

***United States – Laws, Regulations, and Methodology for Calculating
Dumping Margins (“Zeroing”)***

(AB-2009-1 / DS294)

Recourse to Article 21.5 of the DSU by the European Communities

Opening Statement of the United States of America

March 23, 2009

I. Introduction

1. Good afternoon, members of the Division. Thank you for the opportunity to appear before you today. We also wish to thank the Appellate Body for its decision to make this hearing open for observation by all WTO Members and the public. The United States firmly believes that transparency in Appellate Body hearings promotes confidence in the WTO dispute settlement system and makes the WTO a stronger institution.

2. The title of the dispute at hand might lead one to expect this hearing, like others before it, would focus on the issue of “zeroing” in calculating margins of dumping. As the written submissions have made clear, however, the contested issues between the parties in this proceeding have very little to do with “zeroing” in itself. Rather, the fundamental disagreement between the United States and the European Communities (EC) in this proceeding is over the scope of Article 21.5 of the DSU,¹ as it relates to the particular recommendations and rulings of the Dispute Settlement Body (DSB) in this dispute.

3. In focusing on the DSB recommendations and rulings in this dispute, the United States is of course mindful that there have been a number of disputes on the subject of zeroing in the U.S. antidumping system, and the United States is well aware of the DSB recommendations and rulings in those disputes. This dispute was one of the first to examine the subject, and the recommendations and rulings in this dispute are more limited than those that have been made in other disputes. The question in this proceeding is not whether the United States has complied with all of the DSB recommendations and rulings made over the course of a number of disputes, nor even whether all U.S. measures are consistent with the covered agreements, as they have

¹ That is, the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

been interpreted over the course of those disputes. Rather, the question for the Appellate Body in this proceeding is whether the compliance Panel made legal errors when evaluating whether the United States has complied with the recommendations and rulings that the DSB made in this dispute.

4. These recommendations and rulings fall into three main groups. First, the original panel found, and the Appellate Body affirmed, that the use of average-to-average zeroing in original antidumping investigations is “as such” inconsistent with Article 2.4.2 of the Antidumping Agreement.^{2 3} The U.S. Department of Commerce (“Commerce”) announced that, effective February 22, 2007, it would eliminate the use of average-to-average zeroing in all original investigations pending as of that date, or initiated in the future.⁴ It is unchallenged that the United States has complied with this aspect of the DSB recommendations and rulings.

5. Second, the original panel found, and the United States did not challenge on appeal, that the United States acted inconsistently with Article 2.4.2 of the Antidumping Agreement by using average-to-average zeroing in fifteen specifically identified original antidumping investigations involving products of EC member States.⁵ Third, the Appellate Body reversed the original panel and found that the United States acted inconsistently with Article 9.3 of the Antidumping

² That is, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

³ *US – Zeroing (Panel)*, para. 8.1(c); *US – Zeroing (AB)*, para. 263(b).

⁴ U.S. Other Appellant Submission, para. 20; Exhibits EC-1 and EC-2.

⁵ *US – Zeroing (Panel)*, para. 8.1(a).

Agreement and Article VI:2 of the GATT 1994⁶ in sixteen specifically identified administrative or assessment reviews involving products of EC member States.⁷

6. With respect to the thirty-one specific measures – fifteen original investigations and sixteen administrative reviews – to which these “as applied” findings were directed, the United States brought the measures prospectively into conformity with the Antidumping Agreement and the GATT 1994 through a variety of actions, which we will describe in a moment. With some very specific exceptions, the EC does not challenge the validity of these steps in themselves. Rather, the EC mostly accuses the United States of failing to completely bring its measures into conformity with the recommendations and rulings. The heart of the EC claims is that the United States continues to take what the EC calls “positive acts” to assess, enforce, and collect antidumping duties on entries of goods that were made prior to the end of the reasonable period of time for compliance under Article 21.3 of the DSU.

7. In the view of the United States, the relief being sought by the EC is fundamentally a retroactive remedy that is at odds with the established principle that WTO remedies are prospective only. It is true that, in the U.S. retrospective antidumping system, final assessment and collection of duties often take place well after the original entries have been made. But, as the EC points out, duties are not truly “final” in prospective antidumping systems either as long as there is a possibility to request a duty refund.⁸ Thus, for the EC, compliance with the DSB

⁶ That is, the *General Agreement on Tariffs and Trade 1994*.

⁷ *US – Zeroing (AB)*, para. 263(a)(i).

⁸ EC Other Appellee Submission, para. 48.

recommendations and rulings is not limited to withdrawing the WTO-inconsistent measure with respect to current and future entries, but also should extend to correcting the application of the WTO-inconsistent measure to past entries wherever a Member adopts a measure with respect to those past entries after the reasonable period of time expires. This is a wholly unprecedented and incorrect interpretation of “prospective” compliance, and the Appellate Body should reject it.

8. In this statement, we will briefly summarize how the United States complied with the “as applied” recommendations and rulings in this dispute, first with respect to original investigations, and then with respect to administrative reviews. We will then briefly address the issue of the “all others” rates raised by some of the third participants in this appeal. The other aspects of the EC’s appeal and our other appeal are dealt with in our submissions, and we would look forward to discussing them further in response to the Division’s questions.

II. DSB Recommendations and Rulings with Respect to Zeroing “As Applied” in Original Investigations

9. In the original dispute, the use of “zeroing” in fifteen original investigations was found to be inconsistent with the Antidumping Agreement. Out of the fifteen antidumping orders that resulted from these investigations, three had been revoked for unrelated reasons by the time the DSB recommendations and rulings were adopted.⁹ In the remaining twelve cases, Commerce recalculated, without zeroing, the margins of dumping in these original investigations. The Commerce determinations implementing these recalculations are known as “Section 129 determinations.”

⁹ Panel Report, para. 3.1(b) & n.38.

10. Where the recalculated margin of dumping was zero or *de minimis*, the United States revoked the orders, with effect for all entries made on or after April 23, 2007.¹⁰ Where the recalculated margin of dumping was above *de minimis*, the orders remained in place.¹¹ The United States therefore withdrew all of the measures found to be WTO-inconsistent, with prospective effect as of April 23, 2007. This constitutes full and complete compliance with the DSB recommendations and rulings with respect to these fifteen original investigations.

11. However, the United States did not withdraw the measures *retroactively*. That is, entries prior to April 23, 2007 remained subject to the antidumping duty orders that were in place at the time of entry. The United States did not revisit or remove the antidumping duty liability that attached to entries prior to the effective date of the duty revocations. But the United States was not required to do this in order to bring its measures into compliance with the DSB recommendations and rulings on a going-forward basis. Wherever a reasonable period of time is provided pursuant to Article 21.3 of the DSU, it is understood that the consequences under the DSU of noncompliance with the DSB recommendations and rulings will not arise, even if the Member concerned continues to apply the measure found to be WTO-inconsistent during the reasonable period of time. That is what the “reasonable period of time” is.

12. According to the EC, the United States fails to comply with the DSB recommendations and rulings where it assesses or collects antidumping duties prior to the end of the reasonable

¹⁰ See Exhibit EC-5.

¹¹ See Exhibits EC-5, EC-6.

period of time, if this is done through “positive acts” taken after the reasonable period of time.¹²

As an initial matter, it is unclear why the EC limits itself to so-called “positive acts.” As the Appellate Body has made clear, “any act or omission attributable to a Member can be a measure of that Member for purposes of dispute settlement proceedings.”¹³ Thus, it would seem that the EC’s arguments would apply, in principle, to any measure – whether act or omission – taken after the end of the reasonable period of time that results in the application of duties calculated using zeroing, regardless of the date of the entries.

13. The EC does not include in its challenge duties that were “finally liquidated” prior to the end of the reasonable period of time.¹⁴ That is, the EC does not presently object to duties for which any challenge in U.S. courts under domestic law was completed prior to the end of the reasonable period of time. However, the EC does object to the assessment and collection of duties after the end of the reasonable period of time, in at least two ways, though neither of their objections is correct.

14. First, where the Section 129 determination results in the prospective revocation of the antidumping duty order, the EC argues that the DSB recommendations and rulings call on the United States not only to cease applying the antidumping duty at the border – as the United States has done – but also should immediately eliminate all duty liability on past unliquidated entries –

¹² *E.g.*, EC Other Appellee Submission, para. 42 & n.74.

¹³ *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81; *cf.* EC Appellant Submission, para. 183.

¹⁴ EC Other Appellee Submission, para. 42 n.74.

that is, on past entries where the duty may still be subject to review in municipal law.¹⁵ But, as we have shown in our submissions, this is not what it means to “withdraw” a border measure. For example, if a Member is found to be imposing a duty above its tariff bindings in breach of Article II of the GATT 1994 – as the EC was in the *Chicken Cuts* dispute – the Member fully complies by ceasing to apply the WTO-inconsistent duty to new entries. The Member is not required to consider or grant requests for refunds of duties on past entries that were subject to the WTO-inconsistent measure. That is, where the WTO-inconsistent measure has been withdrawn for current and future entries, compliance is not undermined by measures that may reflect the fact that the WTO-inconsistent measure was applied to past entries.

15. Whether municipal law provides an opportunity to seek duty refunds on past entries is irrelevant. That further proceedings may be ongoing under municipal law with respect to past entries – perhaps for reasons entirely unrelated to the WTO-inconsistencies at issue – is irrelevant. As DSU Article 3.7 makes clear, “the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.” When the measure has been withdrawn – that is, no longer applied to current trade – then the objective of dispute settlement has been achieved.

16. It is the same in this dispute. Where the recalculation of the margin of dumping in the original investigation showed that the antidumping duty was unwarranted, the United States withdrew the measure prospectively. To say, as the EC does, that the United States does not

¹⁵ EC Appellant Submission, paras. 198-202.

comply unless it also revisits the application of duties to past entries is simply to ask for a retroactive remedy. Moreover, the EC does not base its argument on the fact that the United States has a retrospective antidumping system in which the amount of duties is often not final for some time after entry. According to the EC, the same principles should apply regardless of the duty assessment system, as long as duties are not truly final under municipal law.¹⁶ But in that case the EC is simply arguing for retroactive remedies. Consider how the EC approach would apply to an internal tax dispute. If someone requested *after* the end of the reasonable period of time that the Member provide a refund of the WTO-inconsistent amount of an internal tax assessed *prior* to the end of the reasonable period of time, any denial of that request would, according to the EC’s approach, be a failure to comply. If that is not a retroactive remedy, what is?

17. The second EC argument asserts that – whether the duty order is revoked or not – any “positive act” taken by the United States with respect to any of these fifteen antidumping duty investigations – including subsequent assessment reviews, sunset reviews, changed circumstances reviews, and duty liquidation – after the end of the reasonable period of time “must be WTO consistent and must not be based on zeroing.”¹⁷ Of course, all Members should act in a WTO-consistent manner at all times – we do not dispute this. However, this is not just any dispute settlement proceeding, but a proceeding under Article 21.5 of the DSU. Such proceedings are limited, as the text of Article 21.5 makes clear, to situations “[w]here there is

¹⁶ EC Other Appellee Submission, para. 48.

¹⁷ *E.g.*, EC Appellant Submission, para. 167.

disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB. For all of the many words in the EC submissions in this appeal, the EC never once refers to this fundamental provision. The Appellate Body, however, cannot ignore the text of Article 21.5.

18. Based on this text, the general question of whether the “positive acts” complained of by the EC are “WTO consistent” arises in this proceeding only if these acts relate to the “existence or consistency . . . of measures taken to comply with the recommendations and rulings” in this dispute. For these fifteen original investigations, the only DSB recommendations and rulings pertain to the use of zeroing “as applied” in those specific investigations. Therefore, the United States submits that the “positive acts” mentioned by the EC, which have nothing to do with the use of “zeroing” in original investigations, are not within the scope of the DSB recommendations and rulings in this dispute, and therefore not within the scope of these Article 21.5 proceedings.

19. The only two assessment reviews for which the EC provided sufficient evidence to enable the compliance Panel to make findings illustrate the point well. These are the reviews of entries made in 2004 and 2005 of *Certain Hot-Rolled Carbon Steel from the Netherlands* and *Stainless Steel Wire Rod from Sweden*.¹⁸ These two antidumping duty orders were revoked in the Section 129 determinations, effective with respect to entries on or after April 23, 2007, but not effective with respect to prior entries. Although the final results of these two assessment reviews were published after the end of the reasonable period of time, their sole effect was to assess duties on entries made in 2004 and 2005 – that is, before the end of the reasonable period of time, and

¹⁸ Panel Report, para. 8.202.

indeed before the DSB recommendations and rulings. There were no recommendations and rulings with respect to these entries, so there is no question of the “existence” of a measure taken to comply. Nor did the assessment reviews affect the application of the Section 129 determinations, so these reviews cannot result in any circumvention or undermining of the compliance achieved by the revocations in the Section 129 determinations. Consequently, these measures cannot come within the scope of this proceeding – unless one agrees with the EC’s wholly unprecedented theory that the DSB recommendations and rulings must be applied retroactively to past entries.

20. In sum, the United States has fully complied with the DSB recommendations and rulings regarding the fifteen original investigations, by recalculating the margins of dumping without zeroing and taking all necessary actions to implement the recalculated margins for all current and future entries. The EC appeal is not aimed at “securing the withdrawal” of WTO-inconsistent measures¹⁹ – that has been done. Rather, the EC appeal is aimed at helping importers get their money back on duties owed for entries prior to the end of the reasonable period of time. That is not what Article 21.5 proceedings are for.

III. DSB Recommendations and Rulings with Respect to Zeroing “As Applied” in Administrative Reviews

21. Next, we turn to the sixteen administrative reviews that were subject to “as applied” findings of inconsistency in the original dispute. In these sixteen reviews, the United States (1) assessed final duties owed on prior entries, and (2) performed a new estimate of the antidumping rate for future entries and consequently set new security levels (in the form of cash deposit rates)

¹⁹ *Cf.* DSU art. 3.7.

for those future entries, pending final assessment at a later date. Only the second of these has a prospective effect, and even then the estimated antidumping rates are no longer being used for the amount of security required, with the exception of one company in one case.²⁰ In all other cases, the assessment reviews at issue in the original dispute have no continuing effects on current or future imports. Accordingly, the United States has complied with the DSB recommendations and rulings.

22. The EC and some third participants argue that the United States ought to have done more. However, they fail to explain what more the DSB recommendations and rulings required in this instance. In particular, they fail to explain how the findings of the Appellate Body in the original dispute – which specifically limited its findings to the sixteen individually identified reviews “as applied” – are to be transformed into recommendations and rulings that apply to any and all administrative reviews conducted at any time – past, present, and future.

23. It should not be surprising that recommendations and rulings that are limited to individual assessment reviews – that is, reviews of past entries in a retrospective antidumping system – have limited prospective effects. This is not to say that the DSB is unable to make recommendations and rulings in a way that may implicate future assessment reviews; the DSB has plainly done so in other disputes. But it did not do so in this dispute. In particular, the Appellate Body has not found in this dispute that there is a “zeroing methodology” in assessment reviews that would be inconsistent “as such” with Article 9.3 of the Antidumping Agreement, although the EC sought

²⁰ Panel Report, para. 8.215.

precisely this finding in the original proceeding. Proceedings under Article 21.5 of the DSU cannot become the basis for expanding the scope of the original dispute.

IV. The Section 129 Determinations Regarding Stainless Steel Bar (“Cases” 2, 4, and 5)

24. Finally, we turn to the EC claims that some of the Section 129 determinations contained inconsistencies with provisions of the Antidumping Agreement. The EC made two such claims with respect to the Section 129 determinations on *Stainless Steel Bar from France, Germany, Italy, and the United Kingdom*. The compliance Panel upheld one EC claim (related to injury),²¹ and rejected the other (related to the “all others” rate).²²

25. First, some background., After the establishment of the compliance Panel, the United States revoked all four antidumping orders covering this product. This revocation was the result of a sunset review and is effective with respect to all entries made on or after March 7, 2007 – that is, prior to the end of the reasonable period of time and prior to the effective dates of the relevant Section 129 determinations.²³ As the compliance Panel recognized, therefore, any finding of inconsistency with respect to these Section 129 determinations “will not affect any remaining US obligation to implement the DSB’s recommendations and rulings.”²⁴ Although the United States disagrees with the compliance Panel’s finding in favor of one EC claim, we chose not to appeal this finding because the issue is now moot. Unfortunately, the EC has not done the

²¹ Panel Report, paras. 8.252-8.272.

²² Panel Report, paras. 8.273-8.284.

²³ Panel Report, para. 8.246 & n.867.

²⁴ Panel Report, para. 8.250.

same with respect to the claim that the compliance Panel rejected. As some of the third participants have addressed this issue, however, we would like to speak to it briefly.

26. The EC claim relates to the calculation of the “all others” rate in three of the Stainless Steel Bar Section 129 determinations. As the compliance Panel found, Article 9.4 sets a “ceiling” on the duty rate that may be applied to imports from non-investigated exporters, but does not impose any disciplines on the calculation of the duty rate itself.²⁵ This “ceiling” is the average of the duty rates applied to investigated exporters, exclusive of margins that are zero, *de minimis*, or based on adverse facts available. In these Section 129 determinations, all of the margins of dumping for the investigated exporters were either zero, *de minimis*, or based on adverse facts available.²⁶ In these circumstances, the compliance Panel concluded that the “ceiling” in Article 9.4 does not apply, and therefore it cannot be found that the United States exceeded it.²⁷

27. The EC agrees that Article 9.4 “refers to a ‘ceiling’ and does not provide any specific methodology for the calculation of a margin of dumping to be applied to non-investigated companies.”²⁸ The third participants that addressed this issue also agree that Article 9.4 governs the “ceiling” for the duty rates that may be applied.²⁹ As the text of Article 9.4 is not “ambiguous

²⁵ Panel Report, para. 8.281.

²⁶ Panel Report, para. 8.273.

²⁷ Panel Report, para. 8.283.

²⁸ EC Appellant Submission, para. 333.

²⁹ Korea Third-Participant Submission, para. 39; Norway Third-Participant Submission, para. 48.

or obscure,” and the compliance Panel’s interpretation is not “manifestly absurd or unreasonable,”³⁰ there is no need to resort – as the EC does – to the negotiating history of Article 9.4 in order to clarify its meaning.³¹

28. Moreover, the EC purports to rely on the negotiating history to assert the “possibility” that Article 9.4 contains, through implication, obligations on the calculation of the “all others” rate.³² Setting aside for the moment the dubious merits of the EC’s argument, it should be noted that it is not enough for the EC merely to show that it is possible to interpret Article 9.4 as the EC suggests. Article 17.6(ii) of the Antidumping Agreement makes clear that the EC can prevail only if it shows that the interpretation relied on by the U.S. investigating authorities is impermissible. Even assuming *arguendo* that the EC could show that it is permissible to give another “possible” interpretation of Article 9.4, it would not follow that the interpretation relied on by the United States and given by the compliance Panel is impermissible.

29. The third participants go even further. According to Norway, the WTO agreements establish a “rules-based system,”³³ and therefore an interpretation of a provision of the Antidumping Agreement that finds no rule to bind a Member in a given situation is tantamount to the “law of the jungle” or a “free for all.”³⁴ Likewise, Korea asserts that there cannot be a “lacuna” in the text of the agreement, and so Article 11 of the DSU therefore imposes on panels

³⁰ *Vienna Convention on the Law of Treaties*, art. 32(a)-(b).

³¹ EC Appellant Submission, para. 333 (discussing Exhibit EC-61).

³² EC Appellant Submission, paras. 332-333.

³³ Norway Third-Participant Submission, para. 37.

³⁴ Norway Third-Participant Submission, paras. 37, 50.

an obligation to “render a reasonable decision to fill the loopholes in the text.”³⁵ However, if the Members agreed not to undertake any obligation in a particular circumstance, then dispute settlement cannot be the avenue by which an obligation is nonetheless created.³⁶ A “rules-based system” is not one in which every situation is covered by a rule. Rather, a “rules-based system” is one that respects the rules that were negotiated among the Members and does not apply rules that the Members did not agree to.

30. In any event, Article 9.4 governs the “anti-dumping duty applied to imports” from non-investigated exporters or producers. In this instance, no antidumping duty calculated in the Section 129 determinations was ever “applied” to imports from non-investigated exporters or producers of stainless steel bar. The Section 129 determinations set only a cash deposit rate, effective for imports entered on or after April 23, 2007. No duties were assessed at the “all others” rate. As Commerce explained at the time:

The new [all-others] rate will not necessarily serve as the assessment rates, if the companies subject to those rates request administrative reviews. Rather, [Commerce] will establish the assessment rates and calculate new, company-specific cash deposit rates through such administrative reviews.³⁷

Further, the subsequent revocation of the duty orders as a result of the sunset review, with effect for all imports entered on or after March 7, 2007, has the consequence of refunding – with interest – all of the cash deposits made as a result of these Section 129 determinations. Thus, not

³⁵ Korea Third-Participant Submission, para. 41.

³⁶ DSU, arts. 3.2, 19.2.

³⁷ Issues and Decision Memorandum for Section 129 Determinations, Apr. 9, 2007, at 20 (Exhibit EC-7).

only were no duties assessed as a result of these Section 129 determinations, no duties ever will be assessed on any imports that were subject to the “all others” rate in the Section 129 determinations in Stainless Steel Bar. Accordingly, even if Article 9.4 imposes an obligation with respect to the amount of duty that may be assessed in this case, the United States could not have acted inconsistently with it, because no duties were assessed.

V. Conclusion

31. For all of the forgoing reasons, as well as those set out in our written submissions, we respectfully request that the Appellate Body reject the EC’s appeal and affirm the Panel’s findings that were the subject of that appeal. We also respectfully request that the Appellate Body reverse the Panel’s findings that were the subject of the U.S. other appeal.

32. We thank you for your attention and look forward to answering your questions.
