3. UNITED STATES - CONTINUED EXISTENCE AND APPLICATION OF ZEROING METHODOLOGY

A. REPORT OF THE APPELLATE BODY (WT/DS350/AB/R) AND REPORT OF THE PANEL (WT/DS350/R)

· Mr. Chairman, the United States first wishes to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding.

· Although we disagreed with several of the Panel's findings, we recognize the Panel's efforts in grappling with the issue of so-called "zeroing." The Panel, like previous panels, properly understood that the Antidumping Agreement could be permissibly interpreted as allowing the use of zeroing in reviews. As the Panel explained, it "generally found the reasoning of earlier panels on these issues to be persuasive."[2] In the end, however, the Panel disregarded the standard of review set out in the Antidumping Agreement and found against the United States. With respect to jurisdictional issues, we welcomed the Panel's rejection of the EC's attempt to include vague, indeterminate measures within the Panel's terms of reference.

· On the other hand, we are deeply disappointed in the Appellate Body's findings, which both incorrectly expanded the scope of the proceedings and disregarded the careful bargain struck as part of the Uruguay Round Agreements. The United States regrets that the Appellate Body, once again, has failed to accept the permissibility of zeroing under the covered agreements, and has imposed obligations on Members where there are none.

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[2] Panel Report, para. 7.169.

- First, in reaching its finding on the inconsistency of zeroing in reviews, the Appellate Body relied on the same flawed interpretation that it offered in previous reports. According to the Appellate Body, the concepts of "dumping" and "margin of dumping" are exporter-based and preclude a finding that dumping can exist with respect to an individual transaction. However, the Appellate Body has manufactured a conflict where there is none – dumping may be an exporter-related concept, but dumping can still exist on a transaction-by-transaction basis. We have previously explained in detail the flaws in the reasoning on which the Appellate Body primarily relies on in this report, and we invite Members to consider our previous communications on this topic.[3] In this regard, we note the opinion of one Appellate Body member who wrote that "[w]hile aggregation is an unavoidable requirement of the Anti-Dumping Agreement, these provisions are not clear as to what it is that must be aggregated"[4] and "[t]here are arguments of substance made on both sides."[5] We respectfully suggest that, as a consequence, under Article 17.6(ii) of the Antidumping Agreement, the Appellate Body should not have found the use of zeroing in reviews to be inconsistent with the AD Agreement.

- Second, we are very disturbed by the Appellate Body's approach to Article 17.6(ii) of the Antidumping Agreement. That provision states that where a panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Antidumping Agreement if it rests on one of those permissible interpretations. Thus, Article 17.6(ii) requires a panel, and the Appellate Body, to determine whether the interpretation proposed by a Member is permissible.

- The Appellate Body, however, failed to take that approach. Instead of examining the U.S. interpretation, the Appellate Body began by reiterating *its* analysis of the Antidumping Agreement. It then found that the U.S. interpretation of the Antidumping Agreement led to a result that contradicted the result of the Appellate Body's analysis – and on that basis alone, said that the U.S. interpretation could not be permissible.[6]

- This is a simple *non sequitur*. If Article 17.6(ii) only sanctioned interpretations that all yield the same result, Article 17.6(ii) would have no function. The article makes clear that a national authority's measure is to be upheld if it rests on *"one"* – not "all" – of the permissible interpretations of the Antidumping Agreement. Thus, the very premise

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[3] WT/DS294/16; WT/DS294/18; WT/DS322/16; WT/DS344/11; *see also* WT/DSB/M/211, paras. 37-40; WT/DSB/M/225, paras. 73-76; WT/DSB/M/250, paras. 47-55.

[4] Appellate Body Report, para. 310.

[5] Appellate Body Report, para. 312.

[6] Appellate Body Report, para. 317.

underlying Article 17.6(ii) is that two interpretations can be permissible simultaneously: one that would render the measure at issue consistent with the Agreement, and another that would render the measure at issue ***in***consistent with the Agreement. By definition, the existence of the second interpretation cannot be a basis for finding the first one not to be "permissible."

- In a related vein, the Appellate Body never actually examined the meaning of "permissible." Instead, it simply asserted "the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results."[7] That assertion is unsupported. The ordinary meaning of "permissible" is "allowable" or "permitted" – that is, an interpretation that can be reached under customary rules of interpretation. Nothing in customary rules of interpretation (reflected in Articles 31 and 32 of the Vienna Convention) says an interpretation is not "allowable" simply because another interpretation could also result from application of those rules.

- In fact, the Appellate Body's approach is particularly surprising in light of the provisions reflecting the customary rules of interpretation in the Vienna Convention. Article 32 makes clear that the application of the rules of interpretation in Article 31 can lead to a meaning that is "ambiguous." In light of that provision as well, we fail to see how the Appellate Body could have reached the view that Article 17.6(ii) cannot contemplate interpretations with mutually contradictory results. We note in this connection that the Appellate Body has been clear to say that its analysis of zeroing rests entirely on an analysis pursuant to Article 31 of the Vienna Convention.[8]

- At the end of the Uruguay Round negotiations, Article 17.6(ii) was key to the acceptance of the other provisions of the Antidumping Agreement. The existence of such a provision confirms that Members were aware that the text would pose particular interpretive challenges, at least in part because it was drafted to cover varying and complex antidumping systems around the world and long-standing differences concerning methodology. The negotiators therefore indicated that it would be a legal error not to respect a permissible interpretation of the Antidumping Agreement. We therefore deeply regret the Appellate Body's disregard for the meaning and importance of Article 17.6(ii).

- There are also a number of procedural findings by the Appellate Body that call for comment. First, we fail to see how the EC's reference, in its panel request, to the "application or continued application of antidumping duties in 18 cases" could in any way meet the requirement of Article 6.2 of the DSU to identify the specific measures at issue. In our view, it was the Panel that adopted the correct approach when it found that the EC

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[7] Appellate Body Report, para. 273.

[8] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, para. 128.

could not meet the requirements of Article 6.2 by referring to duties in a general way, detached from any underlying administrative determinations. We have significant concerns as well regarding the 14 measures not included in the consultations request and the four preliminary measures, but we will not take the time at this meeting to detail those concerns.

- Second, we are concerned by the Appellate Body's statement that the panel in this dispute "appear[s] to have acceded to the hierarchical structure contemplated in the DSU,"[9] a statement that is neither explained nor supported. While expressed in terms of a supposed hierarchy found in the DSU, the thrust of the statement is that panels must follow Appellate Body reports even where their own objective assessment of the "applicability of and conformity with the covered agreements" under DSU Article 11 leads them to a different conclusion. It is easy to understand the attraction to, and convenience for, Appellate Body members of this approach, but this approach is not what was agreed by Members and is not the legal effect of Appellate Body reports.

- As we have explained before,[10] the DSU does not establish a common-law system, in which Appellate Body findings on legal issues become binding precedents. To the contrary, the only thing in the DSU that resembles a hierarchical structure is the role assigned to the Ministerial Conference and the General Council by Article IX:2 of the WTO Agreement: those bodies have the exclusive authority to adopt binding interpretations of the covered agreements.

- Finally, we wish to draw attention to one aspect of the Appellate Body's discussion of the handling of evidence by panels. The Appellate Body emphasized that "the nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member's regulating authority. Because the design and operation of national regulatory systems will vary . . . in a specific case, a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence."[11] The United States, of course, has an extremely transparent legal system. We therefore welcome this recognition that in the case of less-than-transparent systems, it may be entirely appropriate in WTO disputes to make findings based on circumstantial evidence.

- In this connection, it is useful to recall *India – Alcohol Tariffs*, where the Appellate Body

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[9] Appellate Body Report, para. 365.

[10] WT/DS344/11.

[11] Appellate Body Report, para. 357.

refused to complete the analysis, despite the existence of evidence – including an admission by India – from which the proper legal conclusions could be drawn. The United States is puzzled as to whether the Appellate Body intended to take a different approach in these two disputes and if so, why.

· Thank you.