

***UNITED STATES – CONTINUED EXISTENCE AND
APPLICATION OF ZEROING METHODOLOGY***

WT/DS350

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

January 29, 2008

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for agreeing to serve on the Panel. We do not intend to offer a lengthy statement, as our first written submission responds thoroughly to the substantive arguments that the European Communities (“EC”) raised in its first written submission.

2. As an initial matter, the United States would like to thank the Panel for agreeing to open the Panel’s meetings to the public, including opening the third party session for those third parties willing to make their statements public. The Panel properly recognized that under the Dispute Settlement Understanding (“DSU”) it has the authority to modify the working procedures and to organize open sessions. Opening this meeting to the public will have a positive impact on the perception of the WTO dispute settlement system, particularly with respect to transparency. This dispute has a substantial public interest. Permitting the public to observe proceedings and be able to see first-hand the professional, impartial, and objective manner in which they are conducted can only further enhance the credibility of the WTO.

3. Today in our statement we would like to focus on a few points concerning the EC’s argument. First, we will offer some comments on the applicable standard of review and the EC’s argument concerning Article XVI:4 of the WTO Agreement. Second, we will briefly discuss the

proper scope of this dispute and the U.S. requests for preliminary rulings. Third, we will refute the EC's claim that the text of the Antidumping Agreement establishes an obligation to provide an offset for non-dumped transactions in assessment proceedings.

Standard of Review

4. Article 11 of the DSU generally defines a panel's task in reviewing the consistency with the covered agreements of measures taken by a Member. In a dispute involving the Antidumping Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Antidumping Agreement.

5. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find that interpretation to be in conformity with the Agreement.¹

6. Under DSU Article 11, this Panel is charged with making an objective assessment of the matter before it, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements. However, the EC and certain third parties would like this Panel to neglect its express obligation under Article 11 of the DSU to conduct an objective assessment.

7. Instead, those Members urge the Panel to follow prior Appellate Body findings in order to ensure the "security and predictability" referred to in Article 3.2 of the DSU. However, Article

¹*See Argentina – Poultry*, para. 7.341 and n. 223.

3.2 does not impose on panels an obligation to create security and predictability. Rather, Article 3.2 explains that the dispute settlement system is a central element in providing security and predictability to the multilateral trading system. That only occurs, however, when panels and the Appellate Body comply with the provisions of Articles 3.2 and 19.2 of the DSU – that is, when they do not create rights and obligations to which the Members did not agree.

8. The EC’s approach would result in undermining the very security and predictability to which the EC pays lip service. For the EC, it would be enough for a panel to rely uncritically upon a prior Appellate Body report. The EC, in essence, would like this Panel to rubber-stamp those reports favorable to its position. Fortunately for the dispute settlement system, panels and the Appellate Body have refused to embrace the approach urged by the EC.

9. Two panels have expressly rejected allegations that they were bound by Appellate Body conclusions, most recently in *US-Zeroing (Mexico)*. That panel, like the *US – Zeroing (Japan)* panel, was not convinced. According to the *US – Zeroing (Mexico)* panel, in light of its “obligation under Article 11 of the DSU to carry out an objective examination of the matter referred to us by the DSB,” the panel “felt compelled to depart from the Appellate Body’s previous approach” to claims against so-called “zeroing” in administrative reviews.² Similarly, the panel in the dispute *United States – Anti-dumping Measure on Shrimp from Ecuador* re-affirmed the need for a panel to take seriously its obligations under DSU Article 11 to conduct an objective assessment and to hold a complaining party to its burden of proof even where the responding party did not contest the complaining party’s claims. And it is ironic that while the EC urges the

²*US-Zeroing (Mexico)*, para. 7.106.

Panel to treat past Appellate Body reports as being definitive interpretations of the covered agreements, the EC ignores the very findings of the Appellate Body on the issue of the effect to be given to prior Appellate Body reports. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body explained:

We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. . . . Article IX:2 of the *WTO Agreement* provides: “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements”. Article IX:2 provides further that such decisions “shall be taken by a three-fourths majority of the Members”. The fact that such an “exclusive authority” in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.³

10. This Panel likewise is charged with undertaking an objective assessment of the matter before it, applying the proper customary rules of interpretation, and cannot make findings or recommendations that add to or diminish the rights and obligations in the covered agreements.

Article XVI:4 of the WTO Agreement

11. Turning to Article XVI:4 of the WTO Agreement, the EC’s interpretation of that provision, if adopted, would improperly add to or diminish the rights and obligations of Members. The EC argues that “the findings of the Appellate Body as adopted by the DSB in specific disputes create an independent international obligation for the losing party in that dispute to comply.”⁴ Because the DSB has adopted Appellate Body reports holding zeroing inconsistent with provisions of the covered agreements, the EC asserts that the United States is under a

³*Japan–Alcoholic Beverages (AB)*, p. 13.

⁴EC First Written Submission, para. 128.

continuing obligation to comply, has not yet done so, and has therefore acted inconsistently with Article XVI:4.

12. The EC’s expansive interpretation of Article XVI:4 should be rejected. The idea of a continuing “independent international obligation” arising from adopted reports cannot be reconciled with the text of the DSU, nor with the fact that Appellate Body and panel reports are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, no report can create any “obligation” independent of the covered agreements – Articles 3.2 and 19.2 of the DSU are explicit on this fact, and the EC approach is directly contrary to the very text to which the EC has agreed. In light of Articles 3.2 and 19.2 of the DSU – which prohibit panels and the Appellate Body from adding to the obligations of Members – and the specific provisions of the DSU on compliance, including Article 21.5, the EC’s proposed interpretation of the text of Article XVI:4 is entirely inconsistent with the covered agreements and the rules of treaty interpretation as reflected in the Vienna Convention.

Scope of this Dispute

a. The EC Requested Establishment of the Panel on Measures Not Included in its Request for Consultations

13. The United States has asked the Panel to make preliminary rulings as well on the EC’s attempt to expand improperly the scope of this proceeding. Today we will briefly discuss our three preliminary objections and respond to a few points that the EC raised in its submission of October 5.

14. The United States first requests a preliminary ruling that the measures appearing in the EC’s panel request, but not in its request for consultations, are outside of the Panel’s terms of

reference. More specifically, the EC's panel request added 10 sunset reviews and 4 administrative reviews to the 38 specific measures originally listed in its request for consultations. The EC also added a new request concerning the "continued application of, or the application of, the specific antidumping duties" resulting from the antidumping orders in 18 cases, as calculated or maintained in place pursuant to the most recent administrative review, original proceeding, or changed circumstances or sunset review proceeding.

15. Under DSU Article 7.1, a panel's terms of reference are determined by the complaining party's request for the establishment of a panel. In turn, DSU Article 6.2 provides that a panel request must "identify *the specific measures at issue*" in a dispute. Under DSU Article 4.7, however, a Member may not request the establishment of a panel with regard to any measure, but only with respect to a measure that was subject to consultations. Finally, DSU Article 4.4 requires that the request for consultations state the reasons for the request, "including identification of *the measures at issue* and an indication of the legal basis for the complaint." As the United States explained in its first written submission, the Antidumping Agreement contains parallel requirements in Articles 17.3-17.5.

16. The covered agreements thus establish a clear progression from the measures contained in the consultations request to the measures identified in the panel request, upon which a panel's terms of reference are based. As the Appellate Body explained in *Brazil–Aircraft*, "Articles 4 and 6 of the DSU. . . set forth a process by which the complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment

of a panel.”⁵ Under the relevant provisions in the DSU and Antidumping Agreement just discussed, a panel’s terms of reference cannot include measures which were outside the request for consultations.

17. The EC’s panel request contained measures that are not found in its request for consultations. None of the new measures can properly fall within this Panel’s terms of reference. Moreover, permitting the EC’s panel request with respect to these measures would have a detrimental effect on the WTO dispute settlement system. If a party could simply add new measures after consultations, the very purpose of consultations, and their practical utility, would be severely undermined. The parties would never have had the opportunity through consultations to resolve their differences, contradicting the very notion of “prompt settlement” of disputes under Article 3.3 of the DSU. Such an outcome would also detract from the goal in DSU Article 4.1 “to strengthen and improve the effectiveness of the consultation procedures employed by Members.”

18. Responding to the United States’ preliminary objections, the EC has created various legal standards in an effort to convince the Panel to accept the new measures contained in its panel request. However, it is irrelevant whether the new measures have a “direct relationship” with the measures in the consultations request.⁶ Nor has the Appellate Body articulated a test that new measures involving “essentially the same matter” may be included in the panel’s terms of reference

⁵*Brazil–Aircraft (AB)*, para. 131.

⁶EC Response to Request for Preliminary Rulings, para. 25.

when they were not included in the consultation request.⁷ Instead, this Panel should be guided by the DSU – a panel’s terms of reference cannot include measures that were not the subject of a request for consultations. And, in *US–Certain EC Products*, the Appellate Body agreed that the scope of measures subject to referral to the DSB is delineated by the consultations request, and, absent a request for consultations, a new, legally distinct measure may not be placed before a panel in the request for establishment.⁸

b. The EC Failed to Meet the Specificity Requirement of DSU Article 6.2

19. The United States also asks that the Panel find that the EC’s reference in its panel request to the continued application, or application of antidumping duties in 18 enumerated cases does not meet the specificity requirement of DSU Article 6.2. The EC affirmed the open-ended, indeterminate nature of these alleged measures when it stated in its October 5 response that the EC’s panel request pertained to all “subsequent measures” adopted by the United States with respect to the 18 measures included in its panel request.⁹ In effect, the EC is asking this Panel to take jurisdiction over determinations that the United States has not yet made.

20. Under DSU Article 6.2, a panel request must “identify the *specific measures* at issue” in the dispute. The specificity requirement is important for two reasons.¹⁰ First, it ensures the clarity of the panel’s terms of reference, which, pursuant to DSU Article 7, are typically

⁷EC Response to Request for Preliminary Ruling, para. 24.

⁸*US–Certain EC Products (AB)*, para. 82.

⁹EC Response to Request for Preliminary Rulings, para. 47.

¹⁰*Japan–Film (Panel)*, para. 10.9.

determined by the panel request. Second, it informs the responding party and other Members of the nature of the complainant's case (i.e., the "measures" challenged and the WTO provisions invoked by the complaining party). For other Members, this could often mean the difference between deciding to participate as a third party or not.

21. The EC's imprecise reference to "most recent" measures, and its admitted inclusion of "subsequent measures," related to 18 separate orders, is anything but specific. Each determination that sets the margin of dumping for a defined period of time (for example, the period of an administrative review) is distinct and separate, and under DSU Article 6.2, the EC must identify specifically each measure in its panel request. Instead, the EC is impermissibly attempting to include determinations beyond those explicitly listed in its panel request. Because of the EC's lack of specificity, the United States is unable to determine when these determinations were or will be made, what calculations they did or will include, what duty rates they have established or will establish, and what individual companies they did or will cover.

22. The EC cites various Appellate Body and panel reports in an effort to convince the Panel that the "subsequent measures" are somehow identified "precisely" in its request for establishment. However, the reports cited by the EC are inapposite. They involve disputes, such as *EC-Bananas III* and *Japan-Film*, where a law of general application was identified in a panel request, and subsequent implementing regulations were considered to fall within a panel's terms of reference. Here, the EC is not challenging a framework law and subsequent implementing regulations. Each original investigation, administrative review, and sunset review results in a distinct final determination which constitutes an action taken by the United States. In other words, a measure which must be identified precisely in the panel request.

c. The EC's Request Included Measures That Were Not Final at the Time of its Panel Request

23. Additionally, the United States asks that the Panel exclude from its consideration four “measures” in the EC panel request because they are preliminary determinations. Under Antidumping Agreement Article 17.4, a matter may only be referred to a panel if “final action has been taken by the administering authority.” The EC, however, identifies three on-going sunset reviews, and one on-going administrative review in its request for establishment of a panel. In these four proceedings, the United States has not taken “final action,” and therefore, under the Antidumping Agreement, these proceedings have not yet resulted in any measure that can form part of this Panel’s terms of reference.

24. The EC asserts that the on-going proceedings are part of their catch-all reference to “subsequent measures” related to the 18 antidumping duty orders and that they therefore are properly included in the Panel’s terms of reference. Aside from the flaws related to the EC’s “subsequent measure” argument, the EC neglects altogether the plain language of Article 17.4 that governs here. The four on-going proceedings cannot properly be before this Panel, and terming them “subsequent measures” does not change this fact.

The Alleged Obligation to Provide Offsets

25. We now turn to the EC’s argument that the Antidumping Agreement contains an obligation to provide offsets for instances of non-dumping in the context of certain identified assessment proceedings. The key here is that the text of the Antidumping Agreement does not impose on Members an obligation to provide an offset for non-dumped transactions in assessment proceedings. The starting point must be the text of the Agreement. It is fundamental that in

interpreting a treaty, a panel must not impute into that treaty words and obligations that are not contained in the text. In this dispute, the EC asks this Panel to read an obligation into the Antidumping Agreement. In particular, the EC seeks to impose an obligation to reduce antidumping duties to account for instances of non-dumping in assessment proceedings. The EC does so despite the absence of a textual basis for such an obligation and despite the presence of a permissible interpretation of the Antidumping Agreement that does not require such offsets.

26. In fact, 4 panels addressing this exact issue have consistently found that there is no textual basis supporting an obligation to provide offsets outside the context of average-to-average comparisons in investigations.¹¹ There is a significant reason for this consistency. The only textual basis that panels have identified for an obligation to provide offsets has been the “all comparable export transactions” language in the text of Article 2.4.2 of the Antidumping Agreement, which relates specifically to average-to-average comparisons in investigations, and is not applicable to any other kind of comparison in any other context.¹²

27. In urging this Panel to find that the Antidumping Agreement prohibits zeroing in the context of assessment proceedings, the EC cannot rely on text, because no such text exists. Instead, the EC seems to rely most heavily on the Appellate Body’s report in *US-Zeroing (Japan)*. We respectfully disagree with the reasoning used by the Appellate Body regarding the WTO-inconsistency of what it referred to as “simple zeroing” in periodic reviews. Every panel

¹¹ *US-Zeroing (Japan) (Panel)*, paras. 7.216, 7.219, 7.222, 7.259; *US-Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.65, 5.66, 5.77; *US-Zeroing (EC) (Panel)*, paras. 7.223, 7.284; *US-Zeroing (Mexico)*, paras. 7.118, 7.119, 7.143.

¹² *US-Softwood Lumber Dumping (AB)*, paras. 86-90, 104-05.

that has examined the issue has concluded that zeroing is not prohibited by the Antidumping Agreement in such circumstances.

28. The EC argues that margins of dumping calculated in assessment proceedings must relate to the “product as a whole,” and cannot be calculated for individual transactions. The term “product as a whole” is not found anywhere in the Antidumping Agreement, nor does it have a defined meaning; moreover, “product as a whole” is not found anywhere in the Appellate Body report in *US - Zeroing (Japan)*.

29. In attempting to find a basis for its legal theory, the EC refers to the definition of dumping contained in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994. Nothing in either provision supports the argument that a margin of dumping must be calculated for the “product as a whole.” Instead, these provisions talk about dumping in terms of a product being introduced into the commerce of another country – an action that occurs through *individual transactions*. Nowhere does GATT Article VI or Article 2.1 of the Antidumping Agreement refer to the total of all transactions relating to that product over a period of time, let alone explain what would be the applicable period of time.

30. The EC’s argument is that injurious dumping that occurs with respect to one transaction is mitigated by another transaction made at a non-dumped price. However, nothing in the Agreement supports that view, nor does commercial reality. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this is to the benefit of the seller, and does not relieve the domestic industry of the injury caused by other transactions made at less than normal value.

31. Our written submission more fully sets forth the textual and contextual bases, and other

evidence that the concepts of dumping and margins of dumping, as defined in the Antidumping Agreement and the GATT 1994, are applicable to individual transactions. It explains that the terms “dumping” and “margins of dumping,” as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994, do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

32. The EC’s arguments concerning Article 9.3 fail for much the same reason. The EC contends that the term “margin of dumping” relates exclusively to the “product as a whole,” considered on an exporter-wide basis. Article 9.3 requires that the amount of antidumping duty assessed shall not exceed the margin of dumping. However, the obligation in Article 9.3 may be applied at the level of individual transactions. This understanding of the term “margin of dumping” is particularly appropriate in the context of antidumping duty assessments, where duties are assessed on individual customs entries resulting from individual transactions for which importers are liable for payment. Panels in prior disputes have agreed that there is no reason why a product that is introduced into the commerce of another country cannot refer to a particular export sale.¹³

33. Prior panels have also noted that an obligation to weigh one transaction against another cannot be reconciled with Article 9.4, which recognizes the existence of prospective normal value systems of assessment. Under such systems, liability is determined on the basis of an individual transaction. One import transaction has no effect on the amount of antidumping duty due as a result of other distinct transactions. Reading Article 9.3 as requiring one transaction to offset

¹³ *US-Zeroing (Japan) (Panel)*, para.7.201; *US-Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.53-5.57; *US-Zeroing (EC) (Panel)*, para. 7.204.

another would require Members that use prospective normal value systems to conduct refund reviews even where every import was properly assessed duties based on a correct comparison of its export price to the appropriate normal value. This would lead to an absurd result: prospective normal value systems would then be indistinguishable from retrospective assessment systems. The United States has been unable to identify a single prospective normal value system that provides for such reviews.

34. It is also important to consider that, if the EC’s reading of “margin of dumping” is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 may be prevented from fully addressing injurious dumping. If authorities have to take into account the export prices paid by all importers importing from the same exporter, the importers with the highest margins would pay less than the true margin of dumping because of the other importers importing at non-dumped prices. Such an approach would favor importers who participate in dumping over other importers (and domestic competitors) that compete fairly.

35. The panel in *US-Zeroing (Mexico)* recognized this dilemma, finding that this “kind of competitive disincentive to engage in fair trade could not have been intended by the drafters,” and should not be accepted as consistent with Article 9.3.¹⁴ The fact that some imports are made at non-dumped prices does not change the fact that the domestic industry suffers from dumped imports, and the injury suffered is not mitigated by non-dumped prices. Thus, requiring authorities to use non-dumped imports as an offset to dumped imports precludes the objective of

¹⁴ *US-Zeroing (Mexico)*, para. 7.146, quoting Oral Statement of the United States at the Second Meeting, para. 18.

antidumping duties – which is to redress the injurious effects of dumping.

36. Furthermore, adopting the EC’s reasoning would cause implications for Article 2.4.2. Any finding that Articles 2.1 and 2.4.2 of the Antidumping Agreement and GATT Article VI contain a general prohibition of zeroing, would render the second sentence of Article 2.4.2, the targeted dumping provision, *inutile*. This is because the targeted dumping methodology provided for in Article 2.4.2 mathematically must yield the same result as the average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In fact, the EC, a Member that uses the average-to-transaction comparison, addressed this matter before its own tribunal. There, the EC argued that a prohibition of zeroing cannot apply equally to both comparison methodologies because it would lead to the same mathematical result, rendering the average-to-transaction methodology redundant.¹⁵ This fact cannot be ignored or diminished by assuming that the targeted dumping provision permits an authority to ignore any obligation in the Antidumping Agreement other than the obligation to use one of the two symmetrical comparison methods. The panel in *US-Zeroing (Mexico)* agreed that this is a significant concern and one that the Appellate Body in *US-Zeroing (Japan)* had not properly addressed.

37. The EC also contends that zeroing is inconsistent with the “fair comparison” requirement of Article 2.4. However, the EC does not argue that any of the transaction-specific comparisons made by the United States failed to reflect a “fair comparison.” Instead, the EC contends that the aggregate amount of antidumping duties assessed exceeded the margin of dumping for the

¹⁵ U.S. First Written Submission, para. 117, *citing* Case T-274/02, *Ritek Corp. v. Council of the European Union*, 24 October 2006, para. 94 (Exhibit US-3).

product as a whole. The relevant text of Article 2.4, however, provides only that a “fair comparison shall be made between the export price and the normal value.” The text of Article 2.4 does not address whether any particular assessment of antidumping duties exceeds the margin of dumping. This is because the text of Article 2.4 does not address whether “dumping” and “margins of dumping” are concepts that apply to individual transactions. Nor does the text address, for purposes of assessing antidumping duty liability, whether a margin of dumping may be specific to each importer that is liable for payment of the antidumping duties. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is “fair” or “unfair.”

38. Consequently, resolution of the EC’s claim depends not on the text of Article 2.4, but on whether it is permissible to interpret the term “margin of dumping” as used in Article 9.3 as applying to individual transactions. Therefore, if the Panel finds, as the prior panels have found, that it is permissible to understand the term “margin of dumping” as used in Article 9.3 as applying to an individual transaction, the challenged assessments will not exceed the margin of dumping and there will be no basis for a finding of inconsistency with Article 2.4.

39. The EC, in arguing for a blanket prohibition of zeroing, also relies on an erroneous interpretation of the term “investigation ” in Article 2.4.2. It seeks to deny meaning to the phrase “during the investigation phase” by recasting Article 9 assessment proceedings and Article 11 reviews as “investigations.” In the EC’s view, any proceeding which involves questionnaires, verification, and the possibility of a hearing constitutes an investigation subject to Article 2.4.2.

40. The Antidumping Agreement contains clear distinctions between investigations under Article 5 to determine the existence, degree and effect of dumping and other phases of an antidumping proceeding, such as assessment reviews and sunset reviews. The basic interpretive

problem with the EC's analysis is that it reduces language in the Antidumping Agreement to redundancy. Article 2.4.2 provides for the application of certain methodologies to determine the existence of margins of dumping "during the investigation phase." The inclusion of the phrase "during the investigation phase" in Article 2.4.2 was intended to have a limiting effect. Indeed, labeling every dumping calculation exercise to be an investigation would render the phrase "during the investigation phase" without meaning.

41. In summary, the United States respectfully disagrees with the Appellate Body's reasoning that the Antidumping Agreement includes a general prohibition of zeroing, and rejects the EC's assertion that the United States has some type of general obligation under international law to eliminate "zeroing." Instead, the United States agrees with the reasoning of antidumping experts on recent panels, finding that outside the context of average-to-average comparisons in investigations, the Antidumping Agreement does not impose an obligation to provide offsets for non-dumping. At a minimum, we urge this Panel to find that a permissible interpretation of the Antidumping Agreement contains no obligation to provide for an offset to dumping in assessment proceedings.

42. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.