8. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

A. REPORT OF THE APPELLATE BODY (WT/DS464/AB/R AND WT/DS464/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS464/R AND WT/DS464/R/ADD.1)

- The United States thanks the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute.

- The reports cover numerous issues under the AD Agreement[3] and the SCM Agreement.[4] In this statement, the United States will draw Members' attention to certain aspects of the Appellate Body report that are of serious concern. These issues relate to the Appellate Body's approach to substantive claims under the AD Agreement and the SCM Agreement as well as the proper role of the Appellate Body reviewing claims by a party and findings by a panel.

- Important aspects of the Appellate Body report appear to be at odds with the basic purpose of dispute settlement, as set out in the DSU and as understood by the Appellate Body in prior reports. As contemplated by Article 3.7 of the DSU, "[t]he aim of the dispute settlement system is to secure a positive solution to a dispute." Findings on claims or issues not raised by the parties to the dispute are, by necessity, not necessary to secure a positive solution their dispute. Indeed, in *US – Wool Shirts and Blouses*, the Appellate Body stated that it "do[es] not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute."[5]

- The Appellate Body report here, however, goes beyond the resolution of the issues raised by the disputing parties to prescribe particular methodological approaches to the application of the AD Agreement. The Appellate Body report also adopts an interpretive approach this is not – as required under Articles 3.2, 11, and 19.2 of the DSU – based on the text of the covered agreements, but rather is focused on the application of language from prior Appellate Body reports addressing different legal issues. Regrettably, a majority of the Appellate Body Division hearing this appeal has effectively read the

3 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
4 Agreement on Subsidies and Countervailing Measures.
5 *US – Wool Shirts and Blouses (AB)*, p. 19.

methodology in the second sentence of Article 2.4.2 out of the AD Agreement, a result which a dissenting Appellate Body member could not join.

- This is the first dispute involving a Member's application of the alternative comparison methodology that is set forth in the second sentence of Article 2.4.2 of the AD Agreement – the so-called "targeted dumping" provision. The Appellate Body's finding has little basis in the plain text of Article 2.4.2, and essentially rewrites the provision by prescribing a wholly new methodology for addressing "targeted dumping." The methodology created by the Appellate Body was never contemplated at the time the AD Agreement was negotiated and adopted. That methodology has never, to our knowledge, been used by any Member at any time in the 20-plus years since. And no party in the dispute advocated the methodology ultimately prescribed by the Appellate Body.

- Before discussing our concerns with specific Appellate Body findings, the United States would like to note that it appreciates that the Appellate Body rejected Korea's most extreme legal theories. In particular, Korea had argued for an interpretation of Article 2.4.2 that would have resulted in the alternative, average-to-transaction comparison methodology yielding precisely the same result as the normal, average-to-average comparison methodology in all cases. The Appellate Body correctly recognized the exceptional nature of the second sentence of Article 2.4.2, and acknowledged that it must be possible for Members, in some way, to use that provision to address "targeted dumping."

- However, in elaborating its vision of the "targeted dumping" methodology provided for under the second sentence of Article 2.4.2, the Appellate Body found that the AD Agreement prohibits the combined application of the average-to-transaction and average-to-average comparison methodologies.[6] Nothing in the text of the second sentence of Article 2.4.2, nor elsewhere in the AD Agreement, addresses such a combined application. The parties and third parties never disputed that a combined application may be necessary and appropriate in certain situations.

- The Appellate Body's finding that a combined application is not permitted, together with its finding that the second sentence of Article 2.4.2 requires that the alternative comparison methodology be applied only to a subset of transactions – the so-called "pattern transactions" – also conflicts with the Appellate Body's prior finding in at least three reports that margins of dumping must be determined for the "product as a whole,"

6 Appellate Body Report, para. 5.120.

and the failure to "take into account the *entirety* of the *prices* of *some* export transactions" is inconsistent with the AD Agreement.[7]

- To be sure, if the Appellate Body report had acknowledged this tension and had gone on to state that its prior findings related to determining dumping margins only for a "product as whole" were incorrect, this would have been a positive development.[8] But to the contrary, elsewhere in this very same report, the Appellate Body majority continues to rely on the flawed "product as a whole" theory to find that "zeroing" is impermissible with respect to targeted sales.

- The result is that the Appellate Body's view of the proper interpretation of the AD Agreement is internally inconsistent; what ***is*** consistent is that a flawed interpretation has once again led to findings against the use of trade remedies.

- The Appellate Body found that the combined application of the average-to-transaction and average-to-average comparison methodologies is inconsistent with the AD Agreement even though Korea never advanced any claim against the use of such a combined application. Indeed, neither of the disputing parties appealed the panel report's brief reference to this issue. The panel "assume[d] that the combined application of methodologies is not excluded," noting, appropriately, that "Korea ha[d] not advanced any claim" against such a combined application, and thus "there [was] no need for [the panel] to rule on [the] matter."[9]

- In contrast to the panel's restrained, and correct, approach of not making findings on an issue not raised by the complaining party, the Appellate Body announced a prohibition on the use of a combined application, even though it had not even been asked to consider the issue on appeal.

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[7] *US – Softwood Lumber V (AB)*, para. 101 (emphasis in original). *See also, e.g., EC – Bed Linen (AB)*, para. 53, *US – Softwood Lumber V (AB)*, paras. 97-102; *US – Zeroing (EC) (AB)*, para. 132.

[8] In previous communications to the DSB, the United States has explained in detail its concerns about the Appellate Body's findings related to "zeroing" and the Appellate Body's elaboration of its concept of "product as a whole." *See United States – Laws, Regulations and Methodology For Calculating Dumping Margins ("Zeroing"), Communication from the United States*, WT/DS294/16 (May 17, 2006), *United States – Laws, Regulations and Methodology For Calculating Dumping Margins ("Zeroing"), Communication from the United States*, WT/DS294/18 (June 19, 2006), *United States – Measures Relating to Zeroing and Sunset Reviews*, Communication from the United States, WT/DS322/16 (February 26, 2007).

[9] Panel Report, para. 7.161.

- In rewriting the second sentence of Article 2.4.2, the Appellate Body majority also incorrectly expanded its prior findings against the use of "zeroing." In particular, the majority finds that the use of "zeroing" in connection with the application of the average-to-transaction comparison methodology to so-called "pattern transactions"[10] is inconsistent with the AD Agreement. As one Appellate Body member explained in dissent, this finding cannot be supported under the rules of interpretation provided for under the DSU.

- Given the importance of this issue, the United States calls the DSB's attention to the cogent explanation in the dissenting opinion:

> The majority's interpretation would permit investigating authorities to deal with "targeted dumping" only partially, and possibly ineffectively. Within the "pattern", prices above normal value will cancel out – or "re-mask" – partly or completely, the "targeted dumping" that results from prices below normal value. … [S]uch an incomplete approach is not required by the text of the second sentence read in the context of the entire Article 2.4.2 and in light of the object and purpose of the Anti-Dumping Agreement, and it unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with "targeted dumping".[11]

- The dissenting Appellate Body member further reasoned that "allowing an investigating authority to zero within the 'pattern' under the second sentence of Article 2.4.2 not only is a permissible interpretation within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement, but … it is a more defensible interpretation within the meaning of the first sentence of that provision."[12]

- The majority's prescribed approach for addressing "targeted dumping" simply is not the average-to-transaction comparison to which Members agreed in Article 2.4.2. The United States definitively established that applying the average-to-transaction comparison methodology (without zeroing) will, as a mathematical certainty, always yield the same result as applying the average-to-average comparison methodology (without zeroing). This is true whether these comparison methodologies are applied to all export sales or to a subset of export sales. The Appellate Body majority itself acknowledged as a "fact" that "the application of the [average-to-transaction] comparison methodology to [a]

[10] Appellate Body Report, paras. 5.141-5.171.
[11] Appellate Body Report, paras. 5.195-196.
[12] Appellate Body Report, para. 5.202.

pattern of export prices leads to equivalent results as the application of the [average-to-average] comparison methodology to the same pattern."[13]

- Yet, the Appellate Body majority ignored this key "fact."[14] In doing so, it effectively rewrote the second sentence of Article 2.4.2, changing it from permitting Members to apply an average-to-transaction comparison methodology under certain circumstances to permitting Members to apply the average-to-average comparison methodology to a subset of transactions under certain circumstances. Ultimately, the majority read the specific reference to the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, which is contrary to the customary rules of interpretation of public international law.

- As the Appellate Body has explained in prior reports, "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness."[15] "One of the corollaries of 'the general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[16] It is troubling that a majority of the Appellate Body Division hearing this appeal chose not to abide by established customary rules of interpretation that the Appellate Body has recognized previously, though the United States appreciates one dissenting Appellate Body member decided not to join the majority in doing so.

- Turning to the CVD issues in this dispute, the United States agrees with certain findings of the Appellate Body. In particular, the United States finds persuasive the rejection of Korea's assertion that subsidies limited to a designated geographical region somehow are not regionally specific under the SCM Agreement.[17] The Appellate Body found, among other things, that the size of a designated region is irrelevant to the specificity inquiry.[18]

- The United States also agrees with aspects of the Appellate Body's findings regarding the calculation of subsidy margins. The United States agrees that the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, leaving the

[13] Appellate Body Report, para. 5.165.
[14] Appellate Body Report, para. 5.165.
[15] *Japan – Alcoholic Beverages II (AB)*, p. 12.
[16] *US – Gasoline (AB)*, p. 23 (emphasis added).
[17] *See* Appellate Body Report, paras. 5.204-5.246.
[18] Appellate Body Report, para. 5.236.

investigating authority with discretion to choose the most appropriate methodology.[19] In particular, the SCM Agreement does not expressly set forth a method for determining whether a given subsidy is "tied" to a particular product.[20] As the Appellate Body observed, any "tying" determination will depend on the specific circumstances of each case, focusing on the "design, structure, and operation of the measure granting the subsidy."[21]

- The United States has concerns, however, with respect to the Appellate Body's findings that these principles were not adequately addressed and applied in the subsidy determinations made by the U.S. Department of Commerce.

- The United States thanks the DSB for its attention to the important issues covered in our statement today.

[19] *See* Appellate Body Report, para. 5.269.
[20] *See* Appellate Body Report, para. 5.269.
[21] Appellate Body Report, para. 5.270.