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## Reflections on US - Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body

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### Recommended Citation

Roger P. Alford, *Reflections on US - Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 Colum. J. Transnat'l L. 196 (2006).

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# Essays on the World Trade Organization

## Reflections on *US—Zeroing*: A Study in Judicial Overreaching by the WTO Appellate Body

ROGER P. ALFORD\*

*This Essay discusses the role of the WTO Appellate Body through the lens of its decision in United States—Laws, Regulations, and Methodology for Calculating Dumping Margins. The author argues that the Appellate Body ignored textual obligations to defer to administering authorities, improperly engaged in fact-finding, and rejected a well-established doctrine of justiciability—all of which go to the heart of judicial restraint. In so doing, the Appellate Body inappropriately expanded the WTO's authority to hear facial challenges. Ten years after the Body's first report, we should look at the WTO mechanism for dispute resolution with some concern.*

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## I. INTRODUCTION

The World Trade Organization's dispute settlement regime has been a "challenging experiment"<sup>1</sup> fraught with controversy. The establishment of the WTO was a transformative event in the history of international economic relations. But as the international trade regime has transitioned from pragmatism to legalism, the process of adjudication has come under intense scrutiny. If trade relations are now determined by law rather than power or diplomacy, then the success of such a system requires that the appointed adjudicators render binding decisions in a manner that assiduously adheres to agreed procedural norms.

It now has been ten years since the WTO Appellate Body rendered its first report in April 1996.<sup>2</sup> Since that time the Appellate Body has rendered over 75 reports. The distance of a decade allows scholars to make certain predictive judgments about the likely direction of the WTO dispute settlement process. These reports represent data points in a larger story about the exercise of judicial authority in the WTO dispute settlement process. But few of those data points will be as significant and controversial as the April 2006 Appellate Body report of *US—Laws, Regulations, and Methodology for Calculating Dumping Margins* ("US—Zeroing").<sup>3</sup>

The report in *US—Zeroing* provides a useful prism to reflect on the current status of WTO dispute resolution. The decision underscores that the Appellate Body has staked out an ambitious role for itself to shape WTO dispute resolution. That vision is one of a WTO Dispute Settlement Body that does not shy away from political controversy, that does not hesitate to articulate its own interpretation of ambiguous WTO provisions, that arrogates power from the Member States notwithstanding textual limitations on the Appellate Body's role, and that curtails the discretionary authority of executive branch agencies to exercise their delegated authority. In short, the *US—Zeroing* decision belies the felicitous notion that the WTO dispute resolution process embraces an approach of judicial restraint.

The topic at issue in *US—Zeroing* is arcane and technical. It concerns the question of how an administrative agency calculates the

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1. JEFF WAENCYMER, WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT 36–37 (Cameron May ed., 2002).

2. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

3. Appellate Body Report, *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins* ("US—Zeroing"), WT/DS294/AB/R (Apr. 18, 2006) [hereinafter Appellate Body Report, *US—Zeroing*].

margin of dumping for the purposes of imposing antidumping duties. The relevant provisions of the WTO Agreements define "dumping" as occurring when a product is introduced into the commerce of another country at a price that is less than its "normal value."<sup>4</sup> Applying that definition, the U.S. Department of Commerce's challenged methodology found dumping if a product's export price was less than its normal value and found no (or "zero") dumping if a product's export price was the same or higher than its normal value.<sup>5</sup> In other words, Commerce identifies all instances of dumping and treats other sales as "non-dumped."<sup>6</sup> When calculating an average dumping margin, the amount of dumping is summed, with non-dumped sales having a dumping amount of zero, and the sum is divided by the total value of all imports.

The European Union challenged these U.S. practices before the World Trade Organization, bringing both facial "as such" and "as applied" challenges to the zeroing methodologies.<sup>7</sup> The WTO panel ruled against the United States with respect to certain aspects of its zeroing methodology but upheld the United States' approach with respect to its use of zeroing for administrative reviews.<sup>8</sup> On appeal, the Appellate Body reversed, and ruled that the zeroing methodology applied by the United States in administrative reviews was inconsistent with WTO obligations.<sup>9</sup>

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4. General Agreement on Tariffs and Trade art. VI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1994]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.1, Apr. 15, 1994 [hereinafter Antidumping Agreement], Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1133 (1994).

5. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶ 47.

6. Terence P. Stewart, *Antidumping*, in 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992) 1383, 1540 (Terence P. Stewart ed., Kluwer Law & Taxation Publishers 1993).

7. A facial or "as such" challenge is one made without regard to how the measure is applied in any particular case. An "as applied" challenge is limited to the specific factual circumstances of the case under review. A finding that a measure is incompatible "as such" with a WTO obligation requires a broader corrective response by a Member State than an "as applied" violation.

8. Panel Report, *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 7.223, WT/DS294/R (Oct. 31, 2005) [hereinafter Panel Report, *US—Zeroing*] ("The Panel therefore finds that the United States did not act inconsistently with Article 2.4.2 of the AD Agreement when . . . USDOC used a methodology that involved asymmetrical comparisons between export price and normal value and in which no account was taken of any amount by which export prices exceeded normal value.").

9. See Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 132–35:

We move now to the question of whether the zeroing methodology applied by the USDOC in the administrative reviews at issue is consistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 . . . . [T]he methodology applied by the USDOC in the administrative reviews at

This essay is not about substantive questions of antidumping methodologies. It is about the application of procedural approaches in the *US—Zeroing* case that serve to highlight potential problems with Appellate Body decision-making. Those problems go to central issues of judicial restraint, including concerns surrounding standards of review, appellate fact-finding, and notions of justiciability and ripeness. This essay will begin with an analysis of *US—Zeroing*'s approach in applying the specialized standard of review under the Antidumping Agreement, arguing that it fails to adhere to the obligation of deference to permissible Member State interpretations of WTO antidumping obligations. It then examines the fact-finding procedures applied by the Appellate Body, which raise troubling concerns about the Appellate Body's failure to confer deference to the reasonable factual findings of Member States and WTO panels. Finally, it concludes with a discussion of the Appellate Body's rejection of the mandatory/discretionary doctrine, a key tool that restricts the jurisdictional authority of the WTO. The essay concludes that the Appellate Body in *US—Zeroing* circumvented the particularized standard of review required under the Antidumping Agreement, took upon itself the unacceptable task of appellate fact-finding, and inappropriately expanded the authority of WTO panels to hear facial challenges of agency measures. Rather than adhere to an approach of deference as required by the WTO commitments, the Appellate Body engaged in *de novo* review of both the law and the facts to reach its preferred result on zeroing.

I should emphasize that I have no particular policy preference for the United States' zeroing methodology. The concern expressed here is not whether a preferred trade result was effectuated by the Appellate Body in *US—Zeroing*. On that issue I am agnostic. My concern is whether the Appellate Body achieved this result in a manner consistent with its authority under the Dispute Settlement Understanding (DSU).

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issue results in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping. Yet, Article 9.3 clearly stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." In the light of the above, we reverse the Panel's finding, in paragraphs 7.288 and 8.1(f) of the Panel Report, that the United States did not act inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in the administrative reviews at issue, and find, instead, that the United States acted inconsistently with those provisions.

## II. CIRCUMVENTING THE SPECIALIZED STANDARD OF REVIEW

### A. *Specialized standard of review*

The Antidumping Agreement has adopted an explicit provision that addresses the standard of review to be applied in reviewing antidumping measures. Article 17.6(ii) provides that WTO panels shall:

interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. 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.<sup>10</sup>

Application of this standard has been controversial. The negotiating history of this provision provides important clues to understand its meaning.<sup>11</sup> During the final days of the Uruguay Round of Multilateral Trade Negotiations, the standard of review provision in Article 17.6 was added to the final Antidumping Agreement at the insistence of the United States.<sup>12</sup> When deciding on the standard of review, the drafters looked to the *Chevron* deference applied by U.S. federal courts. Under *Chevron*,<sup>13</sup> federal courts will accord significant deference to an administrative agency's reasonable interpretation of a statutory provision. If the statute is unambiguous, a federal court will strike down a conflicting agency interpretation. But if the statute is ambiguous, courts must uphold the agency's interpretation as long as it falls within the range of permissible constructions of the statute.<sup>14</sup> The result is that courts will uphold interpretations that they would not reach on their own, but that nonetheless reasonably flow from the textual provision. At the heart of *Chevron* deference is

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10. Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 416-18 (1985).

11. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 199-201 (1996).

12. See *GATT Partners Work Out Controversial Dumping Issue*, INSIDE U.S. TRADE, Dec. 14, 1993, at 2-3 (on the issue of the standard of review, where the U.S. did win changes toward its position, the new text states that . . . where there is more than one "permissible interpretation" of an antidumping provision, "the [GATT] panel shall find the [domestic] authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.").

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

14. *Id.*

the commitment to defer to the policy choice of the administering authority whenever the text will allow an interpretation consistent with that choice. In such cases, “judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>15</sup>

While the analogy is not perfect,<sup>16</sup> the basic import of the suggestion was that reasonable interpretations by Member States should be upheld by WTO panels.<sup>17</sup> The final language adopted in Article 17.6 embraces this approach, with slight variations. The drafters replaced the word “reasonable” with “permissible” and added an additional sentence that requires interpretations to be in accordance with customary rules of international law.<sup>18</sup> In essence, the language of Article 17.6 incorporates administrative law principles analogous to *Chevron* deference<sup>19</sup> while also adopting traditional international law norms regarding treaty interpretation, i.e., the interpretive methodology reflected in the Vienna Convention on the Law of Treaties.<sup>20</sup>

The confluence of these two interpretive methodologies has been fraught with difficulties. While the first sentence of Article 17.6(ii) requires recourse to Articles 31 and 32 of the Vienna Convention to determine the meaning of a provision of the Antidumping Agreement, the second sentence presupposes that there may be more than one permissible interpretation.<sup>21</sup> At a minimum, this leaves little doubt that Article 17.6 requires a special standard of review. If Article 17.6(ii) is to have meaning, the general approach applied in

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15. *Id.* at 866.

16. See Carlos Manuel Vázquez, *Judicial Review in the United States and in the WTO: Some Similarities and Differences*, 36 GEO. WASH. INT’L L. REV. 587, 601–05 (2004).

17. *Id.*

18. *Id.* at 602 (citing language of Article 17.6 and explaining its relation to *Chevron* deference).

19. See William J. Clinton, Transmission of Legislation and Related Document to Implement Agreements Resulting From GATT Uruguay Round—Message From the President of the United States, H.R. Doc. No. 103-316, at 148 (1994) (“Article 17.6 contains a special standard of review, which is analogous to the deferential standard applied by U.S. courts in reviewing actions by Commerce and the Commission.”). The replacement of the word “reasonable” with “permissible” should not alter this conclusion. *Chevron* itself uses language of “permissible” constructions of statutory language, *Chevron*, 467 U.S. at 843, and numerous decisions of the U.S. Supreme Court apply *Chevron* deference while referring to “permissible interpretations” of the administrative agency. See, e.g., *Gonzales v. Oregon*; 126 S.Ct. 904, 936 (2006); *Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 45 (2002); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 21 (2000); *MCI Telecomm. v. Amer. Tel. & Tel. Co.*, 512 U.S. 218, 227 (1994); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992).

20. Vienna Convention on the Law of Treaties art. 2, para. 1(a), May 23, 1969, 1155 U.N.T.S. 331 (1969).

21. Claus-Dieter Ehlermann & Nicholas Lockhart, *Standard of Review in WTO Law*, 7 J. INT’L ECON. L. 491, 499 (2004).

other contexts cannot be coterminous with the special approach applied under the Antidumping Agreement.

Recognizing this textual distinction, the standard of review is not only comparable to the domestic approach borrowed from U.S. administrative law, but also may reflect the international law principle of the "margin of appreciation."<sup>22</sup> That doctrine recognizes that "international courts should grant national authorities a certain degree of deference" while still authorizing international courts "to review whether national decisions are reasonable."<sup>23</sup> The particular advantage of this approach is that the margin of appreciation is an interpretive device accepted as an international norm appropriate for use by particular international tribunals.<sup>24</sup> As such, by incorporating the international law doctrine of the margin of appreciation, the requirements of the second sentence of 17.6(ii) are fully consistent with the first sentence's mandate to apply customary international law rules of interpretation. The second sentence of 17.6(ii) simply embraces a well-recognized interpretive approach in international law which requires judicial deference to national authorities under certain circumstances.

Thus, the Antidumping Agreement creates a scheme of deference to Member State decision-making. The agreement establishes broad rules, but pursuant to Article 17.6 it does not require Member States to implement identical antidumping systems. The Antidumping Agreement is not comprehensive, and policy choices remain available to Member States to implement different remedies for trade violations within textual constraints. As with the margin of appreciation principle applied by the European Court of Human Rights, the

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22. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909–10 (2005); Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views From the Perspective of the Appellate Body's Experience*, 26 FORDHAM INT'L L.J. 1505, 1538 (2003); James Cameron & Kevin R. Gray, *Principles of International Law in the WTO Dispute Settlement Body*, 50 INT'L COMP. L.Q. 248, 258 (2001); John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 182 (1997). *But see* MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 51–54 (2003).

23. Shany, *supra* note 22, at 910.

24. In particular the European Court of Human Rights ("ECHR") and the European Court of Justice have robust application of this deferential standard of review. *See* Shany, *supra* note 22, at 926–27; HOWARD CHARLES YUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996). The ECHR has described the "margin of appreciation" as a doctrine of deference to national authorities for permissible interpretations that are reconcilable with treaty obligations. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976) (explaining that "[t]he domestic margin of appreciation thus goes hand in hand with a European supervision" and "the Court . . . is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable" with a treaty obligation).



WTO rules authorize different national authorities in different Member States to reach different decisions regarding the application of the international obligation contained in the Antidumping Agreement.<sup>25</sup>

One might also say that this approach of deference is consistent with the broader general international law principle that everything that is not prohibited under international law is permitted.<sup>26</sup> As the Permanent Court of International Justice explained in the landmark *Lotus* case, “[r]estrictions upon the independence of States cannot . . . be presumed. . . . Far from laying down a general prohibition, . . . [international law] leaves . . . [States] a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.”<sup>27</sup> International treaties impose upon States certain mutually agreed-upon boundaries. But beyond those constraints the choice of action remains with the State.

Whatever may be the proper theoretical articulation of the standard, it is clear that the WTO Appellate Body has understood Article 17.6(ii) to require a melding of two interpretive methodologies. As the Appellate Body stated in *US—Hot-Rolled Steel*,

[p]anels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Antidumping Agreement which is permissible under the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention. . . . [A] panel shall find that a measure is in conformity with the Anti-dumping Agreement if it rests upon one permissible interpretation of that Agreement.<sup>28</sup>

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25. Shany, *supra* note 22, at 909–10.

26. *The S.S. “Lotus” (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18–19; *cf. id.* at 34 (dissenting opinion of Judge Loder).

27. *Id.* at 18–19.

28. Appellate Body Report, *United States—Anti-Dumping Measure on Certain Hot-Rolled Steel Products from Japan*, ¶¶ 60, 62, WT/DS184/AB/R (July 24, 2001) [hereinafter Appellate Body Report, *US—Hot-Rolled Steel*]. Paragraphs 59–62 are the key provisions, and they provide in relevant part:

59. Th[e] second sentence of Article 17.6(ii) presupposes that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Anti-Dumping Agreement, which, under that Convention, would both be “permissible interpretations.” In that event, a measure is deemed to be in conformity with the Anti-Dumping Agreement “if it rests upon one of those permissible interpretations.”

60. It follows that, under Article 17.6(ii) of the Anti-Dumping Agreement, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Anti-Dumping Agreement which is permissible under the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention. . . In other words, a permissible interpretation is one which

In short, the task of WTO panels is to examine a Member State's interpretation and assess if its interpretation is permissible using the rules of the Vienna Convention. If a provision admits of more than one interpretation, and the Member State's is one such interpretation, the measure should be construed as conforming to the requirements of the Antidumping Agreement.

That, at least, is the theory behind this specialized standard of review. In practice, applying this approach has been problematic. One prominent critic has described the provision as a "dead letter."<sup>29</sup> Another has argued that "[i]t is difficult to identify any issue in any of the cases in which this special standard has produced an outcome different from that which would have prevailed had there been no Article 17.6."<sup>30</sup> And in no case has the application of Article 17.6(ii) been more difficult than in the zeroing cases. Even otherwise strong proponents of the Appellate Body's approach to antidumping measures have conceded that its approach to zeroing has been a notable instance of judicial overreaching.<sup>31</sup>

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is found to be appropriate after application of the pertinent rules of the Vienna Convention. We observe that the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention apply to any treaty, in any field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned. . . .

62. Finally, although the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an "objective assessment of the matter" as a whole. Thus, under the DSU, in examining claims, panels must make an "objective assessment" of the legal provisions at issue, their "applicability" to the dispute, and the "conformity" of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the Anti-Dumping Agreement suggests that panels examining claims under that Agreement should not conduct an "objective assessment" of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the Anti-Dumping Agreement if it rests upon one permissible interpretation of that Agreement. (emphasis omitted).

29. John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113, 117 (2003).

30. Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POLICY IN INT'L BUS. 109, 118 (2002); see also Vázquez, *supra* note 16, at 603 (noting that "the AB treatment of Article 17.6 thus far suggests that the attempt to import *Chevron* deference into WTO adjudication has not been entirely successful, as the AB has resisted the standard").

31. James P. Durling, *Deference, But Only When Due: WTO Review of Antidumping Measures*, 6 J. INT'L ECON. L. 125, 136 (2003).

B. *Standard of review in US—Zeroing*

The controversy over the proper application of Article 17.6 is clearly evident in the *US—Zeroing* report. Indeed, in its decision the Appellate Body addressed the standard of review on only one occasion, and even then it appeared as an afterthought. The Appellate Body stated that, in applying Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the Appellate Body has been “mindful of the standard of review set out in Article 17.6(ii) of the Anti-Dumping Agreement.”<sup>32</sup> But it concluded that those provisions, “when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not . . . allow the use of the methodology applied by the United States. . . .”<sup>33</sup> It reached this conclusion because the methodology applied by the United States resulted in amounts of anti-dumping duties assessed that exceeded the margin of dumping, contrary to Article VI:2 and Article 9.3, based on the Appellate Body’s interpretation.<sup>34</sup>

The critical interpretive move for the Appellate Body in *US—Zeroing* was to conclude that dumping margins only exist for the “product as a whole”—a term found nowhere in the agreements at issue.<sup>35</sup> The Appellate Body concluded that if the margin of dumping is established based on multiple comparisons of the export price to normal value, then the results of all these price comparisons must be aggregated to establish the margins of dumping for the “product under investigation as a whole.”<sup>36</sup> According to the Appellate Body, investigating authorities were “required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value.”<sup>37</sup> In other words, the Appellate Body found that investigating authorities could not treat non-dumped sales

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32. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶ 134.

33. *Id.*

34. *Id.*

35. *Id.* at ¶¶ 125–30. The Appellate Body first explained that dumping margins must be calculated for the “product as a whole” in the *EC—Bed Linen* dispute and then relied on that interpretation in *US—Softwood Lumber*. Appellate Body Report, *EC—Antidumping Duties on Imports of Cotton-Type Bed Linen From India*, ¶ 53, WT/DS141/AB/R (Mar. 1, 2001) (“[W]hatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the product under investigation as a whole.”); Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber From Canada*, ¶ 96, WT/DS264/AB/R (Aug. 11, 2004) [hereinafter Appellate Body Report, *US—Softwood Lumber*] (“[A]s with dumping, ‘margins of dumping’ can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.”).

36. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 127–28.

37. *Id.* ¶ 127.

as non-dumped but rather had to create a category of sales with “negative” dumping margins which would be used to reduce the total dumping found. It thus found that “[i]nvestigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter.”<sup>38</sup>

While the determination that margins must be calculated based on the “product as a whole” may well be a permissible interpretation of some treaty provisions, it is exceedingly difficult to conclude that it is the *only* permissible interpretation. The Antidumping Agreement expressly contemplates that in some circumstances margins will be determined without reference to the product as a whole.<sup>39</sup> The second sentence of Article 2.4.2 of the Antidumping Agreement states that margins may be established on the basis of “individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods.”<sup>40</sup> Calculating margins based on individual transactions that target particular purchasers, regions, or time periods is not a calculation based on the product as a whole. The Appellate Body’s interpretation is difficult to reconcile with the individual transaction approach contemplated when calculating targeted dumping. Indeed, it would seem that the Appellate Body’s interpretation has rendered Article 2.4.2 of little utility, offering exporters renewed incentives to engage in targeted, geographic, or sporadic dumping.<sup>41</sup>

Significantly, the Panel felt there was no ambiguity on this question, arguing that the United States’ interpretation was the only logical one.

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38. *Id.* ¶ 130.

39. For the United States’ argument in this regard, see Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 44, 143–50.

40. The Antidumping Agreement, *supra* note 4, in Article 2.4.2, states:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison.

41. Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT’L & COMP. L. 99, 211 (2005) (“[Z]eroing may be a useful tool to combat targeted dumping (i.e., dumping in certain markets of an importing country, but not other markets), geographic dumping (i.e., dumping in certain locations of the country, but not other places in that country), or sporadic dumping (i.e., dumping for certain periods, but not other periods).”).

An interpretation of zeroing as by definition unfair in all circumstances, such that even in these circumstances a Member would be required to offset the (pattern of) below-normal-value export prices by others above normal value, would deny the second sentence the very function for which it was created. . . . We cannot interpret the Agreement in a manner that denies a provision the role for which it was created and in fact renders that provision without effect. Accordingly, we *must* conclude that Article 2.4 does not consider zeroing to be unfair and thus prohibited in *all* circumstances, but rather recognizes that in some cases zeroing may be appropriate in order to accurately reflect the existence of dumping by an exporter.<sup>42</sup>

If the Panel concluded that the text of the Antidumping Agreement *compelled* the result articulated by the United States, it is difficult to understand how the Appellate Body could reach the conclusion that there was not sufficient ambiguity in the text such that the United States' position was not at least a *permissible* interpretation of the treaty obligation. This conclusion is underscored by the longstanding practice of zeroing by Member States. Indeed, two GATT panels rejected claims by Japan and Brazil that zeroing was inconsistent with the 1979 Antidumping Code.<sup>43</sup>

Zeroing was also discussed in some detail in the negotiations of the WTO Antidumping Agreement. Some delegates, who were opposed to zeroing, argued that "negative" dumping transactions should be considered when calculating the dumping margin, while others, who favored zeroing, argued that disregarding negative margins was necessary to address targeted dumping on a particular account, product line, region, or time period.<sup>44</sup> Those delegates who

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42. Panel Report, *US—Zeroing*, *supra* note 8, ¶ 7.266 (emphasis in original).

43. Panel Report, *EC—Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ¶ 502, ADP/137 (July 4, 1995); Panel Report, *EC—Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ¶ 360, ADP/136 (Apr. 28, 1995).

44. Stewart, *supra* note 6, at 1540. Indeed, Japan, Hong Kong, and Singapore argued during the Uruguay Round negotiations that "negative dumping margins" (when export prices are equal to or greater than normal value) should be accounted for in calculating dumping margins. See Communication from Japan, *Proposals on the Anti-Dumping Code*, item II.1(4), MTN.GNG/NG8/W/11 (Sept. 28, 1987); Communication from Japan, *Background Notes to Japan's Proposals on the Anti-Dumping Code*, item I.4(3), MTN.GNG/NG8/W/30 (June 20, 1988); Communication from the Delegation of Singapore, *Proposed Elements for a Framework for Negotiations Principles and Objectives for Anti-Dumping Rules*, item II.E, MTN.GNG/NG8/W/55 (Oct. 13, 1989); Communication from the Delegation of Hong Kong, *Principles and Purposes of Anti-Dumping Provisions*, item iv, MTN.GNG/NG8/W/46 (July 3, 1989); Communication from the Delegation of Hong Kong,

avored the use of zeroing argued that negative dumping transactions could mask targeted behavior by allowing producers to receive credit for negative margins, something akin to “arguing that a driver should not be found guilty of speeding if, along other portions of the road, he was driving under the speed limit.”<sup>45</sup> As a result, none of the draft texts included any reference to “negative” dumping margins or zeroing; nor did the final 1994 Antidumping Agreement.<sup>46</sup> As John Greenwald has noted, “zeroing was at the time the Anti-dumping Agreement was negotiated, and remains, a common practice in anti-dumping regimes around the world.”<sup>47</sup>

The Appellate Body in *US—Zeroing* avoided the textual problems identified by the Panel by shifting the emphasis from Article 2.4.2 of the Antidumping Agreement to Article VI of GATT 1994. It did so by relying on language from the previous Appellate Body decision in *US—Softwood Lumber*.<sup>48</sup> The Appellate Body noted that although the Appellate Body in *US—Softwood Lumber* dealt with a zeroing challenge in the context of an original investigation pursuant to Article 2.4.2, that report stated unambiguously that the terms “dumping” and “margins of dumping” in Article VI apply to the product under investigation as a whole. This was a “finding based not only on Article 2.4.2 . . . but also on the context found in Article 2.1 of the *Antidumping Agreement*.”<sup>49</sup> But, of course, the Appellate Body in *US—Softwood Lumber* was interpreting “dumping” and “margins of dumping” in an “integrated manner” with specific reference to and in light of dumping margins under Article 2.4.2.<sup>50</sup> The

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*Amendments to the Anti-Dumping Code*, ¶ 14, MTN.GNG/NG8/W/51/Add.1 (Dec. 22, 1989); Communication from the Delegation of Hong Kong, *Amendments to the Anti-Dumping Code*, item 4(b), MTN.GNG/NG8/W/51/Add.2 (Mar. 21, 1990).

45. Stewart, *supra* note 6, at 1540.

46. Indeed, two former assistant secretaries of the U.S. Department of Commerce who served as principal U.S. negotiators for antidumping rules in the Uruguay Round wrote to the Secretary of Commerce and the U.S. Trade Representative to object to the trend in WTO decisions on zeroing. They pointed out that no reference to zeroing or an offset for “negative dumping margins” was ever included in any draft text or the final Antidumping Agreement because the United States had strongly opposed all proposals to prohibit zeroing or require an offset for “negative dumping margins.” *Former Commerce Officials Call for Stronger Stance on Remedy Laws*, INSIDE U.S. TRADE, June 24, 2005, at 15.

47. Greenwald, *supra* note 29, at 118.

48. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 125–27.

49. *Id.* ¶ 126 (citing Appellate Body Report, *US—Softwood Lumber*, *supra* note 35, ¶ 102).

50. Appellate Body Report, *US—Softwood Lumber*, *supra* note 35, ¶ 85. The Appellate Body’s reliance in *US—Zeroing* on its previous decision in *EC—Bed Linen* is even more tenuous, as *EC—Bed Linen* deals quite explicitly with dumping and margins of dumping within the context of Article 2.4.2, not Article VI of GATT 1994. Compare Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶¶ 46–66, WT/DS141/AB/R (Mar. 1, 2001) to Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶ 126.

analysis in that case centered on those terms “as used in Article 2.4.2 of the *Antidumping Agreement*.”<sup>51</sup>

While the Appellate Body in *US—Softwood Lumber* found that Article 2.4.2 prohibited certain methodologies in the investigation phase of an antidumping proceeding, the question in *US—Zeroing* was quite distinct. The issue in *US—Zeroing* was whether such a finding should be extended to other phases notwithstanding the fact that Article 2.4.2 by its terms applies only to the establishment of margins of dumping “during the investigation phase.” Rather than wrestle with these difficulties, the Appellate Body focused exclusively on its own prior interpretations of the definition of dumping in GATT 1994 Article VI:1 and Antidumping Agreement Article 2.1—provisions that WTO Members had not modified in the Uruguay Round, that had been interpreted by a 1960 Group of Experts as permitting the determination of dumping for each importation of a product,<sup>52</sup> and that had been interpreted by two GATT panels to permit zeroing.<sup>53</sup> Obviously, it is not the text that has changed over the decades, but rather the meaning attributed to it by the Appellate Body in *US—Zeroing*. One would have thought that the absence of change in the text of the renegotiated Antidumping Agreement would have led to a presumption that behavior that was previously sanctioned would remain so.

The point here is not whether the Appellate Body’s conclusions regarding zeroing find any support in the text or the negotiating history. The issue is whether the Appellate Body has taken seriously its obligation to assess Member State action based on a deferential standard of review. The United States in *US—Zeroing* stressed the applicability of the deferential standard of review. The Panel had concluded that the text of the Antidumping Agreement compelled the result articulated by the United States.<sup>54</sup> But the Appellate Body

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51. Appellate Body Report, *US—Softwood Lumber*, *supra* note 35, ¶ 90.

52. The Second Report of the Group of Experts on *Anti-Dumping and Countervailing Duties*, ¶ 8, L/1141 (adopted May 27, 1960), GATT B.I.S.D. (9th Supp.), at 194, 195 (1961).

53. See Communication from the United States, *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶¶ 22, 33–35, WT/DS294/18 (June 19, 2006) [hereinafter U.S. Communication of June 19, 2006]; Communication of the United States, *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 19, WT/DS294/16 (May 17, 2006) [hereinafter U.S. Communication of May 17, 2006].

54. Indeed, the Panel in the *US—Zeroing* dispute and the Article 21.5 panel in *US—Softwood Lumber* had just found that, with the exception of investigations using the average-to-average comparison methodology, zeroing reflected a permissible interpretation of the Antidumping Agreement. See U.S. Communication of June 19, 2006, *supra* note 53, ¶ 36; Panel Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21.5 of the DSU by Canada*, ¶¶ 5.28–29, 5.66, WT/DS264/RW

nonetheless failed to recognize the possibility of more than one permissible interpretation of the relevant provisions of the Antidumping Agreement, including the one reflected in longstanding practice of the United States.<sup>55</sup> As one commentator discussing the *US—Zeroing* case put it, “the Appellate Body’s reasoning on [zeroing] does not seem very convincing. . . . This is especially so given the special . . . standard of review set out in Article 17.6(ii).”<sup>56</sup>

### III. FACTUAL DETERMINATIONS ON APPEAL

The applicable standard of review also addresses factual determinations. This raises two issues. First, what is the standard of review applied by WTO panels in reviewing factual determinations of Member State authorities? And second, what are the limits on the power of review by the Appellate Body of factual determinations of the WTO panels?

#### A. *Standard of review for factual determinations*

Article 17.6(i) of the Antidumping Agreement provides that “in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.”<sup>57</sup> This highlights the deferential standard of review WTO panels apply to factual determinations.<sup>58</sup>

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(Apr. 3, 2006).

55. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶ 47.

56. TradeLaw.net Dispute Settlement Commentary, Appellate Body Report: United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”), at 18, available at [http://worldtradelaw.net/dsc/ab/us-zeroing\(dsc\)\(ab\).pdf](http://worldtradelaw.net/dsc/ab/us-zeroing(dsc)(ab).pdf).

57. Antidumping Agreement, *supra* note 4, art. 17.6 (i).

58. According to Ehlermann & Lockhart, *supra* note 21, at 503–04, Article 17.6(i): seeks to prevent the panel from rejecting factual findings made at the national level just because the panel prefers an alternative finding. Indeed, under this provision, the focus of the panel’s review should not be on the facts themselves, but rather on whether the process of establishing those facts was “proper”. If that process was “proper”, the facts found as a result of the process should be accepted, “even though the panel might have reached a different conclusion”. There is, therefore, no *de novo* review and panels cannot substitute their own analysis for that of the national authority. Only in cases where there is, perhaps, a manifest or egregious impropriety is a panel likely to interfere with a national authority’s establishment of the facts under Article



But Article 17.6(i) also underscores the role of WTO panels, as distinct from the Appellate Body, in making and reviewing factual determinations. It is the panel that determines whether the Member State authorities properly establish the facts.<sup>59</sup> The Appellate Body in *US—Hot-Rolled Steel* has interpreted this to require panels to assess the facts and undertake an active review or examination of the pertinent facts.<sup>60</sup> But this only underscores the affirmative duty of panels to make factual findings consistent with the general mandate of Article 11 of the DSU and the specific mandate of Article 17.6(i) of the Antidumping Agreement.<sup>61</sup>

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17.6(i). In short, the word “proper” carries with it a considerable margin of discretion.

59. OESCH, *supra* note 22, at 165.

60. Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 28, ¶¶ 55–56:

In considering Article 17.6(i) of the *Anti-Dumping Agreement*, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the *Anti-Dumping Agreement*, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities’ “establishment” and “evaluation” of the facts. To that end, Article 17.6(i) requires panels to make an “assessment of the facts”. The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an “objective assessment of the facts”. Thus, the text of both provisions requires panels to “assess” the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is “objective”. However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* “assessment of the facts of the matter”. In this respect, we see no “conflict” between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU. Article 17.6(i) of the *Anti-Dumping Agreement* also states that the panel is to determine, first, whether the investigating authorities’ “establishment of the facts was proper” and, second, whether the authorities’ “evaluation of those facts was unbiased and objective” (emphasis added). Although the text of Article 17.6(i) is couched in terms of an obligation on *panels*—panels “shall” make these determinations—the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their “establishment” and “evaluation” of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities’* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities’ establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*.

61. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125, 1233 (1994) [hereinafter DSU] (“The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant

The specific role of WTO panels—as compared to that of the Appellate Body—is also underscored by the general admonition in the Dispute Settlement Understanding that an appeal to the Appellate Body “shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”<sup>62</sup> As an appellate review body, the record of the panel proceedings forms the basis of review.<sup>63</sup> The limited grounds for review place the WTO Appellate Body in the distinct role of reviewing legal questions, and they circumscribe the authority of the Appellate Body to procure factual information beyond the factual findings established by the panel. As one commentator put it, “[i]n completing the analysis there is . . . a significant difference between relying on factual findings by the Panel and facts placed before a Panel by way of evidence of the parties.”<sup>64</sup> Only in the first instance has there been an adjudicatory review and evaluation of those facts.”<sup>65</sup>

#### B. *Factual determinations in US—Zeroing*

In *US—Zeroing*, the critical factual question arose whether the United States had a policy on zeroing that represented an unwritten rule or norm. The panel determined that zeroing was an established methodology inconsistent with WTO obligations. It based its conclusions on three pieces of evidence: (1) lines of computer code included in the computer programs used by the Department of Commerce in antidumping proceedings; (2) a response by the United States to a panel question; and (3) the historical practice of zeroing that was utilized by the United States and other signatories.<sup>66</sup>

The Appellate Body took a different approach. It referenced some of the evidence that formed the basis of the panel’s findings, but went further, relying upon other evidence that was merely “before the panel.” Specifically, the Appellate Body relied upon (1) the standard programs used by the Department of Commerce; (2) a re-

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covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”).

62. *Id.* art. 17.6.

63. Appellate Body, *Working Procedures for Appellate Review*, WT/AB/WP/5, R. 25 (Jan. 4, 2005).

64. See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 151, WT/DS166/AB/R (Dec. 22, 2000) (“In view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel’s appreciation of the evidence falls, in principle, ‘within the scope of the panel’s discretion as the trier of fact.’”).

65. WAINCYMER, *supra* note 1, at 744.

66. Panel Report, *US—Zeroing*, *supra* note 8, ¶ 7.103 & n.200.

sponse by the United States to a panel question; (3) Department of Commerce determinations in specific cases; (4) expert opinions regarding the use and content of the zeroing methodology; (5) the Anti-Dumping Manual; and (6) oral testimony by the United States at the opening hearing.<sup>67</sup> Significantly, only the first two of these six sources were used by the panel in its findings, and the panel expressly avoided one of the remaining four.

The difference between the factual evidence relied upon by the panel and the evidence relied upon by the Appellate Body is noteworthy. Obviously, evidence is of critical importance in an “as such” challenge, particularly in the absence of a written document establishing the purported rule or norm.<sup>68</sup> The Appellate Body emphasized that an “as such” challenge requires a complaining party to “clearly establish, through arguments and supporting evidence” the content of a rule or norm, its attribution to the Member State, and its general applicability.<sup>69</sup> But having imposed that high threshold, it is also obvious that the Appellate Body was uncomfortable with the incomplete factual record presented by the panel.<sup>70</sup> It criticized the panel for failing to articulate the criteria for bringing an “as such” challenge, for failing to distinguish between the existence and consistency of the challenged measure, and for failing to articulate its ultimate conclusions regarding the consistency of the zeroing methodology.<sup>71</sup> The Appellate Body also re-characterized the Panel’s findings, arguing without support in the Panel’s report that what was before the Panel formed the basis of their factual findings.<sup>72</sup>

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67. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 201–02; *see also* U.S. Communication of May 17, 2006, *supra* note 53, ¶¶ 10–13.

68. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶ 198.

69. *Id.*:

In our view, when bringing a challenge against such a “rule or norm” that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged “rule or norm” is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the “rule or norm” may be challenged, as such. This evidence may include proof of the systematic application of the challenged “rule or norm”. Particular rigour is required on the part of a panel to support a conclusion as to the existence of a “rule or norm” that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported “rule or norm” in order to conclude that such “rule or norm” can be challenged, as such.

70. *Id.* ¶ 203.

71. *Id.*

72. *Id.* ¶ 213 (“The Panel had before it evidence including standard computer programs used by the USDOC to calculate margins of dumping, the Anti-Dumping Manual, expert opinions, and the Standard Zeroing Procedures. We therefore cannot agree with the United

With the factual findings of the Panel wanting, the Appellate Body had few good options. Lacking the power to remit a decision to the panel, it decided against the normal approach of declining to rule on the matter in the absence of sufficient factual findings. Instead, it chose to modify the panel's factual findings and reach a legal conclusion based on those modified findings. In essence, the Appellate Body had to complete the factual analysis in order to conclude that zeroing was the norm or a rule that was inconsistent with Article 2.4.2. It stated that "[n]otwithstanding the[] shortcomings in the Panel's reasoning, we believe that, in the specific circumstances of this case, the evidence before the Panel was sufficient" to identify the content of the zeroing methodology, its attribution to the United States, and its general application.<sup>73</sup> In so doing, it undertook an evaluation of the evidence in the factual record without the benefit of the Panel's factual findings.

This is problematic. The normal approach is for the Appellate Body to complete its analysis "solely on the basis of factual findings made by the Panel and *uncontested* facts in the Panel record."<sup>74</sup> As one noted commentator has put it, any other approach would place "the Appellate Body in an invidious position . . . . If . . . it seeks to make factual findings from its legal conclusions, it is going beyond its express mandate in Article 17.6 [of the DSU] to the effect that 'an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel'. . . ."<sup>75</sup> As the Appellate Body emphasized in *US—Hot Rolled Steel*, the Appellate Body can only complete the analysis "if the factual findings of the panel, or the undisputed facts in the panel record, provide us with a sufficient basis to do so."<sup>76</sup>

By concluding that the panel's factual findings were insufficient and then looking at evidence that did not serve as the basis for the Panel's factual determinations,<sup>77</sup> and which was contested by the parties,<sup>78</sup> and going so far as to rely on evidence the Panel expressly avoided,<sup>79</sup> the Appellate Body in *US—Zeroing* undertook the task of

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States that the Panel analysis 'relie[d] on nothing more than the fact that the USDOC has engaged in zeroing in the past using computers.'").

73. *Id.* ¶ 204.

74. Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and Exportation of Dairy Products*, ¶ 98, WTO/DS103/AB/R (Oct. 13, 1999) (emphasis added).

75. WAICYMER, *supra* note 1, at 744.

76. Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 28, ¶ 235.

77. See Panel Report, *US—Zeroing*, *supra* note 8, ¶ 7.104 ("[T]he evidence before us indicates that zeroing methodology represents a well-established and well-defined norm and it is possible based on this evidence to identify the content of that norm.").

78. See U.S. Communication of May 17, 2006, *supra* note 53, ¶¶ 24–25.

79. Panel Report, *US—Zeroing*, *supra* note 8, ¶ 7.107 ("The panel considers that it not

completing the factual findings of the panel rather than reviewing the legal interpretations that developed from the panel's factual findings. This is unprecedented. Previously, the Appellate Body has determined that "[g]iven the lack of factual findings by the Panel regarding the [zeroing] methodology," the Appellate Body lacked "a sufficient factual basis to complete the analysis" and was "unable to rule on whether the United States acted inconsistently" with the Anti-dumping Agreement.<sup>80</sup>

The Appellate Body's approach raises serious questions about its role with regard to factual evidence. If disputed facts are not established by a WTO panel, then the Appellate Body is doing something quite important and worrisome with respect to factual evidence in the record. It is choosing particular facts as the basis for Appellate Body factual findings, including factual evidence expressly ignored by the panel as well as expert opinion provided by one of the parties. At the same time it discounts other facts in the record and ignores or overrides the factual findings of the WTO Panel. This approach should give one pause if one takes seriously the limited role of the Appellate Body in the dispute settlement process.

In sum, the Appellate Body's approach in *US—Zeroing* with respect to deference on factual findings is troubling. Troubling because the initial Panel's assessment of the facts under the Antidumping Agreement requires deference to the objective and unbiased factual findings of Member State authorities.<sup>81</sup> Doubly troubling because the Appellate Body's assessment of the facts under the DSU requires deference to the factual findings of the WTO panels.<sup>82</sup> As such, the WTO agreements require double deference to factual findings below. But the Appellate Body displayed no such deference. It undertook *de novo* review of the evidence presented to the panel and reached factual conclusions on the basis of that evidence. On the ba-

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necessary to make a finding on whether the Anti-Dumping Procedures Manual is WTO inconsistent as such."'). Indeed, the failure to consider this evidence formed the basis of an appeal by the European Union. See Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 223–25.

80. Appellate Body Report, *United States—Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 138, WT/DS244/AB/R (Dec. 15, 2003) [hereinafter Appellate Body Report, *US—Sunset Review*].

81. See Antidumping Agreement, *supra* note 4, art. 17.6(i):

In its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

82. See DSU, *supra* note 61, art. 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.").

sis of this review it concluded that there was sufficient factual evidence of the precise content, attribution, and general application of the zeroing methodology. In making its own factual findings based on evidence in the record, the Appellate Body improperly overreached.

#### IV. REJECTION OF THE MANDATORY/DISCRETIONARY DOCTRINE

A third and final important problem with the Appellate Body's *US—Zeroing* report is its apparent rejection of the mandatory/discretionary doctrine. That doctrine is the principal mechanism for the WTO dispute resolution process to incorporate notions of ripeness.<sup>83</sup> The Appellate Body in *US—Zeroing* appeared poised to reject this long-standing doctrine in favor of an approach that affords comprehensive and in-depth facial challenges of all agency action that is of general and prospective application. This includes “as such” review of all general practices of the United States administrative agencies in the realm of antidumping and countervailing duties measures.

By way of background, the doctrine that only mandatory laws may be subject to an “as such” challenge is a well-established doctrine in WTO jurisprudence.<sup>84</sup> The essence of the doctrine provides “that legislation which mandate[s] action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such . . . .”<sup>85</sup>

The Appellate Body previously has described this doctrine as a “practice” that “was developed by a number of GATT panels as a threshold question in determining when legislation as such—rather than a specific application of that legislation—was inconsistent with [WTO] obligations.”<sup>86</sup> As developed in numerous WTO panel and

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83. William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION* 43, 63–65 (Thomas Cottier & Petros C. Mavroidis eds., 2003).

84. OESCH, *supra* note 22, at 190.

85. Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, ¶ 259, WT/DS176/AB/R (Jan. 2, 2002) (quoting Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco*, ¶ 118, BISD 41/S/I/133 (adopted Oct. 4, 1994)).

86. Appellate Body Report, *United States—Anti-dumping Act of 1916*, ¶ 88, WT/DS136/AB/R (Aug. 28, 2000).

Appellate Body decisions, the key question under this doctrine is whether discretion is vested in the executive branch of the government of a Member State.<sup>87</sup> If it is, then agency action taken pursuant to such discretion can only be reviewed for as applied violations of WTO obligations.

There is strong theoretical support for such an approach. Its rationale is that discretionary laws should be exempt from review by WTO panels in order to respect a Member's legislative autonomy, allowing it to delegate some decisions to its executive branch to apply the law.<sup>88</sup> A further rationale of the doctrine is that where discretionary authority is vested in the executive branch, it cannot be assumed that the Member State will fail to implement its obligation in good faith.<sup>89</sup> If the Member State fails to do so, an as applied challenge is the appropriate response to correct the violation.

A key component in the analysis of the mandatory/discretionary doctrine is the *locus* of the mandatory obligation. The WTO Appellate Body has been quite reluctant to identify mandatory measures in non-statutory language embodied in court decisions, administrative regulations, or interpretative instruments such as the Statement of Administrative Action ("SAA").<sup>90</sup> Thus, if a statute does not require a specific WTO-inconsistent methodology, the fact that a domestic court, an administering authority, or the SAA interpreted the statute as such does not render it inconsistent with WTO obligations.<sup>91</sup> As one commentator put it, "unless the express wording of a statute requires the authorities to act in a manner inconsistent with a WTO obligation, the wording of a mandatory regulation contrary to that WTO obligation cannot be the basis for finding the statute . . . in violation of that WTO obligation."<sup>92</sup>

But in the *US—Zeroing* decision, the Appellate Body cast serious doubt on the continued viability of the mandatory/discretionary

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87. *Id.* ¶¶ 89, 100; see also OESCH, *supra* note 22, at 68, 190.

88. Yoshiko Naiki, *The Mandatory/Discretionary Doctrine in WTO Law: The U.S.—Section 301 Case and Its Aftermath*, 7 J. INT'L ECON. L. 23, 59 (2004).

89. Panel Report, *Korea—Measures Affecting Trade in Commercial Vessels*, ¶ 7.62, WT/DS273/R (Mar. 7, 2005).

90. See Appellate Body Report, *United States—Countervailing Measures Concerning Certain Products From the European Communities*, ¶¶ 154–160, WT/DS212/AB/R (Dec. 9, 2002).

91. *Id.*; Panel Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶¶ 9.127–28, WT/DS70/R (Apr. 14, 1999).

92. Naiki, *supra* note 88, at 65–66 nn.129–30 (citing Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶¶ 159–162, WT/DS213/AB/R (Nov. 28, 2002)); Panel Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶¶ 8.105–06, WT/DS213/R (July 3, 2002).

doctrine.<sup>93</sup> Relying on the Appellate Body decision in *US—Sunset Review*,<sup>94</sup> it concluded that the Appellate Body has never pronounced generally on the continuing relevance or significance of the mandatory/discretionary distinction and cautioned that application of that distinction cannot be mechanistic.<sup>95</sup> The *US—Zeroing* Appellate Body then proceeded to uphold the Panel decision without further reference to the doctrine, simply concluding that the Panel made an objective assessment based on the evidence that the zeroing methodology was inconsistent as such with Article 2.4.2.<sup>96</sup>

The difficulty with the Appellate Body's analysis is that the previous decision in *US—Sunset Review* did not remotely reject the mandatory/discretionary doctrine in the manner suggested by the *US—Zeroing* decision. That decision continued to accept the doctrine as a useful analytical tool, and at most cast doubt on the wisdom of excluding binding administrative measures from the scope of its application. Specifically, in *US—Sunset Review* the Appellate Body rejected the Panel's treatment of the administrative agency's Sunset Policy Bulletin as a binding measure, stating that the Panel was deficient in its failure to, *inter alia*, consider whether the bulletin was "a legal instrument that operated so as to mandate a course of action," and whether the agency itself treated the bulletin as binding.<sup>97</sup> In other words, the Appellate Body in that case was reconsidering the definition of mandatory law to suggest that under that mandatory/discretionary doctrine, instruments need not be statutes to constitute a binding measure that could be challenged "as such."

By contrast, in the *US—Zeroing* decision, the Appellate Body appeared to jettison the doctrine altogether, suggesting that any identifiable government methodology that is of general and prospective application can be subject to "any such" challenge.<sup>98</sup> Rather than embrace the mandatory/discretionary doctrine, the Appellate Body articulated a test for challenging measures that are of general and prospective application:

[W]hen bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable

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93. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 210–14.

94. *Id.* ¶¶ 210–11 (citing Appellate Body Report, *US—Sunset Review*, *supra* note 80, ¶¶ 93, 95).

95. *Id.* ¶ 211.

96. *Id.* ¶ 213.

97. Appellate Body Report, *US—Sunset Review*, *supra* note 80, ¶ 99.

98. Appellate Body Report, *US—Zeroing*, *supra* note 3, ¶¶ 198–99, 204.



to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining part meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the “rule or norm” may be challenged, as such.<sup>99</sup>

It was of little moment that that measure may or may not be binding.

Thus, the Appellate Body has evolved in its jurisprudence from embracing a well-established doctrine that limited “as such” reviews to binding legislation, to an approach that allowed “as such” reviews for other binding instruments (i.e., mandatory administrative rules and regulations), to an approach in *US—Zeroing* that eschews the mandatory/discretionary distinction altogether and permits “as such” review of all methodologies that are of general and prospective application. As a consequence, facial challenges once reserved for provisions of binding legislation are now available for virtually any general and prospective agency action.

The import of this evolution is obvious for the future of trade disputes. A doctrine that once was a bulwark to shield discretionary agency action from facial WTO review has been rejected in favor of an approach that authorizes WTO panels effectively to review the general practice of agencies as set forth in formal regulatory measures and informal methodologies. Whereas in the past provisions of the United States Code were subject to WTO oversight for “as such” violations, in the future provisions of the Code of Federal Regulations, statements in administrative agency bulletins, and strings in government computer codes are all “general and prospective measures” that may be facially challenged.

Put differently, if the *US—Zeroing* decision is to be taken to its logical conclusion, then the Appellate Body has announced that WTO panels may now review the general practices of both the legislative and executive branches for “as such” violations. In so doing, the WTO Appellate Body has developed a theoretical basis for overcoming the most significant hurdle to in-depth and comprehensive review of U.S. antidumping and countervailing duty regulations, as well as to challenges under other WTO Agreements.

Whereas federal courts under *Chevron* will defer to any agency action that flows from a permissible interpretation of an ambiguous federal statute, WTO panels under *US—Zeroing* are poised to declare as facially invalid any general measure of an administra-

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99. *Id.* ¶ 198.

tive agency that runs afoul of their understanding of WTO obligations. Quite literally, the Appellate Body's decision in *US—Zeroing* suggests that review of discretionary agency action will be more robust and searching when undertaken by an exacting international body in Geneva than by a deferential federal court in New York.<sup>100</sup>

## V. CONCLUSION

It is well recognized that the WTO Appellate Body is not subject to significant controls as there is “nothing like a formal multilateral control of its performance.”<sup>101</sup> But there is the horizontal pressure that is applied when the international community “discusses the activities of the WTO adjudicating bodies and through its writings gives or denies its vote of confidence.”<sup>102</sup> The Appellate Body's report in *US—Zeroing* crystallizes some of the concerns that have been expressed in the past regarding judicial excess in the WTO dispute settlement regime. Since the report's adoption by the Dispute Settlement Body on May 9, 2006, the United States has taken the unusual approach of writing two communications to WTO Members detailing its serious legal objections to the Appellate Body's decision and its corrosive effect on the dispute settlement system.<sup>103</sup> Those communications underscore the disquiet with which the United States greets the Appellate Body's approach to appellate review in this case. That approach is one that ignores textual obligations to defer to administering authorities, partakes in appellate fact-finding, and rejects a well-established doctrine of justiciability. It most certainly does not inspire confidence for the future of WTO dispute resolution.

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100. See generally Thomas Cottier & Petros C. Mavroidis, *Concluding Remarks*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION*, *supra* note 83, at 353 (noting that national and regional courts employ a higher degree of deference than panels and the Appellate Body exercise under the DSU).

101. Thomas Cottier & Petros C. Mavroidis, *The Role of the Judge in International Trade Regulation: An Overview*, in *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION*, *supra* note 83, at 2.

102. *Id.*

103. See U.S. Communication of June 19, 2006, *supra* note 53; U.S. Communication of May 17, 2006, *supra* note 53.