The Jurisprudence of WTO Dispute Resolution (2009)

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I. Introduction

This chronicle summarises the jurisprudence of WTO dispute resolution in 2009. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective.[1] Three cases have attracted particular attention. The dispute in *China – Intellectual Property Rights* turned on various measures imposed by China, which the United States considered to be inconsistent with the TRIPs Agreement. The dispute in *Colombia – Ports of Entry* dealt with customs valuation and freedom of transit. The *United States – Continued Zeroing* case concerned, once again, the legality of the zeroing methodology in determining the margin of dumping. These three cases will each be dealt with in turn. Furthermore, a series of "compliance" panel and Appellate Body reports on the correct implementation of recommendations as set out in previous reports were issued (Article 21:5 DSU cases).[2] These are not discussed in this chronicle. Lastly, in the *China – Publications and Audiovisual Entertainment Products* case, a panel found various measures imposed by China on the importation and distribution of publications, audiovisual products, recordings, and films to be inconsistent with China's Protocol of Accession as well as with certain provi-

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[1] Switzerland did not actively participate in any dispute in 2009 either as complainant, as defendant, or as third party. All WTO panel and Appellate Body reports are accessible online at www.wto.org (click the link for disputes).

[2] Panel and Appellate Body Reports in *United States – Measures Relating to Zeroing and Sunset Reviews*, adopted on 31 August 2009 (WT/DS322/AB/RW); Panel and Appellate Body Reports in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, adopted on 11 June 2009 (WT/DS294/AB/RW).

sions of the GATT 1994 and the GATS.[3] The panel report was appealed, and the Appellate Body is expected to issue its final verdict in early 2010.

II. China – Intellectual Property Rights

Introduction and Facts

Since the accession of China to the WTO in November 2001, there have been ongoing concerns about shortcomings in China's legal regime for the protection and enforcement of intellectual property rights, in particular patents, copyrights and trademarks. Allegedly, various aspects of China's intellectual property laws, regulations, and practices are not consistent with the TRIPs Agreement. Unsurprisingly, various WTO Members have begun to challenge specific aspects of China's intellectual property regime. A series of informal discussions and formal consultations under the Dispute Settlement System (DSU) between China and other WTO Members is currently under way.

One of those cases which could not be resolved through a mutually agreeable solution – despite of bilateral discussions spanning several years – was the dispute in *China – Intellectual Property Rights*.[4] The United States claimed that China acted inconsistently with its obligations under the TRIPs Agreement by denying the protection of its Copyright Law to creative works of authorship (and, to some extent, also sound recordings and performances) that have not been authorized for, or are otherwise prohibited from, being published or distributed within China. According to the United States, China violated Article 5:1 of the Berne Convention for the Protection of Literary and Artistic Works of 1971 (Berne Convention), as incorporated by Article 9:1 of the TRIPs Agreement. Article 5:1 of the Berne Convention reads as follows: "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." Moreover, the United States argued that China's measures for disposing of confiscated goods that infringe intellectual property rights are inconsistent with Article 59 of the TRIPs Agreement. Lastly, the United States claimed that China did not provide for criminal

3 *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products,* currently before the Appellate Body (WT/DS363/R).

4 Panel Report in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights,* 26 January 2009 (not appealed, adopted on 20 March 2009) (WT/DS362/R). Argentina, Australia, Brazil, Canada, the European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand and Turkey participated as third parties.

procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, thus violating Article 61 of the TRIPs Agreement. In response, China contested these allegations and presented a variety of arguments in order to rebut them. China requested that the panel find its measures to be consistent with the TRIPs Agreement.

Findings

The panel issued a mixed ruling.

The panel agreed with the United States that Article 4 of China's Copyright Law violated Article 5:1 of the Berne Convention, as incorporated by Article 9:1 of the TRIPs Agreement. The first sentence of Article 4 of the Copyright Law provided that "[w]orks the publication and/or dissemination of which are prohibited by law shall not be protected by this Law" (para. 7.1). The United States claimed that this provision "denies immediate, automatic protection to certain works of creative authorship" (para. 7.29) and was therefore inconsistent with the TRIPs Agreement "as such". The panel did not question China's response that it may ban, "like many countries in the world, (…) from publication and dissemination such works as those that consist entirely of unconstitutional or immoral content" (para. 7.53). The panel noted, however, that Article 4 of the Chinese Copyright Law "provides for the denial of copyright protection to certain works based on their content" (para. 7.60). The panel found that the Chinese government denied, in certain cases, protection to works on the grounds of a "content review" (para. 7.103). Therefore, the panel concluded that Article 4 of China's Copyright Law violated Article 5:1 of the Berne Convention, as incorporated by Article 9:1 of the TRIPs Agreement. Furthermore, the panel examined China's argument that it would be allowed to control the circulation, presentation, or exhibition of any work, as provided for in Article 17 of the Berne Convention and as incorporated by Article 9:1 of the TRIPs Agreement. The panel acknowledged that a "government's right to permit, to control, or to prohibit the circulation, presentation, or exhibition of a work may interfere with the exercise of certain rights with respect to a protected work by the copyright owner or a third party authorized by the copyright owner" (para. 7.132). The panel went on to state, however, that "there is no reason to suppose that censorship will eliminate those rights entirely with respect to a particular work. With respect to those rights that are granted by the Berne Convention (1971), China is unable to explain why Article 4(1) of its Copyright Law provides for the complete denial of their protection with respect to particular works" (para. 7.132–133). Lastly, the panel established that Article 4 of the Chinese Copyright Law also violated Article 41 of the TRIPs Agreement as "there are no enforcement procedures against any act of infringement of copyright in the relevant works, as required by Article 41.1 of the TRIPs Agreement" (para. 7.175).

With respect to the claim that China's measures for disposing of confiscated goods are inconsistent with Article 59 of the TRIPs Agreement, the panel was called upon to interpret and apply the relevant key terms and principles set out in Article 59 ("Remedies" within Section 4 of the TRIPs Agreement on "Special Requirements Related to Border Measures"), and those set out in Article 46 which are referred to in Article 59. The United States argued that China violated Article 59 "as such". It objected to various types of options which Chinese customs laws and regulations offered to the authorities in disposing of confiscated goods (donation to social welfare bodies, sale to the right holder, auction). The United States argued that these options were "harmful to a right holder" contrary to the first sentence of Article 46 of the TRIPs Agreement. Moreover, the United States contested that this legal framework created a "compulsory scheme so that the Chinese customs authorities cannot exercise their discretion to destroy the goods and must give priority to disposal options that allow infringing goods to enter the channels of commerce or otherwise cause harm to the right holder" (para. 7.197). The panel rejected these claims, mainly based on the finding that Article 59 of the TRIPs Agreement does not provide for a specific obligation on the part of the competent authorities to "exercise that authority in a particular way, unless otherwise specified" (para. 7.238). The panel examined the competences granted to the Chinese authorities with respect to donation, sale and auction of confiscated goods, and it found that there are apparently no circumstances in which donation, sale or auction appear to be "the only option available and could preclude any authority required by Article 59" (para. 7.326). The panel concluded that "the United States has not established that the Customs measures are inconsistent with Article 59 of the TRIPs Agreement, as it incorporates the principles set out in the first sentence of Article 46 of the TRIPs Agreement" (para. 7.355). However, the panel came to a different conclusion with respect to the principles set out in the fourth sentence of Article 46 of the TRIPs Agreement. Again, the United States claimed that the Chinese customs laws and regulations violated this provision "as such". The fourth sentence of Article 46 of the TRIPs Agreement provides that, "[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce." The panel reiterated the purpose of this provision, stating that "[w]here counterfeit trademark goods are released into the channels of commerce after the simple removal of the trademark unlawfully affixed, an identical trademark can be produced or imported separately and unlawfully reaffixed, often with relative ease, so that the goods will infringe once again" (para. 7.373). As Chinese customs laws and regulation appeared to provide for the simple removal of trademarks unlawfully affixed in order to allow release of the goods into the channels of commerce *in general*, the panel considered the relevant provisions to be inconsistent with Article 59 of the TRIPs Agreement.

Lastly, the panel was called upon to decide on the claim that China did not provide for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, thus violating Article 61 of the TRIPs Agreement. Again, the United States challenged the Chinese measure, consisting of various laws and judicial interpretations, "as such". The United States argued that they provided for criminal procedures and penalties only in qualified circumstances, *e.g.*, if the amount of sales is "relatively large" (para. 7.403), or if the circumstances are "serious" (para. 7.405). The United States pointed to "the two limbs of this claim", namely that "the thresholds allegedly require law enforcement officials to disregard other indicia of counterfeiting and piracy", and that, "[b]y specifying certain levels, the thresholds allegedly eliminate whole classes of counterfeiting and piracy from risk of criminal prosecution and conviction" (para. 7.494). The panel dismissed the claim submitted by the United States. At the outset, it clarified the meaning of the first sentence of Article 61 of the TRIPs Agreement. It noted, *inter alia*, that "trademark counterfeiting or copyright piracy is not subject to the obligation in the first sentence of Article 61 unless it is 'wilful' (para. 7.523). Moreover, it held that the "limitation to cases on a commercial scale, like the limitation to cases of wilfulness, stands in contrast to all other specific obligations on enforcement in Part III of the TRIPs Agreement" (para. 7.524). The panel concluded that wilful trademark counterfeiting and copyright piracy on a commercial scale are to be considered "the most blatant and egregious acts of infringement" (para. 7.528). Turning to the factual evidence, the panel noted that the United States "did not provide data regarding products and markets or other factors that would demonstrate what constituted 'a commercial scale' in the specific situation of China's marketplace" (para. 7.614). Referring to a variety of evidence, in particular newspaper articles, put forward by the United States, the panel went on to note that "even if these sources were suitable for the purpose of demonstration of contested facts in this proceeding, the information that was provided was too little and too random to demonstrate a level that constitutes a commercial scale of any product in China" (para. 7.617). The panel did "not ascribe any weight to the evidence in the press articles and finds that, even if it did, the information that these press articles contain is inadequate to demonstrate what is typical or usual in China for the purposes of the relevant treaty obligation" (para. 7.629). Therefore, the panel concluded that the United States "has not established that the criminal thresholds are inconsistent with

China's obligations under the first sentence of Article 61 of the TRIPs Agreement" (para. 7.669).

The panel report was not appealed by either party and was accordingly adopted by the Dispute Settlement Body (DSB).

Commentary

In the aftermath of the publication of the panel report, Peter Allgeier, the United States ambassador to the WTO in Geneva, welcomed the outcome: "These findings are an important victory, because they confirm the importance of IPR protection and enforcement, and clarify key enforcement provisions of the TRIPS Agreement."[5] This, arguably, is only half the truth. The United States failed to convince the panel that China did not provide for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale in accordance with Article 61 of the TRIPs Agreement. In substance, this claim was the most important one. With respect to the panel's reasoning, two aspects are noteworthy.

First, the United States challenged the relevant Chinese laws and regulations "as such". It did not claim that a specific decision rendered by a Chinese authority, in interpreting and applying the relevant Chinese laws and regulations, violated Article 61 of the TRIPs Agreement. "As such" claims are traditionally more difficult to argue than cases in which a specific application of domestic law is challenged before a panel. In this respect, it is important to note that the panel did not establish that China's criminal enforcement regime was consistent with Article 61 of the TRIPs Agreement. It decided the case only on the grounds that the United States could not sufficiently prove its allegation. Tellingly, the panel stated that the Chinese law did indeed, on its face, "exclude certain commercial activity from criminal procedures and penalties" (para. 7.609). However, it went on to note that "based solely on the measures on their face, the panel cannot distinguish between acts that, in China's marketplace, are on a commercial *scale*, and those that are not" (para. 7.609). This being said, it may well be the case that a panel will find, in a future dispute on the legality of a *specific* decision by the Chinese authorities on the application of criminal procedures and penalties, that China has acted inconsistently with Article 61 of the TRIPs Agreement. Thus, the final word on this matter may not yet have been spoken.

5 Office of the United States Trade Representative, Press Release "United States Wins WTO Dispute Over Deficiencies in China's Intellectual Property Rights Laws", see http://www.ustr.gov/about-us/press-office/press-releases/2009/january/united-states-wins-wto-dispute-over-deficiencies-c.

Second, the panel's interpretative findings with respect to the key terms in the first sentence of Article 61 of the TRIPs Agreement were not decisive for the outcome of the case. The panel's ruling that China did not violate Article 61 of the TRIPs Agreement was mainly based on the lack of evidence. The panel noted that "the information that was provided was too little and too random to demonstrate a level that constitutes a commercial scale of any product in China" (para. 7.617). Interestingly, according to the panel, the exhibits submitted by the United States to the panel may in fact have contained information supporting the claim made by the United States, but the United States did not bring this information to the attention of the panel in an appropriate manner. The panel held, with respect to "what is typical or usual in China for the purposes of the relevant treaty obligation" (para. 7.629), as follows (para. 7.630):

> There is no indication that probative evidence on this point would be difficult to obtain. Indeed, it can be noted that more specific information on prices and markets in China is contained in various US exhibits, notably information on prices of products in a report on Cinema and Home Entertainment in China prepared by Screen Digest and Nielsen NRG608 (submitted in support of the claim regarding the Copyright Law) and in annexes to a letter from Nintendo of America to the United States Trade Representative. The United States did not refer to this evidence in its submissions. Further, in response to a question from the Panel, the United States had no apparent difficulty in providing a translation of a Chinese judicial decision that had been mentioned in one of the press articles.

The panel added that "[t]he information in the exhibits would not necessarily have been sufficient and, even if it were, it would not be appropriate for the Panel to trawl them for evidence to which the United States did not refer to make the United States' case for it" (para. 7.631). According to one commentator, "the panel's view seemed to be that the United States did not do a good enough job gathering, presenting and explaining the evidence in support of its claim."[6] At the same, it might be worth noting that it would arguably have been possible for the panel to engage in a more detailed analysis of the factual evidence, which the United States presented in its submission, itself. For instance, the United States submitted a variety of newspaper articles and other press reports which the panel did not take into account at all. The panel considered this type of information to be "anecdotal", "vague" and "not authoritative" and thus to lack credibility (para. 7.628). In order to confirm the legitimacy of its deferential approach, the panel pointed out that its decision not to "ascribe any weight to the evidence in the press articles" (para. 7.629) was consistent with the approach of other international tribunals, notably the International Court of Jus-

6 WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, at 25 (accessible online at www.worldtradelaw.net, visited November 2009).

tice (ICJ). Moreover, the panel noted that its approach was also in line with prior panel and Appellate Body reports.

III. Colombia – Ports of Entry

Introduction and Facts

Irrespective of several markedly successful tariff reduction rounds over the past fifty years, tariffs still play a significant role in international trade. Most WTO Members (with the notable exception of Switzerland) use *ad valorem* tariffs almost exclusively.[7] These duties allow for a transparent comparison of tariff burdens in relation to the price of a product. Valuation of customs, however, is obviously more complex than is the case for specific tariffs. *Ad valorem* tariffs can be skewed by using different ways of calculating the value of goods. Hence, it had already become clear under the GATT 1947 regime that it was necessary, for the predictability and legal security of trade in goods between countries, to ensure that international rules avoid the considerable differences in customs valuation practices, combat fraud and prohibit arbitrary and protectionist procedures. During the *Tokyo Round* negotiations, the Contracting Parties set up the Customs Valuation Code which supplemented and substantiated Article VII of the GATT 1947. It was slightly revised during the *Uruguay Round* negotiations. Today, in the form of the Agreement on Implementation of Article VII of the GATT 1994 (Customs Valuation Agreement), it is an integral part of the WTO legal texts, binding upon all Members.[8]

The *Colombia – Ports of Entry* case was the first dispute in which the correct interpretation and application of various provisions of the Customs Valuation Agreement were at issue.[9] It concerned several Colombian customs measures affecting textiles, apparel and footwear products. In particular, Panama challenged Colombia's use of indicative prices for customs valuation purposes. Panama argued that Colombia would have been obliged to value imported goods based on the actual "transaction value" rather than on indicative prices. By applying indicative prices, Colombia violated, in Panama's view, the Customs

7 See, for the definition of tariffs and their different types (*ad valorem*, specific, and mixed tariffs), Thomas Cottier/Matthias Oesch, International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland, London/Berne 2005, at 578.

8 See, for an overview on the Customs Valuation Agreement, WTO Secretariat, Guide to the Uruguay Round Agreements, The Hague/London/Boston 1999, at 110–111.

9 Panel Report in *Colombia – Indicative Prices and Restrictions on Ports of Entry*, 27 April 2009 (not appealed, adopted on 20 May 2009) (WT/DS366/R). China, Ecuador, the European Communities, Guatemala, Honduras, India, Chinese Taipei, Turkey, and the United States participated as third parties.

Valuation Agreement. Furthermore, Panama argued that Colombia violated Articles I, V, and XI of the GATT 1994 by requiring imports of textiles, apparel and footwear products from Panama to be cleared at two specific ports of entry in Colombia (Bogotá airport or Barranquilla seaport) and by requiring the importers of such products to inform the Colombian authorities 15 days prior to their arrival in Colombia. In response, Colombia contended that the payment of duties resulting from the use of indicative prices amounted to a guarantee, and that customs valuation took place only at a later stage. Moreover, Colombia argued that the contested measures, including those relating to the determination of certain ports of entry, were necessary in order to address significant problems with under-invoicing and smuggling in particular in relation to textiles, apparel and footwear being imported from Panama.

Findings

The panel sympathized with virtually all the claims set forth by Panama. It concluded that the challenged Colombian measures violated the Customs Valuation Agreement and the GATT 1994.

With respect to the Customs Valuation Agreement, the panel noted at the outset that "the ordinary meaning of the concept of customs valuation is straightforward. Essentially, customs valuation involves the process of determining the monetary worth or price of imported goods for the purpose of levying customs duties" (para. 7.83). The panel then analysed the Colombian indicative prices and found that payments required under Colombian law were "payments *strictu sensu* and not 'guarantees in the form of a cash deposit'" (para. 7.124). Therefore, Colombia's use of indicative prices constituted "customs valuation". Having thus concluded that the Customs Valuation Agreement applied, the panel turned to the consistency of Colombia's indicative prices "as such" with that agreement. The panel noted that Articles 1 through 7 of the Customs Valuation Agreement provide for "sequential valuation methods", Article 1 stipulating "the primacy of the transaction value as the valuation method" (para. 7.136). Hence, according to the panel, the Customs Valuation Agreement imposes an obligation on national authorities to determine the customs value of imported goods based on the transaction value. Whenever the application of the transaction value is not possible, national authorities shall sequentially apply the other customs valuation methods provided for in the Customs Valuation Agreement. The panel then turned to examine Colombia's indicative prices system in light of these considerations and found that the structure and design of this system "prevents Colombian customs authorities from sequentially applying the customs valuation methods provided in Articles 1 through 6" (para. 7.143). It thus concluded that "Colombian customs authorities are required to systematically apply a methodology that does not reflect any of the methods provided for in these provisions, i.e. the use of indicative prices, unless the transactional value is higher than the indicative price" (para. 7.143). Therefore, the panel found that Colombia's use of indicative prices instead of the actual transaction values for customs valuation purposes violated "as such" the obligation established in the Customs Valuation Agreement to apply, in a sequential manner, the methods of valuation provided in Articles 1 through 6 of the agreement. Moreover, the panel also found that the indicative prices system was inconsistent with Article 7 of the Customs Valuation Agreement as it could not be considered as a "reasonable means" of customs valuation.

The panel then turned to examine the alleged inconsistency of Colombia's ports of entry measure with Article XI of the GATT 1994. It noted that the requirement that imports of textiles, apparel and footwear products from Panama necessarily needed to be cleared at two specific ports of entry into Colombia constituted an "other measure" within the meaning of Article XI of the GATT 1994. It cited prior panel and Appellate Body reports according to which the concept of "other measures" was a "broad residual category" (para. 7.227). Next, the panel examined whether the ports of entry measure was a "restriction" on importation pursuant to Article XI:1 of the GATT 1994. Again, the panel summarised prior case law according to which "a number of GATT and WTO panels have recognized the applicability of Article XI:1 to measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly, all of which have implications on the competitive situation of an importer" (para. 7.240). Based on this case law, the panel found that the Colombian restrictions on ports of entry limited competitive opportunities for textiles, apparel and footwear arriving from Panama. In particular, the panel pointed to the uncertainties caused by the ports of entry measure, including "access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions" (para. 7.274). Overall, the panel concluded that the restriction to two ports of entry for goods arriving from Panama constituted a restriction on importation, and was thus inconsistent with Article XI of the GATT 1994.

With respect to the requirement set up by Colombian law to present an advance import declaration which only applied to imports from Panama, the panel examined the consistency of this measure with the most-favoured-nation (MFN) principle pursuant to Article I of the GATT 1994. The panel pointed out that this measure did not apply to imports from destinations other than Panama. Therefore, Colombia refused to grant an advantage, which it conferred to imports originating in other countries, immediately and unconditionally to imports from

Panama. The panel concluded that the advance import declaration requirement was inconsistent with Article I of the GATT 1994.

With respect to Panama's claim that Columbia's ports of entry measure violated Article V of the GATT 1994, the panel was called upon to decide various legal and factual issues in relation to "freedom of transit". By way of introduction, the panel held that freedom of transit must be extended "to all traffic in transit when the goods" passage across the territory of a Member is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes" (para. 7.396). It added that "the provision of 'freedom of transit' pursuant to Article V:2, first sentence, *requires* extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been transshipped, warehoused, break-bulked, or have changed modes of transportation" (para. 7.401). At the same time, the panel cautioned that "[r]easonably, in the Panel's view, a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones 'most convenient' for transport through its territory" (para. 7.401). Moreover, the panel confirmed, based on Article V:2 of the GATT 1994, that goods from all WTO Members must be ensured an identical level of access and equal conditions, thus embracing the principle of non-discrimination in this context as well. Applying these findings to the facts of the dispute, the panel established that the Colombian ports of entry measure "*denies* freedom of transit to *all* textiles, apparel and footwear that are traffic in transit arriving from Panama" (para. 7.416). In the same vein, the panel went on to note that "by requiring that goods undergo trans-shipment in order to proceed in international transit, Colombia failed to extend freedom of transit via the most convenient routes to goods arriving from Panama in international transit" (para. 7.423). Hence, Colombia violated Article V:2 of the GATT 1994. Moreover, as only goods arriving from Panama were subject to the ports of entry measure, Colombia also failed to comply with the most-favoured-nation (MFN) principle pursuant to Article V:6 of the GATT 1994. The panel arrived at this conclusion by establishing that this provision also applies to "Members whose territory is the final destination for goods in international transit" (para. 7.475).

Lastly, the panel examined Colombia's claim that its ports of entry measure was "necessary to secure compliance" with its customs laws and regulations pursuant to Article XX(d) of the GATT 1994. Colombia submitted that it faced "problems of smuggling and under-invoicing, which are particularly problematic with respect to imports from Panama" (para. 7.483). The panel acknowledged that WTO Members are permitted to enforce policies aimed at combating under-invoicing, money laundering, smuggling and related problems, provided that the measures for implementing such policies are consistent with WTO law.

Turning to the facts of the dispute, the panel noted that "the circumstances surrounding the imposition of the ports of entry measure support the view that the measure was imposed at a time when customs fraud-related problems existed" (para. 7.542). However, the panel found that the Colombian measure failed to meet the necessity test provided for in Article XX(d) of the GATT 1994. It noted, *inter alia*, that "Colombia has failed to substantiate its statement that under-invoicing has diminished during the periods of implementation of the port of entry measure, possibly due to the influence of a wide array of market facts (…) or due to the fact that Colombia has under-invoicing and smuggling problems with respect to textiles, apparel and footwear arriving from many trading partners" (para. 7.618). Colombia could not demonstrate that the measure contributed to achieving its goal. Therefore, the panel established that the ports of entry measure was not "necessary" in order to secure compliance with Colombia's customs laws and regulations. Article XX(d) of the GATT 1994 could not be successfully invoked by Colombia.

The panel report was not appealed by either party and accordingly was adopted by the Dispute Settlement Body (DSB).

Commentary

In its report, the panel entered new territory. This was the first time in the history of GATT 1947/WTO dispute resolution that a panel was called upon to interpret the Customs Valuation Agreement and the "freedom of transit" provision stipulated in Article V of the GATT 1994. In so doing, however, the panel did not touch upon controversial issues. Its interpretative elaborations and legal findings closely follow the wording of the key provisions. They go along the argumentative lines found in academic writing and do not offer surprises. This holds true for the interpretation of the Customs Valuation Agreement. The panel confirmed that the "transaction value" of an imported product, *i.e.,* the price actually paid for the product when sold for export to the country of importation, is the priority method for determining the product's value for customs purposes. Equally, the panel followed the expected paths when it interpreted and applied Article V of the GATT 1994. Notably, the panel explicitly confirmed that the principle of most-favoured-nation (MFN), which is explicitly reiterated in Article V:6 of the GATT 1994, not only applies when a WTO Member is a transit state, *i.e.* when a product is transported through its territory en route to a third country, but also when the WTO Member is the country of final destination of the product.[10]

[10] Brendan McGivern, WTO Panel Report: *Colombia – Indicative Prices and Restrictions on Ports of Entry,* at 1.

Moreover, the panel confirmed that the prohibition of quantitative restrictions pursuant to Article XI:1 of the GATT 1994, "whether made effective through quotas, import or export licences or other measures", is to be interpreted in a broad sense. The panel, citing a number of previous panel reports, confirmed the case law according to which "other measures" constituted a "broad residual category" (para. 7.227).[11] Thus, a regulatory measure may also fall within this residual category if there is no quantitative element to the limitation. Based on such a reading of Article XI:1 of the GATT 1994, the panel logically concluded that the Colombian ports of entry measure constituted an import restriction as it limited the "competitive opportunities" for imports of textiles, apparel and footwear from Panama. To our knowledge, the Appellate Body has not yet explicitly approved of such a broad interpretation of Article XI:1 of the GATT 1994.

IV. United States – Continued Zeroing

Introduction and Facts

Anti-dumping measures rank among the most controversial issues in international trade regulation. They are prone to being used as instruments of protectionism. While economists largely agree that protection through anti-dumping measures is excessive, it is strongly embedded and forms a core part of international adjudication. Under the auspices of the WTO, it is in particular the use of the "zeroing" methodology in determining the margin of dumping which has been controversial ever since the establishment of the WTO dispute settlement system in 1995.

The legal framework of anti-dumping consists of Article VI of the GATT 1994 and the Agreement on the Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement). The latter implements the general provision of Article VI of the GATT 1994. In order to determine whether a product is being dumped, the anti-dumping authority of the importing country must determine, pursuant to Article 2 of the Anti-Dumping Agreement, whether there is a difference between the export price and the normal value (domestic price) of the product. In particular the United States, but also other countries, have developed a long-standing practice of applying the zeroing methodology in determining the margin of dumping, *i.e.*, the magnitude or amount of dumping. Under zeroing, anti-dumping authorities do not give any credit for so-called

[11] See, for the measures covered by Article XI of the GATT 1994, Petros C. Mavroidis, Trade in Goods, Oxford 2007, at 50–55.

negative dumping margins, *i.e.*, when the export price of the product is higher than the price in the exporting country. The consequence of zeroing is that the anti-dumping authority does not average positive and negative dumping margins together. Instead, it considers the negative dumping margins to be zero with the effect of inflating the overall average dumping margin. The Appellate Body has, on numerous occasions and in different contexts, unequivocally established that the practice of zeroing is not consistent with Article VI of the GATT 1994 and the relevant provisions of the Anti-Dumping Agreement.[12]

The *United States – Continued Zeroing* dispute turned on a complaint brought by the European Communities.[13] It concerned the continued application by the United States of anti-dumping duties resulting from anti-dumping duty orders enumerated in 18 cases, as calculated or maintained in place pursuant to the most recent proceedings at a level in excess of the margin of dumping that would have resulted from the correct application of the relevant provisions of the Anti-Dumping Agreement. The European Communities also challenged the specific instances of application of the zeroing methodology in 4 original anti-dumping investigations, 37 periodic reviews, and 11 sunset reviews pertaining to the same 18 cases. In sum, the European Communities claimed against "continued" zeroing in successive reviews of anti-dumping orders conducted by the US Department of Commerce. In response, the United States contested that the claim made by the European Communities against "continued" application of 18 anti-dumping duties was not consistent with the "specificity" standard provided for in Article 6:2 of the DSU. Moreover, the United States argued that zeroing would be a "permissible" interpretation pursuant to Article 17:6(ii) of the Anti-Dumping Agreement.

Findings

The panel agreed with the United States that the request to establish a panel submitted by the European Communities did not meet, at least in part, the requirements pursuant to Article 6:2 of the DSU. It considered that the European Communities failed to demonstrate "the existence and the precise content of the purported measure" (Appellate Body Report, para. 152). The panel concluded that "the continued application of the 18 duties, in isolation from any proceed-

[12] See, in particular, Appellate Body Report in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico,* adopted on 20 May 2008 (WT/DS344/AB/R), with references to earlier case law in para. 66.

[13] Panel and Appellate Body Reports in *United States – Continued Existence and Application of Zeroing Methodology,* adopted on 19 February 2009 (WT/DS350/AB/R). Brazil, China, Egypt, India, Japan, Korea, Mexico, Norway, Thailand and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu participated as third parties.

ing in which such duties had been calculated, did not represent a measure in and of itself" (Appellate Body Report, para. 152). Upon appeal, the Appellate Body reversed the panel's finding on this issue. It considered that the European Communities had identified, in its panel request, the specific measures with respect to the continued application of 18 duties with sufficient clarity. The Appellate Body noted that the complaint was "not an 'as such' claim, in that its scope is narrower than a challenge to the zeroing methodology as a rule or norm of general and prospective application" (para. 180). At the same time, the Appellate Body held that the measures at issue were "broader than specific instances in which the zeroing methodology was applied, such as a periodic review or sunset review determination" (para. 180). It went on to state that "[w]e see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement" (para. 181). Therefore, the Appellate Body concluded that the continued use of the zeroing methodology in successive proceedings by the United States constituted "measures" that could well be challenged before a panel and the Appellate Body. Having reversed the panel's finding in this respect, the Appellate Body decided to complete the analysis in those cases for which the factual findings of the panel and the undisputed facts in the panel record provided it with a sufficient basis.

In substance, both the panel and the Appellate Body established that zeroing, as applied by the US Department of Commerce in the periodic reviews at issue, is inconsistent with the relevant provisions of the Anti-Dumping Agreement and the GATT 1994. Rather unenthusiastically, the panel followed the Appellate Body's prior case law, although it could not refrain from commenting that "we have generally found the reasoning of earlier panels on these issues to be persuasive", hinting at panel reports which considered zeroing consistent with the relevant legal provisions (Panel Report, para. 7.169). Upon appeal, the United States argued that the panel misapplied the standard of review pursuant to Article 17:6(ii) of the Anti-Dumping Agreement which sets forth a specific standard of review to be relevant for the interpretation and application of this agreement, being *lex specialis* to the generally applicable standard of review provided for in Article 11 of the DSU. The United States noted that zeroing would qualify as "permissible" interpretation of Article 9 of the Anti-Dumping Agreement. The Appellate Body rejected this claim. It held that multiple meanings of a word or term do not "automatically constitute permissible interpretations" (para. 268). It pointed to the central role of the customary rules of interpretation, including those set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention). The Appellate Body noted that only *after* interpreting a provision in light of the customary rules of interpretation "will a panel be able to determine whether the second sentence of Article 17:6(ii) applies. The structure and logic of Article 17:6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence" (para. 271). Overall, the Appellate Body reaffirmed the illegality of the zeroing methodology, confirming its consistent case law on this issue. In a concurring opinion, a course of action seldom found in Appellate Body reports, one of the three Appellate Body members expressed his hope that the ongoing controversy on the legality of zeroing would thus be settled for good (para. 312):

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

The Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB).

Commentary

The overall outcome of the case is not surprising and had been expected by most commentators. Two aspects of the Appellate Body report are particularly noteworthy.

First, the Appellate Body, once again, unequivocally determined that the zeroing methodology is not consistent with the relevant provisions of the Anti-Dumping Agreement and the GATT 1994. This issue has been at the centre of debate in many cases adjudicated by WTO panels and the Appellate Body. Irritatingly, three panel reports prior to the report in *United States – Continued Zeroing* considered zeroing to be permissible.[14] Upon appeal, all three panel reports were reversed by the Appellate Body. With the Appellate Body's confirmation of the illegality of zeroing in this case, it is to be hoped that the controversy has come to a definite end. The unanimous decision against zeroing –

[14] See, for the references, Panel Report in *United States – Continued Zeroing,* para. 7.162 and Fn. 112.

including Appellate Body member David Unterhalter who considered, as a panellist before his appointment to the Appellate Body, zeroing to be a valid method in at least some circumstances – makes it clear that the Appellate Body is not going to change its mind on this matter of principle.[15] Thus, panels are expected to follow the Appellate Body's authoritative interpretation of the Anti-Dumping Agreement and the GATT 1994 in this respect. Further departures by panels from Appellate Body precedents would seriously endanger and undermine the credibility of the Appellate Body and its role in developing a coherent and predictable body of jurisprudence clarifying Members" rights and obligations under the covered agreements.[16] This, however, does not exclude the possibility that the WTO membership as a whole might debate the advantages and disadvantages of the zeroing methodology. Unsurprisingly, zeroing is the subject of controversy in the ongoing *Doha Round* negotiations. Whereas the United States is attempting to include the zeroing methodology explicitly in a revised Anti-Dumping Agreement, most other Members oppose such a proposal.[17]

Second, the Appellate Body touched upon the standard of review pursuant to Article 17:6(ii) of the Anti-Dumping Agreement. This enigmatic provision, applicable only to disputes dealing with anti-dumping matters, was included in the tense moments of the final day of the *Uruguay Round* negotiations. Amid general opposition to an overly loose standard of review, the United States was able to turn refusal to adopt a deferential standard into a "deal-breaker".[18] Ever since, the correct interpretation and application of Article 17:6(ii) of the Anti-Dumping Agreement has been controversial. In the present dispute, the Appellate Body reiterated its prior case law according to which the application of this standard of review involves a two-step-examination.[19] First, a panel has to clarify the provision in question in accordance with the rules of interpretation pursuant to Articles 31 and 32 of the Vienna Convention. If a panel concludes that the provision in fact admits of more than one interpretation, it must then proceed to the second step of its assessment and examine whether the interpretation chosen by the national authority lies within the set of "permissible" interpretations. To date, neither panels nor the Appellate Body have found more than

[15] See WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *United States – Continued Existence and Application of Zeroing Methodology,* at 19 (accessible online at www.worldtradelaw.net, visited November 2009).

[16] See Matthias Oesch, The Jurisprudence of WTO Dispute Resolution (2008), in: SZIER 2008, 387–397, at 396–397.

[17] See, e.g., the Draft Consolidated Chair Texts of the AD and SCM Agreements of 30 November 2007, WTO Doc. TN/RL/W/213.

[18] See Matthias Oesch, Standards of Review in WTO Dispute Resolution, Oxford 2003, at 76–78.

[19] See Appellate Body Report in *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* adopted on 23 August 2001 (WT/DS184/AB/R), paras. 50–62.

one permissible interpretation of a specific provision in any case. Similarly, both the panel and the Appellate Body in the present dispute concluded that Article 9 of the Anti-Dumping Agreement does not allow for zeroing as a permissible interpretation. This interpretative result is arguably correct. At the same time, the uncertainty and controversy on the correct interpretation and application of Article 17:6(ii) of the Anti-Dumping Agreement continues. This is not surprising. The relationship between the first and the second sentence of Article 17:6(ii) of the Anti-Dumping Agreement is ambiguous, to say the least. On the one hand, the possibility of arriving at more than one permissible interpretation is arguably inconsistent with the rules of interpretation stipulated in Articles 31 and 32 of the Vienna Convention. It is submitted that these two provisions provide a complete set of interpretative rules whose application in principle leads to one single, consistent interpretation of a treaty provision.[20] If the methods of interpretation laid down in Article 31 do not resolve interpretative ambiguities, Article 32 comes into play. It is designed to resolve the remaining ambiguities. On the other hand, it might well be argued that Article 17:6(ii) of the Anti-Dumping Agreement appears to codify a different reading of the Vienna Convention and implies the possibility of coexisting permissible interpretations. Any reading to the contrary would simply make the second sentence of Article 17:6(ii) superfluous. This can hardly have been the intention of the drafters of this provision. Thus, Article 17:6(ii) takes priority over the principle that the customary rules of interpretation as stipulated in Articles 31 and 32 of the Vienna Convention result in a single interpretation. Based on this reading, there must *cogently* be provisions in the Anti-Dumping Agreement which allow for more than one permissible interpretation. It is regrettable that the Appellate Body has not seized the opportunity to further clarify the conditions under which a provision might be open to more than one permissible interpretation. As a general rule, panels and the Appellate Body are well advised to have recourse to the second sentence only in exceptional cases.

[20] See, with references to case law and academic writing, Oesch (fn. 18), at 42–48.