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

WT/DS294

COMMENTS OF THE UNITED STATES ON THE EC’S REPLIES TO THE PANEL’S QUESTIONS TO THE PARTIES IN CONNECTION WITH THE SECOND SUBSTANTIVE MEETING

May 18, 2005

1. The United States herewith provides its comments on the EC's May 13, 2005 replies to the Panel's second set of written questions ("EC Second Replies"). To a large extent, the EC repeats points that the EC has made previously and to which the United States already has responded. The United States will not repeat those earlier responses here, except to the extent that they were only provided to the Panel orally at one of the Panel meetings.

To both parties:

1. Please comment on whether the meaning of the first sentence of Article 2.4 is limited by the second sentence of Article 2.4, which provides that "this comparison shall be made ...". In other words, please comment on the supposition that the "fair comparison" referred to in Article 2.4, first sentence, is only that which is contemplated in Article 2.4, second sentence.

2. In response to Question 1, the EC states that "in the Uruguay Round, compared to the Tokyo Round, the fair comparison requirement was lifted up out of the body of Article 2.4 and placed on its own in a new first sentence. The Members would not have done this without a purpose."[1]

3. As the United States noted during the first Panel meeting, Article 2.6 of the Tokyo Round Antidumping Code ("AD Code"), to which the EC refers, stated, "In order to effect a fair comparison ... ." While the United States agrees that Article 2.6 of the AD Code addressed how to make a fair comparison, the language was ambiguous as to whether a fair comparison was required. Thus, all of Article 2.6 of the AD Code could have been read as non-mandatory.

4. The ambiguity contained in Article 2.6 of the AD Code was eliminated in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") by separating and revising the first sentence of Article 2.4 of the AD Agreement so as to make explicit the requirement to make a fair comparison. However, the remainder of Article 2.4 of the AD Agreement, like its predecessor, defines the elements of a fair comparison. Thus, Article 2.4 of the AD Agreement is clearly mandatory – it requires Members to make a fair comparison and instructs them how to do so.

5. This interpretation of Article 2.4 is consistent with its drafting history. In what is known as the "Dunkel Draft", Article 2.4 read as follows:

> "A fair comparison shall be made between the export price and the normal value. The two prices shall be compared at the same level of trade ... ."

Arguably, that formulation was ambiguous as to the elements that make up a fair comparison. That ambiguity was eliminated in the final draft, however, by revising the text to read as follows:

---

[1] EC Second Replies, para. 8 (footnote omitted).

> "A fair comparison shall be made between the export price and the normal value. *This comparison* shall be *made* at the same level of trade ... ." (Emphasis added).

Substitution of the phrase "this comparison" establishes a reference back to the subject of the prior sentence – *i.e.*, a fair comparison – which is what is being defined.

6. Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2 of the AD Agreement which refers to "the provisions governing fair comparison in paragraph 4." The plural term "provisions," as well as the reference to "paragraph 4," rather than a particular portion of paragraph 4, clarify that the entirety of Article 2.4 constitutes the provisions "governing fair comparison."[2]

2. Where, if anywhere else, can the meaning of the notion of fairness contained in Article 2.4, first sentence, be derived from other than the subject matter of Article 2.4?

7. In response to question 2, particularly in paragraphs 12 and 13, the EC speaks to its views of the notion of fairness, for purposes of this dispute, without citing any support – textual or otherwise – for its positions.

8. However, the failure of the EC to provide support for its asserted notion of fairness is critical for two reasons. First, the question asked "where" the meaning can be derived from beyond Article 2.4. The theories developed by the EC for purposes of this dispute are unresponsive to that request.

9. Second, and more important, if this dispute were to turn on the notion of fairness as addressed in Article 2.4, there should be no doubt as to what was intended by the use of that term. There is little debate as to what that term means with reference to the particular elements of a fair comparison discussed in the remainder of Article 2.4. However, it is another thing entirely to assert, without any textual support, that the notion of fairness extends beyond those elements in some undefined manner.

10. Whether one is considering the operation of one of the comparison methodologies identified in Article 2.4.2 for investigations or determining antidumping duties to be assessed on an import-specific basis, the comparison will involve normal values and export prices calculated on a price-per-unit basis, normally at the ex-factory level, after adjustment for any differences affecting price comparability as provided in Article 2.4. Such comparisons are "fair" within the meaning of Article 2.4, regardless of whether one or more transactions are used to establish the price-per-unit on either side of the comparison.

---

[2] *See Answers of the United States to the Panel's Questions to the Parties in Connection with the Second Substantive Meeting*, May 13, 2005, para. 2.

11. To suggest that the concept of fairness goes to whether one or more transactions must figure into the determination of the price per unit on either side of the comparison goes beyond what the text says. To conclude otherwise would render the first sentence of Article 2.4.2 a nullity. Moreover, such a suggestion would indicate that the drafters **both** resolved a long-standing debate as to whether transactions might be considered dumped based only on symmetrical comparisons (and not based on whether there are export transactions below the normal value) **and** suggested that Members using a prospective normal value or variable duty system might not, through the application of that system, be collecting the proper amount of antidumping duties. Astonishingly, the EC suggests that both of these were accomplished solely through the use of the word "fair" in a provision that otherwise does not address either of those issues.

3. Does Article 2.4 prohibit a Member from making adjustments for differences which do not affect price comparability? Please explain your answer.

12. The United States continues to disagree with the EC's characterization of so-called "zeroing" as akin to an unjustified adjustment to export price.[3] In fact, in the EC's response to the Panel's May 2, 2005 questions, the EC has now gone a step further, making the completely incorrect assertion that:

> After making adjustments for differences affecting price comparability, the investigating authority makes certain intermediate comparisons between export transactions and a 'normal value'; and **then makes further adjustments if the value of the export transaction exceeds that of the normal value**.[4]

13. As previously noted, the United States does not adjust the export price based on the difference between the export price and normal value as suggested by the EC, whether in Article 5 investigations, Article 9 assessment proceedings, or in any other phase of an antidumping proceeding and the EC has presented no evidence to the contrary.

***To the European Communities*:**

4. In paragraph 47 of the Second Oral Statement of the European Communities, the European Communities stated that, if two distinct patterns of export prices are identified under Article 2.4.2. then there is a "difference". Article 2.4.2 refers to a "pattern of export prices which differ . . . ." Please comment on the relationship between this "difference" and "differences which affect price comparability" within the meaning of Article 2.4.

---

[3] See, U.S. Second Written Submission, para. 29, fn 20.

[4] EC Second Replies, para. 20 (emphasis added).

14. Although the reasoning in paragraphs 30-34 of the EC Second Replies is difficult to follow, it appears that the EC's logic can be summarized as follows: (1) the AD Agreement does not say that Members cannot "zero" when using the targeted dumping comparison methodology; and (2) it is appropriate to make an adjustment to export price in a targeted dumping situation because whatever the difference is within the export market that justifies the targeted dumping methodology, that same difference "by definition"[5] affects the price comparability between the export market and the home market. In other words, the EC theorizes that differences **within the export market** among purchasers, regions or time periods constitute **differences that affect price comparability between export prices and normal values** within the meaning of Article 2.4.

15. The EC's theory simply cannot be reconciled with the terms of the second sentence of Article 2.4.2. As stated therein, the targeted dumping methodology may be applicable when there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods ... ." In order to avoid the pitfalls of its position that "zeroing" is permitted in a targeted dumping scenario, the EC recasts the language of the second sentence, referring instead to different "markets".

16. However, when the actual language of the AD Agreement is inserted into the EC's theory, its argument can be restated as follows:

> For example, assume that export sales only occurred at the very beginning and the very end of the time period and, therefore, the targeted dumping methodology is justified because of time period differences. Because the dumped sales that occurred at the end of the period cannot be averaged with the non-dumped sales that occurred at the beginning of the period, there is a difference that affects price comparability between those beginning-of-the-period-export-sales and the normal value sales (made throughout the period), that justifies an adjustment to those export prices to "zero" any negative dumping amount.

Alternatively, the argument could be recast as above on a regional basis – substituting non-dumped sales to Germany for the beginning-of-the-period-export-sales, and dumped sales to Spain for the end-of-the-period-export-sales. Again, the EC would argue that the differences between regions of the export market – the EC – that justify the use of the targeting methodology somehow create a difference that affects price comparability between the German sales and the home market sales.

[5] EC Second Replies, para. 33.

17. Finally, perhaps in recognition of the flaws in its position, the EC seeks to discount the importance of the issue.[6] The United States does not agree that this issue is of little relevance. As the United States has argued throughout this dispute, it is critical for the Panel to specify where, if anywhere, in the AD Agreement there exists an obligation to offset dumping amounts with non-dumped comparisons.[7] The targeted dumping methodology is an exception to the symmetrical comparison methodologies in the first sentence of Article 2.4.2, but is not an exception to the fair comparison requirement. Therefore, without an amendment to the language of the second sentence of Article 2.4.2 along the lines suggested by the EC, finding such an obligation in Article 2.4 would, as a matter of mathematics, render the targeted dumping provision a nullity. Even within Article 2.4.2, any obligation with respect to "zeroing" could not be based on general language applicable to all three of the comparison methodologies described therein, because, again, this would result in rendering the targeted dumping methodology a nullity.

5. Please elaborate the argument set out in paragraph 28 of the Rebuttal Submission that systems which calculate anti-dumping duty liability on the basis of a prospective normal value and variable duty pursuant to Article 9.4(ii) must be subject to the refund provisions of Article 9.3.2.

18. The United States has no comments on the EC's reply to Question 5.

6. Has the EC collected anti-dumping duties on the basis of a prospective normal value and variable duty? Has the EC ever conducted a refund proceeding with respect to the payment of duties collected on such a basis?

19. The United States is surprised by the facts asserted in paragraphs 45-47 of the EC Second Replies. The U.S. history of administering antidumping duties is replete with instances in which respondent parties have substantially reduced their dumping, even to the point of not dumping, so that all of their antidumping duty deposits are refunded to them as a result of an Article 9.3.1 assessment proceeding. Moreover, the United States has, in dozens of instances, revoked antidumping duty orders as to particular respondents after the respondent ceased dumping. Given that prospective and retrospective assessment systems are essentially equivalent, it is curious that the EC's experience is so divergent from that of the United States.

[6] EC Second Replies, para. 35.

[7] *See, e.g.*, *Opening Statement of the United States of America at the First Substantive Meeting of the Panel*, March 16, 2005, paras. 4-14.