WHAT DO ALL THESE ADVERSE WTO DECISIONS *MEAN*?

by John R. Magnus, Navin Joneja and David Yocis[1]

This paper was prepared for a panel discussion entitled "WTO Trade Remedy Panel Decisions -- What Do They Mean for Us?" There are any number of ways to approach such a topic. There have been a lot of WTO decisions, and they have in most cases flagrantly overstepped both the negotiated rules and the proper function of dispute settlement by inventing new constraints, never accepted by negotiators, on the application of trade remedy measures (see attached table). This problem has attracted the attention of many people whom one might expect to complain about it, and several whose ringing of the alarm bell comes as more of a surprise.[2]

The body of adopted decisions interpreting the WTO's trade remedy rules is now so extensive -- and elaborates to such an extent on the text of the relevant agreements themselves -- that one could easily prepare a lengthy paper simply cataloguing the newly expanded universe of "black-letter" WTO law in the area. But such a catalogue, while probably useful somewhere, would hardly even begin to capture what these decisions *mean* -- still less what they mean for *us* (*i.e.*, for trade lawyers in the United States). Looking just a bit deeper, we might venture that the adverse trade remedy decisions issued so far "mean" that the United States cannot, without triggering *additional* adverse WTO decisions, use trade remedy instruments in anywhere near the range of circumstances that U.S. negotiators and the Congress believed it could when the Uruguay Round agreements were being finalized and ratified. This answer, while accurate, is likewise too superficial. To understand what these decisions *mean*, one must consider how the actual behavior of national authorities, especially the U.S. authorities, has changed or is likely to change as a result. One must also confront at least briefly the more provocative question of the extent to which -- as a matter of domestic law and policy -- the authorities' behavior *should* change as a result of the adverse WTO decisions. Finally, to understand fully what the decisions *mean for us*, one must consider any broader ramifications, including -- if such exist -- political implications.

That is a tall order indeed. We have sought to make a small contribution by focusing on a carefully selected subset of WTO trade remedy rulings -- selected on the basis that they have mandated a single permissible approach in areas where the Commerce Department and USITC as a matter of domestic law have several available options under the broad discretion vested in them by their governing statutes. This is in our view the most interesting category of cases. Studying how the U.S. legal system has digested even a small number of WTO rulings in this category yields useful insight on the broader question of what the WTO trade remedy decisions mean for *us*. In Section I, we discuss the legal and theoretical backdrop -- the U.S. Government's general approach to ensuring compliance with trade agreement obligations, relevant principles of administrative law, and the much-disputed relevance of DSB-adopted rulings in trade

---

[1] Partner and Associates, respectively, at Dewey Ballantine LLP. The views expressed herein are personal.

[2] *See, e.g.*, Claude E. Barfield, *FREE TRADE, SOVEREIGNTY, DEMOCRACY* (2001); Daniel K. Tarullo, "The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions," forthcoming in *Law & Policy in International Business* (Winter 2003).

remedy cases at the agency level. Section II then takes up some specific examples -- observed reactions at the Department of Commerce ("Commerce") and the International Trade Commission ("ITC") to adverse DSB-adopted trade remedy decisions. Section III considers the broader meaning and implications of the adverse decisions.

I. WTO DECISIONS AND AGENCY PROCEEDINGS -- THE THEORY

A. The USG's "Front-Loaded" WTO Compliance Scheme

Trade agreements normally have no direct effect in U.S. law, as they might if they were presented as treaties and ratified by two-thirds of the Senate. Instead, the custom followed for all major trade agreements entered into by the United States (in the last half century at least) is for Congress to enact implementing legislation. These implementing bills typically express Congress's approval of, but do not in any sense "enact," the international agreements. In fact, they typically specify that the agreements themselves have no force of law at all, while expressly barring court actions predicated on non-compliance with the agreement by a government agency.[3]

This approach minimizes (some would say eliminates) the role of courts in policing the U.S. Government's compliance with trade agreements, a situation that many lawyers find unsettling. But rather than adding this responsibility to those already borne by the judiciary, the U.S. Government ensures its own compliance with trade agreements by promptly amending, before new international obligations take effect, any laws which violate, or require agencies to violate, those new obligations. The contents of the implementing legislation for an agreement represent the collective judgment of the Executive Branch and the Congress concerning what statutory provisions and agency practices, if left unchanged, would put the United States in breach of the newly-minted international obligations. In the AD/CVD area, where expert agencies enjoy considerable discretion, the general approach is to preclude expressly in statutes exactly what is expressly precluded by international agreements -- but nothing more.

Of direct relevance here, the Uruguay Round Agreements Act ("URAA") is explicit in denying the WTO agreements direct effect under U.S. law:

> No person other than the United States (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.[4]

The URAA also specifically denies effect, in U.S. legal proceedings, to DSB-adopted decisions:

---

[3] *See, e.g.*, URAA §102(c), codified at 19 U.S.C. §3512(c).

[4] *Id.* at §3512(c)(1).

> No provision of any of the Uruguay Round Agreements, *nor application of any such provision to any person or circumstance*, that is inconsistent with any laws of the United States shall have effect ….[5]

This "front-loaded" procedure in which Congress and the Administration decide in advance what changes to U.S. law and practice are required by a trade agreement provides an important first clue as to why adverse WTO decisions are not automatically followed by the U.S. trade remedy agencies as litigants sometimes suggest.[6] If implementing legislation accomplishes all of the legitimately required changes -- a condition which both political branches of the government routinely certify is met by the implementing bills they craft -- then by definition the options compatible with the amended U.S. statute also meet the constraints of the new agreement. An agency official can, indeed must, assume that any contrary decision (such as an adverse WTO panel report) is wrong, and is based on an expansion rather than mere enforcement of the United States' negotiated commitments. The overall "implementation strategy" of the United States, then, suggests that an agency official called upon to apply and interpret one of the trade remedy laws will likely be engaging in straight statutory construction, uncolored by DSB-adopted decisions and concerns about (in *Charming Betsy*'s phrasing) the "law of nations."

B. U.S. Administrative Law Principles

To further explore what happens (still in principle, not yet in actual cases) at the agency level, a "hypothetical" is useful. Assume that an agency regards an antidumping law provision added by the URAA as permitting three possible approaches -- *x*, *y*, and *z* -- to a particular problem. Option *z* is favored by petitioners, and the agency was following it (perhaps with court approval) before the URAA took effect and understood the pertinent URAA amendment as confirming its discretion to continue doing so. Now assume that a WTO panel -- either in a case brought against the United States, or in a case to which the United States is not a party -- rules, contrary to the judgment of the Administration and Congress at the time of the URAA, that option *z* is actually precluded by some general language in the *Antidumping Agreement*. Can the agency thereafter adjust its prior view of whether option *z* is indeed permissible under U.S. law? That is, can WTO consistency be assured by simply defining certain formerly-accepted interpretations as out of bounds?

The answer is no -- and not just because of the U.S. government's "front-loaded" technique for implementing trade agreements and Congress' unmistakable efforts to prevent WTO dispute settlement decisions from influencing U.S. legal outcomes. The more important reason

---

[5] 19 U.S.C. §3512(a)(1) (emphasis added). *See also* Uruguay Round Statement of Administrative Action ("SAA") at 1032:

> Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.

[6] These litigants often invoke *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

is that under U.S. administrative law principles crystallized in *Chevron*,[7] interpretations not facially precluded by a trade remedy statute are indeed permissible interpretations -- no matter what a panel or the DSB may have concluded about WTO obligations.[8] Simply "moving the goalposts" will not do the job.

But the analysis does not end there. Returning to the hypothetical, suppose the agency properly continues to regard all three options --*x*, *y*, and *z* -- as permissible under U.S. law. Can, and should, the agency nonetheless alter its discretionary choice among these options, and choose *x* or *y* as a means of avoiding WTO-inconsistency? Here, we have a different problem, which is not a *Charming Betsy* problem. The question is no longer about interpreting the statute. Rather, it is about whether the agency can be guided, in the exercise of its discretion, by factors other than its own best policy judgment and the expectations reflected in legislative history, including the SAA.

Again, the answer -- however unsettling to respondent lawyers and some internationalists -- is no. Allowing WTO decisions to influence the choices made by agencies in areas where those agencies enjoy discretion under U.S. law would give those decisions a role in U.S. trade law administration which they were never intended to have, because Congress legislates against the backdrop of existing agency practices and subject to an understanding that WTO dispute settlement decisions will not trigger changes in those practices.[9]

---

7 *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

8 Commerce espoused this view, perhaps somewhat inelegantly, when it stated in a recent remand determination:

> {T}he respondents contend that distinguishing between a company and its owners for purposes of determining whether subsidies survive a change-in-ownership was rejected by the WTO Panel in Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/R (Dec. 23, 1999) at para. 6.82 …. The respondents argue that, in light of that decision, drawing a distinction between purchasers and the company, and finding that only repayment by the latter can eliminate non-recurring subsidies, would contravene the Charming Betsy doctrine.
>
> Respondents {sic} invocation of a recent WTO panel decision and the Charming Betsy doctrine is inappropriate. … {U}nder U.S. law, WTO panel decision {sic} do not automatically have the force and effect of law. 19 U.S.C. 3533(g). While the Charming Betsy doctrine is an important cannon {sic} of statutory interpretation, it cannot be used to automatically implement WTO panel decisions contrary to U.S. Law. In addition, the Charming Betsy doctrine traditionally been used to examine international obligations of the United States under international agreements and treaties. To use this doctrine to inject into U.S. law a foreign dispute resolution body's interpretation of U.S. obligations under an agreement or treaty would distort the Charming Betsy doctrine beyond recognition.

Results of Redetermination Pursuant to Court Remand, Allegheny Ludlum Corp., et al v. United States, Court No. 99-09-00566, Remand Order (CIT January 4, 2002) at 30-33.

9 Trade law administration necessarily includes dozens of "practices," in the sense of informal rules that regularize the agencies' treatment of recurring issues. Congress legislates against the background of these practices – changing the law when it disagrees with them, sometimes codifying established practice of which it approves, and frequently leaving the law alone when it approves of existing practices. These practices, even when not codified, are part of the framework of U.S. law, and if a particular practice was not addressed in the URAA or the SAA, one can safely assume that Congress and the Administration believed it to comply with U.S. obligations and intended no change. Following is an illustrative list of SAA passages demonstrating how Congress enacted various provisions of the URAA against the backdrop of cur-

Returning to administrative law principles, it is true that, within the *Chevron* framework, policies developed by an agency need not "last forever,"[10] and can "adapt … to the demands of changing circumstances."[11] Yet, *Chevron* itself emphasized that an administrative agency's right to interpret its governing statutes is grounded in Congress' delegation of authority to the agency to implement the statute in the light of its expertise and its considered policy judgment:

---

rent agency practice.

Concerning adjustments to export price and constructed export price in antidumping cases, the SAA states:

> Section 772(d)(1)(B) provides a non-exhaustive list of examples of expenses that Commerce typically will consider as direct selling expenses when reported on an appropriate transaction-specific basis, and will deduct from constructed export price to the extent they are incurred after importation. The Administration does not intend to change Commerce's current practice, sustained by the courts, of allowing companies to allocate these expenses when transaction-specific reporting is not feasible, provided that the allocation method used does not cause inaccuracies or distortions.

Concerning the determination of normal value, the SAA provides:

> [S]ection 773(a)(1)(B)(i) codifies Commerce's current practice of calculating normal value, to the extent practicable, on the basis of home market sales that are made at the same level of trade as the constructed export price or the starting price for the export price.

Concerning adjustments to normal value, the SAA states:

> Section 773(a)(6)(C)(ii) provides for adjustments to account for any differences in costs attributable to physical differences between the merchandise exported to the United States and the merchandise sold in the home or third country market. The Administration intends that Commerce will continue its current practice of limiting this adjustment to differences in variable costs associated with the physical differences.

Concerning indirect subsidies, the SAA states:

> It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and section 771(5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable ….

Concerning the specificity provisions of the SCM Agreement (Art. 2), the SAA states:

> Article 2 provides that to be actionable a subsidy must be specific to "certain enterprises" (*i.e.*, to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority). Consistent with longstanding U.S. practice, government assistance that is both generally available and widely and evenly distributed throughout the jurisdiction of the subsidizing authority is not an actionable subsidy. However, Article 2.1 makes clear that a subsidy is specific not only when the subsidy is limited to certain enterprises by law *(de jure)* but also where, despite the existence of neutral and objective eligibility criteria, the subsidy is provided in fact *(de facto)* only to certain enterprises.
>
> …Similar to longstanding U.S. CVD practice, the Agreement recognizes that subsidies granted by a state or province on a generally available basis within a state or province (*i.e.*, not limited to certain enterprises within a state or province) are not specific, and therefore are not actionable.
>
> …Article 2 essentially reflects U.S. practice, so the substance of the specificity test … generally reflects existing law and practice.

[10] *Rust v. Sullivan*, 500 U.S. 173, 186 (1990).

[11] *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

> [T]he principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[12]

Thus, while an agency has discretion to choose among competing permissible interpretations and methodologies, that discretion is not unbounded and depends crucially on whether the agency is demonstrably using its expert practical and policy judgment. An agency must also produce a "cogent" explanation when it changes practice, and a new practice will be deemed "arbitrary and capricious" if "the agency has relied on factors which Congress has not intended it to consider" or adopts a position not reasonably ascribable to "the product of agency expertise."[13] So -- can an agency, having chosen permissible interpretation *z*, change its mind and choose *x* or *y simply* because the DSB has adopted a decision holding option *z* WTO-inconsistent? The SAA says no: "[P]anel reports *do not provide legal authority* for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations . . . ."[14] Indeed, as a monitoring mechanism to ensure that WTO decisions would not by themselves trigger changes in discretionary agency policies, Congress included in the URAA a detailed set of consultation provisions which an Executive Branch agency such as Commerce must follow when contemplating changes to a "regulation or practice" that has been found WTO-inconsistent in dispute settlement.[15]

In sum, an adverse DSB-adopted decision, taken alone, is not sufficient reason for a U.S. agency to modify its practice, even if the new practice is one that would be valid if adopted by the agency as a result of its own expert judgment. Congress has imposed boundaries on the agencies' discretion that are rather unique in this regard. The next question is, are the agencies listening to Congress? Are they listening to the WTO? Are they listening to anybody?

II. SOME EXAMPLES -- HOW THINGS HAVE WORKED IN PRACTICE

A. Commerce Department

Probably the most significant antidumping "practice" to be challenged in WTO dispute settlement is zeroing – that is, excluding above normal value sales from the final calculation of a

---

12 *Chevron*, 467 U.S. at 844-45 (quoting *United States v. Shimer*, 367 U.S. 374, 382-83 (1961)).

13 *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 48 (1983).

14 SAA at 1032 (emphasis added).

15 URAA §123(g), codified in 19 U.S.C. §3533(g).

dumping margin rather than using those sales to offset dumped sales. Zeroing was upheld by a GATT 1947 dispute settlement panel,[16] but the Appellate Body recently found that the EC's use of zeroing contravened the WTO *Antidumping Agreement*.[17] As there has so far been no WTO decision involving the use of zeroing by the United States, the issue has not yet arisen as an "implementation" issue at Commerce.[18] And even if it did, it would fall outside the category of cases (those involving discretionary agency practices) selected for discussion here, as Commerce has interpreted the U.S. antidumping statute to mandate zeroing.

Perhaps the clearest example of a practice that *has* been changed by Commerce in response to a WTO ruling is the treatment of sales to affiliated parties in calculating dumping margins – the so-called "99.5 percent" rule rejected by the Appellate Body in the *Japan Hot-Rolled* case.[19] Under U.S. law, "normal value" is calculated in the first instance from the price at which the goods are sold in an exporter's home market "in the ordinary course of trade,"[20] a phrase that also appears in Article 2.1 of the *Antidumping Agreement*. For any number of reasons – not the least of which is to avoid a finding of dumping – sales to affiliates are often not made at arm's-length prices and are therefore likely to be outside the "ordinary course of trade" in many cases. Thus, Commerce's regulations state that the agency must be "satisfied" that sales to affiliates are comparable to sales at arm's length before treating them as "in the ordinary course of trade."[21]

Neither the statute nor the regulations, however, prescribe any particular method by which Commerce is to "satisfy" itself that transactions with affiliated parties are "in the ordinary course of trade." Over the course of numerous investigations, Commerce developed a consistent practice that prevented repeated litigation of the issue.[22] If, on average, sales to an affiliated party were for less than 99.5 percent of the average sales price to nonaffiliated purchasers, Commerce would apply a bright-line test and find these sales were not in the "ordinary course of trade" but rather served to mask dumping. Commerce also recognized that unusually high-priced sales to affiliates might not be in the "ordinary course of trade." Since the motive for aberrationally high-priced sales would not be related to dumping and would in any case be to the respondent's advantage to explain, Commerce did not use a bright-line rule but simply announced that it would consider respondents' requests to exclude high-priced sales on a case-by-case basis.[23]

---

16 Report of the Panel, *European Communities–Imposition of Antidumping Duties on Imports of Cotton Yarn from Brazil*, July 4, 1995, paras. 499-502, GATT B.I.S.D., 42d Supp., at 17 (1998).

17 Report of the Appellate Body, *European Communities–Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 12, 2001), para. 66.

18 The CIT recently rejected a claim that the Appellate Body ruling on EC zeroing practice justified a new construction of U.S. law under which zeroing would be prohibited. *Timken Co. v. United States*, 2002 WL 31008981, at *10-*11 (Ct. Int'l Trade Sept. 5, 2002). The CIT had previously upheld zeroing as permissible under both the pre- and post-URAA antidumping statutes.

19 Report of the Appellate Body, *United States–Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001), paras. 131-158 (affirming Report of the Panel, WT/DS184/R (Feb. 28, 2001), para. 7.112).

20 Section 773(a)(1)(B)(i) of the Tariff Act of 1930 (19 U.S.C. §1677b(a)(1)(B)(i) (2000)).

21 19 C.F.R. §351.403(c).

22 The practice had already been developed and implemented at the time of the URAA. *See, e.g., Certain Cold-Rolled Steel Flat Products from Argentina*, 58 Fed. Reg. 7066, 7069 (Dep't Comm. 1993).

23 *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,295, 27,355-56 (Dep't Comm. 1997).

In *Japan Hot-Rolled*, the Appellate Body found that this approach was not sufficiently "even-handed" in its treatment of high-priced and low-priced transactions between affiliates.[24] The Appellate Body did not define what its newly invented obligation of "even-handedness" would mean in practice, although it allowed that the rules for high-priced and low-priced transactions need not be identical.[25] In fact, there is good reason for different treatment of high-priced and low-priced sales, as Commerce itself has pointed out: Respondents are likely to provide willingly advantageous information, such as why high-priced transactions are not in the ordinary course of trade.[26]

The SAA indicates that Congress was aware of existing Commerce practice on this issue and legislated against this background.[27] U.S. courts have also repeatedly upheld the practice.[28] In fact, even after the Appellate Body ruling, the CIT explicitly upheld Commerce's practice as reflecting a "reasonable interpretation" of the statute.[29] Nonetheless, Commerce has announced a change in its practice in response to the WTO decision. After notice and comment,[30] Commerce announced that it would now include all sales to affiliates for which the average price is within a symmetrical band of 98 to 102 percent of sales to nonaffiliates, and exclude sales whose average price falls outside that band.[31] This new practice is now being applied in all investigations and reviews initiated on or after November 23, 2002.[32]

Whatever one's view of the merits of the new approach, or the prior approach, or the economic impact of the different (lower? higher?) margins the new approach will likely produce, there are some interesting and, we believe, troubling elements of this story. First, while the Appellate Body had "generously" offered that the new "even-handedness" requirement could be met by a test for high-priced and low-priced sales that was not "identical," Commerce adopted a symmetrical test because it worried that any other course might contravene the Appellate Body's "reasoning."[33] Second, the rationale that Commerce previously gave for an asymmetrical rule – that access to the required information differs for high- and low-priced sales -- has not gone away. Commerce's policy judgment still, apparently, counsels in favor of an asymmetrical rule.

---

24 Report of the Appellate Body, *United States–Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001), para. 154.

25 *Id.* para. 154 n.113.

26 *Timken Co.*, 2002 WL 31008981 at *9 (citing Commerce brief).

27 *E.g.*, SAA at 834 (URAA specifies "additional types of transactions that Commerce may consider" to be outside the ordinary course of trade, thus *expanding* Commerce practice in this regard).

28 *E.g.*, *SSAB Svenskt Stal Ab v. United States*, 976 F. Supp. 1027, 1030-31 (Ct. Int'l Trade 1997); *NSK Ltd. v. United States*, 969 F. Supp. 34, 48 (Ct. Int'l Trade 1997); *Micron Tech. Inc. v. United States*, 893 F. Supp. 21, 37-38 (Ct. Int'l Trade 1995); *Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1004 (Ct. Int'l Trade 1994).

29 *Timken Co.*, 2002 WL 31008981 at *10.

30 *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 53,339 (Dep't Commerce Aug. 15, 2002).

31 *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186 (Dep't Commerce Nov. 15, 2002).

32 *Id.* at 69,197.

33 67 Fed. Reg. at 69,191.

Third, and most importantly, the judgment of Congress and the Administration in 1994 that the Uruguay Round agreements did not require any change in this Commerce practice has now been set aside, and a change has been implemented based solely on an occurrence (DSB adoption of an adverse decision) which, according to the SAA, does *not* justify revising an agency practice.

U.S. law provides that the 99.5 percent test is permissible. The WTO dispute settlement decision found the same test impermissible. In that respect, the WTO decision is "inconsistent" with U.S. law -- they reach opposite conclusions on the permissibility of the 99.5 percent test. The URAA states that no WTO decision which is inconsistent with U.S. law "shall have effect."[34] Yet, here we are with a new sales-to-affiliates rule. Score one for the WTO.

B. ITC

The ITC's response to WTO trade remedy decisions has taken a different but no less interesting tack. To date, the most compelling opportunities for the ITC to react to adverse WTO decisions have been blunted by Presidential action to revise or withdraw safeguard measures without sending the underlying determinations back to the ITC for further proceedings. And the *Japan Hot-Rolled* case, in which certain ITC "practices" were faulted by the WTO Appellate Body, for technical reasons did not require or trigger any direct "implementation" proceedings at the agency. As a result, the ITC's response to adverse WTO trade remedy decisions has been visible mainly in the way in which subsequent ITC determinations did (or did not) take account of the substance of those decisions.

Here the best candidate for analysis is the ITC's approach for analyzing multiple potential causes of injury and ensuring that harm from other sources is not attributed to imports. The Appellate Body has addressed this "nonattribution" issue in a trio of U.S. safeguard measure cases and in *Japan Hot-Rolled*.[35] Interestingly, no WTO decision has ever found that the ITC has, in fact, done what the WTO rules forbid -- *i.e.*, charged imports with harm actually caused by other factors. Rather, the Appellate Body has limited itself to faulting the way in which the ITC *explained* its determinations. According to the Appellate Body, an authority is obligated to draft its determinations in a way that removes any possible doubt as to whether the nonattribution requirement has been respected -- and in order to do *that* the authority must "separate and distinguish" the injury from every possible source. It may be that the Appellate Body is seeking to use a procedural tool to address what it really regards as a substantive problem; only time will tell. In the meanwhile, the focus is not on the ITC's conclusions, but on its prose.

---

[34] 19 U.S.C. §3512(a)(1) ("No provision of any of the Uruguay Round Agreements, *nor application of any such provision to any person or circumstance*, that is inconsistent with any laws of the United States *shall have effect* ….") (emphasis added).

[35] Report of the Appellate Body, *United States–Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Feb. 15, 2002), para. 220 (finding that "cited parts of the USITC Report do not *establish explicitly*, with a *reasoned and adequate explanation*, that injury caused by factors other than the increased imports was not attributed to increased imports" (emphasis in original)); *see also* Report of the Appellate Body, *United States–Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (July 24, 2001), para. 234; Report of the Appellate Body, *United States–Safeguard Measure on Imports of Fresh, Chilled, or Frozen Lamb Meat from Australia and New Zealand*, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001), para. 188; Report of the Appellate Body, *United States–Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 22, 2000), para. 91.

In our view, U.S. law, the ITC's practice, and the injury determinations challenged to date all fully meet the requirements of the WTO agreements -- both the substantive nonattribution requirement and the procedural "duty to explain." First, although the *Antidumping Agreement*'s nonattribution language has never been copied verbatim into the U.S. antidumping statute, that statute directs the ITC to determine whether material injury is "by reason of" unfairly traded imports, and thus to consider the effects of potential alternative causes of injury.[36] Second, the ITC's methodology for doing so was examined and upheld by GATT 1947 panels in the *Norwegian Salmon* case, as comporting with nonattribution language in the *Tokyo Round Antidumping Code* identical to that in the WTO *Antidumping Agreement*.[37] In crafting the URAA, Congress and the Administration explicitly relied on the adopted *Norwegian Salmon* decision in stating that no amendment to U.S. law was required because the ITC already "must examine other factors to ensure that it is not attributing injury from other sources to the subject imports."[38] Third, the *Antidumping Agreement* nowhere states that authorities must "separate and distinguish" the harm from every possible source of injury; it simply states that they must refrain from tagging imports with harm not caused by imports. The notion that there is only one permissible way to do this is flawed, and the Appellate Body's decision actually revises rather than enforces the negotiated rules.[39] Fourth, the approach dictated by the Appellate Body is not practiced by any WTO Member's investigating authorities.

As for what the ITC has done differently in the wake of the adverse WTO decisions, the answer is "not much." Determinations read much as they always have, and in briefs submitted to the WTO panel currently reviewing President Bush's steel safeguard measure, the ITC has insisted that its practice completely satisfies WTO norms and that the "separate and distinguish"

---

36 19 U.S.C. §§1671d(1), 1673d(1).

37 Report of the Panel, *United States–Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Nov. 30, 1992, GATT B.I.S.D., 41st Supp., at 229 (1997); *see also Report of the Panel, United States–Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Dec. 4, 1992, GATT B.I.S.D., 41st Supp., at 576 (1997).

38 SAA at 851-52. The Federal Circuit's decision in *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 722 (Fed. Cir. 1997) stressed that the ITC must examine alternative causes sufficiently to determine that other factors in the market do not prevent a finding that material injury was caused by the subject imports alone. However, if, as has been suggested, the Appellate Body in *Japan Hot-Rolled* believed it was merely extending U.S. court-imposed requirements to the WTO context, it was mistaken. The ITC's analyses and explanations regarding nonattribution -- explanations like the one critiqued in *Japan Hot-Rolled* -- have been upheld in post-*Gerald Metals* court decisions. *See, e.g., ALTX, Inc. v. United States*, 167 F. Supp. 2d 1353, 1362 (Ct. Int'l Trade 2001) (while ITC must establish a causal link between subject imports and material injury, it need not separately determine whether there is a causal link between other factors, such as nonsubject imports, and material injury).

39 For other opinions to this same effect, *see, e.g.*, Tarullo, *supra* n.2, at 19-21 (stating that the Appellate Body "ignored" the Article 17.6(ii) standard of review in addressing this issue, that it insisted on an interpretation that "does not seem compelled" by the language of Article 3.5, and that "as an economic matter, there is a certain arbitrariness to *any* exercise that purports to separate the causal effects of specific market factors in the harm suffered by a domestic industry") (emphasis in original); *Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body: Report to the Congress Transmitted by the Secretary of Commerce* (Dec. 30, 2002) at 9 ("the Appellate Body {in *Japan Hot-Rolled*} imported into the Antidumping Agreement the affirmative *obligation it developed* in the safeguard cases" on nonattribution, "*fashioned an affirmative requirement* to 'separate and distinguish' the effect of the dumped imports from that of other factors," and "declined to consider … the detailed language in the Antidumping Agreement governing how to conduct a causation analysis") (emphasis added).

rule is both unfounded in the text of the WTO agreements and impossible to implement in practice.[40] In contrast with Commerce's response on the 99.5 percent rule, the ITC has not shifted (or, it appears, even considered shifting) to other analytical approaches that may be within the bounds of its statutory discretion. Rather, it has honored the decision made in 1994 that no change to this aspect of U.S. practice was "necessary or appropriate."

A comparison with the EU's assimilation of the Appellate Body's nonattribution rulings is also instructive. In its own 2002 safeguard determination on steel products, the European Commission frequently recited the "separate and distinguish" mantra in the preface to its causation analysis -- and then proceeded to conduct an analysis that in substance is virtually identical to that used by the ITC.[41] This EU determination provides an interesting hint as to what the ITC might do if it is ultimately called upon to respond directly to a "failure to explain" ruling emanating from the WTO. Specifically, one suspects that any revisions to the ITC's standard explanations will likely be based not on the "separate and distinguish" rule "fashioned" by the Appellate Body, but rather on the actual nonattribution language of the WTO agreements themselves. By retaining its existing analytical approach, but amplifying its *presentation* of the results in such a manner, the ITC may well be able to bolster its decisions while respecting the Congressional directive not to change URAA-approved practices on the basis of adverse WTO decisions.

III. BROADER IMPLICATIONS?

This small sampling of Commerce and ITC reactions to WTO trade remedy decisions provides some useful insights into what the decisions "mean." Commerce's reaction has been what one perhaps would expect from an agency located inside the Executive Branch: the agency has arguably ducked a difficult decision on zeroing by finding the practice to be statutorily-required rather than discretionary, and then by contrast has seemingly overshot the mark in responding to the *Japan--Hot-Rolled* "ordinary course of trade" ruling by crafting a completely symmetrical test for high- and low-priced sales and simply ignoring, rather than discussing and distinguishing, the reasons it had previously advanced for its asymmetrical 99.5 percent test. The ITC has had fewer direct occasions to revisit its discretionary practices, and may arguably have missed an opportunity to tailor its *explanations* -- without altering any of the substance of current practice -- in a way that responds somewhat more directly to the nonattribution language of the *Antidumping Agreement* and the *Safeguards Agreement*.

The agencies have probably been influenced by, but in the main have not expressly grappled with, some of the more fundamental issues discussed in section I above, such as the front-loaded U.S. system for achieving trade agreement compliance, the unmistakable effort of the URAA's crafters to ensure that permissible/discretionary agency practices would not be dropped on the basis of adverse WTO decisions, and the constraints which general U.S. administrative law principles impose on shifts in practice that are based on something other than an agency's

---

40 *See* First Written Submission of the United States, *United States–Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-249, 251-254, 258-259 (Oct. 4, 2002), para. 532 ("it is not realistic as an economic matter to expect a competent authority to precisely identify and separate the injury effects of individual factors in complex and sophisticated markets").

41 *See* Commission Regulation 1694/2002, 2002 O.J. (L 261) 1, paras. 478, 497.

policy judgment and expertise. The day is probably not far off when those issues will become more prominent, given the determined effort by respondent lawyers to inflate the *Charming Betsy* doctrine to the point where it will be accepted as justifying the abandonment (by agencies) or reversal (by courts) of methodologies that are permissible under U.S. law but can be characterized, in light of new rules fabricated by panels or the Appellate Body, as inconsistent with WTO obligations.

What more can be said about the meaning of the WTO decisions?

For one thing, the decisions reveal a dispute settlement system that is broken and in need of major change, in the absence of which a growing crisis of confidence will cloud the prospects for future negotiated trade liberalization under WTO auspices. The failure of panels and the Appellate Body to abide by the *Antidumping Agreement*'s deferential standard of review, mentioned above, is but the tip of the iceberg in this regard. Many if not most of the individuals who participate in deciding WTO dispute settlement cases should not; these include incumbent officials of WTO Member governments who cannot rightly be considered impartial in connection with disputes involving U.S. trade remedy measures, as well as WTO Secretariat officials who today are simultaneously servicing the WTO's judicial, legislative and executive functions in contradiction to basic civics principles taught to schoolchildren. Abstention doctrines (*e.g.*, mootness, ripeness, economic interest through demonstrable trade effects) regulating access to the courthouse door, which are necessary in any juridical system, and which if properly applied in the WTO could substantially slow the flood of cases against the United States in the trade remedy area, have been ignored and in some cases directly vitiated; one example is the "mandatory-discretionary" rule which was effectively shredded in the *US -- Section 301* panel decision and for which Japan in the current Dispute Settlement negotiations has now proposed a formal burial. These problems unfortunately are illustrative, not exhaustive.

The changes needed are not hard to identify. They include:

- restating the *Antidumping Agreement* Article 17.6 standard of review inside Article 11 of the DSU, with revisions so that it (1) applies explicitly to all AD, CVD and safeguard cases; (2) requires that an authority's factual determination be upheld unless it is "without detectable support in the administrative record" (a standard that accords slightly less power to WTO panels than is accorded to U.S. courts reviewing these determinations); and (3) makes explicit the current requirement that an authority's interpretation or methodology be deemed permissible unless expressly precluded by a covered agreement;

- limiting service on AD/CVD/safeguard panels to individuals who have recent experience administering AD/CVD/safeguard remedies at the national level, and who are not currently government employees;

- relieving Secretariat officials of their current dispute settlement functions (helping to choose and then advising panelists), in favor of an alternate group of individuals independent of any role in servicing the WTO's legislative/negotiating functions; and

- reinforcing and adding abstention doctrines to prohibit misuse of the dispute settlement process to obtain advisory opinions.[42]

Another aspect of the broader "meaning" of the WTO trade remedy decisions is that the U.S. Government -- for both substantive trade policy and domestic political reasons -- ought to be proposing far-reaching DSU reforms. Regrettably, this is not occurring. Indeed, the United States has declined even at the "issue identification" stage of the current Dispute Settlement reform discussions to raise *any* of the issues discussed above. Instead, U.S. input has been limited to two recent submissions, one on increasing transparency in WTO proceedings and the other on enhancing litigants' control over the topics addressed in Appellate Body opinions. These proposals, perhaps useful in their own right, have little to do with the problems that have emerged in the trade remedy area. In particular, the "litigants' control" proposal is focused on situations where parties to a dispute would *agree* to block or remove particular findings which they consider to be "unnecessary" at the Appellate Body level. Even conceptually, such a proposal is not relevant in situations where WTO Members are using dispute settlement with the express aim of winning new constraints on U.S. trade remedy enforcement to which the United States was unwilling to consent at the negotiating table. Transparency, meanwhile, does not require a DSU amendment paid for in negotiations; it simply requires bigger U.S. delegations to panel and Appellate Body hearings. The result of the failure to raise more substantive concerns, even as issues that merit exploration, is that, as far as the rest of the world knows, the only problems the United States sees in the dispute settlement process are that it is not open enough and not sufficiently controlled at the appellate stage by litigants.

The "meaning" of the WTO trade remedy decisions also extends to the WTO Rules negotiations. For one thing, the United States may seek in the Rules negotiation to overturn some of the new rules written in DSB-adopted decisions, creating an interesting and difficult dynamic. For another, the Administration has suggested, in its December 30 *Dispute Settlement Strategy Paper*, that fundamental dispute settlement problems can be usefully addressed within the "Rules" negotiation -- a proposal that in our view reflects a serious misjudgment. The Rules agreements (the *Antidumping Agreement* and the *Agreement on Subsidies and Countervailing Measures*) govern the behavior of investigating authorities; it is the DSU that governs panel and Appellate Body proceedings. Any new or improved constraints on legislating by panels and the Appellate Body ought to be codified in the DSU and raised accordingly in the Dispute Settlement negotiations. And even if there were some doubt on this score, it is in the strategic interest of the United States to resolve these matters in the Dispute Settlement negotiation, scheduled to conclude separately in May 2003, rather than in the far more disadvantageous environment of the Rules negotiation. Becoming a demandeur in the Rules context simply invites trade-offs that would weaken U.S. law.

The "meaning" of the WTO trade remedy decisions also extends to debate over unilateral changes to U.S. policy -- *i.e.*, improvements in the way the government conducts its participation in dispute settlement cases. Transparency, for example, could be delivered through the simple and costless expedient of bringing interested non-government observers into hearings as part of the U.S. delegations. There is no need to await (or "purchase" with other concessions) a negoti-

---

[42] This should include a serious effort to accelerate the consideration of trade effects in WTO cases, so that the absence of any plausible claim of adverse effects will in all cases (rather than just in actionable subsidy cases) provide a basis to dismiss complaints without the need for a decision on the "merits."

ated solution on this issue. Likewise, the current "feeding frenzy" of cases against the United States could be slowed at least somewhat through an Administration announcement that as a matter of principle, the United States will not consider itself obliged to implement WTO decisions in cases demonstrably lacking trade effects. Had such a policy been announced several years ago, WTO cases like *Export Restraints*, *Section 129*, *CDSO*, and *1916 Act* might never have been brought. Other necessary and appropriate unilateral changes include a substantial increase of existing litigation resources, including more legal staff from the Commerce Department's Import Administration, in the U.S. Geneva mission, and strong Administration support for efforts to establish, by statute, a WTO Dispute Settlement Review Commission.

Could the meaning of the decisions be broader still? We conclude with some excerpts from Professor Tarullo's forthcoming article[43] raising concerns about legislating in the WTO dispute settlement process and what we may expect to see happen if the problem is not fixed.

> "Moreover, this feature of the Anti-Dumping Agreement {the standard of review} is but one piece of a carefully balanced package of concessions among all the members of the WTO. To ignore or willfully de-emphasize this provision would be to upset the reasonable expectations of one or more member states and, thereby, to undermine the principle of reciprocal benefits that has been fundamental to the world trading systems since 1947." (p. 68)

> "In this context, the dynamic effects of AB activism upon U.S. behavior may result in costs to the world trading system that exceed the putative benefits for liberal trade when the WTO dispute settlement process overturns national trade law actions." (p. 69)

> "To disregard a rule for dispute settlement that was plainly negotiated, and least formally agreed, is to call into question the entire basis for positive international law." (p. 74)

> "By disregarding 17.6(ii), the Appellate Body has effectively revised the Uruguay Round Anti-Dumping Agreement. If the United States still wants the protections for its anti-dumping law administration that it thought it was getting in 1995, it will have to negotiate again for these protections in the new round of negotiations. This will require either foregoing some other negotiating aim or offering additional concessions to other countries. It looks, then, as if the United States must 'pay' twice to obtain discretion to choose among 'permissible' legal interpretations of its international obligations." (p. 76)

> "The impact of the AB practice may not be limited to potential renegotiation of 17.6. Having seen the AB nullify a provision that was supposed to protect national prerogatives, the United States may conclude that the 'costs' of negotiating

[43] Tarullo, *supra* n.2.

further restrictions on the use of its trade laws will increase as the WTO dispute settlement system consistently decides cases against the importing nation. That is, if the United States expects the Appellate Body to construe broadly the constraints imposed by WTO agreements on national administration of import laws, it will assess the costs of these constraints as higher than if 17.6 were 'honestly' applied. To the degree that other governments desire change in national administration of trade remedy laws, they will then have to 'pay' more during trade negotiations to obtain agreement on those changes. Conceivably, the other government will value the expected extension of the constraints by the Appellate Body less than the additional costs which the United States anticipates bearing. Again, the United States and its trading partners will be unable to reach an optimal trade deal, in which each country bargains for the maximum concessions from others for the minimum 'price' it has to pay. (pp. 77-78)

"By significantly 'changing' the rules from what the United States expected it had negotiated, the Appellate Body has denied WTO members the ability to specify obligations in the way that maximizes the benefits each can obtain." (p. 78)

"Suppose now that the Appellate Body's disregard of 17.6(ii) is read as part of the broader effort by the AB to establish the WTO as a potent constitutional regime. In that circumstance, the inhibitions upon negotiating new agreements may spread beyond the area of trade remedies. The 'costs' of trade agreements generally will have become much harder for governments to gauge, since creative interpretation by the AB may effectively enlarge or diminish the scope of all WTO obligations. The AB's emphasis upon the obligation of Member States to act in 'good faith' gives some idea of the potential scope of such interpretation. Consequently, the anticipated benefits of trade agreements will have to be significantly higher, in order to provide a premium for the uncertainty attaching to the obligations being assumed. Again, optimal trade deals that might otherwise be negotiated will not be concluded. If the uncertainty spreads broadly enough across issue areas, it is even possible that no deal at all will be reached." (pp. 79-80)

"Although U.S. experience with Article 17.6(ii) has been the starting point for analysis of the dynamic costs of AB practice, the discussion to this point is essentially applicable to all countries. To the degree AB decisions either remove the ability of WTO members to grant specific concessions or introduce significant uncertainty into the breadth of concessions that may be granted, new trade agreements will be harder to conclude." (p. 81)

December 2002

Recent WTO Decisions on U.S. Trade Remedy Laws

Case	Issue	Nature of Overreach	Importance
United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/R, WT/DS234/R (Sept. 16, 2002), appeal pending	"Byrd Amendment"	Panel found that collected antidumping and countervailing duties may not be awarded to domestic producers, even though negotiators never even considered, much less undertook, any restrictions on how Members may spend collected duties	Fabricates new constraint on how Members may spend government funds
United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS236/R (Sept. 27, 2002)	Benchmark for testing "adequate remuneration"	Panel found that U.S. may not measure the "stumpage" subsidy provided to Canadian lumber producers using market prices for comparable U.S. timber, even though negotiators did not limit the evidence usable to identify a subsidy benchmark	Prevents full offset of massive subsidization of Canadian lumber
United States – Countervailing Measures Concerning Certain Products from the EC, WT/DS212/AB/R (Dec. 9, 2002)	Countervailability of pre-privatization subsidies	AB found that a stock sale must be treated as cutting off all prior subsidies, even though ASCM contains no such rule and selling a company's outstanding shares does nothing to remove benefits enjoyed by the company itself	Exempts billions of dollars of subsidies from CVD offset and reverses results of two-thirds of all U.S. CVD cases
United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/R (July 3, 2002)	Agency determination of likelihood of continuation or recurrence of subsidy	Panel wrongly faulted well-documented DOC finding that continuation or recurrence of subsidies to German producers was likely	New standard raises the bar for maintaining CVD relief in 5-year reviews

Case	Issue	Nature of Overreach	Importance
United States – Anti-Dumping and Countervailing Measures on Steel Plate from India, WT/DS206/R (June 28, 2002)	Use of "facts available"	Panel found that authorities could not reject information submitted by respondent even if untimely and unusable	Fabricates constraints on the use of "facts available" not found in the *Antidumping Agreement*; weakens investigating authorities' ability to ensure full reporting
United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001)	Causation analysis in injury determinations	AB reversed settled case law and announced new requirement that authorities "separate and distinguish" the harm arising from all possible causes of a domestic industry's injury	New standard makes injury/causation findings virtually impossible to substantiate; requires use of speculative analytical methods not used by any WTO Member
United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001)	Calculation of "all others" dumping margin	AB imposed by fiat a new rule under which company-specific margins averaged together to derive an "all-others" margin cannot include any margins based even minimally on "facts available"	New requirement makes it difficult -- and in many cases impossible -- to establish a dumping margin for non-investigated companies
United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001)	Standard for disregarding sales to affiliated companies in dumping cases	AB minted new rules constraining an authority's ability to exclude, when determining normal value, sales to affiliated customers in the home market made at below-market prices	Makes it easier for respondents to mask dumping through sales to affiliates
United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, WT/DS179/R (Dec. 22, 2000)	Dumping analysis in periods featuring sharp currency fluctuations	Panel rejected plainly reasonable methodologies applied by DOC to take account of sharp currency depreciation during the period of investigation	New constraints make it more difficult to ensure that sharp currency fluctuations do not mask dumping
United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors ("DRAMS") of One Megabit or	Standard for revocation of AD orders following temporary cessation of dumping	Panel faulted plainly reasonable DOC standard for determining whether dumping would be likely to resume if the discipline of an AD order were removed	Places burden on authority, rather than on exporter where it belongs after an initial finding of dumping, with re-

Case	Issue	Nature of Overreach	Importance
Above from Korea, WT/DS99/R (Jan. 29, 1999)			gard to likelihood that revocation will lead to resumed dumping
United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000)	Antidumping Act of 1916	AB ruled that U.S. antitrust statute providing damages remedy for workers and businesses deliberately injured by predatory imports is inconsistent with *Antidumping Agreement*, even though that *Agreement* by its terms only applies to antidumping measures	Eliminates Members' intentionally preserved flexibility to act against predatory practices through measures other than antidumping duties
United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R (Feb. 15, 2002)	Design of safeguard measures	AB invented a new rule under which safeguard measures must be narrowly tailored to offset only the serious injury caused by increased imports, despite the practical impossibility of quantifying the harm caused by different factors	Reduces the efficacy of safeguard relief in all cases and imposes an analytical burden which authorities cannot meet
United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R (Feb. 15, 2002)	Application of safeguard measures to FTA partners	AB ruled that U.S. cannot exempt NAFTA partners from safeguard measures without full ITC investigation and finding with regard to non-NAFTA imports as well as all imports generally	Applies new, burdensome requirement limiting the ability to exclude from safeguards non-injurious imports originating in FTA partners
United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R (Feb. 15, 2002)	Causation standard in safeguard determinations	AB imposed un-meetable requirement to separate, distinguish and quantify every possible cause of injury – a methodology not found in the *Safeguards Agreement* or employed by any WTO Member	Applies new and unworkable requirements to show precise effects of all contributing causes of injury before a safeguard can be applied

Case	Issue	Nature of Overreach	Importance
United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001)	Unforeseen developments requirement in safeguard cases	AB mandated authorities to consider whether increasing imports resulted from "unforeseen developments," a GATT 1947 requirement intentionally omitted from WTO *Safeguards Agreement*	Adds new, unjustified burden on Members' ability to impose safeguard measures
United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001)	Definition of domestic industry in safeguard cases	AB ruled that injurious effects of increased imports on live lamb producers could not be considered in determining whether imports of lamb meat caused injury to a domestic industry, even though negotiators intended safeguard remedies to be flexible enough to encompass all injury actually caused by increased imports	Artificially constrains authorities' ability to identify the affected domestic industries to be considered in safeguard determinations
United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001)	Causation standard in safeguard determinations	AB imposed un-meetable requirement to separate, distinguish and quantify every possible cause of injury – a methodology not found in the *Safeguards Agreement* or employed by any WTO Member	Applies new and unworkable requirements to show precise effects of all contributing causes of injury before a safeguard can be applied
United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/AB/R (Dec. 20, 2000)	Causation standard in safeguard determinations	AB imposed un-meetable requirement to separate, distinguish and quantify every possible cause of injury – a methodology not found in the *Safeguards Agreement* or employed by any WTO Member	Applies new and unworkable requirements to show precise effects of all contributing causes of injury before a safeguard can be applied