Trade Remedy Litigation--Choice of Forum and Choice of Law

Lawrence R. Walders

Neil C. Pratt

Follow this and additional works at: http://scholarship.law.stjohns.edu/jcred

Recommended Citation
Available at: http://scholarship.law.stjohns.edu/jcred/vol18/iss1/3
TRADE REMEDY LITIGATION –
CHOICE OF FORUM AND CHOICE OF LAW

LAWRENCE R. WALDERS AND NEIL C. PRATT*

The topic for this year’s Judicial Conference is “Globalization.” A key element of globalization is the increasing influence of international organizations on U.S. foreign trade law. This influence is particularly evident in judicial review of administrative determinations under the antidumping and countervailing duty (“AD/CVD”) laws.1 Respondents in AD/CVD cases now have available a variety of fora in which they may attack or defend decisions of the Department of Commerce (“Commerce”) and the International Trade Commission (“ITC”). They may select the traditional route under U.S. law by filing or intervening in lawsuits before the Court of International Trade (“CIT”). Alternatively, if the case involves imports from Canada or Mexico, the respondent may file a lawsuit before a panel under Chapter 19 of the North American Free Trade Agreement (“NAFTA”).2 Finally, a respondent may also persuade the government of the exporting country to challenge the decision before a World Trade Organization (“WTO”) dispute settlement panel. Each procedure offers advantages and drawbacks, which will be discussed in this paper.

A related issue is the interaction of the laws of the three jurisdictions. While the choice of forum determines the choice of law, to what extent can or should the decisions of a WTO or NAFTA panel influence the decisions of the CIT? The issue has

* Presented at the 12th Judicial Conference of the U.S. Court of International Trade on November 13, 2002. Mr. Walders is Senior Counsel with the Washington, D.C. office of Sidley Austin Brown & Wood, LLP. Mr. Pratt is an Associate with the Washington, D.C. office of Sidley Austin Brown & Wood, LLP.


arisen in only a few cases so far, but it is likely to arise more frequently in the future as the United States faces increasing challenges to its AD/CVD decisions.

These issues were the topic of an interesting panel discussion at the Eleventh Judicial Conference of the Court of International Trade held on December 7, 1999. The panelists presented a fascinating hypothetical case involving a challenge to an antidumping determination on imports of "soccer bounce balls" from Mexico. The issue was whether the imported bounce balls were the same product as standard soccer balls that are produced in the U.S., and whether the U.S. producers of standard soccer balls had standing to file an antidumping petition against imports of the bounce balls. The litigation bounced from forum to forum as the parties contested and defended the antidumping determination in the CIT, NAFTA, and the WTO, with each producing conflicting outcomes.3

The questions raised by the panelists have not been resolved in the three years that have elapsed since the Eleventh Judicial Conference. Meanwhile the issues of choice of forum and choice of law have taken on greater significance with the growing globalization of international trade litigation.

I. CHOICE OF FORUM

A. CIT or NAFTA?

Parties that want to contest agency decisions in AD/CVD cases involving imports from Canada or Mexico have the choice of filing suit in the CIT or bringing their case before a bi-national panel established under Chapter 19 of the NAFTA.4 As discussed further below, foreign producers may also request their government to initiate a WTO panel review. While the WTO process can proceed independently of the CIT or NAFTA litigation, the same is not true with respect to litigation before


the CIT or a NAFTA panel. Once a party requests a NAFTA panel review, the CIT is divested of its jurisdiction, and it must dismiss any litigation that has been initiated regarding the same administrative determination that is the subject of the NAFTA panel review. The following factors should be considered in choosing between the CIT and a NAFTA panel.

1. The CIT:

Filing a summons and complaint pursuant to 19 U.S.C. § 1516a commences an action in the CIT. The Court can issue an injunction preventing liquidation of the entries pending a final judgment in the case. The Court determines whether the challenged administrative determination is supported by substantial evidence or is otherwise in accordance with the law. In so doing, it applies the *Chevron* two step standard of judicial review, whereby an agency's determination receives considerable deference:

First, always, is the question whether Congress has spoken directly to the precise question at issue. If a court, employing traditional rules of statutory construction ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. [Second, if] the court determines that Congress has not directly addressed the precise question at issue ... if the statute is silent or ambiguous with respect to the specific question at issue [then the issue before the court is] whether the agency's answer is based on a permissible construction of the statute, [that is whether the agency's interpretation is reasonable or rational and consistent with the statute].

If the Court rules in favor of the plaintiff, it will remand the case to the agency for reconsideration in accordance with the

---


6 See Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983) (discussing four factors to be considered in granting preliminary injunctive relief under equity).


8 Id. at 842-43 (citations omitted).
Court's decision. The agency issues a draft redetermination and provides an opportunity for comment by the parties. It then issues a final redetermination, which is subject to additional comment by the parties in briefing to the Court. The Court ultimately issues a final judgment and order, which can be appealed to the Court of Appeals for the Federal Circuit ("CAFC"). The CAFC will sustain, reverse, or remand the decision to the CIT, which may in turn remand the case to the agency for further consideration in light of the CAFC decision. After a final judgment is issued in the case, the suspended entries are liquidated in accordance with the final judgment.

The benefit of this procedure is that it will ultimately result in a judgment that will provide direct relief for the prevailing party. The final judgment can result in revocation of an antidumping or countervailing duty order or at least a reduction in the dumping or subsidy margin that will entitle a winning respondent to a refund of cash deposits plus interest running from the date of entry to the date of liquidation. A winning petitioner can get reinstatement of a previously revoked order, an increase in the AD/CVD margin, and assessment of AD/CVD duties. The assessment can also result in cash payments to the petitioner under the Byrd Amendment.9

The main detriment is time. While the parties to CIT litigation are subject to various deadlines imposed by the statute, the orders of the trial judge, and the CIT rules, the CIT itself, as an Article III court, is not subject to any deadlines. Once a case is submitted for judgment, after all of the briefs have been filed, oral argument has been held, and the record is closed, there is no deadline on the Court's decision. The time required depends on the complexity of the case and the workload and predilection of the individual judge. Some decisions are issued quickly while

---

others may take years. Even after the initial decision is issued, remands require further delays at the administrative and judicial levels. Appeals to the CAFC entail additional years of delay.

2. NAFTA Panels:

The NAFTA panel route appears to avoid the potential delay of CIT litigation, given the strict deadlines that NAFTA proceedings are subject to under Chapter 19.\textsuperscript{10} The entire process from filing a request for panel review to the issuance of the panel decision must be completed within 315 days. This deadline, however, is honored more in the breach than in the observance. In fact, many panel decisions are issued well beyond the 315-day deadline, and the delays have been increasing in recent years.

The primary problem is selection of the panels. While NAFTA itself expresses a preference for using active and retired judges,\textsuperscript{11} most NAFTA panels consist of private lawyers who practice international trade law. Service on NAFTA panels by private lawyers can present conflicts problems. Even if the prospective panelists and other members of their law firms have no relationship with the parties to the case, participation on NAFTA panels can present "issue conflicts." While NAFTA panel decisions have no formal precedential value, a private lawyer may feel constrained from taking a position as a panelist that could be cited by an opponent in a later case. Apart from the possibility of issue conflicts, members of law firms are also aware that their participation as panelists could prevent their firm from representing parties to the panel proceeding in other matters. These concerns have made it difficult to recruit panelists and delayed the establishment of such panels.

Unlike the CIT (or for that matter WTO panels), the decisions of NAFTA panels ordinarily are not appealable. Chapter 19 allows for appeals from panel rulings ("Extraordinary Challenges") only in the following narrowly limited circumstances:


(1) a panel member was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct;

(2) the panel seriously departed from a fundamental rule of procedure; or

(3) the panel manifestly exceeded its powers, authority, or jurisdiction; and

(4) any of these actions has materially affected the panel's decision and threatens the integrity of the panel process.12

So far there has been only one extraordinary challenge in the history of the NAFTA.13

Another issue to consider in selecting a forum is that NAFTA panels, unlike the CIT, cannot vacate determinations of Commerce or the ITC, but they do have the power to remand decisions to the agencies for further action consistent with the panel decisions. Some cases have resulted in multiple remands. As a practical matter remands will eventually result in a decision that complies with the panel's decision. Thus, a NAFTA panel's determination has the same force of law in the United States as a decision by the CIT. Accordingly, a successful plaintiff before a NAFTA panel can obtain direct benefits in the form of revocation, refunds of cash deposits or reductions of estimated AD/CVD duties on later entries.

However, a major difference between the CIT and a NAFTA panel decision is that the effect of the panel decision is limited to the specific administrative determination that is before the panel. In short, decisions of NAFTA panels have no stare decisis effect. They are not binding on the DOC or ITC in later proceedings, and are not cited as precedent by the CIT. This lack of precedential effect can have adverse practical consequences for

12 See Konstantin J. Joergens, True Appellate Procedure or Only A Two-Stage Process? A Comparative View of the Appellate Body Under the WTO Dispute Settlement Understanding, 30 LAW & POL'Y INT'L BUS. 193, 208 (1999) (citing enumerative list of different allegations a party can bring to attention of committee).

the parties in the case. While the agency must comply with a NAFTA panel remand order in one case, it is not bound to follow the panel decision in any other case, even one that involves the same AD or CVD order.

This fact was forcefully brought home in Corrosion-Resistant Carbon Steel Flat Products from Canada, Decision of the Panel on the Second Redetermination on Remand.\textsuperscript{14} There Commerce complied with the panel's instructions. However, it stated that it disagreed with the panel's interpretation of the law and indicated that it will disregard the panel's decision in future cases. The panel pointed out that if the CIT had interpreted the law in the same manner as the panel, and if the CIT were upheld by the Court of Appeals for the Federal Circuit, Commerce would be bound by the judicial interpretation. But in this case, Commerce made it clear that it would reject the panel's interpretation in future proceedings including administrative reviews in the same case. Thus, the Canadian producer would have to litigate the same issue before other NAFTA panels in each succeeding administrative review or file suit in the CIT with an appeal to the CAFC to obtain a binding decision that Commerce would be forced to follow in the future.\textsuperscript{15}

B. CIT/NAFTA Panel or WTO

There is no either-or choice of forum between the CIT (or NAFTA), and the WTO in AD/CVD cases. The choice of one forum does not preclude the choice of the other. Both avenues can be pursued as long as the case involves issues under both U.S. law and the WTO AD/CVD agreements. A case at the CIT or before a NAFTA panel involving U.S. law can, and often does,


\textsuperscript{15} True to its word, Commerce has disregarded the panel's finding in each subsequent administrative review, thus forcing the respondent to relitigate the same issue before new NAFTA panels with the same result. See Certain Corrosion-Resistant Carbon Steel Flat Products from Canada; Amended Final Results of Antidumping Administrative Review in Accordance with North American Free Trade Agreement Binational Panel Decision, 68 Fed. Reg. 27,529 (May 20, 2003); Certain Corrosion-Resistant Carbon Steel Flat Products from Canada; Notice of Amended Final Results of Administrative Review in Accordance with North American Free Trade Agreement Panel Decision, 66 Fed. Reg. 52,095 (Oct. 12, 2001).
implicate the WTO as well. The procedures and the consequences, however, are quite different.

1. WTO Dispute Resolution

WTO dispute settlement proceeds according to a schedule set forth in the Dispute Settlement Agreement. The procedures begin with a request for consultations, which must be initiated within 30 days of the request. If the consultations fail to settle a dispute within 60 days of such request, the complaining party may request the establishment of a panel. The Dispute Settlement Body ("DSB") establishes a panel during the first meeting of the DSB following the first meeting when the panel request is on the agenda. If the parties cannot agree on the panelists, the WTO Director-General will establish the panel. The panel proceeding itself entails two meetings (hearings) with the parties and one meeting with third parties that have an interest in the dispute. The panel issues its report to the parties within six months of its establishment, and the panel report is circulated to the DSB within the next three months after it is translated into each of the WTO official languages – English, French, and Spanish. The DSB adopts the report within 60 days unless there is an appeal to the Appellate Body. The appellate review process takes 90 days, after which the report of the Appellate Body is adopted by the DSB.

While the deadlines are relatively precise, the actual time required varies depending on disagreements over the composition of the panels and the complexity of the cases. According to the most recent statistics reported by WorldTradeLaw.net, the average time between the establishment of the panels and circulation of the final panel report is 366.77 days.

Article 17.5 of the DSU provides that Appellate Body proceedings should not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal. The Appellate

---


17 See http://www.worldtradelaw.net/dsc/database/paneltiming.asp (for the most up-to-date statistics).
Body will notify the DSB if it cannot meet the 60-day deadline, but it will receive no more than a 30-day extension.\textsuperscript{18} In contrast to the explicit time limits in the panel and Appellate Body procedures, the time frame for implementation of WTO decisions is open-ended and uncertain. Within 30 days of the panel or appellate report's adoption, the losing party must notify the DSB whether it intends to implement the report and when it intends to do so. The losing party normally requests a "reasonable period of time" for implementation, which is set by negotiation or by arbitration. Six months after the establishment of the reasonable period of time, the losing party must submit reports on the progress in implementation. These reports must continue, "until the issue is resolved."\textsuperscript{19} Resolution may take years. In \textit{EC-Bananas}, the EC submitted implementation reports for more than two years after the establishment of the reasonable period of time.\textsuperscript{20}

Unlike decisions of U.S. courts, the WTO has no power to compel compliance with its decisions. WTO members, as sovereign nations, have the right to decide whether and how to comply with WTO decisions. If the losing party fails to comply, it may be required to pay compensation in the form of tariff concessions, or the winning party may be entitled to retaliate against imports from the losing party. However, the question of whether a losing party has failed to comply, and if so whether and to what extent the winning party may be entitled to compensation or retaliation must be decided in a separate proceeding under Article 21.5 of the DSU.\textsuperscript{21} Article 21.5 proceedings are conducted under an accelerated 90-day schedule by the same panel that heard the original case. Article 21.5 Panel decisions can be appealed to the Appellate Body.

\textsuperscript{18} See \textit{id.} (stating that "[i]n no case shall the proceedings exceed 90 days.").
\textsuperscript{21} See Dispute Settlement Understanding, Article 21.5, available at http://www.worldtradelaw.net/uragreements/dsu.pdf (last visited Sept. 12, 2003) (stating that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.").
Ultimately, if the losing party is found to have failed to implement the original decision, the winning party may seek compensation or retaliation under Article 22 of the DSU. In the absence of an agreement between the parties, the DSB will grant authorization to retaliate within 30 days of the expiration of the reasonable period of time. However, if the losing party objects to the level of retaliation, the matter will be referred to an arbitrator who will then determine whether the level of proposed retaliation is equivalent to the level of harm incurred by the winning party. The arbitrator's decision is due within 60 days after the expiration of the reasonable period of time, and is binding on the parties. WTO agreements, including those on dispute settlement, are not self-implementing in the United States. U.S. law will prevail in the event of a conflict with the agreements as interpreted by a panel or AB report. Implementation of WTO decisions is governed by Section 129 of the Uruguay Round Agreements Act ("URAA"). Section 129(a) applies to implementation of panel or Appellate Body reports relating to decisions of the ITC. The U.S. Trade Representative ("USTR") is responsible for implementation, but the USTR cannot issue direct orders to the ITC because the Commission is an independent agency that is not part of the Executive Branch. Instead, Section 129(a) provides that the USTR may request the ITC to issue an advisory opinion as to whether the U.S. antidumping, countervailing duty, or safeguards laws permit the ITC to modify its decision in a particular proceeding in a manner that would render its action "not inconsistent with" the findings of the panel or Appellate Body. The USTR must notify the House Ways and Means and Senate Finance Committees of any such request. The ITC must make its report within 30 days of the USTR request in the case of a panel decision and 21 days after the request in the case of an Appellate Body decision. Since it is an advisory opinion, the ITC report is not subject to judicial review. If a majority of the Commission concludes that U.S. law would permit it to modify its decision in a manner that is "not inconsistent with" the panel or Appellate Body decision, the USTR will consult with the Finance and Ways and Means

22 See H.R. 5110, 104th Cong. § 129 (1994) (outlining actions taken following issuance of a report by WTO).
Committees to decide whether to ask the Commission to make a new determination. The ITC will then have 120 days to issue a new determination. If, as a result, the Commission issues a negative injury determination regarding imports from one or more of the subject countries, the USTR will instruct Commerce to revoke the order with respect to those imports.\textsuperscript{23}

Section 129(b) governs implementation of WTO decisions relating to Commerce Department proceedings. After consulting with the Finance and Ways and Means Committees, the USTR may direct Commerce to make a determination that is "not inconsistent with" the panel or Appellate Body report. Commerce has 120 days to make the determination.

The practical consequences for the parties vary depending on the case. Panel or Appellate Body reports cannot be implemented by administrative action if the result would be contrary to U.S. law. Thus, if the panel or Appellate Body finds that a U.S. law is inconsistent with a WTO agreement, the report can only be implemented by amending the U.S. law.\textsuperscript{24} To date, most of the panel or Appellate Body rulings against the United States have involved administrative determinations in individual cases, or administrative practices or regulations rather than provisions of the AD/CVD laws themselves. Implementation of those reports has been handled administratively by Commerce or the ITC.

If a panel or Appellate Body rules in favor of the complaining party it cannot order specific remedial action such as refunds of AD/CVD duties or revocation of orders. Instead, it can only "recommend that the Member concerned bring the measure into conformity with that agreement."\textsuperscript{25} The most that the panel or Appellate Body can do is to "suggest ways in which the Member

\textsuperscript{23} In safeguards cases, the President is authorized to reduce, modify, or terminate the safeguards action after receiving the ITC determination and consulting with the Senate Finance and House Ways and Means Committees. See generally 217 F. Supp. 2d 1347 (Ct. Int'l Trade 2002) (discussing the President's power in a safeguards case).


concerned could implement the agreement." The manner of implementation is left to the discretion of the offending country. This open-ended approach has led to disputes over implementation, which result in further proceedings under Article 21.5 of the DSU.

Nevertheless, decisions of WTO panels in some cases leave little room for discretion in the mode of implementation. Several cases have resulted in findings that specific U.S. statutory provisions were inconsistent with WTO agreements. In such cases, the only way that the United States can "bring its measure into conformity with the agreement" is to amend or repeal the law.

The first test of this approach in the antidumping context arose in the WTO challenge to the Antidumping Act of 1916. The Appellate Body ruled that it had jurisdiction under GATT Article VI and the AD Agreement to adjudicate claims challenging the 1916 Act "as such," outside the context of a specific application of the law. It found that the 1916 Act was inconsistent with GATT Article VI and Articles 4 and 5 of the AD Agreement because the 1916 Act imposes damages and civil and criminal penalties for dumping, while the GATT and AD Agreement only authorize the assessment of additional duties. During the panel proceedings the EC submitted that the United States had acted in manner inconsistent with its obligations under the WTO, when it failed to repeal the 1916 Act. The panel implicitly acknowledged that Article 19.1 of the DSU limits its authority to recommending that the Member concerned bring its measure into conformity with the WTO agreements. However, the panel went on to add that it had the authority to suggest ways in which the Member concerned could implement the panel's recommendations. It then noted that "one way" for the United States to bring the 1916

---

26 Id.
28 See id. (challenging validity of 1916 Antidumping Act).
29 See id. at 28 (indicating agreement with panel's findings of jurisdiction).
31 See id. at ¶ 6.207, n.446 (noting that pursuant to Article 19.1 of the DSU, the panel is "entitled to suggest ways in which the Member concerned could implement the Panel's recommendations").
Act into conformity with its WTO obligations would be to repeal the Act.\textsuperscript{32} The USTR agreed to implement the decision by asking Congress to repeal the statute, but Congress has not yet complied.

The United States and the complaining parties (Japan and the EU) could not agree on a timetable for implementation, so the case went to arbitration under Article 129, and the arbitrator ruled that the decision must be implemented within 10 months. The United States was required to implement the decision (i.e., to repeal the law) no later than December 31, 2001. A bill to repeal the 1916 Act was introduced last year but it has never moved past committee. The Bush Administration failed to persuade conferees on the Trade Promotion Authority Bill ("TPA") to add language repealing the 1916 Act. Thus the United States is in continued violation of its WTO commitments with respect to the 1916 Act, and Japan and the EU have the right to retaliate or to seek compensation. The impact on trade is limited because no plaintiff has yet prevailed in a 1916 Act case. Barring a repeal of the law (which seems unlikely) Japan and the EU may retaliate by enacting similar legislation directed against the United States.

The 1916 Act will probably remain on the books as a potential source of legal harassment, and the WTO process will have provided no relief to persons adversely affected by the U.S. failure to comply with its WTO obligations.

The recent decision in \textit{United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan},\textsuperscript{33} presents another example of a direct conflict between U.S. law and a WTO agreement. The Appellate Body upheld a panel finding that a U.S. statutory provision requiring the inclusion of margins based on partial "facts available" in calculating the "all others" rate (the rate that applies to companies that were not investigated) is inconsistent with Article 9.1 of the AD Agreement.\textsuperscript{34} This ruling

\textsuperscript{32} See \textit{id.} at ¶ 6.207


\textsuperscript{34} See \textit{id.} at ¶ 4 (noting the Panel's finding that Section 735(c)(5)(A) of the Tariff Act of 1930, as amended, "mandates that USDOC exclude only margins based entirely on facts available in determining an all others rate, is inconsistent with Article 9.4 of the AD Agreement . . . ").
left Commerce in a quandary as to how to determine an "all others" rate when all of the individual margins are calculated on the basis of partial facts available. The Appellate Body did not resolve the quandary, ruling that the issue was not before them. During the House-Senate conference on the TPA Bill, the Bush Administration failed to persuade the conferees to amend the statute. Thus, this issue remains unresolved and private litigants have obtained no benefit from the WTO decision.

While the process eventually produces a final decision that vindicates the rights of the complaining WTO member, there may be little or no practical benefit for the private parties affected. The potential results for private parties range from complete victory (e.g., when the WTO decision is implemented by revoking an antidumping duty order) to complete loss (e.g., when the losing party chooses to grant concessions on other products or to incur retaliation rather than complying with the WTO decision).

As of now, there have been few instances where the United States has actually implemented WTO decisions involving antidumping or countervailing duty proceedings, and the results offer little comfort for respondents. These cases demonstrate that Commerce will interpret panel decisions as narrowly as possible.

The first case involved implementation of a panel report regarding Commerce's refusal to revoke the antidumping duty order on DRAMs from Korea. The panel ruled that by requiring proof that revocation is "not likely" to lead to a resumption of dumping, Commerce failed to comply with Article 11 of the Antidumping Agreement. Commerce implemented the decision by deleting the "not likely" language from the regulation and providing that the Secretary will revoke an antidumping order unless he finds that continued imposition of antidumping duties is necessary to offset dumping. Applying the new standard to the same set of facts, Commerce reached the same conclusion and refused to revoke the order. Korea complained to the DSB that the United States had failed to comply with the panel decision,

36 See id. at ¶ 6.51.
but the case was settled when Commerce revoked the order in a sunset review after petitioner Micron Technology notified Commerce that it was no longer interested in continuation of the order.

A similar result was reached in United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom.\textsuperscript{37} The panel and the Appellate Body ruled that the United States violated the Agreement on Subsidies and Countervailing Duty Measures (SCM Agreement) by applying an irrebuttable presumption that subsidies granted to government-owned companies are passed through to private buyers when the companies are privatized. Commerce avoided the need to implement this ruling when the CVD order was revoked in a sunset review. However, the same issue was raised in other cases, and a WTO panel recently ruled that the U.S. statutory provision on privatization and the determinations in twelve CVD cases are inconsistent with the SCM Agreement.\textsuperscript{38}

The most recent example of Commerce's approach toward implementation of WTO rulings involves the Appellate Body report in United States-Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan.\textsuperscript{39} The Appellate Body ruled that the U.S. "arm's-length" test for determining whether sales to affiliated parties are made in the ordinary course of trade violates Article 2.1 of the Antidumping Agreement.\textsuperscript{40} Under the arm's-length test, Commerce automatically disregards sales to affiliated parties that are, on average, less than 99.5 percent of


\textsuperscript{38} See United States-Countervailing Duty Measures Concerning Certain Products from the European Communities, WT/DS212/R (July 31, 2002) (finding that such provisions are not consistent with the Agreement on Subsidies and Countervailing Duty Measures), available at http://www.wto.int/wto/english/tratop_e/dispu_e/212r_e.doc. (last visited Aug. 11, 2003).


the price charged to unaffiliated customers. However, high priced sales to affiliates are only excluded where the respondent meets the amorphous burden of showing that such sales were priced aberationally or artificially high. The Appellate Body ruled that Commerce violated Article 2.1 of the AD Agreement by automatically rejecting sales to affiliated parties at prices that fall below the 99.5 percent threshold while using higher priced sales to affiliated parties unless respondents can demonstrate that the prices are aberrational. Instead of conducting a broader reexamination of the rationale for the arm's-length test Commerce focused on the Appellate Body's requirement of "even-handedness" and implemented the ruling by modifying its current standard. Under Commerce's revised arm's-length test sales to affiliated parties at prices that are not within a band of 98 percent to 102 percent of the prices charged to unaffiliated customers are deemed to have been made outside the ordinary course of trade.

Even if the United States ultimately implements a WTO decision, any changes in the results of individual cases will have no retrospective effect. Section 129(c)(1) provides that if Commerce or the ITC revise an AD/CVD determination, the revised determinations have prospective effect only. The revised determinations apply only to unliquidated entries of merchandise entered, or withdrawn from warehouse for consumption on or after the date on which the USTR directs implementation. The SAA points out that the relief available under Section 129(c)(1) is distinguishable from relief available in an action brought before the CIT or NAFTA bi-national panel because the CIT or the panel can provide retroactive relief.

41 See id. at ¶ 149-52 (discussing the 99.5 Percent Test).
42 See id. at ¶ 154 (stating "[t]here is a lack of even-handedness in the two tests applied by the United States").
43 See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 69,186 (Nov. 15 2002). The U.S. has not indicated how it will implement other Appellate Body rulings in this case regarding the captive production provision, the use of facts available dumping margins in calculating the all others rate, and the need for separate evaluation of injury caused by factors other than the dumped imports.
II. CHOICE OF LAW AND ITS RAMIFICATIONS FOR CHOICE OF FORUM

A. CIT or NAFTA?

In choosing between the CIT and NAFTA, choice of law is not a factor. NAFTA panels, just like the CIT, are subject to U.S. law, and, as noted above, a panel's determination has the same force of law regarding that specific dispute as if the CIT had issued the opinion. More significantly, from a choice of law perspective, a NAFTA panel owes Commerce and the ITC the same level of deference under *Chevron* as that given by the CIT.

B. CIT/NAFTA or the WTO?

The WTO DSB seeks merely to interpret and apply the AD Agreement. Although the URRA was intended to bring U.S. law into conformity with the AD Agreement, this has not always proved to be the case. Moreover, the WTO Agreements are not self-implementation under U.S. law, and where there is a direct conflict between U.S. law and the WTO Agreements, U.S. law prevails. Even where U.S. law is silent or ambiguous, the CIT or NAFTA panel is still prone to affirm Commerce's or the ITC's determination on the grounds that the determination is reasonable under the second step of *Chevron*. A WTO panel or Appellate Body, however, is not concerned with deference either to Congress or Commerce, but is free to examine whether the country subject to investigation has acted in a manner that is inconsistent with the AD or SCM Agreement. Thus in those situations where there is a direct conflict between U.S. law and the Agreement, the only forum in which a plaintiff may be able to obtain some relief is before the WTO.

But what if the action is based on challenging Commerce's or the ITC's practice in implementing the URRA? In this scenario, one is not concerned with a conflict between U.S. law and the WTO Agreement, but rather with the manner in which Commerce or ITC applies U.S. law, and whether this application is consistent with the Agreement. As noted above, the CIT has tended to uphold Commerce's practice unless shown to be
unreasonable under the second step of *Chevron*.\(^{46}\) Pursuant to this standard, the CIT has, for example, repeatedly upheld Commerce's arm's-length test,\(^{47}\) and yet this same practice was found impermissible under Article 2.1 of the AD Agreement by a WTO panel and Appellate Body in 2001.\(^{48}\) The main reason for this difference in outcome between cases at the CIT and the WTO is the legal regime, and the deference shown thereunder, in the two different fora.

One further issue that plays into the selection of forum is whether the panel or Appellate Body's report will have any precedential value under U.S. law. As yet this question remains largely undecided because the CIT has only considered this issue in a few cases. To the extent, however, that a successful determination in a WTO case may add weight to a plaintiff's claim before the CIT, there may be additional benefits in persuading one's government to initiate an action against the United States before the WTO.

Pursuant to the *Charming Betsy* doctrine, it is well established that U.S. law should be interpreted in a manner that is consistent with U.S. international obligations.\(^{49}\) If U.S. law mandates that an agency act in a manner that is incompatible with U.S. international obligations, the CIT/NAFTA panel reviewing the agency's determination has no option but to apply U.S. law. Where, however, the statute is silent or ambiguous, or the agency determination is based on discretion rather than statutory requirement, the CIT and NAFTA panel should, under

---

\(^{46}\) *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984) (discussing the second step of determination of whether an agency's answer is based on a reasonable construction of a statute).

\(^{47}\) *See* Micron Tech., Inc. v. United States, 19 C.I.T. 829, 846 (1995) ("This court will uphold the test that Commerce selects to measure whether sales to related parties were at arm's length, unless that test is shown to be unreasonable."); NTN Bearing Corp. of America v. United States, 19 C.I.T. 1221, 1241 (1995) (discussing the reasonableness test similar to that in *Micron*); Usinor Sacilor v. United States, 18 C.I.T. 1155, 1158 (1994) (stating court will uphold the arm's length test unless it is unreasonable).

\(^{48}\) *See* United States-Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001) (stating application of 99.5 percent test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'").

\(^{49}\) *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (holding "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").
the second step of *Chevron*, seek to interpret U.S. AD law in a manner that is consistent with U.S. international obligations.50

The CIT has ruled that the AD Agreement is an international obligation, which is, therefore, subject to the *Charming Betsy* doctrine.51 However, a WTO panel or Appellate Body's construction of the AD Agreement has "no binding effect on the Court."52 The Court stated in *Hyundai* that Congress has "provided that the response to an adverse WTO panel report is the province of the executive branch and, more particularly, the office of the U.S. Trade Representative."53 As such, it would be inappropriate for the CIT to become involved in the implementation of a WTO Report that implicates political decisions.54

However, merely because a WTO panel report is not binding on the CIT, does not mean that the panel report has no weight at the CIT. Indeed, the Court in *Hyundai* specifically noted that its determination on this matter should not be read "to imply that a panel report serves no purpose in litigation before the court. To the contrary, a panel's reasoning, if sound, may be used to inform the court's decision."55

In *Hyundai* the CIT considered whether Commerce acted contrary to law in refusing to revoke an antidumping duty order. While the case was pending before the CIT, a WTO panel ruled that Commerce's decision was inconsistent with U.S. obligations under Article 11.2 of the AD Agreement. The Court held that "[b]ecause Congress declined to enact procedures for revocation, under the *Charming Betsy* doctrine, the Court must consider whether Commerce formulated its regulation consistent with

---


52 See *Hyundai*, 23 C.I.T. at 311 (discussing the binding effect of agency statute construction).

53 Id. at 312 (citing URAA § 129).

54 See *Footwear Distributors and Retailers of America v. United States*, 18 C.I.T. 391, 414 (1994) ("political decisions balancing domestic and foreign interests were the prerogative of the executive branch, not the courts.").

55 *Hyundai*, 23 C.I.T. at 312.
Article 11.2 of the Antidumping Agreement.” The Court then concluded that the authority given to Commerce to predict whether revocation is likely to result in renewed dumping is not inconsistent with the AD Agreement. Thus while the Court considered whether Commerce’s determination was inconsistent with U.S. law on the basis that it violated a WTO Agreement, the Court ultimately disagreed with the WTO panel and found that there was no WTO violation. The Court stated that “unless the conflict between an international obligation and Commerce’s interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce’s regulatory authority under the Charming Betsy doctrine.”

This statement demonstrates a very cautious approach toward application of the Charming Betsy doctrine, while still recognizing the need at least to consider whether an AD or CVD decision is consistent with the WTO Agreement, and therefore consistent with U.S. law.

Only a handful of cases have considered the applicability of WTO determinations at the CIT since Hyundai, and none of them has fully clarified the exact level of deference or consideration that will be given to WTO decisions. In Government of Uzbekistan v. United States the Court did not need to resolve the issue of whether or not the Department’s actions violated the AD Agreement because Commerce had not even met the threshold requirement of providing sufficient evidence of a non-de minimis margin. In Timken Company v. United States the Court, in considering two WTO-based claims, merely reiterated the broad standard announced in Hyundai, that WTO panel reports are “non-binding decisions, the reasoning of which may help inform this Court’s decision.” One of the two issues in Timken was the same as that in the Hot Rolled Steel Appellate Body Report, namely whether Commerce’s

56 Id. at 313.
57 Id. at 313-14.
59 Similarly, in China Steel Corp. v. United States, 264 F. Supp. 2d 1339 (Ct. Int’l Trade 2003) the Court distinguished the WTO decision relied upon by the respondent, which, in turn, obviated the need to consider the precedential value of the WTO decision. Id. at 1367-68.
61 Id., at 1239 (citing Hyundai, 23 C.I.T. at 312).
arm's-length test was consistent with Article 2.1 of the AD Agreement.\textsuperscript{62} The *Timken* Court held that while Commerce's application of the arm's-length test could be inconsistent with U.S. international obligations, it had not been shown that the arm's-length test, as applied to the plaintiff raising the issue, had resulted in the inclusion of sales outside the ordinary course of trade in the calculation of that party's margin.\textsuperscript{63}

The other WTO issue in *Timken*, and the issue that has arisen in each of the other cases that have come before the CIT since *Hyundai*,\textsuperscript{64} regards the Department's practice, when calculating weighted-average dumping margins, of setting the "negative margins"\textsuperscript{65} to zero. The EC's exercise of this practice, commonly referred to as "zeroing", was found by the WTO Appellate Body to violate the fair comparison requirement contained in Article 2.4 of the AD Agreement.\textsuperscript{66} Relying on the WTO Appellate Body's finding, plaintiffs in *Timken*, *Corus Staal* and *PAM* have unsuccessfully argued that Commerce's practice of zeroing negative margin transactions, violates U.S. international obligations under the AD Agreement. Although it is telling that the Court has repeatedly rejected the "zeroing" claim, of more interest is the Court's reasoning in each of these cases.

In *Timken*, which was the first case in which this issue arose, the Court, sidestepped the issue by distinguishing the *EC – Bed Linen Appellate Body Report* on the bases that (1) the Court could not determine whether the U.S. practice of zeroing was the same as the EC practice of zeroing; and (2) the *EC – Bed Linen* case involved an appeal from an antidumping investigation, not, as in *Timken*, from an administrative review.\textsuperscript{67}

\textsuperscript{62} See *id.* at 1236-37 (discussing arm's length test).
\textsuperscript{63} See *id.* at *1241-42 (discussing test with respect to agreement).
\textsuperscript{65} "Negative margins" occur in sales that are not dumped and represent the extent to which the U.S. price exceeds normal value.
\textsuperscript{66} See European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS/141/AB/R at ¶ 55, available at http://docsonline.wto.org/DDF/Documents/tWT/DS/141ABRW.doc (adopted Mar. 1, 2003 ) (finding that "a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions ... is not a 'fair comparison' between export price and normal value, as required by Articles 2.4 and 2.4.2" (emphasis in original)) ("EC – Bed Linen Appellate Body Report").
\textsuperscript{67} *Timken*, 240 F. Supp. 2d at 1243.
In *Corus Staal*, however, the Court was unable to rely on the latter reason for denying the claim, because the appeal to the Court arose from an antidumping investigation. Rather than merely claiming that it could not determine whether the U.S. practice was the same as the EC practice, the Court in *Corus Staal*, instead concluded that because “WTO decisions appear to have very limited precedential value and are binding only upon the particular countries involved,” the Court could not “solely rely upon [the WTO Appellate Body’s] non-binding interpretation of an international agreement as grounds to strike a United States agency interpretation of a statute.” Thus, the Court appeared to hold that while the Court would consider an Appellate Body decision, the Appellate Body decision alone could never be the grounds upon which the CIT would overturn an agency decision.

The Court in *PAM* went even further, essentially precluding the operation of the *Charming Betsy* doctrine in all but the most rare of cases. Although the Court acknowledged that the reasoning contained in a WTO decision “may help to inform the Court’s decision,” the Court held that because the AD Agreement does not expressly prohibit zeroing, the Department’s zeroing practice “is not in such direct contradiction with an international obligation of the United States” to merit “the application of the Charming Betsy doctrine . . . .” Given, however, that most international obligations do not list each and every action that is prohibited, the Court’s decision in *PAM* effectively overrules the *Charming Betsy* doctrine except in cases where the agency action violates an explicit prohibition in a WTO agreement. Only future outings to the CIT will tell if the Court intended to sideline the *Charming Betsy* doctrine in this manner. Some comfort, however, can be drawn from these cases. In each case (e.g., *Timken*, *Corus Staal*, and *PAM*) the CIT rejected the Government’s assertion that WTO panel decisions have no bearing on CIT proceedings. The Government argued that the plaintiffs were barred from claiming that Commerce has acted inconsistently with a WTO agreement because 19 U.S.C. §

68 *Corus Staal*, 259 F. Supp. 2d at 1264.
69 Id.
71 Id. at 1373.
3512(c)(1) provides that “no person other than the United States . . . shall have any cause of action or defense under any of the Uruguay Round Agreements.”72 In Uzbekistan the CIT rejected the United States’ reliance on this “erroneous technical bar”, holding that the plaintiffs were “not bringing an action under any WTO agreement, and they are free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.”73 Thus the CIT has expressly held that a plaintiff is free to argue, pursuant to the Charming Betsy doctrine, that U.S. laws should be construed and applied in a manner consistent with U.S. international obligations under the AD Agreement. The question is whether this freedom to raise a claim founded on an adverse WTO panel report will eventually lead to the CIT holding that a decision by Commerce or the ITC is inconsistent with the AD or SCM Agreement, and is therefore contrary to U.S. law under the Charming Betsy doctrine.

CONCLUSION

In summary, the choice of forum will depend on a number of factors.

If time is of the essence to the plaintiff, then in principle, if not always in practice, a NAFTA panel may be the forum of choice. On the other hand, if the case involves issues that have already been addressed by the CIT in a manner that is adverse to the plaintiff’s position, then an appeal to the CIT may be the only way to obtain a favorable result through an appeal to the CAFC. If the plaintiff is concerned not merely for the immediate case, but also for future administrative reviews, then the CIT is the better choice of forum. However, if the plaintiff would prefer to have representatives from its country adjudicating the matter, then the NAFTA panel would be the preferred forum.

Having selected the primary forum for raising the plaintiff’s claim, legal counsel to the plaintiff should seriously consider the potential benefits of requesting the plaintiff’s government to initiate a WTO action. A plaintiff has little to lose and

potentially much to gain in requesting its government to pursue an appeal to the WTO that can proceed in tandem with the plaintiff's own appeal to the CIT/NAFTA panel. Of course, the plaintiff will need to persuade the foreign government that the issue is of sufficient importance to the government to warrant a WTO action.

Second, where a plaintiff's claim is that a U.S. statute is inconsistent with the AD Agreement, the only forum in which a plaintiff may be able to obtain relief is the WTO. Courts subject to U.S. law have to apply U.S. law, regardless of how inconsistent the U.S. statute may be with U.S. international obligations. Conversely, the DSB, which is not constrained by deference to U.S. law, is free to find that the statute in question is contrary to the AD Agreement.

Finally, if the plaintiff's claim involves a challenge to Commerce's or the ITC's application of the URAA, a decision by a WTO panel or Appellate Body Report that is in the plaintiff's favor may add weight to the plaintiff's case before the CIT, on appeal to the CAFC, and in briefs to Commerce or the ITC in future administrative proceedings. The degree to which U.S. courts and agencies will apply or consider WTO decisions has not been resolved. Although the CIT has proven reluctant to take up this gauntlet, it has also been careful to note that it will, at a minimum, consider a relevant WTO panel and/or Appellate Body's report in reaching its own conclusion. Future cases may provide an opportunity for a more extended cruise on the Charming Betsy.