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# THE GLOBALIZATION OF INTERNATIONAL TRADE LITIGATION: AD/CVD LITIGATION - WHICH FORUM AND WHICH LAW?

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## I. INTRODUCTION

Litigation of antidumping and countervailing duty determinations is becoming increasingly complex—and increasingly interesting—due to the possibility that agency decisions will be reviewed before various fora and the varying array of applicable laws. In addition to traditional judicial review before the United States Court of International Trade (“CIT”), the fora include binational panels under Chapter 19 of the North American Free Trade Agreement (“NAFTA”)<sup>1</sup> and international panels convened under the dispute settlement rules of the World Trade Organization (“WTO”).<sup>2</sup> While the law which these bodies may apply in reviewing agency Anti-Dumping Agreement (“AD”) or Countervailing Duty Determinations (“CVD”) decisions is similar in its general scope, it may vary considerably with regard to significant details. Thus, litigants will think carefully about which forum, and which law, will

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1. North American Free Trade Agreement, Dec. 17, 1992, ch. 19, 32 I.L.M. 682 [hereinafter NAFTA].

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 112 (1994) [hereinafter DSU].

apply in the course of proceedings which they may choose to—or be compelled to—pursue.

This paper will examine a hypothetical antidumping case involving soccer bounce-balls from Mexico to analyze which forum and which law is most appropriate for the litigants. Section II sets forth the hypothetical. Section III details the litigants' response to the agency's preliminary determination and Section IV outlines the final determination. Finally, Section V describes the parties' post-litigation options.

## II. INITIATION

The U.S. Department of Injury, Dumping, and Subsidies ("DIDS") initiates an antidumping investigation against soccer bounce-balls from Mexico. The Mexican soccer balls are made of a new, high-tech, flubber-like substance which conforms to the body (*e.g.*, head or foot) upon impact, so as to diminish bodily injury, yet recovers its prior shape and rebounds from the body with a 30% increase in power and velocity. The new "bounce-balls" cost about the same as traditional soccer balls and are taking the U.S. market by storm. Soccer authorities are in a tizzy as to whether the bounce-balls may be authorized for use in regulation games.

The petitioners for the antidumping duties are U.S. soccer ball producers, allegedly representing all domestic production. There are no U.S. bounce-ball producers, so far as the petitioners know. Nevertheless, to be sure, DIDS takes out a full-page advertisement in *Soccer America*, asking if there are any U.S. bounce-ball producers and, if so, requesting that they come forward and express their views on the merits of the petition. DIDS receives no response and initiates an investigation.

In its initiation notice, DIDS defines soccer balls as the domestic like product because it finds that soccer balls are the domestically produced product most similar in characteristics and uses with the imported bounce-balls. DIDS, therefore, determines that the U.S. industry producing soccer balls has the requisite industry support to bring a case against the producers of Mexican bounce-balls.

Meanwhile, the telephones of the Mexican respondents have been ringing off the hook since DIDS published its ads; as U.S. importers of the Mexican product call furiously to determine what their dumping liability will be and threaten to stop

importing. The Mexican producers are irate at the initiation and push their lawyers and government to stop the case immediately, in any legal manner possible.

*A. After Initiation, What Do the Litigants Do, If Anything, In What Forum, and Why?*

1. Mexican Bounce-Ball Producers

The Mexican bounce-ball producers—respondents in the newly initiated antidumping investigation—want to stop the investigation immediately. Their lawyers advise them that DIDS probably has acted illegally in one respect and is on shaky legal grounds in a second regard. They may have a remedy in the CIT, in the form of injunctive relief, as discussed below.

With regard to the possible illegality of DIDS' initiation, the Mexican respondents first claim that DIDS violated both the WTO Antidumping Agreement<sup>3</sup> and the U.S. statute<sup>4</sup> by publicizing the filing of the antidumping petition in a well-known sports magazine. The AD Agreement specifically requires that investigating "authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation."<sup>5</sup> The U.S. statute states that the administering authority "shall not accept any unsolicited oral or written communications" from any person other than specified domestic interested parties, except when polling the industry to determine if there is sufficient industry support for the petition.<sup>6</sup>

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3. Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994) [hereinafter Anti-Dumping Agreement or AD].

4. The hypothetical DIDS is subject to all United States laws.

5. AD, *supra* note 3, at art. 5.5. An exception to the no-publication rule prior to initiation exists for governments. Article 5.5 requires the investigating authority to notify the government of the exporting country concerned, after receipt of a properly documented application (petition).

6. See 19 U.S.C. §§ 1673a(b)(3)(B), (c)(4)(D) (1994). See also Comments to Final Antidumping Regulations, § 351.202 (concerning pre-initiation communications, Antidumping Duties, and Countervailing Duties); Final Rule, 62 Fed. Reg. 27,296, 27, 305-306 (May 19, 1997). See generally URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 103-316 at 861

Second, the Mexican respondents contend that the DIDS "like product" determination—that soccer balls are similar in characteristics and uses with the imported bounce-balls—is unreasonable and unsupported by the evidence of record. The clearly superior Mexican bounce-ball could never be considered in the same category as a run-of-the-mill U.S. soccer ball, satisfying the definition of "domestic industry" under Article 4.1 of the AD Agreement.<sup>7</sup> That definition refers to the "domestic producers as a whole of the like product."<sup>8</sup> It further defines "like product" in Article 2.6 as "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration."<sup>9</sup> The U.S. statute has a similar definition.<sup>10</sup> Because the U.S. soccer ball producers do not produce a product sufficiently "like" the Mexican bounce-balls for which they are seeking antidumping duties, the Mexican respondents contend that the U.S. producers lack standing to pursue the case and it must be dismissed.

Procedurally, the Mexican respondents urge their lawyers to seek an immediate halt to what they view as an unjust and illegal DIDS investigation, before it plays further havoc with their exports to the United States and their business and marketing plans. In which forum may they seek such a halt? The attorneys advise against the WTO, where the dispute settlement rules generally limit cases to those challenging final agency actions.<sup>11</sup> Nevertheless, the Mexican companies press

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(1994) [hereinafter SAA] (stating that Commerce and the International Trade Commission (ITC) are to avoid publicizing the existence of a petition before initiation and shall not issue press releases during this period).

7. See AD, *supra* note 3, at art. 4.1.

8. *Id.*

9. *Id.* at art. 2.6.

10. See 19 U.S.C. § 1673a(b)(1) (1994) (explaining that a petition to initiate an antidumping investigation may be initiated by an interested party who files a petition "on behalf of an industry."). That interested party is defined as a producer, or other group, of a "domestic like product," which is in turn defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." *Id.* §§ 1677(9)(C-G), (10).

11. See AD, *supra* note 3, at art. 17.4 (limiting dispute settlement to a final action by the administering authority or to action imposing provisional measures under certain circumstances). This provision does not allow cases against initiation

their own government to do something.<sup>12</sup>

Chapter 19 of the NAFTA also limits panel review to final agency determinations, so that is not a viable forum.<sup>13</sup> Similarly, judicial review in the CIT of DIDS determinations is enumerated in great detail, and does not include affirmative initiation decisions.<sup>14</sup> Nevertheless, the Mexican respondents decide to try their luck in the CIT, seeking interlocutory review under the court's "residual jurisdictional" authority.<sup>15</sup> Under this authority, interested parties may obtain "back door" judicial review of DIDS determinations if they can convince the court that the routine review procedures would be "manifestly inadequate" as applied to their case.<sup>16</sup> In addition, unlike WTO and NAFTA panels, the CIT has the equitable power necessary to enjoin an agency from further proceedings.<sup>17</sup> Of course, the Mexican respondents believe the court must review the illegal initiation and immediately exercise its equitable powers to enjoin DIDS from continuing its unjust antidumping investigation. Thus, they instruct their attorneys to file the necessary papers in the CIT as soon as possible.

The Mexican respondents' attorneys proceed with the request for injunctive relief before the CIT, although they advise

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of an anti-dumping investigation, at the time of the initiation. Initiation decisions may be challenged in the context of a challenge to the authority's final determination. *See infra* note 49. *See also Guatemala - Anti-dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, Report of the Panel, circulated June 19, 1998 [hereinafter *Guatemala Cement*], and WT/DS60/AB/R, Report of the Appellate Body, circulated Nov. 2, 1998 [hereinafter *Appellate Report*].

12. Only member governments, not private parties, may pursue cases in the WTO under the dispute settlement scheme. *See* DSU, *supra* note 2, at arts. 1 (Coverage and Application), 3 (General Provisions), and 10 (Third Parties). *See also* AD, *supra* note 3, at art. 17 (Consultation and Dispute Settlement).

13. *See* NAFTA, *supra* note 1, ch. 19, at art. 1904 (referring only to review of "final" AD or CVD determinations). Article 1911 and Annex 1911 define "final determination" as it applies to the United States; this does not include initiations. *See id.* at art. 1911, Annex 1911.

14. *See* 19 U.S.C. § 1516a(a) (1994). *See also* 28 U.S.C. § 1581(c) (1994). In contrast, judicial review of negative initiation decisions is allowed. 19 U.S.C. § 1516a(a)(1)(A) (1994).

15. 28 U.S.C. § 1581(i).

16. *See, e.g., Miller v. United States*, 824 F.2d 961 (Fed. Cir. 1987). *See also Pulton Chain Co. v. United States*, 17 Ct. Int'l Trade 1136, 1139 (1993); *Technoimportexport v. United States*, 766 F. Supp. 1169, 1175 (Ct. Int'l Trade 1991); *Kerr-McGee Chem. Corp. v. United States*, 955 F. Supp. 1466, 1475 (Ct. Int'l Trade 1997).

17. The CIT is an Article III court, with the same powers of law and equity as conferred upon the U.S. district courts. 28 U.S.C. §§ 251(a), 1585 (1994).

their clients that their chance of success is limited. Even if they can convince the court to exercise its residual jurisdiction over such an interlocutory appeal, they will face an uphill battle in proving that their clients are sufficiently harmed to merit the extraordinary relief of an injunction to halt the agency's action.<sup>18</sup> In addition, their claims on the merits regarding pre-initiation publication and like product under the U.S. statute are not necessarily winners. They would prefer to be in the WTO on the pre-initiation claim, but an appeal there is premature. The CIT will, of course, apply the U.S. statute, whereas a WTO panel will apply strictly WTO rules.<sup>19</sup> Nevertheless, the Mexican bounce-ball producers are hopping mad and want action. They also are flush with cash from their highly successful product and willing to bankroll aggressive action to protect the lucrative U.S. market. Because the Mexican respondents' attorneys believe that their case is within the bounds of law, they prepare and file the appropriate papers with the CIT.

## 2. DIDS

DIDS attorneys are well prepared when they receive the papers requesting a temporary restraining order and preliminary injunction against their agency, as filed in the CIT by the Mexican respondents. They have argued against such motions many times and immediately oppose the temporary restraining order ("TRO") request and move to dismiss the action on the grounds that the court lacks jurisdiction over this interlocutory appeal. The Mexican respondents will have a full opportunity

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18. The mere inconvenience and cost of defending against an AD or CVD investigation or review is not, in itself, sufficient to constitute the irreparable harm required to obtain injunctive relief. "[W]ithout more, harm attributable to participating in an unauthorized antidumping proceeding is not sufficient to render the remedy afforded by 28 U.S.C. § 1581(c) manifestly inadequate." *Hylsa, S.A. de C.V. v. United States*, 960 F. Supp. 320, 324 (Ct. Int'l Trade 1997) (citations omitted), *aff'd* 135 F.2d 778 (Fed. Cir. 1998); *accord* *Fed. Trade Comm'n. v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (rejecting argument that expenses and disruption of participating in adjudicatory proceedings claimed to be invalid justifies judicial review prior to a final agency determination). *See also* *Miller*, 824 F.2d at 964 ("mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate") (*citing* *Am. Air Parcel Forwarding v. United States*, 718 F.2d 1546, 1550-51 (Fed. Cir. 1983)).

19. *See* discussion *infra* Part IV.A.2.

to press their points at the end of the investigation when they may appeal under the prescribed statutory regime—either to the CIT or to a Chapter 19 NAFTA panel.<sup>20</sup> It is premature to allow their appeal now; all parties will benefit from a full airing and investigation of the issues before the agency, which will have an opportunity to explain, in detail, the reasons for its views in its final determination.<sup>21</sup>

Moreover, DIDS attorneys are confident that, as to the merits of their action, the pre-initiation publication of the petition is allowable under the U.S. statutory exception for polling the industry, and the agency's like product call for the bounceballs was imminently reasonable on the record as compiled. In short, DIDS attorneys are optimistic that they will get the Mexican case tossed out of the CIT. If not, and the CIT enjoins the agency from continuing its investigation, DIDS will appeal to the U.S. Court of Appeals for the Federal Circuit, arguing that the CIT improperly asserted jurisdiction and improperly granted injunctive relief. Nevertheless, DIDS attorneys are concerned that their client may be vulnerable to an eventual WTO attack on the pre-initiation publication of the petition because the AD Agreement contains no explicit polling exception, even though the action which DIDS took ensured a more thorough examination of the industry support issue. DIDS will not re-visit its standing call made at initiation, as this is prohibited by the U.S. statute.<sup>22</sup> It is not, however, prohibited by the AD Agreement.

### 3. U.S. Soccer Ball Producers

The U.S. soccer ball producers—petitioners in the antidumping investigation—also oppose the Mexican bounceball producers' motion for injunctive relief in the CIT. They intervene on the side of DIDS. At the hearing before the court on the injunction, they present particularly persuasive evidence, including witnesses, and do an effective job of cross-examining the respondents' witnesses. They play up the incon-

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20. See NAFTA, *supra* note 1.

21. This preserves the statutory scheme designed by Congress, "absent which litigants could ignore the precepts of subsections (a)-(h) [of § 1581(i)] and immediately file suit in the Court of International Trade under subsection (i)."<sup>7</sup> *Norcal/Crossetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992).

22. See 19 U.S.C. § 1673a(c)(4)(E) (1994).



sistency in the Mexicans' argument of irreparable harm at being shut out of the U.S. soccer ball market, when at the same time they claim that their product is radically different from the traditional soccer ball.

#### 4. Mexican Government

The Mexican Government—in particular, DIDS' counterpart in SECOFI<sup>23</sup>—is apprised of the initiation but takes no part in the litigation in the U.S. court. However, at the request of the bounce-ball producers, their embassy in Washington, D.C. sends a letter to the Secretary of DIDS, expressing opposition to the investigation and requesting a meeting with the Secretary, Under Secretary, or Assistant Secretary. The meeting is held and the DIDS officials promise to continue to act consistently with U.S. domestic law and international obligations. In addition, the Mexican Government requests consultations under the aegis of the WTO. While the U.S. Government expresses its view that such consultations are premature under any WTO procedure, it nevertheless agrees to general consultations in Geneva, although not under any WTO dispute settlement procedure.

### III. PRELIMINARY DETERMINATION

The CIT declines to exercise its residual jurisdiction over the Mexican bounce-ball producers' attempt at interlocutory appeal and dismisses the case. DIDS then proceeds with its antidumping investigation, finds a reasonable indication of injury,<sup>24</sup> and issues a preliminary affirmative dumping determination, with margins of 70%.

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23. *Secretaria de comercio y fomento industrial* (Secretary of Commerce and Industrial Development) is the agency of the Mexican Government responsible for its AD/CVD program.

24. The hypothetical DIDS performs the investigative functions of the U.S. International Trade Commission with regard to injury findings. See 19 U.S.C. §§ 1673b(a) (preliminary injury determination) and 1673d(b) (final injury determination) (1994).

*A. After the Preliminary Determination, What Do the Litigants Do, If Anything, In What Forum, and Why?*

1. Mexican Bounce-Ball Producers

With issuance of the DIDS preliminary determination, trade in Mexican bounce-balls to the United States is effectively halted because the U.S. Customs Service suspends liquidation on entries of the product and requires bonds at the DIDS estimated dumping rate of 70% of the ad valorem value of the products.<sup>25</sup> The Mexican companies are outraged and again urge their lawyers to take all possible action to stop the investigation and remove the prohibitively high bonds. The lawyers advise them against seeking injunctive relief in the CIT again in the wake of their dismissal at the initiation stage. While arguably their harm is more acute than ever, because steep margins have been found, case precedent in the court is strongly against them.<sup>26</sup> They consider appealing to the Federal Circuit the CIT's dismissal of their challenge to the initiation, but decide that events are proceeding too quickly and that they instead will marshal their resources and fight the investigation.

They also consider seriously a challenge to the preliminary determination in the WTO. The AD Agreement allows such interlocutory suits, provided that the provisional measure has a "significant impact."<sup>27</sup> In the Mexicans' view, a shut-out dumping rate has a "significant impact." Accordingly, they urge their government to challenge the preliminary determination in the WTO on the same substantive grounds as their challenge to the initiation in the CIT. Even so, they feel frustrated by their inability to get strong, swift action against DIDS. The WTO challenge will not move as quickly as would a suit for

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25. See 19 U.S.C. § 1673b(d) (1994).

26. Challenges to affirmative (or negative) AD/CVD preliminary determinations are not among the determinations enumerated in 19 U.S.C. § 1516a(a) (1994), as reviewable in the CIT or before a NAFTA panel.

27. See AD, *supra* note 3, at art. 17.4 (stating that, "[w]hen a provisional measure has a significant impact and the Member considers the measure was taken contrary to the provisions of paragraph 1 of Article 7 of this Agreement, that member may also refer such matter to the DSB [Dispute Settlement Body]."). Paragraph 1 of Article 7 enumerates and cross-references the basic requirements for an AD suit, including a proper initiation pursuant to Article 5 of the Agreement. See *id.* at art. 7.

injunctive relief in the CIT,<sup>28</sup> and the WTO panels do not possess retroactive powers.<sup>29</sup> They are empowered to "examine the matter" and "recommend" that the offending government "bring the measure into conformity" with the Agreement.<sup>30</sup> Nevertheless, the Mexican producers urge their government to begin a WTO challenge to the DIDS preliminary determination; even if only to signal to DIDS how seriously any final determination will be viewed.

## 2. DIDS

Busy DIDS attorneys are somewhat irritated, although only partly surprised, when they receive the papers from Mexico stating that it has requested WTO consultations on the preliminary determination. Rather than traveling to Geneva again, however, the two governments agree to save time and resources by conducting their consultations via video conferencing. This works well, and at the consultations DIDS expresses the U.S. view that the consultations are premature. DIDS attorneys claim there is no "significant impact," as required by Article 17.4, to justify consultations on the provisional measures. Perhaps if the bounce-balls were cantaloupes that were perishing at the border, such an impact might exist. But the mere inconvenience and expense of defending against an antidumping investigation is not sufficient to justify the extraordinary remedy of review before an investigating authority has completed its work. The DIDS attorneys add that the parties' resources, and those of the WTO, will be expended uselessly in traveling back and forth to Geneva. This will incur staff and translation expenses, and will require writing briefs

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28. The DSB includes strict time limits for the work of dispute settlement panels which generally amount to less than a year from panel formation to final panel decision. See DSU, *supra* note 2, at arts. 12, 20. In contrast, the Rules of the CIT, following the Rules of Civil Procedure for the U.S. district courts, provide that the court may grant a temporary restraining order virtually immediately, *ex parte*, for a period of ten days and may extend it, for good cause, for another ten days. See 28 U.S.C. § 65 (1994). Preliminary injunctions are set for hearing and heard as soon thereafter as possible. *Id.*

29. The United States takes the position that WTO panels may only effect prospective relief, and the Uruguay Round Agreements Act so provides. See discussion *infra* Part V (regarding implementation of WTO decision against DIDS).

30. See DSU, *supra* note 2, at art. 19(1); AD, *supra* note 3, at art. 17.4. See also discussion *infra* Part V (regarding implementation of WTO decision against DIDS).

and holding arguments when the final determination may be challenged just a few months in the future. If this were not so, then the WTO drafters' inclusion in Article 17.4 of the "significant impact" requirement would be meaningless, because it would allow routine challenges to preliminary determinations.

In any event, the Mexican officials proceed to present to DIDS their views on the merits of the preliminary determination. Because U.S. law precludes DIDS from re-visiting the issue of standing following the initiation,<sup>31</sup> the DIDS attorneys have nothing more to say on this matter than what they explained to the CIT at the preliminary injunction hearing. They likewise have little to say on the merits of the preliminary antidumping determination because the agency's position is still tentative.

### 3. U.S. Soccer Ball Producers

At this point in the investigation, the U.S. soccer ball producers focus their resources on the continuing success of the DIDS proceeding. There is little they can do about the Mexicans' request for WTO consultations, because these talks occur government-to-government and private parties are not allowed to participate.<sup>32</sup> Nevertheless, they request a short meeting with DIDS officials prior to the WTO talks.<sup>33</sup> They will then focus their resources on reviewing documents filed after the verification conducted by DIDS officials at the Mexican producers' plants to review the accuracy of the information they have submitted.<sup>34</sup> Such verifications are critical to the decisions made in the final determination.

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31. See cases cited *supra* note 16.

32. See AD, *supra* note 3. However, while private parties may not participate as litigants in WTO dispute settlement proceedings, it appears that panels may be willing to accept amicus briefs from private parties based upon a panel's discretionary authority to accept and consider information and advice submitted to it, whether requested by a panel or not. See Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118, para. 108. The U.S. soccer ball producers keep this possibility in mind, in the event that the case proceeds to a panel.

33. Such *ex parte* meetings are allowed in the course of an AD/CVD proceeding. See 19 U.S.C. § 1677f(a)(3) (1994). In contrast, the Mexican Government's meeting with DIDS is under the aegis of the WTO consultation provisions, as discussed above, because the Mexican Government is not an active participant in the DIDS dumping investigation itself.

34. See 19 U.S.C. § 1677m(i) (1994).

#### 4. Mexican Government

The Mexican Government proceeds with the WTO consultations with DIDS regarding the preliminary determination; even though it knows the action is largely *pro forma*. It will be certain to file a separate WTO request challenging the final DIDS determination, assuming it is adverse to the Mexican bounce-ball producers, in order to preserve all rights regarding that decision.<sup>35</sup>

#### IV. FINAL DETERMINATION

DIDS issues a final affirmative injury and antidumping determination, with a knock-out dumping margin of 50%. DIDS continues to define the domestic like product as soccer balls, because it finds that soccer balls are the domestically produced product most similar in characteristics and uses with the imported bounce-balls. However, in the midst of its final investigation, the international soccer authority, FIFA (Federation Internationale de Football Association), issues a ruling that bounce-balls may not be used for regulation matches. While this information is submitted to DIDS during the investigation and is therefore on its administrative record, DIDS does not give it much weight. The agency's decision under the antidumping law is made according to the statutory requirements concerning the definition of domestic like product, whereas FIFA made its decision in the context of completely different, sports-related rules. Then, after DIDS has concluded its investigation, issued its antidumping order, and closed its administrative record, U.S. soccer authorities, including MLS (Major League Soccer)—following a long and bitter debate—also rule that bounce-balls may not be used in regulation games.

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35. Mexico's failure to do this resulted in dismissal from the WTO of its challenge to the final determination by the government of Guatemala in the cement case. See Appellate Report, *supra* note 11.

*A. After the Final Determination, What Do the Litigants Do, If Anything, In What Forum, and Why?*

1. Mexican Bounce-Ball Producers

The Mexican bounce-ball producers first consider whether to challenge DIDS' determination in the CIT<sup>36</sup> or before a NAFTA binational panel.<sup>37</sup> The NAFTA specifies that "each party shall replace judicial review of final antidumping . . . duty determinations with binational panel review . . ."<sup>38</sup> The law governing binational panel reviews is the national law of the country in which the review takes place, specifically "the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing party would rely on such materials in reviewing a final determination of the competent investigating authority."<sup>39</sup> Thus, a request by either the domestic industry or the Mexican bounce-ball producers to initiate binational panel review will supersede and replace litigation initiated in the CIT.<sup>40</sup>

Because the applicable AD/CVD law in a NAFTA panel proceeding is the law of the importing country, the nature of the claims that can be brought before a NAFTA panel and the CIT are generally the same.<sup>41</sup> Nevertheless, the Mexican bounce-ball producers consider differences between the two fora before selecting the one in which to seek relief. The first

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36. 28 U.S.C. § 1581(c) (1994) provides that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." 19 U.S.C. § 1516a (1994) provides that an interested party may challenge any final affirmative antidumping determinations by the administering authority and by the Commission under 19 U.S.C. § 1673(d) (1994).

37. See 19 U.S.C. § 1516a(g) (1994) (providing that final antidumping determinations regarding merchandise from a NAFTA country may be challenged before a binational panel if such review is requested pursuant to Article 1904 of the NAFTA). If such request is made, the determination is not reviewable by the CIT. See 19 U.S.C. § 1516a(g)(2) (1994).

38. NAFTA, *supra* note 1, at art. 1904.1.

39. *Id.* at art. 1904.2.

40. See 19 U.S.C. § 1516a(g)(2) (1994) (providing that an anti-dumping duty determination is not reviewable by the CIT if a binational panel review is requested pursuant to Article 1904 of the NAFTA).

41. An exception exists for constitutional issues, however, under U.S. law. See 19 U.S.C. §§ 1516a(g)(3), (4) (1994) (setting forth the exception to exclusive binational panel review for constitutional issues, and, listing other, technical exceptions to exclusive binational panel review).

involves the speed of the process.<sup>42</sup> With regard to the NAFTA panels, Article 1904.14 states that "[t]he rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made . . . ."<sup>43</sup> However, delays in formation of some panels, and problems arising when panelists discover conflicts of interest, have resulted in the process often falling short of the NAFTA rules' ambitious timetable. The complexity and number of issues that panels must consider in certain cases can result in further delay if panels take more than the ninety days contemplated for issuing a decision.<sup>44</sup> By contrast, the CIT, as an Article III court, does not have specific deadlines for completing litigation. While some CIT litigation may be concluded within a year of its initiation by the filing of a complaint, most cases will take over a year, and sometimes several years if appeals are involved. In sum, the Mexican producers conclude that, as between the two fora, timing is not a determinative factor.

Another consideration for the bounce-ball producers in selecting a forum is the status of the decision issued by each forum. Both CIT and binational panel decisions are binding upon the parties with respect to the matter being litigated.<sup>45</sup> However, the different appellate processes in CIT and panel proceedings serve to distinguish the status of decisions issued in each forum. In the U.S. courts, all parties, as a matter of right, may appeal a CIT decision to the Court of Appeals for the Federal Circuit.<sup>46</sup> A CIT decision that is not appealed is binding in the matter being litigated and generally will attain the status of binding authority in subsequent Department of Commerce matters.<sup>47</sup>

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42. Cost is not a concern, because the expenses of running both the CIT and the NAFTA are borne by governments. That is, private parties do not choose and "hire" NAFTA panelists as in the case of private arbitration. Attorneys fees and related expenses to litigate in either the CIT or the NAFTA would not differ appreciably.

43. NAFTA, *supra* note 1, at art. 1904.14.

44. *See id.* *See also* James R. Holbein, *NAFTA Chapter 19: The U.S. Secretariat's Perspective*, in *THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT* 769 (Practising Law Institute 1998). The paper also mentions funding problems which, in some cases, have delayed panels. *Id.*

45. *See* NAFTA, *supra* note 1, at art. 1904.8 (stating that "[t]he decision of a panel . . . shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.").

46. *See* 28 U.S.C. § 2645 (1994).

47. If the Department of Commerce does not appeal a CIT decision, it nor-

By contrast, the NAFTA Chapter 19 dispute settlement procedures contain much more limited opportunity for parties to appeal panel decisions to an Extraordinary Challenge Committee ("ECC") comprised of three judges from the member countries.<sup>48</sup> Under the U.S.-Canada Free Trade Agreement, the precursor to the NAFTA, there were only three appeals to an Extraordinary Challenge Committee, while only one appeal thus far has been initiated under the NAFTA.<sup>49</sup>

This limited avenue for appealing a panel decision means that, as a practical matter, all parties must live with the panel's decision. Moreover, the panel's decision does not constitute binding precedent upon future DIDS determinations. Despite these distinctions between the status of the opinions in the two fora, there are several reasons why the bounce-ball producers should give this issue only limited weight. First, the pre-initiation publication and like-product issues are unique to investigations and would not be relevant in subsequent administrative reviews of the antidumping duty order. Thus, the bounce-ball producers can be satisfied that a panel decision which reverses the DIDS determination would be binding on this matter and the producers would not have to relitigate these issues every year to achieve their desired results. Moreover, even if the issues were relevant and DIDS continued to decide the matter in the same way, the producers could still refer subsequent panels to the original panel decision as persuasive authority.

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mally acquiesces to the court's holding and applies it in subsequent Commerce proceedings. If Commerce or another party appeals a CIT decision, the resulting Federal Circuit decision is binding on all subsequent Commerce proceedings.

48. See NAFTA, *supra* note 1, ch. 19.

49. A NAFTA government may challenge a panel decision before an ECC where:

- (a)(1) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct;
- (2) the panel seriously departed from a fundamental rule of procedure; or
- (3) the panel manifestly exceeded its powers, authority or jurisdiction . . . for example by failing to apply the appropriate standard of review, and
- (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process . . .

NAFTA, *supra* note 1, at art. 1904.13. One ECC case is pending under NAFTA: Gray Portland Cement and Clinker from Mexico, ECC-2000-1904-01USA.



An additional element in selecting a forum may be the individuals that will be reviewing the DIDS determination. In the CIT, a U.S. judge that is trained and well-versed in U.S. antidumping law will be reviewing the DIDS determination. If the Mexican bounce-ball producers request binational panel review, a panel of five individuals will review the challenged determination. Depending on the case, the panel will be composed of either three Mexican nationals and two U.S. nationals, or vice-versa. These panelists will be selected from a roster of academics, former judges, and private-sector attorneys who bring to the process their individual political, legal, and economic backgrounds.<sup>50</sup> In this regard, Mexican respondents may find it comforting to litigate their claims before Mexican nationals who are familiar with the commercial and legal environment in which Mexican business operates.

Based upon the above considerations, the Mexican bounce-ball producers decide to litigate their claims before a binational panel under Chapter 19 of the NAFTA. The U.S. soccer ball industry is then compelled to seek any claims that it may have in the panel proceeding. Thus, even if the domestic industry wished to litigate any matters in the CIT, the U.S. antidumping law makes clear that the entire matter, once a panel request is made, will be litigated in the binational panel forum.<sup>51</sup> The Mexican producers also decide to urge their government to bring the case in the WTO.

## 2. Mexican Government

The Mexican bounce-ball producers' appeal to their government to pursue their case in the WTO raises issues of both law and policy for the government and, in particular, SECOFI.

SECOFI first considers the legal issues upon which DIDS might be vulnerable in the WTO. These are considered in the context of the relevant AD Agreement provisions, rather than U.S. law.<sup>52</sup> As noted above, there are at least two issues

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50. See NAFTA, *supra* note 1, Annex 1901.2.

51. See *supra* note 37. See also 19 U.S.C. § 1516a(g) (1994).

52. The DSU governs dispute settlement proceedings in the WTO. Article 1 of the DSU applies "to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements')." DSU, *supra* note 2, at art. 1. Identified as a multilateral agreement on trade in goods,

which could be subject to attack. First, the publication of the bounce-ball petition prior to initiating an investigation may violate Article 5.5 of the AD Agreement.<sup>53</sup> Second, the DIDS determination that bounce-balls and soccer balls constitute a single like product for initiation and injury purposes may violate Article 2.6 of the AD Agreement.<sup>54</sup> Based upon the plain language of those provisions, as well as the apparent inconsistency of DIDS' actions with those provisions, Mexico could argue that the DIDS determination was inconsistent with U.S. obligations under the AD Agreement. Thus, based upon legal considerations, the Mexican government decides to pursue WTO dispute settlement by requesting consultations on the matter with the U.S. government. Should consultations fail to cure the alleged deficiencies, Mexico could request to present its arguments before a three-person panel.<sup>55</sup>

However, in deciding to go ahead in the WTO, the Mexican government also remains mindful of a strategic point. Because interested parties must request CIT or panel review of a Commerce determination within 30 days,<sup>56</sup> the Mexican government will know whether the bounce-ball producers are seeking relief in one of those fora prior to the time when the Mexican government likely would begin initiating WTO dispute settlement proceedings. It is conceivable that upon examining the bounce-ball producers' claims, SECOFI may conclude that the producers have a better chance of achieving relief privately

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the AD Agreement is a "covered agreement" and subject to the rules of the DSU. See *id.* at art. 17.1 (stating that "the [DSU] is applicable to consultations and the settlement of disputes under this Agreement.").

53. See AD, *supra* note 3 and accompanying text.

54. *Id.*

55. In the hypothetical, Mexico already has requested consultations upon the issuance of the DIDS preliminary determination. Any panel that is formed is required to review only the matter which was the subject of the consultations which preceded the panel request. The "matter" consists of the measure imposed by the responding government and the legal basis for challenging that measure. See Appellate Report, *supra* note 11, para. 72. The Appellate Body has clarified that the measures which can be the subject of dispute settlement proceedings under the AD Agreement include a provisional measure, a price undertaking, or a final dumping duty. See *id.* para. 79. While the consultations following the preliminary determination involved the provisional measure, the subject of dispute settlement proceedings at this stage would involve the final determination. Since the final determination is a separate measure, a new set of consultations would be required before Mexico can request a panel.

56. See 19 U.S.C. §§ 1516a(1)(B-D), (2)(A) (1994).

than the government would in WTO panel proceedings. For example, even if the government successfully challenged the DIDS determination before a WTO panel, it is uncertain whether revocation of the antidumping duty order on bounce-balls would be achieved.<sup>57</sup>

As noted above, political issues also may influence a government's decision to bring a WTO case. For example, government officials must be cognizant of the implications of an adopted panel report on their own practices. Whether or not a measure is successfully challenged, the report may contain legal interpretations and other language that may impact the complaining government's ability to retain certain practices or procedures of its own. For example, a panel decision on the like product determination by DIDS may affect how SECOFI can examine the existence of a domestic industry and like product issues in its own cases. If SECOFI is concerned about the WTO-consistency of its own practices, it may not want to highlight those issues in dispute settlement proceedings.

Another non-legal consideration may be the limited resources of each government that can be dedicated to WTO dispute settlement proceedings. Each WTO member has certain constraints in the amount of resources that can be expended in such activity. Where resources are so limited, the government must determine which cases are of the highest priority. Prioritizing such cases may involve both legal and political considerations that are unique to each country and case.

Nevertheless, after analyzing all of these legal and non-legal factors, and for purposes of our hypothetical, the Mexican Government decides to file a request for consultations and, subsequently, a panel regarding the DIDS final determination on bounce-balls.

## V. POST-LITIGATION

The Mexican bounce-ball producers pursue their case before a NAFTA panel, while the Mexican Government pursues the case in the WTO. The WTO rules first, handing Mexico a big victory. It rules against DIDS on the like product issue relying heavily on both the FIFA ruling regarding bounce-balls

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57. See *infra* Part V (discussing the results of WTO litigation).

as well as the post-investigation ruling of the U.S. soccer authorities that bounce-balls may not be used in regulation matches. The WTO panel also rules that DIDS' violation of the Antidumping Agreement's no-publication rule renders the initiation illegal. However, the Mexican bounce-ball industry also has challenged DIDS' antidumping order before a NAFTA panel which refuses to consider the post-investigation soccer ruling and affirms the agency's finding that the like product determination was reasonable, as well as finding the ads in the newspapers did not violate any U.S. statute or regulation. Meanwhile, DIDS appeals its loss to the WTO Appellate Body and wins as to the panel's reliance upon the post-investigation, extra-record evidence regarding the U.S. soccer authorities' ruling. However, the Appellate Body affirms the panel on both the like product and pre-initiation publication issues, thus, in effect, affirming DIDS' loss.

*A. After the WTO and NAFTA Litigation, What Do the Litigants Do, If Anything, In What Forum, and Why?*

1. Mexican Bounce-ball Producers

The bounce-ball producers are delighted with their government's WTO victory and concerned with preserving and obtaining implementation of it as soon as possible. They assume that, in accordance with the ruling, DIDS will revoke the AD order on their product and refund any cash deposits and release any bonds. However, their attorneys advise them that this may not occur, because WTO panel rulings are implemented prospectively, as discussed below.

2. U.S. Soccer Ball Producers

Soccer ball producers are delighted with their NAFTA victory and concerned that the WTO ruling against the DIDS final determination not undercut the continuation of the AD order in any way. They convey their views to DIDS and to the U.S. Congress.

3. Mexican Government

The Mexican government is both pleased with its WTO victory and concerned that the obligations of NAFTA under

Chapter 19 be respected and maintained. Mindful of both these goals, it listens to its domestic bounce-ball producers and keeps informed of DIDS' actions, including its statutory obligations, as discussed below.

#### 4. DIDS

DIDS must consider that the WTO panel, affirmed by the Appellate Body, has ruled that DIDS' final AD determination was inconsistent with U.S. obligations under the AD Agreement and that the U.S. must "bring its measures into conformity"<sup>58</sup> with those obligations. Further, the NAFTA binational panel affirmed the lawfulness under U.S. law of the DIDS determination. DIDS attorneys review the provisions contained in the Uruguay Round Agreements Act (URAA) dedicated to the implementation of adverse WTO rulings.<sup>59</sup>

The URAA details how the ITC and Commerce would implement adverse panel reports. Because DIDS acts as both the ITC and Commerce in the hypothetical, the DIDS officials have to consider the provisions relevant to the implementation process in both agencies.

Where a panel report implicates an ITC or Commerce determination, the agency must consult with the Office of the United States Trade Representative (USTR) as well as the appropriate congressional committees (*i.e.*, Senate Finance and House Ways and Means).<sup>60</sup> These consultations are intended to assist the USTR in evaluating the panel's findings and the development of implementing action, if any.<sup>61</sup> While Commerce proceedings likely involve oral consultations, the ITC, upon request of the USTR, may issue an advisory report on whether U.S. trade laws permit ITC action implementing the panel's findings.<sup>62</sup> Based upon this advisory report, the USTR

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58. DSU, *supra* note 2, at art. 19.1.

59. *See* 19 U.S.C. § 3538 (1994).

60. *See* 19 U.S.C. §§ 3538(a)(1), (b)(1) (1994).

61. *See* SAA, *supra* note 6, at 356. Specifically, consultations are intended to provide the USTR with advice on whether implementation is permissible under the U.S. antidumping or countervailing duty law, the implications for the administration of the trade laws upon implementing the findings, and the most desirable method of implementing the findings and the time required to do so. *See id.*

62. *See* 19 U.S.C. § 3538(a)(1) (1994). This advisory report is not subject to judicial review. *See* SAA, *supra* note 6, at 354. The URAA provisions relevant to Commerce's implementation of adverse panel reports do not contemplate the issu-

will determine whether to appeal a panel report, whether to implement an adverse report, and estimate how long an implementation period may be required.

After consultations with DIDS and the congressional committees, the USTR determines that issuing a redetermination would be consistent with existing U.S. law. Therefore, the USTR requests that DIDS issue a determination in connection with the bounce-ball proceeding that would render the DIDS action not inconsistent with the findings of the panel or the Appellate Body. DIDS must do this within the applicable statutory deadlines.<sup>63</sup>

In issuing a new determination, DIDS proceeds to reconsider the U.S. soccer ball producers' petition without publishing anything in *Soccer America* or soliciting public comment prior to initiation. In addition, DIDS re-examines the question of industry support by analyzing anew the like product issue in a manner consistent with the panel's and Appellate Body's interpretation of the like product provision in Article 2 of the AD Agreement. DIDS concludes that soccer balls are not sufficiently similar in characteristics and uses with the imported bounce-balls to support a finding that the U.S. industry producing soccer balls has the requisite industry support to bring a case against the Mexican bounce-ball producers.<sup>64</sup> DIDS therefore issues a negative initiation redetermination, suggesting that the antidumping duty investigation should not have been conducted and the order should not have been imposed.

Once DIDS issues a redetermination, the USTR and DIDS must again consult with the appropriate congressional committees prior to deciding whether to implement the new determination.<sup>65</sup> Whether the USTR directs DIDS to implement its redetermination will be dictated by the issues contained in the

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ance of an advisory report. Instead, Commerce, after consultations with and a written request by the USTR, shall issue a determination that is not inconsistent with the Panel's findings. See 19 U.S.C. §§ 3538(b)(1), (b)(2) (1994).

63. With respect to ITC determinations, the ITC has 120 days from the date of USTR's request to issue a redetermination. See 19 U.S.C. § 3538(a)(4) (1994). Commerce has 180 days from the date of USTR's request to issue a redetermination. See 19 U.S.C. § 3538(b)(2) (1994).

64. The conclusion of the hypothetical DIDS does not implicate what a real-world Commerce Department might conclude in such an unusual instance, after consultation with the ITC about its long-established domestic like product practice.

65. See 19 U.S.C. § 3538(a)(5) (1994) (ITC consultations). See also 19 U.S.C. § 3538(b)(3) (1994) (Commerce consultations).

redetermination. The URAA provides that a redetermination will not be implemented (*i.e.*, have effect under domestic law) if it reaches the same conclusion that was part of the initial determination.<sup>66</sup> By contrast, a redetermination that results in changes in the initial determination will require implementation. If implementation is required, DIDS must publish notice of implementation in the *Federal Register*.<sup>67</sup>

Based upon DIDS' determination that soccer balls and bounce-balls are two, separate, like products and that, based upon this decision, the petition was not filed by or on behalf of an industry that has been injured by reason of imports, the USTR directs DIDS to implement its redetermination.<sup>68</sup> Consequently, DIDS publishes its determination and intention to revoke the antidumping duty order on bounce-balls from Mexico in the *Federal Register*.<sup>69</sup> Importantly, this redetermination is subject to judicial review.<sup>70</sup>

DIDS' revocation of the antidumping duty order appears to be at odds with the results of the binational panel proceedings in which a panel determined that the DIDS determination was based upon substantial evidence and otherwise in accordance with law. However, it appears that Congress contemplated such conflict when promulgating the URAA. The Statement of Administrative Action ("SAA") suggests that DIDS may implement a redetermination pursuant to the USTR's request even if litigation is pending with respect to the initial agency deter-

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66. See SAA, *supra* note 6, at 356. The SAA provides the example of Commerce analyzing the countervailability of a subsidy program. If, based on the panel's findings, Commerce corrects the analytical flaw but reaches the same, affirmative conclusion as to that subsidy program, implementation would not be necessary. *Id.*

67. See 19 U.S.C. § 3538(c)(2)(A) (1994).

68. See 19 U.S.C. § 3538(b)(4) (1994) (The USTR may direct Commerce to implement its redetermination). See also 19 U.S.C. § 3538(a)(6) (1994) (stating that if, based upon a redetermination, an antidumping or countervailing duty order is no longer supported by an affirmative injury determination, then the USTR may direct Commerce to revoke the order in whole or in part).

69. See 19 U.S.C. § 3538(c)(2) (1994) (stating that the Department of Commerce "shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to Title VII of the Tariff Act of 1930.").

70. See 19 U.S.C. § 3538(e) (1994) (amending 19 U.S.C. § 1516a (1984) (providing review by the courts and the NAFTA binational panels of new Title VII determinations made by Commerce or the ITC under 19 U.S.C. § 3538 that are implemented).

mination.<sup>71</sup> Indeed, the SAA addresses this issue directly by discussing the implications of simultaneously litigating an initial agency determination and a redetermination pursuant to an adverse panel report:

Because implemented determinations under [19 U.S.C. § 3538] may be appealed, it is possible that Commerce or the ITC may be in the position of simultaneously defending determinations in which the agency reached different conclusions. In such situations, the Administration expects that courts and binational panels will be sensitive to the fact that under the applicable standard of review, as set forth in statute and case law, multiple permissible interpretations of the law and the facts may be legally permissible in any particular case, and the issuance of a different determination under section 129 does not signify that the initial determination was unlawful.<sup>72</sup>

Thus, DIDS recognizes that the binational panel may affirm the DIDS determination while a second binational panel or the CIT may affirm the redetermination which results in revoking the antidumping duty order.

DIDS officials also consider the implications of the above actions on the assessment of antidumping duties. However, publishing an antidumping duty order does not result in the immediate assessment of antidumping duties on entries of subject merchandise. Specifically, antidumping or countervailing duties on entries subject to Commerce's and ITC's investigations are not assessed until the completion of an administrative review which typically begins one year following the investigation and is not concluded until another year after its initiation.<sup>73</sup> Thus, the inconsistent outcomes of the WTO and binational panel proceedings will not have an impact on the assessment of duties in the DIDS hypothetical.<sup>74</sup>

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71. See SAA, *supra* note 6, at 356.

72. *Id.* at 358.

73. See 19 U.S.C. § 1675 (1994).

74. The SAA makes clear that the redeterminations pursuant to an adverse WTO panel report have prospective effect only:

[Redeterminations] apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under [19 U.S.C. § 3538] is distinguishable from relief available in



## VI. CONCLUSION

The hypothetical could continue with varying outcomes—some that can be imagined and others beyond the imagination. For example, it is conceivable that the United States could decline to implement an adverse WTO panel ruling and address the compensation and retaliation provisions of the DSU.<sup>75</sup> Nevertheless, the hypothetical demonstrates the complexity which litigation of antidumping and countervailing duty determinations may present in various national and international fora. Doubtless the real-world versions of the “hypo” will be—and, in fact, are being—played out in national investigating agencies, courts, and international fora in an increasingly interesting way. Ideally, this litigation will, in the long run, foster freer and fairer trade and more open markets around the world.

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an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available.

SAA, *supra* note 6, at 357.

75. See DSU, *supra* note 2, at art. 21 (concerning implementation of panel rulings and procedures for resolving disputes regarding implementation). See also *id.* at art. 22 (concerning compensation and the suspension of concessions if implementation does not occur within a reasonable period of time, including the possibility of arbitration).