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ANTIDUMPING INVESTIGATIONS AND THE ROLE OF THE JUDICIARY IN THE WTO SYSTEM

Cilj ovog članka je da omogući osnovni uvid u glavne aspekte uspostavljanja anti-dampniških mera na nivou Svetske trgovinske organizacije, kao i uspostavljanja transpartentnosti i anti-protekcionističkih mera.
Ključne reči: Svetska trgovinska organizacija; anti-dampinške mere; transparentnost.

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Introduction

The use of non-quantitative barriers to trade as protectionist measures by the States constitutes one of the main challenges for those who advocate the trade liberalization.

As the 'dumping margins' are defined based on States' internal investigations, following the legislation adopted unilaterally, transparency in the calculations crucial. Moreover, some countries,

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mainly developing ones argue that antidumping measures are used to protect special interests.

Understanding the elements involved in assessing the legality of antidumping measures from the perspective of domestic investigations to the WTO adjudicating bodies, should, better to say, must be among the top concerns for countries as Serbia.

The article firstly provides a panoramic view of the discipline, demonstrating the key elements and tests (if available) currently applied to determine the validity of antidumping measures.

Secondly, the article reflects on the 'US Zeroing System' as a case study that addresses the theoretical aspects previously discussed and arguably demonstrates the lack of transparency and predictability in domestic antidumping investigations.

Finally, the role of the WTO judiciary is addressed as a last resource left to the countries allegedly victims of protectionist antidumping measures.

The agreement of Anti-dumping

One of the most divisive aspects of international trade practice has long been the application of national duties to counter international dumping of products in local markets. States have adopted legislation unilaterally to counter dumping since the beginning of the twentieth century and dumping provisions were included in the GATT 1994.[1] Such anti-dumping practices have attracted international criticism, particularly from developing countries. The US and the EU frequently resort to anti-dumping actions, while developing countries such as China argue that the anti-dumping rules and the quantitative restrictions that are imposed against them are used to protect special interests.[2] There are, however, changing patterns of invocation of anti-dumping measures and more recently India has increased its adoption of such

[1] JACKSON, JH; DAVEY, WJ and SYKES, AO. *Legal Problems of International Economic Relations: Cases, Materials and Text*, 4th ed. West Group, St. Paul, MN, 2002, p. 694.

[2] HORLICK, GN and SHEA, EC. *The World Trade Organisation Antidumping Agreement* (1995) 29(1) JOURNAL OF WORLD TRADE 5; see also discussion by DW Leebron, *Implementation of the Uruguay Round Results in the United States. In*: JACKSON, JH and SYKES, AO (eds.), *Implementing the Uruguay Round*, Clarendon Press, Oxford, 1997, pp 175, 234-5.

measures. Moreover, it is in the context of dumping, along with technical barriers to trade, that differing policy approaches to "fair trade" are exposed between developed and developing Members of the WTO.[3]

Dumping is defined as the introduction of a product into the commerce of another country at less than the normal value if the price of the product is "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".[4] The parties recognise that the dumping of products is "to be condemned" and, where it causes or threatens material injury to an established industry or retards the establishment of a domestic industry, dumping attracts the right to impose anti-dumping duties on the dumped products.[5]

GATT 1994 article VI provides:

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry…

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.

The essential point to be observed in respect of article VI is that **it does not prohibit dumping**: it merely authorises the adoption of duties to offset dumping based on the *caused material injury to the domestic industry* test. Thus, trade disputes have primarily addressed the legality of the antidumping duties imposed by the importing state as an application of such test.

Dumping is a type of price discrimination under which a foreign producer exports products at prices lower then their domestic prices

[3]TRIGGS, G. *Internantional Law: Contemporary Principles and Practices*. LexisNexis Butterworths. Australia. 2006. p. 727.
[4] GATT 1994 article VI: 1(a); Anti-Dumping Agreement article 2.1.
[5] GATT 1994 article VI.

(normal value) or at prices below the cost of production plus normal profits. Although such price discrimination is widely regarded as a legitimate business strategy to maximize profits in the absence of anticompetitive (predatory) intent, international trade law (GATT/WTO) provides importing countries with remedies (*antidumping duties*) to countervail this allegedly unfair practice when such dumping *materially injures domestic industries*[6] (as a result of the material injury caused to the domestic industry test). However, many economists as well as policy-makers criticize the antidumping mechanism as a protectionist scheme.[7]

Agreement on Interpretation of Article VI

The agreement on anti-dumping is founded in Article VI of GATT 1994 and builds upon the Tokyo Round Agreement on Dumping. Essentially, the agreement provides for more effective rules for the determination of dumping, injury and the normal value.[8]

According to the Agreement, dumping may be described as the introduction of products by private parties into the economy of another state at a price below its cost or domestic price. More specifically, dumping is defined as the sale into the market of another member of a product at less than its normal value.[9] Generally, the normal value is a reference to the price charged in the domestic market of the exporter.

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[6] General Agreement on Tariffs and Trade, October 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. VI, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex 1A, Marrakech Agreement Establishing the World Trade Organisation, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 6, 6-18, 33 I.L.M. 1140, 1144-1153 (1994).

[7] Alan Greenspan once observed that antidumping remedies are "just simple guises for inhibition competition" imposed in the name of "fair trade". Richard J. Pierce, Jr. Antidumping Law as a Means of Facilitating Cartelization, 67 ANTITRUST L.J. 725, 725 (2000) (quoting the former Federal Reserve Board Chairman Alan Greenspan, Remarks Before the Dallas Ambassadors Forum, Dallas, Texas (Apr. 16, 1999)).

[8] QURESHI, Asif H. *The World Trade Organisation – Implementing International Trade Norms.* Melland Schill Studies in International Law. Manchester University Press. UK. 1996. p.29.

[9] Article 2 of the Agreement on the Implementation of Article VI of GATT 1994 [AD Agreement].

The normal value can be obtained (i) with reference to the price of a like product in the domestic market, or in the absence of such a sale in the domestic market (ii) with reference to the price of a like product sold to the market of a third country. This second test demands the investigation of what a like product consists of . A like product is defined as a product that is identical or, in the absence of such a product, another product that has similar characteristics.[10] Only where no such comparison can be made then the normal value is constructed with reference to cost of production in the country of export plus a margin for profits.[11] Therefore, the construction of normal value is the last resource available.

As mentioned before, dumping is not itself prohibited, but its occurrence entitles members to recourse to certain anti-dumping measures. These anti-dumping measures are available only if the dumping causes or threatens material injury to a domestic industry of the importing country, or retards in a material way the establishment of such an industry.[12] The agreement provides guidance as to how the injury threat or retardation is to be established – including the causal connection between the dumping and the threat, injury or retardation. A domestic industry is defined as referring to the domestic producers as a whole of the like product. It has been suggested that the rules relating to causation and the calculations of injury have not been sufficiently developed to be clear.[13]

The AD Agreement aims at regulating the circumstances in which a member state may resort to anti-dumping measures – particularly to ensure that the anti-dumping response itself does not act as a trade barrier.

An anti-dumping measure is a response to unfair, or what are perceived to be "unfair", trading practices, by the member state that is

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[10] *Ibid*, Article 2[6].

[11] QURESHI, Asif H. *The World Trade Organisation – Implementing International Trade Norms.* Melland Schill Studies in International Law. Manchester University Press. UK. 1996. p.30.

[12] Footnote 9 to Article 3 of the Agreement on the Implementation of Article VI of GATT 1994.

[13] See for example A. PANGRATIS and E. A. VERMULST. *Injury in anti-dumping proceedings,* JOURNAL WORLD TRADE, 28:5 (1994), at p. 61. Also in a series of cases the WTO adjudicating bodies has to address this issue.

subject of the dumping. The principal form of an anti-dumping measure is the anti-dumping duty.

The determination of the existence of dumping and the anti-dumping response are to be conducted only under certain prescribed conditions. These conditions include *inter alia* a recognition that the anti-duping response itself can be a disguised protectionist measure.[14]

Consistently with other agreements, any determination of injury is to be based on positive evidence involving an objective examination of the *'effect of the dumped imports on prices in the domestic market for like products and ...the consequent impact of these imports on domestic producers'* of those products.[15] Special regard must be given to developing countries and *'possibilities of constructive remedies…shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members'*.[16]

A panel considered the meaning of the phrase 'constructive remedies' in the *EC – Bed Linen dispute*[17]*:*

EC- Bed Linen

Panel Report, WTO Doc WT/DS141/R, adopted 12 March 2001.

Modified by the Report of the Appellate Body, WTO Doc. WT/DS141/AB/R

In September 1996, the EC initiated anti-dumping proceedings against the imports of cotton-type bed-linen from India. Definitive anti-dumping duties were imposed by EC Council Regulation on 28 November 1997. India argued that these measures were inconsistent with the Anti-Dumping Agreement and failed to take into account India's position as a developing country, as required by article 15:

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[14] QURESHI, Asif H. *The World Trade Organisation – Implementing International Trade Norms.* Melland Schill Studies in International Law. Manchester University Press. UK. 1996. p.81.

[15] Article 3 AD Agreement.

[16] Article 15 AD Agreement.

[17] *European Communites – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, Panel Report, WTO Doc WT/DS141/R, adopted 12 March 2001; modified by the Report of the Appelate Body, WTO Doc WT/DS141/AB/R (*EC – Bed Linen*).

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

The panel found that a constructive remedy could include the imposition of lesser duty or a price undertaking and that article 15 imposes an obligation on a developed country to '*actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country'*.[18] The panel found the EU was in violation of article 15 because it rejected the possibility of an undertaking '*out of hand*' and was '*purely passive'* in relation to the obligation.

At the level of member states before proceeding to initiate an investigation the government of the exporting member is to be notified.[19] In addition, notice of the fact of the initiation of the investigations, the basis upon which the dumping is alleged and the final determination is to be forwarded to the member whose products are the subject of a dumping determination, along with other interested parties.[20]

Every member is required to give another affected member the opportunity for consultation.[21] Where consultations fail the Understanding on Rules and Procedures Governing the settlement of Disputes may be invoked. The remit of the Dispute Settlement panel,

[18] *EC – Bed Linen*, WT/DS141/R, adopted 12 March 2001, at [6.233]. The Appelate Body upheld that findings of the panel that the means used by the EC to establish the 'margins of dumping' and to calculate amounts for administration costs and profits were inconsistent with article 2.2.2(ii) of the Anti-Dumping Agreement. It was recommended that the duties be lifted. *In*: TRIGGS, Gillian…. p. 729. fn 189.
[19] Article 5 AD Agreement.
[20] QURESHI, Asif H. *The World Trade Organisation – Implementing International Trade Norms.* Melland Schill Studies in International Law. Manchester University Press. UK. 1996. p.81.
[21] Article 17 AD Agreement.

however, appears to be somewhat circumscribed. First, the panel is to determine whether the authority's establishment of the facts was proper, and whether the valuation of the facts was objective and unbiased.[22] If this is the case, then the conclusion cannot be overturned by the panel on the grounds that the panel might have arrived at a different determination. Further, where there is more than one possible interpretation of a provision of the agreement, then as long as the decision of the member state's authority is consistent with one of the possible interpretations, the panel is to find the actions taken as being in conformity with the agreement.[23]

The panels and the Appellate Body have made significant contributions to the jurisprudence of the WTO in complex areas, such as the validity of '*zeroing'* in the *EC – Bed Linen case*, and have considered the meaning of '*material injury'* under article 3.4 of the Anti-Dumping Agreement.[24] In the *Mexico – Corn Syrup* case there was an unusual reversal of developed and developing state roles in an anti-dumping dispute.[25] The US complained that Mexico's anti-dumping measures against its high-fructose corn syrup were inconsistent with the Anti-Dumping Agreement arguing that the way in which the determination of the threat had been made was incorrect. The panel found that the initiation of the anti-dumping investigation against the US was consistent with the Anti-Dumping Agreement but that the measures adopted by Mexico were inconsistent with articles 3, 7, 10 and 12 of the agreement. In particular, the panel found that, when determining a threat of injury, the national dumping authorities must also consider the elements of article 3.4.[26]

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[22] Article 17 AD Agreement.
[23] Article 17 AD Agreement.
[24] *Egypt – Steel Rebar from Turkey*, Report of the Panel, WTO Doc WT/DS211/R, 1 October 2002; *Thailand – H-Beams*, Report of the Appellate Body, WTO Doc WT/DS122/AB/R, adopted 5 April 2001; *US – Hot-Rolled Steel*, Report of the Appellate Body, WTO Doc WT/DS184/AB/R, adopted 23 August 2001. *In*: TRIGGS, Gillian…. p. 729. fn 190.
[25] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States, Report of the Panel, WTO Doc WT/DS132/R, adopted 24 February 2000 (*Mexico – Corn Syrup*). *In*: TRIGGS, Gillian…. p. 730. fn 191.
[26] TRIGGS, Gillian…. p. 730. fn 189.

At the national level the levying of an anti-dumping duty may be initiated by or on behalf of a domestic industry.[27] A domestic industry is defined as consisting of the domestic producers as a whole of the like product.[28] More particularly, an application for the imposition of anti-dumping measures must be supported by those producers, whose production of the like product constitutes more than 50 per cent of the total production.[29] In special circumstances the authorities of the importing member may initiate of their own accord an anti-dumping investigation.[30] An anti-dumping action may also be started on behalf of a third country where the domestic industry of the third country suffers an injury.[31] In such an event, the approval of the council for Trade in Goods must be sought by the importing member.[32]

In order to establish dumping the authorities have a number of means at their disposal, including investigation in other countries, although with the consent of the firm and the government concerned.[33] In the determination of the dumping of the dumping the authorities may not impose an unreasonable burden of proof on the parties.[34] In the same vein a determination of injury is to be based on positive evidence.[35] Similarly, a threat of material injury is to be based on facts and not merely on allegation, conjecture or remote possibility.[36]

To ensure vigilance various transparency measures have been introduced. All interested parties are to be given full opportunity to defend their interests.[37] There must be public notice of the initiation of an anti-dumping investigation.[38] The notice must include the basis upon which the dumping is alleged. In addition, there must be a public notice of a final determination.[39] This vigilance is reinforce in a number of ways. Thus, each member whose national legislation makes provision

[27] Article 5 AD Agreement.
[28] Article 4 AD Agreement.
[29] Article 5[4] AD Agreement.
[30] Article 5[6] AD Agreement.
[31] Article 14 AD Agreement.
[32] Article 14[4] AD Agreement.
[33] Article 6 AD Agreement.
[34] Article 2 AD Agreement.
[35] Article 3 AD Agreement.
[36] Article 3 AD Agreement.
[37] Article 6 AD Agreement.
[38] Article 12 AD Agreement.
[39] Article 12 AD Agreement.

for anti-dumping measures is to maintain independent judicial, arbitral or administrative tribunals in order to facilitate the review of administrative actions in relation to anti-dumping investigations and determinations.[40]

A member may impose provisional measures where necessary, for example a duty,[41] or require a cash deposit[42] - but only where a preliminary affirmative determination of dumping and injury has been made. A member may accept from an exporter, in lieu of the imposition of anti-dumping duties or provisional measures, a price undertaking or an undertaking to cease the export of the product in question. Such undertakings can only be obtained, however, after a preliminary affirmative determination of dumping and injury has been made.[43]

The anti-dumping duty that a member may impose must be less than the margin of dumping, and should be imposed on a non-discriminatory basis on all sources found to be dumping.[44] The duration of the duty must be as necessary, but not more than five years.

The US Zeroing Methodology

On April 18, 2006, the WTO Appellate Body (AB) released its decision on the '*zeroing*' antidumping case which the EU brought against the U.S.[45] zeroing methodology employed in initial antidumping investigations was inconsistent with the fair comparison requirement under Article 2.4.2 of the WTO Antidumping Agreement (AD Agreement). In addition, the AB, reversing the panel's original finding, held that certain applications of the same methodology in the administrative review process were inconsistent with Article 9.3 of the AD Agreement.

[40] Article 13 AD Agreement.
[41] Article 7 AD Agreement.
[42] Article 7 AD Agreement.
[43] Article 8 AD Agreement.
[44] Article 9[2] AD Agreement.
[45] *United States – Laws Regulations, and Methodology for Calculating Dumping Margins ('Zeroing').* WT/DS294/AB/R, Apr 18, 2006. Available at http://www.wto.org/english/tratop e/dispu e/294abr e.pdf

What the "Zeroing" is

In the "original investigation" the Department of Commerce (DOC) in the U.S. determines a general dumping margin over a particular product in question by summing up each individual dumping margin (normal value minus export price) computed in a group ("an average group") of identical products. In doing so, the DOC disregards any "negative" dumping margin (any excess of export price over normal value) in the group by simply "zeroing" it. Consequently, a general dumping margin, which is a total sum of these individual dumping margins, tends to be inflated because the zeroing methodology precludes any offsetting effect of negative individual dumping margins. The DOC employs the same methodology when it finally assesses a company-specific dumping margin to impose actual antidumping duties in the annual "administrative review" process.

The zeroing methodology has been contested several times under the GATT/WTO. An unadopted panel report under the GATT (Committee on Antidumping Practices) once upheld the European Union's (EU) zeroing methodology.[46] However, the WTO Appellate Body struck down certain applications of such methodology both by the EU[47] and the U.S.[48] A recent NAFTA Chapter 19 panel (*NAFTA Softwood Lumber*)[49] condemned this practice. Invoking the celebrated *Charming Betsy* doctrine (a U.S. Supreme Court decision holding that U.S. statutes should be interpreted, if possible, in such a way as to

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[46] *EC – Antidumping Duties on Audio Tapes in Cassettes Originating in Japan*. ADP/136. Apr 28, 1995 (unadopted). Unlike the WTO, under the old GATT system any party, including a losing party, could "veto" the adoption of a panel report so that the report would not be legally "binding". However, even such an unadopted report is still regarded as a useful legal guidance. See *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R at 13. Appellate Body and Panel Report as modified, adopted on November 1, 1996.

[47] *European Communities – Anti-Dumping Duties on imports of Cotton-Type Bed Linen from India.* The Appellate Body Report circulated on Mar 1, 2001, WT/DS141/AB/R, paras 54-55.

[48] *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, Panel Report circulated on Dec 11, 2000. WT/DS179/R, para 6.105. *U.S. – Final Dumping Determination on Soff Lumber from Canada,* WT/DS264/AB/R, circulated on Aug. 11, 2004, para 183 (a)

[49] *Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-2, Jun.9, 2005, at 43-44.

avoid placing the United States in violation of international law), and expressing the view that the U.S. should follow the AB decision against it in *WTO Softwood Lumber V*. It may be no coincidence that the EU challenged the U.S. zeroing methodology after the EU's own applications of the same methodology were invalidated by the WTO.

The Appellation Body Report

The panel had originally struck down "as such" the U.S.' zeroing methodology embodied in the "Standard Zeroing Procedures" in the original investigation under Article 5 of the AD Agreement. The panel held that the methodology ignored negative margins and thus violated the "fair comparison" requirement under Article 2.4.2 of AD Agreement[50]. The AB upheld the panel's finding.[51] The U.S., in its appeal, had challenged the panel's aforementioned finding under Article 11 of Dispute Settlement Understanding (DSU).[52] The U.S. contended that the zeroing methodology itself could not be challenged "as such" because it did not "mandate" a WTO violation or "preclude" a WTO-consistent action.[53] Thus, the U.S. argued that the panel failed to make an objective assessment required under DSU Article 11.[54] However, the AB rejected this argument and upheld the panel's ruling as it refused to make any "general" mandatory/discretionary distinction in deciding the admissibility of a measure as such.[55]

In addition, the AB reversed the panel's original finding on the EU's "as applied" claims as to the DOC's applications of the zeroing methodology in the administrative review. The panel had ruled in favor of the U.S. that the zeroing applications in the administrative review were not inconsistent with the AD Agreement.[56] The U.S. argued that a

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[50] *United States – Laws, Regulations, and Methodology for Calculating Dumping Margins ('Zeroing)*. WT/DS294/R. Panel Report circulated on Oct. 31, 2005, paras. 7.105-106.

[51] *United States – Laws Regulations, and Methodology for Calculating Dumping Margins ('Zeroing)*. WT/DS294/AB/R, Apr 18, 2006.

[52] "[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 covered agreements, (…)" *supra* 51.

[53] *Id.United States' Other Appellant's Submission*, para. 44.

[54] The AB Report, *supra* 51, paras. 207-208.

[55] *Id*. para. 211.

[56] *Id*. para. 3.

dumping margin can be computed on a "transaction-specific" basis so that a certain comparison in a certain averaging group might produce a zeroed margin.[57] In other words, for the purpose of calculating dumping margins the DOC might rely selectively on a comparison between an averaged normal value (average domestic price) and a *particular* export price (which is less than the normal value), not an averaged export price. Suppose that there are two shipments (transactions) of a widget whose normal value (an average domestic price) is one dollar. Also suppose that an export price is fifty cents in the first shipment, and one dollar and fifty cents in the second shipment. According the U.S., it can simply pick the first transaction to compare the normal value to the export price, thereby producing a 50% dumping margin. However, the AB sternly rejected the U.S. argument. It highlighted its previous position under *EC – Bed Linen* and *US – Softwood Lumber V* which ruled that multiple comparisons to establish a dumping margin should include the results of *all* of those comparisons.[58] Therefore, in the aforementioned example the dumping margin should be 0% (50%-50%), instead of 50%.

In light of this reasoning, the zeroing methodology itself caused the anti-dumping duty to exceed the margin of the dumping, in violation Article 9.3 of the AD Agreement[59] since it inevitably led to higher dumping margins and hence higher antidumping duties than otherwise.[60] The AB focused on the violative structure of the zeroing methodology itself. The AB held that:

Because results of this type were **systematically disregarded**, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. [61]

This uncompromising ruling leaves the DOC nearly no option but to repeal the zeroing methodology on the whole in the administrative

[57] *Id*. *United States' Appellee's Submission*, paras. 171-178.
[58] The AB Report, *supra* 51, para. 126.
[59] "The amount of the anti dumping duty shall not exceed the margin of dumping as established under Article 2."
[60] The AB Report, *supra* 51, para. 133.
[61] *Id*. (Emphasis added)

review as well, even though the EU's claim here was "as applied" to the facts of the particular case.

Further developments: implications on the WTO judiciary

In a surprising move, a recent WTO panel report (*U.S. – Stainless Steel*) explicitly defied the AB's jurisprudence and ruled in favor of certain types of zeroing.[62] This panel's position raises an important legal question. One might argue that a WTO panel could no disobey the AB's case law on the same subject-matter, mainly in an area as dumping and antidumping measures, where the material injure caused test requires the application of other tests construed by the AB for its determination. In this case, the complainant (Mexico) appealed the panel decision to the AB, which is likely to reject the panel ruling, if it still adheres to its case law in this area. If it had not been appealed, however, two conflicting case laws, i.e., one by the AB and the other by the panel, would have co-existed.[63]

The zeroing controversy raises an important legal and institutional (to some, even "constitutional") question as to the limits of the WTO tribunal's interpretation or rule-making, in particular in the area of antidumping as well as the relationship between panels and the AB. Thus far, the AB has viewd that its anti-zeroing rulings are in accordance with the standard of review under Article 17.6(ii) of the Antidumping Agreement.[64] However, the zeroing supporters, such as

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[62] *United Sates – Final Anti-Dumping Measures on Stainless Steel from Mexico*, Report of the Panel, WT/DS344/R, Dec. 20, 2007, para. 7.106 ("[W]e have decided that we have no option but to respectfully disagree with the line of reasoning developed by the Appellate Body regarding the WTO-consistency of simple zeroing in periodic reviews.").

[63] CHO, Sungioon. ASIL Insight. *A WTO Panel Openly Rejects the Appellate Body's "Zeroing" Case Law*. March 11, 2008, Volume 12, Issue 3.

[64] See e.g., U.S. – Zeroing (EC) United-States – Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing"), Appellate Body Report adopted on May 9, 2006, WT/DS294/AB/R, para. 134 (ruling that "Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii), do not, in our view, allow the use of the methodology applied by the United States in the administrative reviews at issue."). *In:* CHO,

the U.S. justify the practice by the deference which they view is granted under the same provision or by a more abstract standard, i.e. sovereignty. Whichever position may prevail in the end, it will change the nature and contour of WTO norms to a great extent.

WTO Judiciary 'creating WTO law'*?*

The DSU builds on the experience of GATT 1947. Dispute settlement under GATT 1947 was centred on the use of ad hoc panels consisting of three or five individuals. Although quite successful, decisions had to be taken by consensus by all GATT contracting parties, including the parties to the dispute who could therefore delay or even block the decision-making process. This led some parties to take unilateral measures. Furthermore, there was no time frame for the decision-making process. The DSU strengthened the rule of law in the world trading system by setting strict time limits for the different stages of the dispute settlement process, by providing for a negative consensus and by obliging parties to refrain from the procedure.

The DSU, one of the covered agreements, explicitly acknowledges the right of WTO adjudicating bodies to establish their own working procedures. DSU Article 17.9 explicitly authorizes the AB to do so (which it has done). Although panels are, in principle, required to obey the working procedures in Appendix 3 to the DSU, Article 12.1 of that agreement permits them to deviate if they so choose. The primary law thus acknowledges the right of WTO adjudicating bodies (albeit not the same for all bodies) to legislate in the narrow context of their own procedures.[65]

In addition to the power to enact procedures, WTO adjudicating bodies have on occasion created law *in order* to be in a position above that, unless one accepts that adjudication bodies are vested with implied powers, it will sometimes be impossible for them to honour their mandates-that is, to resolve the disputes before them. There are some examples found in case law: allocating the burden of proof as

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Sungioon. ASIL Insight. *A WTO Panel Openly Rejects the Appellate Body's "Zeroing" Case Law*. March 11, 2008, Volume 12, Issue 3.

[65] MAVROIDIS, C. Petros. *WTO as Law Practiced by WTO Courts*. AMERICAN JOURNAL OF INTERNATIONAL LAW. July 2008. Volume 102. Number 3. 421-474. p.434.

evidence of such implied powers. But there are other examples as well: third-party rights is an appropriate illustration.[66] Appendix 3 to the DSU does not mention *extended* third-party rights. When the first panel decided on extending the right of third parties so as to allow them to participate in the second substantive panel meeting,[67]the panel had to establish criteria[68] to which future interested parties could refer in order to enjoy the same privilege. Yet another example concerns the participation of *amici curiae*. Nothing in Appendix 3 provides for such participation, the conditions for which[69] have been defined, instead, via the case law of the AB and panels.[70]

Both the panels and the Appellate Body have relied closely – perhaps too closely – on prior decisions. In fact nearly every Report has a list, complete with citations, of every prior WTO or GATT case mentioned in the opinion, in the style of the English law reports. As between the common law and the civil law models, the case method has clearly prevailed, notwithstanding the general international rule that decisions bind only the parties that there is no rule of *stare decisis*.[71]

It is argued that in antidumping cases (as the 'Zeroing case' could demonstrate), case law plays a crucial role in construing the application of the key elements in defining the illegitimate dumping and the

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[66] DSU, Art. 10. Essentially, WTO members can participate in the first panel meeting if they declare their wish to do so within the statutory deadlines.

[67] Third parties do not enjoy this right. *Id*., App. 3, para.6.

[68] Essentially, the panel would first satisfy itself that a third party had an especially strong reason for continuing to participate in a given dispute. The question of *enhanced third-party rights* first arose in *EC-Bananas III*, when a number of developing-country third parties requested that they be permitted to attend all meetings between the panel and the parties to the dispute-and not simply the first meeting as per DSU Article 10.3. Panel Report, EC-Bananas III, *supra* 43, para. 7.4. Given that the export revenue for numerous developing countries risked being heavily affected by the outcome of the dispute, the panel agreed to the request. *Id*., paras. 7.8, 9.

[69] MAVROIDIS, C. Petros. *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing, in* EUROPEAN INTERGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMAN 317 (Arnin von Bogdandy, Petros C. Mavroidis, & Yves Mény eds. , 2004).

[70] BARTELS, Lorant. Applicable Law in WTO Dispute Settlement Proceeding. 35 J. WORLD TRADE 499 (2001).

[71] LOWENFELD, Andreas. F. *International Economic Law*. Second Edition. Oxford Unversity Press. New York. 2008. p. 212.

dumping margin calculation. Accepting the case law (and *stare decisis* as a logical consequence) would provide the use of precise tests to be incorporated the in the different domestic legislations and investigations procedures.

Conclusion

[1] Antidumping measures have long been used to disguise protectionist measures used by States. As the 'dumping margins' are defined based on States' internal investigations, following the legislation adopted unilaterally, transparency in the calculations crucial. Moreover, some countries, mainly developing ones argue that antidumping measures are used to protect special interests.

[2] The test to regard dumping as illegitimate is: the material injury caused to the domestic industry test. However in order to calculate the dumping margin different elements come into play: the definition of normal value, the price of a like product, on its absence, the investigation of what a like product consists of, the definition a like product among others.

The construction of these elements has shown a high degree of uncertainty, mainly due to the lack of guidelines set by the WTO adjudicating bodies on how to apply them to the cases.

[3] It is suggested that applying the case law (and *stare decisis* as a logical consequence) would provide the use of precise tests to be incorporated the in the different domestic legislations and investigations procedures. Therefore the establishment of antidumping measures would follow more transparent and predictable criteria.

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Antidumping Investigations and the role of the Judiciary in the WTO System

The article aims at providing a panoramic view of the main aspects involved in the establishment of antidumping measures, demonstrating the amount of discretion left the countries in their internal investigations and to the WTO adjudicating bodies in assessing their legality. It argues that in order to provide more predictability and transparency to the WTO, the application 'case law' (stare decisis) as WTO law constitutes and essential tool in avoiding the use of antidumping duties as protectionist measures by the States.

Key words: WTO; antidumpnig mesures; transparency

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