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NAFTA Chapter 19 Binational Panel Reviews - Still a Zero Sum Game: The Wire Rod Decision and its Progeny

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NAFTA CHAPTER 19 BINATIONAL PANEL REVIEWS – STILL A ZERO SUM GAME: THE *WIRE ROD* DECISION AND ITS PROGENY

EDWARD TRACY*

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“The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: . . . ESTABLISH clear . . . rules governing their trade . . . “

-North American Free Trade Agreement, Preamble ¶ 6¹

“[B]inational panel review . . . does not create either a new source of U.S. law or a new (and potentially divergent) interpretation of U.S. [antidumping] . . . law in cases on Canadian products. Given the . . . fact that panels must apply U.S. law . . . we anticipate consistency between panel and court decisions.”

-Jean Anderson, U.S. Department of Commerce Attorney²

“From a legal perspective . . . [Chapter 19] panel[s] are strictly circumscribed. [They are] governed by precedents of . . . the Federal Circuit when reviewing an International Trade Administration or U.S. International Trade Commission final determination.”

-Michael H. Greenberg, former Chapter 19 Chairman³

INTRODUCTION

On November 28, 2007, a binational panel, created under Chapter 19 of the North American Free Trade Agreement (“NAFTA”)⁴ issued

1. North American Free Trade Agreement, pmbl., U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

2. *United States-Canada Free Trade Agreement: Hearing on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases Before the S. Comm. on the Judiciary*, 100th Cong. 74 (1988) [hereinafter *Hearing*] (testimony of M. Jean Anderson, Chief Counsel, Int’l Trade, Dep’t of Commerce) (testifying that Chapter 19 was intended to maintain consistency between binational panel decisions and domestic antidumping jurisprudence under NAFTA’s predecessor, the U.S.-Canada Free Trade Agreement, the “FTA”).

3. Michael H. Greenberg, *Chapter 19 of the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the Court of International Trade*, 25 LAW & POL’Y INT’L BUS. 37, 42 (1993) (providing a former Chapter 19 panelist’s perspective that NAFTA Chapter 19 panels are bound by the Federal Circuit).

4. See NAFTA, *supra* note 1, pmbl. (establishing a trilateral free trade agreement between the United States, Canada, and Mexico).

a decision in *Carbon and Certain Alloy Steel Wire Rod From Canada* (“Wire Rod”).⁵ The *Wire Rod* panel broke with NAFTA’s unambiguous directives by incorrectly discerning the applicable standard of review in ruling against the U.S. Department of Commerce (“Commerce”).⁶ The panel’s reasoning circumvented what should have been binding U.S. law and NAFTA’s text, and further convoluted an already inconsistent body of Chapter 19 decisions.⁷

The *Wire Rod* case concerned the trade issues of dumping and zeroing. In international trade, dumping occurs when a company sells an export for less than its fair value in the importing market, attempting to corner that particular market.⁸ To combat this, the importing state may impose tariffs known as antidumping duties.⁹ Zeroing¹⁰ was a former U.S. pricing policy used by Commerce whereby any exports sold above the domestic fair value of that

5. Decision of the Panel, *Carbon and Certain Alloy Steel Wire Rod From Canada*, at 40, USA-CDA-2006-1904-04 (Nov. 28, 2007) [hereinafter *Wire Rod*] (Binational Panel Review pursuant to Art. 1904 of NAFTA).

6. See *id.* (ascertaining NAFTA article 1904.1’s provision that in Chapter 19 panels, the binational panel review replaces the individual judicial review of the parties to the dispute as the applicable standard of review rather than reviewing the case in the same manner as the Court of International Trade would by abiding by Court of Appeals for the Federal Circuit jurisprudence).

7. Compare *id.* at 21 (concluding that NAFTA Chapter 19 panels are not bound by Federal Circuit precedent), with Binational NAFTA Panel Review, *Certain Durum Wheat and Hard Red Spring Wheat From Canada: Final Affirmative Countervailing Duty Determinations*, at 17 n.45, USA-CDA-2003-1904-05 (Mar. 10, 2005) [hereinafter *Wheat From Canada*] (acknowledging, pre-*Wire Rod*, that Federal Circuit jurisprudence binds Chapter 19 panels).

8. See BARRON’S DICTIONARY OF FINANCE AND INVESTMENT TERMS 204 (8th ed. 2010) (defining dumping as “selling goods abroad below cost in order to eliminate a surplus or to gain an edge on foreign competition”); see also RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 358-59 (2d ed. 2001) (explaining that manufacturers dump products to gain an advantage in a foreign marketplace over domestic competitors).

9. See Christopher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT’L L. & BUS. 49, 53 (1997) (asserting that antidumping duties are a necessary defensive measure available to states to safeguard domestic industries).

10. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101-01 (Feb. 14, 2012) (to be codified at 19 C.F.R. pt. 351) (abandoning the use of zeroing in all instances). At the time *Wire Rod* was decided, zeroing was still used in administrative reviews by Commerce.

product are not factored into antidumping duty calculations.¹¹ Zeroing was controversial because it often culminated in drastically increased export duties for foreign manufacturers.¹² Despite a vast body of international jurisprudence outlawing zeroing, U.S. courts sanctioned the practice.¹³

Under NAFTA Chapter 19, a petitioner¹⁴ alleging injury from Commerce's antidumping calculations may request a review by a binational panel in lieu of domestic judicial review in the U.S.¹⁵ NAFTA, while an international legal instrument, instructs its Chapter 19 panels to apply the importing party's domestic antidumping law.¹⁶ Despite this clear directive however, the *Wire Rod* majority discerned an incorrect standard of review by disregarding then-binding U.S. antidumping and zeroing jurisprudence and citing in error to World Trade Organization ("WTO") antidumping law over U.S. law in holding for the Petitioner.¹⁷

11. *Glossary Term — Zeroing*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/glossary_e/zeroing_e.htm (last visited Nov. 20, 2011).

12. See Jeffrey W. Spaulding, Note, *Do International Fences Really Make Good Neighbors? The Zeroing Conflict Between Antidumping Law and International Obligations*, 41 NEW ENG. L. REV. 379, 381 (2007) (observing that if states' investigating authorities, such as Commerce, include all sales in calculating antidumping duties, no dumping duty would be imposed because the periods of higher and lower prices would cancel each other out).

13. *Compare* *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004) (interpreting section 1677b(a), part of the Tariff Act of 1930, to permit zeroing), *with* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, at 38, WT/DS141/AB/RW (Mar. 1, 2001) [hereinafter *Bed Linen*] (holding that zeroing contravenes international legal obligations by superficially inflating antidumping duties).

14. See NAFTA, *supra* note 1, art. 1911, para. 10 (defining an "involved party" as a party whose exports are the subject of a final determination; only involved parties or their respective state—through espousal—have standing to petition for Chapter 19 review).

15. See *id.* art. 1904, para. 1 (allowing a party to challenge Commerce's determinations under NAFTA rather than in U.S. court). This applies equally to all NAFTA members or parties thereof. For example, if an American party wishes to contest Mexico's antidumping calculations, they may request a panel review rather than filing in Mexican court.

16. See *id.* art. 1904, para. 3 (directing panels to apply the law such that "a court of the importing party would otherwise apply"). For example, applying U.S. antidumping law in the same manner as the appropriate U.S. court would apply where a Canadian or Mexican party challenges Commerce.

17. See *Wire Rod*, *supra* note 5, at 40 (determining that, despite then-binding

This Comment addresses the *Wire Rod* holding and argues that the majority's ruling was incorrect due to unsound treaty interpretation, misapplication of WTO law, and disregard for controlling U.S. jurisprudence. Despite Commerce's recent decision to abandon the zeroing methodology entirely, the focus of this Comment is to underscore the ambiguous language of NAFTA with respect to Chapter 19 antidumping reviews. Part II of this Comment discusses the international legal significance of dumping and zeroing.¹⁸ Part II also outlines U.S. antidumping law and its administration, as well as the relationship of WTO jurisprudence to U.S. law.¹⁹ Additionally, Part II explains NAFTA's method for resolving antidumping disputes under Chapter 19, and discusses several U.S. legal doctrines that aid Chapter 19 panels in determining U.S. international legal obligations.²⁰ Part II concludes with a summary of the *Wire Rod* decision, focusing on the underlying facts and key parts of the majority's reasoning.²¹ Part III argues that the *Wire Rod* holding was incorrect because the majority incorrectly ascertained the proper standard of review by misinterpreting NAFTA.²² Part III concludes by arguing that the *Wire Rod* majority's error in citing to WTO law

Federal Circuit jurisprudence sanctioning zeroing, the *Timken* case, Commerce's use of the practice violated U.S. international legal obligations under the WTO Antidumping Agreement).

18. See discussion *infra* Part II.A (commenting on the pricing policies of dumping and zeroing, and discussing how the practices were addressed internationally by both the General Agreement on Tariffs and Trade and its successor organization, the WTO).

19. See discussion *infra* Part II.B (explaining U.S. statutory and judicial antidumping law, stating how Commerce and the International Trade Commission conduct dumping investigations, and addressing the status of WTO law in U.S. courts).

20. See discussion *infra* Part II.C (outlining NAFTA's framework that can replace domestic antidumping judicial review; also explaining the *Charming Betsy* and *Chevron* doctrines with respect to discerning U.S. international legal obligations).

21. See discussion *infra* Part II.D (summarizing the complaint filed under NAFTA by Mittal, a Canadian manufacturer, and the reasoning behind the *Wire Rod* majority's determination that it was not bound by then-controlling U.S. zeroing precedent).

22. See discussion *infra* Parts III.A-B (noting how either analyzing NAFTA's plain meaning and object and purpose using the Vienna Convention on the Law of Treaties or a rudimentary following of NAFTA's text would have resulted in the panel vicariously substituting for the Court of International Trade, thus resulting in a summary dismissal of Mittal's claim).

resulted in a misapplication of the *Charming Betsy* canon of statutory construction.²³

Finally, Part IV recommends that NAFTA should refine the definition of “a court of the importing party” in Chapter 19’s Annex to clarify that Chapter 19 panels function as surrogates for domestic tribunals, and are thus bound by corresponding precedent.²⁴ Moreover, Part IV further implores NAFTA panels to implement *stare decisis* into Chapter 19 and guarantee an appeal of panel decisions under a *de novo* standard of review.²⁵ Without these changes, there will be continued uncertainty in Chapter 19 proceedings, circumventing the original aim of predictability under NAFTA.

I. BACKGROUND

A. DUMPING AND ZEROING: PRACTICES AND RATIONALE

Dumping is a pricing policy whereby exports are sold for less than their normal value (or “fair value”).²⁶ States and trade experts generally consider dumping to be unfair trade.²⁷ The economic incentive to dump products stems from manufacturers’ desire to

23. See discussion *infra* Part III.C (explaining how reliance on WTO precedent abrogated U.S. law, and arguing this led the majority to invoke the *Charming Betsy* canon in error).

24. See discussion *infra* Part IV.A (recommending that NAFTA explicitly define “a court of the importing party” as the Court of International Trade in U.S. cases).

25. See discussion *infra* Part IV.B (suggesting that *stare decisis* and a guaranteed *de novo* appeal would ensure consistent Chapter 19 antidumping jurisprudence).

26. *Glossary Term – Dumping*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/glossary_e/dumping_e.htm (last visited Nov. 20, 2011). For example, suppose a manufacturer, Z Corp, from Country X exports widgets to Country Y. Widgets cost \$100 in Country Y, but Z Corp sells them for \$50. Here, the widgets are dumped exports.

27. See MICHAEL K. YOUNG, UNITED STATES TRADE LAW AND POLICY 52 (2001) (noting a European Commission report, which found that dumping constitutes unfair trade because it allows manufacturers to minimize losses and maximize profits at the expense of the importing state’s domestic industry); see also Marie Louise Hurabiell, Comment, *Protectionism Versus Free Trade: Implementing the GATT Antidumping Agreement in the United States*, 16 U. PA. J. INT’L BUS. L. 567, 572 (1995) (explaining that anti-dumping duties are justified by states’ need to protect their domestic economies against predatory exporters’ dumping).

corner the global marketplace for their products.²⁸ When such predatory exporters are caught dumping, states tax them with antidumping duties, typically in the amount of the difference between the domestic and export price (the “dumping margin”).²⁹ The theory behind antidumping duties is that they are a necessary means for controlling predatory dumping and protecting domestic markets.³⁰ The World Trade Organization’s (“WTO”)³¹ Antidumping Agreement (“ADA”) is the current international antidumping treaty, codified at the culmination of the Uruguay Round of Trade Agreements (“Uruguay Round”).³² Article 18 of the ADA requires all prospective WTO states to enact domestic legislation to further its objects and goals.³³

28. See Corr, *supra* note 9, at 98 (explaining that by dumping goods, exporters can obtain monopoly or oligopoly power over a foreign marketplace and will raise prices once domestic competitors are forced from the market). *But see* FOLSOM ET AL., *supra* note 8, at 358 (listing non-predatory motivations for dumping, including dumping as a response to distress sales, to develop emerging markets, or to foster brand awareness).

29. See Terence P. Stewart & Amy S. Dwyer, *Antidumping: Overview of the Agreement*, in LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE 209 (Kyle W. Bagwell et al. eds., 2010) (explaining that antidumping duties cannot exceed the price difference between the domestic and export prices, but can be less if they remedy the injury caused). States’ ability to impose antidumping duties comes from the General Agreement on Tariffs and Trade. See General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (declaring that states may levy antidumping duties that do not exceed the margin of dumping on any dumped product).

30. See Corr, *supra* note 9, at 98 (opining that there must be a framework whereby predatory exporters are punished through increased antidumping duties); *see also* Hurabiell, *supra* note 27, at 572 (explaining that antidumping duties are justified as a defense mechanism for states whose domestic industries are harmed by the destruction of competition).

31. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (supplanting the GATT with its successor in the World Trade Organization, an international body created to liberalize international trade).

32. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter ADA] (incorporating antidumping provisions of all prior versions of the GATT into a comprehensive international antidumping code administered by the WTO).

33. See *id.* art. 18 (requiring all member states to take “all necessary steps” to ensure its domestic law conforms to the antidumping goals of the ADA).

Zeroing³⁴ was a controversial method used exclusively by Commerce in administrative reviews when calculating dumping margins.³⁵ Normally, when a product has been dumped, the importing party calculates a positive dumping margin; that is, the higher domestic price minus the lower export price.³⁶ If a product is not dumped, the importing party calculates a negative dumping margin; that is, the lower domestic price minus the higher export price.³⁷ When a manufacturer makes multiple sales, its dumping margins are aggregated for purposes of assessing antidumping duties.³⁸ Under a zeroing scheme, however, all negative dumping margins were disregarded, and zero is used instead.³⁹ Opponents of zeroing believed that the practice artificially distorted dumping margins by disregarding sales made above fair value, constituted unfair trade, and served as a punitive trade duty.⁴⁰ Conversely,

34. Zeroing was a highly technical concept, and has been simplified for purposes of this Comment. For a detailed explanation of the former pricing policy, see generally Spaulding, *supra* note 12 (describing the practice of zeroing, particularly with respect to the U.S.-WTO conflict over its legality).

35. See *id.* at 380 (finding that zeroing constituted a contentious methodology in computing dumping margins that had caused tension between U.S. courts, which sanctioned the practice, and the WTO, which consistently outlawed it). But see 77 Fed. Reg. 8101-01 (abandoning the zeroing methodology entirely); *Bed Linen*, *supra* note 13, at 29 (showing that the U.S. was not the only state that had ever used zeroing; in *Bed Linen*, the WTO Appellate Body ruled against the European Communities' use of the practice in 2001).

36. For example: A manufacturer in Country X (Z Corp) sells widgets to consumers in Country Y. Widgets cost \$100 in Country Y, but Z Corp sells them for \$50. Here, Z Corp's dumping margin is \$50: (*Domestic Price*: \$100 – *Export Price*: \$50).

37. For example: The same manufacturer from Country X (Z Corp) sells widgets to consumers in Country Y. Widgets cost \$100 in Country Y, but now Z Corp sells them for \$150. Here, Z Corp's dumping margin is -\$50: (*Domestic Price*: \$100 – *Export Price*: \$150).

38. For example: In the preceding hypothetical, Z Corp, having made two sales in Country Y, would have a total dumping margin of \$0: (*Dumping margin 1*: \$50 + *Dumping margin 2*: -\$50). Thus, Country Y would impose no antidumping duties on Z Corp.

39. For example: In the preceding hypothetical, under a zeroing scheme, Z Corp would have a total dumping margin of \$50: (*Dumping margin 1*: \$50 + *Dumping margin 2*: \$0 [adjusted from -\$50]). Thus, Country Y would impose a \$50 antidumping duty on Z Corp.

40. See Casey Reeder, Comment, *Zeroing in on Charming Betsy: How an Antidumping Controversy Threatens to Sink the Schooner*, 36 STETSON L. REV. 255, 260 (2006) (discussing how opponents of zeroing believed the methodology

proponents of zeroing rationalized it based on policy considerations, such as deterrence for covering up hidden (or “masked”) dumping, and economic incentives.⁴¹

B. U.S. ANTIDUMPING LAW: HISTORY, ADMINISTRATION, AND ADJUDICATIONS

To adhere to the results of the Uruguay Round, specifically Article 18.4 of the ADA requiring conformity of domestic law with its goals, Congress enacted the Uruguay Round Agreements Act (“URAA”).⁴² The URAA specifically provided that the United States would agree to ensure the legal capacity of the WTO, including its goal of international dumping control.⁴³ The U.S. antidumping statute is codified in the amended Tariff Act of 1930 (“the Tariff Act”),⁴⁴ and consistent with the ADA’s goals, Congress amended the Tariff Act’s antidumping provisions.⁴⁵

served as an opportunistic trade duty by refusing to account for all sales, so that states that used zeroing benefitted economically from generating significantly higher revenues in the form of antidumping duties). For example, if the United States were to sanction zeroing, it would stand to collect significantly more in antidumping duties than it otherwise would have collected. However, if the United Kingdom were to outlaw zeroing, it would stand to forego this extra revenue, conceding a distinct economic advantage to the United States.

41. See, e.g., *Serampore Indus. v. U.S. Dep’t of Commerce*, 11 Ct. Int’l Trade 866, 874 (1987) (discussing how exporters may attempt to disguise, or “mask” their use of dumping on a portion of their total exports with more profitable sales of the same exports in other places, and that zeroing attempted to prevent this); see also KATHLEEN W. CANNON & BRADFORD L. WARD, *ZEROING AND TARGETED DUMPING: HAS THE ABILITY TO COUNTERACT INJURIOUS DUMPING BEEN ELIMINATED?* 1, 1 (2009), available at 2009 WL 2030927 (noting that zeroing ensured that all instances of dumping were offset); Reeder, *supra* note 40, at 286 (explaining that by abandoning zeroing—which it has now done—Commerce would stand to forfeit millions of dollars in revenue).

42. See Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501-3624 (2006)) (conforming U.S. law to the WTO’s objects and purposes, including the ADA).

43. See *id.* § 3511(b) (accepting the WTO Agreement and ensuring legal force of the WTO’s functions).

44. Tariff Act of 1930, 19 U.S.C. §§ 1202-1683g (2006) (codifying various amended versions of the Tariff Act into a comprehensive set of U.S. international trade provisions, including antidumping).

45. See, e.g., *id.* § 1677(34) (defining “dumping” to refer to sales made in the United States at “less than fair value”); FOLSOM ET. AL., *supra* note 8, at 363 (noting that prior noncriminal antidumping provisions, such as the Antidumping Act of 1921, 19 U.S.C. § 1301, have been repealed).

Despite acceding to the ADA's vision for international dumping control, the URAA specifically provides that WTO jurisprudence does not bind the United States.⁴⁶ Congress made this especially clear in its Statement of Administrative Action ("SAA"), a proclamation that serves as Congress' official stance on the results of the Uruguay Round.⁴⁷ Notwithstanding this unambiguous proclamation, the URAA contains two provisions designed specifically to alter U.S. practice based on adverse WTO jurisprudence in 19 U.S.C. §§ 3533 and 3538.⁴⁸ These subsections allow for the permissive implementation of WTO law through consultations between Congress, the Executive via the U.S. Trade Representative ("USTR"), and other involved parties.⁴⁹ These URAA provisions are the only proper way to incorporate adverse WTO jurisprudence into U.S. law.⁵⁰

46. See 19 U.S.C. § 3512(a)(2) (2006) (ensuring that no result of the Uruguay Round will have effect if it conflicts with U.S. law); see also Filicia Davenport, Note, *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the Charming Betsy Standard With Respect to WTO Agreements*, 15 FED. CIR. B.J. 279, 281 (2005) (referring to URAA § 3512(a)(2) as the "URAA Supremacy Clause" due to Congress' unequivocal preference for U.S. law over WTO jurisprudence); cf. Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part I)*, 29 J. MAR. L. & COM. 335, 386 (1998) (stating that Congress may statutorily dictate that U.S. law continuously supersedes international law, but that U.S. courts will only enforce this notion if expressly enumerated by Congress).

47. See H.R. DOC. NO. 103-316, at 1032 (1994) (expressing Congress's position that WTO Appellate Body reports do not bind U.S. courts or purport to express U.S. foreign trade policy, and that any such report will be implemented only to the extent that Congress decides if and when it is appropriate).

48. See generally 19 U.S.C. §§ 3533, 3538 (explaining the procedures whereby the United States reacts to WTO disputes involving the United States, and the procedures for amending agency practice based on adverse WTO law).

49. See *id.* (establishing the URAA's permissive mechanism for implementing WTO law into U.S. agency practice: the USTR may request that Commerce issue an advisory report on whether the Tariff Act permits amendments to agency action; if answered affirmatively, this prompts consultations between the USTR, Congress, and interested parties, after which the USTR requests a final determination from Commerce, followed by further consultations with Congress and interested parties; it is only after this process that the USTR may incorporate WTO law by amending U.S. agency practice).

50. See Davenport, *supra* note 46, at 311 n.207 (explaining that Congress granted the USTR, who is part of the Executive branch, the power to determine if and when to amend agency practice based on adverse WTO law).

1. U.S. Antidumping Investigations Conducted by the Department of Commerce and International Trade Commission

Two administrative agencies are authorized to control U.S. antidumping law: Commerce⁵¹ and the International Trade Commission ("ITC").⁵² Commerce manages all phases of U.S. antidumping investigations except for injury determinations.⁵³

Initially, the ITC investigates whether a product is materially injuring its respective U.S. market.⁵⁴ Commerce then determines the extent to which the product was dumped.⁵⁵ Finally, if Commerce finds that the product was dumped, ITC makes a final material injury determination.⁵⁶ If these steps indicate dumping has materially injured a U.S. market, Commerce can impose antidumping duties.⁵⁷

The Tariff Act includes a provision, 19 U.S.C. § 1516a, which allows parties to challenge Commerce's final determinations by

51. See YOUNG, *supra* note 27, at 59-60 (noting that antidumping investigations conducted by Commerce are conducted by the International Trade Administration ["ITA"], a sub-agency within Commerce). For purposes of this Comment, any action the ITA conducts will reference Commerce as a whole.

52. See GREG MASTEL, AMERICAN TRADE LAWS AFTER THE URUGUAY ROUND 73 (1996) (explaining that the protocol for U.S. antidumping investigations is vested in both Commerce and the ITC and that both agencies work parallel to each other).

53. See 19 U.S.C. § 1673(1) (noting that Commerce, as the "administering authority," is responsible for determining that goods are being or are likely to be sold at less than fair value and assigns duties and institutes suspension agreements if the parties settle; the ITC, by contrast, determines whether there is an injury or threat of an injury); see also 19 U.S.C. § 1677(7) (assigning the function of calculating material injury to the ITC).

54. See 19 U.S.C. § 1677(7) (defining material injury as "harm [to an industry] that is not inconsequential, immaterial, or unimportant"; in calculating material injury, the ITC considers price, volume, and other relevant factors); see also MASTEL, *supra* note 52, at 73 (asserting that the material injury requirement has disposed of antidumping cases that are otherwise technically viable).

55. See YOUNG, *supra* note 27, at 59-60 (explaining that Commerce gathers as much data as possible on the affected industry's pricing trends, compares it to the U.S. domestic price, and computes dumping margins if the product has been dumped).

56. See MASTEL, *supra* note 52, at 73-74 (discussing that, if Commerce determines dumping has occurred, the ITC conducts a 45-day final injury determination to validate Commerce's determination; this provides one last opportunity for the case to be dropped).

57. See *id.* at 73 (providing that once Commerce and the ITC conclude dumping occurred, instead of imposing duties, the U.S. Customs Service can require posting a bond in anticipation of the ITC's ruling).

filing for domestic judicial review.⁵⁸ Specifically, the Tariff Act provides that a party may file a claim for judicial review in the Court of International Trade (“CIT”).⁵⁹ The CIT has exclusive jurisdiction to hear antidumping cases in the first instance,⁶⁰ with the Court of Appeals for the Federal Circuit (“Federal Circuit”) having exclusive appellate jurisdiction.⁶¹

2. *The Federal Circuit’s Stance on the Affect of WTO Jurisprudence on U.S. Law*

Between 2004 and 2005, the Federal Circuit issued diverging opinions regarding the applicability of WTO law in U.S. courts. In 2004, the Federal Circuit decided *Allegheny Ludlum Corp. v. United States*.⁶² *Allegheny* involved a manufacturer’s challenge of Commerce’s calculation of countervailing duties.⁶³ In holding that Commerce’s calculation violated the law, the Federal Circuit rationalized its decision based, in part, on contrary WTO jurisprudence.⁶⁴ The *Allegheny* court reasoned that because the WTO and U.S. stances directly conflicted, the court was required to construe the U.S. law so as to coincide with the WTO jurisprudence.⁶⁵

The following year, the Federal Circuit changed its course in

58. See 19 U.S.C. § 1516(a)(1)(D) (2006).

59. *Id.* § 1516a(a)(1)(D).

60. 28 U.S.C. § 1581(a) (2006).

61. 28 U.S.C. § 1295(a)(5); see, e.g., *Co-Steel Raritan, Inc. v. Int’l Trade Comm’n*, 357 F.3d 1294, 1303 (Fed. Cir. 2004) (explaining that the Federal Circuit has exclusive jurisdiction over appeals of the CIT’s final decisions).

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

63. See *id.* at 1341-42 (alleging that Commerce incorrectly calculated countervailing duties using a contentious methodology, whereby the subject corporation was the “same person” pre- and post-privatization).

64. See *id.* at 1348 (conceding that although WTO Appellate Body decisions are not binding on U.S. courts, a WTO Appellate Body decision on countervailing duties was useful in settling the discord between Commerce’s interpretation of the U.S. countervailing duty statute and WTO jurisprudence).

65. See *id.* (considering WTO countervailing duty law as persuasive in U.S. courts to reconcile divergent U.S. and WTO stances); see also John D. Greenwald, *Corus Staal — Is There Any Role, and Should There Be — for WTO Jurisprudence in the Review of U.S. Trade Measures by U.S. Courts?*, 39 GEO. J. INT’L L. 199, 202 (2007) (noting that the Federal Circuit’s stance in *Allegheny* created a “potentially significant role” for WTO law in U.S. domestic adjudications).

Corus Staal BV v. Dep't of Commerce.⁶⁶ *Corus Staal* involved a challenge to Commerce's use of zeroing.⁶⁷ This time, however, the Federal Circuit declined to extend the applicability of WTO jurisprudence to domestic judicial review.⁶⁸ Additionally, the Federal Circuit reaffirmed Commerce's interpretation of the Tariff Act as reasonable and sanctioned its use of zeroing.⁶⁹ Rehearing, rehearing en banc, and certiorari were all denied, and *Corus Staal* remained good U.S. zeroing law at the time *Wire Rod* was decided.⁷⁰

C. NAFTA CHAPTER 19: AN ALTERNATIVE VENUE FOR RESOLVING ANTIDUMPING DISPUTES

NAFTA Chapter 19 includes a binational panel dispute resolution mechanism whereby exporters may challenge antidumping determinations made by the importing party in a neutral forum.⁷¹ Binational panels created under Chapter 19 are comprised of five panelists,⁷² and replace domestic judicial review of antidumping

66. *Corus Staal BV v. Dep't of Commerce* (Corus Staal I), 395 F.3d 1343 (Fed. Cir. 2005), *reh'g & reh'g en banc denied*, May 18, 2005, *cert. denied*, 546 U.S. 1089 (2006).

67. *See id.* at 1346 (exhibiting a Dutch manufacturer's challenge to Commerce's use of zeroing in computing its dumping margins as inconsistent with the WTO decisions against the practice). *But see* 77 Fed. Reg. 8101-01 (abandoning the use of zeroing altogether by April 2012).

68. *See id.* at 1348 (citing *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004)) (concluding that the Federal Circuit could not use WTO law as grounds upon which to hold zeroing unlawful because WTO decisions are not binding on U.S. courts).

69. *See id.* at 1347 (holding that, as of 2005, the Federal Circuit would defer to *Timken* in zeroing cases, and that Commerce's interpretation of the Tariff Act as permitting zeroing was reasonable).

70. *See Corus Staal BV v. Dep't of Commerce* (Corus Staal II), 546 U.S. 1089 (2006) (denying a petition for a writ of certiorari on the Federal Circuit's decision in *Corus Staal I*). *But see* 77 Fed. Reg. 8101-01 (notifying that, starting in April 2012, Commerce will no longer use zeroing).

71. *See* NAFTA, *supra* note 1, arts. 1901-1911 (establishing an alternative forum for domestic antidumping litigation); *cf.* WILLIAM J. DAVEY, PINE & SWINE — CANADA-UNITED STATES TRADE DISPUTE SETTLEMENT: THE FTA EXPERIENCE AND NAFTA PROSPECTS 94 (1996) (discussing how Chapter 19 of the FTA was a compromise to remove domestic judicial bias and to expedite appeals).

72. Each party selects two panelists from their candidates, subject to four peremptory challenges; both parties must agree to the fifth panelist. *See* NAFTA, *supra* note 1, annex 1901.2, paras. 2-3 (giving the parties fifty-five days after the panel request to agree on a fifth panelist).

determinations.⁷³ The panel determinations are binding as to the parties involved but do not bind future panels.⁷⁴ Chapter 19 includes an Annex, which elaborates on the language of Articles 1901-1911 and clarifies how panels are to adjudicate claims under Chapter 19.⁷⁵

Articles 1902 and 1904 of Chapter 19 govern the binational panel procedures.⁷⁶ Article 1902 provides that Chapter 19 panels will apply the domestic antidumping law of the importing party.⁷⁷ Article 1902 encompasses a multitude of judicial, legislative, and administrative bodies of law.⁷⁸ Article 1904 dictates how panels are supposed to apply antidumping law and states that panels are to apply domestic antidumping law in the manner that “a court of the importing party would otherwise apply” its antidumping law.⁷⁹ Article 1904 further stipulates that Chapter 19 panels must adhere to the standard of

73. *Id.* art. 1904; cf. JON R. JOHNSON & JOEL S. SCHACHTER, *THE FREE TRADE AGREEMENT – A COMPREHENSIVE GUIDE* 166 (1988) (explaining that the FTA was drafted to review whether antidumping determinations comported with the importing party’s existing antidumping legislation).

74. NAFTA, *supra* note 1, art. 1904, para. 9 (providing that a panel’s decision only binds “the Involved Parties with respect to the particular matter between the Parties that is before the panel”); see David A. Gantz, *Resolution of Trade Disputes Under NAFTA’s Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL’Y INT’L BUS. 297, 309 (1998) (noting that this lack of stare decisis creates a risk of inconsistent Chapter 19 adjudications); Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, C.D. HOWE INSTITUTE COMMENTARY, Sept. 2002, at 6, available at www.worldtradelaw.net/articles/macrory_chapter19.pdf (observing the lack of stare decisis in Chapter 19 panels).

75. See NAFTA, *supra* note 1, annex 1901.2-1911 (elaborating on procedures used in panel reviews and defining country-specific items that panels use to discern the proper standard of review).

76. See *id.* arts. 1902, 1904 (purporting to retain domestic antidumping law in reviews and establishing the procedure by which panels are to adjudicate reviews).

77. *Id.* art. 1902, para. 1 (reserving the right of an importing state for a Chapter 19 panel to apply that state’s antidumping law); see also Gantz, *supra* note 75, at 306 (explaining that Chapter 19 panels are bound to apply the importing party’s substantive antidumping law).

78. See NAFTA, *supra* note 1, art. 1902, para. 1 (including statutory and case law, legislative history, and administrative practices and regulations in the definition of antidumping law).

79. *Id.* art. 1904, para. 2; see Gantz, *supra* note 74, at 306 (emphasizing that Chapter 19 panels are “surrogate[s] for the federal courts” of each NAFTA member); Eric J. Pan, *Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication*, 40 HARV. INT’L L.J. 379, 390 (1999) (expressing that domestic law is a “natural yardstick” against which Chapter 19 panels’ performances are measured).

review as defined in Annex 1911.⁸⁰

When the panel has reached a decision, it may uphold an agency's antidumping determination or remand to the respective agency for further action.⁸¹ NAFTA Article 1904 does not guarantee an appeal of panel reviews, but it does contain an "Extraordinary Challenge Committee" ("ECC") review.⁸² However, Extraordinary Challenge Committee reviews are rarely granted, and rarer still do the committees vacate decisions.⁸³

1. U.S. Methods for Determining International Legal Obligations That Aid Chapter 19 Panels

Certain U.S. legal doctrines aid Chapter 19 panels in ascertaining U.S. international legal obligations. In the United States, conflicts between U.S. statutory provisions and international law are resolved using the canon enunciated in *Murray v. Schooner Charming Betsy*.⁸⁴ In *Charming Betsy*, an American-born and dual Danish citizen's vessel was seized on suspicion of his trading with a French dependency in contravention of the Nonintercourse Act of 1800, which prohibited engaging in commerce with France.⁸⁵ Attempting to harmonize U.S. and international law, the U.S. Supreme Court construed the legislation in a way that avoided a conflict between the

80. NAFTA, *supra* note 1, art. 1904, para. 3 (noting that panels must adhere to the general legal principles that the importing party's court would otherwise apply).

81. *Id.* art. 1904, para. 8; *see* Gantz, *supra* note 74, at 306 (observing that the powers of national courts and Chapter 19 panels are not equivalent, as Chapter 19 panels may not reverse agency determinations).

82. *See* NAFTA, *supra* note 1, art. 1904, para. 13 (establishing that a party may avail itself of review by an Extraordinary Challenge Committee, described in Annex 1904.13, if it can successfully allege that a panel member engaged in gross misconduct or had a preexisting bias or conflict of interest; that the panel did not follow a fundamental rule of procedure; or that the panel abused its discretion); *cf. id.* art. 1905, para. 1 (providing that a party may request consultations with its opponent as an alternative appeal to applying for an Extraordinary Challenge Committee review).

83. *See* Juscelino Colares & John W. Bohn, *NAFTA's Double Standards of Review*, 42 WAKE FOREST L. REV. 199, 207 (2007) (noting that only six appeals have ever been granted, all challenges brought by the United States, and that no panel decision has ever been vacated).

84. 6 U.S. (2 Cranch) 64 (1804).

85. *Id.* at 64-66.

Act and the “law of nations.”⁸⁶ The Court fashioned its construction into a test for statutory interpretation whereby courts must give effect to both U.S. and international law if possible (the “*Charming Betsy* canon”).⁸⁷ Although the *Charming Betsy* canon exists to avoid conflicts with domestic legislation and international law, its modern day formulation is not technically consistent with the case’s original text, as the original text required appeasement of the law of nations as understood in the United States.⁸⁸ Thus, it can be argued that the *Charming Betsy* principle exists to harmonize U.S. legislation with how the United States interprets its own international legal obligations where possible, not how they may be interpreted elsewhere.⁸⁹

In addition to *Charming Betsy*, Chapter 19 panels can discern the appropriate level of agency deference using the method promulgated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.⁹⁰ The *Chevron* Court fashioned a two-prong test for agency deference: (1)

86. See *id.* at 118, 120-21 (explaining that since the ship’s owner had sworn allegiance to Denmark, he was not a member of the class of citizens the Nonintercourse Act of 1800 intended to target; consequently, the seizure of his vessel violated his rights of neutrality under international law).

87. See *id.* at 118 (proclaiming that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

88. Compare RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 114 (1987) (interpreting *Charming Betsy* to mean that U.S. legislation should not be construed to conflict with international law if an alternative possible construction exists), with *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (stating that U.S. law should be construed, when possible, to appease both U.S. law and the United States’ international legal obligations as the United States understands them).

89. Cf. *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (proclaiming disbelief that “approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than . . . disapproval by ‘other nations and peoples’ should weaken that commitment.”); see also *Fund For Animals v. Kempthorne*, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (noting that courts should be cautious about extending canons of statutory construction such as *Charming Betsy* to non-self-executing treaties such as the ADA, because courts should assume that Congress deliberately chose to incorporate certain treaty provisions and not others while considering U.S. international legal obligations). But see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 490 (1998) (opining that *Charming Betsy* may not be as strongly applied today because of the evolving definition of “possible” being more synonymous with “reasonable”).

90. 467 U.S. 837 (1984).

courts must conclude whether Congress has spoken directly to the issue; if so, the plain language of the legislation controls; (2) if the legislation is ambiguous, however, courts will defer to an agency's interpretation as long as it is reasonable.⁹¹

Chevron involved the level of deference accorded to the Environmental Protection Agency's interpretation of the Clean Air Act.⁹² The Supreme Court concluded that, since the EPA's definition was based on a reasonable interpretation of the Act, the Court would defer to the EPA's expertise.⁹³ The *Chevron* method of determining agency deference can have a critical relationship to U.S. international legal obligations, particularly where an agency is charged with interpreting legislation implicating international obligations.⁹⁴

D. THE *WIRE ROD* DECISION

In *Wire Rod*, a Canadian manufacturer ("Mittal") conducted significant business within the United States, exporting alloy steel wire rod products between October 1, 2003 and September 30, 2004.⁹⁵ Consistent with its delegated authority, Commerce analyzed these transactions to determine whether they involved dumping and extensively used zeroing in its calculations.⁹⁶ Due to Commerce's use of zeroing, Mittal was subject to significantly higher antidumping duties.⁹⁷ When Commerce published its results, Mittal

91. *Id.* at 842-43.

92. *See id.* at 840 (deciding specifically whether to defer to the EPA's interpretation of a "major stationary source" of pollution under the Clean Air Act).

93. *See id.* at 865 (holding that, while the Clean Air Act did not speak specifically to this issue, the Court would defer to the EPA's interpretation because it served both economic and environmental goals of the legislation and was thus reasonable).

94. *See, e.g.,* *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (concluding that, with the use of *Chevron* as a guide, although the U.S. antidumping law is ambiguous on its face as to the permissibility of zeroing, Commerce's interpretation of it was reasonable because the Tariff Act's definition of dumping margin references only sales made at less than fair value).

95. *See Wire Rod, supra* note 5, at 1, 24 (estimating that Mittal conducted 12,800 sales of steel wire rod with U.S. customers during this time frame).

96. *See id.* at 24 (providing that approximately 5,000 of 12,800 of Mittal's transactions were zeroed).

97. *See id.* at 11 (discussing Mittal's argument that Commerce's determination is inaccurate because Commerce refused to include non-dumped sales when calculating Mittal's dumping margins). The *Wire Rod* panel did not specify how much Mittal's antidumping duties increased due to the zeroing. *Id.*

petitioned for Chapter 19 review, claiming that all of its sales should have been factored into Commerce's calculations.⁹⁸

1. The Majority Interpreted NAFTA Such That They Were Not Sitting as the CIT, Were Not Bound by Federal Circuit Jurisprudence, and That the Tariff Act Unambiguously Prohibits Zeroing

A determinative issue for the *Wire Rod* majority was whether the panel was sitting as the CIT, subject to its procedural rules and binding precedent.⁹⁹ The majority concluded that since NAFTA Article 1904 contains the phrase “a court” and not “the court of the importing party,” and because the phrase “a court” is undefined in Annex 1911, the panel was not bound by decisions of a specific court.¹⁰⁰ Rather, the majority concluded that they were sitting as a “virtual” United States court, and thus treated the case as one of first impression.¹⁰¹

Once the majority concluded it was not bound by Federal Circuit jurisprudence, it proceeded to adjudicate the dispute on the merits. Using *Chevron* as a guide, the majority examined the text of the Tariff Act to determine whether it supported Commerce's use of zeroing.¹⁰² The majority only reached the first prong of *Chevron*

98. *See id.* at 2 (explaining that six months after Commerce issued its final dumping calculations, Mittal petitioned for review under Chapter 19, alleging that Commerce's Preliminary Results were inaccurate, inter alia, because of its extensive use of zeroing).

99. *See id.* at 11 (stating that a critical issue was whether Chapter 19 panels sit as the CIT and are thus bound by Federal Circuit precedent). Both parties considered this a vital, if not threshold, issue. *Id.*

100. *See id.* at 15, 18, 21 (stressing that the lack of a definition of “a court of the importing party” from Annex 1911 was dispositive since that section assigns specific statutes and government agencies to other terms defined in that section; since, therefore, “a court” is not limited to the CIT or the Federal Circuit, the panel determined that chapter 19 panels neither sit as a particular court nor are they bound by the corresponding precedent).

101. *See id.* at 21 (concluding that the phrase “a court of the importing party” refers to a “generic or virtual United States court” where the panel could employ Federal Circuit precedent if the panel believed the precedent was well-reasoned); *see also id.* (defining a “virtual court” as a federal court of appeals unbound by any other Circuit's precedent).

102. *See id.* at 25-27 (explaining the *Chevron* test for agency deference and applying it to Commerce's interpretation of the Tariff Act to determine its reasonableness).

however, because it determined that Congress statutorily proscribed zeroing in the Tariff Act.¹⁰³

2. *The Majority Buttressed Its Rationale by Citing WTO Appellate Body Decisions Outlawing Zeroing*

Furthermore, the *Wire Rod* majority deferred to international jurisprudence in support of its decision.¹⁰⁴ The majority reasoned that since the WTO has categorically banned zeroing, Commerce's use of the practice violated *Charming Betsy* for failing to correctly interpret the Tariff Act.¹⁰⁵ The majority thus ruled in Mittal's favor and remanded the case to Commerce.¹⁰⁶

Wire Rod's ultimate effect, however, stems not from a final decision, as the panel was terminated and the parties settled.¹⁰⁷ Rather, it derives from the majority's reasoning. *Wire Rod's* reasoning surfaced in *Stainless Steel Sheet and Strip in Coils From Mexico* ("*Mexinox*")¹⁰⁸ in April 2010, and nothing in NAFTA prevents another panel from adopting the same rationales.¹⁰⁹ Left

103. See *id.* at 27-30 (concluding that by using the phrase "aggregate dumping margins" in the Tariff Act, Congress clearly evinced its intent for Commerce to include all sales when computing dumping margins, and that any contrary interpretation would violate both U.S. and international law).

104. See *id.* at 36 (referencing seven WTO Appellate Body reports, all holding that zeroing violates the ADA).

105. See *id.* at 38 (declaring that the WTO Appellate Body has not found that zeroing is legal and explaining that construing the Tariff Act to permit zeroing violates *Charming Betsy's* aim to respect the law of nations whenever possible, since both the international and U.S. law clearly prohibit zeroing).

106. See *id.* at 40 (directing Commerce to recalculate Mittal's dumping margins without zeroing for violating the ADA).

107. See *Carbon and Certain Alloy Steel Wire Rod From Canada*, 73 Fed. Reg. 29, 481 (May 21, 2008) (notice of final results of antidumping duty admin. review) (dissolving the *Wire Rod* panel and settling Mittal's claim before a final decision was rendered).

108. See Decision of the Panel on Remand, *Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of 2004/2005 Antidumping Review*, USA-MEX-2007-1904-01, 11-13 (Apr. 14, 2010) [hereinafter *Mexinox*] (Binational Panel Review pursuant to Art. 1904 of NAFTA) (adopting several portions of the *Wire Rod* majority's reasoning in an analogous zeroing case, in particular, the notion that Commerce must comply with both *Chevron* and *Charming Betsy*).

109. Cf. Gantz, *supra* note 74, at 309 (noting that panels are not bound to prior decisions, even in identical factual and legal scenarios); Macrory, *supra* note 74, at 6 (pointing out that Chapter 19 panel decisions do not bind future Chapter 19 panels).

unchecked, this threatens to further convolute the state of NAFTA antidumping jurisprudence.

II. ANALYSIS

By developing a uniform body of decisions through consistent interpretations of NAFTA, Chapter 19 panels have the power to develop predictable rules of international trade.¹¹⁰ Despite this opportunity, NAFTA panels have been unable to develop a consistent body of antidumping jurisprudence.¹¹¹

Wire Rod exemplifies this lack of cohesive jurisprudence; the majority's interpretation of NAFTA was unsound, and its determination of the proper standard of review was patently incorrect. *Wire Rod* was decided inconsistently with the decisions of prior Chapter 19 panels, and it has further convoluted the trade rules under NAFTA. Left unchecked, faulty reasoning may affect future NAFTA panels. *Mexinox* highlights this flaw, and the credibility of Chapter 19 as permitting a fair and predictable tribunal will be unalterably tarnished without corrective action.

110. See Peter C. Maki, Note, *Interpreting GATT Using The Vienna Convention On The Law Of Treaties: A Method To Increase The Legitimacy Of The Dispute Resolution System*, 9 MINN. J. GLOBAL TRADE 343, 350-51 (2000) (explaining that consistent treaty interpretation allows states to better predict the ramifications of their actions); cf. Sydney Foster, *Should Courts Give Stare Decisis Effect To Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1888-89 (2008) (discussing the benefits of consistent statutory interpretation, such as greater predictability for actors, limiting judicial discretion, saving legislative costs, and effectuating Congressional intent, and arguing that the case for giving *stare decisis* effect to statutory interpretation is stronger than that for giving *stare decisis* effect to substantive law). But cf. Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 49-58 (2010) (suggesting that the costs of *stare decisis* in statutory interpretation outweigh its purported benefits because an interpretive framework forces judges to compromise, allows consideration of all arguments, and because different statutes require different interpretive approaches).

111. See Colares & Bohn, *supra* note 84, at 209 (noting the wide disparity in case results of Chapter 19 panels, particularly between the United States and Canada; explaining that Chapter 19 panels reverse U.S. agencies more frequently than U.S. courts do).

A. INTERPRETING NAFTA'S PLAIN MEANING WOULD HAVE
DICTATED APPLICATION OF FEDERAL CIRCUIT ZEROING
JURISPRUDENCE AND RESULTED IN A DISMISSAL OF MITTAL'S
CLAIM

Had the *Wire Rod* majority correctly ascertained NAFTA's plain meaning using the Vienna Convention on the Law of Treaties ("Vienna Convention"),¹¹² it would have concluded it was bound by then-controlling Federal Circuit zeroing jurisprudence, and it would have summarily dismissed Mittal's claim.¹¹³

Article 31 of the Vienna Convention contains a generally accepted method for treaty interpretation.¹¹⁴ Under Article 31, treaties are interpreted primarily according to the ordinary meaning ascribed to their terms, or using a "plain meaning" analysis.¹¹⁵ This analysis is objective, and emphasizes the text of the treaty itself as opposed to subjective interpretations.¹¹⁶ Thus, interpretation using this approach

112. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention] (establishing a comprehensive set of rules derived from customary international law governing treaty formation, termination, and interpretation).

113. Recently, the approach to treaty interpretation taken by the Vienna Convention has gained greater acceptance in U.S. courts. So, although the United States has not yet ratified the Vienna Convention, there would have been support for the *Wire Rod* majority to conduct this analysis. See, e.g., *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1361-62 (2d Cir. 1992), *rev'd sub nom.*, *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (noting the codification of common law treaty interpretation principles in the Vienna Convention and applying it to the U.N. Convention on the Status of Refugees).

114. See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 438 (2004) (explaining that the final product of the Vienna Convention consists of provisions relating to entry into force, observation and application, amendments and modifications, invalidity and termination, and notification and registrations, all intending to produce "a unified interpretive framework").

115. See Vienna Convention, *supra* note 113, art. 31 (requiring that a treaty should be interpreted according to its terms' ordinary meanings); see also *Report of the International Law Commission on the Work of its Eighteenth Session*, [1966] 2 Y.B. Int'l L. Comm'n 220, U.N. Doc. A/6309/Rev.1 (providing the opinion of one of the Vienna Convention's framers that the starting point should always be the meaning of the text and not an investigation into the parties' intentions); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 973 (1994) (explaining that, while it is a narrow approach to treaty interpretation, the Vienna Convention permits adherence to extrinsic means of interpretation, such as the parties' intent, though only in extraordinary circumstances).

116. See David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a*

stays within the four corners of the treaty's text.¹¹⁷ When analyzing the *Wire Rod* majority's interpretation of NAFTA, it is clear the majority ignored NAFTA's plain meaning when it held that Federal Circuit jurisprudence was not controlling.

First, NAFTA Article 1904's text unambiguously states that Chapter 19 panels must apply domestic law of the importing party in the same manner as "a court of the importing party otherwise would apply" it.¹¹⁸ Congress has vested exclusive jurisdiction to adjudicate trade cases involving the United States, including antidumping cases, in the CIT and Federal Circuit, with the Supreme Court remaining the court of last resort.¹¹⁹ Since these courts have exclusive jurisdiction over trade disputes involving the United States, the phrase "otherwise would apply" in Article 1904 is of paramount significance, as no alternative forum exists under U.S. law.¹²⁰ Thus, if a Chapter 19 panel is required to apply U.S. antidumping law in the manner that would otherwise be applied, and there is only one tribunal that could otherwise exercise proper jurisdiction, Chapter 19 panels must apply the law in the same manner that this one tribunal would.¹²¹

Treaty: Three Interpretive Methods, 43 VAND. J. TRANSN'L L. 565, 577 (2010) (explaining that the objective and textualist method of interpretation assumes that treaty signatories' intent is reflected in the treaty's text).

117. Cf. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (noting that statutory interpretation should first instruct a court to look at the text itself, and that no interpretation is necessary if the statutory text is clear). See generally *id.* at 577-78, 578 n.76 (noting that a more subjective approach goes outside the text itself when attempting to ascertain the signatories' intent, and further mentioning that the Vienna Convention Article 32 only permits interpretation according to the parties' intent in preparing the treaty—or *travaux préparatoires*—in the event that interpretation under Article 31 either leaves the treaty's meaning ambiguous, or leads to an absurd result).

118. NAFTA, *supra* note 1, art. 1904, para. 3.

119. 28 U.S.C. §§ 1295(a)(5), 1581 (2006); see also *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1303-04 (Fed. Cir. 2004) (explaining that the CIT has exclusive jurisdiction over claims filed under the Tariff Act, with the Federal Circuit having exclusive appellate jurisdiction over the CIT).

120. See 28 U.S.C. § 1581 (providing no alternative domestic legal option but to file in the CIT; in cases involving the United States, review of an antidumping determination would be heard by a NAFTA panel if a complainant so chose).

121. Despite this, the *Wire Rod* majority incorrectly concluded that "a court of the importing party" means a non-exclusive, "virtual" federal court. See *Wire Rod*, *supra* note 5, at 21 (declaring that NAFTA's text does not purport to have panels sit as a particular tribunal). But see *Gantz*, *supra* note 74, at 306 (contending that

The *Wire Rod* majority was thus incorrect to emphasize the phrase “a court” and not the phrase “would otherwise apply.”¹²² While “a court” may connote an inclusive meaning, or that the phrase does not reference a specific court, there can only be one “a court” of the importing party in United States cases – the CIT. Thus, in actuality, “a court” is exclusive.¹²³ Moreover, since the CIT is bound by Federal Circuit jurisprudence, it necessarily follows that Chapter 19 panels are similarly bound.¹²⁴ Finally, when NAFTA text has intended for its dispute resolution bodies to apply international law, it has done so explicitly.¹²⁵ Thus, the absence of any reference to international law in Chapter 19 necessarily precludes its application in antidumping reviews.

Therefore, combining the plain meaning of NAFTA and the exclusivity of antidumping judicial review in U.S. courts necessarily compels application of the law as the CIT—not a “virtual” federal court—would. Consequently, the *Wire Rod* majority held in error that Federal Circuit precedent did not bind the panel.¹²⁶

Chapter 19 panels sit in the place of the domestic federal courts, and that the ability of Chapter 19 panels to reach the actual substantive law of the importing party is “more apparent than real.”).

122. See *Wire Rod*, *supra* note 5, at 21 (defining a “virtual” court as a court unconstrained by any circuit’s precedent).

123. See *id.* at 12 (questioning whether “a court of the importing party” means the CIT or a “hybrid or virtual court of the United States,” as there is no other U.S. court of first instance for these types of claims).

124. See 28 U.S.C. § 1295(a)(5) (establishing that the Federal Circuit has exclusive appellate jurisdiction over claims from the CIT); see also *Wheat From Canada*, *supra* note 7, at 17 n.45 (noting that Federal Circuit decisions are “binding on Article 1904 binational panels”).

125. See Gantz, *supra* note 74, at 307 (comparing NAFTA Chapters 19 and 20, and explaining that, while Chapter 20 interprets and applies an international legal instrument, Chapter 19 purports to interpret and apply national law). Compare, NAFTA, *supra* note 1, arts. 2004-2005 (providing that all disputes except for those arising under Chapter 19 should be resolved through Chapter 20’s dispute settlement procedure, which allows for resolution under either NAFTA or the GATT and its successor organizations), with *id.* art. 1904, para. 2 (requiring a Chapter 19 binational panel to determine whether antidumping calculations comport with domestic law).

126. While the Vienna Convention relegates preparatory work and parties’ intentions as secondary to a treaty’s plain meaning, a correct *Wire Rod* result would have comported with the *travaux préparatoires* of Chapter 19 of the U.S.-Canada Free Trade Agreement. See *Hearing*, *supra* note 2, at 69-70, 75 (testifying that Chapter 19 was not intended to fashion new antidumping law or to alter judicial interpretations of it; rather, it was intended to create a neutral forum for

Beyond its ordinary meaning analysis, Article 31 of the Vienna Convention provides that a treaty must be interpreted in light of its object and purpose.¹²⁷ One of the primary objectives of Chapter 19 is to allow an importing party to retain application of its domestic antidumping law in Chapter 19 reviews.¹²⁸ Moreover, NAFTA specifically notes that a party's antidumping law includes judicial precedent.¹²⁹

In the case of the United States, the object and purpose of Chapter 19 is to apply U.S. antidumping law that stems from the tribunals charged with interpreting the Tariff Act—the CIT and Federal Circuit.¹³⁰ Despite this, the *Wire Rod* majority determined that the Federal Circuit's antidumping precedent was not binding.¹³¹ This determination created an end-run around U.S. law, permitting the majority to adjudicate the case on the merits by citing extensively to WTO law and circumventing the Federal Circuit's then-binding zeroing precedent.¹³² This is inconsistent with NAFTA's object to

antidumping review, and that its drafters anticipated that Chapter 19 panel decisions would be consistent with domestic antidumping jurisprudence); *see also* Daniel N. Adams, *Back to Basics: The Predestined Failure of NAFTA Chapter 19 and its Lessons for the Design of International Trade Regimes*, 22 EMORY INT'L L. REV. 213-14 (2008) (explaining that the FTA was created on the express understanding that panels were constituted to serve in a neutral forum, but in no way were an attempt to change substantive domestic law); Gantz, *supra* note 74, at 305 (documenting that Chapter 19 of CUSFTA, like Chapter 19 of NAFTA, was a compromise only to change venue, not to exempt Canada from U.S. antidumping law).

127. Vienna Convention, *supra* note 113, art. 31 (explaining that the primary method of treaty interpretation under the Vienna Convention is to interpret a treaty by properly ascertaining its terms' ordinary meaning "in light of [the treaty's] object and purpose"); *see also* Jonas & Saunders, *supra* note 116, at 578 (referring to ascertaining the object and purpose of a treaty as the "teleological approach").

128. *See* NAFTA, *supra* note 1, art. 1902, para. 1 (maintaining that each NAFTA member retains the right to apply its domestic antidumping laws in Chapter 19 reviews). For example: permitting the United States to have its antidumping law applied by a Chapter 19 panel in a challenge brought by a Mexican manufacturer, including relevant Tariff Act sections and Federal Circuit jurisprudence.

129. *See id.* art. 1902, para. 1 (providing a list of applicable bodies of domestic antidumping law, including, *inter alia*, judicial precedent).

130. 28 U.S.C. §§ 1295(a)(5), 1581 (2006).

131. *See Wire Rod*, *supra* note 5, at 21 (determining that the absence of a specific definition of "a court of the importing party" in NAFTA Article 1904.2 meant that the panel was not bound by Federal Circuit jurisprudence).

132. *See id.* 29-31 (proceeding to use *Chevron* as a guide to adjudicate Mittal's

apply domestic antidumping law in the manner it otherwise would be applied. Consequently, the *Wire Rod* majority erred in holding that the panel was sitting as a “virtual” federal Court of Appeals unbound by the Federal Circuit.

Had the majority correctly determined that the panel was sitting as the CIT, and because the Federal Circuit binds the CIT, *Corus Staal* would have bound the *Wire Rod* panel. Accepting WTO jurisprudence as persuasive,¹³³ the majority could have attempted to ground its decision on *Allegheny*, where the Federal Circuit significantly relied upon WTO precedent.¹³⁴ Although the majority failed to invoke *Allegheny*, despite its acceptance of WTO jurisprudence as persuasive, *Corus Staal* would have controlled this case for several reasons.¹³⁵

First, *Corus Staal* is more recent precedent than *Allegheny*, having been decided the following year.¹³⁶ More importantly, *Corus Staal* was a zeroing case such as *Mittal*'s.¹³⁷ *Allegheny*, however, was a subsidies case based on Commerce's alleged miscalculation of a corporation's countervailing duties, an issue not implicated by

claim on the merits, and holding that Commerce's interpretation is not entitled to deference, despite unambiguous contrary then-binding Federal Circuit jurisprudence in *Corus Staal*, and bolstering this erroneous holding by stating that conflicting WTO zeroing precedent meant that Commerce violated U.S. international legal obligations under *Charming Betsy*).

133. See discussion *infra* Part III.C (discussing the majority's reliance on WTO jurisprudence in determining that Commerce violated both U.S. and international law).

134. See *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004) (relying on WTO jurisprudence as a guideline for adjudicating a claim challenging Commerce's calculation of countervailing duties to harmonize the diametrically opposed stances of the WTO and the United States).

135. Despite the failure of the *Wire Rod* majority to invoke *Allegheny*, the *Mexinox* panel majority grounded its decision on the *Allegheny* holding in a zeroing case. See *Mexinox*, *supra* note 108, at 21-22 (asserting that since the Federal Circuit accepted WTO jurisprudence in harmonizing divergent U.S.-WTO stances in *Allegheny*, Chapter 19 panels can use the same reasoning in zeroing cases).

136. Compare *Corus Staal BV v. Dep't of Commerce* (*Corus Staal I*), 395 F.3d 1343, 1349 (Fed. Cir. 2005) (deciding in 2005 that WTO jurisprudence is not binding, and does not have persuasive effect in U.S. courts), with *Allegheny Ludlum Corp.*, 367 F.3d at 1348 (determining in 2004 that WTO jurisprudence had persuasive value in U.S. courts).

137. See *Corus Staal I*, 395 F.3d at 1345 (reviewing Commerce's use of zeroing in calculating a Dutch manufacturer's dumping margins).

Mittal's claim.¹³⁸ Moreover, the Federal Circuit's adherence to WTO law was made in *dicta*, and consequently is not binding.¹³⁹ Finally, trade experts have explained that the ADA calls for greater deference to Executive action than does the WTO Subsidies and Countervailing Duties Agreement.¹⁴⁰ Thus, *Allegheny* could not have been used as a controlling basis upon which to rule against Commerce in a zeroing case.

As the controlling zeroing precedent, *Corus Staal* would have preempted the majority's merit-based decision because it unambiguously held that zeroing was then permissible under U.S. law, thus leaving no material issue of fact to be adjudicated.¹⁴¹ It is possible that, noting the body of international anti-zeroing jurisprudence, and because Commerce had, at the time, discontinued zeroing in original investigations,¹⁴² the majority attempted to creatively evade the controlling U.S. zeroing jurisprudence in *Corus Staal*. However, Chapter 19 panelists are unequivocally prohibited from substituting their own judgment for controlling law.¹⁴³

138. See *Allegheny Ludlum Corp.*, 367 F.3d at 1340 (adjudicating a French corporation's challenge to Commerce's calculation of its countervailing duties, not its use of zeroing).

139. See *Mexinox*, *supra* note 108, at 81-82 (Lichtenstein & Liebman, dissenting) (elucidating that *Allegheny*'s invocation of WTO decisions can only be a guide for, and is not binding on, U.S. courts because it was made in *dicta*).

140. See *id.* at 81 n.247 (citing ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 315 (2d ed. 2008)) (explaining that the Uruguay Round provided a special standard of review under the ADA which is inapplicable to the WTO Agreement on Subsidies and Countervailing Measures, and that the ADA requires significantly greater deference to domestic investigating authorities than other provisions of the WTO).

141. See *Corus Staal I*, 395 F.3d at 1348-49 (holding that WTO Appellate Body jurisprudence does not bind U.S. tribunals, and that Commerce's interpretation of the Tariff Act permitting zeroing warranted *Chevron* deference because the Tariff Act allows for a reasonable interpretation that zeroing was permissible); see also FED. R. CIV. P. 56 (providing that a court shall grant a motion for summary judgment in cases where there is no genuine issue of material fact to be adjudicated).

142. See Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Mar. 6, 2006) (abandoning the use of zeroing in original antidumping investigations); see also 77 Fed. Reg. 8101-01 (abandoning all instances of zeroing by April 2012).

143. See *Mexinox*, *supra* note 108, at 84 (Lichtenstein & Liebman, dissenting) (suggesting that the *Mexinox* majority unequivocally substituted its own judgment for Commerce's, which "contravene[d] t[he] [p]anel's jurisdiction and authority"); cf. Committee Opinion and Order, *Live Swine From Canada*, at 14, 16, ECC-93-

Accordingly, had the majority correctly determined it was sitting as the CIT, the proper outcome would have been a summary dismissal of Mittal's claim.¹⁴⁴ This would have coincided with NAFTA's plain meaning and intent to apply domestic antidumping law in an international adjudication.

B. A CORRECT ANALYSIS OF NAFTA CHAPTER 19 WOULD HAVE ALSO COMPELLED APPLICATION OF FEDERAL CIRCUIT ZEROING JURISPRUDENCE AND RESULTED IN A SUMMARY DISMISSAL OF MITTAL'S CLAIM

In addition to a proper analysis of NAFTA's plain meaning and objectives, if the *Wire Rod* majority correctly discerned the appropriate standard of review as annunciated by NAFTA itself, the panel would have similarly dismissed Mittal's claim.

NAFTA instructs Chapter 19 panels to apply the standard of review that is set out in Annex 1911.¹⁴⁵ In challenges involving the United States, Annex 1911 provides that panels must apply the standard of review contained in the Tariff Act.¹⁴⁶ By simply following the Tariff Act's directives, a Chapter 19 panel would correctly determine that the Tariff Act permits filing an antidumping challenge only in the CIT.¹⁴⁷

1904-01USA (Apr. 8, 1993) [hereinafter *Live Swine*] (Extraordinary Challenge Committee review pursuant to Art. 1904.13 of NAFTA) (stating that panels must assume a limited role in Chapter 19 reviews and cannot impose their own opinion on the meaning of the applicable statute).

144. See Pan, *supra* note 79, at 390-91 (analyzing the criticism of Chapter 19 panels that interpret domestic law differently from domestic courts, and explaining possible reasons for any difference).

145. NAFTA, *supra* note 1, art. 1904, para. 3; see also *id.* annex 1911 (providing a list of country-specific definitions that panels must refer to when interpreting and applying Chapter 19). For example: In a case where the United States is the importing party, Annex 1911 would direct the panel as to which agency is the "competent investigating authority" (Commerce), and which U.S. statute provides the applicable standard of review (the Tariff Act). See *id.* Or, in a case where Canada is the importing state, Annex 1911 would show that the applicable statute would be Canada's Special Import Measures Act (citation omitted). See *id.*

146. See *id.* annex 1911 (establishing the proper standard of review as the standard contained in § 516a of the Tariff Act).

147. See 19 U.S.C. § 1516a(a)(2)(A)(II) (2006) (providing only one avenue of judicial review for antidumping challenges under U.S. law: filing a claim in the CIT; the statute contains no contingent provision to file in any other federal district

In addition to the Tariff Act establishing that the CIT is the exclusive U.S. court in which to file an antidumping challenge, the Chapter 19 also establishes the procedure to follow when a petitioner's claim is suspended or terminated.¹⁴⁸ Critically, the Tariff Act states that when certain criterion are met,¹⁴⁹ and upon the request of an authorized agent,¹⁵⁰ the final determination upon which the original proceedings are based must be transferred to the CIT.¹⁵¹ Thus, even if a case is removed from a Chapter 19 panel's jurisdiction, there is no other forum besides the CIT with proper jurisdiction to adjudicate the claim when the United States is the importing party.

Since NAFTA requires Chapter 19 panels to adjudicate a case in the same way it otherwise would in the domestic venue, and because the only U.S. forum that hears antidumping cases is the CIT, Chapter 19 panels must function as the CIT when the United States is the importing party. Therefore, the *Wire Rod* majority concluded in error

court). This is supported by Congress' exclusive grant of jurisdiction over trade cases to the CIT. 28 U.S.C. § 1581. *Cf.* Committee Opinion and Order, *Certain Softwood Lumber Products From Canada*, at 21, ECC-2004-1904-01USA (Aug. 10, 2005) [hereinafter *Softwood Lumber*] (Extraordinary Challenge Committee review pursuant to Art. 1904.13 of NAFTA) (explaining that Chapter 19 panels must apply the same standard of review as the CIT would when reviewing the International Trade Commissions' determinations).

148. *See* NAFTA, *supra* note 1, art. 1905 (providing a mechanism whereby parties dissatisfied with their panel can request the convention of a special committee to resolve the dispute, and permitting suspension of the panel by the USTR if an interested party remains dissatisfied after special committee review); *see also* 19 U.S.C. § 1516a(g)(11) (providing applicable procedures that must be employed when proceedings are suspended, and permitting transfer to a different venue).

149. *See* 19 U.S.C. §§ 1516a(g)(12)(B)(i), 1516a(g)(12)(C) (stating that, if Chapter 19 proceedings are suspended in accordance with either NAFTA Article 1905, paragraph 8(a) or 9, the review will be transferred to the CIT if requested by the government or interested party); *see also* NAFTA, *supra* note 1, art. 1905, paras. 8(a), 9 (permitting suspension of Chapter 19 proceedings if the parties are unable to reach a compromise within 60 days after consultations with a special committee and opposing party).

150. *See* 19 U.S.C. § 1516a(g)(12)(C) (establishing the persons authorized to request the transfer of Chapter 19 proceedings, including an interested party's government or parties that are privy to the proceedings).

151. *See id.* § 1516a(g)(12)(B)(i) (requiring that, in the case of suspension of Chapter 19 proceedings, the final determination on the subject of the Chapter 19 review must be transferred to the CIT).

that it was sitting as a “virtual” federal court.¹⁵²

Had the majority correctly interpreted NAFTA, it would have concluded that the panel was sitting as the CIT. Accordingly, the Federal Circuit’s controlling zeroing jurisprudence would have bound the panel, and Mittal’s case would have been dismissed.¹⁵³

C. THE *WIRE ROD* MAJORITY ERRED BY DEFERRING TO WTO
APPELLATE BODY PRECEDENT AND BY INVOKING *CHARMING*
BETSY

Properly interpreting NAFTA according to its text and objectives, or correctly ascertaining the standard of review would have led the *Wire Rod* majority to correctly determine it was sitting as the CIT.¹⁵⁴ This means that, aside from Federal Circuit jurisprudence, other U.S. law, statutory and otherwise, would have similarly bound the panel. Accordingly, U.S. statutory law would have precluded the majority’s reliance on WTO jurisprudence and invocation of *Charming Betsy*.

152. See *id.* § 1516a(a)(1) (allowing for review of anti-dumping procedures only by the CIT); see also Decision of the Panel, *Color Picture Tubes From Canada*, at 3, USA-95-1904-03 (May 6, 1996) (Binational Panel Review pursuant to Art. 1904 of NAFTA) (citing to NAFTA Article 1904, paragraph 3 and noting that “decisions of the . . . [Federal Circuit] are binding on this Panel”); Greenberg, *supra* note 3, at 42 (stating that Chapter 19 panels are restricted by the Federal Circuit). Several commentators have noted that the *Wire Rod* majority’s decision was made in error and is troubling. See Mark A. Bennett, *Choices, Choices: Domestic Courts Versus International Fora: A Commerce Perspective*, 17 TUL. J. INT’L & COMP. L. 435, 453-54 (2009) (opining that the *Wire Rod* majority’s decision that it was not constrained by Federal Circuit precedent was “nothing short of shocking”); see also CANNON & WARD, *supra* note 41, at 4 (explaining that the majority’s failure to adhere to the appropriate standard of review is troubling and may have future ramifications, but not speculating as to what the ramifications might be).

153. See discussion *supra* Part III.A (explaining that the Federal Circuit’s decision in *Corus Staal* should have bound the *Wire Rod* panel).

154. See discussion *supra* Parts III.A-B (explaining why a correct interpretation of NAFTA using the Vienna Convention or correctly ascertaining the proper standard of review by following NAFTA and the Tariff Act’s guidelines would have resulted in the panel functioning as the CIT).

1. The URAA Should Have Precluded the Majority From Applying WTO Appellate Body Precedent Because it Unambiguously Preempts Such Use Until Implemented by the USTR and Congress

In addition to the majority's incorrect interpretations of NAFTA, it also erred in supporting its argument with WTO Appellate Body reports.

Although an international legal instrument, NAFTA's text makes clear that Chapter 19 panels are to apply domestic antidumping law.¹⁵⁵ Article 1904 unambiguously states that domestic antidumping law is not limited to case law; therefore, a Chapter 19 panel can rely on statutory law.¹⁵⁶ In assessing its international antidumping obligations, Congress has statutorily declared in the URAA that neither does WTO jurisprudence bind U.S. courts, nor must U.S. courts accord any special deference to WTO Appellate Body decisions.¹⁵⁷ Therefore, the *Wire Rod* majority should have been precluded from citing to WTO law under the URAA.

Despite the URAA's statutory preemption of WTO law, the *Wire Rod* majority cited extensively to WTO jurisprudence in support of its rationale.¹⁵⁸ The majority explained that WTO jurisprudence

155. NAFTA, *supra* note 1, art. 1904, para. 2; *see also* Adams, *supra* note 126, at 215 (noting that Chapter 19 was designed to retain the application of domestic substantive antidumping law); Gantz, *supra* note 74, at 307 (remarking that even though created by an international agreement, the panels are "not international tribunals" and "do not . . . apply international law").

156. *See* NAFTA, *supra* note 1, art. 1902, para. 1 (explaining that domestic antidumping law is comprised of judicial and statutory law, legislative history, and administrative practices).

157. *See generally* H.R. DOC. NO. 103-316, at 1032 (1994) (clarifying the relationship of WTO law to U.S. courts and its effect on U.S. sovereignty and trade policy — that WTO law is not accorded binding effect in U.S. courts, nor does it purport to represent U.S. international trade policy; moreover, the Statement of Administrative Action notes that it is a matter for Congress, and not the judiciary, to amend U.S. substantive law or practice when confronted with an adverse WTO decision).

158. *See* Appellate Body Report, *United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/AB/R (Aug. 23, 2001) [hereinafter *Hot-Rolled Steel*]; Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber From Canada*, WT/DS264/AB/RW (Aug. 15, 2006); Appellate Body Report, *United States — Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (Apr. 18, 2006); Appellate Body Report, *United States — Measures Related to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) [hereinafter *Measures Related to*

settled the then-existing international zeroing discord by holding that zeroing is illegal under the ADA.¹⁵⁹ Therefore, the majority reasoned, Commerce's use of zeroing in computing Mittal's dumping margins violated international law.¹⁶⁰ This analysis, however, is incorrect.

As previously stated, the majority should have determined that it was sitting as the CIT.¹⁶¹ Both Federal Circuit jurisprudence and U.S. statutory law, including the URAA, bind the CIT.¹⁶² As a result, the CIT, and necessarily Chapter 19 panels, cannot properly apply WTO law that conflicts with U.S. law.¹⁶³ As it relates to zeroing, WTO and U.S. law directly conflicted at the time *Wire Rod* was decided — the WTO outlawed it, whereas the United States sanctioned its use.¹⁶⁴ Thus, any application of WTO law in Chapter 19 proceedings

Zeroing]; Appellate Body Report, *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R (Dec. 15, 2003); *Bed Linen*, *supra* note 13; *Softwood Lumber*, *supra* note 148; *Wire Rod*, *supra* note 5, at 36 (citing seven WTO Appellate Body decisions proscribing zeroing in support of its ruling in favor of Mittal).

159. *See Wire Rod*, *supra* note 5, at 36 (relying on the several WTO Appellate Body decisions cited to conclude that they unequivocally prohibited zeroing “in any circumstance”).

160. *See id.* at 36-40 (determining that based on the WTO's consistent proscription of the practice, Commerce's use of zeroing violated the ADA by failing to make fair comparisons of all sales in computing dumping margins since it disregarded Mittal's non-dumped sales in its calculations).

161. *See discussion supra* Parts III.A-B (determining that the panel would have correctly determined it was sitting as the CIT).

162. *See* NAFTA, *supra* note 1, art. 1902, para. 1 (providing that domestic judicial precedent, as well as statutory law, are included in a party's antidumping law and are thus applicable to Chapter 19 panels).

163. *See* 19 U.S.C. § 3512(a)(1) (2006) (providing that provisions of the Uruguay Round, including those of the WTO, that are inconsistent with the laws of the United States have no effect in the United States).

164. *See* *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (explaining that U.S. courts must defer to an agency's reasonable interpretation of an ambiguous statute). *Compare* *Corus Staal BV v. Dep't of Commerce* (Corus Staal I), 395 F.3d 1343, 1349 (Fed. Cir. 2005) (affirming the *Timken* holding that the court should defer to Commerce's interpretation of the Tariff Act under *Chevron*), *and* *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (determining that Commerce's interpretation of the Tariff Act allowed for its use of zeroing and should thus be granted deference under *Chevron*), *with* *Hot-Rolled Steel*, *supra* note 158, at 41-47 (affirming the WTO's stance on zeroing as an impermissible violation of international law under the ADA), *and* *Bed Linen*, *supra* note 13, at 27 (holding that zeroing is an impermissible practice under the terms of the ADA because it does not allow for fair comparisons of all sales).

relating to zeroing would be patently incorrect.¹⁶⁵ Furthermore, based on the above analysis,¹⁶⁶ a rationale to rely on this jurisprudence under *Allegheny*¹⁶⁷ would have been unpersuasive, as *Allegheny* did not concern zeroing.¹⁶⁸ The Federal Circuit's zeroing jurisprudence in *Corus Staal* would thus control, and would have preempted application of WTO law.¹⁶⁹ Consequently, the *Wire Rod* majority's reliance on WTO zeroing law was done in error.

Additionally, the *Wire Rod* majority incorrectly reasoned that portions of the URAA permitting incorporation of WTO law do not apply to cases involving zeroing.¹⁷⁰ The URAA contains only two provisions permitting incorporation of adverse WTO law to amend U.S. law or agency practice through collective action between the USTR, Congress, and any involved parties: 19 U.S.C. §§ 3533 and 3538.¹⁷¹ Despite the adverse WTO rulings on zeroing, the USTR and Congress had yet to amend Commerce's use of zeroing in administrative reviews such as Mittal's.¹⁷²

165. See 19 U.S.C. § 3512(a)(1) (mandating that any provision of the Uruguay Round conflicting with U.S. law—such as zeroing—would have no effect on U.S. law).

166. See discussion *supra* Part III.A (explaining why reliance on *Allegheny* to bolster application of WTO law would be unpersuasive in this case because *Corus Staal* is more recent precedent and, unlike *Allegheny*, involved zeroing, not countervailing duties).

167. The majority did not implicate *Allegheny* in support of its reliance on WTO jurisprudence, despite the *Allegheny* court's *dicta* that WTO law is guiding and persuasive in U.S. courts. See *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

168. Compare *Corus Staal I*, 395 F.3d at 1348 (determining that WTO law is not binding and would have no effect on U.S. courts in a challenge to Commerce's former use of zeroing), with *Allegheny*, 367 F.3d at 1348 (relying on WTO jurisprudence as a persuasive, interpretive guide for U.S. courts in a challenge to Commerce's calculation of countervailing duties).

169. See Greenwald, *supra* note 65, at 204, 208-09 (questioning whether *Corus Staal* would ever permit a U.S. court to rely on WTO jurisprudence in its review, and remarking that U.S. courts should be cautious about incorporating adverse WTO law due to fundamentally different modes of legal analysis).

170. See *Wire Rod*, *supra* note 5, at 32 (rejecting the idea that Executive and/or Congressional action are necessary to amend or abandon zeroing).

171. See 19 U.S.C. §§ 3533(g), 3538 (2006) (requiring extensive cooperation between the interested parties, the Executive (through the USTR), and Congress before adverse WTO law is incorporated as a part of, or has effect on, U.S. law).

172. See *Measures Related to Zeroing*, *supra* note 158, at 3-4, 88, 96 (noting that despite its stated intentions to stop applying zeroing in average-to-weighted comparisons, the United States had yet to institute procedures to amend or abandon

Nevertheless, the majority reasoned that Chapter 19 panels are not required to wait for the USTR and Congress to alter Commerce's use of zeroing because those URAA subsections do not apply to zeroing.¹⁷³ Specifically, the majority determined that zeroing was inapplicable to these provisions because it was not an agency "practice" as contemplated by the URAA, since it is not addressed by a written policy.¹⁷⁴ The majority's conclusion is wrong for two reasons. First, the CIT and Federal Circuit, the courts that Chapter 19 panels are surrogates for, consistently referred to zeroing as a "practice."¹⁷⁵ Second, the legal definition of "practice" does not require a written instrument, despite the majority's conclusion that one is required to amend or abandon zeroing.¹⁷⁶

By deferring to WTO precedent, the *Wire Rod* majority abrogated both U.S. law and Congressional intent of ensuring that the WTO

zeroing in transaction-to-transaction comparisons and administrative reviews at the time *Wire Rod* was decided). *But see* 77 Fed. Reg. 8101-01 (abandoning zeroing altogether by April 2012); Rossella Brevetti, *Commerce Proposal to Curb Zeroing Draws Response From 22 Lawmakers*, 28 I.T.R. (BNA) 296 (2010) (noting that Commerce solicited public and international response to its proposed rule ending zeroing, and so far has received over 100 comments, 22 from members of the U.S. Congress alone); REGULATIONS.GOV, <http://www.regulations.gov/> (last visited Nov. 20, 2011) (select "Public Submission" under "Document Type" and search "ITA-2010-0011" under "Keyword") (archiving all public comments received on Commerce's proposed rule).

173. *See Wire Rod*, *supra* note 5, at 31-32 (discussing the provisions of the URAA, specifically §§ 3533 and 3538, and whether zeroing was a "practice" as contemplated by the URAA in the absence of a written policy guideline on the methodology).

174. *See id.* at 31-33 (opining that zeroing could not have been a "practice" within the meaning of the URAA in the absence of written guidance, and thus is not subject to the implementation requirements of §§ 3533 or 3538); *see also* H.R. DOC NO. 103-316 at 1021 (1994) (exhibiting the portion of the SAA the majority referred to, which states that consultations are required for changes in agency regulations or administrative practice consisting of "written policy guidance").

175. *See, e.g.,* *Corus Staal BV v. Dep't of Commerce* (Corus Staal I), 395 F.3d 1343, 1349 (Fed. Cir. 2005) (stating that the Federal Circuit would "not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing *practice*") (emphasis added); *see also* *PAM S.p.A. v. U.S. Dep't of Commerce*, 27 Ct. Int'l Trade 671, 672 (2003) (noting that "the U.S. *practice* of zeroing is . . . being challenged . . . pursuant to the WTO rules of dispute settlement") (emphasis added).

176. *See Practice*, LAW.COM, <http://dictionary.law.com/Default.aspx?selected=1569> (last visited Nov. 20, 2011) (defining practice as "custom or habit as shown by repeated action" and making no reference to a written guideline).

Appellate Body does not undermine U.S. law. The majority also incorrectly determined that zeroing was not a “practice” subject to the implementation mechanisms of the URAA, as Executive and Congressional consultations must occur before zeroing is amended or abandoned (in the absence of a legislative prohibition). Thus, the *Wire Rod* majority, although created under an international treaty, failed to properly adjudicate Mittal’s case in the manner prescribed by NAFTA.

2. *The Majority Should Have Been Precluded From Invoking Charming Betsy Because the URAA Supremacy Clause Preempts its Application in Cases Implicating WTO Appellate Body Decisions*

Since the URAA unambiguously defers to U.S. law that conflicts with WTO Appellate Body reports, the majority should have been precluded from invoking *Charming Betsy* because there is no possible construction than can give effect to both.

One of the major reasons for the *Wire Rod* majority’s ruling was the majority’s determination that Commerce’s use of zeroing violated international law under *Charming Betsy*. The majority reached this conclusion for two principal reasons. First, the majority concluded that because the Tariff Act categorically proscribes the practice by its own language, Commerce’s interpretation was unreasonable.¹⁷⁷ Second, the majority reasoned that, because the WTO had consistently ruled that zeroing was inconsistent with Article 2.4 of the ADA,¹⁷⁸ any construction of the Tariff Act permitting zeroing would violate international law for circumventing the adverse WTO jurisprudence.¹⁷⁹

The *Charming Betsy* canon of statutory construction, under its

177. *See id.* at 27 (considering that based on the term “aggregate dumping margins” in the Tariff Act, and since “aggregate” means “all,” the Act cannot possibly be read to mean that only some transactions are included in dumping margin calculations; thus, by the majority’s reasoning, the Tariff Act statutorily required Commerce to include all 12,800 of Mittal’s sales when computing its dumping margins, which it did not).

178. ADA, *supra* note 32, art. 2, para. 2.4 (requiring that a “fair comparison” of all sales must be accounted for in calculating dumping margins).

179. *See Wire Rod*, *supra* note 5, at 31 (opining that employing *Charming Betsy* would not necessarily implement any particular WTO Appellate Body ruling into Mittal’s case, but would rather reflect the fact from the “totality of [WTO Appellate Body] rulings” that zeroing violated the ADA).

modern formulation, states that an act of Congress should not be interpreted to violate international law so long as there is a possible alternative construction.¹⁸⁰ The URAA, a Congressional act, dictates U.S. international legal obligations under the Uruguay Round and with regard to the WTO.¹⁸¹ Specifically, the URAA “Supremacy Clause”—19 U.S.C. § 3512—provides that the United States is not bound by, nor must U.S. courts accord any special deference to WTO jurisprudence.¹⁸² Thus, in zeroing cases, where there was a direct conflict between U.S. and international law, *Charming Betsy* would normally require that courts attempt to harmonize both where possible. The URAA Supremacy Clause, however, preempts judicial attempts to harmonize the then-divergent zeroing stances because it unambiguously provides that domestic law prevails; courts cannot possibly construe the statute any other way.¹⁸³ Consequently, the *Wire Rod* panel, if properly applying U.S. law, should have been precluded from even invoking *Charming Betsy* as a rationale for ruling against Commerce.¹⁸⁴ Despite this, the *Wire Rod* majority

180. See, e.g., *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1303 (Fed. Cir. 2002) (explaining that *Charming Betsy* stands for the proposition that Congressional legislation should not be interpreted in a way that violates international law, if possible).

181. See generally 19 U.S.C. §§ 3501-3624 (2006) (incorporating the results of the Uruguay Round into U.S. domestic law, including acceptance of the WTO as a legal entity and adopting its corresponding antidumping measures). But see Davenport, *supra* note 46, at 281 (discussing how Congress has restricted the application of WTO law to amend U.S. agency practice).

182. See 19 U.S.C. § 3512(a)(1) (stating that no provision resulting from the Uruguay Round Agreements that is inconsistent with U.S. domestic law shall have effect on any person or circumstance); see also H.R. DOC NO. 103-316, at 1032 (1994) (emphasizing that WTO Panel and Appellate Body decisions do not affect U.S. interpretation of its international legal obligations and are not binding as rules of law in the United States).

183. See 19 U.S.C. § 3512(a)(1) (providing, unambiguously, that when in direct conflict with Uruguay Round provisions, such as those from the WTO, U.S. law prevails).

184. See *Corus Staal BV v. Dep’t of Commerce* (Corus Staal I), 395 F.3d 1343, 1349 (Fed. Cir. 2005) (acknowledging that *Charming Betsy* was inapplicable because the URAA explicitly delegated authority to the Executive to resolve these situations); see also Davenport, *supra* note 46, at 312-14 (opining that the URAA Supremacy Clause should prohibit U.S. courts from invoking *Charming Betsy* in cases where WTO jurisprudence is at issue, and that courts that continue to invoke the canon in such cases abrogate Congressional intent); Greenwald, *supra* note 65, at 205 (noting that *Charming Betsy* runs into a problem with WTO Appellate Body decisions because they are not international legal obligations, as the United States

stated that the WTO's categorical proscription of zeroing was a large factor in its determination that Commerce's use of zeroing violated U.S. international legal obligations under *Charming Betsy*.¹⁸⁵ The *Wire Rod* majority therefore invoked *Charming Betsy* in error.

Even assuming, *arguendo*, that the *Wire Rod* majority properly invoked *Charming Betsy*, Commerce's prior use of zeroing did not violate international law. The majority's reliance on the modern formulation was only partially correct, as the original text states that courts should avoid conflict between an act of Congress and the law of nations as understood in the United States.¹⁸⁶ At the time *Wire Rod* was decided, U.S. courts had consistently affirmed that the United States did not interpret its international legal obligations as prohibiting zeroing in dumping margins calculations.¹⁸⁷ Thus, since the U.S. position was then that its international legal obligations permitted zeroing, the *Wire Rod* majority incorrectly concluded that Commerce violated U.S. international legal obligations under *Charming Betsy*.¹⁸⁸

is not obligated to follow them by its own legislation; further arguing that *Charming Betsy* is problematic with respect to WTO Appellate Body decisions, especially since the WTO dispute settlement system has no authority to enforce changes in domestic law). *But see* Reeder, *supra* note 40, at 281-82, 290-91 (noting that although the URAA Supremacy Clause may logically preclude the application of *Charming Betsy* in cases involving WTO Appellate Body Reports, no U.S. court has completely embraced the idea, and that if a court were to fully embrace the idea, it would violate the expanding international anti-zeroing consensus).

185. *See Wire Rod*, *supra* note 5, at 36, 38-40 (citing, incorrectly, to seven different WTO Appellate Body decisions proscribing zeroing, and asserting that due to this jurisprudence, Commerce violated *Charming Betsy* by employing the methodology).

186. *Compare id.* at 9-10 (explaining the *Charming Betsy* canon such that U.S. law should not be construed to violate international law if it is possible to appease both), *with* *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that Congressional legislation should never be construed to violate U.S. international legal obligations, as understood in the United States, if both can be placated).

187. *See, e.g., Corus Staal I*, 395 F.3d at 1346-48 (holding that Commerce's use of zeroing was based on a reasonable interpretation of the U.S. antidumping law despite the large body of WTO jurisprudence outlawing the practice).

188. Even using the *Charming Betsy* analysis used by the majority, Commerce did not violate the canon. The *Wire Rod* dissent astutely explained that *Charming Betsy* does not require "immediate compliance" with adverse international law. *Wire Rod*, *supra* note 5, at 78 (Barr, dissenting). Thus, given the URAA's permissive implementation requirements, simply failing to immediately

III. RECOMMENDATIONS

After analyzing the *Wire Rod* decision, it is clear the majority incorrectly ruled against Commerce based on unsound treaty interpretation and misapplication of, and disregard for, WTO and binding U.S. law, respectively. Irrespective of the fact that zeroing will no longer be a permissible U.S. practice as of April 2012, as currently written, NAFTA Chapter 19 threatens to further convolute international antidumping jurisprudence, a problem NAFTA was originally drafted to avoid. To preempt future panels from emulating *Wire Rod*'s flawed reasoning, NAFTA must address specific issues in its text, such as its lack of an explicit standard of review and the absence of *stare decisis* in Chapter 19 reviews. NAFTA must grapple with this issue if it intends on maintaining clear and consistent rules governing international trade under its framework.

A. NAFTA SHOULD AMEND ANNEX 1911 TO DEFINE "A COURT OF THE IMPORTING PARTY" AS THE CIT IN U.S. CASES

The first, and perhaps most important, step NAFTA should take in remedying Chapter 19's inconsistencies is to explicitly define "a court of the importing party" in Annex 1911.¹⁸⁹

The lack of a clear definition of "a court of the importing party" in Chapter 19 was one of the primary reasons the *Wire Rod* majority concluded in error that they were not acting as a proxy for the CIT.¹⁹⁰ This error clearly abrogates both U.S. law and NAFTA's own directive to apply domestic law in an international forum.¹⁹¹

incorporate adverse WTO law does not violate *Charming Betsy*. See 19 U.S.C. §§ 3533, 3538 (2006) (creating a mechanism to amend U.S. agency action based on adverse WTO decisions, but not requiring such amendment); cf. *Medellín v. Texas*, 552 U.S. 491, 508 (2008) (holding that since the UN Charter stipulates that parties "undertake to comply" with ICJ decisions, no immediate action was required to implement an adverse ICJ ruling).

189. In the case of Chapter 19 reviews instituted against the United States, this would be the CIT. 28 U.S.C. § 1581 (2006); see also discussion *supra* Parts III.A-B (explaining why Chapter 19 panels act as surrogates for the CIT in U.S. cases).

190. See *Wire Rod*, *supra* note 5, at 18, 20 (stating that the omission of a clear definition of "a court" was "pregnant with meaning" and determining that the omission was intentional).

191. See discussion *supra* Part III (analyzing such a determination by the *Wire Rod* panel, and how this was erroneous by explaining the correct interpretation of NAFTA's text and purpose, NAFTA's and the Tariff Act's own directives, as well

Consequently, one of the immediate benefits of this addition to Annex 1911 would be that it would align Chapter 19 decisions with one of NAFTA's primary goals by ensuring application of a consistent standard of review.¹⁹² Currently, the Chapter 19 jurisprudence is inconsistent and unpredictable.¹⁹³ Its diverging results expunge the goal of establishing clear and predictable rules of international trade among the NAFTA states.¹⁹⁴ Clarifying the standard of review would prove to be a large step towards remedying this defect.¹⁹⁵

B. NAFTA SHOULD IMPLEMENT *STARE DECISIS* INTO CHAPTER 19
AND GUARANTEE A *DE NOVO* APPEAL OF PANEL DECISIONS

Additionally, NAFTA should institute *stare decisis* in Chapter 19, and guarantee a *de novo* appeal of panel decisions. These suggestions would ensure a legally correct, consistent, and predictable body of antidumping jurisprudence under NAFTA.¹⁹⁶

As NAFTA is currently written, Chapter 19 decisions do not bind future panels, and the only immediate appellate mechanism is rarely-granted review by an Extraordinary Challenge Committee.¹⁹⁷ While

as how it is patently incorrect for Chapter 19 panels to accord any deference to WTO decisions in zeroing cases challenging Commerce); *see also* Bennett, *supra* note 152, at 453-54 (remarking that the *Wire Rod* majority's determination that it was not bound by the Federal Circuit was surprising).

192. *See* NAFTA, *supra* note 1, pmbl. (proclaiming that one of NAFTA's primary goals is to establish clear rules for international trade between the United States, Canada, and Mexico).

193. *Compare Wire Rod*, *supra* note 5, at 21 (determining that Chapter 19 panels are not sitting as the CIT and that they are thus not bound by Federal Circuit precedent), *with Wheat From Canada*, *supra* note 7, at 17 n.45 (concluding, pre-*Wire Rod*, that Federal Circuit and U.S. Supreme Court precedent bound Chapter 19 panels).

194. *Compare* NAFTA, *supra* note 1, pmbl. (enunciating a primary goal of NAFTA as providing rules governing international trade), *with Wire Rod*, *supra* note 5, at 21 (holding that Federal Circuit precedent does not bind Chapter 19 panels), *and Wheat From Canada*, *supra* note 7, at 17 n.45 (concluding that Chapter 19 panels are bound by the Federal Circuit).

195. *See Gantz*, *supra* note 74, at 309 (opining that the risk of inconsistent results is further exacerbated by the lack of an effective appellate mechanism).

196. *See generally* Maki, *supra* note 110 (explaining that consistent treaty interpretation enhances states' ability to predict their actions).

197. *See* NAFTA, *supra* note 1, art. 1904, para. 13 (providing that an aggrieved party may apply for adoption of an Extraordinary Challenge Committee under Annex 1904.13 if it feels that there was gross misconduct, departure from a

this does provide a limited avenue for appellate review, parties are not guaranteed an appeal, as they must show materiality and prospective harm to NAFTA's framework to even qualify for Extraordinary Challenge Committee ("ECC") review.¹⁹⁸ The difficulty of securing an ECC appeal all but makes the mechanism an illusion, as very few have ever been granted, and none have ever vacated a judgment.¹⁹⁹

The body of erratic jurisprudence developing under Chapter 19, such as the *Wire Rod* and *Mexinox* decisions, exemplifies the need for a guaranteed appeal in Chapter 19 proceedings under a *de novo* standard.²⁰⁰ If NAFTA ensured an appeal with a *de novo* standard, a party subject to an adverse ruling would not have to meet the current requirements for an Extraordinary Challenge Committee review.²⁰¹ Instead, with a *de novo* appeal, an injured party would only have to show errors of law based on the record, as the appellate tribunal would not be bound by the lower panel's findings and legal conclusions.²⁰² Had such an option existed for Commerce in *Wire Rod* or *Mexinox*, Commerce would have at least had the opportunity to achieve a correct result in front of an appellate tribunal.

fundamental procedural rule, or if the panel abused its power).

198. See, e.g., *Live Swine*, *supra* note 143, at 4-5 (enumerating the USTR's reasons for appealing the results of a Chapter 19 panel to review Commerce's calculation of countervailing duties, including that the panel did not satisfy its responsibility to determine whether Commerce's interpretation of the countervailing duty statute comported with U.S. law, that it improperly invoked a rule of finality, and that it substituted its own interpretation of U.S. countervailing duty law for Commerce's interpretation).

199. See Colares & Bohn, *supra* note 83, at 207 (showing that only six ECC appeals have ever been granted, all have involved U.S. challenges to panel decisions, and none of the six granted appeals vacated the panel's original decision).

200. See discussion *supra* Parts III.A-C (highlighting the *Wire Rod* majority's mistakes, including unsound treaty interpretation and improper invocation of WTO law and the *Charming Betsy* doctrine).

201. See generally Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308 (2009) (suggesting that, while universal *de novo* appellate review is undesirable, the standard requires a less onerous showing than other, narrower standards, such as abuse of discretion). Given the inability of petitioners to prove abuse of discretion, even in cases that have been incorrectly decided, a *de novo* standard would ensure appellate review of panel decisions. *id.* at 334.

202. See *id.* at 313 (noting that, under *de novo* review, appellate tribunals owe no deference to the lower tribunals' original findings of fact and legal conclusions).

CONCLUSION

International trade law today has been plagued by a dearth of consistent rulings on contentious practices. The former zeroing controversy exemplified this issue; U.S. courts consistently sanctioned zeroing, while the World Trade Organization categorically outlawed it for a number of years. The NAFTA binational panel review system only exacerbates the problem. Chapter 19, while part of an international legal instrument, was created on the express understanding that domestic antidumping law would be applied in challenges filed under it. However, panels such as those in *Wire Rod* and *Mexinox* continue to abrogate U.S. law by departing from the applicable standard of review in refusing to abide by controlling Federal Circuit precedent. This not only undermines U.S. law, but also conflicts with NAFTA's goal of clear trade rules for its members. These results have further convoluted the body of NAFTA Chapter 19 jurisprudence. Improving NAFTA's treaty language would be the first step towards ensuring proper antidumping jurisprudence under Chapter 19. Until the treaty language is refined, inconsistent panel decisions will continue to undermine both international and domestic law.