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

WT/DS294

OPENING STATEMENT OF THE

UNITED STATES OF AMERICA

AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

April 26, 2005

Mr. Chairman, Members of the Panel:

1. On behalf of the United States delegation, let me say that is a privilege to appear before you again to present the further views of the United States in this dispute. We do not intend to offer a lengthy statement, as you have our written answers to the Panel's questions and our second written submission, in which we address the arguments contained in the EC's answers.

2. The fundamental issue that this Panel must resolve is whether the requirements of Article 2.4.2 of the AD Agreement extend beyond Article 5 investigations. The U.S. view is that they do not, because it is only in an Article 5 investigation that a Member establishes "the existence of margins of dumping".[1]

3. The U.S. interpretation finds strong support in the text of the AD Agreement. Articles 1, 2.4.2 and 5, read together, establish that a unique determination as to the "existence" of dumping must be made in Article 5 investigations. Outside of the Article 5 investigation phase, the task of an authority is not to determine whether dumping "exists". Instead, the AD Agreement makes

[1] AD Agreement, Article 2.4.2.

clear that in the Article 9.3.1 assessment proceedings challenged by the EC, the task of the United States is to determine "the amount of the anti-dumping duty" and the "final liability for payment of anti-dumping duties."

"Existence of Margins of Dumping During the Investigation Phase" versus "Investigation"

4. The EC largely ignores the meaning of the phrase "existence of margins of dumping during the investigation phase" in Article 2.4.2 in favor of an irrelevant discussion of the ordinary meaning of the word "investigation" as used elsewhere in the Agreement. But the ordinary meaning of the word "investigation," considered in isolation, is not the issue. The issue is the use of the word "investigation" as part of the phrase "the existence of margins of dumping during the investigation phase."

5. The text of Article 2.4.2, read in the context of Articles 1 and 5, clearly establishes that the obligations of Article 2.4.2 are limited to the Article 5 investigation phase. Although numerous provisions in the AD Agreement refer, for example, to the "period of investigation", the term "investigation phase" appears only once, in Article 2.4.2. Moreover, the establishment of "the existence of margins of dumping" refers to something that is required only in an Article 5 investigation, and not in an Article 9.3.1 assessment proceeding. The linkage of the term "investigation phase" to the establishment of "the existence of margins of dumping" must be given meaning and may not be read out of the Agreement.

Offsetting and Symmetry

6. Over the course of this proceeding, the EC appears to have backed away from its contention that Article 2.4 creates an "overarching" obligation to offset positive and negative dumping margins. In its answers to the Panel's questions, the EC recognized that so-called "zeroing" cannot be barred by the fair comparison obligation in Article 2.4 when it conceded that "zeroing" is an acceptable method to address "targeting."[2] A general bar on "zeroing," pursuant to Article 2.4, would render the targeted dumping provisions of Article 2.4.2 a nullity because the targeted dumping provisions are not an exception to the fair comparison requirement in Article 2.4. Such an outcome would be impermissible under the customary rules of treaty interpretation. Alternatively, if "zeroing" constitutes an unjustifiable adjustment to export price, the EC has failed to provide any explanation as to how such an adjustment becomes permissible in the context of a targeted dumping analysis.[3]

7. Similarly, the EC has failed to articulate how Article 2.4 creates an overarching symmetry obligation, independent from that contained in Article 2.4.2. Again, the AD Agreement contains at least two provisions that discuss asymmetrical comparisons. Article 2.4.2 provides for asymmetrical comparisons in cases of targeted dumping and Article 9.4(ii) provides for asymmetrical comparisons in certain circumstances in a prospective normal value system. Nothing in either provision, however, suggests that the use of an asymmetrical comparison is an exception to the fair comparison requirement of Article 2.4.

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[2] EC Replies to the Panel's Questions, 7 April 2005, paras. 157, 159 (hereinafter "EC Replies").
[3] EC Replies, paras. 142-145.

Equal Treatment for Prospective and Retrospective Systems

8. At the first Panel meeting and in its second written submission,[4] and again this afternoon, the EC raised concerns as to whether the U.S. position regarding the scope of Article 2.4.2 would place prospective antidumping systems at a relative disadvantage vis-a-vis retrospective systems. This concern is misplaced. Article 9.3 places prospective and retrospective systems on precisely the same footing. Under both systems, the AD Agreement permits the investigating authority to attach liability for antidumping duties on imports as they cross the border. The AD Agreement then provides for the Member, no matter what the system, to determine whether any refund is due.

9. Terminology aside, this refund process is inherently retrospective in nature, in both prospective and retrospective systems. It involves a look back at the export price or constructed export price of imports and the antidumping duties deposited or paid. In the case of prospective systems, Article 9.3.2 of the AD Agreement characterizes the process as "a prompt refund . . . of any duty paid in excess of the margin of dumping." In the case of retrospective systems, Article 9.3.1 also characterizes the process as a "refund" of excess deposits as part of the determination of final liability.

10. There is nothing about a prospective system that inherently requires the application of Article 2.4.2 to refund proceedings. Nothing in Article 9.3 requires Members to conduct such assessment proceedings so as to cover all imports from a particular exporter over any particular period of time. Members are free to apply their duty assessment systems so as to focus any

[4] *Rebuttal by the European Communities*, 13 April 2005, para. 30.

Article 9.3 proceedings on particular imports, particular importers, or particular exporters, as they deem most appropriate. Recognizing this, there is no "basic logic" that requires the application of Article 2.4.2 in Article 9 assessment and refund proceedings. To the extent that the EC in its municipal law purports to use some average to average methodology in its refund proceedings,[5] that is the EC's prerogative. Such a choice by one Member, however, does not create a WTO obligation.

Factual Issues

11. In its answers to the Panel's questions, the United States explained its reservations about the EC's so-called "factual" characterization of the U.S. antidumping system, and we will not repeat those comments here. However, there is a significant error in the EC's second written submission that requires correction. In paragraph 27 of the EC's second written submission, the EC states that "USDOC calculates, in a retrospective assessment, a single assessment rate for the entire period of review, and this rate is then applied to all shipments or transactions (entered merchandise) during the "period of review" "dumped" and "non-dumped alike."""[6] This is incorrect.

12. The facts are these. In an assessment proceeding, Commerce calculates the amount by which each import transaction that occurred during the period of review was dumped, if at all. For each importer, these dumping amounts are aggregated into a total dollar amount. That importer-specific total dollar amount represents the aggregate dumping liability for that importer. As a matter of convenience and in order not to impose on importers or exporters the burden of

[5] EC Replies, paras. 67-68.
[6] Underscoring and double quotation marks in original.

linking each particular import sale to a specific customs entry – as had been done in the past – Commerce expresses this aggregate dumping amount as a percentage of that importer's imports during the period of review.

13. Pursuant to this methodology, liability for antidumping duties is only incurred for dumped transactions. The assessment rates are nothing more than the amount of dumping liability incurred by a particular importer, expressed as a percentage of imports by that importer. The importer's total liability for antidumping duties is the same as it would be if sales were linked to entries.

14. The EC seeks to characterize this ministerial step as "a single" assessment rate for the "entire period of review" because this suits its effort to inappropriately shoehorn the Article 2.4.2 investigation phase provisions into Article 9 assessment proceedings. But that is not how the United States retrospective assessment system works and there is, of course, no such obligation to apply Article 2.4.2 to refund proceedings.

Conclusion

15. Mr. Chairman, members of the Panel, that concludes our opening statement. We would once again like to thank you for agreeing to serve on this panel, and we look forward to continuing our dialogue with you at this meeting.