WTO—Anti-dumping Agreement—"zeroing"—role of precedent—standard of review

UNITED STATES—FINAL ANTI-DUMPING MEASURES ON STAINLESS STEEL FROM MEXICO. WT/DS344/AB/R. *At* <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>. World Trade Organization Appellate Body, April 30, 2008 (adopted May 20, 2008).

Over the past several years, one of the most contentious issues in World Trade Organization dispute settlement has been the use of "zeroing" in the context of calculating antidumping duties in domestic trade remedy proceedings. The practice varies somewhat, but in general terms it refers to a dumping calculation that ignores import sales for which the export price exceeds the "normal value" (usually the value in the home market), instead taking into account only those sales where export price is less than normal value. In essence, the difference between the zeroing and nonzeroing approaches is the following: zeroing calculates dumping based only on the export sales that could themselves be classified, individually or as a subgroup, as "dumped," whereas nonzeroing calculates dumping based on *all* export sales. Critics of the practice argue that zeroing inflates the dumping margin unfairly; proponents contend that it offers an accurate calculation of the total amount of dumping. Almost all WTO members who have expressed a view on the issue oppose the practice in most situations. By contrast, the United States remains a staunch defender of "zeroing," and all of the recent complaints related to the practice have been brought against the United States.

In the *U.S.—Stainless Steel (Mexico)*[1] case, the Appellate Body found that the U.S. zeroing measures at issue violate WTO rules. Its findings in this regard offer some important new interpretations relating to zeroing, as well as some clarifications of the role of precedent in the WTO dispute settlement system.

Mexico's complaint referred to several aspects of zeroing. At issue in the appeal was the use by the U.S. Department of Commerce of a practice called "simple zeroing," in the context of "periodic reviews" of past antidumping determinations. According to Mexico, "simple zeroing in periodic reviews" refers to

> a method whereby the authorities compare individual export transactions against monthly weighted average normal values and do not fully take into account the results of comparisons where the export price exceeds the monthly weighted average normal value when such results are aggregated in order to calculate the margin of dumping for the product under consideration as a whole in a periodic review.[2]

Mexico alleged that the U.S. rules and procedures relating to "simple zeroing in periodic reviews," as well as their application in specific cases, violated the WTO's antidumping

[1] Appellate Body Report, United States—Final Anti-dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (adopted May 20, 2008), *modifying* Panel Report, United States—Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/R (adopted May 20, 2008) [hereinafter U.S.—Stainless Steel (Mexico)]. Decisions of the panels and Appellate Body are available at <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

[2] Panel Report, U.S.—Stainless Steel (Mexico), *supra* note 1, para. 7.7.

rules—in particular, Article VI of the General Agreement on Tariffs and Trade (GATT)[3] and Articles 2.1 and 9.3 of the Anti-dumping Agreement (AD Agreement).[4]

The panel had concluded that "simple zeroing in periodic reviews" is not inconsistent with these provisions (para. 77). Mexico appealed the panel's conclusions, arguing that "once the investigating authorities define the product under consideration, the scope of that definition determines the scope of the authorities' dumping determination," such that "dumping cannot exist in relation to a specific type, model, or category of the product under consideration, or in relation to individual import transactions." Mexico thus asserted, under Article 9.3, that "'the margin of dumping must be calculated in respect of the individual exporters or foreign producers subject to such proceeding and for the product under consideration taken as a whole,' without disregarding any export transaction" (para. 78). The United States countered that the panel's findings should be upheld, arguing that under GATT Article VI and AD Agreement Article 2.1, margins of dumping need not necessarily be established on an aggregate basis for the "product as a whole" and that "'dumping' can be found to exist each time that a weighted average normal value exceeds the export price in a particular export transaction, and 'margins of dumping' can be calculated for individual import transactions" (para. 80).

At the outset of its analysis, the Appellate Body noted three questions that, in its view, arise based on the panel's reasoning and the arguments advanced in the appeal: (1) "[A]re the terms 'dumping' and 'margin of dumping' exporter- or importer-related concepts for the purpose of Article 9.3 of the Anti-Dumping Agreement?" (2) "[C]an 'dumping' and 'margin of dumping' be found to exist at the transaction and importer-specific level for the purpose of Article 9.3 of the Anti-Dumping Agreement?" (3) "[I]n duty assessment proceedings under Article 9.3 of the Anti-Dumping Agreement, is it permissible to disregard the amount by which the export price exceeds the normal value in any export transaction?" Recognizing that these questions are "interconnected," the Appellate Body examined each of them in turn (para. 82).

Starting with the question of whether "dumping" and "margin of dumping" are exporter- or importer-related concepts, the Appellate Body began by examining those concepts under GATT Article VI, as "carried over" into AD Agreement Article 2.1. Based on the definitions and uses of these terms in those provisions, the Appellate Body concluded that the

> elements of the definition of "dumping" . . . —namely, that "dumping" occurs when a product is "*introduced* into the commerce of *another country*" at an "*export price*" that is less than the "comparable price for the like product in the *exporting country*"—suggest to us that Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement* address the pricing practice of an exporter. (Para. 86)

The Appellate Body found support for this conclusion in various contextual provisions (paras. 87–93).

Next, the Appellate Body addressed the second question, "whether 'dumping' and 'margin of dumping' can be found to exist at the transaction- and importer-specific level for the purpose of Article 9.3 of the *Anti-Dumping Agreement*" (para. 97). On this point, it recalled its earlier

[3] Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, *in* WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 486 (1995) [hereinafter THE LEGAL TEXTS].

[4] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement, *supra* note 3, Annex 1A, *in* THE LEGAL TEXTS, *supra* note 3, at 168.

consideration that "dumping arises from the pricing behaviour of an exporter." It then stated that a "proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions over a period of time." Moreover, it added:

> Contrary to what the Panel indicates, the notion that 'a product is introduced into the commerce of another country at less than its normal value' in Article VI:1 of the GATT 1994 suggests to us that the determination of dumping with respect to an exporter is properly made not at the level of individual export transactions, but on the basis of the totality of an exporter's transactions of the subject merchandise over the period of investigation." (Para. 98)

As to the third question, the Appellate Body considered whether under AD Agreement Article 9.3, it is "permissible" in duty assessment proceedings to "disregard the amount by which the export price exceeds the normal value in any transaction"—that is, whether it is permissible to use "simple zeroing" (para. 100). Recalling its discussion above concerning the term "margin of dumping," the Appellate Body explained that under Article 9.3 and GATT Article VI:2, "the margin of dumping established for an exporter in accordance with Article 2 operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter." The Appellate Body then stated, "We see no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the Anti-Dumping Agreement for disregarding the results of comparisons where the export price exceeds the normal value when calculating the margin of dumping for an exporter." In this regard, it recalled past Appellate Body precedent finding the practice of zeroing to be inconsistent with AD Agreement Articles 2.4.2 and 9.3, noting that a product definition applies throughout a dumping investigation and that "dumping" can "be found to exist only for the product under investigation as a whole" (paras. 102–06). In addition, the Appellate Body stated:

> We fail to see a textual or contextual basis in the GATT 1994 or the Anti-Dumping Agreement for treating transactions that occur above normal value as 'dumped' for purposes of determining the existence and magnitude of dumping in the original investigation and as 'non-dumped' for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review." (Para. 107)

Moving beyond the initial three questions that it had set out, the Appellate Body addressed "concerns," as expressed by the United States and the panel, regarding "the implications for importer-specific duty assessment in periodic reviews" that flow from the Appellate Body's previous interpretations of Article 9.3. In this context the Appellate Body stated, "It appears to us that the United States and the Panel have not correctly understood the Appellate Body's interpretation of Article 9.3 in previous disputes." In particular, the Appellate Body explained that a "margin of dumping is properly calculated under the Anti-Dumping Agreement only if all transactions are taken into account, including those where the export prices exceed the normal value" (paras. 111–16).

The Appellate Body then turned to the panel's analysis relating to "prospective normal value" systems. The panel had found it "quite illogical" that the drafters of the AD Agreement would have intended to allow the existence of prospective normal value systems, but then envisaged a duty assessment system under Article 9.3 in which authorities would be required to calculate a dumping margin on the basis of aggregated data pertaining to exporters

(paras. 117–19). In response, the Appellate Body noted that the amount of duties collected on a prospective basis is subject to review and that while duties are "collected" in individual export transactions only "where the prices are less than the prospective normal value, . . . a review can be requested if the prospective normal value has been improperly determined so as to result in collection of anti-dumping duties in excess of the ceiling prescribed in Article 9.3." In this regard, the Appellate Body emphasized that the AD Agreement is neutral as to the different systems for the levy and collection of antidumping duties (paras. 120–21).

Next, the Appellate Body examined the question of whether the context of the AD Agreement Article 2.4.2, second sentence, justified the panel's decision not to follow the Appellate Body's established approach. The panel had found that

> an interpretation that prohibits zeroing in all contexts would be contrary to the principle of effective treaty interpretation, because it would mean that the application of the second sentence of Article 2.4.2 would always yield the same mathematical result as that obtained by applying the [weighted average–to–weighted average (W-W)] comparison methodology of the first sentence, thereby rendering the second sentence of Article 2.4.2 *inutile*. (Para. 123)

Mexico asserted that the panel's interpretation and the issue of "mathematical equivalence" would be valid only under the assumption that the weighted average-normal value used in the weighted average-to-transaction (W-T) comparison methodology is identical to that used in the W-W comparison methodology. However, Mexico pointed out that the U.S. system does not follow that approach: it uses contemporaneous monthly normal values in W-T situations but mandates period-long normal-value averages (typically, one year) for W-W comparisons (para. 124). In response to Mexico's arguments, the Appellate Body noted that the United States did not contest Mexico's assertion, and also referred to U.S. statements suggesting that there is uncertainty as to how the W-T comparison methodology would be applied in practice (paras. 124–27).

Finally, the Appellate Body addressed the "historical background" of the AD Agreement. Given that its analysis under Article 31 of the Vienna Convention on the Law of Treaties had neither left the meaning of the relevant provisions of the Agreement "ambiguous or obscure" nor led to a "manifestly absurd or unreasonable" result, the Appellate Body did not find it "strictly necessary" to have recourse to the supplementary means of interpretation identified in Article 32. Nevertheless, the Appellate Body said that it would examine the U.S. arguments concerning Article 32 (paras. 128–29). For the following reasons, however, the Appellate Body stated that it was "not persuaded" that the historical materials provide guidance as to whether simple zeroing is permissible under Article 9.3: the parties had various different viewpoints as to the meaning of the negotiating proposals submitted during the Uruguay Round; the same historical materials were examined by the Appellate Body in previous cases and had been rejected; the 1960 Group of Experts Report was of "little relevance" and did not shed light on the determination of the margin of dumping under Article 9.3; and the Tokyo Round Anti-dumping Code was "legally separate from the GATT 1947," had been terminated, and, in any event, had different wording than the current AD Agreement (paras. 130–32).

On that basis, the Appellate Body concluded that simple zeroing "results in the levy of an amount of anti-dumping duty that exceeds an exporter's margin of dumping, which . . . operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales

made by an exporter," such that simple zeroing in periodic reviews is inconsistent with GATT Article VI:2 and AD Agreement Article 9.3. As a final note, the Appellate Body stated that in its interpretation it had "been mindful of the standard of review provided in Article 17.6(ii)" but that, when interpreted in accordance with the customary rules of interpretation of public international law, GATT Article VI:2 and AD Agreement Article 9.3 "do not admit of another interpretation as far as the issue of zeroing raised in this appeal is concerned" (paras. 133–36). For the same reasons, the Appellate Body reversed the panel's finding that simple zeroing, as applied by the U.S. Department of Commerce in the five periodic reviews at issue in this dispute, is not inconsistent with GATT Articles VI:1 and VI:2 and AD Agreement Articles 2.1 and 9.3. (paras. 137–39).

In addition to the substantive law issues, the Appellate Body also addressed the role of precedent in relation to the issue of zeroing. The panel had decided not to follow the legal interpretation of the Appellate Body in *U.S.—Zeroing (EC)*[5] and *U.S.—Zeroing (Japan)*,[6] in which the Appellate Body had found that simple zeroing in periodic reviews is inconsistent with GATT Article VI:2 and AD Agreement Article 9.3. Instead, the panel found this kind of zeroing to be consistent with the GATT and the AD Agreement. On appeal, Mexico argued that the panel's approach was inconsistent with the first sentence of Article 11 of the WTO's Dispute Settlement Understanding (DSU), "which stipulates that the function of panels is to assist the [Dispute Settlement Body (DSB)] in discharging its responsibilities under the DSU." As further support, Mexico referred to DSU Articles 3.2 and 3.3 (paras. 146–47, 154).

In examining this issue, the Appellate Body observed that it is "well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties." It noted, however, that it would be incorrect to infer that "subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB" (para. 158). The Appellate Body further explained that "[d]ispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports," which (if adopted) are "often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes." Thus, it said, "the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system." The Appellate Body further stated that "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (para. 160).

The Appellate Body then noted that "[i]n the hierarchical structure contemplated in the DSU, panels and the Appellate Body have distinct roles to play"—referring to DSU Articles 17.6 and 17.13. It pointed out that the "creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under

[5] Appellate Body Report, United States—Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (adopted May 9, 2006).

[6] Appellate Body Report, United States—Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (adopted Jan. 23, 2007).

the covered agreements," which "is essential to promote 'security and predictability' in the dispute settlement system, and to ensure the 'prompt settlement' of disputes." Here, the Appellate Body explained, "The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU." According to the Appellate Body, "Clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law," and the "relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case" (para. 161).

With all this in mind, the Appellate Body said that it was "deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues" as those involved in this dispute, and that the panel's approach had "serious implications for the proper functioning of the WTO dispute settlement system." Nevertheless, the Appellate Body considered that "the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue," and because the panel's findings have been reversed, there was no need for "an additional finding that the Panel also failed to discharge its duties under Article 11 of the DSU" (para. 162).

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The Appellate Body has made clear in a series of decisions that it does not look favorably on the practice of "zeroing," regardless of the type of zeroing or the type of antidumping proceeding in which it is used. To date, the Appellate Body has found all types of zeroing brought before it to violate WTO rules.[7] Its decision in this case continues that trend, with yet another condemnation of zeroing.

To some degree, the Appellate Body's clear stance on zeroing makes it seem that the issue has been definitively addressed, as the Appellate Body is the highest judicial body in the WTO dispute settlement system. However, there are several countervailing forces at work. First, several panels have differed with the Appellate Body regarding the permissibility of certain types of zeroing. In the dispute at hand—for the second time recently—a WTO panel declined to follow a prior ruling by the Appellate Body on the permissibility of a particular type of zeroing (the *U.S.—Zeroing (Japan)* panel, mentioned above, was the first). Second, the issue of zeroing has been actively discussed as part of the ongoing negotiations on trade remedies in the Doha Round; despite the strong opposition to zeroing from most WTO members, the current draft text prohibits zeroing only in one specific situation, while allowing it in others.[8] Thus, despite its minority position, the United States has been somewhat successful in pushing its views, though many other members have been quite critical of the most recent draft.[9] Finally, the Appellate Body's reasoning on the issue of zeroing has met with some strong criticism in the legal literature. In particular, given that the text of the agreements does not address the issue

[7] The Appellate Body reviews its past findings on zeroing in paragraph 66 of the instant case.

[8] *See* WTO Doc. TN/RL/W/213 (November 30, 2007).

[9] *See, e.g.,* WTO Doc. TN/RL/W/214/Rev.2 (December 18, 2007).

explicitly, and in view of the special standard of review for legal issues under the AD Agreement,[10] some have argued that the Appellate Body's findings constitute "overreaching."[11]

In addition to these substantive legal issues relating to zeroing, the instant dispute also raised a systemic issue concerning panels that ignore the Appellate Body's prior legal interpretations related to zeroing. In addressing this issue, the Appellate Body stated, inter alia: "'Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" (para. 160). The implications of the Appellate Body's statements on this issue leave a bit of uncertainty. For instance, will the standard apply differently to the Appellate Body itself, as opposed to panels? Note that the Appellate Body refers to "an adjudicatory body"—in the singular—perhaps implying that only the Appellate Body may depart from prior rulings on the basis of "cogent reasons." Alternatively, the "adjudicatory body" it mentions may be the Dispute Settlement Body, which would thus include panels. Since there are several ongoing zeroing disputes, the panels in question may have the opportunity to test the boundaries of the Appellate Body's new standard.

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[10] In this regard, AD Agreement Article 17.6(ii) states: "Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

[11] *See, e.g.,* Roger P. Alford, *Reflections on US-Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 44 COLUM. J. TRANSNAT'L L. 196 (2006).