

**UNITED STATES ANTI-DUMPING POLICY
AND THE NEGOTIATION OF A FREE TRADE AREA
OF THE AMERICAS:
THE IMPACT OF PROTECTIONIST MEASURES ON
REGIONAL TRADE INTEGRATION**

Patrick J. Glen*

We cannot have trade and commerce in world markets
and international waters exclusively on our terms,
governed by our laws, and resolved in our courts.¹

- Chief Justice Warren E. Burger

I. INTRODUCTION

ALTHOUGH THE ABOVE-CITED QUOTE arose in a case dealing with the legitimacy of a forum selection clause in an international contract for towage, the logic of Chief Justice Burger is perhaps even more apparent in the context of the ongoing regional and global integration of trade regimes. Since the 1994 *Marrakesh Agreement*, the World Trade Organization (“WTO”) has represented a certain, though not total, measure of trade integration at the global level. The WTO oversees states’ duties with respect to the *General Agreement on Tariffs and Trade* (“GATT”), the *General Agreement on Trade in Services* (“GATS”), the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”), and certain plurilateral agreements dealing with trade in civil aircraft, government procurement, dairy products, and bovine meat. To aid in the enforcement of the provisions contained within these agreements, there is also a dispute settlement mechanism within the WTO to handle disputes arising under any of the aforementioned agreements. Though the WTO has represented a major step towards the global integration of trade, agreement on such a broad scale between participants of remarkably different economic prowess, production capability, and product focus has inevitably created a regime left with many jurisdictional questions. In a pseudo-protectionist vein, (although some would argue, and quite convincingly so, that these measures are

* LL.M. (Georgetown University Law Center); J.D. (Ohio Northern University, Pettit College of Law). The views expressed in Mr. Glen’s article do not represent those of the U.S. government or the Department of Justice.

¹ *The Bremen et al. v. Zapata Off-Shore Co.*, 407 U.S. 1 at 9; 92 S. Ct. 1907 at 1913 (1972).

applied in only a protectionist manner) the *GATT* allows for the imposition of anti-dumping and countervailing duties.

One of the most important aspects of the WTO is its allowance for regional integration agreements,² which are often able to bridge certain gaps the resolutions of which are presently impossible in the global context. The European Union ("EU") provides the best example of regional integration at the moment, but other instruments have set up similar, though not identical, types of arrangements throughout the world. In North America, the *North American Free Trade Agreement* ("NAFTA") between the U.S., Canada, and Mexico has been operating rather smoothly for years. In Central and South America there are also various agreements operating on differing levels of integration, including the *Canada-Chile Free Trade Agreement*, the Central American Common Market, the Andean Community, the Caribbean Community and Common Market, and the Southern Common Market ("MERCOSUR"). These agreements represent regional and sub-regional attempts to integrate trade with consistent and like-minded trading partners. Yet the launch of negotiations for a *Free Trade Area of the Americas* ("FTAA") has highlighted, on a regional level, the same problems that have been faced in the global context.

The key question then asked is how can nations of such differing backgrounds see eye-to-eye and agree on the important issues? The Americas' situation is a perfect example, in microcosm, of the disparities that exist globally: the nations situated between the tip of Chile in the South and the uppermost reaches of Canada in the North represent economies ranging from the richest in the world to the poorest.

While this is a broadly formulated question, this paper focuses on the continuing existence of protectionist measures in U.S. law, specifically the U.S. policy of zeroing when making determinations of dumping.

Part II of this paper will analyze the existing statutory and regulatory schemes of U.S. law in the context of dumping determinations, as well as Federal court cases on the subject. Part III will focus on the WTO's agreement on anti-dumping measures and a series of cases heard pursuant to the Dispute Settlement Understanding of the WTO implicating U.S. policy on this point. Part IV will examine the importance of eliminating protectionist measures in the context of an FTAA and the logical ways in which the U.S. may work to make this elimination a reality. In concluding, it should become apparent that any

² See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948), art. XXIV [*GATT* 1947]. See also *General Agreement on Trade in Services*, art. V, Annex IB to the *Agreement Establishing the World Trade Organization*, online: World Trade Organization <http://www.wto.org/English/docs_e/legal_e/26-gats.pdf> [GATS].

sort of protectionist measures are incompatible with trade integration, and if the U.S. truly does wish to move towards a global economy, it must heed the words of Chief Justice Burger: such integration cannot be had solely on its terms.

II. U.S. ANTI-DUMPING POLICY

U.S. ANTI-DUMPING POLICY has been one of the main focal points of international criticism in the years subsequent to the establishment of the WTO. Policy and practice in this area have been criticized in and of themselves, but U.S. action, or more appropriately non-action, in the face of unfavorable WTO dispute settlement decisions has exacerbated what had already been a fractious issue. In the view of the international community, not only does the U.S. adhere to policy and practice that is contrary to its international obligations, but further, it will not abide by a decision of illegality rendered by a body to whose jurisdiction it had previously subjected itself. Although this tension is readily apparent as a practical matter within the context of the WTO, the inevitability of future tension in an FTAA has raised significant questions that must be answered if a free trade area spanning the Americas is to be achieved. The purpose of this section is to elucidate U.S. law, policy, and jurisprudence on the subject of dumping determinations. Part A will present the statutory and policy aspects of how a dumping determination can be made, while Part B will examine certain decisions of the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit dealing with the Department of Commerce's policy of "zeroing."

A. Statutory Law and Policy on Dumping

Dumping refers to "the import of goods at a price below the home-market or a third-country price of below the cost of production,"³ while the term "anti-dumping" refers to the regime of trade laws aimed at eliminating any unfair trade advantages or practices related to dumping.⁴ The *United States Code* and *Code of Federal Regulations* provide for complicated and comprehensive procedures to determine when a

³ Berta Gomez, "Commerce Dept. Rule Unfair Subsidies on Canada Softwood Lumber" (22 March 2002), online: The Embassy of the United States of America, Ottawa

<http://canada.usembassy.gov/content/textonly.asp?section=can_usa&subsection1=softwoodlumber&document=softwood_lumber_032202>.

⁴ See e.g. Eugenia S. Pintos & Patricia Murphy, "Congress Dumps the International Antidumping Code" (1968) 18 *Cath. U.L. Rev.* 180 at 180.

dumping investigation can be initiated, how that investigation should proceed, what margin should be levied against the offender, and when the anti-dumping duty should be lifted, including provisions for periodic and sunset reviews of the anti-dumping order. Although there are many contentious aspects of this mechanism, including the proper standard of review to be employed during the periodic and sunset reviews, within the scope of this paper, only two code provisions are implicated. The main problem with these provisions is their ambiguity, which, when coupled with the traditional heightened deference U.S. courts grant agency interpretations of statutes, has given rise to the policy of zeroing and acquiescence to this policy by the Federal courts.

The first statutory provision provides that: “The term ‘dumping margin’ means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.”⁵ The second provision provides that: “The term ‘weighted average dumping margin’ is the percentage determined by dividing the aggregate dumping margin determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.”⁶ Taken together, these two provisions set out, in a very general way, the procedure the Department of Commerce should use in arriving at a determination of dumping. The problem has its roots in what will be explored below in the examination of the jurisprudence on point: judicial deference to agency interpretations.

The Department of Commerce, because of the ambiguity of this language, has employed a policy of “zeroing” when determining the weighted average dumping margin. “‘Zeroing’ is the practice of assigning a zero value to ‘sales of merchandise that were sold at non-dumped prices when determining the aggregate dumping margin.’”⁷ This is a two-step process. “First, the Department of Commerce averages all sales of a single product to determine whether that specific product is dumped.”⁸ After this, the Department “segregates the ‘good’ (fairly traded) products from the ‘bad’ (dumped) products and calculates the remedial measures by averaging the dumped products.”⁹ One of the main reasons this policy was employed in the first place and was consistently upheld as a permissible interpretation of the statute by the courts, is its underlying logic: that if non-dumped sales are taken into account, it allows exporters to “water-down” violations of the law with legal sales. This

⁵ *Tariff Act of 1930*, 19 U.S.C.A. §1677(35)(A) (1996).

⁶ *Ibid.*, §1677(35)(B).

⁷ J. Steven Jarreau, “Department: Recent Development: International Law” (April/May 2005) 52 L.A. Bar Jnl. 473 at 474.

⁸ Deborah Long, Press Release, “U.S. Antidumping Calculations Are Logical and Legal” (15 December 2004), online: Southern Shrimp Alliance <www.shrimpalliance.com/Press%20Releases/12-15-04%20Zeroing.pdf>.

⁹ *Ibid.*

rationale is based on a recognition that the Department should concentrate only on violations of the law rather than on instances where the exporter has complied with the law.

A hypothetical dumping determination will highlight the distortionary effect this policy has on foreign exporters.¹⁰ Imagine that a foreign corporation exports five kinds of widgets to the U.S. made of rubber, plastic, metal, brick, and stone. All are sold in the U.S. at the price for which they are sold in the home market, except for the rubber and stone widgets. The rubber widget is sold at \$.50 less in the home market than in the U.S., while the stone widget is sold at \$.50 less in the U.S. than it is in the home market. The stone widget thus has a positive (dumped) margin while the rubber widget has a negative (i.e. fairly traded) margin. The table below graphically represents the results of a Department of Commerce investigation of these facts.

Product Code	Net U.S. Price	Net H.M. Price	Unit Margin	U.S. Quantity	Total Margin	Total PUDD	Total Value
Rubber	\$1.00	\$0.50	-\$0.50	100	-\$50	\$0	\$100
Plastic	\$1.00	\$1.00	\$0.00	100	\$0	\$0	\$100
Metal	\$1.00	\$1.00	\$0.00	100	\$0	\$0	\$100
Brick	\$1.00	\$1.00	\$0.00	100	\$0	\$0	\$100
Stone	\$1.00	\$1.50	\$0.50	100	\$50	\$50	\$100

The total margin in this case turns out to be \$0.00 because of the three sales at identical prices in both markets and the counterbalancing of the positive and negative margins. Because of the zeroing of the negative margin on the rubber widgets, however, the total PUDD (potentially uncollected dumping duties) is \$50. The total value of the products exported is \$500, and thus under § 771(35)(B) of the *Tariff Act of 1930*,¹¹ the Department of Commerce would divide this number by the \$50 PUDD, arriving at an aggregate weighted dumping margin of 10.00%. Under the zeroing methodology, the total margin of “0” is disregarded, the negative margin is zeroed, and a dumping margin arises even though the foreign exporter has received no real benefit from his actions.

In nearly every case brought before the U.S. Court of International Trade challenging a Department of Commerce dumping

¹⁰ The following example is provided by Daniel Ikenson, *Abuse of Discretion: Time to Fix the Administration of the U.S. Antidumping Law* (Working Paper No. 31, CATO Institute, 6 October 2005) at 10, online: CATO’s Center for Trade Policy Studies <<http://www.freetrade.org/pubs/pas/tpa-031.pdf>> (cited with author’s permission).

¹¹ 19 U.S.C.A. §1677(35)(B).

determination, the petitioners have challenged this policy. These challenges have been categorically unsuccessful, and a brief examination of the latest case on point will demonstrate why.

B. “Zeroing” Jurisprudence

The Court of International Trade and the Court of Appeals for the Federal Circuit have consistently upheld Department of Commerce determinations based on the zeroing methodology.¹² An analysis of the most recent case will demonstrate that this is a function of two U.S. legal principles: the *Chevron* doctrine and the *Charming Betsy* doctrine.

First, as a matter of administrative law, the Federal Courts have granted Commerce determinations a substantial degree of deference under the second prong of the test set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (“*Chevron*”). The *Chevron* test is derived from a United States Supreme Court decision mandating deference to agency interpretations of ambiguous statutory provisions. The two-prong test is meant to determine whether a reviewing court should grant deference to an agency interpretation:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.¹³

¹² See generally *NSK Ltd. v. United States*, 358 F. Supp. 2d 1276 (Ct. Int’l Trade 2005); *SNR Roulements v. United States*, 341 F. Supp. 2d 1334 (Ct. Int’l Trade 2004); *Corus Eng’g Steels Ltd. v. United States*, 2003 Ct. Int’l Trade LEXIS 110 (Ct. Int’l Trade 2003); *PAM S.p.A. v. United States Department of Commerce*, 265 F. Supp. 2d 1362 (Ct. Int’l Trade 2003); *Slater Steels Corp. v. United States*, 297 F. Supp. 2d 1351 (Ct. Int’l Trade 2003).

¹³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 at 842-43 (1984).

Secondly, in relation to the *Charming Betsy*¹⁴ doctrine, the Courts have decided to avoid entanglement with foreign affairs and policy questions unless and until the political branches of the Federal government have seen fit to change U.S. law on the relevant point. As such, the Courts have refused to grant deference to WTO decisions or the language and provisions of the WTO agreements that are inconsistent with existing U.S. law. Both of these facts can be seen through an examination of *Corus Staal BV v. Department of Commerce* (“*Corus*”),¹⁵ a 2005 Federal Circuit case.

Corus dealt with a Department of Commerce determination of dumping made in the course of an administrative investigation. The Department had calculated a preliminary weighted average dumping margin of 2.44% for Corus on the import of hot-rolled carbon steel flat products during the period of 1 October 1999 through 30 September 2000. Corus appealed this determination to the United States Court of International Trade, which held that: 1) 19 U.S.C. §1677(35)(A) & (B) neither required nor prohibited the Department of Commerce from considering non-dumped sales, and 2) zeroing was a reasonable interpretation of the statute.¹⁶ Corus then appealed to the United States Court of Appeals for the Federal Circuit, arguing that zeroing was inconsistent with the unambiguous statutory scheme for administrative investigations, thus making that practice both unlawful and unreasonable. Corus further argued that Commerce’s zeroing methodology violated the U.S.’s obligations to interpret §1677(35) in conformity with WTO decisions prohibiting zeroing.¹⁷ Corus’ first argument implicates the second prong of the *Chevron* test, while its second argument deals with the *Charming Betsy* doctrine.

Prong two of the *Chevron* test becomes important in understanding the inertia surrounding zeroing methodology, as the statutory provision at issue does not explicitly require the Department of Commerce to ignore or take into account sales at non-dumped prices. Thus, as long as the methodology can be seen as a permissible interpretation of the statute, the decision of the agency will be upheld against challenge. The Court in *Corus* could find no compelling reason to find the practice an unreasonable interpretation of the statute, and thus extended the logic of their previous decision in *Timken*¹⁸ to administrative reviews by Commerce.

¹⁴ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64; 2 L.Ed. 208 (1804).

¹⁵ *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005).

¹⁶ *Corus Staal BV v. United States Department of Commerce*, 259 F. Supp.2d 1253 at 1261-63 (Ct. Int’l Trade 2003).

¹⁷ *Corus Staal BV v. Department of Commerce*, *supra* note 15 at 1346.

¹⁸ *Timken Co. v. United States*, 354 F. 3d 1334 (Fed. Cir. 2004). In *Timken*, the Federal Circuit had upheld the zeroing methodology against a similar challenge

The existence of *Chevron* deference in this context makes it a virtual certainty that a foreign importer contesting the imposition of anti-dumping duties will not prevail in the federal judiciary. Compounding the presence of *Chevron* deference in this context is the court's refusal to give deference to international decisions on U.S. policy. Although those decisions will be dealt with in the subsequent section, the logic of the U.S. court's refusal to adhere to these decisions is important within the context of domestic jurisprudence.

Going hand-in-hand with the second prong of the *Chevron* test is the general principle that “[w]here the intent of Congress is not clear, the reviewing court, as an aid to assessing the reasonableness of the agency’s interpretation, may turn to a pertinent international obligation of the United States, and construe the statute in harmony with it, if possible.”¹⁹ The genesis of this doctrine lay with an early United States Supreme Court decision where Chief Justice John Marshall stated “[...] an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains [...]”²⁰ This canon of statutory interpretation has since been included in the *Restatement (Third) of the Foreign Relations Law of the United States*.²¹ The import of this rule to anti-dumping determinations by Commerce would seem to be that the federal courts should consider an interpretation of the statute permissible only if it does not conflict with international law or international agreements of the U.S. Corus argued this, noting the language of the WTO *Anti-Dumping Agreement*, as well as the rulings of the Appellate Body that found zeroing to be contrary to the U.S.’s obligations under that agreement, but the Court was not persuaded by this logic.

The reasoning of the Court on this point is linked with basic separation of powers issues and the limits of the judiciary in areas that implicate foreign policy. As the Court notes, “[...] the conduct of foreign relations is committed by the Constitution to the political departments of

in the context of an administrative review. Corus argued that the distinction between an investigation and review meant that the *Timken* rationale was not controlling, but the Court was not persuaded by this argument. Thus, the *Timken* rationale does control, and absent any other evidence of unreasonableness, Commerce’s methodology is a reasonable interpretation of the statute.

¹⁹ Elizabeth C. Seastrum, “*Chevron* Deference and The Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?” (2003/2004) 13 Fed. Cir. B.J. 229 at 232.

²⁰ *Murray v. The Schooner Charming Betsy*, *supra* note 14 at 118.

²¹ *Restatement (Third) of the Foreign Relations Law of the United States* §114 (1987). (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”)

the Federal Government [...].”²² Turning to the stated policy of the political branches, it is clear that international law that is contrary to U.S. law should not be granted deference. The power granted to the United States Trade Representative,²³ as well as the statute implementing U.S. obligations after the Uruguay Round of the WTO, are unambiguous on this point.²⁴ The Court then concludes by noting that substantial deference is due the Commerce Department’s determination, notwithstanding contrary international law, and that the federal judiciary

will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce’s zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.²⁵

The coupling of ambiguous statutory provisions and judicial deference to agency determinations means that policy will change only if the political branches of the government can be persuaded. Considering the sustained existence of the *Byrd Amendment*²⁶ and previous practice

²² *United States v. Pink*, 315 U.S. 203 at 222-23; 86 L.Ed. 796; 62 S. Ct. 552 (1942).

²³ *Corus Staal BV v. Department of Commerce*, *supra* note 15 at 1349. “Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.”

²⁴ 19 U.S.C.A. §3512(a)(1) (2000). (“No provision of any of the Uruguay Round Agreements [e.g., the ADA], nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”) See also 19 U.S.C.A. §2504(a) (2000). (“No provision of any trade agreement [...] nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the law of the United States.”)

²⁵ *Corus Staal BV v. Department of Commerce*, *supra* note 15 at 1349.

²⁶ See WTO, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc. WT/DS217/AB/R, WT/DS234/AB/R (2003), online: WTO <<http://docsonline.wto.org>>. This Act (known as the “Byrd Amendment” because of its sponsor, Senator Robert Byrd of West Virginia) imposed anti-dumping and countervailing duties on a class of imports that threatened U.S. producers, mostly in the steel industry. Not only were heightened duties imposed, but the duties actually collected were paid to the original U.S. complainants resulting in an effective double penalty on foreign importers. The Appellate Body of the WTO condemned the practice, and after the U.S. refused to comply with the decision, permission was given for the imposition of punitive trade measures by those countries affected by the Amendment (joint complaint by Australia, Brazil, Chile,

on the issue of dumping, it is unclear when, or even if, this change will come about.

The next two sections explain why U.S. policy is contrary to international law and what must be done to reduce the friction caused by the continued use of zeroing methodology so as to allow for the creation of an *FTAA*.

III. THE AGREEMENTS AND DECISIONAL LAW OF THE WTO

THE FOCUS OF THIS SECTION turns from the domestic law of the U.S. to international trade law and jurisprudence under the auspices of the WTO. Implicated specifically is the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“*Anti-dumping Agreement*” or the “*ADA*”),²⁷ which deals with the availability and mechanics of anti-dumping determinations within the context of the WTO, and the decisional jurisprudence of the WTO’s Dispute Settlement Body (“DSB”) on the practice of zeroing. Although the agreement mentioned is arguably as ambiguous in its substantive provisions as U.S. trade law, it is clear that the WTO Dispute Settlement Body has reached dramatically different conclusions as to the permissibility of zeroing. Part A of this section will review the main substantive article of the *ADA* on point, while Part B will analyze the reports made on the policy of zeroing by the WTO dispute settlement body.

A. The WTO’s *Anti-dumping Agreement*

Similar to U.S. laws on dumping, the WTO’s *ADA* establishes a comprehensive *and exclusive* framework by which members of the WTO may impose anti-dumping duties. Despite U.S. disagreement on this point, the exclusivity of the Agreement is clear from a simple reading of Article 1: “An anti-dumping measure shall be applied *only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of*

European Communities, India, Indonesia, Japan, Korea, and Thailand, and joint complaint by Canada and Mexico). Despite the continued existence of these counteracting measures, the U.S. has not changed course, an action that might represent a foreboding of the U.S. response to criticism of its zeroing methodology during potential *FTAA* negotiations.

²⁷ WTO, *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement)*, 14 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/19-adp.pdf>.

this Agreement." (italics added) Subsequent articles deal with making a determination of dumping,²⁸ determining injury and causation,²⁹ the proper way in which to define the domestic industry,³⁰ the initiation of investigations,³¹ propriety of subsequent investigations,³² the proper evidence admissible during the course of these investigations,³³ the availability of provisional measures,³⁴ the imposition and collection of anti-dumping duties,³⁵ and the cognizance of panels to hear complaints arising under the Agreement.³⁶

Arguments against the zeroing methodology have centered on Article 2:4:2 of the *ADA*. That Article reads as follows:

Subject to the provisions governing fair comparison in paragraph 4, the 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 if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

The language concerning the determination of margins requiring that "all comparable export transactions" should be used seems clear enough. To

²⁸ *Ibid.*, art. 2.

²⁹ *Ibid.*, art. 3. Article 3 of the *ADA* requires that, notwithstanding the existence of dumping as technically defined, to institute an anti-dumping action, dumping must cause or threaten to cause "material" injury to a domestic industry or market. See also J.-G. Castel & C.M. Gastle, "Deep Economic Integration Between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform" (1998) 7 *Minn. J. Global Trade* 1 at 2; Presentations at the Fourth Annual Conference of the United States-Mexico Law Institute, "Comments on the Tension Between Trade and Antitrust Laws" (1996) 4 *U.S.-Mex. L.J.* 61 at 62.

³⁰ *Ibid.*, art. 4.

³¹ *Ibid.*, art. 5.

³² *Ibid.*

³³ *Ibid.*, art. 6.

³⁴ *Ibid.*, art. 7.

³⁵ *Ibid.*, art. 9.

³⁶ *Ibid.*, art. 17.

return to the hypothetical determination made in Part II.A, this means that the total margin and PUDD should be equal to each other. Zeroing is what causes the discrepancy, and, ultimately, this is due to the fact that *not all* transactions were taken into account.

There is an exception to the “all” language of Article 2:4:2, but it is only available upon a valid explanation of why every transaction should not be used and if there has been a pattern of differences in the export prices of a particular foreign exporter. In the cases that follow below, this exception is clearly not applicable.

This begs the question, why does the U.S. maintain its policy in the face of such unequivocal language? Despite the seeming clarity of the term “all,” the U.S. has consistently argued before the WTO that the term is relative rather than absolute, thus leaving room for the permissibility of the zeroing methodology. What follows is an examination of the relevant decisions of WTO panels and the Appellate Body.

B. Decisions Under the WTO Dispute Settlement Mechanism

Disputes alleging that the U.S. methodology of zeroing was contrary to its obligations under the *Anti-dumping Agreement* ballooned following the WTO’s Appellate Body decision in *EC-Bed Linen*, decided in March 2001.³⁷ That case was the first opportunity that the Appellate Body had to rule on the legality of zeroing under the *Anti-dumping Agreement* and they minced few words in their decision. The practice of zeroing clearly violated Article 2:4:2 of the Agreement because it inherently did not take into account “all transactions.” The EC readily complied with the decision and discontinued use of the methodology. Despite this definitive ruling, the U.S. did not change its own policy, and from a jurisprudential view, argued that the reasoning of the Appellate Body was not binding on it, as the U.S. had not been party to the case. In the wake of this political entrenchment, a rash of cases was brought under the Dispute Settlement Understanding and the *Anti-dumping Agreement*, with plaintiffs seeking a ruling regarding U.S. policy similar to the ruling made in relation to EC policy.³⁸ This paper focuses on two

³⁷ WTO, *Report of the Appellate Body on European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc. WT/DS141/AB/R (2001), online: WTO <<http://docsonline.wto.org>>.

³⁸ See WTO, *Report of the Appellate Body on United States—Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WTO Doc. WT/DS282/AB/R (2005); WTO, *United States—Anti-Dumping Determinations Regarding Stainless Steel from Mexico*, WTO Doc. DS325 (2005); WTO, *United States—Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. DS322 (2004); WTO, *United States—Anti-Dumping Measures on Cement from Mexico*,

specific decisions: *Final Dumping Determination on Softwood Lumber from Canada*³⁹ and *Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) ("Zeroing Case")*.⁴⁰

The *Softwood Lumber* case arose from a Department of Commerce ("DOC") dumping determination made on 2 April 2002 that established dumping margins ranging from 2.18% to 12.44% for the six largest exporters of softwood lumber from Canada.⁴¹ The initial Panel decision found that the U.S. had acted consistently with its obligations under the *Anti-dumping Agreement*, except for its use of the zeroing methodology which violated Article 2:4:2.⁴² Canada appealed the determination that the U.S. had acted consistently on the issues other than zeroing, while the U.S. appealed the decision that the zeroing methodology violated the *Anti-dumping Agreement*.

In making its appeal, the U.S. made five main arguments. First, they argued that the phrase "margins of dumping" by definition applies only to dumped sales and not non-dumped sales, and thus even if aggregation is required, it only applies to the aggregation of dumped sales.⁴³ The second argument was that non-dumped sales are not comparable dumped sales, as set out within the language of Article 2:4:2.⁴⁴ Thirdly, it was argued that the language "all comparable sales" is applicable only to the average-to-average methodology and not to the other two methodologies provided for by the *ADA*.⁴⁵ Fourthly, they argued that the negotiating history of the *ADA* demonstrates that zeroing had been permissible prior to the Agreement, and nothing in the Agreement itself explicitly changed this.⁴⁶ Finally, it was suggested that the *EC-Bed Linen* case was not applicable to the case at hand because the U.S. was not a party in *EC-Bed Linen*, its practice of zeroing was not at issue in

WTO Doc. DS281 (2003); WTO, *United States—Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany*, WTO Doc. DS262 (2002); WTO, *United States—Anti-Dumping Duties on Silicon Metal from Brazil*, WTO Doc. DS239 (2001), online: WTO <<http://docsonline.wto.org>>.

³⁹ WTO, *Report of the Appellate Body on United States—Final Dumping Determination on Softwood Lumber from Canada (Softwood Lumber)*, WTO Doc. WT/DS264/AB/R (2004), online: WTO <<http://docsonline.wto.org>>.

⁴⁰ WTO, *Report of the Panel on United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WTO Doc. WT/DS294/R (2005), online: WTO <<http://docsonline.wto.org>>.

⁴¹ *Softwood Lumber*, *supra* note 39 at para. 2.

⁴² *Ibid.* at paras. 4-5.

⁴³ *Ibid.* at para. 12.

⁴⁴ *Ibid.* at para. 14.

⁴⁵ *Ibid.* at para. 15.

⁴⁶ *Ibid.* at para. 16.

that case, and the arguments presented by the U.S. and the EC in the two cases were different.⁴⁷ Thus the issue before the Appellate Body was:

whether the Panel erred in finding [...] that the United States acted inconsistently with Article 2:4:2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “*Anti-Dumping Agreement*”) in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of ‘zeroing.’⁴⁸

The Appellate Body begins its decision by defining the exact scope of its ruling, namely the methodology of zeroing *in this case alone*, rather than the permissibility of the practice generally.⁴⁹ It then goes on to note the three types of methodologies that are permissible under Article 2:4:2: 1) comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, 2) comparison of normal value and export prices on a transaction by transaction basis, and 3) comparison of weighted average normal value with prices of individual export transactions.⁵⁰ This case dealt only with the DOC’s use of the first methodology.⁵¹ The U.S. argued that “Article 2:4:2 deals only with multiple comparisons at sub-group levels, and does not address the issue of how the results of such comparisons are to be aggregated in order to calculate an overall margin of dumping for the product as a whole.”⁵² In effect, then, the U.S. methodology is permissible because the Agreement is silent as to its validity. Both the Appellate Body and Canada agreed that multiple averaging, as was done in this case, is permissible under the agreement.⁵³ The disagreement was centered on different interpretations of the phrases “all comparable transactions”⁵⁴ and “margins of dumping.”⁵⁵

In one sense, the language of the *ADA* is unequivocal: a state may *only* compare comparable transactions and they must compare *all* such comparable transactions.⁵⁶ The DOC complied with this dictate at the subgroup level, but the discrepancy arises from the aggregation of the

⁴⁷ *Ibid.* at para. 17.

⁴⁸ *Ibid.* at para. 62(a).

⁴⁹ *Ibid.* at para. 63.

⁵⁰ *Ibid.* at para. 76.

⁵¹ *Ibid.* at para. 77.

⁵² *Ibid.* at para. 79.

⁵³ *Ibid.* at para. 81.

⁵⁴ *Ibid.* at paras. 82-83.

⁵⁵ *Ibid.* at para. 84.

⁵⁶ *Ibid.* at para. 86.

initial multiple comparisons.⁵⁷ At the final aggregation stage, the U.S. zeroed out the negative margins so as, under their argument, to avoid watering down violations with legal sales.⁵⁸ Although the ultimate dispute is focused on the phrase “all comparable sales,” the root of the interpretative problem lies with the meaning given “dumping” and “margin of dumping” within the *ADA*.⁵⁹ As noted earlier, the U.S. has consistently interpreted these terms to encompass only positive margins. Under this view, a negative margin would mean that the product wasn’t dumped and thus shouldn’t be taken into account for purposes of determining the margin of dumping. Yet this interpretation is clearly at odds with the language of the *ADA*. The phrase “dumping,” from a textual standpoint, clearly relates to an investigation and calculation of the subject product *as a whole*.⁶⁰ Since this is the case, the phrase “margin of dumping” similarly must take into account sales of the product on the whole and not just the aggregation of positive dumping margins.⁶¹ Zeroing is explicitly in contravention of this principle. Dumping relates to all transactions, and thus every transaction of a specific product must be taken into account in determining the margin of dumping. Ignoring negative margins will thus be a violation of the language of Article 2:4:2 and the broader logic of the *ADA*.⁶²

The Appellate Body made short shrift of a U.S. argument based on the negotiating history of the *ADA* agreement. While no evidence suggested that the *ADA* was meant to allow or prohibit zeroing, a plain reading of the text of Article 2:4:2 leads to the conclusion that zeroing is inconsistent with the proper way to calculate the margin of dumping.⁶³ The Appellate Body then reached its final conclusion after determining the inapplicability of several other U.S. arguments extraneous to the scope of this paper: “In light of the foregoing, we uphold the Panel’s findings that the U.S. acted inconsistently with Article 2:4:2 of the Anti-Dumping Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of ‘zeroing.’”⁶⁴

Yet the U.S. was not quick to comply, either with the specific directive in this case or with the broader finding that the zeroing methodology violated the *ADA*. This, in part, could be seen as a natural result of the Appellate Body’s own stated limited scope of decision—its statement that zeroing was only being implicated in this case and not as

⁵⁷ *Ibid.* at paras. 87-88.

⁵⁸ *Ibid.* at para. 88.

⁵⁹ *Ibid.* at para. 90.

⁶⁰ *Ibid.* at paras. 93-94 (citing arts. 2, 9.2, & 6.10 of the *ADA* for further support).

⁶¹ *Ibid.* at paras. 96-98.

⁶² *Ibid.* at paras. 101-103.

⁶³ *Ibid.* at para. 108.

⁶⁴ *Ibid.* at para. 117.

a general proposition. A Panel was able to revisit the issue just over a year later, in October 2005.

A Panel issued its report in *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)* on 31 October 2005. The case was initially brought by the European Community, and on 5 February 2004, after consultations with the U.S. had failed, they requested the establishment of a Panel. The case itself concerned the imposition of anti-dumping duties in several cases implicating exporters in almost all of the EC. The main point of importance in the case was that the challenge was not to zeroing “as applied” (i.e. in a specific case) but rather to zeroing “as such”:

The **European Communities** requests the Panel to find that: [...] The ‘Standard Zeroing Procedures’ used by the United States in original investigations (or the U.S. practice or methodology of zeroing) [...] are as such inconsistent with [...] Article 2:4:2[.]⁶⁵

Before making this determination, however, the Panel did have to determine whether, in this case, the use of the zeroing methodology was inconsistent with the *ADA*. The U.S. made the same arguments it had previously made in the *Softwood Lumber* case, basically concerning the proper definition of “all comparable transactions” and “margin of dumping,” while additionally arguing, to escape the logic of that case, that the Appellate Body had erred in its decision. The arguments of the EC mirrored those of Canada in the *Softwood Lumber* case, and thus the Panel was confronted with an issue that had been definitively decided already by the Appellate Body. Taking note of both the *Softwood Lumber* and *EC-Bed Linen* cases, and the general deference that a Panel should grant to a previous decision of the Appellate Body, the Panel saw no reason to depart from these prior decisions and accordingly, found that the U.S. methodology of zeroing was inconsistent with its obligations under the *ADA*.⁶⁶

The Panel then turned its attention to the EC’s “as such” claim against zeroing. An “as such” claim implicates the actual policy or methodology at issue rather than only the application of a certain methodology in a specific case. For a claim to be allowed, there must be a clear methodology at issue rather than a mere discretionary practice or temporary policy. The Appellate Body has laid down the general reasoning that should govern the allowance of an “as such” claim:

⁶⁵ *Report of the Panel on United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), supra note 40 at para. 7.1(b) (bold in original).*

⁶⁶ See *ibid.* at paras. 7.24-7.32.

[...] the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.⁶⁷

Thus a well-established norm or methodology that consistently and predictably leads to WTO-inconsistent action can be challenged and struck "as such" instead of waiting for a judgment in each and every case where the policy or methodology is employed. In relation to the methodology of zeroing utilized by the U.S.:

The evidence before the Panel [...] indicates that this exclusion of comparison results with negative margins has been invariably performed by the USDOC for an extended period of time. In response to a panel question whether there have been cases in which the Anti-Dumping Margin Program has been applied without zeroing, the United States states that, whether calculations have been done by hand or by computer, it is unable to identify any instance where USDOC had given a credit for non-dumped sales. The United States has not contested in this proceeding that USDOC's zeroing methodology reflects a deliberate policy.⁶⁸

The evidence available to the Panel indicates:

⁶⁷ WTO, *Report of the Appellate Body on US—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc. WT/DS244/AB/R (2002) at para. 82, online: WTO <<http://docsonline.wto.org>>.

⁶⁸ *Report of the Panel on United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, *supra* note 40 at para. 7.103.

that the zeroing methodology manifested in the ‘Standard Zeroing Procedures’ represents a well-established and well-defined norm followed by the United States DOC and that it is possible based on this evidence to identify with precision the specific content of that norm and the future conduct that it will entail.⁶⁹

As the methodology had been found inconsistent with the *ADA* “as applied” in the specific instances that were the subject of this case, as well as previous cases such as *Softwood Lumber*, the Panel thought it clear that the “USDOC maintains a norm that will necessarily produce WTO-inconsistent actions.”⁷⁰ This being the case, and “in light of all the foregoing considerations, the Panel **finds** that the United States’ zeroing methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2:4:2 of the *AD Agreement*.”⁷¹

Moving a step beyond the previous Appellate Body rulings on zeroing, this case is extremely important for its “as such” ruling. Whereas the previous cases had provided no incentive for the U.S. to change its policy because of the narrowness of review, it is clear that to become WTO-consistent, the U.S. must cease applying its zeroing methodology. Although the case has been appealed, there is little reason to believe that, confronted with the identical issue, the Appellate Body will waver from the reasoning of the Panel.⁷² Of course, the larger question is whether the U.S. will eventually comply. The answer to that question, which is unfortunately a probable “no,” is the subject of the remainder of this paper: Will the U.S. change course and reduce the friction its policies have created in the sphere of international trade, and, if so, how can this be done?

⁶⁹ *Ibid.* at para. 7.104.

⁷⁰ *Ibid.* at para. 7.105.

⁷¹ *Ibid.* at para. 7.106 (bold in original).

⁷² The Appellate Body has since upheld the decision of the panel, on slightly different grounds, and that decision has been adopted by the Dispute Settlement Body. See WTO, *Report of the Appellate Body on United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WTO Doc. WT/DS294/AB/R (2006), online: WTO <<http://docsonline.wto.org>>. The United States has objected to virtually all points of the Appellate Body’s decision in a communication circulated to the DSB members. See WTO, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (zeroing), Communication from the United States*, WTO Doc. WT/DS294/16 (2006), online: WTO <<http://docsonline.wto.org>>.

IV. THE FRICTION OF “ZEROING” AND WAYS TO EASE THE TENSION

THE OPINION OF THE WORLD in regard to the U.S.’s continued refusal to abandon the methodology of zeroing is succinctly summed up by Robin Lanier in a letter written to Commerce Secretary Donald Evans following the WTO decision in the *Softwood Lumber* case:

Refusal to abandon zeroing in the face of decisive WTO rulings that the practice itself, regardless of the commodity to which it is applied, violates WTO rules, demeans both the United States as a world trade leader and the WTO as a credible dispute-settlement body. As you know, the WTO first determined that zeroing was inconsistent with world trade rules in a case brought against the European Union regarding bed linens. While the EU might have taken the position that the ruling was applicable only to the facts of the specific case involved, it chose to discontinue zeroing across the board. Your letter indicates that the United States, while tacitly admitting this policy cannot stand international scrutiny, will resort to technical legalisms and procedural delaying tactics to avoid doing the right thing in this situation. The obvious question this attitude raises is how the United States can expect other nations to respect and comply with WTO rulings, and to engage in the “competitive liberalization” that the Administration seeks, when we refuse to do the same?⁷³

In effect, Lanier posed the following question:

In an international arena in which America’s commitment to the international rule of law is questioned by some of her closest allies, are these fights politically prudent, even if some of them may make sense from a technical, legal perspective?⁷⁴

These questions refer to the fact that, despite intense criticism from the international community, the U.S. did have glimmers of “daylight” in

⁷³ Letter from Robin Lanier, Executive Director, Consumers for World Trade, to Commerce Secretary Donald Evans (5 January 2005) on file with author.

⁷⁴ Raj Bhala & David A. Gantz, “WTO Case Review 2004” (2005) 22 *Ariz. J. Int’l & Comp. Law* 99 at 121.

relation to retaining the policy of zeroing, most notably the Appellate Body's stated jurisprudential limitation of ruling zeroing inconsistent only on the particular facts presented. This situation has changed since these statements were made, as a Panel has ruled zeroing "as such" inconsistent with the *ADA*, and the Appellate Body has concurred in this finding. The result is that the potential for the U.S. to use technical arguments to uphold its zeroing practice has been greatly diminished, if not eliminated entirely. Thus, it has become a political question that must be addressed if the U.S. is to avoid becoming an international trade pariah.

This section will proceed in Part A by taking note of the status of "zeroing" within the *FTAA* negotiations; Part B will examine the specific importance of abandoning the protectionist policy of zeroing within the context of an *FTAA*; and finally, Part C will explain the mechanics of how this can in fact be accomplished.

A. Zeroing Within the *FTAA*: A Toothless Text

The *FTAA* negotiations have been criticized for involving substantial debate while producing little substantive result. The texts that have been produced are heavily bracketed, reflecting a lack of consensus on the key issues that could give rise to an *FTAA*. This is especially true in relation to the Chapters on Subsidies, Antidumping and Countervailing Duties that have been drafted thus far. Although these draft agreements represent a desire to move away from protectionist trade remedy laws, that desire has yet to become a reality. When the Negotiating Group on Subsidies, Antidumping and Countervailing Measures began debate within their mandate, they were directed "[t]o achieve a common understanding with a view to improving, where possible, the rules and procedures regarding the operation and application of trade remedy laws in order to not create unjustified barriers to trade in the Hemisphere."⁷⁵ A heightened level of importance was seemingly added to the work of the Negotiating Group at the Sixth Meeting of Ministers of Trade:

We instruct the Negotiating Group on Subsidies, Antidumping and Countervailing Duties to *intensify* its efforts to reach a common understanding with a view to improving, where possible, the rules and procedures for the operation and enforcement of trade remedy laws, so as

⁷⁵ Free Trade Area of the Americas, *Summit of the Americas Fourth Trade Ministerial Joint Declaration San Jose, Costa Rica*, (1998) "Annex II: Objectives by Issue Area", online: Free Trade Area of the Americas <http://www.ftaa-alca.org/Ministerials/SanJose/SanJose_e.asp>.

not to create unjustified obstacles to free trade within the Hemisphere [...].⁷⁶

It is clear that the Ministers of Trade view trade remedies law as an important aspect of the FTAA negotiation process, but have their desires been heeded by the participants?

Yes and no. In the first draft of the Article dealing with making a determination of dumping, the Negotiating Group came up with the following text:

[2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall *only* 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. *[In the calculation of the margin of dumping “zeroing” will not be used.]*⁷⁷

The bracketed and italicized text represents language that has not been agreed upon. It has obviously been supported by certain states, hence its inclusion, but interests are not such that consensus could be reached. This lack of agreement is most likely due to strong U.S. opposition to dealing with trade remedy law in the regional context, an issue that will be dealt with in greater detail in the next section.

In the second draft, concerning dumping determinations, zeroing is still mentioned in all three proposed texts, but it remains bracketed. More importantly, the language itself is a step back from the blanket prohibition on zeroing contained in proposed Article 2.4.2 of the first draft; all three proposed articles use the phrase “[i]n the case where there are different types of products, ‘zeroing’ will not be allowed.”⁷⁸ This is a

⁷⁶ Free Trade Area of the Americas, *Sixth Meeting of Ministers of Trade of the Hemisphere Ministerial Declaration Buenos Aires, Argentina*, (2001) “Annex I: Instructions to the Negotiating Groups” at D(2), online: Free Trade Area of the Americas <http://www.ftaa-alca.org/Ministerials/BA/BA_e.asp> (emphasis added).

⁷⁷ Free Trade Area of the Americas, *First Draft FTAA Agreement*, FTAA.TNC/w/133/Rev.1 (2001) “Subsidies, Antidumping and Countervailing Duties,” art. 2.4.2, online: Free Trade Area of the Americas <http://www.ftaa-alca.org/FTAADraft/ngsu1_e.asp#c> (bold and italics in original).

⁷⁸ Free Trade Area of the Americas, *Second Draft FTAA Agreement*, FTAA.TNC/w/133/Rev.2 (2002) “Subsidies, Antidumping and Countervailing Duties,” art. 2.8, online: Free Trade Area of the Americas <http://www.ftaa-alca.org/ftaadraft02/ngsu1_e.asp#Subsidies>.

retreat from the broader initial prohibition, perhaps evidencing the intent of certain countries to garner U.S. support for a limited relaxation of its trade remedies law. However, if this was in fact a retreat from a stauncher position on dumping determinations, it was short-lived. The language of the third draft returned to absolute prohibition: "In the calculation of the margin of dumping, zeroing will not be allowed."⁷⁹ Yet again, the text is bracketed and has not been agreed upon by the participants. The Negotiating Group has heeded its mandate, as is evidenced by this language, but it has not received the support it needs from the participants themselves. The stalemate reflects entrenched interests that will be difficult to change. The U.S.'s potential partners in an *FTAA* must recognize, and most likely do, that to get a compromise on dumping issues, they must concede on issues they hold dear. Whether they will actually undertake this high-stakes game of give and take is yet to be seen. An issue as important to the U.S. as anti-dumping law will simply not be altered without the U.S. receiving significant concessions from the other negotiating states.

Unfortunately, the likelihood of achieving true regional consensus on an issue like dumping was dealt a severe blow at the Miami Ministerial Meeting. In the declaration issued by the Ministers, they endorsed what has been termed an *FTAA à la carte* (or *FTAA* "light"):

Taking into account and acknowledging existing mandates, Ministers recognize that countries may assume different levels of commitments. We will seek to develop a common and balanced set of rights and obligations applicable to all countries. In addition, negotiations should allow for countries that so choose, within the *FTAA*, to agree to additional obligations and benefits. One possible course of action would be for these countries to conduct plurilateral negotiations within the *FTAA* to define the obligations in the respective individual areas.⁸⁰

This step away from a truly regional instrument encompassing all areas of trade within the Americas will probably end any chance of consensus on dumping law. The U.S. may be able to push it from the table into one of the plurilateral agreements and avoid the issue entirely. If not, the text of the *FTAA* might remain toothless while other states take

⁷⁹ Free Trade Area of the Americas, *Third Draft FTAA Agreement*, FTAA.TNC/w133/Rev.3 (2003) "Subsidies, Antidumping and Countervailing Duties," art. 3.9, online: Free Trade Area of the Americas <http://www.ftaa-alca.org/FTAADraft03/ChapterXV_e.asp>.

⁸⁰ Free Trade Area of the Americas, *Eighth Ministerial Meeting Miami, USA*, (2003) at para. 7, online: Free Trade Area of the Americas <http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp>.

on deeper obligations vis-à-vis trade remedy laws in separate plurilateral agreements addressing specific aspects of dumping and subsidies. The pressure that might have brought the U.S. around will simply no longer exist when obligations and benefits can be picked piecemeal from the assortment that the *FTAA* will offer. With the same prospect greeting them, the Southern countries might as well forget about concessions, allow the U.S. to keep zeroing, and maintain some of their own protectionist policies.

It is unclear what actual effect the à la carte approach might have, but there exist very few scenarios in which it could possibly contribute to reaching an agreement on the proposed provisions in the Chapter on dumping. Most likely, an aggressive *FTAA* prohibiting zeroing will be put to rest in favor of an animal that will have far fewer teeth and a weaker bite.

B. The Obstacle of Protectionism Within the Context of the *FTAA*

The obstacle presented by zeroing specifically, and anti-dumping duties generally, is actually two-fold. First, anti-dumping has been argued to be nothing more than a veiled national protectionist measure. Second, the U.S. has been extremely reticent in undertaking negotiations of the anti-dumping issue on a sub-global level, leaving foreign negotiators attempting to press a regional agenda to speak into an effectively deaf ear.

Since the 1994 *Marrakesh Agreement* was put into effect, establishing the WTO, the U.S. has largely become a protectionist power.⁸¹ The *Byrd Amendment* and like-designed measures initially bore the brunt of foreign criticism, but increasingly that criticism has been directed at contingent protection, such as the anti-dumping laws. In recent years, it has been the U.S.'s utilization, administration, and employment of safeguard, anti-dumping, and anti-subsidy remedies that has drawn the greatest ire.⁸² Some believe that these trade remedies laws are "many times imposed for purely protectionist reasons."⁸³

⁸¹ Dr. Mario E. Carranza, "Latin American Perspective: MERCOSUR, The Free Trade Area of the Americas, and the Future of U.S. Hegemony in Latin America" (2004) 27 *Fordham Int'l L.J.* 1029 at 1063.

⁸² Colin B. Picker, "Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions" (2004) 30 *Brooklyn J. Int'l L.* 67; Kelly Henry, "Is the United States the World's Dumping Ground for Steel? Recent Influxes in Steel Imports in the United States, the Effects, and the Possible Remedies" (2003) 25 *Hous. J. Int'l L.* 381 at 383-84.

⁸³ Thomas Andrew O'Keefe, Esq., "Chile: Team Player, Free Market Economic Power, and Entrant into the Adversarial Criminal Procedure System: The

Of course, the situation is not this one-sided. Perceptions on the issue of anti-dumping vary widely, “ranging from the perception that antidumping is an appropriate response to an activity that is condemned by the GATT to the view that antidumping is straightforward protectionism without any economic justification.”⁸⁴ This assessment, however, is not exactly on point with the U.S. situation. While many countries do have anti-dumping laws, the U.S. has been one of the few to employ zeroing and after the *EC-Bed Linen* case, it is the last significant trade power to retain this methodology. This has led to the conclusion that U.S. practice, as opposed to just the legal regime, is predominantly simple protectionism.⁸⁵

Compounding the situation is the fact that these types of protectionist policies, once put into place, are extremely difficult to reverse and thus, present a greater threat to trade integration than is generally appreciated.⁸⁶ The lobby that was successful in getting Congress to implement the policy in question has a much easier time perpetuating the law, and a general xenophobic distrust of global trade regimes by large segments of the U.S. decision-making hierarchy helps ensure the survival of such barriers.

Even if the U.S. does retain allies in the imposition of anti-dumping duties on a global level, the great majority of opinion within the Americas is directed against such policy and methodology. So great is this opposition that some commentators have stated that “[t]he United States’ abundant anti-dumping legislation is currently seen as the

Evolution of Chilean Trade Policy in the Americas: From Lone Ranger to Team Player” (1998) 5 Sw. J.L. & Trade Am. 251 at 252.

⁸⁴ Bernard Hoekman, “Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements” (Working paper No. 1950, The World Bank, 1998) at 1, online: The World Bank <<http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1900series/wps1950/wps1950.pdf>>; Gilbert R. Winham & Heather A. Grant, “Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and Beyond” (1994) 3 Minn. J. Global Trade 1 at 4; Jon M. Tate, “Sweeping Protectionism Under the Rug: Neoprotectionist Measures Among MERCOSUR Countries in a Time of Trade-Liberalization” (1999) 27 Ga. J. Int’l & Comp. L. 389 at 405. (“Some view the use of such measures as a way to remedy unfair trade practices such as dumping [...]. Another view taken is that antidumping measures and countervailing duties are politically motivated contingency protection measures, designed to protect certain areas from outside competition.”)

⁸⁵ Hoekman, *ibid.* at 13; Joel R. Paul, “Do International Trade Institutions Contribute to Economic Growth and Development?” (2003) 44 Va. J. Int’l L. 285 at 331.

⁸⁶ James M. Cooper, “Spirits in the Material World: A Post-Modern Approach to United States Trade Policy” (1999) 14 Am. U. Int’l L. Rev. 957 at 1022.

biggest hurdle to finalizing negotiations on the [FTAA ...].⁸⁷ Brazil, which has evolved into the de facto voice of the South in pressing for regional interests, views the U.S. definition of “dumping” as too broad and the imposition of duties in most cases a function of protectionism rather than a truly remedial trade action.⁸⁸

This view is not based on an abstract or theoretical view of the anti-dumping laws. It is based solidly on past U.S. action where several Southern countries, most notably Brazil and Argentina within *MERCOSUR*, have been the victims of anti-dumping determinations distorted by zeroing and other methodology employed by the U.S. Department of Commerce.⁸⁹ This will make negotiations with the South far more difficult than the administration’s negotiations with Mexico in coming to terms on *NAFTA*, as Mexico had not yet been stung by the full-breadth of U.S. trade remedies law.⁹⁰ Dumping will be placed squarely at the forefront of negotiations, and U.S. action on this point may be the determinative factor in whether or not an FTAA is realized. As the following text demonstrates, however, the outlook for this prospect is not particularly promising.

The protectionist characterization of these policies is exacerbated by the U.S.’s entrenchment on the issue of non-negotiability. In every trade instrument negotiated between the U.S. and another country, either bilaterally, multilaterally, or plurilaterally, the U.S. has refused to make any concessions on dumping.⁹¹ In the narrow context of an FTAA, the U.S. has entirely removed trade remedies law from the negotiating table, not even allowing debate on the issue.⁹²

⁸⁷ Gustavo Gonzalez, “U.S. Antidumping Laws—a Hurdle to Free Trade in the Americas” *Third World Network* (27 April 2001), online: Third World Network <<http://www.twinside.org.sg/title/hurdle.htm>>.

⁸⁸ Robert Grosse & Roy C. Nelson, “Expected Impact of FTAA on Latin American Countries” (2004) 1 *Loy. Int’l L. Rev.* 139 at 152; see also Andrea Miller, “The United States Antidumping Statutes: Can a Trade Agreement With the United States be both ‘Free’ and Fair? A Case Study of Chile” (2005) 54 *Cath. U.L. Rev.* 627 at 655. (“ [...] Brazil views U.S. antidumping law as an unacceptable protectionist measure.” *Ibid.* at 656-57.)

⁸⁹ Thomas Andrew O’Keefe, Esq., “Potential Conflict Areas in Any Future Negotiations Between MERCOSUR and the NAFTA to Create a Free Trade Area of the Americas” (1997) 14 *Ariz. J. Int’l & Comp. Law* 305 at 316.

⁹⁰ *Ibid.*

⁹¹ Carranza, *supra* note 81 at 1051; Jurgen Kurtz, “A General Investment Agreement in the WTO? Lessons From Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment” (2002) 23 *U. Pa. J. Int’l Econ. L.* 713 at 775.

⁹² *Trade Act of 2002*, 107 Pub. L. 210, 116 Stat. 933 (2002). Under Subdivision B, titled Bipartisan Trade Promotion Authority, the extent of negotiability on trade remedies is starkly curtailed. Section 2102(b)(14) reads:

This reluctance to change the domestic trade remedies regime is more a “political constraint than a technical one. In every recent trade negotiation, the U.S. Congress has expressed its opposition to any modification that could undermine the effectiveness of the current protection regime.”⁹³ Political will, or rather, the lack thereof, is due mainly to the strength of the respective lobbies that are protected by the present regime. The only situation where this might change is if the potential beneficiaries of the *FTAA* had a stronger presence in Washington than those that would be negatively affected. Although there has been significant debate over whether the U.S. would stand to gain in an economically significant way from an *FTAA*, it is likely that even if it did, this would not be “sufficient to offset the almost theological devotion of the U.S. Congress to maintain antidumping laws, which provide the safeguards measure of choice for protectionist lobbies.”⁹⁴

Between the absence of concessions offered by the U.S. in existing sub-international trade agreements and its unwillingness to negotiate the issue on a regional level, it is likely that serious talk on the present trade remedies regime will have to wait until the next round of WTO negotiations.⁹⁵

Trade Remedy Laws.-- The principal negotiating objectives of the United States with respect to trade remedy laws are - ... (A) to preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions[.]

See also Marcos Sawaya Jank & Zuleika Arashiro, “Free Trade in the Americas: Where Are We? Where Could We Be Headed?” in *Inter-American Dialogue, Free Trade in the Americas: Getting There from Here* (October 2004) 27 at 28, online: Inter-American Dialogue <http://www.thedialogue.org/publications/program_reports/trade/ftaa_1004.pdf>.

⁹³ Jaime Zabludovsky, “The Long and Winding Road to Hemispheric Integration: Ten Key Elements in Understanding the FTAA” in *Inter-American Dialogue, Free Trade in the Americas: Getting There from Here* (October 2004) 7 at 12, online: Inter-American Dialogue <http://www.thedialogue.org/publications/program_reports/trade/ftaa_1004.pdf>.

⁹⁴ Jeffrey J. Schott, “Whither the Free Trade Area of the Americas?” in *Inter-American Dialogue, Free Trade in the Americas: Getting There from Here* (October 2004) 17 at 25, online: Inter-American Dialogue <http://www.thedialogue.org/publications/program_reports/trade/ftaa_1004.pdf>.

⁹⁵ *Ibid.*

C. Easing the Friction: The Need for Policy Changes

The friction caused by the U.S. anti-dumping methodology can be eased, but it will require affirmative action from our political officials. This paper identifies three distinct ways in which the friction caused by anti-dumping measures can be eased and an *FTAA* could hypothetically proceed: 1) the elimination of anti-dumping measures solely between members of the potential *FTAA*, 2) an *FTAA* specific anti-dumping agreement accompanied by a dispute settlement mechanism, and 3) special treatment during the investigative phase of the dumping determination for *FTAA* members.

The first option is to eliminate the availability of anti-dumping measures solely between members of the *FTAA*. Several preferential trade agreements “have illustrated that governments can abolish antidumping on intra-area trade flows.”⁹⁶ The European Union evolved along similar lines, disallowing the imposition of anti-dumping duties as between members, but continuing their use vis-à-vis third parties. Within the American experience, the *Canada-Chile Free Trade Agreement* provides an example that could be referred to within the *FTAA* negotiations. That agreement “obligates both countries to phase out the use of antidumping duties against imports from either country.”⁹⁷

A situation such as this may provide the best of both worlds. Although ultimately the countries involved would have to totally eliminate the imposition of anti-dumping duties as between members, they would have a predetermined amount of time to implement them while retaining the ability to impose duties against non-members. This avenue also makes the most economic sense, as price discrimination cannot occur between intra-block members, undercutting one of the significant justifications for the existence of anti-dumping laws.⁹⁸ At the very least, the U.S. should look to eliminate the use of its zeroing methodology as between members of an *FTAA*. This would represent a middle ground that could potentially be built upon through the course of negotiations and experience.

Whatever view is taken of this policy-change, and there is no doubt that even a limited abandonment of anti-dumping laws would send certain political constituencies clamoring to Washington, “[e]xperience

⁹⁶ Hoekman, *supra* note 84 at 2.

⁹⁷ O’Keefe, *supra* note 89 at 306.

⁹⁸ David A. Gantz, “The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?” (1997) 14 *Ariz. J. Int’l & Comp. Law* 381 at 404.

has revealed that antidumping can be eliminated in the regional context.”⁹⁹

Second, an *FTAA* specific anti-dumping agreement could be explored. Roughly 50 countries around the world still maintain anti-dumping laws.¹⁰⁰ To this end, “[s]ome *FTAA* partners have underscored the need for a comprehensive, well-balanced arrangement which includes new disciplines in the area of antidumping.”¹⁰¹ This agreement could definitively establish the applicable rules as to *FTAA* members, and if a dispute settlement mechanism is established by the general agreement, disputes arising under the anti-dumping agreement could be deemed justiciable. There are two problems with this course of action. First, and perhaps most importantly, the U.S., as mentioned earlier, has been almost categorically opposed to the negotiation of such a comprehensive regional discipline. To jar the U.S. from its malaise at this juncture seems an unlikely prospect, yet the idea should not be abandoned. The second criticism would be directed at the U.S. record before the Panels and Appellate Body of the WTO. Although it has complied with a number of rulings, it has retained policies inconsistent with others. The *Byrd Amendment* and zeroing are just two examples of a broader systemic problem that might give the Southern countries pause before viewing this type of solution as a panacea. Of some moment is the remarkably better record of the U.S. before *NAFTA* panels, as well as the Federal judiciary’s greater willingness to give deference to *NAFTA* decisions than to WTO decisions. Perhaps another regional body, as opposed to an international body, would gain similar respect within the U.S.

Finally, instead of an explicit agreement delineating anti-dumping rules within the Americas, “special treatment for *FTAA* partners in safeguards cases might be possible following, to some extent, the precedent set in *NAFTA*.”¹⁰² These policies would basically mirror what has been offered above, but in a more informal setting. Zeroing, for instance, could be eliminated between *FTAA* partners, as its use is within the sole discretion of the Department of Commerce. Another possible option would be to increase the *de minimis* exceptions that presently exist. At the moment they are at 2%, but between partners this

⁹⁹ Hoekman, *supra* note 84 at 41.

¹⁰⁰ Chad P. Brown, *Global Antidumping Database Version 1.0* (Working paper No. 3737, The World Bank, 2005), online: Brandeis University <http://people.brandeis.edu/~cbrown/global_ad/bown-global-ad-v1.0.pdf>. See also Maurizio Zannaradi, “Antidumping: What are the Numbers to Discuss at Doha?” (2004) 27(3) *The World Economy* 403.

¹⁰¹ Kathy-Ann Brown *et. al.*, “Proceedings of the Second Annual Legal and Policy Issues in the Americas, 2001: V. What Economic Integration in the Hemisphere Means to Florida Industries: Now and in 2005: B. Panel Discussion” (2001) 14 *Fla. J. Int’l L.* 82 at 97.

¹⁰² Schott, *supra* note 94 at 25.

percentage could be raised, helping to exclude a number of determinations that would have found dumping. Given the discretion that has been granted both the Department of Commerce and the International Trade Commission, “preferential” treatment to member states might provide the best alternative yet examined. No explicit alterations of domestic law and policy would be needed, and the abandoned policies could be used as a negotiating tool, kept in the wings as a bargaining chip. Even though discretion and judicial deference have largely been the cause of the present problems concerning zeroing, it could be possible to use these aspects of the U.S. system to the advantage of the *FTAA*. Further, the U.S. would again be able to maintain its existing policies in regard to third party imports.

These potential negotiation routes have their own pros and cons. They are, however, certainly viable ways in which to ease the friction and increase the potential for the realization of an *FTAA* in the near future. Unfortunately, there is probably little that the rest of the world can do to precipitate these changes. That impetus must come from domestic initiatives by those who are brave enough to face the inevitable political fallout that such suggestions might cause. There is a growing sentiment that protectionism must be abandoned and that the U.S. should commit itself more fully to the observance of the international rule of law. These concepts, coupled with education on the gains an *FTAA* would bring consumers and producers in the U.S., conveyed from the right positions within the U.S. hierarchy, just might be enough to change the present stagnation.

V. CONCLUSION

WITH ALL THAT HAS BEEN DISCUSSED in this paper, the words of Chief Justice Burger seem to take on an almost apocryphal meaning. As trade integration moves forward at an ever increasing pace, on both regional and global levels, the U.S. will risk either being left behind or engendering greater bitterness in their partners through strong-arm tactics and the imposition of U.S.-centric policies. The only option available to stem this tide is to heed the words of Burger C.J. and change those policies that have been definitively ruled inconsistent with U.S. obligations under international law. This paper has presented one such problem in the form of zeroing and has offered clear ways in which the U.S. can ease the tension caused by the continued use of this methodology. Ultimately it seems that the determination of this issue will reside in the political sphere rather than the legal. What U.S. policy makers need to know is that without expanding our agenda and without compromise with even our weakest partners, that Delphic prophecy made almost 35 years ago could

culminate in a world free of trade restriction, save the U.S., which would remain alone and isolated in the swirl of integration.