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Panel 4: View from the Bench and the Bar Roundtable: A Year in Review

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A. Background

1. WTO jurisprudence relating to "zeroing" in antidumping determinations is impressive in terms of quantity. Unfortunately, this is largely due to the continued rejection of certain Appellate Body rulings by one party to the disputes and by a number of panels.
2. The first two disputes: *EC - Bed Linen* (AB and panel reports adopted on 12 March 2001) and *US - Softwood Lumber V* (AB and panel reports adopted on 31 August 2004) did not give rise to much controversy. They concerned "model" zeroing in original investigations, the inconsistency of which with Article 2.4.2 of the Antidumping Agreement is largely uncontested. Since 2006 the following disputes have concerned various aspects of zeroing in antidumping investigations (in order of date of adoption of AB and/or panel reports, dates in parentheses): *US - Zeroing (EC)* (9 May 2006), *US - Softwood Lumber V (21.5)* (1 September 2006), *US - Zeroing (Japan)* (23 January 2007), *US - Zeroing (Ecuador)* (20 February 2007), *US - Stainless Steel (Mexico)* (20 May 2008), *US - Shrimp (Thailand)* (1 August 2008), *US - Continued Zeroing* (19 February 2009).
3. In two further disputes final adoption has not yet taken place: in *US-Zeroing (Japan) (21.5)* the panel report was circulated on 24 April 2009 and in *US – Zeroing (EC) (21.5)* the Appellate Body report was circulated last week, on 14 May 2009. These reports focus on the scope of a party's obligation of compliance.
4. In the "zeroing" disputes the Appellate Body has had to address various types of zeroing. In *US - Stainless Steel (Mexico)* the Appellate Body summarized its previous "zeroing" jurisprudence as follows:

> "…the Appellate Body has found zeroing to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in the original investigations in five disputes. The Appellate Body has also found zeroing in period reviews to be inconsistent with Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement in two disputes. In one of those disputes, the Appellate Body further found zeroing in new shipper reviews to be inconsistent with Article 9.5 of the Anti-Dumping Agreement. Moreover, in that same dispute, the Appellate Body found that the United States had acted inconsistently with Article 11 of the Anti-Dumping Agreement because it had relied on margins of dumping calculated in previous proceedings in using zeroing in two sunset review determinations." (par. 66, footnotes omitted)

5. The "zeroing" cases have amounted to a kind of vicious circle, constituting a *de facto* chain of reversals, where the Appellate Body has reversed a panel's findings, subsequently the Appellate Body's reasoning has been rejected, that is, "reversed" by another panel, following which that panel's findings have again been reversed by the Appellate Body. Panels have emphasized that they are not bound by Appellate Body reports. While often recognizing the systemic considerations in favour of following adopted panel and Appellate Body reports, panels have balanced these considerations against their obligation under Article 11 of the DSU to make an objective assessment of the matter before them and to clarify the existing provisions of covered agreements in accordance with Article 3.2 of the DSU.
6. Today's discussion will focus on two of the most recent disputes: *US - Stainless Steel (Mexico)* and *US - Continued Zeroing*.

B. US - Stainless Steel (Mexico)

7. In *US - Stainless Steel (Mexico)* the complaining party challenged "model" zeroing in original investigations and "simple" zeroing in periodic reviews. The Appellate Body had previously found that "simple" zeroing was WTO-inconsistent: in *US - Zeroing (Japan)* (reversing the panel's conclusions) and *US - Zeroing (EC)*. In its arguments before the panel the United States explicitly rejected the Appellate Body's line of reasoning in *US - Zeroing (Japan)*, finding that of the panel more persuasive.
8. The panel in *US - Stainless Steel (Mexico)* disagreed with the Appellate Body's earlier conclusions with respect to the WTO-inconsistency of "simple" zeroing. In

doing so, it criticized the Appellate Body's expectation that panels should follow adopted panel or Appellate Body reports, finding no basis for this in the DSU (par. 7.105). The panel emphasized that "the preservation of a consistent line of jurisprudence should not override a panel's task to carry out an objective examination of the matter before it through an interpretation of the relevant treaty provisions in accordance with the customary rules of public international law". It believed it had "no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews". It was aware that its reasoning was similar to that reversed by the Appellate Body in previous cases but "felt compelled to depart from the Appellate Body's approach", in light of its obligation in Article 11 of the DSU (paras. 7.105-7.106).

9. On appeal, the Appellate Body reversed this panel's conclusions and found that simple zeroing, "as such" and as applied by US in the periodic reviews, was inconsistent with Article VI:2 of GATT 1994 and Article 9.3 of the Anti-Dumping Agreement. The Appellate Body's analysis rested on treating the concepts of "dumping" and "margins of dumping" as "exporter-specific" (see e.g. par. 94).
10. In its appeal, Mexico claimed that the panel had violated Article 11 of the DSU, because "by making findings and conclusions that are identical to those that have been reversed by the Appellate Body in previous disputes, it failed to assist the DSB in discharging its responsibilities under the DSU and the covered agreements" (par. 145). The Appellate Body confirmed that its reports were not binding, except with respect the particular dispute between the parties. However, it added (and invoked several reasons for this) that this: "does not mean 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".
11. The Appellate Body emphasized that: "the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. 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" (par. 158).

12. The Appellate Body also addressed its position in the WTO dispute settlement mechanism. It pointed out that Articles 17.3 and 17.6 of the DSU create a hierarchical structure and assign a special role to this organ. It went on to say:

> "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 the covered agreements. This is essential to promote 'security and predictability' in the dispute settlement system, and to ensure the 'prompt settlement' of disputes. 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. 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. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case." (par. 159)

13. However, the Appellate Body did not rule that the panel had violated Article 11 of the DSU. In its opinion, the panel's decision was due to "its misguided understanding of the legal provisions at issue", which had been corrected. It decided not to make the finding that the panel had also failed to discharge its duties under Article 11 of the DSU (par. 162).

C. US - Continued Zeroing

14. In *US – Continued Zeroing*, the European Communities challenged the continued application of anti-dumping duties resulting from anti-dumping orders in a whole range of proceedings (original investigations, periodic reviews and sunset reviews).
15. In its arguments before the panel, the United States once again contested the previous findings of the Appellate Body in *US – Stainless Steel (Mexico)*, among others, the concept of "product as a whole" and the proposition that the terms "dumping" and "margin of dumping" are "exporter-specific". The panel made clear that it shared the respondent's criticism. One of the panel members submitted a separate opinion, in which he gave support to the Appellate Body's reasoning regarding these issues,

though he emphasized that they reflected his objective examination of the facts and legal issues (par. 9.1 ff.).

16. The panel stated that it had "generally found the reasoning of earlier panels on these issues to be persuasive" and that the position of the United States reflected a "permissible interpretation", within the meaning of Article 17.6 of the Anti-Dumping Agreement. However, the panel acknowledged that it was "faced with a situation where the Appellate Body reports, adopted by the DSB, have consistently reversed the findings in the mentioned panel reports that simple zeroing in periodic reviews is not WTO-inconsistent". It noted the "consistent line of reasoning underlying the Appellate Body's conclusion regarding simple zeroing in periodic reviews" (paras. 7.169-170). Just like the panel in *US – Stainless Steel (Mexico)*, it engaged in a long discussion of the role of jurisprudence and adopted Appellate Body reports, as well as a panel's responsibilities under Article 11 of the DSU. It noted that a panel need have "cogent reasons for <u>any</u> decision it reaches, regardless of whether or not there are any relevant adopted panel reports, and whether or not the panel follows such reports" (par. 7.180).

17. The panel nevertheless concluded: "Given the consistent adopted jurisprudence on the legal issues that are before us with respect to simple zeroing in periodic reviews, we consider that providing prompt resolution to this dispute in this manner will best serve the multiple goals of the DSU, and, on balance, is furthered by following the Appellate Body's adopted findings in this case" (par. 7.182). Ultimately, the panel found the various instances of zeroing inconsistent with Article 2.4.2 of the Anti-Dumping Agreement (use of model zeroing in original investigations), Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of GATT 1994 (application of simple zeroing in periodic reviews), and Article 11.3 of the Anti-Dumping Agreement (reliance in sunset reviews on dumping margins obtained through zeroing in prior investigations).

18. On appeal, the Appellate Body again invoked its analysis, based on dumping as an exporter-specific concept, along the lines of its reasoning in *US - Stainless Steel (Mexico)*. It should be noted that one member of the Division reviewing the appeal had previously served as a panelist on a "rebellious" panel, *US - Zeroing (Japan)*.

19. The Appellate Body's conclusion on the inconsistency of simple zeroing in periodic reviews with Article 9.3 of the Antidumping Agreement and Article VI:2 of GATT 1994 was supported by a "concurring opinion" of one of the Appellate Body members. This member noted that the interpretative debate about "zeroing" had demonstrated "the robustness of the WTO's system of dispute settlement, but also its limits". After pointing out various problems with the interpretation of certain provisions of the Antidumping Agreement, the author of the opinion concluded:

> "There is little point in further rehearsing the fine points of these interpretations. In my view, there is every reason to survey this debate with humility. There are arguments of substance made on both sides; but one issue is unavoidable. In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of "dumping", it cannot bear a meaning that is both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of Article 17(6)(ii). The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come." (par. 312)

D. Issues/Questions for Discussion

20. The following issues come to mind in the debate on the precedential effect of Appellate Body rulings: (i) the role and position of the Appellate Body in the WTO dispute settlement system, including the relationship between the Appellate Body and panels, (ii) the problem of an erroneous interpretation by the Appellate Body and possible steps that may be taken by Members if such case occurs, (iii) the extent of the obligation of parties to a dispute to accept a ruling and the interpretation of the Appellate Body, in particular, the scope of the obligation in Article 17.14 of the DSU to unconditionally accept an adopted report of the Appellate Body.

Role of the Appellate Body

21. There is no doubt that the Appellate Body is the principal judicial organ in the WTO dispute settlement system. As it has itself explained, the DSU, in particular Articles 17.3 and 17.6, create a hierarchical structure and assign a special role to this organ. It is the Appellate Body which is the organ primarily responsible for the clarification of the covered agreements and for providing security and predictability to the multilateral trading system, as provided for in Article 3.2 of the DSU.
22. This hierarchical structure and the Appellate Body's special responsibility must be recognized by panels. Panels should not easily assume that there exist "cogent reasons" to disregard previous Appellate Body rulings in earlier cases. Nor should panels easily assume that Article 11 of the DSU requires them to look for "flaws" in the Appellate Body's reasoning. As the "zeroing" disputes have indicated, the questioning by panels of the authority of the Appellate Body has a negative effect on the dispute settlement system and, in fact, undermines its objective of providing security and predictability. In this context, one may further ask: what is achieved by a panel's rejection of the Appellate Body's reasoning? Surely a panel cannot expect, in a series of cases like the "zeroing" disputes, that the Appellate Body will finally yield to an interpretation preferred by the panel?

Erroneous Interpretation of the Appellate Body

23. No interpretation is ever fully satisfactory to everyone: there are always as many interpretations as there are lawyers. Members are not deprived of means to correct what they consider an erroneous interpretation of the Appellate Body. They may request an authoritative interpretation on the basis of Article IX:2 of the WTO Agreement. They may also suggest amendments (as the United States has done) to the relevant agreement. But Members should not engage in a crusade against the Appellate Body, even for the sole reason that this could one day backfire against them.

Unconditional Acceptance of an Appellate Body Ruling

24. Article 17.14 explicitly provides that an Appellate Body report "shall be adopted by the DSB and *unconditionally* accepted" by the parties to a dispute. There is no similar requirement with respect to panel reports: Article 16.4 of the DSU only states that a panel report shall be adopted unless appealed or rejected by consensus.
25. Can the statements and actions of the United States relating to the Appellate Body rulings in the "zeroing" disputes be regarded as an "unconditional acceptance" of the Appellate Body reports in question? Of course, by virtue of Article 17.14, parties to a WTO dispute have the right to express their *views* on an Appellate Body report. However, the United States has done more to "express its views"; its actions have amounted to a continuous *non-acceptance* of the adopted "zeroing" reports, taking the form of a systematic undermining the reasoning and authority of this organ. The United States has repeatedly referred to the Appellate Body's reasoning in a previous adopted report as "erroneous" and invited panels to "refrain from adopting the Appellate Body's reasoning" (e.g. *US- Continued Zeroing*, par. 7.120). It has placed an emphasis on the number of panelists disagreeing with the Appellate Body, their "caliber … and …. manifest expertise in antidumping",[1] clearly with an intent to question the value of the Appellate Body's legal reasoning.
26. There is no "unconditional acceptance" of an Appellate Body ruling if it is clear from a party's actions that it will accept such ruling but only *on the condition* that the Appellate Body applies this party's interpretation of a WTO agreement.

Final Question

27. Has *US - Continued Zeroing* put an end to the struggle between panels and the Appellate Body in the context of the precedential effect? Even if so, it seems that the question of "zeroing" will lead to further problems: as recent jurisprudence indicates, the debate is now likely to shift to the scope of the obligation to comply with DSB recommendations and rulings.

[1] United States – Final Anti-Dumping Measures on Stainless Steel from Mexico (AB-2008-1), Appellee Submission of the United States of America, 25 February 2008, par. 139.