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United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")

(AB-2006-2)

Oral Statement of the United States of America at the Meeting of the Appellate Body

March 1, 2006

Introduction

1. Mr. Chairman and members of the Division, the United States appreciates this opportunity to present its views.

2. Today, we will begin with, and focus primarily on, the EC Appellee Submission and its defense of the Panel's "as such" finding. Following that discussion, we also will make a few comments on the topic of zeroing in assessment proceedings.

The Panel's "As Such" Finding Regarding "Methodology"

3. With respect to the Panel's "as such" finding regarding a "methodology norm," the Panel's reasoning was as follows. First, the Panel found that a norm, in and of itself, can be a measure. Second, it found that past determinations by the U.S. Department of Commerce (Commerce) and past usage of computer programs by Commerce indicate that the United States maintains a norm of "zeroing." Third, this norm "as such" breaches Article 2.4.2 of the AD Agreement because it necessarily will produce WTO-inconsistent actions.

4. As explained in our Appellant Submission,[1] the Panel erred by failing to identify any relevant act or omission of the United States as the measure in question. The Panel consciously and explicitly went beyond prior Appellate Body reasoning on what may constitute a measure, and in so doing radically redefined the scope of WTO dispute settlement.[2] Indeed, the Panel's approach would extend WTO dispute settlement so that when a Member does something in a particular instance, the Member's action results in a separate measure that may be subject to an "as such" challenge, at least if the Member repeats the action with some indeterminate frequency. There is no basis for such a sweeping conclusion.

5. With respect to the Panel's finding that the "norm" in question breached Article 2.4.2, the Panel first rejected, then appeared to apply, the mandatory/discretionary distinction. However, whether it did so or not, the Panel pointed to no facts to support its conclusion that the purported "measure" necessarily will product WTO-inconsistent results. The Panel simply assumed this conclusion.

The Fact That the United States Contests the Existence of an "As Such" Measure Does Not Prove That Such a Measure Exists

6. In defending the Panel's finding, the EC argues that because the United States contests the EC's "as such" claims regarding the so-called "Standard Zeroing Procedures" – *i.e.*, certain lines of computer code – this somehow "confirms that . . . there is an 'as such' measure that

[1] Other Appellant Submission of the United States of America, February 1, 2006 (hereinafter "U.S. Appellant Submission").

[2] Panel Report, 7.100.

needs to be addressed."[3] In a similar vein, the EC argues elsewhere that anything that a complaining Member alleges, in good faith, to be a "measure" is a "measure."[4]

7. This is a remarkable argument. Essentially, the EC asserts that a complaining party determines whether something falls within the scope of the agreement term "measure." If the responding party should disagree with the complaining party, the mere act of disagreement will "confirm" that a "measure" exists. However, the DSU does not make the complaining party the arbiter of whether, in a particular case, there are "measures taken."[5]

8. The EC also tries to rewrite and repackage the Panel's findings, apparently in recognition of the impossibility of defending the Panel's conclusion that a "norm" is a "measure." For example, a large portion of the EC Appellee Submission is devoted to the so-called "Standard Zeroing Procedures." Truth be told, these "procedures" are nothing more than lines of computer code that the EC labels with a newly minted, capitalized phrase to make them look more official and, thus, more like a "measure."

9. The EC's assertions regarding these lines of computer code are wrong and irrelevant. First, contrary to the EC's assertions,[6] the Panel clearly found that these lines of computer code are *not* a measure challengeable "as such."[7] The Panel applied the reasoning in prior Appellate Body reports to the lines of computer code, and concluded that the lines of code did not set forth

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[3] EC Appellee Submission, 13 February 2006, para. 6.
[4] EC Appellee Submission, para. 26.
[5] DSU, Article 3.3.
[6] *See*, *e.g.*, EC Appellee Submission, para. 51.
[7] Panel Report, para. 7.97.

rules or norms of general and prospective application, one of the hallmarks of a measure.[8] As the Panel correctly found, the lines of computer code "by themselves do not create anything and are simply a reflection of something else."[9] As the EC has not appealed these findings of the Panel, they stand on appeal.

10. Second, the EC's assertions regarding the lines of computer code are irrelevant. This is because the Panel – in finding that zeroing "methodology" is a "norm" which is a measure – did not rely on any conclusion that those lines of code are an act or instrument. The Panel stated that it considered that a norm could itself be a measure,[10] and that "zeroing methodology" "is a norm which, as such, is inconsistent with Article 2.4.2."[11] In doing so, the Panel did not concern itself with the question of whether the evidence on which it relied could be regarded independently as a measure.

11. The EC also tries to repackage the Panel's analysis of the evidence by asserting that the Panel did not rely on historical evidence of what Commerce had done in the past.[12] However, in its analysis of the evidence – which consisted of one paragraph – the Panel emphasized the historical facts that Commerce had engaged in zeroing "for an extended period of time," that the United States and other Tokyo Round Anti-Dumping Code signatories had used "zeroing," and that computer code had been used.[13]

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[8] Panel Report, para. 7.97.
[9] Panel Report, para. 7.97.
[10] Panel Report, para. 7.99.
[11] Panel Report, paras. 7.105-7.106.
[12] EC Appellee Submission, para. 51.
[13] Panel Report, para. 7.103 and note 200; *see also* U.S. Appellant Submission, paras. 36-38.

How Can the United States Implement the "As Applied" Findings Unless There Is an "As Such" Measure to Withdraw?

12. Turning to the Panel's finding of an "as such" inconsistency, the EC makes the incredible argument that the United States will not be able to implement the Panel's adverse "as applied" findings in the fifteen antidumping investigations unless it also withdraws the separate "as such" measure that must be responsible for the results in these investigations.

13. Here, the EC engages in the same circular logic as did the Panel. The EC simply assumes that consistent results must be caused "automatically" by some separate measure.[14] Moreover, the EC again tries to repackage the Panel's findings by focusing on lines of computer code as the alleged measure that forces Commerce to "zero."[15]

14. The fact is that there is no measure that requires Commerce to zero. As the Panel found, the statutory provisions cited by the EC do not even address zeroing,[16] and the EC did not even allege that a Commerce regulation requires zeroing in investigations. None of the other measures and purported measures identified by the EC dictate Commerce behavior either. Indeed, Commerce will soon be publicly announcing that it no longer will engage in zeroing when using the average-to-average method in investigations.

15. In this regard, following the adoption of the reports in the *EC – Bed Linen* case, the EC informed the DSB that implementation would require the following steps: (1) a revision of the dumping calculations and re-examination of the EC's injury findings; (2) disclosure of the results to interested parties and provision of an opportunity to comment; and (3) formal

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[14] *See* U.S. Appellant Submission, para. 50.
[15] *See, e.g.*, EC Appellee Submission, paras. 61-63, 71, and 81-85.
[16] Panel Report, para. 7.65, 7.67-7.68.

amendment of the EC definitive antidumping duty in question.[17] Nowhere did the EC mention the need to withdraw or revise any sort of "as such" measure in order to implement the DSB's "as applied" findings. Our understanding is that the situation in the EC was the same as in the United States – zeroing was not mandated by any measure, but simply was something that the EC did on a consistent basis.

16. Turning to the mandatory/discretionary distinction, the EC refers to the oft-cited Appellate Body statement that the distinction should not be applied "mechanistically." However, assuming *arguendo* that the Panel did apply the distinction, its analysis was entirely "mechanistic." The Panel "mechanistically" *assumed* that the consistent results it observed were caused by a separate measure.

17. More fundamentally, though, the EC urges the Appellate Body to discard the mandatory/discretionary distinction. The Appellate Body should decline this invitation.

18. For one thing, the distinction has been applied in numerous disputes,[18] and it is a known and predictable analytical tool on which Members and panels have come to rely. Discarding it for no good reason hardly promotes the type of security and predictability referred to in Article 3.2 of the DSU. Indeed, we suspect that most Members have not even considered how many of their measures leave open the possibility of WTO-inconsistent action and, thus, under the EC's proposed standard, would run afoul of their WTO obligations.

19. And, more importantly, there is no good reason to discard it. Most WTO obligations prohibit a Member from doing something or require a Member to do something. If a measure

[17] WT/DSB/M/103 (6 June 2001), para. 31.
[18] *See* U.S. Appellant Submission, note 43 and cases cited therein.

does not require a Member to take a prohibited act or preclude a Member from taking a required act, why should such a measure be declared WTO-inconsistent? Or, put differently, with what WTO provision would such a measure be inconsistent?

20. The EC argues that Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement are such provisions, asserting that they require that a Member must ensure the "conformity" of its laws with WTO law. But what does "conformity" mean? If the WTO obligation is to do or not do something, a measure that does not require WTO-prohibited action or preclude WTO-required action is in conformity with WTO law.

The WTO System Will Not Collapse if the Panel's "As Such" Finding Is Reversed

21. The EC's final theme is that unless the Panel's finding of an "as such" measure is affirmed, there allegedly will be an endless cycle of litigation that will "reduce[] the entire WTO system to irrelevance and ridicule ... ."[19] However, the EC's overwrought doomsday scenario is belied by the submission of Brazil, in which Brazil describes how the United States responded to the "as applied" finding concerning the so-called "99.5 percent test" in the *US – Hot-Rolled Steel* dispute.[20] As Brazil notes, Commerce applied a different arm's length test in the recalculation of the hot-rolled steel dumping margins, and publicly announced that it intended to apply a new arm's length test to future cases.[21] The sky did not fall on the WTO because the dispute settlement system refrained from concocting some sort of "as such" measure that could then be blamed as the "root of the problem."

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[19] EC Appellee Submission, para. 4.

[20] Third Participant Submission by Brazil, 13 February 2006, para. 23 (hereinafter "Brazil Submission").

[21] Brazil Submission, para. 23.

22. In the view of the United States, what is more likely to subject the WTO system to ridicule are findings by WTO dispute settlement panels that, for no good reason, stretch beyond the breaking point the concept of "measure taken," and that offer advisory opinions on "methodologies" in the abstract, unconnected to any act or instrument of a Member.[22] We say "for no good reason" because such fabricated "as such" findings achieve nothing. As demonstrated by the *US – Hot-Rolled* case and the *EC – Bed Linen* case, one can solve problems without having to invent allegedly mandatory measures.

23. In summary, the EC appears eager to cast aside fundamental principles of GATT and WTO dispute settlement in order to address non-existent measures and non-existent problems. It is regrettable that, in a report otherwise characterized by rigor and extensive, careful analysis, the Panel accepted the EC's invitation in finding that a zeroing methodology "norm" as such breached U.S. WTO obligations. We urge the Appellate Body to reverse this error.

Interpreting "Margin of Dumping" as Always Referring to the "Product as a Whole" Would Have Serious Implications for the Application of Article 2.2 of the AD Agreement

24. Turning to the issue of offsets or "zeroing" in assessment proceedings, the United States has demonstrated that the Appellate Body has found an obligation to provide an offset (or not to "zero") only when an authority uses average-to-average comparisons in an investigation. The United States also demonstrated, and the Panel below found, that the obligations of Article 2.4.2 regarding average-to-average comparisons do not extend beyond investigations and that Article 2.4 does not provide obligations with respect to offsets in any post-investigation phase activities. Today, the United States would like to make one additional point as to why it would be improper

[22] *See* U.S. Appellant Submission, paras. 27, 31.

to interpret the term "margin of dumping" as necessarily referring to the "product as a whole" in all circumstances.

25. In addition to rendering the second sentence of Article 2.4.2 a nullity, interpreting "margin of dumping" to refer invariably to the "product as a whole" would have serious implications for the application of Article 2.2 of the AD Agreement. Article 2.2 permits an authority, in certain situations, to calculate the margin of dumping by comparing export price to normal value based either on third country sales or on constructed value.

26. The practice of many Members is to resort to constructed value on a comparison specific basis. That is, if there are 100 different export transactions of a product, and there are domestic market comparison sales for all but 25 of them – for example, because the comparison sales for the remaining 25 were not in the ordinary course of trade – Members would use third country sales or constructed value to determine normal value for those 25 comparisons and would use the domestic market sales as the normal value for the remaining 75 comparisons.

27. Accepting the EC's argument means that "margin of dumping" in Article 2.2 must mean a single margin of dumping for the product as a whole and cannot, in that context, relate to the specific comparisons. In that case, the margin of dumping for the product as a whole, and therefore for all comparisons, must be calculated using constructed normal value, even if the condition precedent for using Article 2.2 relates only to 25 of the 100 comparisons. This would lead to a less accurate calculation of the margin of dumping, increase the burden on respondents, and, as we understand it, is inconsistent with the EC's own interpretation of that Article, as reflected in EC antidumping administration.

Concluding Remark

28. Finally, we cannot help but note the numerous instances in which the EC states that the United States "has not contested" or "in fact admits" various facts or propositions.[23] An examination of these statements indicates that they either are unsupported by any citation to a U.S. submission,[24] or, perhaps more remarkably, supported solely by citation to *EC* submissions.[25] We will not accept the EC's invitation to follow and rebut each of these red herrings. Suffice it to say that we would be happy to point out to the Appellate Body how the Panel record contradicts the EC's assertions.

29. Thank you very much for your attention. We look forward to your questions.

[23] *See, e.g.*, EC Appellee Submission, para. 90.
[24] *See, e.g.*, EC Appellee Submission, paras. 50, 90.
[25] *See, e.g.*, EC Appellee Submission, para. 44.