

Domestic and Multilateral Forums for the Judicial Review of U.S. Trade Remedy Determinations: Complementary or Conflicting?

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I. Introduction

Trade remedies such as antidumping and countervailing measures are the most popular policy instruments employed by countries to protect their domestic industries from “unfair” foreign competition. The Agreements on Antidumping (the “AD Agreement”) and on Subsidies and Countervailing Measures (the “SCM Agreement”) of the World Trade Organization (WTO) permit the use of such remedies as an exception to the general WTO principles of non-discrimination and tariff bindings.¹ However, the use of trade remedies is subject to substantive and procedural restrictions aimed at preventing their potential misuse for protectionist reasons.² To begin with, trade remedies may only be applied when the competent national authorities determine that there are dumped³ or subsidized⁴ imports

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1 See General Agreement on Tariffs and Trade 1994, 15 April 1994, 1867 U.N.T.S. 187, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 154, (GATT 1994), Article I (providing that WTO Members cannot discriminate between like products based on their country of origin), Article II (providing that WTO Members cannot apply a tariff which is higher than the bound levels specified in their Schedule of Concessions).

2 See A. O. Sykes, Trade Remedy Laws, in A. T. Guzman and A. O. Sykes (eds.), *Research Handbook in International Economic Law* (2007), 62. See also G. W. Bowman, N. Covelli and I. H. Uhm, *Trade Remedies in North America* (2010), 41.

3 Dumping refers to the ‘[introduction] of a product into the commerce of another country at less than its normal value.’ See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 15 April 1994, 1868 U.N.T.S. 201, GATT 1994, *supra* note 1, (Anti-Dumping Agreement), Article 2.

4 The SCM Agreement defines subsidies as financial contributions or any form of income or price support that confers a benefit upon the recipient. See Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14, GATT 1994, *supra* note 1, (SCM Agreement), Article 1.

causing material injury to the domestic industry.⁵ More importantly, such determinations can be challenged domestically through tribunals designated for this purpose and/or multilaterally through the WTO dispute settlement system.⁶ Domestic tribunals typically apply domestic trade remedy legislations, but these legislations are substantially similar to the provisions of the relevant WTO Agreements.⁷ The major difference between domestic and multilateral judicial review of trade remedy determinations is procedural. The question arises, therefore, whether these procedural differences make the two forums complementary or competing. This chapter sets out to address this question by exploring some of the key procedural differences, namely, standing, standard of review and remedies, between the domestic and multilateral forums for the judicial review of trade remedy determinations.

The chapter proceeds as follows. Part II presents some of the key issues in trade remedy determinations. The use of trade remedies is a controversial issue in international trade. While some argue that trade remedies constitute unnecessary barriers to international trade, others contend that trade remedies play an important role in promoting fair international trade and competition. The AD and SCM Agreements represent attempts to reconcile these concerns. While they allow the use of trade remedies, they limit their use by imposing extensive substantive and procedural restrictions. These restrictions will be outlined in this Part to provide the necessary context for the discussion on the judicial review of trade remedy determinations.

The term 'trade remedy determinations' refers to three types of investigations carried out by domestic authorities to impose import restrictions

5 The AD and SCM Agreements define the term 'injury' to mean either material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation to the establishment of a domestic industry. See Antidumping Agreement, *supra* note 3, footnote 9; SCM Agreement, *supra* note 4, footnote 45.

6 See Antidumping Agreement, *supra* note 3, Articles 13 and 17; SCM Agreement, *supra* note 4, Articles 23 and 30. Trade remedy determinations can also be challenged regionally when there are regional trade agreements (RTAs) between the country imposing the trade remedy and the exporting country. For instance: US anti-dumping and countervailing duty determinations against imports from Canada and Mexico can also be challenged before NAFTA Panels. However, regional judicial review forums are beyond the scope of the chapter.

7 Most WTO Members have their own domestic trade remedy legislations. However, these legislations must be consistent with the relevant WTO Agreements. See Antidumping Agreement, *supra* note 3, Article 18.4; SCM Agreement, *supra* note 4, Article 32.5.

for the purpose of protecting domestic industries from unfair foreign competition: safeguards, antidumping and countervailing measures. The focus of this chapter is, however, limited to antidumping and countervailing determinations.

Antidumping and countervailing measures address different challenges; antidumping duties are aimed at addressing the practice of dumping whereby foreign producers/exporters sell their product in the domestic market at a price below production cost or below the normal price at which the product is sold in the home market, whereas countervailing duties are intended to offset the unfair competitive advantage that foreign producers enjoy over domestic producers because of government subsidies.⁸ Nevertheless, they are very similar trade policy instruments.⁹ Both are used to shield domestic industries from the effects of foreign dumping/subsidy by imposing tariffs in addition to ordinary customs duties on the dumped/subsidized imports. Since the procedure for the determination and judicial review of both antidumping and countervailing duties are very similar, they are treated together in this chapter.

Part III is divided into three sections. The first section deals with the reasons for and the legal basis of the judicial review of trade remedy determinations. The second section provides an overview of the alternative forums for the judicial review of trade remedy determinations. With respect to domestic judicial review, the chapter focuses on the judicial review of trade remedy determinations in the United States. The United States is by far the most active user of trade remedy instruments. Moreover, challenges against United States trade remedy determinations are frequent both in domestic courts and in the WTO. 46 of the 109 antidumping cases and 24 of the 37 countervailing cases brought before the WTO dispute settlement system as of July 2016 were against the United States.¹⁰ The third section of Part III compares domestic judicial review of trade remedy determinations with multilateral judicial review focusing on standing, standard of review and remedies.

Part IV sums up the discussion in the form of conclusion.

8 J. F. Francois, D. Palmeter and J. C. Anspacher, *Conceptual and Procedural Biases in the Administration of Countervailing Duty*, in R. Boltuck and R. E. Litan (eds.), *Down in the Dumps: Administration of the Unfair Trade Laws* (2010), 96.

9 P. C. Mavroidis, *Trade in Goods* (2007).

10 See WTO, 'WTO Dispute Settlement: Disputes by Agreement', available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (last visited 16 October 2018).

II. Trade Remedy Determinations

A. *The Use and Abuse of Trade Remedies*¹¹

The use of trade remedies and concerns about their impact on international trade predates the establishment of the multilateral trading system. In fact, the origin of trade remedy legislation dates back to the 19th century. The world's first countervailing law was enacted in the United States in 1897, followed shortly by the Canadian antidumping law of 1904.¹² Trade remedy laws subsequently spread to other industrial countries such as Japan, New Zealand, France and the United Kingdom.¹³ However, it was not until the 1970s that the widespread use and controversy surrounding trade remedies began to dominate the international trade agenda.

The entry into force of the General Agreement on Tariffs and Trade (GATT 1947) in 1948 saw the birth of international rules governing 'unfair' trade practices and the policy responses to them.¹⁴ Articles VI and XVI of the GATT expressly condemned dumping and export subsidization as unfair trade practices and allowed Contracting Parties to use antidumping and countervailing duties (under specified circumstances) to counter the effects on their domestic industries. However, when the GATT was negotiated in the 1940s, the major concern was that of dumping and export subsidization – not the mechanism put in place to address them (i.e. antidumping and countervailing duties).¹⁵ GATT discussions were mainly fo-

11 The expression 'the use and abuse of trade remedies' is borrowed from J. Miranda, *On the Use and Abuse of Trade Remedies by Developing Countries* (Paper presented at the Dartmouth/Tuck Forum on International Trade and Business, Washington D.C., 2003).

12 The US Tariff Act of July 24, 1897 (ch. 11, 30 Stat. 151, authorizes the Department of Treasury to impose duties to offset 'bounty or grant' bestowed on imported merchandise. See Sykes, *supra* note 2; The Canadian Antidumping law authorizes the Minister of Customs to levy a special duty when it appeared that the export price or the actual selling price to the importer in Canada of any imported dutiable article [...] is less than the fair market value thereof. See J. M. Finger, *The Origins and Evolution of Antidumping Regulation* (1991), WPS 783.

13 See M. Zanardi, *Antidumping: A Problem in International Trade*, 22 *European Journal of Political Economy* (2006), 591; Bowman, Covelli and Uhm, *supra* note 2.

14 General Agreement on Tariffs and Trade 1947, 30 October 1947, 55 U.N.T.S. 194, (GATT 1947).

15 Perhaps this was because trade remedy laws were enacted in few industrial countries and were rarely implemented at that time. Since tariffs were set unilaterally, countries were relatively free to raise or lower their tariffs without the need to rely

cused on tackling dumping/subsidies rather than on disciplining the use of antidumping/countervailing measures. For this reason, neither Article VI nor Article XVI contains any procedural safeguards to ensure that trade remedies are not used for protectionist purposes.¹⁶

The situation, however, drastically changed over the next two decades. Tariffs were substantially reduced in the early rounds of multilateral trade negotiations and locked-in through legally binding commitments. As tariffs can no longer simply be raised,¹⁷ many countries resorted to “non-traditional” instruments of protection (i.e. antidumping and countervailing measures and non-tariff trade barriers such as import licensing requirements, standards and labelling requirements). Antidumping and countervailing laws were originally conceived as temporary means to counter unfair competition, but in the 1970s they evolved into one of the most frequently used trade protection instruments.¹⁸ Developing countries were especially concerned with the increased imposition of antidumping and countervailing duties by developed countries against their exports. GATT Contracting Parties attempted to address these concerns by negotiating new multilateral rules during the Tokyo Round (1973-79). The resultant plurilateral agreements, namely, the Tokyo Round Antidumping Code and the Subsidies Code, were designed to address the misuse of trade remedies as much as to discipline dumping and subsidies.¹⁹ These agreements subse-

on their trade remedy laws. Some countries were, however, concerned about the impact of dumping and subsidies on their domestic industries. The United States in particular insisted that it would not agree to the trade liberalization commitments of the GATT without an exception for trade remedies. See M. J. Trebilcock and R. Howse, *The Regulation of International Trade* (2005); P. C. Rosenthal and R. T. C. Vermylen, *The WTO Antidumping and Subsidies Agreements: Did the United States Achieve Its Objectives during the Uruguay Round*, 31 *Law and Policy in International Business* (2000), 871.

- 16 P. T. Stoll and F. Schorkopf, *WTO: World Economic Order, World Trade Law* (2006), 152 and 163.
- 17 GATT/WTO Members may modify or withdraw their tariff bindings, but this requires negotiations and the payment of compensation (reduced tariffs on other items) to affected countries. See GATT 1947, *supra* note 14, Article XXIII.
- 18 See I. N. Neufeld, *Anti-Dumping and Countervailing Procedures: Use or Abuse? Implications for Developing Countries* (2001); Bowman, Covelli and Uhm, *supra* note 2, 41 *et seq.*
- 19 See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 12 April 1979, GATT Doc. LI/TR/A/1 (Tokyo Round Antidumping Code); Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, 12 April 1979, GATT Doc. LI/TR/A/3 (Subsidies Code).

quently repealed and replaced by the multilateral AD and SCM Agreements at the end of the Uruguay Round (1986-93). Like their predecessors, the AD and SCM Agreements allowed the use of trade remedies subject to the substantive and procedural requirements thereof (see the following section). The requirements, however, proved to be inadequate to curtail the growing use of trade remedies.

The number of WTO Members with national trade remedy legislations has increased exponentially since the entry into force of the AD and SCM Agreements in January 1995. As of October 2015, antidumping and countervailing laws have been introduced in 78 and 106 WTO Members (with the European Union counted as one Member) respectively.²⁰ Paralleling the rise in the number of countries with trade remedy legislations has been the sharp increase in antidumping and countervailing investigations. WTO Members have initiated a total of 4,757 antidumping and 380 countervailing investigations between 1995 and 2014.²¹ Another notable development over the past two decades is the spread in the use of trade remedies from few traditional to several new users.²² The so-called “non-traditional” users such as South Korea, Mexico, Brazil, India, South Africa and Argentina have become active participants over the last two decades. There is general recognition among trade scholars and policy makers alike that protectionist purposes drive the widespread use of trade remedies more than to simply counter foreign dumping/subsidies.²³ This recognition has led to the inclusion of trade remedies in the Doha Round (2001-present).²⁴ However,

20 WTO, Report of the Committee on Anti-Dumping Practices (2015), G/L/1134 and G/ADP/22; WTO, Report of the Committee on Subsidies and Countervailing Measures (2015), G/L/1133 and G/SCM/146.

21 See WTO, ‘Anti-Dumping Initiations: By Reporting Member 01/01/1995 – 31/12/2014’ available at https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf (last visited 23 October 2018); WTO, ‘Countervailing Initiations: Reporting Member vs Exporter 01/01/1995 -31/12/2014’ available at https://www.wto.org/english/tratop_e/scm_e/CV_InitiationsRepMemVsExpCty.pdf (last visited 23 October 2018).

22 See Neufeld, *supra* note 18, 3 et seq.

23 See e.g. H. Vandenbussche and M. Zanardi, What Explains the Proliferation of Antidumping Laws?, 23 *Economic Policy* (2008), 94; T. Voon, Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements, 59 *International and Comparative Law Quarterly* (2010), 625; Zanardi, *supra* note 13; Sykes, *supra* note 2; P. Chandra and C. Long, Anti-Dumping Duties and Their Impact on Exporters: Firm Level Evidence from China, 51 *World Development* (2013), 169; Trebilcock and Howse, *supra* note 15.

24 See Doha Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1, para. 28.

like the rest of the Doha Round negotiations, the negotiations on antidumping and countervailing rules are currently stalled, and their fate remains uncertain.

In the absence of strong rules that prevent the misuse of trade remedies, and in the face of growing protectionism, the judicial review of trade remedy determination has attracted increasing interest and attention.²⁵ Trade remedy determinations currently account for over 40 percent of the WTO dispute settlement caseload. This high number of WTO disputes over trade remedies is not surprising when one considers the widespread protectionist-driven use of trade remedies and the transparency with which trade remedies are imposed. For Chad Bown, the surprise is rather why so few trade remedy determinations are challenged before the WTO dispute settlement system.²⁶

Bown investigated this question both theoretically and empirically and concluded that the number of WTO disputes over trade remedies is influenced by the size of imports lost to the trade remedy, the foreign country's capacity to retaliate, and the size of the trade remedy that was imposed.²⁷ He also found that:

An adversely affected foreign industry may resort to a reciprocal (and retaliatory) antidumping measure against the protected U.S. industry if it has the capacity to do so, in lieu of working to convince its government to file a dispute at the WTO on its behalf.²⁸

25 See e.g. M. Yilmaz (ed.), *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013); J. P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 *Journal of International Economic Law* (2003), 125; T. P. Stewart, A. S. Dwyer and E. M. Hein, *Trends in the Last Decade of Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*, 24 *Arizona Journal of International and Comparative Law* (2007), 251; E. Vermulst and G. N. Horlick, *Judicial Review of Trade Remedy Determinations in Ten User Countries*, 7 *Global Trade and Customs Journal* (2012), 195; C. P. Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 *The Journal of Legal Studies* (2005), 515; J. L. Dunoff, *The Many Dimensions of Softwood Lumber*, 45 *Alberta Law Review* (2007), 319; K. W. Cannon, *Trade Litigation before the WTO, NAFTA, and US Courts: A Petitioner's Perspective*, 17 *Tulane Journal of International and Comparative Law*, 389.

26 Bown, *supra* note 25. Similar questions were also raised by B. A. Blonigen and T. J. Prusa, *Antidumping*, in E.K. Choi and J. C. Hartigan (eds.), *Handbook of International Trade: Economic and Legal Analyses of Trade Policy and Institutions* (2008), 276; Bowman, Covelli and Uhm, *supra* note 2, 481.

27 Bown, *supra* note 25.

28 *Ibid.*, 551, 552.

However, conspicuously absent from Bown's analysis was the fact that adversely affected industries have and frequently exercise the option to seek domestic judicial review of trade remedy determinations. The scope of his analysis was explicitly limited to the WTO dispute settlement system, but, in my view, one cannot fully answer the question why only few trade remedy determinations are challenged at the WTO without simultaneously considering the alternative forums for challenging trade remedy determinations. The fact that adversely affected industries can and have challenged trade remedy determinations domestically is an important factor capable of influencing the number of WTO disputes over trade remedy determinations. It is precisely in this context that comparing the domestic and multi-lateral judicial review of trade remedy determinations becomes crucial.

Before proceeding to the judicial review of trade remedy determinations, however, the following section will briefly review the process and authorities involved in trade remedy determination.

B. The Trade Remedy Investigation Process

The AD and SCM Agreements contain detailed substantive and procedural rules governing the initiation and conduct of trade remedy investigations. WTO Members may impose trade remedies only pursuant to investigations initiated and conducted in accordance with these rules.²⁹ This section attempts to briefly review the procedural rules governing trade remedy investigations. Since the procedural rules set out in the AD Agreement (Articles 5-12) and the SCM Agreement (Articles 11-22) are "very similar", they will be treated together in this paper.³⁰ Before addressing the specifics of these procedural rules, however, it is worth making a few general points about trade remedy investigations.

29 See Antidumping Agreement, *supra* note 3, Article 1; SCM Agreement, *supra* note 4, Article 10. Investigation authorities normally follow the procedures governing the initiation and conduct of antidumping/countervailing investigations set out in their respective national trade remedy legislation. However, such procedures shall be consistent with the provisions of the AD and SCM Agreements and must be notified to the relevant WTO Committees. See Antidumping Agreement, *supra* note 3, Article 16.5; SCM Agreement, *supra* note 4, Article 25.12.

30 See e.g. P. C. Mavroidis, P. A. Messerlin and J. M. Wauters, *The Law and Economics of Contingent Protection in the WTO* (2008), 373; P. van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (2005), 576.

Trade remedy investigation is a technical and complex process that essentially involves determining the existence of the three substantive elements: dumping/subsidy, injury, and causal link between the two.³¹ Such investigation can only be conducted by a competent authority. While it is up to each WTO Member to decide which of its authorities are competent to initiate and conduct investigations, such decisions must be notified to the relevant WTO Committees.³² In the U.S., the responsibility for trade remedy investigations is shared between the Department of Commerce (Commerce) and the International Trade Commission (ITC). Commerce is responsible for all parts of the investigation process except for the determination of injury, which is the responsibility of the ITC.³³

The WTO Agreements require the competent authorities to conduct their investigation in an objective manner.³⁴ As noted by the Appellate Body in *EC-Bed Linen* (Article 21.5 – India):

The duty of the investigating authorities to conduct an “objective examination” recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.³⁵

This means that trade remedy determinations can be challenged if the investigation is not conducted in an objective manner.

Investigation authorities must also follow due process in conducting their investigation. The due process requirements mandate that the investigation authorities must ensure that interested parties are given a chance to

31 The substantive requirements are linked to specific procedural steps that must be observed by any WTO Member wishing to impose trade remedies. See Mavroidis, Messerlin and Wauters, *supra* note 30, 131.

32 See Antidumping Agreement, *supra* note 3, Article 16.5; SCM Agreement, *supra* note 4, Article 25.12.

33 For more on the nature and role of these agencies, see Bowman, Covelli and Uhm, *supra* note 2, 53-54.

34 See Antidumping Agreement WTO, Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (EC – Bed Linen), Doc. WT/DS141/AB/RW (adopted 08 April 2003) (Article 21.5-India), 3, Article 3.1; SCM Agreement, *supra* note 4, Article 15.1. Strictly speaking, the duty to conduct an objective examination is limited to injury determinations but, as correctly pointed out by Mavroidis et al., it is logical (especially in light of the fact that the determination is subject to domestic and multilateral judicial review) to argue that this obligation permeates all of the investigating authorities' obligations. See Mavroidis, Messerlin and Wauters, *supra* note 30, 132.

35 See Appellate Body Report EC – Bed Linen, *supra* note 34 (Article 21.5 of the DSU India) (it is worth noting that the AB here is summing up its previous case law), para. 114.

adequately present their views and have access to all information having a bearing on the case.³⁶ The illustrative lists of interested parties include; exporters or foreign producers, importers of the product subject to investigation, or trade or business associations, exporters or importers of such product, the government of the exporting Members and producers of the like product in the importing Member or trade or business associations a majority of the members of which produce the like product in the importing country.³⁷ Notwithstanding specific standing requirements (discussed in Part III.C.1), any interested party affected by trade remedy determination may request the judicial review of such determination.

The actual investigation is a multistage process which must be triggered by a written petition by or on behalf of the domestic industry.³⁸ The AD and SCM Agreements envisage special circumstances whereby investigation authorities may initiate an investigation without receiving an application or petition from the domestic industry, but such circumstances are quite uncommon.³⁹ The petition for an investigation must be accompanied by evidence of dumping/subsidy, injury and causality. The petitioners are required to substantiate their application (beyond mere assertion) by submitting such information as is 'reasonably available' to them concerning the volume and value of their production of the like product, the allegedly dumped/subsidized product and the alleged dumpers/subsidizing country, the normal value and export price, the volume and price effect of the imports, and their consequent impact on the domestic industry.⁴⁰ Both the AD and SCM Agreements also place standing requirements for the domestic industry filing application. Trade remedy investigation may only be initiated if: (i) the application is supported by those producers whose collective output is more than 50 percent of the total production of that portion of the domestic producers expressing an opinion in favour or against the initiation; and (ii) the producers expressly supporting the initiation ac-

36 For detailed overview, see Mavroidis, Messerlin and Wauters, *supra* note 30, 132 et seq.

37 See Antidumping Agreement, *supra* note 3, Article 6.11; SCM Agreement, *supra* note 4, Article 12.9.

38 See Antidumping Agreement, *supra* note 3, Article 5.1; SCM Agreement, *supra* note 4, Article 11.1.

39 See Antidumping Agreement, *supra* note 3, Article 5.6; SCM Agreement, *supra* note 4, Article 11.6.

40 See Antidumping Agreement, *supra* note 3, Article 5.2; SCM Agreement, *supra* note 4, Article 11.2.

counts for at least 25 per cent of total production of the like product.⁴¹ It is only when these two requirements are fulfilled that an application is considered to have been made by or on behalf of the domestic industry.

Upon receiving an application, the investigation authorities must determine whether the application fulfils the requirements mentioned above (evidence & standing). The first step is to review the accuracy and adequacy of the evidence submitted by the petitioners to determine whether the evidence is sufficient to justify the initiation of an investigation.⁴² Neither the AD Agreement nor the SCM Agreement expressly defines what constitutes “sufficient evidence” (in terms of both the nature of the evidence presented and the burden of persuasion). However, it has been clarified in the case law to simply mean that the investigation authority must satisfy itself that the evidence presented before it is such that an unbiased and objective investigating authority could determine that there was sufficient evidence to justify initiation of an investigation.⁴³ Therefore, whether the information submitted by petitioners was sufficient is to be determined on a case by case basis by each investigation authority. Investigation authorities must also determine whether the standing requirement mentioned above is fulfilled before initiating an investigation. As clarified by the Appellate Body in *US-Offset Act (Byrd Amendment)*, the duty of an investigation authority in this regard is limited to examining whether the degree of support for an application (the statutory percentage mentioned above) is met.⁴⁴ Whether the petition was driven by protectionist motives is irrelevant to an investigation authority’s decision whether to initiate an investigation. It is also worth noting that the degree of support for an application required from the domestic industry is not as strict as it may appear at first glance. As also pointed out by Mavroidis *et al.*, the requirement could easily be circumvented by defining the product in question narrowly enough.⁴⁵ The practical implication is that even an application from an individual firm may sat-

41 See Antidumping Agreement, *supra* note 3, Article 5.4; SCM Agreement, *supra* note 4, Article 11.4. For detailed discussion on the standing requirement, see Mavroidis, Messerlin and Wauters, *supra* note 30, 138-142; R. Wolfrum, P. T. Stoll and M. Koebele (eds.), *WTO-Trade Remedies* (2008).

42 See Antidumping Agreement, *supra* note 3, Article 5.3; SCM Agreement, *supra* note 4, Article 11.3.

43 For a critical analysis of the jurisprudence, see Mavroidis, Messerlin and Wauters, *supra* note 30, 142-150.

44 United States – Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act (Byrd Amendment)), WTO Appellate Body Report, Docs. WT/DS217/AB/R and WT/DS234/AB/R (adopted 27 January 2003), para. 281 *et seq.*

45 See Mavroidis, Messerlin and Wauters, *supra* note 30, 140, 141.

isfy the standing requirement if such firm is the major or sole producer of the product in question.

Investigating authorities may launch a formal investigation only when they find the evidence presented to be sufficient and that the application was made by or on behalf of the domestic industry. In the event of a positive finding, they will start by defining the “product under consideration”⁴⁶ and the “period of investigation”⁴⁷, and then proceed to gather further information from interested parties regarding the existence of dumping/subsidy and injury. In doing so, all interested parties must be given notice (normally in the form of a questionnaire) of the information which the investigation authorities require and ample opportunity to present (in writing) all evidence which they consider relevant to the investigation.⁴⁸ Interested parties shall be given at least 30 days to reply to the questionnaire. Both the AD and SCM Agreements also stipulate several requirements aimed at ensuring transparency and fair treatment of interested par-

46 The product under consideration or ‘subject product’ is the allegedly dumped/subsidized product causing the injury. Neither the AD Agreement nor the SCM Agreement provides guidance on how to define the product under consideration. In the absence of any guidance, investigation authorities are free to define it as they deem fit. A wider definition allows the imposition of antidumping/countervailing duties on a wide range of products, but it complicates the investigation process. The definition of the product under consideration also has a direct bearing on the determination of the like (domestic) product. For more on this, see *ibid.*, 162 et seq.

47 The period of investigation is the period chosen by investigating authorities to determine the existence of dumping/subsidization and injury. Since no guidance is provided in the WTO Agreements, the choice of period of investigation largely falls under the discretion of investigating authorities. Nevertheless, such choices can and have been challenged before the WTO dispute settlement system. See e.g. Guatemala – Definitive Anti-Dumping Measure on Grey Portland Cement from Mexico (Guatemala –Cement II), Doc. WT/DS156/R (adopted 17 November 2000); WTO Panel Report United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (US – Carbon Steel (India)), Doc. WT/DS436/R (adopted 19 December 2014); WTO Panel Report Mexico – Definitive Anti-Dumping Measures on Beef and Rice (Mexico- Antidumping Measures on Rice), Doc. WT/DS295/R (adopted 20 December 2005).

48 See Antidumping Agreement, *supra* note 3, Article 6.1; SCM Agreement, *supra* note 4, Article 12.1. Moreover, Article 6.1.3 of the AD Agreement and Article 12.3 of the SCM Agreement require investigating authorities to provide (as soon as investigation has been initiated) the full text of the application to the known exporters and to the authorities of the exporting Member and make this text available upon request to other interested parties. Energy Charter Treaty, 17 December 1994, 2080 UNTS 95 (ECT).

ties in the investigation process. However, if any interested party refuses access to or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, the investigation authorities can make their determination based on the facts available.⁴⁹ Moreover, as explained by the Panel in *US-Softwood Lumber V*, in cases where the information that they submit can be read in different ways, interested parties should explain to investigating authorities how the information should be read and evaluated.⁵⁰

Once they gather sufficient information and examine the existence of dumping/subsidy and injury, investigating authorities normally make preliminary determinations on these issues. If the preliminary determinations are affirmative on both the existence of dumping/subsidy and consequent injury to the domestic industry, provisional duties may be imposed on the dumped/subsidized imports.⁵¹ The rationale for imposing provisional duties is to prevent injury from being caused during the investigation. However, provisional duties may only be imposed 60 days after the investigation was initiated and for a short period not exceeding four months in the case of countervailing duties and six months in the case of antidumping duties.⁵² At this juncture, the investigation may be suspended or terminated without the imposition of provisional duties if the exporter enters into a voluntary undertaking to revise prices or stop exporting to the Member in question.⁵³ In countervailing investigations, a voluntary undertaking can also be entered by the government of the exporting Member to eliminate or limit the subsidy or take other measures concerning its effects. If no undertaking is agreed, the investigation continues to final determination, which includes further examination of the evidence presented by all interested parties. A final affirmative determination leads to the imposition of trade remedies on the dumped/subsidized imports, whereas a negative final determination leads to the termination of the investigation. Trade remedies shall remain in force only for as long as and to the extent neces-

49 See Antidumping Agreement, *supra* note 3, Article 6.8; SCM Agreement, *supra* note 4, Article 12.7.

50 See United States – Final Dumping Determination on Softwood Lumber from Canada (*US – Softwood Lumber V*), WTO Panel Report, Doc. WT/DS264 (adopted 31 August 2004), para. 7.183.

51 See Antidumping Agreement, *supra* note 3, Article 7.1; SCM Agreement, *supra* note 4, Article 17.1.

52 See Antidumping Agreement, *supra* note 3, Article 7.3/4; SCM Agreement, *supra* note 4, Article 17.3/4.

53 See Antidumping Agreement, *supra* note 3, Article 8; SCM Agreement, *supra* note 4, Article 18.

sary to offset the injurious effects of dumped/subsidized imports. The investigation authorities are required to periodically review the need for the continued imposition of trade remedies on their own or upon the request of any interested party with positive information substantiating the need for review. In any case, trade remedies must be terminated within five years from their imposition or the date of the most recent review.⁵⁴ Continuing their imposition beyond five years is permissible only pursuant to a sunset review. All these restrictions are intended to prevent the protectionist abuse of trade remedies. It should also be noted that trade remedy investigations shall normally be concluded within 12 months (from initiation to final determination) but in no case more than 18 months. Upon making the final determination, the investigation authorities are required to give public notice (this obligation also extends to the initiation and preliminary determinations) of such determination.

III. Judicial Review of Trade Remedy Determinations

A. Reasons for and Legal Basis of Judicial Review

Whether dumping and subsidies require any response and whether antidumping and countervailing duties are appropriate responses to them have been the subject of much debate and controversy since the early 1920s.⁵⁵ On the one hand, free trade advocates contend that foreign dumping and subsidies benefit consumers in the importing country. Whilst accepting that import-competing industries may lose due to dumped/subsidized imports, they claim that the benefit to consumers outweighs the loss to domestic producers. Paul Krugman is often quoted for suggesting that the proper policy response to a foreign state's subsidies is "to send a thank you note to the embassy"- not to impose countervailing duties.⁵⁶ There is widespread consensus among economists that antidumping and countervailing duties constitute unnecessary barriers to international trade, and thus they should be eliminated.⁵⁷ On the other hand, others consider dumping and subsidies as problems that warrant responses. Perhaps the

54 See Antidumping Agreement, *supra* note 3, Article 11.3; SCM Agreement, *supra* note 4, Article 21.3.

55 See J. Viner, *Dumping: A Problem in International Trade* (1923).

56 See Sykes, *supra* note 2 (quoting P. Krugman), 107.

57 See e.g. Zanardi, *supra* note 13; J. J. Barcelo III, *Antidumping Laws as Barriers to Trade the United States and the International Antidumping Code*, 57 Cornell

most compelling argument against dumping is that foreign producers/exporters sell their products at a price below fair value to drive domestic rivals out of the market and become monopolists. Once they control the market, the argument continues, they would raise prices (or charge monopoly prices). The problem with this argument is, however, first, there are several legitimate commercial reasons for dumping other than predation.⁵⁸ Second, it is virtually impossible to prove the predatory intent of foreign producers/exporters. As noted by Tania Voon:

In any case, the [AD Agreement] does not target predatory dumping by requiring investigating authorities to examine intent before imposing anti-dumping measures.⁵⁹

The proponents of countervailing measures justify such measures on the basis that subsidies lead to inefficient allocation of economic resources by distorting comparative advantage.⁶⁰ They contend that countervailing measures are necessary to level the playing field that has been tilted by government subsidies in favour of subsidized imports.

The AD and SCM Agreements represent an attempt to reconcile these two sets of concerns. They authorize the use of trade remedies, but at the same time impose numerous substantive and procedural restrictions to discourage the abuse of these instruments. The judicial review of trade remedy determinations is part of the procedural safeguards. It serves this purpose in two ways. First, the presence of judicial review creates an incentive for investigating authorities to conduct their investigation strictly in accordance with the relevant substantive and procedural rules. The risk of their determination being rejected keeps them from imposing protectionist and unfounded trade remedies. Second, judicial review ensures that interested parties who have been adversely affected by trade remedy determinations have the opportunity to have that adverse determination judicially reviewed.

Law Review (1971), 491; T. Besedeš and T. J. Prusa, *The Hazardous Effects of Anti-dumping*, 55 *Economic Inquiry* (2016), 1; A. O. Sykes, *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 *Law & Policy in International Business* (1989), 699; Sykes, *supra* note 2.

58 For a brief summary of the literature on the potential reasons for dumping, see J. B. Benedetto, *Placing Economists' Analyses of Antidumping in an Antitrust Context*, 66 *Real-World Economics Review* (2014), 119.

59 Voon, *supra* note 23, 631.

60 See Trebilcock and Howse, *supra* note 15.

The WTO agreements stipulate that trade remedy determinations can be reviewed domestically through tribunals designated by WTO Members for this purpose and/or multilaterally through the WTO dispute settlement system. It is important to note, however, that neither of the agreements refers to the latter as judicial review. Both agreements use the term “judicial review” only with respect to domestic judicial review (see below). This should not come as a surprise, given the general reluctance to describe the WTO dispute settlement system as judicial (or the tendency to describe it as *quasi-judicial*). Within the WTO the reluctance was borne out of the concern not to antagonize countries that were not in favour of a highly judicialized dispute settlement system by overtly describing the system as judicial.⁶¹ By contrast, the reluctance among some scholars to describe the system as judicial stems from the political nature of the system in which Panel and Appellate Body reports have to be adopted by a political organ to have legal effect.⁶² However, as pointed out by Helene Ruiz Fabri, this does not prevent the dispute settlement body from participating in the performance of a judicial function nor does it preclude it from being described as judicial.⁶³ Whether one describes it as “judicial” or “quasi-judicial” there is little doubt that the dispute settlement body discharges judicial function in the same manner as other international courts, including the International Court of Justice (ICJ). The dispute settlement system is in fact widely hailed as the “most effective dispute settlement system” in international

61 See R. E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in J. N. Bhagwati and M. Hirsch (eds.), *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel* (1998); J. Watson, *The WTO and the Environment: Development of Competence beyond Trade* (2013), 12 et seq.

62 See e.g. C. D. Ehlermann, *Experiences from the WTO Appellate Body*, 38 *Texas International Law Journal* (2003), 469; D. C. Esty and D. Geradin, *Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements*, 21 *Harvard Environmental Law Review* (1997), 265; D. Georgiev and K. van der Borgh (eds.), *Reform and Development of the WTO Dispute Settlement System* (2006), 11.

63 See H. Ruiz Fabri, *Dispute Settlement in the WTO: On the Trail of a Court*, in S. Charnovitz et al. (eds.), *Law in the service of human dignity: essays in honour of Florentino Feliciano* (2005), 156. See also J. Bacchus, *Table Talk: Around the Table of the Appellate Body of the World Trade Organization*, 35 *Vanderbilt Journal of Transnational Law* (2002), 1021; I. Van Damme, *Jurisdiction, Applicable Law, and Interpretation*, in D. L. Bethlehem (ed.), *The Oxford Handbook of International Trade Law* (2009), 304 et seq.

relations.⁶⁴ It is, therefore, safe to conclude that the review of trade remedy determinations by WTO Panels and the Appellate Body is judicial.⁶⁵ In addition to the Dispute Settlement Understanding (DSU), the DSB's mandate to review trade remedy determinations is explicitly stipulated in Article 17 of the AD Agreement and Article 30 of the SCM Agreement.

The relevant provisions governing domestic judicial review are contained in Article 13 of the AD Agreement and Article 23 of the SCM Agreement. The text of these two articles is the same except for the last part of Article 23 (italicized):

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, *and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.*⁶⁶

These provisions require WTO Members with national antidumping and countervailing legislations to maintain tribunals for the judicial review of trade remedy determinations.⁶⁷ Such tribunals may be of judicial, arbitral or administrative charter. However, in most countries, the judicial review

64 See among others Mavroidis, *supra* note 9, 841; J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006); A. T. Guzman, *Global Governance and the WTO*, 45 *Harvard International Law Journal* (2004), 303, 320.

65 The term 'judicial review' generally refers to the review of the lawfulness of a decision or action taken by a public body. Its modern roots can be traced back at least to *Marbury v. Madison*, 5 U.S. 137 (1803), in which the US Supreme Court declared, for the first time, an act of the US Congress unconstitutional. For a general discussion on the origin and development of judicial review, see G. S. Wood, *Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 *Washington & Lee Law Review* (1999), 787.

66 Agreement on Implementation of Article VI of the GATT, *supra* note 3, Article 13; See Agreement on Subsidies and Countervailing Measures, *supra* note 4, Article 23.

67 Neither of these provisions has been interpreted by the case law. The only WTO Panel that referred to any of these provisions was the Panel in *Mexico – Olive Oil*, which noted in a footnote that Article 23 of the SCM Agreement leaves considerable discretion to Members to define their own procedures. See *Mexico – Defini-*

of trade remedy determinations is conducted by judicial tribunals.⁶⁸ The WTO Agreements do not require these tribunals to be specialized ones, and thus in many countries, judicial review is conducted by the same courts which review administrative decisions. However, some countries such as the United States and Thailand have special courts dealing with the judicial review of trade remedy determinations.⁶⁹ Regardless of their nature, these tribunals are free to determine their own procedures.

B. The Domestic and Multilateral Forums for Judicial Review

The judicial review of trade remedy determinations represents an area where the WTO dispute settlement system and domestic tribunals have overlapping subject matter jurisdictions. Trade remedy determinations adversely affect one or another of the interested parties. Domestic producers that petitioned for trade remedies may seek to challenge negative antidumping and countervailing determinations. However, their choice of forum is limited to domestic tribunals. This is because, as private parties, they do not have direct access to international judicial review. They cannot convince their government to file a WTO dispute against its own action either.⁷⁰ Only Members may file challenges at the WTO. Parties adversely affected by final affirmative determinations may challenge such determinations domestically and/or multilaterally. The exporting WTO Member may challenge the determination domestically (depending on the sovereign immunity rules of the importing country) and/or multilaterally through the WTO dispute settlement system. Importers and producers/exporters have the choice of challenging the determination before the domestic tribunals of the importing country or convince the exporting country to file a WTO dispute on their behalf. This means that insofar as the judicial review of affirmative trade remedy determinations is concerned, the jurisdiction of do-

itive Countervailing Measures on Olive Oil from the European Communities (Mexico – Olive Oil), WTO Panel Report, Doc. WT/DS341/R (adopted 21 October 2008), footnote 63.

68 See M. Yilmaz, Conclusions, in M. Yilmaz (ed.), *Domestic Judicial Review of Trade Remedies: Experiences of the Most active WTO Members* (2013), 423.

69 *Ibid.*, 424. See also, Wolfrum, Stoll and Koebele, *supra* note 41, 177.

70 For a detailed discussion on petitioners' choice of forum, see Cannon, *supra* note 25; M. A. Barnett, Choices, Choices: Domestic Courts versus International Fore: A Commerce Perspective, 7 *Tulane Journal of International and Comparative Law* 4 (2009), 35.

mestic tribunals overlaps with that of the WTO dispute settlement system. However, there are no rules governing this overlapping jurisdiction in the WTO Agreements. In the absence of such rules, affirmative trade remedy determinations can be and have been challenged either domestically or multilaterally or both domestically and multilaterally (simultaneously or sequentially).

While the issue of overlapping jurisdictions between the dispute settlement system of regional trade agreements (RTAs) and that of the WTO has been the subject of considerable debate especially in academic circles,⁷¹ the overlapping jurisdiction between domestic tribunals and the WTO dispute settlement system in trade remedy cases has received scant attention. Recent years, however, have witnessed growing scholarly interest on the subject.⁷² Much of the impetus for this interest has been prompted by parallel WTO and domestic proceedings over the same US trade remedy determinations. US trade remedy determinations involving products from *Softwood Lumber from Canada* and *DRAMS from South Korea to certain products from China* were challenged before both US courts and the WTO dispute settlement system.⁷³ This has drawn interest to the issue of overlapping jurisdiction between the two forums. While some commentators focus on

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- 71 See in particular K. Kwak and G. Marceau, Overlapping Jurisdictions between the World Trade Organization and Preferential Trade Agreements, in L. Bartels and F. Ortino (eds.), *Regional trade agreements and the WTO legal system* (2006); J. Pauwelyn and L. E. Salles, Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions, 42 *Cornell International Law Journal* (2009), 77; J. Pauwelyn, Going Global, Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions, 13 *Minnesota Journal of Global Trade* (2004), 231; C Henckels, Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO, 19 *European Journal of International Law* (2008), 571.
- 72 See e.g. S. Cho and T. H. Lee, Double Remedies in Double Courts, 26 *European Journal of International Law* (2015), 519; J. D. Greenwald, A Comparison of WTO and CIT/CAFC Jurisprudence in Review of US Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings, 21 *Tulane Journal of International and Comparative Law* (2013), 261; M. P. Ryan, Interplay of WTO and U.S. Domestic Judicial Review: When the Same U.S. Administrative Determinations Are Appealed under the WTO Agreement and under U.S. Law, Do the Respective Decisions and Available Remedies Coexist or Collide, 17 *Tulane Journal of International and Comparative Law* (2009), 353; Cannon, *supra* note 25.
- 73 US trade remedy determinations that have been challenged both domestically and multilaterally include (by final decisions): United States – Final Countervailing Duty Determination With Respect To Certain Softwood Lumber from Canada Recourse to Article 21.5 of the DSU by Canada (US — Softwood Lumber IV),

the diverging conclusions of the two forums over the same trade remedy determinations,⁷⁴ others have raised concerns about the lack of interplay between the two forums even when they reach the same conclusion (for different reasons).⁷⁵ However, the focus of the discussion is generally on how to enhance the interaction between the two forums (and thereby prevent conflicts between the overlapping jurisdictions) than on how to dissolve the overlap itself. This is due in part to the view that the two forums are complementary to one another.⁷⁶ We will see whether and to what extent they complement each other in the following sections.

Before proceeding, however, a few introductory words on the US courts responsible for the judicial review of trade remedy determinations and the WTO dispute settlement system are in order.

1. The Domestic Forum for the Judicial Review of Trade Remedy Determinations

The US Court of International Trade (CIT) possesses exclusive nationwide subject matter jurisdiction over the judicial review of final antidumping and countervailing duty determinations.⁷⁷ The CIT was established in 1980 pursuant to the Customs Court Act of 1980 as a successor to the US Customs Court.⁷⁸ The jurisdiction of the CIT over antidumping and counter-

WTO Appellate Body Report, Doc. WT/DS257/AB/RW (adopted 20 December 2005); United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (US — Countervailing Duty Investigation on DRAMs), WTO Appellate Body Report, Doc. WT/DS296/AB/R (adopted 20 July 2005); United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping and Countervailing Duties (China)), WTO Appellate Body Report, Doc. WT/DS379/AB/R (adopted 25 March 2011).

74 See Greenwald, *supra* note 71 (lamenting about the judicial activism of the Appellate Body in particular and the resultant divergence in the interpretation of substantially similar trade remedy provisions by the WTO dispute settlement system and US courts over the interpretation of substantially similar provisions).

75 See Ryan, *supra* note 72; Cho and Lee, *supra* note 72 (criticizing the lack of interaction between US Courts and WTO Panels/Appellate Body and suggesting ways to improve the interaction between the two forums).

76 See M. Yilmaz, Introduction, in M. Yilmaz (ed.), *Domestic Judicial Review of Trade Remedies: Experiences of the Most active WTO Members* (2013), 5; Ryan, *supra* note 72, 356.

77 See 28 U.S.C. § 1581(c) (2012); 19 U.S.C. § 1516a (2012).

78 See 28 U.S.C.A. § 251. For a historical background, see R. A. Cohen, *The New United States Court of International Trade*, 20 *Columbia Journal of Transnational*

vailing duty cases stems primarily from 28 U.S.C. § 1581(c) which provides that the Court, “shall have exclusive jurisdiction over any civil action commenced under section 516a of the Tariff Act of 1930” (i.e., 19 U.S.C. § 1516a “Judicial review in countervailing duty and antidumping duty proceedings”). CIT is an “Article III” court, meaning its nine active judges have life tenure under the condition of good behaviour.⁷⁹ It also means that the Court is empowered by the US Constitution to issue final decisions subject only to appeal to higher courts.⁸⁰ The US Court of Appeals for the Federal Circuit (Federal Circuit) has exclusive appellate jurisdiction over final decisions of the CIT.⁸¹ The US Supreme Court has discretionary jurisdiction to review the decisions of the Federal Circuit.⁸² However, the Supreme Court has reviewed only a handful of trade remedy cases in the last 100 years.⁸³ According to Gregory Bowman *et al.*, this is perhaps due in part to the fact that trade law cases tend to be “quite technical and typically do not raise the sort of constitutional issues that are often addressed by the Supreme Court.”⁸⁴ It could also be because there is typically no need for the Supreme Court to reconcile differing judicial interpretations of federal law among different federal courts.⁸⁵

2. The Multilateral Forum for the Judicial Review of Trade Remedy Determinations

Multilateral judicial review of trade remedy determinations is conducted by a two-tiered dispute settlement system composed of ad hoc Panels and the Appellate Body. The WTO dispute settlement system was established in 1995 as “a central element in providing security and predictability to the

Law (1981), 277; E. D. Re, *Litigation before the United States Court of International Trade*, 26 *New York Law School Law Review* (1981), 437.

79 See US Constitution, Article III, s.1.

80 See J. A. Restani and I. Bloom, *The Nippon Quagmire: Article III Courts and Finality of United States Court of International Trade Decisions*, 39 *Brooklyn Journal of International Law* (2014), 1005.

81 See 28 U.S.C. § 1295(a) (5) (2012).

82 See 28 U.S.C. § 1254.

83 See J. F. Colares, *Alternative Methods of Appellate Review in Trade Remedy Cases: Examining Results of US Judicial and NAFTA Binational Review of US Agency Decisions from 1989 to 2005*, 5 *Journal of Empirical Legal Studies* (2008), 171, 174.

84 See Bowman, Covelli and Uhm, *supra* note 2, 170-171.

85 *Ibid.*

multilateral trading system.”⁸⁶ Its purpose is to preserve the rights and obligations of Members under the WTO Agreements and to clarify the existing provisions of those agreements.⁸⁷ The dispute settlement system has an exclusive and compulsory jurisdiction over disputes which arise under the WTO Agreements.⁸⁸ Panels are appointed on an ad hoc basis and serve as “adjudicators of first instance.”⁸⁹ Their decisions are subject to appeal to the Appellate Body, which is a standing body comprised of seven individuals. Both Panel and Appellate Body reports have to be adopted by the Dispute Settlement Body (DSB) to have legal effect. However, the adoption of Panel and Appellate Body reports is automatic, meaning it can only be blocked by consensus.

C. Comparing the Domestic and Multilateral Forums for Judicial Review

This section attempts to compare and contrast the key differences between the WTO dispute settlement system and US Courts for the judicial review of trade remedy determinations from the perspective of parties affected by affirmative trade remedy determinations. The section will focus on three key differences which are fundamental in determining the choice of forum for the judicial review of trade remedy determinations: the legal standing of interested parties to bring a complaint against trade remedy determinations before US Courts and the WTO dispute settlement system, standard of review and available remedies.

1. Standing

Under the Trade Agreement Act of 1979 (incorporated into the Customs Court Act of 1980 by reference) “any interested party” who was a party to antidumping and countervailing proceedings enjoys standing before the

86 See Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, 1869 U.N.T.S. 401, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1867 U.N.T.S. 154, Article 3.2.

87 Ibid.

88 See *ibid.*, Article 23.

89 See G. Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (2015), at http://assets.cambridge.org/97811071/02767/frontmatter/9781107102767_frontmatter.pdf.

CIT to challenge such determination. The term “interested party” in antidumping and countervailing cases is defined to include foreign producers/exporters, domestic producers, the governments of the exporting country, unions, trade associations, and importers.⁹⁰ This means that all interested parties who can be affected by an affirmative trade remedy determination can challenge such determination before the CIT. However, although foreign governments have intervened or sought to intervene before CIT proceedings (e.g. Canadian governments in *Tembec, Inc. v. United States* and Chinese Government in *GPX International Tire Corp. v. United States*), most of the trade remedy determination cases brought before the CIT were filed by private parties.

By contrast, standing in WTO dispute settlement proceedings is exclusively restricted to WTO Members only. Private parties have no standing in WTO dispute settlement proceedings and must rely on their respective governments to argue their positions.⁹¹ This is notwithstanding the fact that private parties play an instrumental role in lobbying and financially supporting their governments to file a WTO complaint.⁹² A number of WTO cases are known by the private parties behind than by the countries in question. The most classic example in this regard is the *Japan-Film* case between Japan and the United States, which is widely known as the *Fuji-Kodak* dispute.⁹³ Recent examples include the *EC- Large Civil Aircraft* and *US-Large Civil Aircraft* disputes which are more about *Boeing v. Airbus* than *US v. EU*.⁹⁴

90 See 19 U.S.C. § 1677(9). See also P. Huston, Antidumping and Countervailing Duty Dispute Settlement under the United States-Canada Free Trade Agreement: Is the Process Constitutional, 23 Cornell International Law Journal (1990), 529.

91 There is a longstanding scholarly debate as to whether private parties should acquire legal standing before the WTO dispute settlement proceedings, see P. C. Mavroidis et al., Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?, 32 Journal of World Trade (1998), 147; J. P. Trachtman and P. Moremen, Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway, 44 Harvard International Law Journal (2003), 221; A. Catbagan, Rights of Action for Private Non-State Actors in the WTO Disputes Settlement System, 37 Denver Journal of International Law and Policy (2008), 279.

92 See e.g. G. C. Shaffer et al., Winning at the WTO: The Development of a Trade Policy Community within Brazil 41 Cornell International Law Journal (2010), 383; M. Elsig and M. A. Pollack, Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization European Journal of International Relations (2012), 391.

93 See Japan – Measures Affecting Consumer Photographic Film and Paper (Japan-Film), WTO Panel Report, Doc. WT/DS44/R (adopted 22 April 1998).

The inference from the foregoing is that although private parties cannot directly participate as parties to a dispute, they play an increasingly significant role in WTO dispute settlement proceedings. This, however, does not necessarily mean that private parties adversely affected by trade remedy determinations have easy access to multilateral judicial review. First, it is relatively large firms that are capable of lobbying their governments to file a WTO complaint against another Member's trade remedy determinations.⁹⁵ Second, aside from pressure from interested private parties, there are several other factors that influence governments' decisions whether to file a WTO complaint. As pointed out by Christina Davis, filing a WTO complaint is costly in terms of government resources and diplomatic relations.⁹⁶ This means that governments may not always respond to the demands of private parties by filing a WTO complaint. To this extent, domestic tribunals complement the WTO dispute settlement system by providing access to judicial review for interested parties who otherwise have no direct access to judicial review.

2. *Standard of Review*

Standard of review is another important factor that influences the choice of forum in which the judicial review of trade remedy determinations takes place. In the context of the judicial review of trade remedy determinations, standard of review can be defined as the degree of deference or discretion that the reviewing forum accords to trade remedy investigating authorities.⁹⁷ The standard of review applied by a reviewing forum may vary from *de novo* review to full deference. Under *de novo* standard of review, the reviewing forum decides an issue anew, without regard to the in-

94 See United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (US – Large Civil Aircraft (2nd complaint)), WTO Appellate Body Report, Doc. WT/DS353/AB/R (adopted 23 March 2012); European Communities – Measures Affecting Trade in Large Civil Aircraft (EC and certain member States – Large Civil Aircraft), Doc. WT/DS316/AB/R (adopted 1 June 2011).

95 See in general C. L. Davis, *Why Adjudicate? Enforcing Trade Rules in the WTO* (2012). See also S. Wilckens, *The Usage of the WTO Dispute Settlement System: Do Power Considerations Matter?*, in H. Beladi and K. Choi (eds.), *Frontiers of Economics and Globalization* (2009).

96 C. Davis, *The Effectiveness of WTO Dispute Settlement: An Evaluation of Negotiation Versus Adjudication Strategies* (2008), unpublished manuscript at 9.

97 See J. Bohanes and N. Lockhart, *Standard of Review in WTO Law*, in D. L. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law* (2009), 379.

investigating authorities' determinations. Under deferential standard of review, the reviewing forum accepts the investigating authorities' determinations insofar as certain purely procedural requirements are complied with. There are some more or less deferential/*de novo* standards of review between these two extremes.⁹⁸ The adoption of one or another standard of review has considerable implications for the outcome of the judicial review of trade remedy determinations. From the standpoint of interested parties adversely affected by an affirmative trade remedy determination, the forum which applies a less deferential standard of review is obviously preferable. The discussion in this section shows that although the standards of review to be applied by US Courts and the WTO dispute settlement system appear similar, they are practically different.

US Courts generally review antidumping and countervailing determinations under the standard articulated in 19 USC § 1516a (b) (1) (B) (i). The key inquiry under this standard is whether the investigating authority's decision is supported by substantial evidence on the record, or is otherwise in accordance with law. With respect to factual determinations, the standard of review entails that insofar as the investigating authorities' determination is supported by substantial evidence it should be upheld. The mandate of the CIT is limited to deciding whether the determination is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁹⁹ The legal standard of review was formulated as a two-step review in 1984 by the US Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron standard*). The *Chevron standard* entails that when a statute is clear, it must be applied as written, and when it is silent or ambiguous, the courts must defer to the investigating authorities' interpretation so long as it is "based on a permissible construction of the statute."¹⁰⁰ As noted by the Federal Circuit, the CIT may not substitute its own judgment for that of the investigating authority if the authority's interpretation is reasonable. However, the CIT has long recognized that a high level of deference to agency expertise is appropriate. In *Habas* it explained that:

98 L. Gruszczynski, The Standard of Review of Health and Environmental Regulations by WTO Panels, in G. van Calster and D. Prévost (eds.), *Research Handbook on Environment, Health and the WTO* (2013), 733.

99 See *Steel Authority of India, Ltd. v. United States*, 146 F. Supp. 2d 900, 903 (CIT 2001).

100 See *Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984), 842 et seq.

Commerce is the master of the antidumping law and that factual determination supporting antidumping margins are best left to the agency's expertise.¹⁰¹

Similarly, the Federal Circuit stated that:

While this court generally reviews ITC interpretations of statutory provisions de novo, some deference to constructions by the agency charged with its administration may be appropriate, particularly if technical issues requiring some expertise are involved.¹⁰²

The general standard of review applicable to all WTO Agreements is embodied in Article 11 of the DSU. However, Article 17.6 of the AD Agreement contains a special standard of review for antidumping determinations. There was some doubt as to whether the special standard of review for antidumping determinations also applies to the review of countervailing duty determinations. This doubt stemmed in part from a 1994 WTO Ministerial Declaration which stated that "Ministers recognize [...] the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."¹⁰³ In *US – Lead and Bismuth II*, the United States invoked this declaration to argue that the special standard of review contained in the AD Agreement also applies to the review of countervailing duty determinations.¹⁰⁴ However, the Appellate Body rejected this argument by stating that the declaration is couched in hortatory language and does not provide for the application of the special standard of review to countervailing determinations.¹⁰⁵ However, the difference between the standards of review for antidumping and countervailing determinations should not be overstated. The purpose of the special standard of review in Article 17.6 of the AD Agreement is to supplement, not replace

101 *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi v. United States*, No. 05-00613 (Ct. Int'l Trade 2007).

102 See *Farrel Corp. v. International Trade Commission*, 949 F.2d 1147, 1151 (Fed. Cir. 1991).

103 See Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, MTN/FA HII-12 (1994).

104 See *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US – Lead and Bismuth II)*, WTO Appellate Body Report, Doc. WT/DS138/AB/R (adopted 07 June 2000), para. 9 et seq.

105 See *ibid.*, para. 49.

the general standard of review in Article 11 of the DSU.¹⁰⁶ It is, therefore, useful to discuss the general standard of review first and then move to the special standard of review for antidumping determinations.

WTO Panels are bound by the standard of review contained in Article 11 of the DSU, which requires them to “make an objective assessment of the [...] facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements”. In interpreting this provision, the Appellate Body in *EC-Hormones* opined that:

So far as fact-finding by panels is concerned, their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor ‘total deference’, but rather the ‘objective assessment of the facts.’¹⁰⁷

The key term here is “objective assessment”, which is left undefined under the DSU. Recalling previous jurisprudence, the Appellate Body in *US – Countervailing Duty Investigation on DRAMs* said that “objective assessment” must be understood in light of the substantive requirements of the WTO Agreement at issue.¹⁰⁸ In the context of the SCM Agreement, the Appellate Body held that the duty to make an “objective assessment” requires WTO Panels to review whether the investigating authority provided “a reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings, and (ii) how those factual findings supported the overall subsidy determination.”¹⁰⁹ According to the Appellate Body, panels should not conduct a *de novo* review of the evidence, nor should they substitute their judgment for that of the investigating authority.¹¹⁰ They must also limit their examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.¹¹¹ This

106 See *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US – Hot-Rolled Steel)*, Doc. WT/DS184/AB/R (adopted 23 August 2001), para. 62.

107 See *European Communities – Measures Concerning Meat and Meat Products (Hormones) (EC-Hormones)*, Docs. WT/DS26/AB/R & WT/DS48/AB/R (adopted 13 February 1998), para. 117.

108 See *US – Countervailing Duty Investigation on DRAMs*, supra note 73, para. 184.

109 See *ibid.*, para. 186.

110 See *ibid.*, para. 187.

111 *Ibid.*

may prompt the conclusion that the WTO standard of review, at least insofar as general standard of review is concerned, is similar to that of the US Courts. However, unlike the CIT, WTO panels are not allowed to simply defer to the conclusions of the investigating authority. The panels' examination of those conclusions must be "critical and searching".¹¹² For instance, in *US-Softwood Lumber*, the Appellate Body criticized the Panel for applying a standard of review that is too deferential. However, the exact degree of deference WTO Panels should give to investigating authorities remains uncertain.

The special standard of review for antidumping determinations appears similar to the *Chevron standard*.¹¹³ With respect to factual standard of review, the special standard of review for antidumping determinations contained in Article 17.6 (i) is largely similar to the general standard of review discussed above. However, the legal standard of review gives considerable deference to investigating authorities when there are multiple interpretations of the disputed text of the AD Agreement. As clarified by the Appellate Body, the legal standard of review for antidumping determinations enshrined in Article 17.6 (ii) simply adds that a panel shall find that a measure is in conformity with the AD Agreement if it rests upon one permissible interpretation of that Agreement.¹¹⁴ This is quite similar to the degree of deference US Courts accord to investigating authorities under the *Chevron standard*. The difference, however, stems from how this standard is applied by the WTO dispute settlement system. Article 17.6(ii) of the AD Agreement states that:

[T]he 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 those permissible interpretations.¹¹⁵

112 See United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 215 of the DSU by Canada (US – Softwood Lumber VI (Article 215 – Canada)), WTO Appellate Body Report, Doc. WT/DS277/AB/RW (adopted 9 May 2006), para.93.

113 Some commentators suggest that the drafting of Article 17.6 of the AD Agreement was inspired by the *Chevron standard*, see e.g. S. P. Croley and J. H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *The American Journal of International Law* (1996), 193.

114 See *US – Hot-Rolled Steel (Japan)*, supra note 106, para. 62.

115 See *Antidumping Agreement*, supra note 3, Article 17.6(ii).

According to the Appellate Body, the second sentence of this provision presupposes that the application of the customary rules of treaty interpretation could give rise to multiple interpretations of some provisions of the AD Agreement.¹¹⁶ WTO Panels are, therefore, obliged first to determine whether the relevant provision of the AD Agreement admits more than one interpretation by applying the customary rules of treaty interpretation embodied in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). If such an interpretation reveals that the relevant provision of the AD Agreement “admits of more than one permissible interpretation”, the panel “shall find the [investigating] authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.” The problem is that the application of the pertinent rules of the VCLT rarely permits more than one permissible interpretation. WTO Panels and especially the Appellate Body often rely on a textual and contextual approach to treaty interpretation.¹¹⁷ Such approach, however, normally leads to a single preferred interpretation. This means that the standard of review for antidumping determinations is not as deferential as it first appears.

Thus, in practice, the standard of review for trade remedy determinations employed by the WTO dispute settlement system appears to be less deferential than the standard of review applied by US Courts. This has been particularly evident in the diverging conclusions reached by US Courts and the WTO dispute settlement system in cases involving the same antidumping and countervailing determinations. The most controversial of all these cases have been those related to the practice of zeroing in antidumping determinations. Neither the AD Agreement nor the US antidumping legislation that implements the AD Agreement explicitly prohibits zeroing. However, while US Courts defer to the interpretation of the investigating authorities and approve such practice, the Appellate Body repeatedly found that zeroing is inconsistent with the provisions of the AD Agreement. In so doing, the Appellate Body has effectively neutralized the difference between the general standard of review of DSU Article 11 and the special standard of review of AD Agreement Article 17.6.

116 *Ibid.*, para. 59.

117 See Y. Zhang, *Contribution of the WTO Appellate Body to Treaty Interpretation*, in G. Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (2015); I. V. Damme, *Treaty Interpretation by the WTO Appellate Body* (2009).

3. Available Remedies

The legal remedies available in WTO dispute settlement proceedings vary from those that can be obtained from the US Courts for the judicial review of trade remedy determinations. Much of the difference lies in the prospective nature of remedies under the WTO dispute settlement system. Before discussing this difference and its implications, however, it is important first to highlight the nature of remedies that complainants in trade remedy proceedings may normally seek. Affirmative antidumping and countervailing determinations lead to the imposition of antidumping and countervailing duties. There are two systems of collecting such duties. While most countries operate a prospective duty assessment system whereby antidumping and countervailing duties are assessed at the time of entry (of the products subject to antidumping or countervailing duties), the United States operates a retrospective duty assessment system under which an estimated cash deposit is collected at the time of entry, and the duties are assessed at a later time.¹¹⁸ Complainants in trade remedy proceedings normally seek the elimination or reduction of the antidumping and countervailing duties (i.e. prospective remedies) and the refund of the antidumping and countervailing duties paid or the cash deposit (i.e. retrospective remedies). The question is which forum for the judicial review of trade remedy determinations offers such remedies.

When the CIT concludes that a trade remedy determination by Commerce and ITC is not supported by substantive evidence or otherwise inconsistent with the law, it normally remands the case to the relevant agency with instruction to explain its determination or issue a new determination in accordance with the decision of the court.¹¹⁹ The CIT has the authority to either affirm or remand the redetermination by Commerce and ITC. Since there is no limit as to the number of times a case may be remanded to Commerce/ITC, trade remedy cases tend to bounce back and forth between Commerce/ITC and the CIT several times before the Court makes a final and conclusive decision. On remand, Commerce/ITC may have to explain or change their determination depending on the scope of the remand. During the proceedings, antidumping and countervailing duty deposits continue to be paid, but parties normally request for an injunction against liquidation. The CIT and the Federal Circuit are authorized to grant such injunctions insofar as the complainant shows that: (a) it is likely

118 Barnett, *supra* note 70, 455.

119 19 USC § 1516a(c) (3).

to prevail on the merits; (b) it would suffer irreparable injury in the absence of an injunction; (c) the balance of hardships favours the complainant, and (d) the public interest would not be adversely affected by an injunction.¹²⁰ Although these requirements seem restrictive at first glance, the CIT and the Federal Circuit routinely grant preliminary injunctions against liquidation.¹²¹ The injunction prevents the relevant authority from liquidating the deposit until the final and conclusive court decision. If the antidumping and countervailing duty rate is lowered on remand or the duties are revoked by the Federal Circuit on appeal the remedy available for successful complainants include the refund of the deposit paid (or the difference) plus interests.

The remedies that can be granted by WTO Panels and the Appellate Body to successful complainants in antidumping and countervailing proceedings are limited by Article 19 of the DSU. Article 19.1 states that:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.¹²²

WTO Panels and the Appellate Body may also suggest ways of implementing the recommendations, but they are not empowered to issue recommendations for the repayment of WTO-inconsistent antidumping and countervailing duties. Nor do they have the authority to issue preliminary injunctions against the collection of duties (or liquidation of deposits) during the proceedings.

However, retrospective remedies and preliminary injunctions have particular importance in trade remedy cases. As much as they want the cessation of antidumping and countervailing duties, importers or exporters of products subject to antidumping and countervailing duties want to get back the duties they paid or deposited. It is partly for this reason that such parties often pursue a two-track approach whereby they lobby their governments to file a WTO complaint (largely because of the high likelihood of success) and challenge the same trade remedy determination before US Courts either at the same time (to benefit from the routinely granted preliminary injunctions) or subsequently (to benefit from the retrospective

120 19 U.S.C. § 1516a(c).

121 See Barnett, *supra* note 70 ('virtually automatic'), 462; Ryan, *supra* note 72 ('routinely granted'), 375.

122 Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401, GATT 1994, *supra* note 1 (DSU).

remedies).¹²³ The problem with such an approach is, however, WTO dispute settlement body reports are not binding upon US Courts.¹²⁴ This means that it is only when US Courts also reach the same conclusion with that of the WTO dispute settlement body that the retrospective remedies can be obtained.

The mechanism for the implementation of WTO reports in the United States is set out in section 129 of the Uruguay Round Agreement Act. According to this Act, if WTO panels or the Appellate Body report finds that antidumping and countervailing determinations by US agencies are inconsistent with the AD or SCM Agreement, the United States Trade Representative (USTR) requests whether the Commission would be able to implement the report. In response to such requests, the Commission may revoke the original determination or simply change the dumping margin or the amount of countervailable subsidies to comply with the WTO Panel or Appellate Body recommendations.¹²⁵ The new antidumping or countervailing determination applies prospectively and in principle does not allow complainants to claim the refund of duties or deposits paid in accordance with the original determination.

IV. Conclusion

The WTO dispute settlement system and domestic tribunals share overlapping subject matter jurisdictions over the judicial review of trade remedy determinations. The AD and SCM Agreements envisage that final affirmative antidumping and countervailing determinations can be challenged domestically through tribunals designated for this purpose and/or multilaterally through the WTO dispute settlement system. However, neither of these agreements addresses the issues posed by the overlap in jurisdiction between the two forums. Nor are there any ongoing initiatives to address the overlap. This is due in part to the implicit assumption that the two forums are complementary. Judicial review is part of the procedural safeguard against the misuse of trade remedy measures for protectionist pur-

123 See Barnett, *supra* note 70 (noting that ‘some foreign respondents have pursued domestic litigation apparently for the sole purpose of maintaining an injunction against liquidation’), 456.

124 See *Corus Staal BV v. Dep’t of Commerce*, 395 E3d 1343 (Fed. Cir. 2005).

125 If the complainant WTO Member disagrees with the Commissions’ redetermination, it can bring further WTO complaints in accordance with Article 21.5 of the DSU.

poses. Insofar as they are complementary, the presence of alternative forums for judicial review enhances the exposure of trade remedy determinations to judicial review. The question is whether and to what extent the domestic and multilateral forums for the judicial review of trade remedy determinations complement one another. This chapter has attempted to address this question by focusing on some key procedural differences between US Courts for the judicial review of trade remedy determinations and the WTO dispute settlement system. The significant differences between these two forums in terms of standing, the standard of review and available remedies, justify the coexistence of the overlapping jurisdiction between the two forums. On the one hand, US Courts offer direct access to judicial review for interested private parties and provide remedies unavailable in WTO dispute settlement proceedings (i.e. preliminary injunctions and retrospective remedies). On the other hand, the less deferential standard of review applied by WTO Panels and especially by the Appellate Body puts affirmative trade remedy determinations under more rigorous scrutiny. Enhanced interaction between the two forums will further strengthen the role of domestic and multilateral judicial review in ensuring adherence to the rule of law in the application of trade remedy measures.

