "dumped" for injury purposes.[68] The Panel rejected India's argument that the EC was required to treat unexamined producers' imports as either dumped or not dumped for purposes of the injury analysis based on the proportion of dumped imports found in the group of sampled producers.

The Appellate Body reversed the Panel's conclusion, finding that the EC acted inconsistently with those Articles when it included imports from non-examined producers as dumped imports in its injury determination.[69] In its decision, the Appellate Body focused on the Antidumping Agreement's language providing that an injury determination must be made on the basis of "positive evidence" and involve an "objective examination" of the dumped imports.[70] The Appellate Body acknowledged that the Agreement does not require investigating authorities to examine each producer and exporter for the purposes of determining margins of dumping and that antidumping duties may be imposed on unexamined producers and exporters.[71] Nonetheless, the Appellate Body concluded that, with respect to an authority's determination of what imports are dumped and may be included in the authority's injury analysis, the "positive evidence" and "objective examination" requirements "are not ambiguous" and "'do not admit of more than one permissible interpretation'" under the Antidumping Agreement.[72]

According to the Appellate Body, if an authority determines that some producers were not dumping during the period of investigation, the authority may not automatically include imports from all non-examined producers in the volume of dumped imports in its injury analysis. In the

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[67] *Bed-Linens*, ¶ 103.

[68] *Bed-Linens*, ¶ 105.

[69] *Bed-Linens*, ¶¶ 108-146.

[70] *Bed-Linens*, ¶¶ 110-119.

[71] *Bed-Linens*, ¶¶ 131-139.

[72] *Bed-Linens*, ¶ 118.

view of the Appellate Body, such an approach did not meet the "positive evidence" and "objective examination" requirement of the Agreement because the authority would be assuming that all of the unexamined producers were dumping, even though several examined producers were not found to be dumping. In the Appellate Body's view, before including in its analysis import volumes attributable to producers or exporters that were not examined individually, an authority should have "positive evidence" establishing that the unexamined producers' imports could be considered "dumped" before including them in its injury analysis as "dumped" imports. The Appellate Body added, however, that the Agreement does not require any specific methodology or approach to perform such an analysis.[73]

The *Bed-Linens* decision is problematic in two significant respects. First, Bed-Linens does not reflect a particularly sound interpretation of the Antidumping Agreement. The Antidumping Agreement expressly permits an investigating authority to choose not to calculate dumping margins for all subject producers,[74] and allows the authority to impose antidumping duties on imports from producers for whom a dumping margin was not calculated.[75] Moreover, it does not contain any language explicitly or implicitly indicating that an investigating authority must demonstrate that imports from unexamined producers can be considered "dumped" before including those imports in its injury analysis.[76] In fact, at its core, the only basis for the Appellate Body's finding was the language of the Agreement requiring that an injury determination be based on "positive evidence" and involve an "objective examination" of the data. Thus, the *Bed-Linens* decision appears to support one commentator's view that:

> The Appellate Body has taken the view that, where the agreements are silent on an issue, the dispute settlement body can and should fill in gaps in the agreements based on its own views without deferring to members' interpretations. Under this approach, the Appellate Body is essentially legislating a new body of law to which members never agreed.[77]

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

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[73] *Bed-Linens*, ¶ 131-139 & 146.

[74] *Antidumping Agreement*, Article 6.10.

[75] *Antidumping Agreement*, Article 9.4.

[76] *See generally Antidumping Agreement*, Article 3.

[77] Cannon, *Trade Litigation Before the WTO, NAFTA and the U.S. Courts*, 17 Tulane J. Int'l & Comp. L. at 395.

Moreover, the *Bed-Linens* decision is inconsistent with the language of the U.S. antidumping statute. Under the U.S. antidumping statute, the Commission must consider, as part of its injury analysis, *all* imports that are within the class or kind of merchandise for which Commerce has made an affirmative dumping determination.[78] Because Commerce includes all unexamined producers as subject imports in the scope of its affirmative determinations, imports from these producers must be treated as "dumped" imports within the scope of the investigation, whether or not there is "positive evidence" showing that they were dumped, as the Appellate Body concluded. Indeed, the Commission's consistent practice of including in its injury analysis all imports covered by an affirmative Commerce determination has been affirmed by the Federal Circuit in *Algoma Steel Corporation v. United States*, which found that the Commission's practice was consistent with the plain language of the statute.[79] Given these concerns about the nature and scope of WTO rulings, the Federal Circuit and the Court of International Trade should exercise great restraint they are asked to remand a Commission or Commerce determination on the ground that the determination is inconsistent with the Appellate Body's reading of the Antidumping or Subsidies Agreements.

Another example of these issues is the Appellate Body's decision in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*.[80] In that proceeding, Japan challenged the Commission's application of the provision to Japanese hot-rolled imports in the antidumping investigation covering hot-rolled steel, arguing that the provision itself, as well as the Commission's application of it to Japanese imports, was not in conformity with the Antidumping Agreement.[81] The "captive production" provision of the U.S. antidumping statute requires the Commission to "focus primarily" on the impact of imports on the U.S. industry's merchant market operations in its injury analysis when certain conditions are met.[82] Because the Commission found that these conditions were satisfied in the hot-rolled steel investigation, the Commission performed a detailed examination of the impact of Japanese imports of hot-rolled steel from Japan on the industry, consisting of an examination of the impact of these imports on the industry's operations as a whole (including its captive and merchant market operations) and of their impact on its merchant market operations, considered separately.[83]

The WTO panel empaneled to hear the dispute affirmed the Commission's findings,

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[78] 19 U.S.C. § 1673d(b)(1).

[79] 865 F.2d 240, 241-242 (Fed. Cir. 1989).

[80] *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*Hot-Rolled Steel*"), AB-2001-2, WT/DS184/AB/R (July 24, 2001).

[81] *Hot-Rolled Steel*, ¶¶ 23-24.

[82] 19 U.S.C. §1677(7)(C)(iv).

[83] *Id*.

determining that the "captive production" provision and the Commission's application of it to Japanese hot-rolled imports were in conformity with Agreement.[84] The Appellate Body did not agree. Although the Appellate Body affirmed the panel's finding that the captive production provision did not itself violate the Antidumping Agreement,[85] the Appellate Body reversed the panel's finding that the Commission had applied the provision in a manner that was consistent with the Antidumping Agreement.[86]

Once again relying on the broad language of the Agreement providing that an authority's injury analysis should be based on "positive evidence" and reflect an "objective examination" of the record evidence, the Appellate Body found that the Commission's analysis did not reflect an "objective examination" of the industry's condition because the Commission had not separately examined the industry's captive production operations of the industry, even though the Commission has examined the impact of imports on both the industry's merchant market operations and the industry's operations as a whole, which included its merchant market *and* captive production operations.[87] The Appellate Body concluded that, in light of its separate analysis of the impact of imports on the industry's merchant market operations, the Commission's analysis of the impact of imports on the industry could only be considered "objective" if it conducted a third analysis, covering its captive production operations.[88]

The Appellate Body's analysis is problematic because it is not necessarily required by, nor implicit in, the language of the Antidumping Agreement. In this regard, the Agreement explicitly requires only that an investigating authority conduct its injury analysis by examining the impact of subject imports on the industry as a whole.[89] It does not preclude the more focused analysis of the impact of imports on the industry required by the captive production provision, nor does it contain any language at all addressing an authority's obligations when conducting a segmented market analysis. Instead, the sole textual foundation for the Appellate Body's finding was the very broad "objective examination" and "positive evidence" language of the Agreement. Thus, like the Appellate Body's decision in *Bed-Linens*, *Hot-Rolled Steel* shows that the Appellate Body may, when it so chooses, fill in gaps in the Agreements with its own preferred approaches to dumping and injury issues. Since this indicates, as one commentator states, that the Appellate Body has a tendency to "legislat{e} a new body of law to which members never

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[84] *Hot-Rolled Steel*, ¶ 187.

[85] *Hot-Rolled Steel*, ¶¶ 189-209

[86] *Hot-Rolled Steel*, ¶¶ 210-215.

[87] *Hot-Rolled Steel*, ¶¶ 210-215.

[88] *Hot-Rolled Steel*, ¶¶ 210-215.

[89] *Antidumping Agreement*, Articles 3.1, 3.4 & 4.1.

agreed,"[90] the U.S. courts should treat the Appellate Body's readings of the Antidumping Agreement and the Subsidies Agreement with great caution when performing their own analysis on appeal.

IV. Conclusion

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

[90] Cannon, *Trade Litigation Before the WTO, NAFTA and the U.S. Courts*, 17 Tulane J. Int'l & Comp. L. at 395.

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