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Orange Juice, Shrimp, and the United States Response to Adverse WTO Rulings on Zeroing

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Introduction

Continued rulings in World Trade Organization (WTO) disputes against the United States are having a profound effect on the WTO dispute settlement system, ongoing WTO negotiations, and U.S. anti-dumping law and practice.

In a series of cases over the last decade, the WTO's Dispute Settlement Body (DSB) has adopted Panel and Appellate Body Reports ruling that the "zeroing" methodology for determining anti-dumping margins^[1] is contrary to WTO law, specifically the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)^[2] and the General Agreement on Tariffs and Trade 1994 (GATT 1994).^[3] The first two cases were against the European Union (EU), which then changed its anti-dumping practices.^[4] All fourteen subsequent cases have been against the United States.

The most recent two cases, both circulated this year, related to U.S. administrative reviews of anti-dumping orders concerning orange juice from Brazil and shrimp from Viet Nam.^[5] In addition to the Panels' substantive findings on zeroing in these two cases, the Panel Reports provide valuable insights into the kinds of measures that may be successfully challenged in the WTO dispute settlement system and the role of precedent within that system. The United States' response to these and other adverse zeroing rulings demonstrates the significant, wide-ranging impact of the Appellate Body's consistent yet controversial outlawing of zeroing.

Implications of the Latest Panel Reports within the WTO

The two recent Panel Reports on zeroing grappled with the difficulty that, although the Anti-Dumping Agreement does not explicitly prohibit zeroing, and different interpretations of the relevant provisions seem possible as regards the meaning of dumping and the permissibility of zeroing,^[6] the Appellate Body has repeatedly ruled that zeroing is

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prohibited. The Appellate Body's conclusions have been consistent (although its reasoning has varied), regardless of the type of anti-dumping proceeding before it (e.g. original investigation, administrative review, or sunset review) or the overarching method used by the respondent in calculating anti-dumping margins (e.g. average-to-average, transaction-to-transaction, or average-to-transaction—all ways of determining whether the export price of an allegedly dumped product is lower than its "normal value"). The Appellate Body has also not hesitated to overrule and even chastise Panels that had reached different conclusions.

Against this background, the Panel in *US—Orange Juice (Brazil)* seems to have concluded primarily in deference to the Appellate Body that dumping has the meaning ascribed to it by the Appellate Body:

[W]e find it difficult to accept . . . that the [Anti-Dumping] Agreement entertains only one exclusive definition of "dumping". However, there is no doubt in our minds . . . the string of Appellate Body reports concerning mainly the United States' use of "zeroing" in anti-dumping proceedings read loud and clear. . . .

[O]n balance, our function under Article 11 of the [Understanding on Rules and Procedures Governing the Settlement of Disputes], and the integrity and effectiveness of the WTO dispute settlement system, are best served in the present instance by following the Appellate Body.[7]

On this basis, the Panel concluded that so-called "simple zeroing" in administrative reviews is inconsistent with the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement, even if the review results in a dumping margin of 0% and no antidumping duties.[8] The Panel in *US—Shrimp (Viet Nam)* reached a similar conclusion,[9] also finding, in reliance on the Appellate Body's earlier rulings, that this form of zeroing is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[10]

The Panel's reasons for following the Appellate Body in *US—Orange Juice (Brazil)* call to mind the words of one Appellate Body Member, in a concurring opinion specifically referred to by the Panel in *US—Shrimp (Viet Nam)*:

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.[11]

That Appellate Body Member, like the Panel in *US—Orange Juice (Brazil)*, referred to the fact that the DSB has routinely adopted Appellate Body Reports prohibiting zeroing, which (in the words of the Panel) "implies acceptance by all WTO Members of their contents, and bestows upon them systemic legitimacy." [12] Yet adoption by the DSB is quasi-automatic, and in no instance to date has the DSB reached agreement not to adopt a WTO Panel or Appellate Body Report. Indeed, such an outcome would be virtually impossible since even the "winning" party would need to agree not to adopt the Report. Adoption of an Appellate Body Report does not mean that all WTO Members agree with it; indeed, Members

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frequently make statements objecting to an Appellate Body Report being adopted—for example, the U.S. statement that the Appellate Body Report in *US—Zeroing (Japan)* was “devoid of legal merit.”^[13] And the Appellate Body has ruled^[14] that adopted WTO Panel and Appellate Body Reports do not constitute “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.^[15] Adopted Panel and Appellate Body Reports are strictly binding only on the parties to that dispute and only in connection with that dispute; they do not constitute authoritative interpretations of WTO law,^[16] although the zeroing line of cases may suggest otherwise.

These two Panels also addressed the way in which a measure may be framed in a WTO dispute. In *US—Orange Juice (Brazil)*, the Panel declined a U.S. request to make a preliminary ruling that Brazil’s claim of a WTO violation through the “continued use” of zeroing by the United States fell outside the Panel’s terms of reference.^[17] The Panel went on to find—relying on an earlier Appellate Body Report^[18]—that “ongoing conduct,” in the sense of “conduct that is currently taking place and is *likely to continue* in the future,” may be challenged in a WTO dispute.^[19] Moreover, the Panel accepted Brazil’s claim that the U.S. Department of Commerce (DoC) was engaged in the continued use of zeroing in proceedings related to the anti-dumping duty order against orange juice from Brazil, and that this ongoing conduct was inconsistent with Article 2.4 of the Anti-Dumping Agreement.^[20]

Similarly, the Panel in *US—Shrimp (Viet Nam)* found that the zeroing methodology applied by the DoC in administrative reviews “is a rule or norm of general and prospective application . . . which may be challenged ‘as such,’” and that this norm is inconsistent with WTO law.^[21] These broader successful claims against zeroing, which are more frequently being made in addition to claims against zeroing “as applied” in particular anti-dumping proceedings, further limit U.S. flexibility in implementing adverse zeroing rulings. Rather than merely addressing the determination of dumping margins in specific investigations or reviews, the United States must consider more extensive changes to its anti-dumping practice, as discussed further below.

In an unusual step, the DSB agreed to extend the time for an appeal of the Panel Report in *US—Orange Juice (Brazil)*,^[22] but ultimately the Panel Report was adopted without appeal.^[23] The usual procedural rules give the parties sixty days from July 11, 2011 (when the Panel Report was circulated) to appeal the Panel Report in *US—Shrimp (Viet Nam)*, which may be placed on the DSB agenda for adoption after twenty days.^[24] If this too is not appealed, both these cases could represent some form of acceptance by the United States, not that the Appellate Body’s interpretation of zeroing in administrative reviews is correct, but that appeal is not worthwhile as there is no realistic possibility of changing that interpretation. This seems to be the U.S. approach in the five most recent zeroing cases concerning “model zeroing” in original investigations, where the United States has chosen not to appeal the relevant Panel Report, or not to appeal the relevant Panel finding.^[25] Indeed, in most of these cases the United States did not even present arguments to contest all claims regarding zeroing.^[26]

Negotiations on Zeroing in the Doha Round

The Appellate Body’s insistence on the unlawfulness of zeroing also affects the ongoing negotiations on WTO rules (including anti-dumping rules) in the Doha Round of multilateral trade negotiations in the WTO. According to the latest status report by the negotiating

group Chair, zeroing “remains among the most divisive [issues] in the AD negotiations, and there have been few signs of convergence. Positions range from insistence on a total prohibition on zeroing . . . to a demand that zeroing be specifically authorized in all contexts.”^[27]

The Appellate Body’s stance on zeroing establishes the starting point for any bargaining on zeroing: if the Members cannot agree on whether to explicitly permit or explicitly prohibit zeroing, or to take some middle path, the outcome will be that zeroing remains prohibited according to the Appellate Body’s past reasoning and conclusions. Arguably, the Appellate Body has in effect handed over significant negotiating power from the United States to other WTO Members. To change the current treatment of zeroing in the WTO, the United States would likely have to provide something significant in return, either in the rules negotiations or in some other area of the Doha Round. The Panel in *US—Orange Juice (Brazil)* recognized the overlap between dispute settlement and negotiations, stating, “we firmly believe that all Members have a strong systemic interest in seeing that a lasting resolution to the ‘zeroing’ controversy is found sooner rather than later.”^[28]

Related Developments in the United States

Despite the United States’ continued stance that zeroing is and should be permitted under WTO law, the string of adverse Appellate Body rulings has had significant concrete impact on U.S. anti-dumping practice in connection with zeroing.

From February 22, 2007, the DoC ceased using “model zeroing” in original anti-dumping investigations.^[29] More recently, on December 28, 2010, the DoC proposed further “modifications to its practice in response to . . . WTO dispute settlement findings.” Specifically, the DoC proposed replacing the average-to-transaction methodology it typically uses—together with zeroing—in administrative reviews with an average-to-average methodology of the kind it now uses—without zeroing—in original investigations.^[30] Comments on the proposal were due by early 2011, but no deadline has been set for a decision on the proposal, which would also require review by Congress before implementation.^[31] Some members of Congress have already expressed concerns about the DoC proposal.^[32]

Following a WTO determination that the United States failed to comply with certain past rulings on zeroing, the EU and Japan sought authorization to retaliate; arbitration proceedings on the retaliation are suspended, but only until September 7, 2011.^[33] The EU and Japan have demanded that the United States correct the results of past administrative reviews that calculated dumping margins using zeroing.^[34] However, it is not clear as a matter of U.S. law whether the DoC has authority to recalculate dumping margins or refund duties paid.^[35] The September deadline places pressure on the United States to finalize its proposal for future calculations of dumping margins in administrative reviews, ^[36] although the original proposal did not specifically address past reviews such as those at issue in the disputes with the EU and Japan.

The DoC’s approach to date in implementing adverse WTO rulings on zeroing has already created substantial concerns under domestic law, with rulings in the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. These disputes concern issues such as whether U.S. law permits the DoC to calculate dumping margins without zeroing, and the apparent inconsistency between the DoC’s current general approaches to original investigations (in which it has renounced zeroing) and administrative

reviews of anti-dumping orders (in which it continues to use zeroing).[37]

Conclusion

The intransigence of the WTO Appellate Body in relation to zeroing appears to have increased the scope and significance of its rulings, with Panels falling in line in recognition of its authority, and the United States in recent years refraining from contesting some claims and declining to appeal adverse Panel findings on some forms of zeroing. At the same time, the Appellate Body's prohibition of zeroing has established the framework for the negotiations on this issue in the Doha Round, while provoking substantial developments in U.S. anti-dumping law and practice. It would indeed be preferable for WTO Members to resolve this issue through negotiation, but the current state of the Doha Round may preclude progress on that front, along with many others.

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Endnotes:

[1] Dumping margins are essentially determined by comparing the normal value (typically the domestic price) and export price of a product over a series of transactions. The sum of the results of these comparisons is the numerator in establishing the degree of dumping for the product (with the denominator being the total value of all export transactions). A given transaction is dumped if the normal value exceeds the export price. In the terms preferred by the United States, zeroing entails "offsetting" comparisons for non-dumped transactions against comparisons for dumped transactions. Put differently, zeroing entails disregarding or counting as zero (rather than as a negative number) the results of any comparison showing an absence of dumping. Zeroing may take different forms depending on the precise methodology used to calculate the dumping margin. In a U.S. anti-dumping investigation, "model zeroing" was traditionally used by comparing a weighted average normal value with a weighted average export price for each model (or sub-category) of a product and then aggregating the results, excluding non-dumped models. In U.S. administrative reviews, "simple zeroing" is typically used by comparing a weighted average normal value with the export price for each individual export transaction and then aggregating the results, excluding non-dumped export transactions.

[2] 1868 U.N.T.S. 201, available at http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

[3] 1867 U.N.T.S. 187, available at http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm.

[4] WTO Dispute Settlement Body, *Minutes of Meeting Held on 17 February 2005*, ¶ 44, WT/DSB/M/183 (Mar. 7, 2005).

[5] Panel Report, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil*, WT/DS382/R (Mar. 25, 2011) [hereinafter *US—Orange Juice (Brazil)*]; Panel Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R (Jul. 11, 2011) [hereinafter *US—Shrimp (Viet Nam)*].

[6] See Tania Voon, *The End of Zeroing? Reflections Following the Appellate Body's Latest Missive*, 34 Leg. Issues Eco. Integ. 211 (2007).

[7] Panel Report, *US—Orange Juice (Brazil)*, ¶¶ 7.131, 7.135. See *infra* note 24.

[8] *Id.* ¶¶ 7.154, 7.156-7.157, 7.160-7.161.

[9] Panel Report, *US—Shrimp (Viet Nam)*, ¶¶ 7.93-7.95.

[10] *Id.* ¶¶ 7.138-7.142.

[11] Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 312, WT/DS350/AB/R (Feb. 4, 2009) (concurring opinion), (cited in Panel Report, *US—Shrimp (Viet Nam)*, ¶ 7.140) [hereinafter *US—Continued Zeroing*].

[12] Panel Report, *US—Orange Juice (Brazil)*, ¶ 7.132.

[13] *U.S. Agrees To Comply With Appellate Decision In Japan Zeroing Case*, Inside U.S. Trade (Feb. 23, 2007).

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

[15] 1155 U.N.T.S. 331 (adopted May 22, 1969).

[16] Appellate Body Report, *Japan—Alcoholic Beverages II*, at 14; Marrakesh Agreement Establishing the World Trade Organization art. IX:2, Apr. 15 1994, 1867 U.N.T.S. 154, available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

[17] Panel Report, *US—Orange Juice (Brazil)*, ¶ 7.49.

[18] See Appellate Body Report, *US—Continued Zeroing*, ¶ 185.

[19] Panel Report, *US—Orange Juice (Brazil)*, ¶ 7.176 (original emphasis).

[20] *Id.* ¶¶ 7.192-7.193.

[21] Panel Report, *US—Shrimp (Viet Nam)*, ¶¶ 7.120, 7.142.

[22] WTO, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil: Joint Request by Brazil and the United States for a Decision by the DSB*, WT/DS382/7 (Apr. 11, 2011); *News Item: WTO Establishes Panel in Seal Case*, WTO (Apr. 21, 2011), available at http://www.wto.org/english/news_e/news11_e/dsb_21apr11_e.htm.

[23] WTO, *United States—Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil—Panel Report: Action by the Dispute Settlement Body*, WT/DS382/8 (June 20, 2011).

[24] Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401, available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm, art 16.

[25] Panel Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006) (“model zeroing” finding in respect of original investigations not appealed); Panel Report, *United States—Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (Jan. 30, 2007) (not appealed) [hereinafter *US—Shrimp (Ecuador)*]; Panel Report, *United States—Measures Relating to Shrimp from Thailand*, WT/DS343/R (Feb. 29, 2008) (zeroing finding not appealed) [hereinafter *US—Shrimp (Thailand)*]; Panel Report, *United States—Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R (Jan. 22, 2010) (not appealed) [hereinafter *US—Anti-Dumping Measures on PET Bags*]; Panel Report, *United States—Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R (Jan. 18, 2011) (not appealed) [hereinafter *US—Zeroing (Korea)*].

[26] See, e.g., Panel Report, *US—Shrimp (Ecuador)*, ¶¶ 7.25, 7.43; Panel Report, *US—Shrimp (Thailand)*, ¶¶ 2.4, 7.19; Panel Report, *US—Anti-Dumping Measures on PET Bags*, ¶¶ 7.3, 7.5, 7.7, 7.18, 7.25; Panel Report, *US—Zeroing (Korea)*, ¶¶ 7.12, 7.13, 7.35.

[27] WTO, *Negotiating Group on Rules: Communication from the Chairman*, at 6, TN/RL/W/254 (Apr. 21, 2011).

[28] Panel Report, *US—Orange Juice (Brazil)*, ¶ 7.134.

[29] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (Dec. 27, 2006); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3783 (Jan. 26, 2007).

[30] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81533, 81534 (Dec. 28, 2010).

[31] Rossella Brevetti, *Commerce Official Says Timing Of Zeroing Final Rule Cannot Be Predicted*, BNA Int'l Trade Daily(July 14, 2011).

[32] *Congress Urges Commerce to Alter Zeroing Proposal, Preserve Flexibility*, Inside U.S. Trade (Feb. 25, 2011).

[33] WTO, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)—Recourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator*, WT/DS294/39 (Dec. 8, 2010); WTO, *United States—Measures Relating to Zeroing and Sunset Reviews—Recourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator*, WT/DS322/38 (Dec. 15, 2010).

[34] *EU Says U.S. Zeroing Proposal Not Enough To Comply with WTO Cases*, Inside U.S. Trade (Jan. 28, 2011).

[35] *U.S. Still Examining Whether it Will Adjust Past Reviews in Zeroing Cases*, Inside U.S. Trade (Jan. 7, 2011). See also GATT Panel Report, *United States—Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, ¶¶ 5.21, 5.24, ADP/47 (Aug. 20, 1990) (unadopted).

[36] *Commerce Official Downplays Date for Zeroing Final Rule in OIRA Report*, Inside U.S. Trade (July 13, 2011).

[37] See, e.g., *JTEKT Corp. v. United States* (Fed. Cir., Jun. 29, 2011), available at <http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1516%20-1518.pdf>; *Dongbu Steel Co., Ltd. v. United States*(Fed. Cir., Mar. 31, 2011), available at <http://www.cafc.uscourts.gov/images/stories/opinions-orders/10-1271.pdf>; *United States Steel Corp. v. United States*, 621 F.3d (Fed. Cir., Oct. 4, 2010), available at <http://www.cafc.uscourts.gov/images/stories/opinions-orders/09-1572%20-1573.pdf>.