

AFTER *CORUS STAAL*—IS THERE ANY ROLE, AND SHOULD THERE BE—FOR WTO JURISPRUDENCE IN THE REVIEW OF U.S. TRADE MEASURES BY U.S. COURTS?

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I. INTRODUCTION

After a series of decisions by the Court of International Trade (“CIT”) and the Court of appeals for the Federal Circuit (“CAFC”) in 2004 suggesting that the *Charming Betsy* doctrine gives the jurisprudence of the World Trade Organization (“WTO”) a meaningful role in U.S. judicial review of agency action under the trade laws of the United States, both Courts reversed direction in 2005 and 2006.¹ Given the most recent pronouncements by the CIT and the CAFC, do WTO dispute settlement decisions have any relevance to U.S. judicial review of agency action under the trade laws of the United States? And if not, is the legal and trade policy rationale behind the decision to marginalize WTO jurisprudence in U.S. judicial review persuasive?

The purpose of this article is not to provide a comprehensive review of decisions by U.S. courts that have addressed the relevance of WTO jurisprudence under U.S. law.² Rather, it is to (1) examine the 2005/2006 retreat from earlier CAFC and CIT decisions indicating that WTO jurisprudence is relevant to a domestic court’s interpretation of U.S. trade law, (2) argue that WTO jurisprudence is almost always legally irrelevant to judicial review of agency decisions, and (3) offer a trade policy rationale for keeping to a minimum the attention paid by U.S. courts to WTO dispute settlement decisions.

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1. “[A]n act of Congress ought never be construed to violate the law of nations if any other construction remains . . .” *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804).

2. Other authors have already handled this issue. *See e.g.* Robin Miller, Annotation, *Effect of World Trade Organization (WTO) Decisions Upon United States*, 17 A.L.R. FED. 2d 1 (2007); Patrick C. Reed, *Relationship of WTO Obligations to U.S. International Trade Law: International Vision Meets Domestic Reality*, 38 GEO. J. INT’L L. 209 (2006).

II. THE RELEVANCE OF WTO JURISPRUDENCE TO U.S. JUDICIAL REVIEW
HAS CHANGED SINCE 2004

There has never been any question that WTO law is subordinate to domestic trade law. By statute, “no provision of any [WTO agreement] . . . that is inconsistent with any law of the United States shall have effect.”³ If U.S. “statutory provisions . . . are inconsistent with” the provisions of a trade agreement, then “it is a matter for Congress.”⁴ Section 129 of the Uruguay Round Agreements Act sets out specific procedures under which the U.S. Trade Representative *may*, but need not, implement WTO panel and Appellate Body decisions.⁵ At the same time, however, there is no statutory or other bar preventing a U.S. court from taking note of WTO jurisprudence. Decisions in 2004 by the CIT and CAFC generally accepted the proposition that WTO dispute settlement decisions can usefully inform the construction of U.S. trade statutes by domestic courts where “Congress has not directly addressed the precise question at issue.”⁶

A. 2004 CIT and CAFC Decisions

In *SNR Roulements v. United States*,⁷ the CIT upheld antidumping policies of the U.S. Department of Commerce (“Commerce”) that the WTO had found inconsistent with the WTO Antidumping Code. In doing so, the CIT recognized the relevance of WTO jurisprudence to U.S. judicial review:

The *Charming Betsy* doctrine may conflict in certain circumstances with the deference that courts owe to interpretations of statutory law by agencies Moreover, the judiciary generally grants the executive branch an even greater level of deference in the area of foreign affairs. However, Courts have held that *Chevron* must be applied in concert with the *Charming Betsy* doctrine when the latter is implicated

WTO decisions are not binding on the Court nor on Commerce . . . WTO decisions may, however, shed light on whether

3. 19 U.S.C. § 3512 (a) (2000).

4. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992).

5. 19 U.S.C. § 3538(b)(4) (2000).

6. *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *See* discussion *infra* Part II.A.

7. *SNR Roulements v. United States*, 341 F. Supp. 2d 1334 (Ct. Int’l Trade 2004).

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an agency's practices and policies are in accordance with U.S. international obligations.⁸

In *Allegheny Ludlum Corp. v. United States*, the CAFC went a step further, holding that a WTO Appellate Body decision was a factor supporting the lower court's ruling that Commerce's subsidy calculation violated the law.⁹ The CAFC decision went out of its way to bring WTO jurisprudence into its analysis:

The trial court correctly grounded its judgment in the statute and this court's precedent Another consideration also supports the trial court's analysis. Section 1677(5)(F) "must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or legislative history." . . . This two-century-old canon of construction originated with *Murray v. Charming Betsy*, where the Supreme Court explained:

. . . [A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains

In this case disparate treatment under the same-person methodology would contravene the international obligations of the United States. As noted earlier, the WTO issued an appellate report stating that the same person methodology violates § 123 of the URAA Accordingly, where neither the statute nor the legislative history supports the same person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel. In so doing, this court recognizes that the *Charming Betsy* doctrine is only a guide; the WTO's appellate report does not bind this court in construing domestic countervailing duty law. Nonetheless, this guideline supports the trial court's judgment.¹⁰

Allegheny Ludlum introduced WTO jurisprudence as a factor for domestic courts to consider when assessing the application of U.S.

8. *Id.* at 1342 (citations, internal quotation marks omitted).

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

10. *Id.* at 1348 (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

trade law in a way that conflicts with a ruling of the WTO Appellate Body. As such, the CAFC's decision suggested a potentially significant role for WTO jurisprudence in domestic judicial review of trade agency action.

Other 2004 CIT decisions that addressed the relevance of WTO dispute settlement decisions to U.S. judicial review, summarized in Robin Miller's article, are *Acciai Speciali Terui S.P.S. v. United States*, and *Usinor, Beautor, Haironville, Sollac Atlantique, Sollace Lorraine v. United States*.¹¹ In response to the argument that there was no need to look to either the WTO agreements or the WTO decisions, the court in *Usinor* disagreed, stating that "[the court's] opinions may be informed by WTO documents."¹² These decisions, however, must be kept in perspective. They cite to WTO jurisprudence as relevant to the court's construction of U.S. trade law, but in all cases, the holding explicitly rests on the courts' analysis of the lawfulness of the relevant agency's action under domestic law.

B. 2005 & 2006 CIT and CAFC Decisions

In 2005 and 2006, the decisions of both the CIT and the CAFC took on a very different tone insofar as the role of WTO jurisprudence in U.S. judicial review is concerned. In *Corus Staal B.V. v. Department of Commerce*, the CAFC rejected Plaintiff-Appellant Corus' claim that, where Commerce has the authority to administer the antidumping statute in a manner consistent with decisions of the Appellate Body of the WTO, it has an obligation to do so.¹³

Briefly, Corus argued that under the *Charming Betsy* doctrine, Commerce's practice of "zeroing" negative antidumping margins, which the Appellate Body has repeatedly found to violate the WTO Antidumping Agreement, amounts to an abuse of discretion.¹⁴ The CAFC accorded

11. *Acciai Speciali Terui S.P.S. v. United States*, 350 F. Supp. 2d 1254, 1264 n.11 (Ct. Int'l Trade 2004) ("Neither the WTO legal texts nor the AB and panel reports have direct applicability under U.S. law. The reasoning in those materials, however, can [be] useful for clarifying the subsidy provisions at issue in this case."); *Usinor, Beautor, Haironville, Sollac Atlantique, Sollace Lorraine v. United States*, 342 F. Supp. 2d 1267, 1279 & n.13 (Ct. Int'l Trade 2004) (finding "persuasive" the reasoning of the WTO Appellate Body in *Corrosion-Resistant Flat Steel Products from Germany*). Miller, *supra* note 2, § 5

12. *Usinor*, 342 F. Supp. 2d at 1279, n.13.

13. *Corus Staal B.V. v. Dep't of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005).

14. See, e.g., WTO Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/21 (Jan. 9, 2007); WTO Appellate Body Report, *United States—Laws Regulation and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (Apr. 18, 2006);

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“no deference” to the WTO Appellate Body rulings cited by *Corus*:

Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative . . . to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation

. . . We therefore accord no deference to the cited WTO cases

“[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government” In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce’s zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted as per Congress’ statutory scheme.¹⁵

The brusqueness of the CAFC’s opinion in *Corus Staal* towards WTO jurisprudence is difficult to reconcile with the court’s language in *Allegheny Ludlum*. In 2006, the CAFC cited to *Corus Staal* in *Cummins Engine v. United States*, a decision that “accorded no deference” to a World Customs Organization (“WCO”) opinion on a customs classification matter:

[w]hile such an opinion is not given deference by United States courts, it can be consulted for its persuasive value, if any. *Cf. Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 . . . (2006) (rejecting the argument that U.S. courts are obligated to comply with interpretations of the Vienna Convention by the International Court of Justice (“ICJ”)); . . . The Supreme Court has rejected any notion of deference or obligation to a foreign tribunal’s decisions Like the ICJ’s interpretation of the treaty terms

WTO Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) [hereinafter *EC-Bed Linens*].

15. *Corus Staal*, 395 F.3d at 1349 (citations omitted).

in *Sanchez-Llamas*, the WCO opinion is not binding and is entitled, at most, to “respectful consideration.” . . . It is not a proxy for independent analysis.¹⁶

Recently, the CIT has also been dismissive of WTO jurisprudence. In *Koyo Seiko, Ltd. v. United States*, the CIT rejected out of hand plaintiff’s request for leave to amend its complaint in order to reflect a subsequent WTO Appellate Body decision.¹⁷

Plaintiffs Nankai’s wish to amend its Complaint and challenge U.S. law based on a WTO ruling is futile given it is not controlling precedent and is immaterial to the court’s examination of the administrative decisions issued by Defendant.¹⁸

While *Corus Staal* and *Koyo Seiko* represent a marked retreat from the language of *Allegheny Ludlum* and *SNR Roulements*, neither goes so far as to reject the idea that WTO jurisprudence can inform U.S. judicial review of trade agency action. To the contrary, the Court in *Koyo Seiko* cited to “a long standing principle” that “WTO adjudicatory decisions may be persuasive” to presumably help U.S. courts in their construction of U.S. trade law.¹⁹

However, except in cases where the CIT or the CAFC are reviewing agency action that purports to implement a WTO ruling, it is not at all clear why the logic of *Corus Staal* and *Koyo Seiko* would ever permit a U.S. court to let WTO jurisprudence influence its review of U.S. agency action under antidumping, countervailing duty, escape clause or other provisions of U.S. trade law. If these decisions stand for the proposition that as long as agency action constitutes a permissible use of delegated authority even if contrary to the *law* of the WTO, how can WTO dispute settlement decisions be a legitimate factor in a U.S. court’s review of agency action?

One possible answer is that the *Charming Betsy* doctrine is a U.S. rule of statutory construction that has a place in determining the scope of agency authority delegated by Congress. However, *Charming Betsy* runs into a problem with the status of WTO dispute settlement decisions under U.S. trade law. WTO panel and Appellate Body decisions are *not* international obligations of the United States in the sense that the

16. *Cummins Inc. v. United States*, 454 F.3d 1361, 1366 (Fed. Cir. 2006).

17. *Koyo Seiko Co v. United States*, 442 F. Supp. 2d 1360, 1363 (Ct. Int’l Trade 2006).

18. *Id.*

19. *Id.* (citing *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276, 1288 (Ct. Int’l Trade 2005)).

United States is under any obligation to follow them.²⁰ The Statement of Administrative Action, submitted to the Congress along with the legislation that implemented the Uruguay Round Trade Agreements which created the WTO and its dispute settlement system, is explicit on this point:

It is important to note that the new WTO dispute settlement system does not give panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences. The defending country may choose to make a change in its law or it may decide instead to offer trade ‘compensation’—such as lower tariffs Alternatively, a country may decide to do nothing. In that case, the country that lodged the complaint may retaliate [Also,] reports issued by panels or the Appellate Body under DSU have no building effect under the law of the United States and do not represent an expression of U.S. or foreign trade policy

Furthermore, neither federal agencies nor state governments are bound by any finding or recommendation included in such reports.²¹

A problem with both the CIT’s and the CAFC’s 2005-2006 retreat from the 2004 decisions is that neither court addressed head on the question posed by the CIT in *SNR Roulements*—“whether a WTO dispute settlement decision interpreting a WTO agreement may constitute an international obligation under any circumstances in applying the *Charming Betsy* doctrine.”²² If WTO dispute settlement decisions do not set out the international obligations which the United States is bound to follow, then there is no basis to invoke *Charming Betsy* as a reason to look at WTO jurisprudence in judicial review of U.S. trade measures.

20. See the Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4300 [hereinafter Statement of Administrative Action].

21. *Id.*

22. *SNR Roulements* 341 F. Supp. 2d at 1344 n.6. In *SNR Roulements*, the Court “decline[d] to reach” the merits of the issue. *Id.*

III. WTO JURISPRUDENCE IS ALMOST ALWAYS IRRELEVANT TO U.S. JUDICIAL REVIEW

A. *WTO Dispute Settlement Decisions Do Not Create International Obligations that the United States is Bound to Follow*

While ignored by the Court in *Corus Staal*, the question of whether WTO jurisprudence can ever constitute an international obligation for purposes of the *Charming Betsy* doctrine of the United States was addressed in 2006, albeit in passing, by a three judge CIT panel in *Tembec v. United States*.²³ In *Tembec*, the CIT pointed out that:

Unlike litigation before the court or a NAFTA panel, WTO Members are not required automatically to comply with the recommendations of a WTO panel or the [Appellate Board]. While compliance is encouraged, the [Dispute Settlement Understanding (“DSU”)] contemplates three different responses to an adverse WTO panel report. A Member may elect to bring its domestic practices in line with the WTO’s recommendations. Alternatively, Members may substitute a compensatory trade agreement that lowers other barriers to trade while leaving an objectionable practice in place. Finally a Member may choose not to comply with the WTO’s recommendation. When there is a dispute over a Member’s compliance with an adverse report, Article 21.5 of the DSU provides for the formation of an arbitration panel to determine whether a Member has taken measures to comply with a final report. If the Article 21.5 panel finds that a Member has not taken measures to comply with an adopted WTO report, the panel may authorize a suspension of trade concessions at a value “equivalent to” the nullification of trade benefits caused by the practice in question.²⁴

The court in *Tembec* recognized that under the WTO, the United States, like all other WTO members, is always free to disregard the ruling of a panel or the Appellate Body.²⁵ The *Tembec* court could have added that the terms under which the United States adopted the package of Uruguay Round agreements was unambiguous on this question. Accordingly, it is wrong to conclude that United States action that is inconsis-

23. *Tembec v. United States*, 441 F. Supp. 2d 1302 (Ct. Int’l Trade 2006).

24. *Id.* at 1328 (internal citations omitted).

25. *Id.*

tent with a WTO dispute settlement ruling “violates the law of nations.”²⁶ Rather, the WTO is an agreement that the United States accepted and has implemented on the understanding that its response to a WTO dispute decision may be “to do nothing” and let “the country that lodged the complaint” to retaliate.²⁷ By failing to address this issue, the CAFC in *Corus Staal* missed an important point. It could have, and should have, gone further than it did laying to rest the notion that WTO dispute settlement decisions represent an international obligation of the United States for purposes of the *Charming Betsy* doctrine.

A related point that also could have, and should have, been made is that WTO dispute settlement decisions are not binding except with respect to resolving the specific dispute between the specific parties to that dispute. There is, in other words, no WTO rule of *stare decisis*.²⁸ In a paper that is critical of the lack of dissent in WTO dispute settlement proceedings, Professor Meredith K. Lewis of Victoria University of Wellington, New Zealand, points out that “as a technical matter *stare decisis* does not apply in the WTO context”²⁹ In the *Japan Alcoholic Beverage Case*, the Appellate Body stated that:

Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute.³⁰

Ms. Lewis also points to the WTO’s training materials, which advise that:

26. *Murray v. Charming Betsy*, 6 U.S. 64, 118 (1804).

27. Statement of Administrative Action, *supra* note 20, at 4300.

28. Meredith K. Lewis, *The Lack of Dissent in WTO Dispute Settlement: Is There a “Unanimity” Problem?*, Paper 1286 bepress Legal Series, Paper 1286 at 34 (2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=6124&context=expresso> (quoting WTO Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 14 (Oct. 4, 1996)).

29. *Id.*

30. WTO Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, *supra* note 28, at 15. It is also true, however, that WTO panels and the Appellate Body routinely refer to their prior opinions to support their decisions. Lewis, *supra* note 28 at 37.

As in other areas of international law, there is no rule of *stare decisis* in WTO dispute settlement according to which previous rulings bind panels and the Appellate Body in subsequent cases.³¹

In *Usinor*, the CIT stated that although WTO and Appellate Body opinions “are not *stare decisis* in U.S. courts,” the courts’ opinions may be informed by WTO documents.³² Would it have reached the same conclusion if it had understood that WTO dispute settlement decisions are not *stare decisis* within the WTO?

Once WTO dispute settlement decisions are recognized for what they are—decisions that do not set precedent and that the United States may choose to, but need not, implement—the obvious question becomes why would a U.S. court ever pay any attention to them? Whether or not to give a WTO decision any effect is, to quote the CAFC in *Corus Staal*, an issue that falls “within the exclusive province of the political branches.”³³ Given their nature, there is no persuasive reason for a U.S. court to even imply that the decisions of WTO panels and the Appellate Body have any relevance to their review of agency decision-making under U.S. trade law.

B. *Additional Differences Between WTO Jurisprudence and U.S. Jurisprudence Argue Against Giving Weight to WTO Dispute Settlement Decisions*

Differences between U.S. jurisprudence and the jurisprudence of the WTO beyond the rule of *stare decisis* argue for caution on the part of U.S. courts when it comes to taking judicial notice of WTO dispute settlement decisions. The approach to legal analysis taken by the WTO departs in fundamental ways from U.S. legal traditions. The single most significant difference is the *deference* paid to decisions by national authorities.

Under *Chevron*, U.S. courts defer to a *permissible* interpretation of delegated authority by an agency whenever the governing statute is

31. Lewis, *supra* note 28, at 36 (quoting World Trade Organization, *Dispute Settlement System Training Module: Chapter 7 Legal Effect of Panel and Appellate Body Reports and DSB Recommendations and Rulings*, Nov. 2003, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm).

32. *Usinor, Beautor, Haironville, Sollac Atlauntique, Sollace Lorraine v. United States*, 342 F. Supp. 2d 1267, 1280 n.13 (Ct. Int’l Trade 2004).

33. *Corus Staal* 395 F.3d at 1349.

“silent or ambiguous with respect to the specific issue” in question.³⁴ WTO panels and the Appellate Body, by contrast, accord no such deference to decisions by national authorities. Their approach has been to systematically dismiss the idea that the language of an agreement is susceptible to different *permissible* interpretations.³⁵ Instead, WTO panels and the Appellate Body always come up with an *ordinary meaning* of an agreement that dictates a particular outcome.³⁶ The WTO decisions on zeroing, which were at issue in *Corus Staal* and *Koyo Seiko*, are cases in point.³⁷

Under Article 2.4.2 of the WTO Antidumping Agreement, dumping margins are to be calculated by a comparison of the weighted average normal value to the weighted average export price of all “comparable” export transactions.³⁸ The United States interpreted this formulation as permitting separate dumping margin calculations for each set of “comparable” transactions within the universe of products subject to the investigation, with sets of non-dumped sales assigned a “zero margin” in the computation of the overall weighted average dumping margin.³⁹

The Appellate Body, however, concluded that the U.S. interpreta-

34. *Chevron U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

35. See Daniel Tarullo, *Hidden Costs of International Dispute Settlement: WTO Review of Antidumping Decisions*, 34 LAW & POLY INT'L BUS. 109, 131-36 (2003) (discussing examples of the Appellate Board's narrow view of interpretations).

36. In *United States—Continuing Dumping and Subsidy Offset Act of 2000*, the panel took the WTO's dispute settlement system's penchant for finding a single correct interpretation of WTO agreement to particularly absurd lengths. WTO Panel Report, *United States—Continuing Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R (Sept. 16, 2002). In that case, the WTO panel that decided that the Byrd Amendment was WTO illegal, and concluded that the “ordinary meaning” of the term “against” was “having an adverse bearing” on. *Id.* at ¶ 7.17. This meaning, which is one of 29 definitions or uses of the word “against” set out in the Oxford English Dictionary, suited the panel's purposes because it allowed the panel to rule that the Byrd Amendment distributions, which were not, strictly speaking, “in opposition to” (another, and more common, meaning of the word “against”) dumping, were nonetheless WTO inconsistent. *Id.* at ¶ 7.46.

37. See cases cited *supra* note 11.

38. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.4.2, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1141 (not reproduced) [hereinafter WTO Antidumping Agreement], available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

39. Zeroing was also the practice in other jurisdictions, including the EC and Canada, at the time the WTO Antidumping Agreement entered into effect. See, e.g., *EC-Bed Linens*, ¶¶ 8-15 WT/DS141/AB/R (Mar. 1, 2001); Greg Kenargelidis, *New Anti-Dumping Rules Applied by Canada — The “Zeroing” Debate*, BLAKES BULLETIN ON INTERNATIONAL TRADE, July 2005, available at http://www.blakes.com/english/view_disc.asp?ID=836.

tion was not *permissible*, it read the key language as requiring a comparison of the weighted average normal value for the entire class of products under investigation to the weighted average export price of all sales of that class of products.⁴⁰ The Appellate Body summarily dismissed the possibility that the language of the Agreement might reasonably be interpreted to allow comparisons of weighted average normal values and export prices within comparable subsets of the product under investigation:

[w]e are mindful that Article 2.4.2. provides for “a comparison of a weighted average normal value with a weighted average price of all comparable export transactions.” In our view, the word “comparable” in Article 2.4.2. does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of a comparison of the weighted average of normal value with the weighted average prices of all comparable export transactions.

The ordinary meaning of the word “comparable” is “able to be compared.” “Comparable export transactions” within the meaning of Article 2.4.2. are, therefore, export transactions that are able to be compared . . . Having defined the product at issue and the “like product” on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not “comparable.” All types or models falling within the scope of a like product must necessarily be ‘comparable,’ and export transactions involving these types or models must therefore be “comparable” export transactions within the meaning of Article 2.4.2.⁴¹

There is, however, no serious support for the proposition that there is a single *ordinary meaning* of the word “comparable” or, that if there were, the correct ordinary meaning would be “capable of comparison” rather than, say, “suitable for comparison,” “equivalent,” or “similar.”⁴²

Acceptance by a U.S. court of the Appellate Body’s reasoning on the

40. *EC-Bed Linens*, ¶ 60 (emphasis added).

41. *Id.* ¶¶ 56-58 (internal citations omitted).

42. All of which are other dictionary definitions of “comparable.” See e.g. WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1995).

zeroing issue would amount to subordination of established U.S. principles of statutory construction and deference to agency discretion to an approach that is very much at odds with those principles.⁴³ If the U.S. courts are inclined to take note of WTO dispute settlement decisions, they should, at the very least, make a point of looking carefully into the nature of the legal reasoning behind the decisions.

There are additional reasons for a measure of skepticism regarding legal reasoning behind WTO dispute settlement decisions. These include (1) the absence of a tradition of dissent, and (2) the influence of WTO bureaucracy on panels and the Appellate Body. Taking the latter point first, the WTO Secretariat and the Appellate Body Secretariat provide, respectively, whatever support panelists and Appellate Body members may need—and given the sheer volume of paper submitted by both the parties to the dispute and interested third parties, it is considerable.⁴⁴

Panelists and Appellate Body members who, in many instances, cannot hope to master the details of the case file themselves cannot turn to their own clerks for support. Instead, they have no choice but to rely on case memoranda and other assistance provided by the WTO bureaucracy. It takes a self-confident and strong-willed panelist or Appellate Body member with enough time to probe the WTO staff on the evidence to take issue with the “expert” substantive guidance given by the Secretariat. And, like any bureaucracy, the WTO staff has its own view of the world. I have elsewhere compared WTO dispute settlement decisions to decision-making by the U.S. Department of Commerce in antidumping investigations. The decisions by both are, overwhelm-

43. The Appellate Body also concluded that zeroing was inconsistent with the WTO Antidumping Agreement because it did not permit a “fair” comparison of export price to normal value. *EC-Bed Linens* at ¶ 55. The problem here is that neither a panel nor the Appellate Body should be in the business of tossing out an otherwise permissible construction of the Antidumping Agreement because of their notions of “fairness.” To the contrary, the presumption should be that as long as a particular construction of the text Agreement is “permissible,” the negotiators must also have considered it to be “fair since they would never have allowed an “unfair” construction of the text to be permissible.”

44. Lewis, *supra* note 28, at 28-29. The volume of paper in a WTO panel/Appellate Body proceeding, which includes evidence provided under Annex V as well as multiple written statements by the parties with exhibits and written answers to panel questions with exhibits from the parties, typically runs into the thousands of pages. The WTO website “www.wto.org” provides on-line access to all WTO panel and Appellate Body reports but does not provide access to the written statements along with supporting exhibits of the parties or the Annex V documents submitted by the parties. The reports, however, are dense and offer insight into the length and detail of the argument and supporting evidence submitted by the parties.

ingly, in favor of the complaint.⁴⁵ The most obvious explanation is that both institutions have an institutional mission in finding transgressions, *i.e.* finding dumping, in the case of Commerce, and finding violations of the WTO rules in the case of the WTO staff.⁴⁶

The second problem of a dispute settlement process that can be shaped by the WTO bureaucracy has been compounded by the absence of vigorous dissent. From the beginning, the WTO sought to promote unanimous panel and Appellate Body decisions. Thus, for example, Rule 3.2 of the Appellate Body's Working Procedures states that "the Appellate Body and its divisions shall make every effort to take their decisions by consensus."⁴⁷ To date, there has been only one dissent from an Appellate Body decision, timid in tone, and a handful of dissenting panel opinions.⁴⁸ At the same time, there are, by all accounts, real disagreements among panelists and Appellate Body members that are hammered out in private and never mentioned in panel or Appellate body reports.⁴⁹ What value is there, then, in the reasoning of dispute settlement reports that deliberately mask any disagreement among members of the panel or Appellate Body? When a U.S. court says, as the CIT did in *Acciai Speciali*, that the reasoning of Appellate Body and panel reports can be useful for clarifying federal statutory provisions, it should be aware of just what goes into and, as important, what does not go into, those reports.⁵⁰

The reasoning behind WTO dispute settlement decisions on the use of trade remedies by national authorities—precisely the context in which the question of the role of WTO jurisprudence under U.S. law most often arises—has been the subject of particularly pointed criti-

45. John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation*, 6 J. INT'L ECON. L. 113, 121 n.14 (2003). WorldTradeLaw.net has a table that summarizes the results of WTO disputes brought between January 1, 1995 and December 31, 2003. See <http://www.worldtradelaw.net>. There is ambiguity in the data. Should panel and Appellate Body decisions that reject most, but not all, of the complaint be considered "negative" or "affirmative?" Should complaints by different countries against the same measure, *e.g.*, a U.S. safeguard measure on steel imports, be counted as one case or separate cases? However, by my count at least, the WTO Appellate Body (or, in cases not appealed, the panel) found a significant violation of the WTO rules in 58 of 68 cases that were the subject of a panel or Appellate Body decision, or 85 percent of the time.

46. Greenwald, *supra* note 45, at 121 n.14.

47. WTO Working Procedures for Appellate Review, WT/AB/WP/5, ¶ 3(2) (Jan. 4, 2005), available at http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm.

48. *Lewis*, *supra* note 28, at 11.

49. *Id.* at 19-20.

50. *Acciai Speciali Terui S.P.S. v. United States*, 350 F. Supp. 2d 1254, 1264 n.11 (Ct. Int'l Trade 2004).

cism. Skeptics argue that WTO panels and the Appellate Body have not read the language of agreements governing the use of trade measures in an even-handed way, and instead impose on national authorities obligations that are nowhere to be found in the texts of the governing agreements, *i.e.*, that WTO dispute settlement in this area has been more an exercise in legislation than adjudication.⁵¹ Given the U.S. tradition of deference to agency expertise, U.S. courts should be particularly cautious about factoring WTO decisions on trade remedies into their review of agency action.

IV. THERE IS NO PERSUASIVE TRADE POLICY REASON FOR U.S. COURTS TO TAKE ACCOUNT OF WTO JURISPRUDENCE

The transition from the General Agreement on Tariffs and Trade (“GATT”) to the WTO marked a very significant shift from an international trading system based on diplomacy to a system that is far more juridical in nature. The shift has generally been applauded, especially by the trade law community.⁵² However, the rules-based approach to international trade has created policy problems that have been greatly underestimated.

The core problem is that the emphasis on dispute settlement makes changes to the existing set of WTO agreements more difficult to negotiate for at least two reasons. First, because panels and the WTO Appellate Body have been quick to construe ambiguous agreement provisions as imposing obligations on WTO members that the members did not believe they had agreed to, negotiators can no longer rely on deliberate ambiguity to bridge otherwise unbridgeable negotiating differences.⁵³ This greatly complicates the task of negotiating new

51. See *e.g.*, Tarullo, *supra* note 35; Greenwald, *supra* note 45, at n.16.

52. See, *e.g.*, David Palmetier, *The WTO Dispute Settlement System in the Next Ten Years* (Apr. 7, 2006) (unpublished manuscript), available at <http://www.sipa.columbia.edu/wto/pdfs/PalmetierWorkingPaper.pdf> (“The dispute settlement system has been, and no doubt will continue to be, the crown jewel of the WTO.”); Robert Lawrence, *The United States and the WTO Dispute Settlement System*, CSR no. 25, March 2007, at 6 (“The WTO provides more benefits to the United States than GATT did But the biggest advantage of the WTO system is that it includes a mechanism to enforce these rules: the dispute settlement system.”); and ANDREAS LOWENFELD, *INTERNATIONAL ECONOMIC LAW 150* (Oxford University Press 2002) (calling the WTO dispute settlement system “the most complete system of international dispute settlement in history.”).

53. For example, concerning the use of zeroing in antidumping investigations, the WTO Appellate Body found Article 2.4.2 to impose the obligation “of investigating authorities to establish the existence of margins of dumping on the basis of a comparison of the weighted average of normal value with the weighted average prices of all comparable export transactions.” *EC-Bed Linens*, ¶¶ 56-58 WT/DS141/AB/R (Mar. 1, 2001).

trade agreements and does so at a real cost to the trading system. The principal benefit of trade agreements is that they are observed routinely and without much thought. Disputes are the exception, not the rule. To the extent the judicial activism of WTO panels or the Appellate Body inhibits the ability of WTO members to expand trade policy discipline through new agreements, it is a case of a trade policy tail wagging the trade policy dog.

Second, an emphasis on dispute settlement creates difficulties where the existing balance of rights and obligations is distributed unevenly among countries⁵⁴ or across subject areas.⁵⁵ A country with relatively high tariff and other barriers to imports that believes it benefits from the existing distribution of WTO rights and obligations may see its interests better served by the status quo—enforcing existing rights—than by new agreements that significantly increase the level of its obligations.⁵⁶ It is one thing to champion a rule of law where the legal regime is well-developed, where its benefits are evenly distributed among those subject to it, and/or where changes to the regime through legislation are part of the routine political process. A hard rule of international law, where there is an imbalance in the distribution of rights and obligations among countries and each country must agree to any change to the status quo, is a very different proposition.

If present trade flows were more balanced, this might not matter much. But the structural U.S. trade deficit, which is now closing in on a

54. For example, Brazil, India and China, all rapidly growing economies, maintain relatively high average tariffs (*e.g.*, China's average tariff level is 9.8 percent, and Brazil's and India's average tariff level for industrial products is 11 and 19.5 percent, respectively). *See Doha or Die*, WALL ST. J., Oct. 5, 2007, at A18. Moreover, on key products such as automobiles, the tariffs are much higher; Brazil's, India's and China's tariffs on automobile imports are, respectively, 35 percent, 60 percent and 25 percent. The U.S. tariff on autos is, by contrast, 2.5 percent. *See Conclude an Economic Partnership Agreement between Japan and India at an Early Date*, NIPPON KEIDENREN, July 18, 2006, available at <http://www.keidanren.or.jp/english/policy/2006/053.html>; Mylena Fiori, *WTO: Brazil Offers to Lower Tariffs in Exchange for Farm Goods Access*, BRAZZIL MAGAZINE, Dec. 13, 2005, available at <http://www.brazzilmag.com/content/view/4792/54/>; *China to Cut Tariffs on Cars, Auto Parts*, Xinhua News Agency, June 15, 2006, available at http://www.chinadaily.com.cn/china/2006-06/15/content_617952.htm.

55. For example, the WTO rules that govern trade-in-goods are much more detailed than the rules that govern trade-in-services. *Compare* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1168 (1994), *with* Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1154 (1994).

56. Prime examples are Brazil, China, and India. *See* David Lague, *U.S. Official Urges China to Work to Revive Trade Talks*, N.Y. TIMES, Aug. 30, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CEFD9113EF933A0575BC0A9609C8B63&sec=&spoon=&pagewanted=2>.

trillion dollars per year, may not be sustainable very much longer.⁵⁷ If, as the recent evidence suggests, the only give in the system is a sharp devaluation of the U.S. dollar in relationship to the Euro, the Canadian dollar or the Australian dollar, but *not* in relation to the currencies of countries that run large and persistent structural trade surpluses like China, Korea and Japan, the likely result is simply to shift part of the trade imbalance problem from the United States to Europe or Canada or Australia.⁵⁸

Ideally, a trade negotiation like the Doha Round would address this very basic problem, but recent events suggest that it will not do so—countries that see an advantage in the status quo have no real incentive to offer, and have resisted offering, significant concessions.⁵⁹ If the Doha Round succeeds, the likely mix of incentives and disincentives to trade that dictate present trade flows will remain essentially unchanged.⁶⁰ Ultimately, the United States may have no option but to

57. According to the National Trade Data published by the U.S. Department of Commerce's Office of Trade and Industry Information at Trade Stats Express, the U.S. merchandise trade deficit was \$818 billion in 2006 compared to \$436 billion in 2000. TradeStatsExpress Homepage, <http://tse.export.gov/> (follow "National Trade Data" hyperlink; then follow "Global Patterns of U.S. Merchandise Trade" hyperlink; then set the options to reflect a "balance" for years 2000 to 2006; then click the "Go" button; then click the "View Data – Text Only" hyperlink) (last visited Dec. 6, 2007).

58. As the size of the U.S. trade deficit has grown since January 1, 2000, historic exchange rate data indicate that the Euro, the Australian dollar and the Canadian dollar have appreciated against the U.S. dollar by, respectively, 40.5 percent, 37 percent and 48.5 percent. <http://www.GoCurrency.com> (follow GoCurrency Historic Rate Lookup Web Tool Link) (last visited Dec. 7, 2007). By contrast, over the same period, China's Yuan has risen against the dollar by only 10.4 percent, the Korean won has appreciated by 23.8 percent relative to the dollar, and the Japanese yen has actually *depreciated* against the dollar by about 10 percent. *Id.*

59. See *e.g.*, *Doha or Die*, WALL ST. J., Oct. 5, 2007, at A18 ("Under the current negotiating text Brazil is only being asked to cut its average industrial tariffs to 9.3 percent from 11 percent. Not all of its tariffs would dip into single digits, however. Only a little more than half of its industrial tariffs would be reduced from current applied levels. And Brasilia has already carried out special protection for certain key industries; tariffs on automobiles, for instance, would fall to 24 percent from 30 percent Under the current Doha text, India's industrial tariffs would fall to just 16.8 percent from 19.5 percent. Contrast this with the U.S. market, where the average industrial tariffs are 3.9 percent, and would fall to 2 percent under the current Doha draft.")

60. The wisdom among economists is that the U.S. trade deficit, and the surpluses of structural trade surplus economies, are a function of our savings deficit and their savings surpluses. As a matter of national accounting, it is true that national consumption in excess of national production is national disavings and national production in excess of national consumption counts as national savings. But this is another way of saying that a country's trade balance is a factor in its rate of savings. Nor does it follow that the answer to the trade imbalance is less consumption and more savings by American consumers. For the United States trade deficit, what matters is the level of U.S. exports and the distribution of consumer spending between imports

take exception to the existing WTO rules in order to acquire the negotiating leverage needed to “persuade” others to reduce their trade barriers. In this context, the prospect of U.S. courts taking note of WTO dispute settlement rulings in their review of U.S. trade measures (on, for example, the applicability of countervailing duty measures to imports from China) would be most unwelcome for trade policy reasons.⁶¹

IV. CONCLUSION

Generally U.S. courts should be cautious about everything that lends credence to the idea that the WTO system constitutes a rule of international trade law that is relevant to the review of agency action by domestic courts. The GATT, from which the WTO has sprung, was conceived as a contract among the various Contracting Parties under which they would agree to progressively and reciprocally lower trade barriers for the benefit of all. The glue that held the system together was the reciprocity of the benefits—under the GATT system, if any Contracting Party concluded that the balance of benefits no longer served its interests, it could take action to redress the balance.

While the transition from the GATT to the WTO has emphasized formal dispute settlement, each WTO member retains a fundamental right to implement the WTO rules and dispute settlement rulings only to the extent that it believes doing so is in its interests. Whether the United States chooses to exercise that right is a political decision which the courts must leave to the elected branches of the government.

and domestic production. If the U.S. produced more, whether for export or for import substitution, without an offsetting rise in consumption, the U.S. savings rate would improve. In concrete terms, if an increase in Ford’s U.S. production were to replace automobiles imported from, say, Japan, and nothing else changed, the U.S. savings rate would improve.

61. The U.S. Department of Commerce has just reversed long-standing policy by ruling that imports from China and other non-market economy countries are subject to U.S. countervailing duty law. *See* Press Release, U.S. Dep’t of Commerce, Int’l Trade Admin., Commerce Announces Final Decisions on Unfair Dumping and Subsidization of Glossy Paper (Oct. 18, 2007) (on file with author). The Government of China unsuccessfully challenged the legality of applying U.S. countervailing duty law to imports from China in the Court of International Trade. *See* Gov’t. of the People’s Republic of China v. United States, 483 F.Supp. 2d 1274 (Ct. Int’l Trade 2007). It would not be at all surprising if China were to challenge the change in U.S. countervailing duty policy before the WTO.