US Antidumping Decisions and the WTO Standard of Review: Deference or Disregard?

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I. INTRODUCTION

The Uruguay Round of negotiations on the General Agreement on Tariffs and Trade ("GATT 1994") produced a regime of international trade agreements known loosely as the World Trade Organization ("WTO"). These agreements were partially intended to enhance the power of international dispute resolution panels, which previously had been unable to make decisions that were binding on all parties. The new WTO system attempted to fix that problem, but in the process created a new one, in that binding WTO review of national actions could infringe on traditional notions of national sovereignty.

One aspect of this infringement is international review of decisions made by national bodies regarding the harm caused by certain unfair trade practices, such as dumping. Nations have a particular interest in protecting domestic industries from unfair competition, especially if the governments of those nations rely heavily on the support of domestic industries for political power.

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3 The Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") states that dumping is found when “the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.” Antidumping Agreement, art 2.1, available online at <http://www.wto.org/english/docs-e/legal_e/19-adp.pdf> (visited Mar 24, 2003).

Outside review of these political decisions could have negative effects on domestic industries and national governments.

Rulings of the United States International Trade Commission ("US ITC") have recently been challenged before the WTO, and various Dispute Settlement Boards ("DSBs") have determined that several of the United States’ laws implementing the WTO do not conform with the various agreements of GATT 1994. In addition to questions over the implementation of GATT 1994, various parties have also questioned whether the US Department of Commerce’s ("DOC") interpretation of the US antidumping laws comports with those agreements. This development will consider the latter of the two issues, especially addressing the actual standard of review the DSBs use when examining national interpretations of GATT 1994. This development will show that the DSBs are applying a nondeferential standard whereby the Boards substitute their own interpretation of the agreements for that of the member nations.

II. THE ANTIDUMPING AGREEMENT AND DEFERENCE

When Nation A suspects or believes that Nation B is unfairly dumping its products on Nation A's domestic market, Nation A is permitted, under the GATT 1994 system, to take action to protect its domestic industry from harm. The chief method by which Nation A can protect itself is through the imposition of countervailing duties, or import tariffs, on the dumped goods from Nation B, so that the market price in the importing nation matches the market price in the producing nation. This system allows Nation A to determine whether a dumped product has harmed its domestic industry, and whether to impose a countervailing duty to counteract that harm. But it also allows Nation B to appeal adverse national decisions to a DSB if it believes that the

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6 World Trade Organization, Report of the Panel, United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above From Korea ¶ 7.1, WTO Doc No WT/DS99/R (Jan 29, 1999) (hereinafter Korea Semiconductors) (finding that certain US Department of Commerce regulations defining the procedures by which the US ITC could decide to allow antidumping measures to continue violated the agreements of GATT 1994).

7 See Antidumping Agreement at art 5.1 (cited in note 3).

8 Id at art 9.1.
countervailing duties were imposed in violation of the agreements that make up GATT 1994.9

Under the Antidumping Agreement, countervailing duties expire five years after their inception unless the imposing nation finds that “the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”10 The Agreement also requires that antidumping duties be terminated immediately if the imposing nation finds that a duty is no longer warranted at any time after its imposition. To do this, the nation may consider whether “the continued imposition of the duty is necessary to offset dumping, [or] whether the injury would be likely to continue or recur if the duty were removed ... ”11 Recently, various nations have challenged the procedures used by the United States in its interim reviews and sunset reviews, which determine the likelihood of continued injury and whether duties should remain in place.12 The Antidumping Agreement provides that a DSB can be empanelled in order to decide whether the duties applied were proper and continue to be necessary to avert a likely harm.13

The Antidumping Agreement specifies the standard of review applied by the DSBs, and appears to require that the DSBs give deference to the findings of the national panels. The rule reads:

(i) ... If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation should not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.14

The language of the Antidumping Agreement was the result of intense negotiations at the Uruguay Round of GATT. Disputes over the amount of deference DSBs should give to national panels nearly derailed the talks.15

The phrase “permissible interpretation” was specifically chosen over “reasonable interpretation” in order to enhance the power of the DSBs, but it still seems to leave some room for deference.16 This language reflects the tension between the notion that DSBs should allow some variations in interpretation

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9 Id at art 17.5.
10 Id at art 11.3 (emphasis added).
11 Id at art 11.2.
12 See German Flat Steel at ¶ 2.1 (cited in note 5); Korea Semiconductors at ¶ 2.5 (cited in note 6).
13 See Antidumping Agreement at art 17.5 (cited in note 3).
14 Id at art 17.6.
15 See Croley and Jackson, 90 Am J Intl L at 194 (cited in note 2).
16 See id at 199.
among the member nations, and the competing notion that the bodies should enforce a uniform interpretation of the Antidumping Agreement.

III. A RECENT CASE: KOREA SEMICONDUCTORS

A Dispute Settlement Board ruled in 1999 on a case brought by Korea in which the DSB asserted that the standards used by the DOC to determine whether antidumping duties should be terminated were in violation of the Antidumping Agreement. 17

The panel in Korea Semiconductors agreed with Korea on several of its points, and held that certain standards applied by the DOC violated the United States’ treaty obligations. 18 The panel held that 19 CFR § 353.25(a)(2)(ii), the regulation detailing the procedure by which the DOC can determine whether the revocation of antidumping duties would lead to continuing harm to domestic industry, 19 was inconsistent with Article 11.2 of the Antidumping Agreement. 20 When the DSB analyzed the regulation and determined that it did not comply with the United States’ obligations under GATT 1994, 21 the DSB stated that it was applying the standard of review laid out in Article 17.6(ii) of the Antidumping Agreement. 22

The DSB found that the Antidumping Agreement requires that antidumping duties be prolonged only so long as they are necessary to prevent injurious dumping. 23 It also found that the standard applied by Article 11.2 of the Agreement was more stringent than the DOC’s “not likely” to recur standard. 24 When it determined that the DOC’s standard was inconsistent with the Antidumping Agreement, the DSB found that the standard rested on an impermissible interpretation of the Agreement.

The Antidumping Agreement requires the termination of an antidumping duty if the duty is no longer considered “necessary to offset dumping,” or if there is not a finding that “the injury would be likely to continue or recur if the duty were removed or varied.” 25 The impermissibility found by the panel seems to be the difference between the US and WTO findings enabling continuation of antidumping duties: that a recurrence of dumping is not “not likely” to recur

17 Korea Semiconductors at § VII (cited in note 6).
18 Id at ¶ 7.1.
19 See 19 CFR § 353.25(a)(2)(ii) (1997) (“The Secretary may revoke an order [imposing antidumping duties] … if the Secretary concludes that: … (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value.”).
20 Id.
21 Korea Semiconductors at ¶ 6.54 (cited in note 6).
22 Id at ¶ 6.22.
23 Id at ¶ 6.41.
24 Id at ¶ 6.48.
under the US provision, and that a recurrence is “likely to ... recur” under the Antidumping Agreement. The DSB panel found that this subtle difference in wording resulted in a different standard of proof, and therefore required that the DOC prove the affirmative likelihood of recurrence, rather than disproving the unlikelihood of recurrence.

The DSB’s textual analysis does not permit even minor variation in the wording of regulations implementing the Antidumping Agreement, and instead leads to a requirement of formal uniformity between the DOC regulations and the text of the Agreement. If that is the case, then an “impermissible interpretation” is an interpretation that is not textually identical to the language of the Agreement. Under such a stringent standard of review, there seems to be very little room for deference to interpretations of the Agreement made by the DOC.

IV. IMPACT OF THE RULE ON FUTURE CASES

The weak standard of deference applied to the DOC in Korea Semiconductors could lead to further rulings against the United States. Japan has raised similar arguments to the ones pressed by Korea in a second hot rolled steel case filed in April 2002.

The fact that the United States has already lost antidumping cases such as Japan Hot Rolled Steel I and Korea Semiconductors, coupled with the fact that this case challenges a regulation very similar in language to the one challenged in Korea Semiconductors, leads to the conclusion that the DSBs will give little deference to the US government’s interpretations of GATT 1994. While national uniformity may have been the goal of the drafters of GATT 1994, this rule of interpretation is certainly not obvious from the text of Article 17.6 of the Agreement. Furthermore, it may step too roughly on the prerogatives of national governments and lead to wide disregard of DSB rulings and a concomitant injury to the goal of free trade.

Nonetheless, nations may believe that their interests are better served by a strong dispute resolution regime, in order to prevent other nations from cheating by misinterpreting the GATT 1994 Agreements. If so, then they are likely to countenance a small affront to their sovereignty. At the same time, a

26 The panel in Korea Semiconductors actually made that very distinction, stating, “A finding that an event is ‘likely’ implies a greater degree of certainty that the event will occur than a finding that the event is not ‘not likely’.” Korea Semiconductors at ¶ 6.46 (cited in note 6).


28 Compare 19 CFR § 353.25(a)(2)(ii) (cited in note 19), with 19 CFR § 351.222(j)(1)(2) (2002) (“[T]he Secretary will revoke an order … (ii where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of ... dumping.”) (emphasis added).
simple change in the language of US regulations may save them from violating the Antidumping Agreement, without appreciably affecting the outcome of cases before the DOC, especially if the difference between “likely” and *not* “not likely” is as narrow as it seems.

V. CONCLUSION

The question of the amount of sovereignty retained by member nations of the WTO has existed since the conclusion of the Uruguay Round of negotiations in 1994.\(^{29}\) Any review by international bodies of the decisions of national agencies would seem to impinge upon that sovereignty, since those bodies can act with near impunity and are virtually free from higher review. Therefore it would appear important for those bodies to give some deference to the national agencies’ interpretations of their obligations.

When WTO DSBs review the actions of US agencies with regard to antidumping in particular, very little deference is given to the DOC’s interpretation of the Antidumping Agreement embodied in its own regulations. It seems instead that the DSBs substitute their own judgment for that of the national agencies by narrowly deciding what interpretations are “permissible.” A fair reading of the Agreement, which speaks of more than one “permissible” interpretation, may require a more deferential standard.\(^{30}\) Regardless, for the WTO system to function well, a more deferential standard of review would be preferable, acknowledging the validity of the varied approaches that member nations may use when enacting and interpreting the Antidumping Agreement.

\(^{29}\) Croley and Jackson, 90 Am J Intl L at 194 (cited in note 2).

\(^{30}\) See Antidumping Agreement at art 17.6 (cited in note 3).