RECENT DEVELOPMENTS

United States—Final Anti-Dumping Measures on Stainless Steel from Mexico: Row over Zeroing Reveals Judicial Quagmire

I. OVERVIEW

Threatening to further derail Doha Round negotiations at the World Trade Organization (WTO) is the recent Appellate Body report striking down the United States Department of Commerce's (Commerce) use of zeroing in periodic reviews.[1] At issue is Commerce's method of calculating antidumping duties on imported stainless steel from Mexico.[2] Mexico challenged the practice before a WTO panel, asserting that zeroing in periodic reviews is inconsistent with the General Agreement

1. *See* Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter *United States—Stainless Steel from Mexico*].
2. *Id.* ¶ 75.

on Tariffs and Trade 1994 (GATT) and the Antidumping Agreement.[3] The panel declined to accept Mexico's argument and held zeroing in periodic reviews consistent with the GATT and Antidumping Agreement.[4]

Mexico promptly appealed the panel report to the Appellate Body, arguing that the panel erred in its finding and, additionally, that the panel violated its obligation under the Dispute Settlement Understanding (DSU) to follow previous Appellate Body reports prohibiting zeroing in periodic reviews.[5] The Appellate Body *held* that the use of zeroing in periodic reviews is inconsistent with the GATT and the Antidumping Agreement but that the panel's failure to follow previous Appellate Body reports on the same issue was not in violation of its obligations under the DSU. Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 165, WT/DS344/AB/R (Apr. 30, 2008).

II. BACKGROUND

The architects of the WTO set out to establish a world trade regime with the twin aims of providing an efficient and reliable dispute mechanism and increasing predictability and security in trade practices.[6] Toward this end, the drafters created a dispute settlement system that exhibits many characteristics of a domestic court.[7] Furthermore, WTO

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3. Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.13, WT/DS344/R (Dec. 20, 2007) [hereinafter Panel Report, *United States—Stainless Steel from Mexico*].

4. *Id.* ¶ 8.1.

5. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶¶ 8, 19.

6. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1141 (1994), *available at* http://www.wto.org/English/docs_e/legal_e/19-adp.pdf [hereinafter Antidumping Agreement]. The WTO sought to correct the internal flaws of the post-World War II GATT. The GATT was not an international organization, but rather an intergovernmental treaty with institutional shortcomings. Professor Jackson described these shortcomings as "birth defects" and enumerated the following: lack of a charter giving the GATT a legal personality and system of rules, the fact it only had "provisional" application, a right for parties to maintain inconsistent practices under a "grandfather clause," ambiguity about its authority, and decision-making ability. The WTO kept the GATT principles but provided an organizational structure and a dispute settlement mechanism. *See* John H. Jackson, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 161, 163 (Anne O. Krueger ed., 1998).

7. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 104 (2d ed. 2006). The dispute settlement institutions enjoy compulsory jurisdiction, disputes are settled by applying rule of law, decisions are binding on parties, and sanctions may be imposed if members do not comply with a decision.

members commit themselves to set a tariff schedule that applies equally to all other members.[8] In short, the WTO creates an international trade regime where members are committed to certain levels of tariffs and bound to settle disputes regarding those tariffs through the dispute settlement mechanism.[9]

A. Dumping and Antidumping

Notwithstanding these commitments, in specified circumstances WTO law permits members to deviate from their obligations in order to protect certain overriding interests.[10] One such circumstance is where a member is subjected to a predatory trade tactic known as dumping.[11] In its common form, dumping is international price discrimination: an exporter sells its goods abroad at a lower price than it sells that same product in its domestic market.[12] In theory, the foreign producer engaged in dumping unfairly and intentionally undersells the domestic competition to force it out of the market.[13] To combat dumping, members constructed a legal framework within the GATT/WTO regime. The primary organs of this framework are GATT article VI and the supplementary Antidumping Agreement. Article VI of the GATT sets forth the general provisions,[14] while the Antidumping Agreement guides their implementation and clarifies their terms.[15] After a determination of dumping is made under article 2 of the Antidumping Agreement,[16] governments may impose and collect antidumping duties under article 9.3.[17] In short, a margin of dumping is established under article 2, which then reflects the amount of antidumping duty a government can impose on an exporter under article 9.[18] However, the ambiguous language in article 2 engenders enormous tension between panel and Appellate Body

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8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

9. MATSUSHITA ET AL., *supra* note 7, at 3.

10. GATT art. VI.

11. *Id.*

12. Antidumping Agreement, *supra* note 6, art. 2.

13. Joseph E. Stiglitz, *Dumping on Free Trade: The U.S. Import Trade Laws*, 64 S. ECON. J. 402, 408 (1997).

14. *See* GATT art. VI. The first requirement for establishing dumping is that the export price be lower than the normal value (domestic price) of that product; second, that exports of such product cause or threaten to cause material injury to a domestic industry or materially retard the establishment of a domestic industry; third, there must be a causal relationship between dumping and the injury. *Id.*

15. *See* Antidumping Agreement, *supra* note 6, art. 2.

16. *Id.* arts. 2-3.

17. *Id.* art. 9.3.

18. *Id.* arts. 2, 9.

interpretations concerning how dumping margins are established.[19] The effect of this rift spills over into the calculation of antidumping duties and is the source of the controversy regarding zeroing.[20]

The noted case involves Commerce's controversial use of zeroing as a method for investigating dumping and calculating antidumping duties.[21] When Commerce conducts a dumping investigation, it first establishes multiple dumping margins for subgroups of the product under investigation and then determines an overall dumping margin for the product by adding up the margins from these subgroups.[22] Zeroing occurs when the margins that do not reflect dumping are disregarded or set at zero.[23] However, zeroing can also take place in the context of periodic reviews, where Commerce reviews all of an importer's transactions from the previous year and disregards those where the dumping margin is zero.[24]

The Appellate Body has developed a significant body of case law that prohibits zeroing in both original investigations[25] and periodic reviews.[26] In *United States—Final Dumping Determination on Softwood Lumber from Canada* (*U.S.—Softwood Lumber V*), the Appellate Body delegitimized zeroing in original investigations on the ground that it failed to establish one dumping margin for the dumped product "as a whole" and instead found multiple margins at the subgroup level.[27] The Appellate Body extended this reasoning to zeroing in periodic reviews in *United States—Laws, Regulations and Methodology for Calculating*

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19. *See id.*

20. *See United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 103.

21. *See id.* ¶¶ 71-75.

22. *Id.* ¶¶ 72-73.

23. *Id.* This form of zeroing is referred to as zeroing in original investigations and is not at issue in the noted case because the panel found it inconsistent with the GATT and the Antidumping Agreement. Panel Report, *United States—Stainless Steel from Mexico*, *supra* note 3, ¶ 8.1.

24. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 75. Periodic reviews are also referred to as "administrative reviews." The significant difference between zeroing in original investigations and zeroing in periodic reviews is that the latter applies to importers and the former to exporters. *See id.* ¶¶ 71-75.

25. *See* Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) [hereinafter Appellate Body Report, *United States—Softwood Lumber V*]; Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001).

26. *See* Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 166, WT/DS322/AB/R (Jan. 9, 2007) [hereinafter *United States—Zeroing (Japan)*]; Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006) [hereinafter Appellate Body Report, *United States—Zeroing (EC)*].

27. Appellate Body Report, *United States—Softwood Lumber V*, *supra* note 25, ¶ 97.

Dumping Margins, where it reversed the panel's finding that dumping margins can exist at the level of a transaction when an importer's liability for antidumping duties is assessed during a periodic review.[28] It clarified its opposition to zeroing in periodic reviews in *United States—Measures Relating to Zeroing and Sunset Reviews* (*United States—Zeroing (Japan)*) by highlighting the conflict created when zeroing is prohibited during the investigation but not during the duty assessment.[29] Referring to the WTO cornerstones of security and predictability, the Appellate Body held that multiple dumping margins for each transaction would "create uncertainty and divergences" in determinations made in original investigations and subsequent periodic reviews.[30]

Nonetheless, in the noted case, the Appellate Body was confronted with an appeal from a panel report that broke with the previous body of case law.[31] In doing so, the panel clung to the text of article 17.6(ii) of the Antidumping Agreement, providing that when two permissible interpretations of a provision exist, the panel should give deference to the authorities' measure—in this case Commerce's method of zeroing—if it is in conformity with one of those interpretations.[32] The panel's reasoning focused on the absence of the words "product as a whole" in the Antidumping Agreement and on its finding that the relevant articles, when read together, do not compel a definition of dumping based on an aggregation of all export transactions.[33]

B. The Absence of Stare Decisis in WTO Jurisprudence

It is pertinent to note that WTO panels are able to break from previous Appellate Body decisions because the judicial concept of stare decisis is absent from WTO jurisprudence.[34] Moreover, Appellate Body reports are not binding interpretations of WTO agreements.[35] As such, reports have little direct effect on other members because they do not

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28. Appellate Body Report, *United States—Zeroing (EC)*, *supra* note 26, ¶ 128.
29. Appellate Body Report, *United States—Zeroing (Japan)*, *supra* note 26, ¶ 126.
30. *Id.*
31. Panel Report, *United States—Stainless Steel from Mexico*, *supra* note 3, ¶ 7.115.
32. *Id.* ¶ 7.2.
33. *Id.* ¶ 7.117.
34. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *available at* http://www.wto.org/English/docs_e/legal_e/28-dsu.pdf [hereinafter DSU].
35. "While Appellate Body reports . . . shall be accepted unconditionally by the parties to the dispute, it is the exclusive authority of the Ministerial Conference and the General Council to adopt, pursuant to article IX:2 of the *WTO Agreement*, interpretations that are binding upon the WTO Membership." *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 158 n.308.

create precedents. Despite this lack of stare decisis, however, panel and Appellate Body judges treat previous reports as evidence of treaty practice and cite them frequently in decisions.[36]

Governing the WTO dispute settlement process is the DSU.[37] Article 3.2 describes the DSU as a "central element in providing security and predictability to the multilateral trading system."[38] However, tension results when article 3.2 is read in conjunction with article 11, which characterizes the panel's role as conducting its own objective review of the applicable facts and law.[39] In the noted case, the panel viewed article 11 as granting it the authority to break with previous Appellate Body reports—in this case, to hold zeroing permissible under the Antidumping Agreement.[40] The panel went so far as to acknowledge the Appellate Body's previous instruction to take into account other adopted panel reports when relevant to a dispute[41] but then declined to do so under the authority granted to it in article 11.[42] Furthermore, the panel referred to, and then flouted, language from *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (*United States—Oil Country Tubular Goods Sunset Reviews*) that described following previous Appellate Body reports as appropriate and "what would be expected from panels."[43] Despite these direct instructions from the Appellate Body, the panel addressed the textual conflict between articles 3.2 and 11 by reaffirming its sovereignty to make its own interpretation of the law.[44]

III. THE APPELLATE BODY'S DECISION

In the noted case, the Appellate Body reversed the panel's finding that simple zeroing in periodic reviews is consistent with GATT articles VI:1 and VI:2 and articles 2.1 and 9.3 of the Antidumping Agreement but did not make the additional finding that the panel failed to fulfill its

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36. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 14, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter Appellate Body Report, *Japan—Alcoholic Beverages II*].

37. *See* DSU art. 1.

38. *Id.* art. 3.2.

39. *Id.* art. 11.

40. Panel Report, *United States—Stainless Steel from Mexico*, *supra* note 3, ¶ 7.115.

41. *Id.* ¶ 7.103 (citing Appellate Body Report, *Japan—Alcoholic Beverages II*, *supra* note 36, at 14).

42. *Id.* ¶ 7.115.

43. *Id.* ¶ 7.104 (citing Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 188, WT/DS268/AB/R (Nov. 29, 2004)).

44. *Id.* ¶ 7.115.

obligations under article 11 of the DSU.[45] At the outset, the Appellate Body broke its zeroing analysis into three interconnected parts.[46] It first held that "dumping" and "margin of dumping" are exporter-related concepts for the purposes of article 9.3 of the Antidumping Agreement.[47] Second, it held dumping and margin of dumping to exist only for the totality of an exporter's transactions and not at the individual transactional level.[48] Third, it held Commerce's practice of disregarding the amount by which the export price exceeds the normal value in an export transaction—zeroing—impermissible in periodic reviews.[49] After holding zeroing inconsistent with the GATT and the Antidumping Agreement, the Appellate Body did not find the panel in violation of its duty under article 11 of the DSU.[50]

A. Are Dumping and Margin of Dumping Exporter- or Importer-Related Concepts?

After referring to the definitions of dumping in the GATT and the Antidumping Agreement and to the context in which the terms are used throughout the agreements, the Appellate Body held dumping and margin of dumping to be exporter-related concepts.[51] The Appellate Body paid special attention to the diction used by the drafters.[52] Specifically, it found compelling the phrase "*introduced* into the commerce of *another country*" used in both the GATT and the Antidumping Agreement's definition of dumping.[53] On this point, the United States argued that dumping and margin of dumping have different meanings in different parts of the agreements and thus they do not always relate to the exporter.[54] To counter this claim, the Appellate Body cited the opening phrase of article 2.1—"For the purpose of this Agreement"—to confirm its holding that one definition applies throughout the Antidumping Agreement.[55]

To buttress its conclusion, the Appellate Body referred to the context of various other provisions of the Antidumping Agreement that

45. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 165.
46. *Id.* ¶ 82.
47. *Id.* ¶¶ 83-96.
48. *Id.* ¶¶ 97-99.
49. *Id.* ¶¶ 133-136.
50. *Id.* ¶ 162.
51. *Id.* ¶ 89.
52. *Id.* ¶ 83.
53. *Id.* ¶ 86.
54. *Id.* ¶ 26.
55. *Id.* ¶ 84.

confirm dumping and margin of dumping as exporter-related concepts.[56] For example, articles 5.2(ii), 6.1.1, and 6.7 address antidumping investigations and place the known exporters of the product at the center of the investigation.[57] Additional support is found in article 6.10, which requires authorities to find a margin of dumping for each exporter of the product under investigation.[58] Further textual authority is found in article 8.1, which speaks to the receipt of voluntary undertakings from exporters to revise their prices or cease exporting at dumped prices.[59] Consequently, the plain meaning of the text, coupled with diverse and abundant use of the terms in various provisions, provides the Appellate Body with adequate grounds to find that dumping and margin of dumping are exporter-related concepts.[60]

B. Can Dumping and Margin of Dumping Be Found To Exist at the Level of a Transaction?

Having determined that dumping arises from the behavior of an exporter, the Appellate Body held that a proper dumping determination can only be made by examining an exporter's pricing behavior "as reflected in all of its transactions over a period of time."[61] In support of its conclusion, the Appellate Body emphasized the purpose of the Antidumping Agreement, namely, to combat the negative effects of "injurious dumping."[62] Injurious dumping, it claimed, can exist only when the domestic industry is negatively affected by dumping.[63] Thus, if injurious dumping can exist at the level of a transaction, the principles of the Antidumping Agreement are defeated.[64]

Furthermore, the Appellate Body found that if dumping and margin of dumping could exist at the transactional level, multiple margins of dumping would exist for each exporter and for the dumped product.[65] Such a situation is irreconcilable with a proper interpretation and application of certain provisions in the Antidumping Agreement.[66] Specifically, under article 3, multiple levels of dumping would be

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56. *Id.* ¶ 87.
57. *Id.*
58. *Id.* ¶ 88.
59. *Id.* ¶ 90.
60. *Id.* ¶ 95.
61. *Id.* ¶ 98.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* ¶ 99.
66. *Id.*

incompatible with an injury determination based on the total volume of dumped imports and its effect on domestic prices.[67] Equally important, separate margins of dumping for each transaction would render impossible the proper establishment of an individual margin of dumping for each exporter under numerous articles of the Antidumping Agreement.[68] Therefore, the principal purpose of the Antidumping Agreement and the proper execution of its various provisions prohibit dumping and margin of dumping to exist at the transactional level.[69]

C. Is It Permissible To Disregard the Amount by Which the Export Price Exceeds the Normal Value in Any Transaction?

After making two preliminary determinations—that dumping and margin of dumping are exporter-related concepts and that they cannot exist at the level of a transaction—the Appellate Body held that zeroing in periodic reviews is inconsistent with duty assessment proceedings under the GATT and the Antidumping Agreement.[70] The analysis on this point began with the text of article 9.3 of the Antidumping Agreement, which stipulates that an antidumping duty "shall not exceed the margin of dumping as established under Article 2."[71] Article 2 of the Antidumping Agreement restricts the margin of dumping from exceeding the difference of the average domestic price and the average export price established in the original investigation.[72] Thus, the Appellate Body found no basis from the text of article 2 or article 9.3 for "disregarding the results of comparisons," or setting them at zero, in cases where the export price exceeds the domestic price when calculating margin of dumping.[73]

To reinforce this point, the Appellate Body concentrated on text in the Antidumping Agreement explicitly addressing zeroing.[74] First, article 9.4 instructs "investigating authorities to disregard 'any zero and *de minimus* margins' . . . when calculating the weighted average margin of dumping to be applied to exporters that have not been individually investigated."[75] Also, in article 2.2.1, which addresses calculating domestic price, the text allows for certain expenses to be excluded from

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67. *Id.*
68. *Id.*
69. *Id.* ¶¶ 98-99.
70. *Id.* ¶ 103.
71. *Id.* ¶ 102.
72. *Id.*
73. *Id.* ¶¶ 102-103.
74. *Id.* ¶ 103.
75. *Id.*

the domestic price.[76] The Appellate Body used these two examples to bolster its finding that the Antidumping Agreement is the product of negotiation and its text reflects the will of its drafters: when interpretation of a provision was vulnerable to zeroing, it was explicitly prohibited; when disregarding a transaction is allowed, the process is explicitly set forth.[77]

To further illustrate its holding, the Appellate Body recalled its decision in *United States—Softwood Lumber V*, where it held that investigating authorities were allowed to undertake multiple averaging to establish dumping, but that an overall dumping margin must be calculated by aggregating all of the multiple averages.[78] Similarly, the Appellate Body cited *United States—Zeroing (Japan)* to reiterate the need for consistency throughout the antidumping process.[79] In that case, the Appellate Body detailed how zeroing in one instance, but not the other, would create a situation where certain models of the product under investigation would be neglected during the final assessment stage.[80] Thus, the result of allowing zeroing in periodic reviews was a "mismatch" between the dumped product and the product defined by the investigating authorities.[81]

D. Did the Panel Fulfill Its Duty Under Article 11 of the DSU?

After striking down zeroing, the Appellate Body next addressed whether the panel was derelict in discharging its responsibilities under the DSU and relevant WTO agreements.[82] Central to the Appellate Body's analysis is the text of article 11 of the DSU.[83] The first sentence of article 11 directs the panel "'to assist the DSB [dispute settlement body] in discharging its responsibilities' under [the DSU] and the covered agreements."[84] The Appellate Body interpreted this phrase as embodying the panel's general obligation found in the text of article 3.2 of the DSU to provide "security and predictability" by clarifying relevant agreements "in accordance with customary rules of interpretation of

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76. *Id.* When calculating the price of the dumped good in its domestic market, investigating authorities may zero any nonrecurring item of cost which may benefit current or future production. Antidumping Agreement, *supra* note 6, art. 2.2.1.

77. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 103.

78. *Id.* ¶ 104.

79. *Id.* ¶ 105.

80. *Id.* (citing Appellate Body Report, *United States—Zeroing (Japan)*, *supra* note 26, ¶ 128).

81. *Id.* ¶ 107.

82. *Id.* ¶ 145.

83. *Id.* ¶ 155.

84. DSU art. 11.

public international law."[85] The Appellate Body next examined the second sentence of article 11, which outlines two specific functions of the panel to be conducted in accordance with the general spirit of the DSU, specifically, to "make an objective assessment of the matter before it" and to "make such other findings as will assist the DSB."[86] Because the two sentences are linked together by the word "accordingly," the Appellate Body read into article 11 a duty for the panel to promote security and predictability through its findings and conclusions.[87]

To further elucidate the panel's role, the Appellate Body cited its decision in *Japan—Taxes on Alcoholic Beverages* (*Japan—Alcoholic Beverages II*), where it stressed the importance of "creat[ing] legitimate expectations among WTO Members."[88] Additionally, the Appellate Body referred to its holding in *United States—Oil Country Tubular Goods Sunset Reviews*, which noted that following previous Appellate Body reports "is not only appropriate" but also "expected from panels, especially where the issues are the same."[89] Moreover, the need for consistency is illustrated by the significance members attach to previous Appellate Body reports.[90] These reports are often the basis for members' legal arguments and guide panels and the Appellate Body in future disputes.[91] Just as importantly, members rely on these rulings when enacting or modifying national laws to conform with adopted reports.[92] Thus, to ensure predictability and security, the Appellate Body held that "absent cogent reasons," panels should resolve legal disputes the same way as similar previous disputes.[93]

In addition, the Appellate Body found an inherent desire to bring consistency and stability to the dispute settlement system in its hierarchical structure.[94] In keeping with the goals of security and predictability, members must be reassured that others will not repeatedly

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85. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 157 (quoting DSU art. 3.2).

86. *Id.* ¶ 155.

87. *Id.* ¶¶ 156-157.

88. *Id.* ¶ 158 (citing Appellate Body Report, *Japan—Alcoholic Beverages II*, *supra* note 36, at 14). *Japan—Alcoholic Beverages II* dealt with the effect of previously adopted panel reports; however, in a later case, the Appellate Body held that this reasoning applies to adopted Appellate Body reports. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSW by Malaysia*, ¶ 109, WT/DS58/AB/RS (Oct. 22, 2001).

89. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 159.

90. *Id.* ¶ 160.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* ¶ 161.

bring the same dispute before different panels.[95] Consequently, the panel's failure to follow previous Appellate Body reports on the same issue "undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations."[96]

Despite being "deeply concerned" about the serious implications for dispute settlement, the Appellate Body traced the panel's failure to "its misguided understanding of the legal provisions at issue."[97] Instead of finding the panel in violation of its duties, the Appellate Body simply corrected the panel's errors and instructed it to follow previous Appellate Body reports "absent cogent reasons" to do otherwise.[98]

IV. ANALYSIS

Once widely recognized as the paradigmatic international organization,[99] the WTO is suffering from a number of setbacks. Chief among them is the growing chasm between the United States and other WTO members regarding zeroing.[100] The drafters of the GATT and Antidumping Agreement feared that an antidumping provision could open the door for protectionism under the guise of a remedy for unfair trade practices.[101] Those fears have come home to roost.

On substance, the Appellate Body correctly analyzed articles 2 and 9.3 of the Antidumping Agreement by first examining the plain language of the text and then applying those meanings to the Agreement as a whole.[102] In relation to the first element of its holding, the Appellate Body clearly demonstrated from the numerous references to exporters and export prices that the drafters intended antidumping duties to be targeted at the pricing behavior of foreign producers.[103] Unlike the Appellate Body, the panel clung to the faulty logic that because importers pay antidumping duties in periodic reviews, an importer-specific

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95. *Id.*
96. *Id.*
97. *Id.* ¶ 162.
98. *Id.* ¶¶ 160-162.
99. *See* MATSUSHITA ET AL., *supra* note 7, at 14-17.
100. *See* Jeffrey W. Spaulding, Note, *Do International Fences Really Make Good Neighbors? The Zeroing Conflict Between Antidumping Laws and International Obligations*, 41 NEW ENG. L. REV. 379 (2007) (discussing the conflict between the United States and other WTO members over zeroing).
101. The drafters of the Antidumping Agreement used language that requires antidumping authorities to make a "fair comparison" between the export price and normal value to combat protectionism. Article 2.4.2 of the Antidumping Agreement guides authorities in making this determination. *See* Antidumping Agreement, *supra* note 6, art. 2.4.2.
102. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶¶ 77-109.
103. *See id.* ¶¶ 83-96.

characterization of antidumping duties must be taken into consideration when interpreting article 9.3.[104] It is true, as the panel claimed, that antidumping duties are paid by importers, but the duties levied upon or collected from importers are a mere reflection of the margin of dumping established for exporters.[105] Thus, regardless of an importer's obligation to pay Commerce an antidumping duty, exporters are the intended and actual subjects of antidumping duties.

Next, the Appellate Body properly determined that dumping and margin of dumping cannot exist at the level of a transaction.[106] To reach this conclusion, it looked first to the purpose of the Antidumping Agreement: specifically, the intent of the Antidumping Agreement to blunt the impact of injurious dumping on domestic industries.[107] Although the provisions are somewhat ambiguous on how multiple margins are to be aggregated,[108] it would be impossible to prove injury to the entire industry without aggregating all of the transactions for the dumped product. In other words, certain importers may have a commercial relationship with an exporter engaged in dumping; other importers may not. In order to establish injury to the domestic industry in its entirety, the existence, nonexistence, and magnitude of dumping must be gauged for all exporters of the subject product. Also, the Appellate Body reasoned that if margins of dumping can exist at the transactional level, then multiple margins of dumping exist for a single exporter.[109] Such a situation, it held, is incompatible with various provisions of the Antidumping Agreement—when read as a whole—that provide for a single margin of dumping.[110]

Contrary to the panel's holding in support of zeroing in periodic reviews, there are textual and contextual bases in the Antidumping Agreement for prohibiting zeroing at this stage. Specifically, as the Appellate Body illustrated, the text of the Antidumping Agreement speaks directly to two instances where zeroing is explicitly permitted.[111] Thus, in keeping with the customary rules of interpretation of public international law as required by article 17.6(ii) of the Antidumping Agreement, the Appellate Body interpreted the provision in accordance

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104. Panel Report, *United States—Stainless Steel from Mexico*, *supra* note 3, ¶ 7.124.
105. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 94.
106. *Id.* ¶¶ 97-99.
107. *Id.*
108. *See* Antidumping Agreement, *supra* note 6, art. 9.3.
109. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 99.
110. *Id.*
111. *Id.* ¶ 103; *see supra* text accompanying notes 74-77.

with the terms of the treaty's context and purpose as required by the Vienna Convention on the Law of Treaties.[112]

After clarifying the nature of dumping and dumping margins, the Appellate Body directly invalidated the practice of zeroing in periodic reviews.[113] In keeping with its duty to interpret a provision within the context of a treaty, and consistent with previous case law, the Appellate Body properly held zeroing in periodic reviews inconsistent with the GATT and Antidumping Agreement.[114] Perhaps the Appellate Body's most cogent argument on this point is that article 9.3 of the Antidumping Agreement is indentured to article 2.[115] In other words, the margin of dumping established in article 2 restricts the calculation of the antidumping duty under article 9.3 by operating as a ceiling.[116] Thus, if zeroing is prohibited at the investigation stage—and subsequently when the margin of dumping is calculated—then it is certainly incongruous to allow zeroing during a periodic review.[117] The Appellate Body's holding on this issue is more commonsensical than profound: zeroing in periodic reviews would result in a final duty assessment that does not reflect the process used to establish the very duty itself.

Surprisingly, the Appellate Body did not find the panel in violation of its responsibilities under the DSU and relevant agreements.[118] To a large extent, this decision was likely a deliberate effort not to impose de facto stare decisis into WTO jurisprudence. That is, if the Appellate Body were to hold the panel in violation for breaking with previous Appellate Body decisions on the same issue, it would effectively be injecting a common law tradition into the WTO that was intentionally and explicitly excluded from the DSU. However, the Appellate Body's decision to stay within its mandate may have the paradoxical effect of giving the panel more power than the framers of the DSU originally envisioned. In concluding that the panel did not violate the DSU, the Appellate Body reaffirmed that the panel is to follow previous disputes "absent cogent reasons" to the contrary.[119] Such broad terminology, coupled with the panel's duty under article 11 to make its own objective assessment of the facts and law, essentially provides it with a green light

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112. *See* Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

113. *United States—Stainless Steel from Mexico*, *supra* note 1, ¶ 103.

114. *Id.* ¶¶ 133-134.

115. *Id.* ¶ 102.

116. *Id.*

117. *Id.*

118. *Id.* ¶ 162.

119. *Id.* ¶¶ 161-162.

to break with previous Appellate Body reports anytime it believes it has a solid basis for a disparate interpretation.

More alarming is that the decision comes at a crucial juncture in WTO history. Developed countries are currently at loggerheads with the developing world over agricultural subsidies. Trade talks in Geneva this past summer ended abruptly as negotiations over special safeguard mechanisms disintegrated and angry trade ministers from developing countries stormed out of WTO headquarters.[120] Against this backdrop, the zeroing discord pits the United States against the rest of the world at a time when unity is in short supply. The United States Trade Representative referred to the noted case as an example of the Appellate Body "inventing new obligations" under the WTO.[121] In contrast, other WTO members have formed groups like the "Friends of Anti-Dumping Negotiations," which is pushing to renegotiate the Antidumping Agreement to include an even more explicit ban on zeroing.[122]

The likely outcome is that once the agricultural hurdle is passed, members will renegotiate the Antidumping Agreement to explicitly prohibit zeroing in periodic reviews. The reasons are simple: no other WTO member is currently engaged in zeroing, and the United States' dwindling financial clout on the global stage does not give it the bargaining power it once enjoyed. But just as importantly, ending zeroing will be good for the U.S. economy. As hinted at above, zeroing is simply a form of protectionism disguised as an antidumping duty. The effect of zeroing artificially increases the price of goods exported to the United States in the name of protecting domestic industries from injury. Once zeroing is removed, consumers will benefit from lower-priced imports, while legitimate antidumping protections will remain in force to protect domestic industries.

V. CONCLUSION

The Appellate Body's decision preserves the integrity of the WTO antidumping regime by holding zeroing inconsistent with the GATT and Antidumping Agreement. But by failing to rein in panels that break from well-developed bodies of case law, the Appellate Body abandoned its

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120. Stephen Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 30, 2008, *available at* http://www.nytimes.com/2008/07/30/business/worldbusiness/30trade.html?_r=l&scp=1&sq=World%20Trade%20Collapse&st=cse.

121. Frances Williams, *WTO Court Delivers Rebuke on 'Zeroing,'* FIN. TIMES, May 1, 2008, World News, at 2.

122. World Trade Org. [WTO], Country Groupings, http://www.wto.org/english/thewto_e/minst_e/min05_e/brief_e/brief25_e.htm (last visited Mar. 16, 2009).

duty to advance security and predictability in the dispute settlement system. At this current juncture, the Appellate Body's stance against zeroing—at any stage of the antidumping process—is thoroughly articulated and strongly supported by the text and purpose of the GATT and Antidumping Agreement. However, the noted case marks a pivotal point in the storied history of the WTO: given the Appellate Body's unwillingness to read a requirement of stare decisis into the DSU, will members take on the United States' use of zeroing by either renegotiating the Antidumping Agreement to add an even more explicit ban on zeroing or renegotiating the DSU to add the judicial principle of stare decisis into WTO jurisprudence? It is almost certain the United States will continue its use of zeroing regardless of pressure from the Appellate Body and other members. It is less certain how panels will approach future issues of zeroing in periodic reviews. But given the Appellate Body's deference, it appears that the only way to return the pillars of predictability and security to the WTO is to take the zeroing and stare decisis discords out of the judicial branch and bring them back to the drawing board.

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