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Notes, Comments and Developments

DEFERENCE, BUT ONLY WHEN DUE: WTO REVIEW OF ANTI-DUMPING MEASURES

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INTRODUCTION

Critics of the WTO have been unfairly harsh in condemning panel and Appellate Body decisions reviewing anti-dumping measures. If we step back to look more broadly at the frequency of WTO challenges, and then step closer to look more carefully at what WTO panels have actually been doing, a different and more nuanced picture emerges. Countries hit by anti-dumping measures have actually been surprisingly restrained in challenging these measures in the WTO. Panels and the Appellate Body have been deferential, but only when the particular decision deserved deference. Given the pervasive and often abusive nature of anti-dumping measures, the WTO response has in fact been quite modest. To paraphrase Winston Churchill, never have so many complained so much about so little.

The criticism has become widespread. The Senate Finance Committee recently accused WTO panels of 'ignoring their obligation to afford an appropriate level of deference to national authorities, and erod[ing] bargained for trade remedy protections'.[1] The Committee to Support US Trade Laws recently has been active lamenting the allegedly dismal record of the United States in defending its trade remedy measures. Yet this criticism reflects largely the self-serving interests of those domestic groups that benefit from the protection provided by the trade remedies. The record of WTO review of trade remedies does not deserve such criticism.

This article reviews that record with respect to the most contentious area: anti-dumping measures.[2] As the trade remedy of choice for more and more countries, anti-dumping measures are the most commercially significant. This particular remedy also has the only specially negotiated standard of review –

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[1] Bipartisan Trade Promotion Authority Act of 2002 Report, Senate Finance Committee, S. Rep. No. 107–139, at Sec.III.1 (2002).

[2] Note this article addresses only anti-dumping measures. WTO review of safeguard and countervailing duty measures are also important topics, and are the subject of future research by the author, but they are beyond the scope of this particular article.

Article 17.6 of the Agreement on the Implementation of Art. VI GATT ('Anti-Dumping Agreement'). Thus WTO review of anti-dumping measures should provide critics with their best case for lack of appropriate deference. Yet the WTO system has been surprisingly restrained in its review of anti-dumping measures:

- Only a tiny fraction of anti-dumping measures are ever challenged at all in the WTO, and many of those attack developing country measures, not US measures.
- An even smaller fraction of anti-dumping measures ever lead to final WTO panel decisions that might require some change to the anti-dumping measure or national law. Most of the WTO challenges never progress beyond simple consultations.
- In those few cases that progress to panel decisions, a large number of claims fail. Even though these few cases are carefully selected as presenting the best possible arguments to demonstrate WTO inconsistency, overall only about 40–50 percent of individual claims have prevailed.
- Rather than challenge these findings by panels, many countries essentially concede the claim of WTO inconsistency. Although the Uruguay Round allows appeals of unfavorable panel decisions, about half of the panel determinations never faced an appeal.
- For those successful claims that faced appeal, a substantial number reflect rather obvious violations that no reasonable person could defend. When an authority ignores the explicit instructions in treaty text, such a decision is not entitled to deference under any standard of review.

My argument is not that the WTO has made completely indisputable decisions in every single case. Although I believe there are strong textual and contextual arguments to support every Appellate Body decision, there are some findings of WTO inconsistency for which WTO critics would challenge my assessment. Those instances, however, have been few and far between. The critics have focused on a few instances, and in doing so conveniently ignore the broader context.

Moreover, in many cases the administering authorities often continue their measures and continue their practices in spite of WTO rulings to the contrary. Yet the critics largely ignore this poor record on implementation in their hurry to condemn WTO overreaching.

Every legal system for adjudicating disputes will inevitably uphold some claims and reject other claims. One would have to doubt a WTO dispute settlement system that always found administering authorities to be correct, and never found a violation of WTO obligations. Yet that is the system being implicitly advocated by the WTO critics. They seem to believe that every

instance of a WTO panel challenging the action of an administering authority represents a violation of the extreme deference that should be accorded to the national level decision maker. The WTO panels and the Appellate Body have properly recognized that they have a responsibility to enforce the international obligations set forth in the Anti-Dumping Agreement, notwithstanding the special standard of review reflected in Article 17.6. WTO panels have been deferential, but only when deference is due.

I. DISPUTES IN CONTEXT: THE FREQUENCY OF WTO CHALLENGES TO ANTI-DUMPING MEASURES

The use of anti-dumping measures has increased dramatically in recent years. With the reduction of other trade barriers, many governments and domestic industries now view anti-dumping measures and other trade remedies as the most attractive WTO-consistent way to protect domestic markets. As more and more countries adopt anti-dumping laws, more and more countries are using those laws to impose anti-dumping measures.

Yet only a tiny fraction of these proliferating anti-dumping measures actually triggered WTO disputes. Given the harsh rhetoric of the critics, one would think that a large number of anti-dumping measures have been invalidated, stripping away much needed protection for domestic industries. The actual data in Table 1, however, presents a very different picture.

Table 1. Frequency of WTO Challenges to Anti-Dumping Measures[a]

Item	Frequency
AD Measures in Force	1173
Requests for Consultations	37
Panel Decisions	13
Appellate Body Decisions	6

[a]The number of anti-dumping measures comes from tabulations in the 2002 WTO Annual Report, at p. 35 (measures in force at year end 2000, plus notification in first half of 2001.) Since all pre-WTO measures required re-evaluation through the new 'sunset' mechanism of Article 11.3, this count is a reasonable proxy for measures imposed during this period. This tabulation, and all the analysis in this article, reflect formal requests for consultations filed with the WTO during the period 1995 through 30 September 2002. Multiple requests relating to the same underlying measure are counted once.

The results are rather stark. Of the 1173 anti-dumping measures in force, only 37 of those measures have triggered even the modest initial step of a request for consultations. Of all these WTO consultations on anti-dumping measures, only 13 of these disputes have gone to final panel decisions.[3] Of

[3] *Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico*, ('*Cement*'), WT/DS60 and WT/DS156/R, (24 Oct. 2000); *United States – Anti-Dumping Duty on Dynamic Random*

these 13 disputes, three have involved anti-dumping laws as such,[4] and the remaining have involved actual anti-dumping measures. These 13 disputes represent a fraction of total complaints and an even smaller fraction of new anti-dumping duty measures. With respect to these other requests for consultations, Table 2 provides the complete breakdown of these 37 requests for consultations.

Table 2. Disposition of WTO Complaints about AD Measures

Outcome	Frequency
Panel Decisions	13
Settled	4
Pending Panel	5
Inactive	15

As of 30 September 2002, at most five more of these cases were either pending or likely to continue to a panel.[5] Many cases never move forward. Four cases settled.[6] The remaining 15 cases remain inactive – and 14 of these

Access Memory Semiconductors ('DRAMS') of a Megabit or Above from Korea, WT/DS99/R, (29 Jan. 1999); *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup ('High Fructose Corn Syrup' or 'HFCS') from the United States*, WT/DS100 and WT/DS132/R, (28 Jan. 2000); *United States – Anti-Dumping Act of 1916 ('1916 Act')*, WT/DS136/R and WT/DS162/R, (31 March 2000); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel and Strip from Korea ('Stainless Steel')*, WT/DS179/R, (22 Dec. 2000); *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, ('Bed Linen')*, WT/DS141/R, (30 Oct. 2000); *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron and Non-Alloy Steel and H-Beams from Poland ('Structural Steel')*, WT/DS122/R, (28 Sep. 2000); *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan ('Hot-Rolled Steel')*, WT/DS184/R (28 Feb. 2001); *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy ('Ceramic Tiles')*, WT/DS189/R (28 Sep. 2001); *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India, ('Steel Plate')*, WT/DS206/R (28 June 2002); *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey ('Rebar')*, WT/DS211/R (8 Aug. 2002); *United States – Section 129 (c)(i) of the Uruguay Round Agreements Act, ('Section 129')*, WT/DS221/R (15 July 2002); *United States – Continued Dumping and Subsidy Offset Act of 2000 ('Byrd Amendment')*, WT/DS234/R (16 Sep. 2002). For this tabulation, I have treated multiple proceedings involving the same underlying measure as a single panel decision, even if there may have been more than one decision.

[4] *1916 Act*, WT/DS136 and WT/DS162; *Section 129*, WT/DS221; and *Byrd Amendment*, WT/DS217 and WT/DS234.

[5] *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fitting from Brazil*, WT/DS219; *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241; *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, WT/DS244; *United States – Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany*, WT/DS262; and *United States – Final AD Measure on Softwood Lumber*, WT/DS264.

[6] *Venezuela – Anti-Dumping Duty Investigation Regarding Certain Oil Country Tubular Goods from Mexico*, WT/DS23 (Venezuela terminated the AD order); *United States – Anti-Dumping Investigation Regarding Fresh or Chilled Tomatoes from Mexico*, WT/DS49 (US authorities settled case); *United States – Imposition of Anti-Dumping Duties on Imported Color Television Receivers from Korea*, WT/DS89 (US

15 cases have been inactive for more than a year, sometimes several years. Even if we consider all panel decisions and active panels, only 18 out of 36 requests for consultations – only half – result in any formal action being taken by the WTO dispute settlement system. Taken in context, it is hard to say that there has been a flood of WTO litigation about anti-dumping measures.[7]

II. DISPUTES IN DETAIL: ANALYSIS OF WTO DECISIONS

These litigated cases give us a basis to assess how panels have been enforcing international obligations under the Anti-Dumping Agreement. Although the number of decided cases still remains too small to undertake sophisticated quantitative analysis, these cases do provide the basis for interesting descriptive and qualitative analysis. Specifically, we can address the frequency with which: (1) broad claims have been upheld, (2) losing parties bother to appeal findings of inconsistencies, and (3) more detailed individual claims have been upheld before the Appellate Body.

We can then isolate and consider more closely those relatively few instances where both a panel and the Appellate Body agreed that a national authority had acted inconsistently with its WTO obligations. Are there many such examples? More importantly, do these findings of WTO inconsistency represent defensible interpretations of the Anti-Dumping Agreement, or overreaching in violation of the standard of review in Article 17.6?

A fair assessment of the WTO record requires such a comprehensive approach. It is easy to isolate a few carefully selected examples to argue that panels and the Appellate Body have gone too far. Given enough decisions, there are bound to be some 'close calls' about which reasonable minds might differ. The more important question, however, is whether the evidence shows a systemic problem. As the analysis below demonstrates, the overall record shows moderation, not overreaching.

A. Going beyond mere win–lose: assessing the success rate of individual claims

At the outset, one must keep in mind the self-selection bias at work. The vast majority of anti-dumping measures are never challenged at all. Countries bringing WTO cases do not do so indiscriminately. The time, effort, and cost

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terminated AD order during sunset case); and *Australia – Anti-Dumping Measures on Imports of Coated Woodfree Paper Sheets from Switzerland*, WT/DS119 (mutually agreed solution). In addition, in *DRAMs*, WT/DS99, although the original dispute went to a panel, an Article 21.5 panel settled when the US authorities agreed to terminate the underlying AD order after the petitioner withdrew continued support for the order.

[7] It is interesting to note that although the United States has become a leading target of anti-dumping measures, the political sensitivity of attacking such measures seems to have led the United States to pull its punches. The United States has challenged only one anti-dumping measure – that measure imposed by Mexico against *High Fructose Corn Syrup*.

of bringing the case – all combined with the embarrassment factor associated with losing a case – means that countries only bring those WTO challenges they believe they can win. Countries may file a request for consultations to make a political point. Since pursuing a panel requires more, it is not surprising that more than half of those 37 measures triggering consultations never even made it to a panel. Cases go to a panel because legal experts have singled them out as having the *best* possible chance of success. Thus the 13 litigated cases represent those cases that legal experts believed were the best cases for demonstrating WTO inconsistencies (Table 3).

So what happens in this narrowly self-selected sample of strong cases? Table 3 breaks down the outcome *by claim* within the case. This analysis reflects the panels' own categorization of discrete 'claims' when presenting the panel's findings, and excludes those claims not addressed by the panel.[8]

Table 3. Outcome of WTO Challenges to Anti-Dumping Measures: Findings of Inconsistencies at the Panel Stage

Case	Complaining Country	Target Country	Accepted–Rejected
Cement	Mexico	Guatemala	16–1
DRAMs	Korea	US	2–9
HFCS	US	Mexico	8–4
1916 Act	EC, Japan	US	10–0
Stainless Steel	Korea	US	7–7
Bed Linen	India	EC	4–6
Structural Steel	Poland	Thailand	6–4
Hot-Rolled Steel	Japan	US	3–4
Ceramic Tiles	EC	Argentina	4–0
Steel Plate	India	US	1–3
Section 129	Canada	US	0–9
Rebar	Turkey	Egypt	2–19
Byrd Amendment	EC, Others	US	6–3
			69–69

Contrary to the rhetoric that anti-dumping authorities always lose, a different and more complex picture emerges. Even in these self-selected strong

[8] Each separate provision raised and addressed is treated as a separate claim. Although any such system of classification will be somewhat subjective, these breakdowns apply the following guidelines. If the panel identifies separate claims for the same provision, they were separately counted. For *Guatemala – Cement*, this analysis reflects WT/DS156, and not WT/DS60 – the panel decision invalidated on jurisdictional grounds by the Appellate Body. For most cases, the summary of findings at the end of the panel report sets forth individual claims made. For *DRAMs*, we had to review the body of the decision for a summary of rejected claims. For *1916 Act*, we counted claims raised in either the EC Challenge (WT/DS136) or the Japan challenge (WT/DS162). This analysis also reflects the outcome of the original panel proceedings, not the Article 21.5 proceedings that have been brought for several of these disputes. This analysis also does not include parallel claims under the SCM Agreement.

cases, panels have rejected many individual claims. It is true that in 12 out of 13 cases, the panel found at least some WTO inconsistency; but overall, only 69 out of 138 claims prevailed, or 50 percent. If we exclude the *Guatemala Cement* case – widely recognized as *sui generis*, since the Guatemalan authorities had done such a bad job on so many issues – the proportion of successful claims of WTO inconsistencies drops to about 44 percent. The overall success rate of those cases challenging US anti-dumping measures is about the same: 29 out of 61 claims prevailed, or about 47 percent.

B. Conceding the loss: challenging findings of WTO inconsistency

In WTO disputes, the panel decision reflects only the first level of consideration. If one of the losing parties feels the panel decision is legally flawed, the panel decision can be appealed to the Appellate Body. This second level of review, to guard against legal error by panels, was an important part of the overall package of changes brought to the dispute settlement system by the Uruguay Round Agreements. If a losing party believes the panel made the wrong decision, or that the panel improperly applied the Article 17.6 standard of review, the losing party can appeal. The target country has no choice about the claims brought to the panel; but the target country has a major say in whether those claims (if successful) are then brought before the Appellate Body.

Table 4 shows that with respect to WTO challenges to anti-dumping measures, half of the time the losing party does not even appeal the loss.

Of the 6 out of 13 panel decisions that were appealed, the parties sometimes narrowed the issues being disputed. In three of the cases, once one party appealed particular issues, the other party cross-appealed other issues. Table 5 provides a breakdown of the number of claims being brought to the Appellate Body.[9]

The decision to appeal reflects the losing party's own assessment of the strength of the legal claim, and the significance of the loss. If the losing party does not even bother to appeal, one can reasonably assume either that the losing party recognizes a WTO problem with its action, or that the WTO inconsistency can be easily changed. It is hard to be particularly concerned about these issues.

This reality is particularly important when assessing the US losses in the WTO. The United States has been the target of six reported panel decisions: *DRAMs*, *1916 Act*, *Stainless Steel*, *Hot-Rolled Steel*, *Steel Plate*, *Section 129*, and *Byrd Amendment*. Yet the United States has appealed only three of the five adverse decisions: *1916 Act*, *Hot-Rolled Steel*, and *Byrd Amendment*. Why? In

[9] These breakdowns are somewhat subjective. We used the Appellate Body findings as the guide for the number of issues. In some instances, the Appellate Body either merged or distinguished issues from the panel stage.

Table 4. Outcome of WTO Challenges to Anti-Dumping Measures: Decisions to Appeal Adverse Panel Decisions[a] (1996–2001)

Case	Complaining Country	Target Country	Appealed?
Cement	Mexico	Guatemala	no
DRAMs	Korea	US	no
HFCS	US	Mexico	yes
1916 Act	EC, Japan	US	yes
Stainless Steel	Korea	US	no
Bed Linen	India	EC	yes
Structural Steel	Poland	Thailand	yes
Hot-Rolled Steel	Japan	US	yes
Ceramic Tiles	EC	Argentina	no
Steel Plate	India	US	no
Section 129	Canada	US	no
Rebar	Turkey	Egypt	no
Byrd Amendment	EC, Others	US	yes

[a]In *Cement*, the initial panel decision was appealed, but was decided on jurisdictional grounds and thus did not address the merits of the Anti-Dumping Agreement; the subsequent panel decision was never appealed. In *HFCS*, the initial panel decision was not appealed, but the subsequent Article 21.5 panel decision that addressed substantially the same issues was appealed.

Table 5. Appeals of Panel Determinations on Anti-dumping Duty Measures before the Appellate Body

Case	Total Issues Before the Panel	Issues Appealed and Ruled on By AB	Outcome of Appeal
HFCS	12	5 (Mexico)	upheld all 5 Panel determinations
1916 Act	10	6 (US) 1 (EC and Japan)	upheld all 6 of the Panel's determinations, declined to rule on EC and Japan claim
Bed Linen	10	1 (EC) 2 (India)	upheld one Panel finding, reversed 2 Panel findings
Structural Steel	10	6 (Thai)	upheld 4 Panel findings, reversed 2 Panel findings
Hot-Rolled Steel	7	3 (US) 4 (Japan)	upheld 5 Panel findings, reversed 2 Panel findings
Byrd Amendment	9	6 (US)	Uphold 3 Panel findings, reversed 3 Panel findings

Section 129, the United States prevailed on *all* issues, and thus did not need to appeal. In both *DRAMs* and *Stainless Steel*, the United States prevailed on many issues – 16 out of the 25 claims raised – and felt that it could easily adapt its anti-dumping measures with respect to the other issues. The United States appealed only those three cases where the panel decision required some change to a US statute. It is hard to see such cases that are not even appealed as examples of WTO 'overreaching'. If anyone is going to complain about panels exceeding their bounds, if there is a sound legal basis to do so, it will be the US authorities.

It is also worth nothing that of these three US appeals, only one involves a traditional anti-dumping measure. The other two – *1916 Act*, and *Byrd Amendment* – both involved rather unusual statutory schemes unique to the US anti-dumping system. Even the third case – *Hot-Rolled Steel* – involved a statutory issue, since the Panel and Appellate Body had found the US statute governing the determination of the 'all others rate'[10] to be WTO inconsistent. Thus, the US approach has been to appeal those cases that require a change to a statute, and to work with the Panel decision in those cases that do not require a change to a statute. This judgment probably reflects US political realities: USTR does not want to go to Congress asking for changes to the statute unless it absolutely must do so.

Beyond this US determination to fight changes to its statutes, the decisions to appeal these three cases demonstrate another important point: traditional US anti-dumping measures are under much less attack than one might think. Of the three traditional anti-dumping measures challenged in the WTO – *DRAMs*, *Hot-Rolled Steel*, and *Steel Plate* – the United States appealed only one of these three losses. In both *DRAMs* and *Steel Plate*, the impact of the WTO loss was so modest that the United States did not even feel it necessary to appeal the decisions.

C. Parsing the details: assessing individual Article 2 and Article 3 claims

1. Analysis of Article 2 claims

This preceding summary provides an overall perspective, but we need to dig deeper to assess what panels have been doing. Article 2 of the Anti-Dumping Agreement – setting the rules for dumping margins – has been one of the most contentious articles of the entire agreement – both during the Uruguay Round negotiations and during the subsequent WTO disputes. Article 2 thus provides a useful case study for more careful assessment of WTO review of individual claims.

(a) *The first cut: how many violations?* As summarized in Annex 1 the various

[10] This statutory provision governs how to determine anti-dumping or countervailing duty margins for those companies not individually investigated by the authorities.

panel decisions have explicitly discussed 21 distinct claims under Article 2.[11] Of these claims, the panel agreed only nine out of 21 times – fewer than half of the claims. The losing party appealed only five out of these 21 claims. In two instances, the finding of WTO inconsistency was reversed;[12] in one instance, a panel finding of WTO consistency was reversed,[13] thus creating a new inconsistency. The net effect is that of the 21 claims brought formally to the WTO dispute settlement system, only eight claims ended up surviving as final findings of WTO inconsistencies.

(b) *The second cut: what kind of violations?* These eight findings shed useful light on WTO decision-making. Most of the claims involved issues of legal interpretation. Even under the special standard of review of Article 17.6, however, it is hard to defend certain of these particular interpretations by national authorities as being 'permissible' in any sense. Three interpretations in particular seemed dubious:

- identifying a physical difference, but then ignoring the *express* requirement in Article 2.4 to make some adjustment for that difference (*Ceramic Tiles*);
- reading the language 'terms of sale' in Article 2.4 as including factors such as bankruptcy, that were *not even known* at the time of the sale in question (*Stainless Steel*); and
- expanding the concept of cost 'before' resale in Article 2.4 to include even those costs that occur *after* resale (*Stainless Steel*).

These legal issues seemed obvious to the panels, and the losing party must have agreed. In none of these three instances did the losing party even bother with an appeal. The two instances in *Stainless Steel* involved decisions by the United States not to appeal.

Of the eight findings of inconsistencies, only two involved fundamentally factual issues. In *Stainless Steel*, the panel allowed the use of multiple periods for exchange rates in principle, but then found that in this particular case the United States had violated its treaty obligations. The panel quite painstakingly analysed the factual record of the two administrative decisions before the panel, and found that the US authorities simply had not justified their decision in one of the two cases being reviewed. In the other case, the panel upheld the US findings. Also in *Stainless Steel*, the panel upheld the concept

[11] Developing these categories is inherently judgmental, but the annexes provide a completely transparent summary of my analysis. In this breakdown, I have identified those discrete issues that received sustained discussion by the panel in its determination. In most instances, these issues were distinguished by the use of separate headings. Although others might disagree with some of my categories, those disagreements would be at the margin, and I do not believe would affect any of my conclusions developed here.

[12] *Hot-Rolled Steel*, WT/DS184 (use of downstream sales by affiliates); *Bed Linen*, WT/DS141 (can limit calculation of profit to above cost sales).

[13] *Bed Linen*, WT/DS141 (cannot use certain profit method against single company).

of using multiple averages in some circumstances, but found the United States had not adequately justified that decision in this particular case. For both of these issues if the US authorities felt the panel had gone too far, they presumably would have appealed these decisions. But the United States did not appeal.

Thus in five out of these eight findings of WTO inconsistency, the losing party did not even bother to appeal the panel finding. Interestingly, four out of five of these decisions not to appeal were by the US authorities – the country that has most vocally argued that Article 17.6 requires substantial deference.

Only three of these eight claims therefore represent instances where the losing party even bothered to appeal. Consider these instances more closely. All three of these instances involved issues of legal interpretation – did the national authority have a 'permissible' interpretation of the treaty obligations?

One of these three issues seems quite straightforward, even though it was appealed. Under Article 2.2.2, can the rule of subprovision (ii) apply to a single company? Although the panel in *Bed Linen* had interpreted the rule broadly, and thus did not find a WTO violation, the complaining party disagreed and filed an appeal. Based on a straightforward textual reading, the Appellate Body reversed the panel finding, and found a WTO inconsistency. The Appellate Body found that the use of the term 'weighted average' and the plural terms 'exporters and producers' meant there must be more than one company to apply this methodology.[14]

The final two instances require going somewhat beyond simple text. On the US 'arms length' test, the Panel and Appellate Body in *Hot-Rolled Steel* had to give meaning to the concept of 'ordinary course of trade' in Article 2.1. The US practice at issue was the so-called '99.5% test' for measuring the arms-length nature of affiliated party transactions in the home market. Under standard Commerce Department practice, if the average sale prices to an affiliated company are not 99.5 percent or higher than the average prices to unaffiliated parties, then the Commerce Department rejects those prices as being unreliable and outside the 'ordinary course of trade'. The test is one-sided: low prices in the home market that would reduce the dumping margin are rejected, but high prices that would increase the dumping margin are included no matter how high. Neither the Panel nor the Appellate Body was prepared to endorse such a one-sided test. Rather, they required that authorities use an even-handed test. In this instance, the particular US methodology at issue was so obviously designed to increase dumping margins that it simply did not even pass a 'smile test'. The Appellate Body did not consider such a biased interpretation as 'permissible'.[15] In my view, this issue required

[14] *Bed Linen,* WT/DS141/AB/R, at paras 74–76.

[15] *Hot-Rolled Steel,* WT/DS184/AB/R, at paras 140–57.

going beyond the literal text of Article 2, but should not be considered a close call.

The remaining issue is 'zeroing' – the controversial practice of counting only positive dumping margins and treating any negative (and thus offsetting) margins as 'zero'. The effect of this practice is to increase dumping margins in many cases. Of all the Article 2 issues, this issue from *Bed Linen* is the toughest to assess, and has triggered a lot of criticism. The text of Article 2.4.2 was ambiguous. But ambiguity in the text of a treaty provision alone does not resolve the issue, and makes alternative interpretations equally 'permissible'. The Appellate Body correctly decided to look at the text, context, object, and purpose of Article 2.4.2 before deciding on its interpretation.

In particular, the Appellate Body discussed the following key rationales for its decision. First, the Appellate Body noted that determinations under Article 2.4.2 must be made for the product under investigation, not for various subcategories of products as the EU had done. Second, the Appellate Body noted that Article 2.4.2 required the authorities to consider 'all comparable' transactions, and that the term 'all' must be given meaning. Third, although the EU had argued that the term 'comparable' justified its separation of product categories, the Appellate Body found that the EU had essentially concluded that all bed linen was 'comparable' by defining it as a single like product for purposes of the investigation.[16] The Appellate Body thus adopted an interpretation based on the text of Article 2.4.2, but grounded in the context of that provision in Article 2 as a whole.

Many believe the Appellate Body in fact reached the correct conclusion about a treaty provision that addressed the particular issue indirectly rather than directly. I agree. Even if one disagrees with this assessment of the Appellate Body decision on zeroing, however, this decision means that in one instance out of 21 claims under Article 2, the WTO system may have overreached. This record as a whole reflects a remarkable amount of restraint.

2. Analysis of the Article 3 claims

We can extend this analysis to the other key substantive provision of the Anti-Dumping Agreement – Article 3 dealing with the determination of 'injury'. Other than Article 2, Article 3 has been one of the most contentious articles of the entire agreement.

(a) *The first cut: how many violations?* Annex 2 summarizes the various disputes that have raised 23 distinct claims under Article 3. Of these claims, the panel agreed only 12 out of 23 times – about half of the claims. The losing party appealed only six out of these 23 claims. In one instance, where a panel tried to find implicit support for procedural due process, the finding of WTO

[16] *Bed Linen*, WT/DS141/AB/R, at paras 52–62.

inconsistency was reversed.[17] In two instances, a panel finding of WTO consistency was reversed (at least in part), thus creating a new inconsistency.[18] The net effect is that of the 23 claims, only 13 ended up surviving as findings of WTO inconsistencies.

(b) *The second cut: what kind of violations?* But what do these 13 findings really represent? In nine instances, the losing party did not even bother to appeal the panel finding. Not surprisingly, these nine instances represent pretty clear-cut cases of WTO inconsistencies:

- Assessing injury base exclusively on a segment of the industry, rather than the industry as a whole as required by Articles 3 and 4; (*Rebar*)
- Determining there were adverse price effects from imports within the meaning of Article 3.2, but basing that determination on material typographical errors; (*Structural Steel*)
- Failing to consider all the factors under Article 3.4, even though the text uses the word 'shall';[19]
- Failing to consider the Article 3.4 factors in the context of a threat determination under Article 3.7; (*High Fructose Corn Syrup*)
- Including in the injury determination companies that were outside the scope of the industry defined by the authorities; (*Bed Linen*)
- Never explaining away positive trends in some of the mandatory factors set forth in Article 3.4, which undermined the conclusion of material injury; (*Structural Steel*)
- Refusing to assess imports by the petitioner itself when assessing the causal link for Article 3.5; (*Cement*)
- Resting the conclusion of imports causing injury required by Article 3.5 on factually flawed findings under Article 3.2 on price effects and under Article 3.4 on injury. (*Structural Steel*)

These obvious inconsistencies included five claims based largely on facts, and four claims based largely on law. But they all shared the common feature of the authority making pretty obvious mistakes. Four of these eight findings simply repeated the same conclusion: that Article 3.4 requires explicit consideration of all the specifically enumerated factors, whether in context of current material injury or threat of material injury. Of the four factually based claims, all four were directed at developing countries – Mexico (*High Fructose Corn Syrup*) and Thailand (*Structural Shapes*). These nine claims all also share the

[17] In *Structural Steel*, WT/DS122, the panel tried to read Article 3.1 broadly to require authorities to base their decisions on only those facts available to all the parties during the underlying proceeding. The Appellate Body was unwilling to read this notion of fundamental fairness into the treaty text.

[18] Both instances arose in *Hot-Rolled Steel*, WT/DS184.

[19] This issue counts twice, since the same issue arose in *Cement* and *Bed Linen*, but there was no appeal for this issue in either case; in *Structural Steel*, there was an appeal on this same issue.

feature of being so obviously wrong that the losing party did not bother to appeal.

So we are left with only four instances in which the WTO system found an inconsistency, and the losing party felt strongly enough about the issue even to bother with an appeal. These four represent two instances of the panel and Appellate Body agreeing, and two instances of the Appellate Body finding an inconsistency that the panel did not.

Even under the special standard of review of Article 17.6, it is hard to defend some of these particular interpretations by national authorities:

- An authority refused to consider all of the specific factors enumerated in Article 3.4, even though the text clearly indicates that these factors 'shall' be considered. (*Structural Steel*)
- An authority continued to allege a fear that imports will increase and cause a threat of future injury, without ever adequately explaining away market conditions that limit strictly the ability of imports to surge. (*High Fructose Corn Syrup*)[20]

So we are left with two other issues. Ironically, both of these issues arose in the dispute over *Hot-Rolled Steel,* and for both of these issues the panel had not found a violation, but the Appellate Body agreed with Japan's appeal, and reversed the panel's finding to create a WTO inconsistency. Both of these issues require closer scrutiny.

One issue was the legal significance of the non-attribution language in Article 3.5. The panel had agreed with the United States that Article 3.5 did not require a careful effort to ensure that imports were not being blamed for injury actually caused by other factors, relying largely on the textual interpretation of an older GATT panel, *Atlantic Salmon*.[21] The Appellate Body disagreed, and concluded that the language 'must not be attributed' means what it says.

In particular, the Appellate Body stressed the following points. First, that the authority could ensure that it had not 'attributed' other causes only if the authority had first separated and distinguished the other causes. Second, although the Panel had found persuasive the *Atlantic Salmon* interpretation that authorities need not 'isolate' other causes, the Appellate Body disagreed, and found that the non-attribution language must require an administering authority to separate and distinguish to have any meaning. Third, the Appellate Body found that its prior interpretations analogous of language in Article 4.2(b) of the Safeguards Agreement reinforced this interpretation.[22]

[20] This appeal was not of the original panel decision, but rather of the subsequent Article 21.5 panel decision. Mexico apparently decided that instead of an initial appeal, it should instead try to do a better job of justifying its decision. When the panel still found an inconsistency, then Mexico had no choice but to appeal that finding.

[21] *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, BISD 41S/Vol I/229, adopted 27 April 1994.

[22] *Hot-Rolled Steel*, WT/DS184/AB/R, at paras 223–33.

Interestingly, the Appellate Body specifically declined to go beyond this narrow issue of legal interpretation. Since the factual record was unclear, the Appellate Body declined to complete the analysis of whether the decision by the US authorities in fact complied with the correct legal standard.[23] That issue remains to be seen in how the United States implements the WTO decision in this case, and any subsequent litigation on that point.

The final issue involved the special provision of US law known as the 'captive production' provision. This provision requires the US authorities in certain circumstances to 'focus primarily' on the merchant market sales of product (like hot-rolled steel sold to end users), and to de-emphasize the captive market sales of product (like hot-rolled steel consumed internally by the same producer to make downstream products like cold rolled and galvanized steel). The panel had upheld both the law on its face, and the law as applied in that case. The Appellate Body agreed that the law on its face was WTO consistent, largely because the law left enough discretion for the US authorities to comply with WTO obligations in theory.

The Appellate Body found in this case, however, that the US authorities had gone too far, and undertaken too one-sided an analysis. In particular, the Appellate Body found that the requirement in Article 3.1 to make an 'objective examination' meant that authorities could not examine different parts of the domestic industry on a selective basis. The Appellate Body stressed that the USITC had not provided any analysis of the captive segment, and had analysed only the overall market and the merchant market segment. Rather, both the captive segment and the merchant market segment should have been examined in a similar manner.[24]

Although both of these determinations generated a lot of political attention in Washington, DC, neither determination represents any overreaching. The decision on captive production simply reflected the degree to which the USITC had narrowed its focus in a particular case to one segment of the industry to the exclusion of the other segment. The decision on non-attribution reflected Appellate Body correction of a panel decision that too quickly deferred to an earlier GATT panel decision, and did not make any serious effort to address a consistent line of Appellate Body decisions on what non-attribution requires in trade remedy cases. Both decisions were in fact quite narrow, and neither decision seriously constrains the ability of authorities to impose anti-dumping measures when those measures are justified.

But as with the single arguable 'close call' under Article 2, these two arguable 'close calls' are limited in context. A far greater number of Article 3 claims were raised and resolved in ways that all parties could accept, and without political controversy.

[23] Ibid, at paras 234–36.

[24] Ibid, at paras 210–15.

3. Summary assessment

In very few instances involving Article 2 and Article 3 can one credibly argue that WTO panels have somehow overreached. Table 6 summarizes the findings.

Table 6. Overall Assessment of Findings of WTO Inconsistency for Article 2 and Article 3 Claims

Outcome	Frequency
Claims of WTO Inconsistency	44
Findings of WTO Inconsistency	21
Inconsistencies Subject to Appellate Review	7
Arguably 'Close Calls'	3

In my view, these three instances of arguable 'close calls' are not that close at all. *Bed Linen* reflects a proper interpretation of Article 2.4.2, particularly in the context of Article 2.1. *Hot-Rolled Steel* correctly recognized that in a particular case, the USITC analysis of market segments was too imbalanced to be fair and objective. *Hot-Rolled Steel* also correctly recognized that the old *Atlantic Salmon* standard for non-attribution had been replaced by the new language of Article 3.5, and that authorities had a serious obligation to separate and distinguish alternative causes. In all three cases, the Appellate Body had textual and contextual bases for its interpretation.

The real problem in all these cases is that the authorities had developed a certain way of doing the analysis, and fiercely resisted any change to 'business as usual'. The new legal text in the Uruguay Round, however, would inevitably call for changes. Sometimes countries voluntarily adjust their laws and practices. When countries stubbornly cling to old laws and methods, the WTO dispute settlement system has an obligation to make such findings and urge countries to bring their laws and practices into compliance.

Moreover, even for those WTO critics who disagree with my analysis of these cases, and consider them examples of over reading, it is hard to see how these three instances of arguable 'close calls' could be considered pervasive overreaching. Rather, the 23 instances in which the WTO did not find any inconsistency, and the 14 instances in which the finding of an inconsistency did not even trigger any appeal, demonstrate quite convincingly that the WTO dispute settlement system overall has been quite restrained in how it has handled anti-dumping measures.

Furthermore, although these three findings will have some impact on future cases, the impact will not be as much as the critics have suggested. The decision on 'zeroing' is often labeled a major weakening of the anti-dumping law. 'Zeroing' only matters, however, in those cases where there are sales transactions with negative dumping margins that can be affected by the policy. In some cases, particularly administrative reviews, the policy matters – although the US argues that the *Bed Linen* case does not apply to reviews. In

investigations, where dumping margins tend to be higher, the impact is far lower, resulting perhaps in slightly lower margins – hardly a 'gutting' of US anti-dumping law.[25] The decision on the captive production provisions is quite narrow. This provision has rarely been invoked, and usually only with respect to anti-dumping investigations of steel. Moreover, in many of those steel cases, the USITC has made clear that it would have decided the case the same way with or without the captive production provision. The non-attribution rulings admittedly have a bigger impact, at least in those cases where other factors play a role in an industry's weakened performance. This requirement of non-attribution, however, does not mean that imports cannot still be shown to be a material or substantial cause of injury. The Appellate Body's ruling simply requires the authorities to be more careful and deliberate in making determinations, and to apply the correct legal standard.

Thus, WTO critics have exaggerated both the frequency and severity of WTO decisions on anti-dumping measures. Anti-dumping measures remain an often-used and effective policy for protecting domestic industries.

III. DISPUTES OVER DEFERENCE: THE ROLE OF ARTICLE 17.6

Much of the criticism of WTO panel decisions flows from a mistaken view of Article 17.6 of the Anti-Dumping Agreement. Many view this special standard of review as requiring substantial deference to the national authorities – so much deference that decisions by national authorities should rarely, if ever, be overturned. This simplistic view, however, does not do justice to the actual text and operation of Article 17.6.

The text of Article 17.6 sets forth some very specific instructions. The provision provides:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of these permissible interpretations.

[25] A recent paper makes an initial effort at quantification. See Brink Lindsey and Dan Ikenson, 'AD 101: The Devilish Details of "Unfair Trade" Law', Cato Institute Trade Policy Analysis, No. 20 (26 Nov 2002). Table 4 of the paper provides a summary of how much zeroing would affect the dumping margins in a set of 14 original investigations and 4 administrative reviews for which the authors had access to the complete proprietary databases. To protect confidentiality, the authors show only the percentage change in dumping margins.

In *Hot-Rolled Steel*, the Appellate Body had occasion to comment at length about just what this standard of review meant.[26] Not surprisingly, the Appellate Body parsed the precise language carefully. With respect to Article 17.6(i), and review of factual issues, the Appellate Body noted:

> Under Article 17.6(i), the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts. To that end, Article 17.6(i) requires panels to make an 'assessment of the facts'. The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an 'objective assessment of the facts'. Thus the text of both provisions requires panels to 'assess' the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts.[27]

Thus, the Appellate Body reads 'assessment' as requiring active review of the facts, not passive acceptance of whatever the authorities might have found. This interpretation is a perfectly appropriate understanding of the plain meaning of 'assessment'.

In addition, the Appellate Body noted the specific perspective a panel should bring to this active review of the facts:

> Article 17.6(i) of the *Anti-Dumping Agreement* also states that the panel is to determine, first, whether the investigating authorities' 'establishment of the facts was proper' and, second, whether the authorities' 'evaluation of those facts was unbiased and objective' (emphasis added). Although the test of Article 17.6(i) is couched in terms of an obligation on panels – panels 'shall' make these determinations – the provision, at the same time, in effect defines when investigating authorities can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their 'establishment' and 'evaluation' of the relevant facts.[28]

Both the term 'unbiased' and the term 'objective' reinforce the idea that panels and the Appellate Body must undertake active review of the facts, not passive acceptance, or extreme deference.

It is significant that the second sentence of Article 17.6(i) is explicitly conditional. It is only if the facts are 'proper', 'unbiased', and 'objective' that the obligation to defer to reasonable conclusions comes into play. Thus the text makes clear that any deference only applies once these important due process safeguards have been met.

With respect to Article 17.6(ii), and review of legal issues, the Appellate Body noted the carefully structured interrelationship of obligations:

> This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give

[26] This discussion of the meaning of Article 17.6 is the most sustained, and pulled together earlier comments. WTO Appellate Body Report, *Guatemala – Cement*, WT/DS60/AB/R, at para 65 (2 Nov. 1998); WTO Appellate Body Report, *European Communities – Bed Linen*, WT/DS136/AB/R, at para 63–65 (12 March 2001); and *Thailand – Steel*, WT/DS122/AB/R at para 127.

[27] *Hot-Rolled Steel*, WT/DS184/AB/R, at para 55.

[28] Ibid, at para 56.

> rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that convention, would both be '*permissible interpretations*'. In that, even a measure is deemed to be in conformity with the *Anti-Dumping Agreement* if it rests upon one of those permissible interpretations.[29]

The Appellate Body thus underscored the importance of an interpretation rising to the level of 'permissible'. Article 17.6(ii) does not call for deference to any possible interpretation. Only after applying the interpretative rules of the Vienna Convention – rules designed to encourage a single permissible interpretation of treaties – does the possibility of deference arise.

Of the rules under the Vienna Convention, perhaps the most important is the rule to interpret treaty text in context. Article 31 of the Vienna Convention requires treaties to be interpreted based on the 'ordinary meaning' of the terms, but 'in their context and in light of its object and purpose'. This interpretative rule is critical. WTO critics often assume that if the treaty text does not explicitly rule out some approach or methodology, then the national authorities have discretion to use that approach or methodology. Article 31 of the Vienna Convention, however, requires the interpreter to go beyond the explicit text. Treaty language that might seem ambiguous when viewed in isolation often becomes much more clear when viewed in context. This obligation to look at treaty provisions in context, therefore, is a critical feature of WTO dispute settlement.

With respect to both factual and legal issues, Article 17.6 thus provides much less deference than one might initially think. The provision sets forth a rather careful set of tasks for panels when reviewing decisions by national authorities. Critics say that panels and the Appellate Body have essentially ignored the special standard of review in Article 17.6. But a review of the actual cases demonstrates that this criticism is unfair, and that to the contrary, panels and the Appellate Body have been performing precisely the tasks assigned by Article 17.6.

At the outset, one should remember the bigger picture. First, recall that in 23 out of 44 claims involving Article 2 or Article 3, the WTO dispute settlement system *agreed* with the national authorities. Given that these issues were pre-screened as being strong claims, this fact alone reflects a substantial amount of deference. Second, recall that in 14 out of 21 findings of WTO inconsistency, the losing party did not even bother to appeal. Although there may be a variety of reasons not to pursue an appeal, in this early stage of the WTO's development, one can safely assume that any country seriously disagreeing with a panel decision would pursue an appeal. The decision not to appeal thus represents a clear signal that the complaining country recognized the strength of the argument against its position, and does not see obvious evidence of panel overreaching or erroneous interpretation.

So we are left with only 7 claims out of 21 findings of WTO inconsistency

[29] Ibid, at para 59.

for which there is even a potential issue about possible abuse of the standard of review – in other words, arguably excessive WTO intervention into the domain of the national authorities. Let us consider each of these cases, as summarized in Table 7.

Table 7. Summary of WTO Inconsistencies Reviewed by Appellate Body

Issue	Comments
Hot-Rolled Steel: Is the 99.5% arms length test consistent with the 'ordinary course of trade' for Art 2.1?	Legal issue. Authorities have discretion to interpret 'ordinary course of trade,' but it must be applied in an even-handed way. Must evaluate all sales, not just lower priced sales. USG interpretation too one-sided, and thus not 'permissible' when read in context.
Bed Linen: Can the method of Art. 2.2.2(ii) apply to a single company?	Legal issue. The text uses the plural, which means there must be more than one company. Text did not permit alternative interpretations.
Bed Linen: Is 'zeroing' of dumping margins consistent with Art. 2.4.2?	Legal issue. Since the text uses the word 'all', all the margins – both positive and negative – must be included. Specific language read in context of decision to find 'dumping'.
Hot-Rolled Steel: Is the U.S. captive production provision consistent with Art. 3?	Legal and factual issue. The application in this case was WTO incosistent. The AB found that the USG had not 'objectively' examined both segments of the industry, and concentrated on one segment largely to the exclusion of the other segment.
Structural Steel: Does the authority have discretion not to consider consider certain Art. 3.4 factors?	Legal issue. The text uses 'shall' and thus requires consideration of all the specifically listed factors. Text did not permit alternative interpretations.
Hot-Rolled Steel: Does Art. 3.5 require careful examination of other causes?	A legal finding. The panel inappropriately relied on a prior GATT panel decision, and did not permissibly interpret the Art. 3.5 requirement not to 'attribute' the effect of other causes to imports.
High Fructose: Does the authority have discretion to find the possibility of increased imports for Art. 3.7?	A factual finding. The authority had made no adequate showing of why imports were likely, given the market conditions. USG successfully defended this panel finding before the Applellate Body.

Taken as a group, what do these seven findings tell us about the standard of review? For two issues, the decision simply involved careful reading of the text. The use of the plural in Article 2.2.2(ii) (*Bed Linen*) and the use of 'shall' in Article 3.4 (*Structural Steel*) simply left no other permissible interpretation. For another issue, the Mexican Government rationale for why imports would increase (*High Fructose Corn Syrup*) was simply too weak to pass muster as 'objective' and 'unbiased'. Similarly, the US arms-length text (*Hot-Rolled*

Steel) was too biased to survive WTO scrutiny. In my view, reasonable minds could not really disagree on these findings.

With respect to the arguable 'close calls', the Appellate Body made the hard calls that interpretation sometimes requires. With respect to the 'captive production' provision (*Hot-Rolled Steel*), the US authorities placed so much emphasis on one segment and so little emphasis on the other segment, the Appellate Body could not find that approach to be objective and unbiased. With respect to the requirements of non-attribution for Article 3.5 (*Hot-Rolled Steel*), the Appellate Body found that the only permissible interpretation of 'attributed' is to require some separation and isolation of alternative causes – an interpretation directly at odds with the panel's findings. With respect to these two issues, in my view the Appellate Body had the much better argument. These are close calls, but the Appellate Body made the right decision.

It is unfortunate that these two issues involved the US steel industry. As one of the most vociferous and active users of its national dumping law, the US steel industry accepts no loss without a fight. The WTO system had the misfortune to have to make some hard decisions against an industry accustomed to obtaining and keeping its protection, and willing to attack anyone with the audacity to suggest that perhaps the protection was not justified.

Which leaves just one claim: the issue of 'zeroing' from the *Bed Linen* case. This issue is admittedly the hardest. Although I believe the Appellate Body made the correct decision, this issue provides WTO critics with their best claim that the two alternative interpretations were indeed both 'permissible'. In the end, however, deciding whether an alternative interpretation in fact rises to the level of 'permissible' is the essence of the task entrusted to the Appellate Body. In *Bed Linen*, the Appellate Body found that the balance of the arguments so favored one interpretation as to make the other interpretation impermissible. In particular, the Appellate Body believed that the broader context of Article 2 rendered one interpretation of Article 2.4.2. 'permissible' and the other not.

The more important point, however, is to place this one decision – or these three close calls – into the broader perspective. When considered in the context of 44 distinct claims of WTO inconsistency, to have so few arguably close calls is in fact a striking tribute to how well the system is working. Most issues are being resolved in ways that everyone can accept. For the system to be working so well for the Anti-Dumping Agreement – one of the most detailed and arcane set of WTO obligations – is truly remarkable.

IV. DISPUTES OVER TIME: THE STATUS OF IMPLEMENTATION OF WTO DECISIONS

Let us step back again from the details of specific claims. What have all these panel decisions meant in terms of the continued application of anti-dumping measures and laws about anti-dumping? As Annex 3 sum-

marizes for the 13 disputes to date, the implementation of WTO decisions involving anti-dumping has been spotty at best. In only five instances were the anti-dumping orders eventually terminated or amended to satisfy the parties.[30] These orders, however, ended on average 3.2 years after being imposed. This is a rather long period of time to be subject to improper duties, particularly since WTO remedies are only prospective, and not retroactive.

In three other instances, the anti-dumping orders still stand.[31] Litigation continues, reasonable periods of time continue to run, losing parties make the same decision over again, and force the winning parties to go to an Article 21.5 panel to seek redress. Overall, these orders have continued in force for an average of over three years, and the period only becomes longer and longer. Two other orders – *Steel Plate* and *Rebar* – are too recent to access implementation.

This persistence of certain anti-dumping orders belies the rhetoric of the critics of WTO dispute settlement. The WTO is not stripping away protection for domestic industries. Out of 1173 anti-dumping measures in force, only five have been changed in response to decisions in WTO disputes. Moreover, even when anti-dumping orders have been challenged, the process remains distressingly slow and cumbersome. When authorities decide to drag their feet, the system allows them to drag their feet ever so slowly.

Finally, we have those three disputes that would have required some change in a law. No changes have been implemented. In *Section 129*, the United States prevailed, so no changes were needed. In *1916 Act*, the United States continues to drag its feet – submitting legislation, but taking no steps to push for Congressional action. In *Byrd Amendment*, the United States recently lost several issues on appeal, but all indications suggest a pattern of inaction similar to the *1916 Act*.

CONCLUSIONS

Although this analysis is not exhaustive – it does not cover the other procedural and substantive obligations under the Anti-Dumping Agreement – the analysis demonstrates the pattern that exists in all the various WTO determinations about anti-dumping measures and trade remedies more generally. Few trade remedies are challenged. For those few that are challenged, most issues are straightforward, and produce either a finding of WTO consistency or a finding of WTO inconsistency that the losing party accepts. Some findings of WTO inconsistency are appealed, but many of them are in fact straightforward. The

[30] *Cement*, WT/DS156; *DRAMs*, WT/DS99; *Stainless Steel*, WT/DS179; *Structural Steel*, WT/DS122; *Ceramic Tiles*, WT/DS189.

[31] *HFCS*, WT/DS132; *Bed Linen*, WT/DS141; *Hot-Rolled Steel*, WT/DS104.

appeals often reflect the political need to continue fighting, as opposed to any genuine argument about the legal merits of the claim.

This body of WTO precedent as a whole shows a remarkable amount of restraint. Many critics of the WTO simply do not want US trade remedy actions subject to review by any neutral tribunal applying a meaningful standard of review: not by the WTO, and not by anyone else. They know that such review will call into question many of the anti-dumping orders that provide these narrow domestic producer interests significant commercial benefits, but that lack any legitimate basis in WTO law.

Annex 1. DETAILED ANALYSIS OF ARTICLE 2 CLAIMS

Claim	Nature	Panel	AB	Comment
99.5% 'arms length' test violates 2.1; *Hot-Rolled Steel*	legal	agreed	agreed	US could not defend a one-sided test as even handed.
Use of downstream sales by affiliated party violates 2.1; *Hot-Rolled Steel*	legal	agreed	rejected	
Requesting cost data violates 2.1 and 2.2; *Cement*	factual	rejected	N/A	
Must make interest income offset to cost of production under 2.2; *Rebar*	factual	rejected	N/A	
Ignoring forward pricing study violates 2.2.1.1; *DRAMs*	factual	rejected	N/A	
Choice of profit method violates 2.2.2; *Bed Linen*	legal	rejected	N/A	
2.2.2(i) includes separate reasonability test; *Bed Linen*	legal	rejected	N/A	
Cannot use 2.2.2(ii) against single company; *Bed Linen*	legal	rejected	agreed	Plural means plural; average cannot apply to single company.
Cannot apply 2.2.2(ii) only to above cost sales; *Bed Linen*	legal	agreed	rejected	
2.2.2(ii) includes reasonability test; *Bed Linen*	legal	rejected	N/A	
Cannot define a narrow category for 2.2.2(i); *Structural Steel*	legal	rejected	N/A	
Must adjust for physical difference under 2.4; *Ceramic Tiles*	legal	agreed	N/A	Obvious violation of explicit textual requirement; never appealed.
Unexpected bankruptcy not a difference in terms of sale under 2.4; *Stainless Steel*	legal	agreed	N/A	Textual reading of 'terms of sale'; US never appealed.
Unpaid sale not a cost before resale under 2.4; *Stainless Steel*	legal	agreed	N/A	Cost arose *after* resale; US did not appeal.
Cannot use multiple periods for ex. rates under 2.4; *Stainless Steel*	legal	rejected	N/A	

Annex 1. DETAILED ANALYSIS OF ARTICLE 2 CLAIMS—*Continued*

Claim	Nature	Panel	AB	Comment
Burden of proof in 2.4 applies to requests for cost information; *Rebar*	legal	rejected	N/A	
Unnecessary currency conversion violates 2.4.1; *Stainless Steel*	factual	agreed	N/A	Text said 'requires'; then reached different factual conclusions in *Sheet* and *Plate* cases; US did not appeal.
Cannot use multiple periods for ex. rate under 2.4.1; *Stainless Steel*	legal	rejected	N/A	
Use of multiple averages always violates 2.4.2; *Stainless Steel*	legal	rejected	N/A	
Use of multiple averages in these cases violates 2.4.2; *Stainless Steel*	factual	agreed	N/A	US based decision solely on exchange rates, not the comparability of periods themselves; US never appealed.
Zeroing violates 2.4.2; *Bed Linen*	legal	agreed	agreed	Narrow textual reading of 2.1 and 2.4.2.

Annex 2. Detailed Analysis of Article 3 Claims

Claim	Nature	Panel	AB	Comment
US statute on captive production violates Art. 3 on its face; *Hot-Rolled Steel*	legal	rejected	rejected	
US application of captive production provision violates Art. 3; *Hot-Rolled Steel*	factual	rejected	agreed	AB read scope of appeal broadly
considering only a segment rather than the industry as a whole violates Art. 3; *Rebar*	legal	agreed	N/A	Arts. 3 and 4 require consideration of industry as a whole
violates 3.1 to consider more than imports specifically found to be 'dumped'; *Bed Linen*	legal	rejected	N/A	
violates 3.1 to base decision on facts not discernible from documents provided to parties; *Structural Steel*	legal	agreed	rejected	Panel read Art. 3.1 broadly, but AB rejected
violates 3.2 to consider import volume and pricing data over only one year; *Cement*	factual	rejected	N/A	
authorities in this case improperly found volume effects under 3.2; *Structural Steel*	factual	rejected	N/A	
authorities in this case improperly found price effects under 3.2; *Structural Steel*	factual	agreed	N/A	material typographical errors; never appealed
violates 3.2 not to undertake a specific price undercutting analysis; *Rebar*	factual	rejected	N/A	
violates 3.4 by focusing on two recent years to exclusion of first year; *Hot-Rolled Steel*	factual	rejected	N/A	
violates 3.4 not to consider explicitly all enumerated factors; *Cement*	legal	agreed	N/A	textual analysis of 'shall' in Art. 3.4; never appealed

Annex 2. Detailed Analysis of Article 3 Claims—*Continued*

Claim	Nature	Panel	AB	Comment
violated 3.4 not to consider explicitly all enumerated factors; *Bed Linen*	legal	agreed	N/A	textual analysis of 'shall' in Art. 3.4; never appealed
violated 3.4 not to consider explicitly all enumerated factors; *Structural Steel*	legal	agreed	agreed	narrow textual analysis of 'shall' in Art. 3.4
violates 3.4 to ignore all these factors in a threat case; *High Fructose Corn Syrup*	legal	agreed	N/A	textual analysis of 'shall' in 3.4; never appealed
violates 3.4 to consider companies outside domestic industry defined by authorities; *Bed Linen*	legal	agreed	N/A	legal interpretation of scope of domestic industry; never appealed
violates 3.4 to consider various factors inadequately; *Structural Steel*	factual	agreed	N/A	some factors not considered at all; others had unexplained positive trends; never appealed
violates 3.4 not to consider factors identified by party; *Rebar*	legal	rejected	N/A	
authorities violated 3.5 in this specific case; *Hot-Rolled Steel*	factual	rejected	agreed in part	AB agreed that wrong legal standard applied, but could not complete the analysis
authorities violated 3.5 in this specific case but not considering imports by affiliate of petitioner; *Cement*	factual	agreed	N/A	authorities presented internally inconsistent rationale; never appealed;
authorities violated 3.5 in this specific case; *Structural Steel*	factual	agreed	N/A	really just an extension of the 3.2 and 3.4 violations; never appealed
violates 3.5 not to investigate other causes; *Structural Steel*	legal; factual	rejected	N/A	
violates 3.5 not to consider specific alternative causes identified by party; *Rebar*	factual	rejected	N/A	
violates 3.7 in specific case by not explaining reason for feared import increase; *High Fructose Corn Syrup*	factual	agreed	agreed	USG challenge to Mexican determination; AB review of subsequent 21.5 panel

Annex 3. Status of Implementation of WTO Decisions on Anti-Dumping Measures

Case	Issues	Status
Cement (DS 50, 156)	validity of initiation and subsequent AD measures inconsistent with Arts. 3, 5, 6, and 12.	Initial panel decision voided by AB as lacking jurisdiction. Subsequent panel found multiple violations. In Oct. 2000, Guatemala terminated the AD order, bringing its measure into compliance. By the time it was terminated, the order had been in effect for almost 4 years.
DRAMs (DS 99)	failure to terminate AD order violates Article 11.	US changed the underlying regulation, but still continued the AD order under the new standard. Korea brought an Article 21.5 panel, but dismissed this case on 20 Oct. 2000 when Micron and Hynix worked out a settlement of the case in connection with a pending sunset review. The AD order had continued in effect for an additional 1.5 years beyond the time it should have terminated.
HFCS (DS 101, 132)	threat of injury determination violates Article 3.7	Mexico made a re-determination, again finding threat of injury. US brought Article 21.5 panel, and won at both the Panel and AB. DSB adopted reports on 21 Nov. 2001. Parties still trying to work out solution. As of 30 Sept. 2002, the AD order has been in effect for almost five years.
1916 Act (DS 136, 162)	permissibility of statute authorizing other remedies for dumping	Reasonable period of time expired; legislative repeal pending without any action as of 31 Dec. 2002.
Structural Steel (DS 122)	dumping and injury determinations violate Arts. 2 and 3	Thailand appealed and lost several issues. Thailand adjusted the rationale for the decision, but did not revoke the order. In December 2000, parties agreed on procedural issues to resolve compliance. On 21 Jan. 2002, the parties announced a mutual agreement. The order had been in effect, however, for 4.5 years.
Bed Linen (DS 141)	dumping and injury determinations violates Articles 2 and 3	EU appealed, and lost at the AB. After AB decision, EU announced prompt implementation of decision. India is not fully satisfied with changes to the EU regulation, and requested an Article 21.5 panel in May 2002. The AD order on Bed Linen has remained in effect for more than five years.

Annex 3. Status of Implementation of WTO Decisions on Anti-Dumping Measures—*Continued*

Case	Issues	Status
Stainless Steel (DS 179)	dumping determination violates Article 2	US did not appeal, and agreed to implementation within 7 months. Implemented on 1 Sept. 2001, by amending AD order. At that time, the improper AD duty deposit rate had been in place for 2.5 years.
Hot-Rolled Steel (DS 184)	dumping and injury determinations violate Articles 2 and 3	Article 21.3 arbitration gave US 14 months – until November 2002 – to implement the Panel and AB decision. Implementation pending. The US recently announced changes to implement certain of the DOC issues, but has not changed the statute on 'all others rate' and has not reconsidered the ITC affirmative determination. As of 30 Sept. 2002, the order has been in effect for over three years.
Ceramic Tiles (DS 189)	dumping determination violates Articles 2 and 6	No appeal filed. Parties agreed to implement within 5 months, which should be completed by 5 April 2002. Implementation pending. The order was revoked on 24 April 2002. The order was in effect for almost three years.
Steel Plate (DS 206)	dumping determination impermissible, used facts available	Parties agreed reasonable period of time would extend to 29 Dec. 2002.
Rebar (DS 211)	dumping determination violates Article 3	Parties agreed reasonable period of time would extend to 31 Jul. 2003.
Section 129 (DS 221)	US statute prohibiting retroactive effect of WTO decisions	US prevailed; no implementation action needed.
Byrd Agreement (DS 217, 234)	challenge to payment of duties to Petitioners	Appellate Body upheld panel on 16 Jan. 2003; implementation pending.