

**UNITED STATES – LAWS, REGULATIONS AND METHODOLOGY
FOR CALCULATING DUMPING MARGINS (“ZEROING”)**

WT/DS294

**OPENING STATEMENT OF THE
UNITED STATES OF AMERICA**

AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

March 16, 2005

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, it is our privilege to appear here today to present the views of the United States concerning the issues in this dispute. We do not intend to offer a lengthy statement; you have our written submission in which we fully respond to the arguments contained in the EC’s written submission.

2. Instead, today’s statement will be limited to a few points on the following three topics: (1) offsets for “negative margins” in assessment proceedings; (2) the concept of “measure” and the application of the mandatory/discretionary distinction in the context of this dispute; and (3) offsets for “negative margins” in antidumping investigations.

Offsets for Non-Dumped Sales

3. At one level, this dispute might be mistaken as one about nothing more than names: is the U.S. methodology properly characterized as “zeroing” or is the EC trying to impose an

“offset” obligation without any basis in the Anti-Dumping Agreement?¹ Are U.S. administrative reviews properly referred to as “assessment proceedings,” or are they “investigations” by another name, subject to the “investigation phase” obligations of Article 2.4.2? While these questions are undoubtedly relevant to the issues before this Panel, they most certainly do not exhaust the inquiry.

4. In this dispute, it is the obligations in the Anti-Dumping Agreement and the actual methodology being challenged that we must look to, rather than names. In order for a complaining party to establish that a Member’s application of a methodology is inconsistent with the Anti-Dumping Agreement, it must be able to point to a provision in the Anti-Dumping Agreement that addresses the methodology in question and the phase of an antidumping proceeding at which the methodology is applied. If an obligation exists, but on its face the obligation is limited to a particular phase of an anti-dumping proceeding, that textual limitation must be given meaning.

5. In this dispute, the EC unilaterally substitutes labels for reasoning. When merchandise subject to an antidumping measure is imported at a price above its normal value and that merchandise is simply allowed to enter without dumping liability, the EC seeks to label such an action as “zeroing.” But where in the Anti-Dumping Agreement is the obligation to treat such a transaction as giving rise to an offset that reduces or even cancels the dumping liability of another transaction which is made at below normal value?

¹ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”).

6. Similarly, when faced with a plain textual limitation on the obligations of Article 2.4.2 to “the investigation phase”, the EC is undeterred. It simply recasts every aspect of an antidumping proceeding into an “investigation” – coining such terms as “review investigations” and “sunset review investigations” – as if a renaming exercise by a single Member could create an Agreement obligation applicable to all.

7. As we said, it is not the names that matter – it is only the obligations as reflected in the text that matter. With that, let us turn to those obligations.

8. In *Softwood Lumber Dumping*, the Appellate Body found that the failure to provide an offset for “negative margins” was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.² Even if the Panel accepts the reasoning of the Appellate Body, that report must be carefully considered to distinguish between its relevant findings and the *obiter dicta* in order to determine the exact textual basis for the Appellate Body’s finding. The Appellate Body did not find that the U.S. methodology was inconsistent with Article 2.4, notwithstanding its prior *dicta* about Article 2.4 in *EC – Bed Linen*.³ Instead, in *Softwood Lumber Dumping*, the Appellate Body found that in the investigation phase, “zeroing is prohibited when establishing the existence of margins of dumping under the weighted-average-to-weighted-average methodology.”⁴

9. By contrast, in this dispute, the EC seeks to extend the limited finding of the Appellate Body in *Softwood Lumber Dumping* to U.S. assessment proceedings, suggesting, among other

² *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, Report of the Appellate Body adopted 31 August 2004.

³ *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, Report of the Appellate Body adopted 12 March 2001, para. 55.

⁴ *Softwood Lumber Dumping*, para. 108.

things, that an offset requirement can also be found in the “fair comparison” provision of Article 2.4 of the Anti-Dumping Agreement.

10. While there are a number of reasons why the “fair comparison” provision cannot be said to include an offset requirement, perhaps the single most compelling reason is that such an interpretation would be inconsistent with the corollary to the customary rules of treaty interpretation that provides that “interpretation must give meaning and effect to all the terms of a treaty”⁵ – in this case, Article 2.4.2 of the Anti-Dumping Agreement.

11. Article 2.4.2 provides for three comparison methodologies: average-to-average, transaction-to-transaction, and, in certain circumstances, average-to-transaction. This last methodology, commonly referred to as the “targeted dumping” methodology, is provided for as an exception to the first two methodologies. It is not, however, an exception to the “fair comparison” provision of Article 2.4.

12. The “targeted dumping” provision permits Members to make average-to-transaction comparisons in an investigation under certain conditions. So, if there is an offset requirement in the language of the first sentence of Article 2.4.2 with respect to average-to-average comparisons, that requirement does not apply to the average-to-transaction exception in the second sentence. However, if the requirement to make a “fair comparison” included an offset requirement, that offset requirement would also be applicable to the average-to-transaction or targeted dumping methodology.

⁵ *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, p. 23.

13. Any offset requirement cannot cover the targeted dumping exception because that would render the exception a nullity as a simple matter of mathematics. If the offset requirement applies to both the average-to-average methodology and the average-to-transaction methodology, in both cases, non-dumped transactions would offset dumped transactions. Mathematically, the results of the two comparison methodologies would be identical. Despite a finding that average-to-transaction comparisons are appropriate, the result would be guaranteed to be the same as if average-to-average comparisons had been made. In other words, the EC would have this panel render the targeted dumping provision redundant, a result inconsistent with the customary rules of treaty interpretation. To avoid rendering the second sentence of Article 2.4.2 a nullity, the Panel must conclude that the “fair comparison” provision of Article 2.4 does not incorporate an offset requirement.

14. In fact, this reasoning would apply with respect to any argument that the text of the Anti-Dumping Agreement contains an offset requirement outside the specific context of the average-to-average comparison methodology in Article 2.4.2. The average-to-transaction methodology is only an exception to the average-to-average and transaction-to-transaction comparison methodologies in Article 2.4.2, and not to any other requirements of the Anti-Dumping Agreement. Consequently, interpreting any other provision of the Anti-Dumping Agreement to impose an offset requirement would be inconsistent with the customary rules of treaty interpretation.

15. The only argument remaining to the EC is its reinterpretation of the term “investigation.” In its first written submission, the United States addressed the fact that the Anti-Dumping Agreement contains clear and obvious distinctions between investigations and other phases of an

antidumping proceeding. In order not to repeat those arguments, we will again focus on a basic, interpretative problem with the EC's analysis: it is inappropriate to interpret Agreement language so as to reduce it to inutility or redundancy. That, however, is precisely what the EC seeks to do.

16. 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 clearly intended to have a limiting effect. This is particularly evident when the phrase is contrasted with phrases used elsewhere in the Agreement, such as “[f]or the purpose of this Agreement,”⁶ and “as used in this Agreement.”⁷

17. The EC seeks to deny meaning to the phrase by recasting Article 9 assessment proceedings as investigations and Article 11 reviews as investigations. Any proceeding which involves questionnaires, verification, and the possibility of a hearing would, in the EC's view, constitute an investigation subject to Article 2.4.2. Such an interpretation, however, would deny any meaning to the phrase “during the investigation phase” in a manner inconsistent with the customary rules of treaty interpretation.

18. The Anti-Dumping Agreement plainly permits a variety of antidumping duty assessment systems. Some of those systems, such as prospective normal value systems, inherently operate on an entry-by-entry basis. While the U.S. system functions on a retrospective basis, in substance it operates much like a prospective normal value system, albeit with contemporaneous normal values. The United States calculates normal values and compares them to transaction-specific export prices to determine the amount of dumping duty to be assessed as the result of

⁶ Art. 2.1.

⁷ Art. 1, fn.1.

that transaction. These amounts of dumping duty are then aggregated, on an importer-specific basis, and, in most cases, converted to an *ad valorem* equivalent to facilitate the assessment of those antidumping duties by customs officials. This system is designed so that the total dollar amount assessed from any importer is the same as if, at the time of entry, the contemporaneous normal value had been used as the prospective normal value. This is consistent with the Anti-Dumping Agreement, which permits Members to assess antidumping duties based on the amount by which export price is less than normal value.

19. In short, an application of the basic tools of treaty interpretation refutes the core arguments presented by the EC. Reading an offset obligation into Agreement text outside of the average-to-average comparison methodology in Article 2.4.2 would render the targeted dumping methodology redundant. Labeling every dumping calculation exercise to be an investigation would render the phrase “during the investigation phase” without meaning. We would be pleased to explore further with this Panel the textual and interpretive issues raised in this dispute, because these are the true issues before this Panel, not the labels on which the EC relies.

The Concept of “Measure” and the Application of the Mandatory/Discretionary Distinction

20. Turning to another topic, the EC has advanced an extreme position regarding what constitutes a “measure” for purposes of WTO dispute settlement. According to the EC, a computer program is a “measure.” However, an instrument that implements, rather than establishes, rules or norms does not meet the criteria identified by the Appellate Body for a measure that may be challenged “as such” in a WTO dispute.⁸

⁸ *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, Report of the Appellate Body adopted 9 January 2004, para. 82.

21. The EC takes an equally extreme position regarding the application of the mandatory/discretionary distinction, arguing that “the relevant standard in an ‘as such’ case is not whether the municipal measure *in all cases* leads to a WTO inconsistent result.”⁹ In the recent *Korea - Commercial Vessels* dispute, the EC made a similar argument, claiming that legislation that provides the discretion to provide export subsidies is inconsistent “as such” with Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures*. However, the panel in that dispute rejected the EC approach, explaining that it would be inconsistent with the principle – confirmed by the Appellate Body – that it cannot be assumed that a WTO Member will fail to implement its WTO obligations in good faith.¹⁰

Offsets for Non-Dumped Sales in Investigations

22. Finally, we would recall that in the U.S. first written submission, we did not address the issue of offsets for “negative margins” in antidumping investigations. As we noted earlier, in *Softwood Lumber Dumping*, which involved “as applied” claims, the Appellate Body found that due to the failure of Commerce to account for non-dumped comparisons in an antidumping investigation on softwood lumber from Canada, the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.

23. The United States believes that the report is flawed with respect to its finding that the Anti-Dumping Agreement requires Members to calculate and give credit for weighted average comparisons in investigations when the export price exceeds the normal value. The *amicus* submission received by the Panel identified other flaws in the Appellate Body report, as well.

⁹ EC First Submission, para. 143.

¹⁰ *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, Report of the Panel circulated 7 March 2005, para.7.64 (unadopted).

Nevertheless, that report was adopted by the Dispute Settlement Body (“DSB”) and the United States is in the process of implementing the DSB’s recommendations.

24. We note that the Panel is not obligated to follow the Appellate Body’s reasoning. We would be interested in discussing our concerns with this reasoning and why the Panel should not follow it, should the Panel consider that this would assist its analysis of this issue. We seek your guidance in this respect.

Conclusion

25. Mr. Chairman, members of the Panel, that concludes our opening statement. We would like to thank you for agreeing to serve on this panel, and we look forward to having a healthy dialogue regarding the important issues raised in this proceeding.