SIGNIFICANT RECENT DECISIONS OF THE COURT OF INTERNATIONAL TRADE AND OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT AFFECTING TRADE

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Among the most significant cases in the area of antidumping law in recent years are those cases from the U.S. Court of International Trade ("CIT") and the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") addressing the so-called "zeroing" issue. These cases address not only the intersection between U.S. law and international dispute settlement, but also some very key domestic legal issues, such as the application of the Chevron doctrine, the nature and extent of *stare decisis* in U.S. courts, and the power of the executive branch in the conduct of international trade negotiations.

This article focuses on two major Federal Circuit opinions addressing "zeroing" released in the last two years, Timken v. United States[1] ("Timken") and Corus Staal BV v. Department of Commerce ("Corus I").[2] Part I of this article describes what is meant by "zeroing." Part II discusses the Federal Circuit's opinions in Timken and Corus I. Part III discusses three significant CIT opinions addressing the "zeroing" issue in the wake of Timken and Corus I: Corus Staal BV v. United States, ("Corus II"),[3] Paul Muller Industrie GmbH v. United States,[4] and Koyo Seiko Co. v. United States.[5]

I. "Zeroing" – The Treatment of Non-Dumped Sales

"Zeroing" refers to the manner by which the U.S. Department of Commerce ("Commerce") treats sales where the export price exceeds normal value ("non-dumped sales") in calculating the weighted average dumping margin. Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise."[6] Commerce interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. Section 771 (35)(B) of the Act defines the "weighted average dumping margin" as "the percentage determined by dividing the aggregate *dumping margins* for a specific

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[1] Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

[2] Corus Staal v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006) ("Corus I").

[3] 387 F. Supp. 2d 1291 (Ct. Int'l Trade 2005), aff'd, 2006 U.S. App. LEXIS 15022 (Fed. Cir. June 13, 2006), rehearing denied, 2006 U.S. App. LEXIS 24388 (Fed. Cir. Sept. 12, 2006).

[4] 435 F. Supp. 2d 1241 (Ct. Int'l Trade 2006).

[5] 442 F. Supp. 2d 1360 (Ct. Int'l Trade 2006).

[6] 19 U.S.C. § 1677 (35)(A) (emphasis added).

exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."[7]

The weighted average dumping margin, therefore, is a ratio of the total amount by which the export prices of an exporter's or producer's sales exceed normal value (*i.e.* the aggregate dumping margins) divided by the total value of all of the exporter's or producer's sales to the United States.[8] When the export price of a particular transaction is less than normal value, Commerce considers the transaction to be dumped, and includes the difference between export price and normal value in the numerator of the weighted average dumping margin. When the export price exceeds normal value, under Commerce's interpretation of the statute, there is no "dumping margin" for that transaction to include in the numerator. Commerce will not permit the amount by which export price exceeds normal value for such a transaction to offset the dumping found with respect to other transactions. Thus, while many consider the issue to be whether Commerce may assign a value of zero to those transactions where export price is greater than normal value, for Commerce the issue is whether sales that are not dumped should be permitted to offset the dumping found with respect to other sales.

II. Federal Circuit Opinions Addressing Commerce's Treatment of Non-Dumped Sales

In the past two years, the Federal Circuit has issued opinions in two cases addressing Commerce's treatment of non-dumped sales. The first, Timken, addresses the treatment of non-dumped sales in an administrative review. The second, Corus I, addresses the treatment of non-dumped sales in an investigation.

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[7] 19 U.S.C. § 1677 (35)(B).

[8] See 19 U.S.C. § 1677(35)(B).

A. Timken

In Timken, the appellant, a respondent in the administrative review of the antidumping duty order on tapered roller bearings from Japan challenged Commerce's interpretation of the statute. Commerce argued that through the use of the word "exceeds," the statute required the exclusion of non-dumped sales from the numerator of the weighted average dumping margin. Alternatively, Commerce argued that its treatment of non-dumped sales was based on a reasonable interpretation of the statute.

The Federal Circuit applied the two-part Chevron test, looking first to see whether Congress spoke directly and unambiguously on the issue.[9] If the statute were silent or ambiguous on the issue, the Court would determine whether Commerce's interpretation of the statute were permissible.[10]

With respect to the first part of the Chevron test, the Federal Circuit recognized that this was "a close question."[11] Commerce argued that the dictionary defines "exceeds" as "to be or go beyond (the given or supposed limit, measure, or quantity),"[12] or "1. To be greater than; surpass. 2. To go beyond the limits of."[13] The Federal Circuit, however, stated that it was "reluctant to find these dictionary definitions so clear as to compel a finding that Congress expressly intended to require" Commerce's treatment of non-dumped sales.[14] Rather, the Court found that the statute

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[9] Timken, 354 F.3d at 1341 (citing Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984)).

[10] Id.

[11] Id.

[12] Id. (citing Webster's New Twentieth Century Dictionary of the English Language Unabridged 636 (2d ed. 1980)).

[13] Id. (citing The American Heritage College Dictionary 477 (3d 1993)).

[14] Id.

did not unambiguously require only those sales with positive differences between export price and normal value to be included in the numerator of the weighted average dumping margin.[15] In other words, Congress did not express a clear intent with regard to the treatment of non-dumped sales.

The Federal Circuit, therefore, turned to the question of whether Commerce's treatment of non-dumped sales was based on a permissible interpretation of the statute. The Federal Circuit first agreed with Commerce that the statutory definitions "at a minimum" permit Commerce's interpretation, stating, "Basically, one number 'exceeds' another if it is 'greater than' the other, meaning it falls to the right of it on the number line."[16]

The Federal Circuit then found that Commerce's interpretation "makes practical sense."[17] The Federal Circuit stated:

> Commerce calculates dumping duties on an entry-by-entry basis. . . . Its practice of zeroing negative dumping margins comports with this approach. . . . . This approach makes sense; it neutralizes dumped sales and has no effect on fair-value sales. On the other hand, the approach urged by Koyo, whereby Commerce could not zero negative transactions, would essentially require Commerce to grant the first customer a credit. In the absence of offsetting sales below fair market value, however, Commerce could potentially owe the first customer a payment--a result clearly not contemplated by the statutory scheme.[18]

Finally, the Federal Circuit noted the numerous cases in which the CIT upheld Commerce's treatment of non-dumped sales in cases preceding the passage of the Uruguay Round

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[15] Id.

[16] 354 F.3d at 1342.

[17] Id.

[18] Id. at 1342-43 (internal citations omitted).

Agreements Act ("URAA").[19] While these cases predated the URAA, the Federal Circuit held that neither the pre-URAA statutory definitions nor the URAA itself unambiguously addressed the treatment of non-dumped sales.[20] Accordingly, the Federal Circuit held that Commerce's interpretation of the statute was reasonable.[21]

The appellant argued, however, that under the Charming Betsy doctrine,[22] the Department could not interpret a U.S. statute inconsistently with the international obligations of the United States. The appellant pointed to a report from the World Trade Organization's ("WTO") Appellate Body addressing an antidumping investigation performed by the European Communities ("EC"), *EC – Bed Linen*.[23] In *EC – Bed Linen*, the EC divided the subject merchandise into different types or models, and compared the weighted average normal value to the weighted average export price for each model.[24] Where export price exceeded normal value for a particular model, the EC did not include that amount in the calculation of the weighted average margin of dumping.[25] The Appellate Body found[26] that this was inconsistent with the

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[19] Id. at 1343 (citing Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 20 C.I.T. 558, 926 F. Supp. 1138, 1150 (1996); Serampore Industries Pvt., Ltd. v. U.S. Department of Commerce, 11 C.I.T. 866, 675 F. Supp. 1354, 1360-61 (1987)).

[20] Id.

[21] Id.

[22] See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804).

[23] *European Communities –Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, Report of the Appellate Body, adopted March 12, 2001 ("*EC – Bed Linen*").

[24] Id. at para. 47.

[25] Id.

[26] Id. at para. 66.

EC's obligations under the WTO Antidumping Agreement.[27]

The Federal Circuit stated that the Appellate Body report was "not binding on the United States, much less this court."[28] In doing so, the Federal Circuit agreed with the opinion from the CIT, that "the absence of the United States as a party [was] an important distinction."[29] Thus, the Federal Circuit held that Commerce's interpretation of the statute continued to be reasonable, despite the Appellate Body's report in *EC – Bed Linen*.[30]

B. Corus I

The Federal Circuit revisited the issue of Commerce's treatment of non-dumped sales in Corus I. This case involved the antidumping investigation of hot-rolled steel from the Netherlands. By the time that the Federal Circuit issued its opinion in this case, the WTO Appellate Body had issued a report finding Commerce's treatment of non-dumped sales as applied in the antidumping duty investigation of softwood lumber from Canada to be inconsistent with U.S. obligations under the Antidumping Agreement (*US – Softwood Lumber*).[31] The United States Trade Representative ("USTR") had announced that the United States intended to implement the *US – Softwood Lumber* report.

The appellant first argued that a distinction should be made between an antidumping review, which was the subject of Timken, and an investigation, which was the subject of Corus I.

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[27] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement").

[28] 354 F.3d at 1344.

[29] Id.

[30] Id. at 1345.

[31] United States-Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, report of the Appellate Body, adopted August 31, 2004 ("*US – Softwood Lumber*").

The appellant argued that while the statute envisioned the calculation of individual dumping margins for each transaction in a review, in an investigation the statute contemplated the use of all subject merchandise to calculate the weighted average dumping margin.[32]

The Federal Circuit rejected this argument, noting that in Timken, the court addressed Commerce's interpretation of section 771(35) of the Act.[33] The court concluded, "[I]t is of no consequence that it was decided in the context of a review."[34]

The appellant then argued that Commerce's treatment of non-dumped sales was inconsistent not only with *EC – Bed Linen*, but also with two Appellate Body reports involving the United States directly: *US – Corrosion-Resistant Steel*[35] and *US – Softwood Lumber*. The Federal Circuit noted that *EC – Bed Linen* did not involve the United States, and that *US – Corrosion-Resistant Steel* made no finding regarding Commerce's treatment of non-dumped sales.[36] However, in *US – Softwood Lumber*, the Appellate Body did find that Commerce acted inconsistently with the Antidumping Agreement with respect to how it treated non-dumped sales in calculating the margin of dumping.[37]

Nonetheless, the Federal Circuit rejected the appellant's argument, first noting that in Timken the court held that "WTO decisions are 'not binding on the United States, much less this

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[32] See Corus I, 395 F.3d at 1347.

[33] 395 F.3d at 1347.

[34] Id.

[35] *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, report of the Appellate Body, adopted January 9, 2004 ("*US – Corrosion-Resistant Steel*").

[36] 395 F.3d at 1348.

[37] Id.

court.'"[38] The court continued:

> Neither the GATT nor any enabling international agreement outlining compliance therewith (*e.g.*, the ADA) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress. . . . 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.[39]

Noting that "[t]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government," the Federal Circuit accorded the cited WTO reports no deference.[40] The Court concluded:

> We 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.[41]

The Federal Circuit, therefore, has had two opportunities to address the issue of Commerce's treatment of non-dumped sales. Both Timken and Corus I support Commerce's interpretation of the statute as being reasonable. In addition, the Federal Circuit has clearly held that WTO dispute settlement reports have no ability to change U.S. law directly (including Commerce's interpretation of the law). Rather, consistent with the intent of Congress, the executive branch decides whether to implement a WTO report adverse to the interests of the United States, and to what extent. The Federal Circuit opinions respect this separation of powers.

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[38] 395 F.3d at 1348 (quoting Timken, 354 F.3d at 1344).

[39] Id. at 1348-49 (internal citations and footnotes omitted).

[40] Id. at 1349 (citing United States v. Pink, 315 U.S. 203, 222-23 (1942)).

[41] Id.

III. CIT Cases After Timken and Corus I

Challenges to Commerce's treatment of non-dumped sales, however, have continued to be filed despite clear precedent from the Federal Circuit. Thus, the CIT has had several opportunities to apply the Federal Circuit's holdings in Timken and Corus I. In each case, the CIT has recognized the binding effect of the Federal Circuit decisions, and upheld the power of the executive branch to make the decision regarding whether, and to what extent, to implement an adverse WTO report.

Corus II concerned a challenge to the first administrative review of hot-rolled steel from the Netherlands. The plaintiff argued that the United States had completed its implementation of *US – Softwood Lumber*, and thus Commerce's treatment of non-dumped sales was now an unreasonable interpretation of the statute. Chief Judge Restani rejected this argument, noting that by statute the implementation of *US – Softwood Lumber* affected only the antidumping investigation of softwood lumber from Canada, and no other case.[42] Chief Judge Restani noted that the Court was bound by Federal Circuit precedent upholding Commerce's treatment of non-dumped sales.[43]

In Paul Muller, the plaintiffs raised new arguments that they contended the Federal Circuit had not ruled upon in either Timken and Corus I. The Court, however, recognized that it was bound by Federal Circuit precedent and rejected these arguments, noting that "[n]ew argument alone, however, does not defeat binding precedent."

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[42] 387 F. Supp. 2d at 1299 (citing 19 U.S.C. § 3538).

[43] Id. at 1301.

Similarly, in Koyo,[44] a plaintiff sought to amend a complaint to challenge Commerce's treatment of non-dumped sales after the WTO Appellate Body issued its report in *US – Zeroing (EC),*[45] which again found such treatment to be inconsistent with the Antidumping Agreement. The Court rejected this attempt, noting that WTO reports are not binding on the Court and that amending the complaint to include a challenge to the treatment of non-dumped sales would be futile.

IV. Conclusion

Respondents in antidumping proceedings continue to attack Commerce's treatment of non-dumped sales, using dispute settlement reports from the WTO Appellate Body as their weapons of choice. However, the Courts have recognized that Commerce's treatment of non-dumped sales stems from a reasonable interpretation of the statute, and that WTO reports have no power to change U.S. law directly. Recognizing the role of the Executive Branch with respect to the negotiation and implementation of international trade agreements, the Courts have declined to interfere in decisions concerning the implementation of adverse WTO reports. In short, what matters in determining the effect of an adverse WTO dispute settlement report are the actions of U.S. agencies in response to that report, not the report itself.

Timken, Corus Staal, and their progeny are particularly encouraging in that they were decided under the second prong of Chevron – in cases in which it was acknowledged that the U.S. statute was ambiguous (the United States has acknowledged that it could change its practice

[44] 442 F. Supp. 2d 1360 (Ct. Int'l Trade 2006).

[45] *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, Report of the Appellate Body, adopted May 9, 2006.

on zeroing to implement the adverse WTO reports without amending the statute). This is particularly important for several reasons. First, there are many instances in which the U.S. statute is ambiguous. Second, given that the WTO AD and SCM Agreements are considerably shorter than the U.S. statute, there are considerably more instances in which the WTO Agreements are ambiguous. Third, WTO panels and the WTO Appellate Body have a decided propensity to disregard the quasi-Chevron standard of review in Article 17.6 of the WTO AD Agreement. This is particularly true of the WTO Appellate Body reports on zeroing.[46] WTO Panels have also declined to apply the standard of review in Article 17.6 to the SCM Agreement.[47] Consequently, the question in WTO dispute settlement has become, not whether an AD or CVD measure is a permissible or reasonable interpretation of the relevant Agreement, but whether that measure is consistent with the Panel's or Appellate Body's preferred interpretation.

Given the WTO's approach, if the U.S. Courts were to interpret Charming Betsy to require them to look to the WTO Agreements and reports in interpreting vague provisions of U.S. law, they would be making an end-run, not only around the specific legislation governing the implementation of adverse WTO reports, but also around Chevron. While nominally giving Chevron deference to Commerce and the ITC on their interpretations of the U.S. statute they are charged with administering, the courts would be re-writing U.S. law on the basis of WTO that give no such deference. This would be true even of reports that the United States has agreed to

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[46] Communication from the United States, *United States -- Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/16, circulated May 17, 2006.

[47] Article 17.6(ii) of the WTO AD Agreement provides in part that, "[w]here 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."

implement. The United States' decision to implement an Appellate Body report by no means indicates that the United States has accepted the Appellate Body's interpretation of the AD Agreement – only that it has agreed to abide by the outcome of an adverse decision. Again, the zeroing cases are the best example.[48]

It is to be hoped that the U.S. Courts will continue in the direction they have chosen – of interpreting U.S. law based on U.S. materials, and leave to the Executive Branch the decisions of whether, and to what extent, to implement adverse WTO reports. If they were to rely on adverse WTO reports, they would compromise their primacy in interpreting U.S. law.

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[48] Communication from the United States, *United States -- Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/16, circulated May 17, 2006.