
RECENT INTERNATIONAL DECISION

INTERNATIONAL TRADE LAW — ROLE OF DISPUTE SETTLEMENT DECISIONS IN WTO LAW — WTO APPELLATE BODY REAFFIRMS WTO-INCONSISTENCY OF “ZEROING.” — Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008).

The precedential nature of World Trade Organization dispute settlement jurisprudence has long been a subject of imprecision. Although the conclusions of adopted WTO panel¹ and Appellate Body² reports are formally binding only with regard to the particular matter and parties in a given dispute, the reports are regularly cited by third parties in advancing legal arguments or supporting conclusions. This practice has given rise to the organic development of substantive and procedural doctrine.³ While the Appellate Body has observed that adherence to prior Appellate Body rulings by WTO panels is “appropriate” and “expected,”⁴ the status of the reports as formally nonbinding has left open the potential for panels to depart from settled Appellate Body jurisprudence as a matter of simple disagreement. Recently, in *US—Stainless Steel (Mexico)*,⁵ the Appellate Body reversed a panel report that had departed from the Appellate Body’s dumping⁶ juris-

¹ In WTO dispute settlement, panels are established on an ad hoc basis at the request of a complaining Member and are typically composed of three panelists. See Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 6.1, 8.5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1226 (1994) [hereinafter DSU].

² The Appellate Body is a standing body of seven members who are appointed for four-year terms. *Id.* arts. 17.1–2. Three Appellate Body members serve on each case. *Id.* art. 17.1.

³ See Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication* (pt. 2), 9 J. TRANSNAT’L L. & POL’Y 1, 4 (1999).

⁴ Appellate Body Report, *United States—Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 188, WT/DS268/AB/R (Nov. 29, 2004) [hereinafter Appellate Report, *US—Oil Country*].

⁵ Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter Appellate Report, *US—Stainless Steel (Mexico)*].

⁶ Under WTO law, a product is “dumped” when it is “introduced into the commerce of another country at less than its normal value.” Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.1, Apr. 15, 1994, WTO Agreement [hereinafter Anti-Dumping Agreement], available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf. To determine whether a product has been dumped, a Member typically compares the export price of the product with the average price of the product when sold in the ordinary course of trade in the exporter’s home market — the latter being a standard proxy of “normal” value. *Id.* When a Member determines that such “dumping” has caused or threatened material injury to domestic industry, *id.* art. 3 n.9, the Anti-Dumping Agreement allows the Member to put in place an anti-dumping duty, *id.* art. 9.1. As the size of the duty cannot exceed the overall margin of dumping, *id.* art. 9.3, the method for calculating the dumping margin largely determines the size of the permissible anti-dumping duty.

prudence by finding “simple zeroing,”⁷ a method of calculating dumping margins, consistent with the General Agreement on Tariffs and Trade 1994⁸ (GATT) and the WTO Anti-Dumping Agreement.⁹ The Appellate Body was also asked to determine whether the panel had violated the Dispute Settlement Understanding¹⁰ (DSU) in departing from settled Appellate Body conclusions. Although the Appellate Body formally declined to rule on the issue, its discussion of WTO jurisprudence, viewed in the context of prior and subsequent case law, suggests a potential strengthening of the doctrinal expectation that panels will adhere to Appellate Body reports.¹¹

In October 2006, Mexico requested the formation of a WTO panel to challenge the use of zeroing by the United States.¹² Mexico challenged the use of simple zeroing “as such” and “as applied” in five periodic reviews¹³ of dumping margins for stainless steel products from Mexico.¹⁴ Cognizant of the fact that the Appellate Body had found zeroing impermissible in *US—Zeroing (EC)*¹⁵ and *US—Zeroing (Japan)*,¹⁶ Mexico urged the panel to adopt two key interpretations devel-

⁷ “Zeroing” is a controversial method for calculating dumping margins. The zeroing methods used by the United States in this case compare the weighted average normal value of the product to either the price of individual export transactions (under “simple zeroing”) or the weighted average export price of each model of the product (under “model zeroing”). Appellate Report, *US—Stainless Steel (Mexico)*, *supra* note 5, ¶ 2 nn.3 & 7. Where the export price is lower than the normal value in one of these intermediate comparisons, a dumping margin is computed; where the export price is higher than the normal price, the *margin is set to zero*. *Id.* The result is that in any investigation where there is a negative margin for at least one such intermediate comparison, zeroing increases the aggregate margin of dumping.

⁸ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 1, 33 I.L.M. 1154 (1994).

⁹ See Anti-Dumping Agreement, *supra* note 6.

¹⁰ See DSU, *supra* note 1.

¹¹ The potential ramifications for future panels were raised in the trade press following a subsequent decision on the issue. See generally Jamie Strawbridge, *Zeroing Panel Rules Against U.S. in Explicit Deference to Appellate Body*, INSIDE U.S. TRADE, Oct. 3, 2008, at 1.

¹² Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 1.2, 2.1, WT/DS344/R (Dec. 20, 2007) [hereinafter Panel Report, *US—Stainless Steel (Mexico)*].

¹³ A “periodic review” is a review of the amount of anti-dumping duties assessed in the initial investigation to determine final liabilities. See Appellate Report, *US—Stainless Steel (Mexico)*, *supra* note 5, ¶ 2 n.7.

¹⁴ Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶ 3.1. Mexico also challenged the use of model zeroing “as such” and “as applied” in a U.S. investigation of the same products, and the panel found model zeroing impermissible under Article 2.4.2 of the Anti-Dumping Agreement. See *id.* ¶ 7.61. The United States had already abandoned the use of model zeroing and did not appeal the issue. *Id.* ¶ 7.44.

¹⁵ Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006) [hereinafter Appellate Report, *US—Zeroing (EC)*].

¹⁶ Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 190, WT/DS322/AB/R (Jan. 9, 2007) [hereinafter Appellate Report, *US—Zeroing (Japan)*].

oped in those cases. The panel declined, adopting instead the reasoning developed by the *panel* in *US—Zeroing (Japan)*¹⁷ — a line of legal argument that the Appellate Body subsequently rejected in that case.¹⁸ First, the panel rejected Mexico’s contention that a Member must evaluate a product under investigation “as a whole,” finding that the treaty language cited by Mexico did not compel such a conclusion.¹⁹ Second, the panel was not convinced that an importer- or transaction-specific calculation of dumping margins was inconsistent with the GATT and the Anti-Dumping Agreement.²⁰ The panel concluded that the U.S. reading was at least “permissible” under the special standard of review in the Anti-Dumping Agreement,²¹ and accordingly found simple zeroing consistent with the legal texts.²²

The Appellate Body reversed.²³ Reviewing the text of the relevant provisions, the Appellate Body found that the export-oriented language of Article VI of the GATT and Article 2 of the Anti-Dumping Agreement confirmed the exporter-specific nature of dumping,²⁴ and it thus rejected the panel’s conclusion that an importer- or transaction-specific concept of dumping was a permissible reading.²⁵ Echoing *US—Zeroing (Japan)*, the Appellate Body reasoned in turn that the broad requirement of Anti-Dumping Agreement Article 9.3 — that “the anti-dumping duty shall not exceed the margin of dumping as established under Article 2”²⁶ — would be violated by discarding negative margins of dumping under simple zeroing, and it reiterated that a product must be assessed “as a whole.”²⁷ The Appellate Body

¹⁷ See Panel Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006) [hereinafter Panel Report, *US—Zeroing (Japan)*].

¹⁸ See Appellate Report, *US—Zeroing (Japan)*, *supra* note 16, ¶¶ 108–111.

¹⁹ Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶¶ 7.117, 7.119. Mexico noted the focus on the “product” in the dumping provisions of Article 2.1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT. Executive Summary of the First Written Submission of Mexico, Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, Annex A-1, ¶ 13.

²⁰ Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶ 7.124. In addition to contextual support for this reading in the provisions governing duty determination, *id.* ¶ 7.131, the panel reasoned that if Mexico’s view were accepted, a provision in Anti-Dumping Agreement Article 2.4.2 that allows weighted average normal values to be compared to individual transactions (“W-to-T”) would be mathematically equivalent to the method of comparing weighted average values (“W-to-W”), and thus “*inutile*,” *id.* ¶ 7.136.

²¹ When a provision “admits of more than one permissible interpretation, the panel shall find the [Member’s] measure to be in conformity with the [Anti-Dumping] Agreement if it rests upon one of those permissible interpretations.” Anti-Dumping Agreement, *supra* note 6, art. 17.6(ii).

²² Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶ 7.143.

²³ Appellate Report, *US—Stainless Steel (Mexico)*, *supra* note 5, ¶ 165.

²⁴ *Id.* ¶ 86.

²⁵ *Id.* ¶¶ 94–95, 98–99.

²⁶ Anti-Dumping Agreement, *supra* note 6, art. 9.3.

²⁷ Appellate Report, *US—Stainless Steel (Mexico)*, *supra* note 5, ¶¶ 102, 106. Regarding the mathematical equivalence argument, the Appellate Body noted that if the time periods used for

accordingly found simple zeroing impermissible “as such” and “as applied.”²⁸

In addition to its zeroing claims, Mexico argued that the panel had acted inconsistently with Article 11 of the DSU by interpreting the treaty text in ways that had been expressly rejected by the Appellate Body in prior reports addressing identical issues of law.²⁹ Mexico claimed that in so doing, the panel had violated its obligation under Article 11 to assist the Dispute Settlement Body (DSB) “in discharging its responsibilities under the DSU.”³⁰

The Appellate Body observed that the first sentence of Article 11 of the DSU states that “[t]he function of panels is to assist the DSB in discharging its responsibilities.”³¹ While the second sentence instructs the panel to make an “objective assessment of the matter before it,” that sentence begins with the term “[a]ccordingly,” creating a link to the first sentence.³² The Appellate Body moreover concluded that the meaning of “[t]he function of the panels” is informed by DSU Article 3, which makes the provision of “security and predictability to the multi-lateral trading system” a broad objective of dispute settlement.³³

Although the Appellate Body acknowledged that its reports do not create formally binding precedent, it rejected the implication that panels “are free to disregard the legal interpretations and the *ratio decidendi*” in those reports,³⁴ and noted that “the relevance of clarification contained in [its reports] is not limited to the application of a particular provision in a specific case.”³⁵ The Appellate Body further observed that, in practice, subsequent panels and parties to dispute settlement, as well as national legislatures, often rely on the reports.³⁶ The goal of “security and predictability” in DSU Article 3.2 thus “implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”³⁷ Despite “deep[] concern[]” with the panel’s departure from Appellate Body ju-

weighted average normal values in W-to-W and W-to-T were different, as was in fact the case in U.S. periodic reviews, the mathematical equivalence would not hold. *Id.* ¶ 126.

²⁸ *Id.* ¶¶ 134, 139.

²⁹ *Id.* ¶ 19.

³⁰ *Id.*

³¹ *Id.* ¶ 155 (quoting DSU, *supra* note 1, art. 11) (alteration in original) (internal quotation marks omitted).

³² *Id.* ¶ 156 (quoting DSU, *supra* note 1, art. 11) (internal quotation marks omitted).

³³ *Id.* ¶ 157 (quoting DSU, *supra* note 1, arts. 3, 11) (alteration in original) (internal quotation marks omitted).

³⁴ *Id.* ¶ 158.

³⁵ *Id.* ¶ 161.

³⁶ *Id.* ¶ 160. The Appellate Body also noted that “the hierarchical structure contemplated in the DSU” was motivated by the Members’ desire to strengthen dispute settlement and provide consistency. *Id.* ¶ 161.

³⁷ *Id.* ¶ 160 (internal quotation marks omitted).

risprudence and the “serious implications” for dispute settlement, the Appellate Body declined to determine whether the panel had violated the DSU, attributing the panel’s conclusions to a “misguided understanding of the legal provisions at issue.”³⁸

At first blush, *US—Stainless Steel (Mexico)* appears to be a facsimile of prior cases addressing zeroing: the same legal claims were raised against the United States, the same conclusions were reached by the panel, and the Appellate Body again reversed on much the same grounds. Few expected the Appellate Body to rule otherwise. Yet the panel’s rejection of settled Appellate Body jurisprudence and its reliance upon theories that had been expressly rejected by the Appellate Body forced to light fundamental questions about the precedential nature of Appellate Body rulings.

The status of prior rulings in WTO law has been grounded in the principle of international law that international tribunals’ decisions do not represent binding precedent, but are limited to providing persuasive evidence of the law.³⁹ In the landmark 1996 dispute *Japan—Alcoholic Beverages II*,⁴⁰ the Appellate Body concluded that, as a formal matter, adopted panel reports bind only the particular dispute and parties before the panel;⁴¹ the Appellate Body later ruled that the same principle applies to adopted Appellate Body reports.⁴² In support of this conclusion, the Appellate Body in *Japan—Alcoholic Beverages II* cited Article IX:2 of the WTO Agreement,⁴³ which provides that “[t]he Ministerial Conference and the General Council shall have the *exclusive* authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.”⁴⁴ The tension between this formal nonbindingness and the “legitimate expectations” created by the reports was already apparent, however, and the Appellate Body accordingly stressed the importance of the reports to the GATT *acquis*.⁴⁵

Subsequent Appellate Body rulings have suggested a presumption that WTO panels will adhere to Appellate Body findings. In the 2004

³⁸ *Id.* ¶ 162.

³⁹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. b (1986); Raj Bhala, *The Myth About Stare Decisis and International Trade Law* (pt. 1), 14 AM. U. INT’L L. REV. 845, 863–68 (1999).

⁴⁰ Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS11/AB/R (Oct. 4, 1996) [hereinafter Appellate Report, *Japan—Alcoholic Beverages II*].

⁴¹ *Id.* § E.

⁴² Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, ¶¶ 108–109, WT/DS58/AB/RW (Oct. 22, 2001); see also PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 54 (2008).

⁴³ WTO Agreement, *supra* note 1.

⁴⁴ Appellate Report, *Japan—Alcoholic Beverages II*, *supra* note 40, § E (emphasis added) (quoting WTO Agreement, *supra* note 1, art. IX:2) (internal quotation marks omitted).

⁴⁵ *Id.*

case *US—Oil Country Tubular Goods Sunset Reviews*,⁴⁶ the Appellate Body concluded that “following the Appellate Body’s conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.”⁴⁷ Scholars’ characterizations of the precedential force of Appellate Body rulings on panel decisions have ranged from that of “nonbinding precedent” — akin to courts of the same level in the United States⁴⁸ — to the suggestion that a system of de facto stare decisis may already exist.⁴⁹

Evidence from the zeroing cases demonstrates that panels have not felt as bound by Appellate Body reports as would be expected in a de facto system of vertical stare decisis. The panel in *US—Zeroing (Japan)*, for example, felt free to reach conclusions contrary to those of the Appellate Body in *US—Zeroing (EC)*⁵⁰ on the same issue of law, and it did so with relatively little discussion of the departure.⁵¹ When the Appellate Body later reversed the panel report, it made no mention of the panel’s failure to adhere to the prior ruling. For reasons similar to those cited by the panel in *US—Zeroing (Japan)*, the panel in *US—Stainless Steel (Mexico)* found it appropriate to reach conclusions contrary to prior Appellate Body rulings, even when the theories it adopted had been expressly rejected by the Appellate Body.⁵²

The Appellate Body’s response in *US—Stainless Steel (Mexico)* underscored the importance of adherence to prior jurisprudence by emphasizing the WTO’s overarching interest in security and predictability.⁵³ If *US—Oil Country* made reliance on prior jurisprudence “expected,” rather than merely “appropriate,” *US—Stainless Steel (Mexico)* appears to have gone a step further in making it an implicit requirement of Article 3.2 of the DSU, absent “cogent reasons” for acting otherwise. Moreover, in marked contrast to the Appellate Body’s statement in *US—Oil Country*, the Appellate Body took the additional step of grounding the cogent reasons standard in the text of the DSU — a step that suggests implications beyond the zeroing line of cases. Although the report acknowledged the formally nonbinding nature of reports, the emphasis of its discussion of reliance interests, stability of

⁴⁶ Appellate Report, *US—Oil Country*, *supra* note 4.

⁴⁷ *Id.* ¶ 188.

⁴⁸ David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT’L L. 398, 401 (1998).

⁴⁹ See Bhala, *supra* note 3, at 15.

⁵⁰ Appellate Report, *US—Zeroing (EC)*, *supra* note 15.

⁵¹ In a footnote, the panel in *US—Zeroing (Japan)* noted the nonbinding nature of adopted reports, the panel’s obligation under the DSU to make objective assessments of facts and of Members’ conformity with the agreements, and the provision of Article 3.2 of the DSU that rulings “cannot add to or diminish the rights and obligations” of Members. See Panel Report, *US—Zeroing (Japan)*, *supra* note 16, ¶ 7.99 n.733.

⁵² See Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶¶ 7.101–106.

⁵³ See Ernst-Ulrich Petersmann, *Judging Judges*, 11 J. INT’L ECON. L. 827, 841 (2008).

legal interpretation, and the hierarchical structure of the dispute settlement system⁵⁴ was decidedly on narrowing the circumstances in which a panel may depart from prior Appellate Body rulings.

While any inference of a doctrinal shift in the weight accorded to Appellate Body reports awaits a broad body of empirical evidence, the first decision to subsequently address the issue was particularly notable. In *US—Continued Zeroing*,⁵⁵ a panel was again asked to rule on the permissibility of the use of simple zeroing in U.S. periodic reviews. The European Community (EC) claimed violations of the GATT and Anti-Dumping Agreement on nearly identical grounds to those of Mexico in *US—Stainless Steel (Mexico)*.⁵⁶ In evaluating the key arguments, the panel noted that it generally agreed with the views of the panel report in *US—Stainless Steel (Mexico)*, quoting and citing that report at length.⁵⁷ In a remarkable turn, however, the panel concluded after a discussion of the role of jurisprudence in the WTO — a discussion that included citations to the Appellate Body report in *US—Stainless Steel (Mexico)* — that it would nonetheless follow the Appellate Body ruling, and it found the United States in violation.⁵⁸

This case is significant in that it suggests the possibility that *US—Stainless Steel (Mexico)* has shifted WTO doctrine regarding adherence to Appellate Body reports. It is important to recognize, however, that there are a number of ways in which *US—Continued Zeroing* might be understood, with differing implications for future disputes. One possibility is that the panel in *US—Continued Zeroing* found the Appellate Body's reading of the DSU text persuasive with respect to precedent and accordingly afforded greater weight to prior Appellate Body findings on zeroing.⁵⁹ The structure of the panel report is consistent with such an inference: the panel concluded from its review of *US—Stainless Steel (Mexico)* that it needed to conduct *its own* review as to the role of the panels in WTO jurisprudence, and it ultimately "agree[d]" with the Appellate Body's emphasis on security and predictability and with a "cogent reasons" standard.⁶⁰ This reading might suggest a shift in the doctrine if future panels are similarly persuaded.

⁵⁴ Appellate Report, *US—Stainless Steel (Mexico)*, *supra* note 5, ¶¶ 161–162.

⁵⁵ Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (Oct. 1, 2008) [hereinafter Panel Report, *US—Continued Zeroing*].

⁵⁶ Compare *id.* ¶ 3.1, with Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶ 3.1.

⁵⁷ Panel Report, *US—Continued Zeroing*, *supra* note 55, ¶¶ 7.162–169 (citing Panel Report, *US—Stainless Steel (Mexico)*, *supra* note 12, ¶¶ 7.124–128, 7.130–133, 7.139, 7.146).

⁵⁸ *Id.* ¶¶ 7.170–182. On appeal, the Appellate Body declined to further clarify the "cogent reasons" standard. See Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶¶ 362–365, WT/DS350/AB/R (Feb. 4, 2009).

⁵⁹ It is important to distinguish this from the circular idea that the panel would follow the Appellate Body's jurisprudence as to bindingness simply because the Appellate Body had declared its own jurisprudence more strictly binding. See Bhala, *supra* note 39, at 878.

⁶⁰ Panel Report, *US—Continued Zeroing*, *supra* note 55, ¶¶ 7.179–180.

In addition, the input of WTO Members may have influenced the panel independently of the legal interpretation of the Appellate Body in *US—Stainless Steel (Mexico)*. The EC and Japan joined as third parties in that case, contending that the panel's departure violated the DSU;⁶¹ Chile and Thailand, though less forceful, criticized the panel for having undermined security and predictability.⁶² Responsiveness to the preferences of Members is not without precedent in the dispute settlement system⁶³ and may have lent weight to the Appellate Body's conclusions in the eyes of the panel. This reading would also suggest a shift in doctrine if future panels are similarly influenced.

Yet the panel in *US—Continued Zeroing* might also have been influenced in ways that would suggest that *US—Stainless Steel (Mexico)* will have a limited impact on the nature of precedent. For example, the greater weight accorded to precedent here may have been conditional on the cumulative effect of the Appellate Body having reached the same result on zeroing on numerous occasions.⁶⁴ The panel may have grown pessimistic about the utility of continued dissent, for example, or may have feared that the rift between the panels and the Appellate Body would grow more destabilizing as it persisted over time. The emphasis of the panel on the *consistency* of Appellate Body rulings on zeroing supports such an inference.⁶⁵

Thus although a considerable number of the key variables remained constant between the panel reports in *US—Stainless Steel (Mexico)* and *US—Continued Zeroing* — among them the defendant, the tribunal, and the legal claims — the foregoing discussion highlights additional covariates that make inference as to doctrinal change premature. *US—Stainless Steel (Mexico)* has nonetheless provided occasion for the Appellate Body to interpret the DSU with respect to the bindingness of prior rulings and the standard for departing from such rulings. Although the broader impact of the case is uncertain, the construction of the language of *US—Stainless Steel (Mexico)* in subsequent reports will guide the development of this fundamental and evolving issue of WTO jurisprudence.

⁶¹ Appellate Body Report, *US—Stainless Steel (Mexico)*, *supra* note 5, ¶¶ 51, 58.

⁶² *Id.* ¶¶ 41, 59.

⁶³ See, e.g., Marc L. Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, 58 *WORLD POL.* 446, 448 (2006) (describing the idea that “third-party participation signals the preferences of the wider membership and thus influences the strategic behavior of a WTO judicial body in rendering a legal verdict” as the most likely “conventional wisdom” on the matter); Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's ‘Constitution’ and the Discipline of International Law*, 17 *EUR. J. INT’L L.* 647, 660 (2006) (discussing the sensitivity of the Appellate Body to the views of the broad Membership regarding the submission of amicus briefs by NGOs).

⁶⁴ See Strawbridge, *supra* note 11.

⁶⁵ See Panel Report, *US—Continued Zeroing*, *supra* note 55, ¶¶ 7.170, 7.182.