

University at Buffalo School of Law

## Digital Commons @ University at Buffalo School of Law

---

Contributions to Books

Faculty Scholarship

---

2016

### When Popular Decisions Rest on Shaky Foundations: Systemic Implications of Selected WTO Appellate Body Trade Remedies Jurisprudence

Meredith Kolsky Lewis

*University at Buffalo School of Law*, [mlewis5@buffalo.edu](mailto:mlewis5@buffalo.edu)

Follow this and additional works at: [https://digitalcommons.law.buffalo.edu/book\\_sections](https://digitalcommons.law.buffalo.edu/book_sections)



Part of the [International Trade Law Commons](#)

---

#### Recommended Citation

Meredith Kolsky Lewis, *When Popular Decisions Rest on Shaky Foundations: Systemic Implications of Selected WTO Appellate Body Trade Remedies Jurisprudence* in *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* 113 (Julien Chaisse & Tsai-yu Lin, eds., Oxford University Press 2016)

*International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* edited by Julien Chaisse & Tsai-yu Lin, 2016, reproduced by permission of Oxford University Press, <https://global.oup.com/academic/product/international-economic-law-and-governance-9780198778257>



This Book is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Contributions to Books by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

When Popular Decisions Rest on Shaky Foundations:  
Systemic Implications of Selected WTO Appellate Body Trade  
Remedies Jurisprudence

*Meredith Kolsky Lewis\**

**I. INTRODUCTION**

When former Appellate Body member Professor Mitsuo Matsushita gives general remarks at a conference, he often recounts, in highly amusing detail, a story about when, early in the history of the WTO, he and fellow Appellate Body members were called upon to consider the appeal in the *Japan – Taxes on Alcoholic Beverages* case.<sup>1</sup> At issue in that case was, *inter alia*, whether vodka and shochu (a Japanese alcohol) are ‘like products’ pursuant to the first sentence of GATT Article III:2. Professor Matsushita humorously explains that the seven Appellate Body members felt compelled to ‘do a little field work,’ and arranged a taste test for themselves to compare vodka and shochu.<sup>2</sup> While this tale may or may not reflect the actual actions of the Appellate Body members, it could be understood to include an implicit suggestion that ‘real world’ context and experience are relevant to determining likeness.

We see a similar message — this time documented explicitly in an Appellate Body report — in the *European Communities – Measures Concerning Meat and Meat*

---

\* It is my great pleasure to contribute this chapter in honour of my mentor and friend, Professor Mitsuo Matsushita. Professor Matsushita has expressed interest in and been supportive of my scholarship since our first meeting at a 2006 conference in Australia. We have had many interesting discussions over the years, but have particularly shared an interest in the applicability of economic principles to issues arising in WTO dispute settlement, and in disputes with popular outcomes but for which we may not have agreed with the reasoning. I therefore felt the focus of this chapter would be fitting as a tribute to Matsushita-sensei.

<sup>1</sup> Appellate Body Report, *Japan — Taxes on Alcoholic Beverages (Japan – Alcohol)*, WT/DS8, 10, 11/AB/R, 4 October 1996. *Japan — Alcohol* was only the second appeal to be heard by the Appellate Body.

<sup>2</sup> The Appellate Body hears appeals in divisions of three, but all seven members consult and discuss each appeal. Thus while Professor Matsushita was not on the division assigned to the *Japan – Alcoholic Beverages* dispute, he would have participated in discussions regarding the issues in the dispute.

*Products (Hormones)* dispute.<sup>3</sup> In discussing how to assess the risk to humans of treating cattle with growth hormones, the Appellate Body wrote one of the most famous lines in WTO jurisprudence: ‘It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 [of the Agreement on the Application of Sanitary and Phytosanitary Measures] is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.’<sup>4</sup> Although Justice Feliciano has indicated publicly that he penned this line, Professor Matsushita also participated on this division and I am therefore taking the liberty of inferring his agreement with the sentiment.<sup>5</sup>

The instinct to look to the real world for context of course also finds support in the WTO Dispute Settlement Understanding (DSU). Article 3.2 indicates the dispute settlement system ‘serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’.<sup>6</sup> The Appellate Body made clear in its first appeal that ‘customary rules of interpretation of public international law’ included Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),<sup>7</sup> explaining that the ‘general rule of interpretation [in VCLT Article 31] has attained the status of a rule of customary or general international law. As such, it forms part of the “customary rules of interpretation of public international law” which the Appellate Body has been directed to apply.’<sup>8</sup> Article 31(1) provides that: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’<sup>9</sup>

In practice, particularly in certain trade remedies cases, the Appellate Body has not been consistent in applying Article 31 of the VCLT and considering the context of

---

<sup>3</sup> Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)* (*EC – Hormones*), WT/DS/26, 48/AB/R, 16 January 1998.

<sup>4</sup> *ibid* 72.

<sup>5</sup> The Appellate Body division responsible for the *EC – Hormones* case consisted of Justice Feliciano (presiding), Claus-Dieter Ehlermann and Professor Matsushita.

<sup>6</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 15 April 1994, 1869 U.N.T.S. 401, art 3.2.

<sup>7</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 1155 U.N.T.S. 331.

<sup>8</sup> Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 17 (footnote omitted). The Appellate Body similarly indicated the applicability of VCLT Article 32 in Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (n 1) 10 (‘[t]here can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status’), and of the provisions of VCLT Article 33 in a series of later cases. See Isabelle Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’ (2010) 21 *Eur J Intl L* 605, 608 n 4.

<sup>9</sup> VCLT, art 31(1).

the relevant treaty text in light of its object and purpose, and has instead either been overly mechanistic in its textual interpretation or has strayed from the text, seemingly in favour of an outcome-based result. Part I of this chapter will discuss the appropriate role context should play in interpreting the WTO agreements. Parts II through IV will critique aspects of the Appellate Body's jurisprudence in the zeroing cases; the 1916 Act dispute; and the early safeguards cases, as generating interpretive difficulties by failing to give enough attention to real-world context and object and purpose.<sup>10</sup> Part V will explore possible reasons for these departures by the Appellate Body from a contextualised textual analysis, and identify some systemic implications of these decisions.

## **II. HOW SHOULD THE COVERED AGREEMENTS BE INTERPRETED?**

The DSU provides guidance as to how the dispute settlement panels and Appellate Body should approach interpreting the covered agreements. Of particular relevance are Articles 3.2, 11 and 19.2, which address, inter alia, how treaty interpretation and reviews of domestic conduct should be conducted.

### **A. Context and Object and Purpose**

As noted above, Article 3.2 requires reference to Articles 31 and 32 of the VCLT to ensure provisions are clarified in accordance with public international law rules of treaty interpretation, and Article 19.2 cautions that 'the panel and Appellate Body cannot add to or diminish the rights and obligations provided for in the covered agreements'.<sup>11</sup>

In adjudicating in accordance with the VCLT, the drafting history of the VCLT emphasises a preference for a textual, rather than a teleological, approach to treaty interpretation.<sup>12</sup> However, 'textual' does not mean that the words of the text are of sole relevance. Indeed, Article 31 of the VCLT additionally requires consideration of context and the terms' object and purpose. Article 31 provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose.
2. *The context* for the purpose of the interpretation of a treaty *shall comprise*, in addition to the text, including its preamble and annexes:

---

<sup>10</sup> Because this chapter aims to provide a macro-level critique, the cases are summarised briefly rather than described in detail.

<sup>11</sup> DSU, art 19.2.

<sup>12</sup> Michael Lennard, 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 J Intl Econ L 17, 20-22.

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the *context*:
- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties. (emphasis added)

Thus while WTO treaty analysis must begin with the actual text, '[t]his is only a starting point. The reference to the object and purpose and the context confirms that interpretation is not well served if it does not consider other elements besides the text of the treaty'.<sup>13</sup>

The Appellate Body has considered context and object and purpose in a variety of cases<sup>14</sup> but it has not done so consistently. For example, in *EC – Chicken Cuts*, the Appellate Body, in interpreting the meaning of 'salted' in the European Communities' tariff schedule, considered context under both Article 31(1) and 31(2). Its analysis pursuant to VCLT Article 31(2) was particularly extensive, spanning nearly 50 paragraphs.<sup>15</sup> With respect to Article 31(1), the Appellate Body approved of the Panel's determination that 'factual context' is a part of the ordinary meaning.<sup>16</sup> This suggests an intent to interpret 'ordinary meaning' with reference to context rather than solely the dictionary definition.<sup>17</sup> The Appellate Body also characterised the treaty interpretation process as a 'holistic exercise that should not be mechanically subdivided into rigid components'.<sup>18</sup>

In contrast to its focus on context and taking a holistic approach thereto in *Chicken Cuts*, the Appellate Body has in other cases, particularly certain trade

---

<sup>13</sup> Van Damme (n 8) 620.

<sup>14</sup> *ibid* 622.

<sup>15</sup> Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts (EC – Chicken Cuts)*, WT/DS269, 286/AB/R, September, 2005), paras 188-235.

<sup>16</sup> *ibid* para 187.

<sup>17</sup> Van Damme (n 8) 626.

<sup>18</sup> Appellate Body Report, *EC – Chicken Cuts* (n 15) para 176. Even in *EC – Chicken Cuts*, however, the Appellate Body examined 'context' completely separate from 'object and purpose', see Henrik Horn and Robert L Howse, 'European Communities – Customs Classification of Frozen Boneless Chicken Cuts' (2008) 7 *World Trade Rev* 9, 15. A more holistic approach to context would not assess these two elements entirely separately.

remedies disputes, seemed either to assess context in an overly mechanistic way<sup>19</sup> or to ignore the Vienna Convention altogether.

## **B. Standard of Review**

In addition to taking into account context and object and purpose, the panels and Appellate Body also need to determine the appropriate standard of review to apply in assessing the measures they are reviewing. DSU Article 11 provides the following general guidance<sup>20</sup> on the standard of review to be applied in reviewing a Member's measure: 'a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.'

The Appellate Body has stated that the appropriate standard under Article 11 'must be considered in light of the obligations of the particular covered agreement at issue in order to derive the more specific contours of the appropriate standard of review'.<sup>21</sup> Ross Becroft has argued that 'where there has been a prior national-level process, such as in trade remedy matters, this approach should result in a more deferential standard being applied'.<sup>22</sup> However, the Appellate Body has not applied a more deferential standard of review in trade remedies cases, but has instead repeatedly criticised panels in such cases for failing to conduct a sufficiently rigorous review of the underlying evidence.<sup>23</sup> Furthermore, the Appellate Body has essentially ignored the more deferential standard of review required by the Anti-dumping Agreement.<sup>24</sup>

The Parts below elaborate upon the concerns described in this introduction.

## **III. THE ZEROING CASES**

As many readers will know, the WTO dispute settlement system has addressed the permissibility of zeroing, a methodology used in calculating antidumping duties, on numerous occasions.<sup>25</sup> These cases have generated significant controversy because of

---

<sup>19</sup> See eg, Federico Ortino, 'Treaty Interpretation and the WTO Appellate Body Report in US – Gambling: A Critique' (2006) 9 J Intl Econ L 117, 131 (critiquing Appellate Body's assessment of context as being overly mechanistic); Lennard (n 12) 23 (analysis should involve a holistic approach rather than being conducted robotically).

<sup>20</sup> As will be discussed below, the Anti-dumping Agreement contains its own agreement-specific standard of review provision, Article 17.6 (ii).

<sup>21</sup> Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, WT/DS296/AB/R, 27 June 2006, para 184.

<sup>22</sup> Ross Becroft, 'The WTO Standard of Review: A Means to Strengthen the Trading System' in Susy Frankel and Meredith Kolsky Lewis (eds), *Trade Agreements at the Crossroads* (Routledge 2014) 70.

<sup>23</sup> *ibid* 70-71.

<sup>24</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement), 15 April 1994, 1868 U.N.T.S. 201, art 17.6 (ii).

<sup>25</sup> For purposes of this chapter, no understanding of zeroing is required. For an explanation of the methodology and different contexts in which it has been challenged, see Meredith Kolsky Lewis, 'Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement' (2012) 48 *Stan J Intl L* 1, 18-19.

the level of disagreement between the panels and Appellate Body on the merits, and because it took many years and lost cases before the United States largely ceased the practice of zeroing.<sup>26</sup> This Part will focus on the former.

On the surface, the zeroing cases might appear straightforward and to raise no cause for concern. The Appellate Body has never found any use of zeroing to be permissible, and, following an early case involving the European Union,<sup>27</sup> the United States has been the sole respondent in the many separate disputes challenging zeroing in a host of contexts. Zeroing is widely reviled as a practice, as its use will almost always result in higher antidumping margins. However, these cases merit attention because the reasoning applied therein raises a number of concerns. While the Appellate Body has never upheld the use of zeroing, several dispute settlement panels determined that at least some forms of zeroing were permissible, and two panels so found even *after* the Appellate Body had found such zeroing to be impermissible in earlier disputes.<sup>28</sup> Eventually the Appellate Body encouraged panels, in the name of security and predictability, to stop fighting this fight, and panels indeed began following the Appellate Body's decisions.<sup>29</sup> However, the initial level of disagreement between the panels and the Appellate Body was, and remains, unprecedented.<sup>30</sup>

The Anti-dumping Agreement contemplates three ways to compare prices, and in which zeroing could therefore theoretically be used:

[T]he existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions [under certain elaborated conditions] . . . .<sup>31</sup>

---

<sup>26</sup> The US change in policy was reported in the Federal Register in 2012. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101 (14 February 2012). See also Sungjoon Cho, 'No More Zeroing? The United States Changes its Antidumping Policy to Comply with the WTO' (9 March 2012) 16(8) Am Socy Intl L Insights.

<sup>27</sup> Appellate Body Report, *European Communities — Anti-Dumping Duties on Cotton-Type Bed Linen from India*, WT/DS141/AB/R, 1 March 2001.

<sup>28</sup> See Panel Report, *United States — Measures Relating to Zeroing and Sunset Reviews (US — Zeroing (Japan))*, WT/DS322/R, 20 September 2006; Panel Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico (US — Stainless Steel (Mexico))*, WT/DS344/R, 20 December 2007.

<sup>29</sup> Appellate Body Report, *United States — Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para 160.

<sup>30</sup> See Lewis (n 25) 19-21.

<sup>31</sup> Anti-dumping Agreement, art 2.4.2.

From the earliest cases, there was primarily agreement that Article 2.4.2 prohibited zeroing in the weighted average to weighted average (WA-WA) context. The disagreement centred over whether the above provision also prohibited zeroing when transactions were compared to transactions (T-T) or a weighted averaged was compared to separate transactions (WA-T). In the four cases leading up to the Appellate Body signalling the debate should end, 11 of 12 panellists found zeroing in the T-T and/or W-T context to be permissible, while the divisions of the Appellate Body unanimously found in each case that such zeroing was impermissible.<sup>32</sup>

Before turning to the merits, it bears noting that the Anti-dumping Agreement requires a more deferential standard of review than DSU art. 11. Article 17.6(ii) provides: ‘the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.’<sup>33</sup>

Thus the Anti-dumping Agreement contemplates that there may be provisions that could be subject to more than one permissible interpretation. In such a case, the adjudicators should defer to the interpretation of the domestic authorities, if it is based on one of the permissible interpretations.<sup>34</sup> Some have argued that Article 17.6 (ii) was intended to require deference akin to the so-called *Chevron* deference that US courts apply in administrative law cases.<sup>35</sup> This narrative would be consistent with the understanding, expressed by several scholars, that Article 17.6(ii) of the Antidumping Agreement was drafted by the United States in order to imbed precisely this type of deference into the ADA.<sup>36</sup> While others have rejected the notion that Article 17.6(ii) was intended to build *Chevron*-style deference into the Agreement per se,<sup>37</sup> it is

---

<sup>32</sup> For a discussion of these cases and the level of disagreement, see Lewis (n 25) 19-22.

<sup>33</sup> Anti-dumping Agreement, art 17.6(ii).

<sup>34</sup> See Van Damme (n 8) 609.

<sup>35</sup> *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that in interpreting statutes that mandate agency action, courts should give deference to the implementing agencies’ interpretations of said statutes unless those interpretations are unreasonable.

<sup>36</sup> See eg, Roger P Alford, ‘Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body’ (2006) 45 Colum J Transnatl L 196, 200-02.

<sup>37</sup> See eg, Sungjoon Cho, ‘The World Trade Constitutional Court’ (2009) Faculty Scholarship Paper No 182, 27 <[http://scholarship.kentlaw.iit.edu/fac\\_schol/182](http://scholarship.kentlaw.iit.edu/fac_schol/182)> accessed 7 September 2015; Carlos Manuel Vázquez, ‘Judicial Review in the United States and in the WTO: Some Similarities and Differences’ (2004) 36 Geo Wash Intl L Rev 587, 603-04; Steven P Croley and John H Jackson, ‘WTO Dispute Procedures, Standards of Review, and Deference to National Governments’ (1996) 90 Am J Intl L 193, 205-06.



difficult to argue with the proposition that Article 17.6(ii) requires some level of deference.<sup>38</sup>

Without delving into the arguments made by the panels and Appellate Body, the fact that four panels in a row (each of which featured one or more panellists with extensive trade remedies experience) read Article 2.4.2 to permit the zeroing methodology at issue, would seem like strong evidence either that (a) the panels had the only correct interpretation; or (b) there were two permissible interpretations. As to the former, the panels in the later two disputes identified flaws in the reasoning of the Appellate Body in the two earlier disputes,<sup>39</sup> including noting that the Appellate Body's reading of Article 2.4.2 as prohibiting zeroing in all instances would render the WA-WA and WA-T methodologies the same and thus render the third sentence inutile.<sup>40</sup> In the *US – Zeroing (Japan)* appeal, the Appellate Body disagreed with this assessment but did little to clarify its own analysis.<sup>41</sup> With respect to the latter, the Appellate Body rejected the notion that the large number of panellists' reading of Article 2.4.2 could be correct; it has never found multiple permissible interpretations of the Anti-dumping Agreement, and has effectively read Article 17.6(ii) out of the Agreement.<sup>42</sup> Isabelle Van Damme has commented that rather than looking for permissible interpretations, '[t]he Appellate Body seeks the "proper" or "correct" interpretation, not any "permissible" interpretation . . . . A right interpretation is not the same as a possible interpretation; and a possible interpretation is not the same as the better or best answer to an interpretive problem'.<sup>43</sup>

Although WTO Members are probably pleased with the Appellate Body's zeroing jurisprudence, they should instead have some concerns. Particularly in its early zeroing decisions, the Appellate Body did not base its decisions on a clearly textual VCLT analysis, but instead relied on the concept of 'the product as a whole' [as the only acceptable basis for assessing dumping, rather than looking at individual transactions], which does not appear in the Anti-dumping Agreement but was instead an argument raised in the European Communities' written submissions.<sup>44</sup> This

---

<sup>38</sup> See eg, Andrew T Guzman, 'Determining the Appropriate Standard of Review in WTO Disputes' (2009) 42 Cornell Intl LJ 45, 75 ('Article 17.6 of the AD Agreement reflects the decision of the member states that panels should refrain from aggressive review of anti-dumping measures.').

<sup>39</sup> The Appellate Body's decision in the Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ('Zeroing') (US – Zeroing (EC))*, WT/DS294/AB/R, 18 April 2006 dispute was particularly deficient, relying largely on its own prior reports rather than conducting a VCLT analysis of the Anti-dumping Agreement.

<sup>40</sup> Panel Report, *US – Zeroing (Japan)* (n 28) paras 7.136-43.

<sup>41</sup> See Tania Voon, 'The End of Zeroing? Reflections Following the WTO Appellate Body's Latest Missive' (2007) 34 Legal Issues Econ Integration 211, 225.

<sup>42</sup> In some instances it has declined to accept that there was more than one permissible interpretation of the treaty text; in others it has simply ignored Article 17.6(ii). See Van Damme (n 8) 610. See also Voon (n 41) 219 (Article 17.6(ii) has arguably been rendered a dead letter).

<sup>43</sup> Van Damme (n 8) 610.

<sup>44</sup> See Lewis (n 25) 37.

nontextual and noncontextual approach runs afoul of DSU Article 3.2 and erodes security and predictability.

The Appellate Body's failure to give effect to Article 17.6 (ii) of the ADA similarly reflects a blinkered approach that has disregarded context and object and purpose. The Anti-dumping Agreement is the only WTO agreement to have a separate standard of review, and it is a notably deferential standard. Reading this standard out of the Agreement is inappropriate, even if applying it would mean fewer measures were struck down. That is the bargain Members struck in their negotiations, and the Appellate Body should not disregard it. Doing so arguably violates DSU Article 19.2 by diminishing Members' rights under the covered agreements.

Finally, the Appellate Body's approach in the zeroing decisions discussed above may complicate the Organization's efforts to complete future agreements. The Rules negotiations in the Doha Round have included efforts by the United States to make it explicit that zeroing is permitted.<sup>45</sup> Even if the US backs down on this issue, it seems highly likely that it will insist on more precise, exacting language in future agreements. Given that a degree of fuzzy language is often necessary to get all parties comfortable enough to conclude an international treaty, this should be a matter of concern for other Members.

#### **IV. THE 1916 ACT CASE — BLURRING TRADE AND ANTITRUST?**

The second instance in which the Appellate Body has reached a popular result without necessarily taking into account relevant contextual considerations is its decision in the *United States – Anti-Dumping Act of 1916* dispute.<sup>46</sup> On initial impression, this case raised few eyebrows. The law in question, which provided a private right of action (as well as the possibility of government action) for predatory international price discrimination, had not been invoked successfully in its over eighty-year history, and the US government did not particularly care whether or not it remained on the books. At the same time, the few instances where courts had left open the possibility that the right case could be successful against foreign defendants who

---

<sup>45</sup> These efforts began early in the zeroing saga. In the 2007 draft chairperson's text relating to antidumping and subsidies, provisions were included specifying the permissibility of zeroing in a number of contexts. See WTO, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, 30 November 2007. The United States was reportedly dissatisfied that the draft did not go further in permitting zeroing, whereas other delegations objected to any authorisation of zeroing at all. See International Centre for Trade and Sustainable Development, 'Divisions Persist on Anti-Dumping Draft Text' (30 January 2008) 12(3) Bridges <<http://www.ictsd.org/bridges-news/bridges/news/divisions-persist-on-anti-dumping-draft-text>> accessed 7 September 2015; WTO, Negotiating Group on Rules, *Communication from the Chairman*, TN/RL/W/254, 21 April 2011, 6 (noting wide divide amongst members on the issue of zeroing).

<sup>46</sup> Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, 28 August 2000.

had had antidumping duties levied against them in US administrative proceedings (pursuant to an entirely different statute), was enough to cause consternation amongst trading partners. Nonetheless, the Appellate Body's approach to this dispute seems again to have been somewhat outcome-driven, without fully taking into account the relevant context.

The 1916 Act (although the statute is often referred to as the Antidumping Act of 1916, its official name is 'Title VIII of the United States Revenue Act of 1916'<sup>47</sup> and the Act itself does not use the words 'dumping' or 'antidumping') made it illegal to 'commonly and systematically . . . cause to be imported and sold . . . articles within the United States at a price substantially less than the actual market price or wholesale price . . . in the principal markets of the country of . . . exportation . . . provided, that such act . . . be done with the intent of destroying or injuring an industry in the United States . . . or of restraining or monopolizing any part of trade . . . in such articles in the United States'.<sup>48</sup> The 1916 Act was a penal statute, with imprisonment a possible penalty, alongside fines. Private parties could also seek treble damages.<sup>49</sup>

One of the major issues in the dispute was whether the 1916 Act regulated dumping, in which case it arguably violated the mandate of GATT Article VI by providing remedies for dumping other than antidumping duties (the 1916 Act provided for the possibility of criminal fines and treble damages), or regulated anticompetitive behaviour in the sense of an antitrust statute. The panel and Appellate Body both concluded the Act regulated dumping. Also at issue was whether the petitioners could challenge the Act 'as such' (since it had never been successfully invoked). This issue hinged upon whether the United States Justice Department had discretion in enforcing the law or whether it was mandatory legislation. On this issue, the Appellate Body deemed the Act mandatory, and thus susceptible to an 'as such' challenge.

On the first issue, the Appellate Body seems to have discounted context in its assessment. While the international price discrimination regulated by the Act has an overlap with antidumping in that antidumping also regulates selling more cheaply in a foreign market than in the home market, the Act's predatory intent requirement is more reminiscent of an antitrust law than an antidumping rule. In addition, the remedies, including treble damages, were consistent with those found in the US antitrust laws. Indeed, the Act appeared<sup>50</sup> alongside the US antitrust laws, in Title 15 of the United States code, in a chapter immediately following a chapter entitled 'Monopolies and Combinations in Restraint of Trade.' The chapter in which the Act

---

<sup>47</sup> Revenue Act of 1916, 39 Stat 756 (1916); 15 U.S.C. s 72 (2004).

<sup>48</sup> Revenue Act of 1916, s 801.

<sup>49</sup> *ibid.*

<sup>50</sup> As a result of the WTO rulings, the Act was repealed in 2004. 15 U.S.C. s 72 (2004).

featured is called Federal Trade Commission; Promotion of Export Trade and Prevention of Unfair Methods of Competition. Thus the 1916 Act is not in Title 19 of the US code, which is where the US trade laws that explicitly address antidumping have been located, including the Anti-dumping Act of 1921 (19 U.S.C. 160 et seq. and the current law, Title VII of the Tariff Act of 1930, as amended (19 U.S.C. ch.4). Title 19 also contains the Trade Act of 1974, as amended (19 U.S.C. ch 12), which houses, *inter alia*, the US safeguards law and the provisions establishing the Office of the United States Trade Representative.

For most of the Act's existence, it was understood to be an antitrust statute.<sup>51</sup> The Act was little-used because other laws existed to remedy anticompetitive, predatory conduct (eg the Sherman Act), and it was not used to combat dumping due to the required showing of predatory intent and the availability of the Anti-Dumping Act of 1921 and later Title VII of the Tariff Act of 1930, both of which addressed dumping directly and did not require a showing of predatory intent.<sup>52</sup>

Those who wished to use the Act to remedy antidumping quickly determined that the statutory requirements made it too difficult to take action. Thus there were almost immediate steps to enact an administrative mechanism to address dumping, which resulted in the Antidumping Act of 1921.<sup>53</sup> The 1916 Act has been deemed 'a dead letter almost from its enactment'<sup>54</sup> and the efforts to bring actions under the Act were few and far between. The first courts that had occasion to interpret the Act treated it as an antitrust statute.<sup>55</sup> It was not until the late 1990s that two courts left open the possibility that the 1916 Act could be invoked by petitioners who had succeeded in administrative antidumping proceedings. It was these opinions that sparked the EC and Japan to challenge the 1916 Act as such (rather than as applied).<sup>56</sup> In the end, only

---

<sup>51</sup> See eg, Jeffrey L Kessler, 'The Antidumping Act of 1916: Antitrust Analogue or Anathema?' (1986) 56 Antitrust LJ 485, 485 (1987) ('the 1916 Act is an antitrust statute whose aim is the prevention of *predatory* international price discrimination, not the protection of domestic industries from foreign competition.' 'The 1916 Act is not a protectionist act, but an antitrust act, and . . . [its] purpose . . . is to foster competition for the benefit of the consumer'); Saxon Peters, 'The 1916 Antidumping Act After Goss: Why a More Expansive Reading of the Act's Intent Requirement Is Justified' (2004) 4 UC Davis Bus LJ 8, [redacted] (2004) ('During the majority of its existence, the Antidumping Act of 1916 has largely been seen as an antitrust statute of little or no significance.');

*Zenith Radio Corp v Matsushita Elec Indus Co, Ltd*, 494 F Supp 1190, 1242 (E.D. Pa 1980).

<sup>52</sup> See also Hiroko Yamane, 'The Anti-dumping Act of 1916: A Victory at What Cost?' (2001) 7(1) Intl Trade L & Reg 12, 12-13 and n 6 (noting US Department of Justice Antitrust Enforcement guidelines describing the 1916 Act as covering 'subject matter . . . closely related to the antitrust rules regarding predation.')

<sup>53</sup> Matthew J Marks, 'United States Antidumping Laws – A Government Overview' (1974) 43 Antitrust LJ 580, 582.

<sup>54</sup> See Harvey M. Applebaum, 'The Antidumping Laws – Impact on the Competitive Process' (1974) 43 Antitrust LJ 590, 591.

<sup>55</sup> See eg, *Zenith Radio Corporation v Matsushita Electric Industrial Co., Ltd.*, 494 F Supp 1190 (ED Pa 1980).

<sup>56</sup> *Geneva Steel Co v Ranger Steel Supply Corp*, 980 F Supp 1209 (D Utah 1997); *Wheeling-Pittsburgh Steel Corp v Mitsui & Co*, 26 F Supp 2d 1022 (SD Ohio 1998).

one plaintiff ever succeeded in obtaining damages under the 1916 Act, ironically in litigation commenced *after* the initiation of the WTO proceedings.<sup>57</sup>

Although the panel and Appellate Body decided that the 1916 Act could be applied to remedy dumping as well as antitrust violations, it seems unlikely that this was the original legislative intent: ‘it is very rare that a violation of the antidumping law also would be a violation of antitrust law.’<sup>58</sup>

To the extent the Act regulated a type of dumping that rose to the level of predatory conduct, it would have better respected the separate objectives of unfair trade laws and competition laws to view the Act as addressing a type of anti-competitive conduct falling within the antitrust sphere. Reading the 1916 Act as an antidumping measure rather than an antitrust statute could encroach upon countries’ ability to enforce aspects of their antitrust laws.<sup>59</sup> Deeming provisions designed to provide antitrust remedies to be contrary to the Antidumping Agreement effectively removes the availability of those remedies for their intended purpose.<sup>60</sup> As Professor Matsushita has explained, it is entirely possible based on the WTO’s 1916 Act jurisprudence that WTO Members could complain about a variety of other antitrust-focused statutes, thus encroaching upon Members’ ability to regulate anticompetitive conduct.<sup>61</sup> For example, the United States’ Robinson-Patman Act<sup>62</sup> is an antitrust statute that regulates injurious, unjustified price discrimination and, like US antitrust laws generally, applies extraterritorially. The remedies for violating the Robinson-Patman Act, as with many US antitrust laws, include injunctive relief and the possibility of treble damages. In light of the WTO’s 1916 Act findings, Professor Matsushita has noted the possibility that WTO Members could challenge the Robinson-Patman Act as well, arguing that it covers dumping in that it regulates international price discrimination, and that thus it is covered by the Antidumping

---

<sup>57</sup> Goss Graphic Systems was awarded treble damages in its suit against Tokyo Kikai Seisakusho (TKS), in a trial held in the United States District Court for the Northern District of Iowa. Although this litigation was stayed for a lengthy period pending the resolution of the WTO dispute, it ultimately proceeded against TKS (other defendants settled their claims) because it did not appear that Congress would repeal the 1916 Act retrospectively, meaning this litigation would remain live (and indeed, Congress repealed the Act prospectively in 2004, during the pendency of TKS’s appeal). *Goss Intern Corp v Tokyo Kikai Seisakusho, Ltd*, 294 F Supp 2d 1027 (ND Iowa 2003). The United States Court of Appeals for the Eighth Circuit affirmed the award. I was counsel to one of the other defendants in an earlier phase of the litigation and in that capacity researched the history of the 1916 Act in detail.

<sup>58</sup> Mitsuo Matsushita and Douglas E Rosenthal, ‘Was the WTO Mistaken in Ruling on Antidumping Act of 1916?’ (2001) 18 Intl Trade Reporter 1450.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> Mitsuo Matsushita, ‘Basic Principles of the WTO and the Role of Competition Policy’ (2004) 3 Wash U Global Stud L Rev 363, 371 (2004).

<sup>62</sup> 15 U.S.C. s 13 *et seq* (1936).

Agreement and the only permissible remedy for a breach is the imposition of antidumping duties.<sup>63</sup>

Paul Stephan has more broadly critiqued the WTO's failure to incorporate context into its analysis of disputes with an antitrust component: 'The WTO has had little direct involvement with competition policy, but the few instances in which it has engaged these problems illustrate the shortcomings of international supervision of national competition law. In the Kodak-Fuji dispute, the WTO dispute settlement process rejected the claim that Japan's tolerance of inefficient retail distribution networks, which impeded the entry of foreign products, constituted an impermissible trade barrier.'<sup>64</sup> Stephan argues that the Appellate Body's condemnation of the 1916 Act as violating the Antidumping Agreement (ADA) further illustrates a misguided approach: 'A symmetrical dispute involving US antitrust law reinforces the point . . . . This statute [the 1916 Act], as interpreted by the US courts, simply recapitulated the substantive requirements of a predatory pricing violation under the Sherman Act. No criminal or civil suit under the 1916 Act had ever succeeded. But, because in form, the 1916 Act regulates dumping in a matter not authorized by the WTO agreements, the WTO condemned it as violating US obligations [under the ADA]'.<sup>65</sup> Stephan attributes these findings as coming 'at the cost of the substantive ends that these agreements purportedly pursue'.<sup>66</sup>

Thus while the Appellate Body's decision was in a sense quite safe in that it addressed the 'chilling effect' concerns of the petitioners while only impacting a law that was already moribund, it was also somewhat risky to import into the WTO realm a statute that, in context, had never been successfully invoked by plaintiffs; had never been invoked by government (but was nonetheless deemed 'mandatory'); and which was situated with the antitrust laws and had the hallmarks of an antitrust statute. It would have better balanced context and object and purpose to treat the 1916 Act as discretionary and not susceptible to an as such challenge. Had the Appellate Body done so and litigation never advanced beyond preliminary stages under the Act, there would have been minimal impact to deferring to the national characterisation of the

---

<sup>63</sup> Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy' (n 61) 371-72. Professor Matsushita also raises the possibility that private challenges to subsidies as forms of predatory pricing could lead to an argument that the remedy should be a countervailing duty rather than the remedies provided for under competition/antitrust laws. *ibid* 372.

<sup>64</sup> Paul B. Stephan, 'Global Governance, Antitrust, and the Limits of International Cooperation' (2005) 38 *Cornell Intl LJ* 173, 200. While Stephan and Matsushita share concerns regarding the WTO's competition law-related jurisprudence, Stephan argues against developing an international competition law regime, whereas Matsushita has advocated for incorporating antitrust to a greater degree into the WTO system: 'There will be a greater need to increase to the application of competition rules in the framework of the WTO in order to maintain market access among member states.' Mitsuo Matsushita, 'Competition Law and Policy in the Context of the WTO System' (1995) 44 *DePaul L Rev* 1097, 1106.

<sup>65</sup> Stephan (n 64) 200-01.

<sup>66</sup> *ibid* 201.

Act and treating it as presumptively not targeted at dumping. If, however, the Goss litigation had arisen and proceeded as it did, an ‘as applied’ challenge could then have been brought, with no need to grapple with whether the Act could theoretically be used to remedy dumping.

## V. SAFEGUARDS

Lastly, we turn to the Appellate Body’s jurisprudence in cases challenging the imposition of safeguard measures, for which it has been subject to some criticism.<sup>67</sup> In particular, in a series of decisions in the late 1990s and early 2000s, the Appellate Body, among other things, interpreted the Safeguards Agreement to require that the relevant increase in imports result from ‘unforeseen developments’ even though this language had been essentially read out of GATT Article XIX by GATT panels and does not appear in the Safeguards Agreement,<sup>68</sup> and appeared to conflate correlation and causation, leading to confusion as to how to demonstrate the requisite causation.<sup>69</sup> During this period, every safeguards measure that was challenged in WTO dispute settlement was deemed to violate WTO rules.<sup>70</sup> As a result, some questioned whether it would ever be possible to impose a WTO-consistent safeguard.<sup>71</sup>

Presumably as a result of the jurisprudence described above, the imposition of safeguards dropped significantly among WTO Members after 2003.<sup>72</sup> The number of safeguards measures imposed reached a peak of 15 in 2003, and then dropped off to between five and seven between 2004 and 2008. Following the global financial crisis, there have been peaks and troughs since 2009, with as few as four safeguards imposed

---

<sup>67</sup> See eg, Alan O Sykes, ‘The Safeguards Mess: A Critique of WTO Jurisprudence’ (2003) U Chicago L Econ, Olin Working Paper No. 187 <<http://ssrn.com/abstract=415800>> accessed 12 September 2015.

<sup>68</sup> This interpretation was surprising given that the Safeguards Agreement had been imported in significant part from the United States safeguards law, Section 201 of the Trade Act of 1974, as amended, which does not contain an ‘unforeseen developments’ requirement.

<sup>69</sup> For a detailed critique of the Appellate Body’s early safeguards jurisprudence, see Sykes (n 67).

<sup>70</sup> These cases included Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, 22 December 2000; Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177, 178/AB/R, 1 May 2001; Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, 15 February 2002; and Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248, 249, 251-254, 258, 259/AB/R, 10 November 2003.

<sup>71</sup> See eg, Sykes (n 67) 1. My objective here is not to argue that particular safeguards decisions were incorrect, but instead to point out the systemic implications of interpreting the Safeguards Agreement quite narrowly.

<sup>72</sup> The number of initiations has fluctuated more dramatically over the same period. See Julien Chaisse and others, ‘Mastering a Two-Edged Sword: Lessons from the Rules and Litigation on Safeguards in the World Trade Organization’ (2015) 13 Rich J Global L Bus 563, 572. In the case of the United States, the latest International Trade Commission report pertaining to a global safeguards investigation was published in 2001, indicating that petitions essentially ceased after this date. See United States International Trade Commission, ‘Trade Remedy Publications – Global and Special Safeguards Publications’ [https://www.usitc.gov/trade\\_remedy/publications/safeguard\\_pubs.htm#201](https://www.usitc.gov/trade_remedy/publications/safeguard_pubs.htm#201) accessed 21 April 2016.

(in 2010) and as many as 11 (in 2011).<sup>73</sup> Over the period from 1 January 1996 through 30 April 2014, the primary users of safeguards were developing countries, which accounted for over 90 percent of the measures imposed.<sup>74</sup> However, this figure does not entirely capture the effect the Appellate Body's jurisprudence has had on previous users of safeguards. While the United States has always imposed duties in far more antidumping cases than it has imposed safeguards measures, it used to impose safeguards on a regular, albeit limited, basis. From 1996 to 2002, the US imposed a total of six safeguards, or almost one safeguard per year. Strikingly, since 2002 the US has not imposed a single safeguard measure.<sup>75</sup>

The linkage between the US's safeguards practice and the Appellate Body's safeguards jurisprudence can be inferred even more strongly when one looks at the respondents in WTO safeguards disputes. Between 1997 and 2012, 43 WTO disputes were brought relating to the imposition of safeguard measures. Of these 43, the United States was the respondent in 15 cases, or 35 percent of all the disputes. However, all 15 of the cases brought against the United States were initiated between 1997 and 2002, a period during which 29 total safeguards disputes were initiated. Thus the United States went from being the respondent in over half of the safeguards cases brought between 1997 and 2002, to not imposing any safeguard measures and thus not being the subject of any further safeguards disputes from 2003 through the present.<sup>76</sup>

The dramatic change in United States and other developed-country practice could be viewed as a positive. Safeguards are highly controversial because they entail a government imposing trade barriers on imports in the absence of any allegations of unfairness on the part of the importers.<sup>77</sup>

However, one must keep in mind the context and object and purpose of the Agreement on Safeguards. In particular, one of the objectives of the Uruguay Round negotiators was to provide a limited framework in which it would be acceptable to provide temporary support to a domestic industry, while at the same time prohibiting previously used 'grey market' measures such as voluntary restraint agreements (VRAs), orderly marketing arrangements (OMAs) and voluntary restraints on exports (VERs). The Agreement on Safeguards indeed prohibits the use of grey market measures in Article 11(1)(b), which provides that 'a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any similar measures on the export or import side'. While there is some uncertainty as to

---

<sup>73</sup> See WTO, 'Safeguard Measures by Reporting Member Period: 01/01/1995 - 30/04/2014' <[http://www.wto.org/english/tratop\\_e/safeg\\_e/SG-Measures\\_By\\_Reporting\\_Member.pdf](http://www.wto.org/english/tratop_e/safeg_e/SG-Measures_By_Reporting_Member.pdf)> accessed 7 September 2015.

<sup>74</sup> Chaisse and others (n 72) 574.

<sup>75</sup> See WTO (n 73).

<sup>76</sup> Chaisse and others (n 72) 582-84.

<sup>77</sup> This distinguishes safeguards from the other two trade remedies, antidumping duties and countervailing duties, which are often described as remedying 'unfair' conduct.



why this was a high priority for the negotiators,<sup>78</sup> logical concerns could have included the fact that grey market arrangements are not formal treaties or agreements and as such are not transparent, and that powerful entities such as the United States and European Union could, and did, use their might to effectively impose grey market arrangements on their trading partners.

So why allow any type of measure to protect domestic industry in the absence of ‘unfair’ trade practices? Grey market measures and safeguards both serve the function of a safety valve: when political pressure becomes particularly intense to assist a domestic industry, these mechanisms provide a means to give a measure of assistance to said industry. There has long been a perceived need for such safety valves, notwithstanding their trade distorting effects, and it seems likely that the availability of some form of safety valve was an important consideration for countries considering whether to join the WTO with its more legalistic form of dispute settlement. Thus effectively shutting the safeguards safety valve has problematic implications.

It is unlikely that Members such as the United States and others are simply withstanding the occasional intense political pressure to protect a domestic industry now that safeguards are essentially unavailable as a policy tool. Instead, they are probably reverting to the use of VRAs, VREs and OMAs, which the Safeguards Agreement prohibits.<sup>79</sup> There are indicia that such measures have been used in recent years.<sup>80</sup> Unfortunately, it is unlikely that a WTO Member could or would police this violation of the Safeguards Agreement, because they have agreed to the breach themselves.<sup>81</sup>

Thus when we consider the Agreement on Safeguards in context and in light of its object and purpose, we can see that negotiators were agreeing to a limited safety valve, alongside an agreement to cease grey-market measures. The consequence of the Appellate Body disregarding these real-world considerations is that the permissible safety valve is now going unused by the United States and many other developed

---

<sup>78</sup> See Sykes (n 67) 12.

<sup>79</sup> Cf. Sykes (n 67) 1, predicting that ‘if the WTO continues on its present course, considerable pressure may develop for a return to ‘extra-legal’ measures such as voluntary restraint agreements, measures that the WTO Agreement on Safeguards sought to eliminate’.

<sup>80</sup> One such example is the United States – Canada Softwood Lumber Agreement of 2006, pursuant to which Canada agreed its softwood lumber industry would accept export charges or a combination of export quotas and lesser export charges, in exchange for the United States agreeing not to initiate new trade actions against the industry and to revoke retroactively various pending actions. See Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America, 12 September 2006 <<http://www.treaty-accord.gc.ca/text-texte.aspx?id=105072&lang=eng>> accessed 7 September 2015. For a discussion of this agreement as a grey-market measure, see Yong-Shik Lee, *Safeguard Measures in World Trade: The Legal Analysis* (3rd edn, Edward Elgar 2014) 166-67.

<sup>81</sup> Cf. Warren H Maruyama, ‘The Wonderful World of VRAs: Free Trade and the Goblet of Fire’ (2007) 24 *Ariz J Intl Comp L* 149, 154 (‘the legality of VRAs was never challenged in the GATT dispute settlement process, in part because such measures were consensual and necessarily required the agreement of both parties.’).

countries, and it is likely that in its stead, these Members are reverting to grey-market arrangements.

## VI. CONCLUSION

It is important not to lose sight of the fact that the WTO is not the Free Trade Organization; it is instead a sophisticated system of *managing* trade. That system includes rules and mechanisms to remove or reduce trade barriers in many contexts. However, it also includes numerous provisions that permit various forms of government actions that are inconsistent with an unfettered free market. For example, the SPS and TBT Agreements allow Members, subject to certain conditions, to regulate to ensure the safety and healthfulness of imported foods and other products. Such regulations impede trade, because nonconforming goods will not be permitted into the regulating Member's territory. Nonetheless, the Members of the WTO, and the GATT signatories before them, determined that food and product safety were legitimate domestic objectives, and that they would therefore accept some policy space to regulate to achieve these objectives, even at the expense of some trade. The trade remedies provisions can also be seen as a form of managing trade.<sup>82</sup> The WTO contains entire agreements that permit, albeit with parameters, the use of trade remedies because a number of key participants in the international trading system were not willing to commit to the GATT/WTO trade liberalisation measures and limitations on national autonomy unless they could retain the right to employ certain safety valves.

While other participants would have preferred bans on such safety valves, or at least stringent limitations on their use, they recognised that some safety valves are harder to regulate than others, and as such there was some value to elaborating specified permissible safety valves, particularly if the alternative were no WTO at all. In the give and take of trade negotiations, these compromises were struck in the form of the Antidumping Agreement, Safeguards Agreement, and Agreement on Subsidies and Countervailing Measures. These agreements should be read and understood in this context. Some types of safety valves were explicitly forbidden, such as voluntary export restraints and orderly market arrangements (in the Safeguards Agreement) and the granting of remedies for dumping other than antidumping duties (in the Antidumping Agreement), but in exchange, some remained.

Although there would likely be broad agreement with the proposition that the WTO's trade remedies agreements reflect a set of compromises designed to permit the

---

<sup>82</sup> For a discussion of antidumping as a double-edged sword, with some wishing to discipline dumping as 'unfair' and others seeking to reign in the protectionist use of antidumping measures, see Mitsuo Matsushita, 'Some International and Domestic Antidumping Issues' (2010) 5 Asian J WTO Intl Health L Poly 249, 250-51.

use of some safety valves without issuing a blank check, it would be overly simplistic to suggest that each WTO Member had a perfect understanding of exactly what the intended meaning was of each article of every Covered Agreement. To the contrary, to reach consensus over treaty text — not just in the trade context but in many forms of international negotiations — often necessitates using language that is vague, subject to multiple interpretations, or otherwise less than clear. In these circumstances within the WTO, dispute settlement panels and the Appellate Body may be required to determine the meaning of provisions that may have been drafted to be imprecise or unclear. Nonetheless, the panels and Appellate Body have guidance in the Dispute Settlement Understanding and VCLT. Part of the context and the object and purpose has to be to understand that the trade remedies were permitted so that Members would have agreed-to safety valves available to them if they felt it politically imperative to deviate from a hands-off, free trade approach under certain circumstances. The Appellate Body has complicated matters by disregarding the context that gave rise to the trade remedies agreements and their object and purpose.

The Appellate Body has navigated difficult terrain in its first twenty years, and is in general to be commended for positioning the WTO dispute settlement system as the ‘jewel in the crown’ of the WTO.<sup>83</sup> The Appellate Body’s role is a challenging one; it is expected to refrain from judicial activism while maintaining an awareness of the systemic implications of its actions. While the Appellate Body has generally navigated these roles with only limited critiques from WTO Members and academic commentators, a subset of the antidumping and safeguards disputes have been more controversial. In a number of these cases, the Appellate Body has reached outcomes that Members would in the main applaud – because they would like to see more disciplines on the use of trade remedies in general – but that nonetheless raise some systemic concerns due to the substantive analysis or the flow-on implications thereof. It is probably unrealistic to expect an Appellate Body comprised of generalists, selected by a somewhat politicised process, to always be able to resolve cases involving highly technical subject matter in a manner that in the main satisfies the WTO Membership while neither adding to, nor diminishing the rights and obligations of Members provided by the covered agreements.<sup>84</sup> However, the Appellate Body has, particularly in some of the antidumping and safeguards disputes, perhaps erred too far in favour of appeasing the majority at the expense of a faithful Vienna Convention analysis of what the agreements do and do not permit. While these interpretive choices may appear to be largely victimless, if nothing else, the main ‘victim’ the

---

<sup>83</sup> The dispute settlement system has been so described countless times. See eg, Jonathan T Fried, ‘2013 in Dispute Settlement: Reflections from the Chair of the Dispute Settlement Body’ (2013) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/jfried\\_13\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm)> accessed 7 September 2015.

<sup>84</sup> DSU, arts 3.2 and 19.2.

United States, is likely to insist on more clarity and less interpretive leeway in all future trade remedies-related negotiations within the WTO. Given the gulf that already existed between the US and many other Members on these topics, such negotiations promise to be exceedingly challenging.