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UNITED STATES – MEASURES RELATING TO ZEROING AND SUNSET REVIEWS

Communication from the United States

The following communication, dated 20 February 2007, is circulated at the request of the delegation of the United States.

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1. At the DSB meeting of 23 January 2007, the United States offered some initial observations on the Appellate Body report in *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007 ("Appellate Body Report"). As indicated at that time, the United States wishes to provide these additional comments.

2. The United States continues to be deeply troubled by the Appellate Body Report's evaluation of the issue of "zeroing". The Report's reasoning presents serious problems both from the perspective of treaty interpretation and from the practical perspective of WTO Members endeavouring to administer their anti-dumping regimes consistently with their WTO obligations.

Flawed interpretive approach not based on the agreed text

3. The question before the Appellate Body was not whether zeroing is good or bad from a policy perspective and should be prohibited, but whether the Members agreed to prohibit zeroing as part of their WTO obligations. Any such agreement could only be manifest in the text of the Anti-Dumping Agreement. However, the text of the Anti-Dumping Agreement is silent on the issue of zeroing. Faced with agreement language that does not address zeroing at all, let alone include a broad prohibition on zeroing, the Appellate Body has apparently attempted to infer from the text what it is that Members intended with respect to zeroing. The difficulties and problems of such an inferential approach are illustrated by the Appellate Body reports on the issue. Over several reports, the Appellate Body modified its analysis in mutually contradictory ways. The Appellate Body's most recent effort is no less flawed. In particular, the Appellate Body Report largely assumes its conclusion, relying not on the text of the Agreement but on language from its previous reports removed from its context.

At odds with how anti-dumping systems actually work

4. The Report also suffers from a fundamental misapprehension of how anti-dumping systems work, resulting in interpretations of Agreement provisions that, if applied, would fundamentally alter the anti-dumping practices of numerous Members using this remedy and render many of these systems difficult, if not impossible, to administer. Many of these flaws stem from the Appellate Body Report's conclusion, necessary to its findings on a broad prohibition on zeroing, that dumping cannot be calculated for a particular transaction, but must instead be calculated based on "all" transactions for

a given exporter or producer. Leaving aside the practical difficulty of how one determines "all" transactions (all on a given day, a given month, a given year), this analysis simply ignores basic business realities.

5. While dumping involves differential pricing behaviour of an exporter or producer between its export market and its normal value, dumping's injurious impact can be felt at the level of an individual transaction. An importer of a low-priced export sale will be in a position to pass along that low price, and take sales from its competitors, in the absence of an anti-dumping duty. To the extent prices will often vary from transaction to transaction, and importer to importer, the competitive position of each importer may differ. In the absence of anti-dumping duties, the importer of the lower priced merchandise that will contribute most, if not entirely, to a finding of dumping will have an advantage over its competitors importing at higher prices, in addition to its advantage over domestic competitors.[1]

6. Members have addressed this problem in part by calculating and assessing anti-dumping duties on a transaction specific basis. Thus, in the US retrospective duty system, dumping is calculated for each entry over a preceding period of time, and the amount owed by an importer will depend on the prices of the merchandise it enters. A very similar result is obtained in prospective normal value systems, in which dumping duties are assessed at the time of entry, based on a comparison of the price for the particular entry as compared to a normal value. Often this normal value is calculated based on an average of prices in the home market, an approach similar to the way the United States calculates normal value in assessment proceedings. Another approach to dealing with the problem is to compare prices of individual export transactions to individual transactions in the market used to establish normal value. Indeed, GATT anti-dumping experts in 1960 concluded that the ideal way of calculating anti-dumping would be on a transaction-by-transaction basis.

7. Through a transaction-specific approach, dumping duties ultimately assessed for a given import and importer will relate to the prices paid by that importer, and any differences, incidental or otherwise, in pricing to other importers are addressed directly in the assessments of duties for those importers. No importer will gain a competitive advantage from having received merchandise which contributes more to the dumping margin than the merchandise imported by others, and the resulting injury will be fully taken into account.

Renders prospective normal value systems retrospective

8. The Anti-Dumping Agreement explicitly provides for both retrospective and prospective normal value duty assessment systems, as well as for transaction-to-transaction comparisons, and this became an important part of the context for the analysis in this dispute. If, as the Appellate Body Report ultimately concludes, dumping must be based on all of the transactions of an exporter, it appears to have several consequences, in particular for prospective normal value systems.

9. First, notwithstanding the fact that prospective normal value systems are by their very terms "prospective", it will be necessary for such systems to include reviews of multiple entries, so that dumping margins can take into account "all" of the exporter's transactions. In effect, prospective normal value systems will become retrospective, a conclusion also reached in a Canadian

[1] *See* Panel Report, para. 7.199 (the Panel concluded that, where a margin of dumping can only be determined at the level of the exporter or producer, "a Member may be precluded from collecting anti-dumping duties in respect of particular export transactions at prices less than normal value to a particular importer at a particular point of time because of prices of export transactions to other importers at a different point in time that exceed normal value. We find it significant, in this respect, that Article 9.3 contains no language requiring such an aggregate examination of export transactions in determining final liability for payment of anti-dumping duties under Article 9.3.1 or in determining the amount, if any, of refund under Article 9.3.2.").

parliamentary report on potential changes to its prospective normal value system. In that report and at its trade policy review, Canada expressed its view that in a prospective normal value system, each entry provides a margin of dumping. All of this was brought to the Appellate Body's attention, including the fact that the Panel, in its report, carefully laid out this analysis. Nevertheless, the Appellate Body Report dismisses these issues. In so doing, the Appellate Body Report creates further difficulties with the text of the Agreement. If, in fact, Members had intended prospective normal value systems to have such reviews, one would have expected Members to have provided for this in explicit agreement language, just as one would have expected a broad prohibition on zeroing to be reflected in explicit agreement text.

Creates perverse incentives to dump and injure another Member's industry

10. A second implication of the Appellate Body Report's conclusion that dumping margins must be calculated based on all the transactions of an exporter relates to how a Member might implement such a finding. If dumping is determined on the basis of all of an exporter's transactions, then one way to implement would involve assessing the same duty rate on all import transactions, regardless of whether the transaction was below normal value or not. This would create a perverse incentive to dump, as importers of higher priced, non-dumped merchandise would not wish to be disadvantaged both by higher prices and a dumping duty, and since importers of lower priced, dumped merchandise would know that others would be paying at least part of the duties attributable to the low prices from which it already benefitted. Even if one were not to impose duties on importers whose entries were not responsible for the finding of dumping, such importers would still be disadvantaged, since reducing the duties paid by the importer of the lower priced merchandise would mean that that importer still has a cost advantage. Yet these are the real world implications of the Appellate Body Report's approach.

Unprecedented view of how to do targeted dumping analysis

11. A third implication of the Appellate Body Report's conclusion that dumping margins must be calculated based on all the transactions of an exporter relates to the targeted dumping methodology of Article 2.4.2. Under that methodology, the price of an export transaction may be compared to a normal value based on an average of prices where there is a pattern of export prices differing significantly among purchasers, regions or time periods, and the differences cannot be taken into account through the use of average-to-average or transaction-to-transaction comparisons. However, if there were a broad prohibition on zeroing, such that offsets must be granted for non-dumped transactions, then the result of the targeted dumping calculation would be mathematically the same as that for the average-to-average calculation. This is because the normal values and the universe of export transactions in average-to-average and average-to-transaction comparisons are the same. The EC took this same position before its domestic tribunal in arguing that it is necessary to use zeroing with the targeted dumping methodology,[2] and three panels have found this to be true as a factual matter.[3]

12. The Appellate Body Report indicates that it is possible to avoid this mathematical fact by interpreting the targeted dumping methodology to permit it to be applied to a subset of export transactions. The Appellate Body Report's suggestion is novel. No Member has ever done this, nor

[2] US Appellee Submission in *US – Zeroing (Japan)*, para. 44 and Attachment 1 (citing Case T-274/02, Ritek Corp. v. Council of the European Union, 24 October 2006, para. 94.)

[3] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) (US – Zeroing (EC))*, WT/DS294/R, para. 7.266; Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada (US – Softwood Lumber Anti-Dumping Article 21.5)*, WT/DS264/RW, para. 5.52; Panel Report, *US – Zeroing (Japan)*, para. 7.127.

has any Member ever suggested that it was permissible to do this. The language of the Anti-Dumping Agreement says nothing about selecting a subset of transactions when conducting a targeted dumping analysis. Further, it is difficult to reconcile the use of a sub-group of merchandise when using a targeted dumping comparison with the Appellate Body Report's conclusion that "all" export transactions must be included when performing average-to-average or transaction-to-transaction comparisons.

No textual basis, as 8 experts have concluded

13. Given all of the implications of the Report's reasoning, one would expect the Uruguay Round negotiators to have addressed these various issues in the text of the Anti-Dumping Agreement. In particular, one would expect the text to be clear that zeroing is not permitted or, at the least, that margins of dumping must be calculated on the basis of "all" sales by an exporter or producer (except in the case of targeted dumping). However, the text is silent on the use of "zeroing," and the only reference to comparing "all" export transactions comes in Article 2.4.2 language relating exclusively to average-to-average comparisons. Indeed, it was on this basis that the Appellate Body originally concluded that zeroing was not permitted when conducting this type of comparison.[4] It was the absence of such language in the context of other types of comparisons that led eight of nine dumping experts serving on panels to conclude that any prohibition on dumping in the Anti-Dumping Agreement is limited to the average-to-average context.

14. In overruling these panels, the Appellate Body Report has not identified any agreement text which those panels overlooked. Rather, the Appellate Body Report assumes its conclusion, draws questionable inferences from the text, and relies on language not from the Agreement, but from its prior reports interpreting the Agreement.

15. The Appellate Body Report begins its analysis by assuming its conclusion. According to the Report, to "assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation, and if so, by which margin, it is *obviously* necessary to take into account the prices of all the export transactions of the exporter or foreign producer."[5] However, as already noted, what the Appellate Body Report considers "obviously necessary" is nowhere stated in the Anti-Dumping Agreement and was considered neither obvious nor necessary by eight of nine trade remedy experts that have served on panels in these disputes – or to the numerous Members who both before and after 1995 calculated and assessed margins for individual entries. In this regard, it is worth recalling once again that Article 17.6(ii) of the Anti-Dumping Agreement provides that where a provision of the Agreement admits of more than one permissible interpretation, a measure resting on one such interpretation must be found in conformity with the provision.

16. The Appellate Body Report also purports to find in the use of the word "product" in GATT Article VI:1 and AD Agreement Article 2.1 support for its conclusion that a margin of dumping must be calculated for all export transactions, and not on a transaction basis. However, an individual entry is no less a "product" than all entries aggregated. As the Panel stated, the "ordinary meaning of the words 'product' and 'products' ... provide[] no support for the view that these words ... requir[e] an examination of export transactions at an aggregate level. We note, in this respect, that the record of

[4] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India ("EC – Bed Linen")*, WT/DS141/AB/R, para. 55; Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada ("US – Softwood Lumber Anti-Dumping")*, WT/DS264/R, para. 7.215-7.216.

[5] Appellate Body Report, para. 111 (emphasis added).

past discussions in the framework of the GATT shows that historically the concept of dumping has been understood to be applicable at the level of individual export transactions."[6]

Shifting rationales

17. In successive zeroing reports, the Appellate Body's rationale for prohibiting zeroing has shifted. In *US – Softwood Lumber Anti-Dumping*, the Appellate Body interpreted the term "margins of dumping" in the first sentence of Article 2.4.2 in an integrated manner with the phrase "all comparable export transactions" to derive a concept of the "product as a whole" as distinguished from sub-groups or models of a product. The phrase "all comparable export transactions" appears only in connection with average-to-average comparisons, but Article 2.4.2 also provides for the calculation of a margin of dumping on a transaction-to-transaction or average-to-transaction basis. Thus, in *US – Softwood Lumber Anti-Dumping* the Appellate Body had concluded that zeroing was not permitted in the context of "multiple averaging", but did not explain how zeroing could be prohibited in the context of "multiple comparisons" generally. Indeed, it specifically refrained from making a finding concerning the other two methods of comparison.

18. However, in contrast to *US – Softwood Lumber Anti-Dumping*, in *US – Zeroing (EC)* the Appellate Body appeared to embrace a new interpretation, such that a new concept of the "product as a whole" led to the conclusion that zeroing is prohibited whenever "multiple comparisons" are made. Again, these phrases do not appear in the Anti-Dumping Agreement, but were derived from interpretations based on the phrase "all comparable export transactions", which appears only in connection with average-to-average comparisons in investigations. In considering this, the Panel in this dispute found that the Appellate Body had provided:

> no explanation of this shift from the use of the 'product as a whole' concept as context to interpret the term "margins of dumping" in the first sentence of Article 2.4.2 of the AD Agreement in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms 'dumping' and 'margins of dumping' cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value. (Panel Report, para. 7.101)

19. Subsequent to the Panel report, the Appellate Body's report in *Softwood Lumber Anti-Dumping (Article 21.5)* relied on a similar leap of logic to find a zeroing prohibition relating to "multiple comparisons" without relying on the phrase "product as a whole", but instead finding the term "product", in effect, cannot have a meaning other than "product as a whole".

20. The Appellate Body's rationales shift on occasion to the point of contradicting earlier ones. As explained above, in *Softwood Lumber*, the Appellate Body interpreted "margins of dumping" and "all comparable export transactions" in an integrated manner such that in calculating the margin of dumping the results of all model-specific comparisons must be accounted for. Thus, the phrase "all comparable export transactions" necessarily refers to all transactions across all models of the product under investigation. In contrast, in the interpretation offered in this report, the Appellate Body has reinterpreted "all comparable export transactions" to relate solely to all transactions within a model, and not across models of the product under investigation.[7] Before, the Appellate Body relied on the word "all" in "all comparable export transactions" as the textual basis for requiring the results of all

[6] Panel Report, para. 7.107.
[7] Appellate Body Report, para. 124.

model-average-to-model-average comparisons to be included in the margin of dumping in the average-to-average context. Now, with regard to transaction-to-transaction comparisons, the Appellate Body Report insists that the word "all" is not necessary to its finding that a single overall margin of dumping must be calculated and must include the results of all transaction-to-transaction comparisons. Because the Appellate Body has concluded that there is a single permissible interpretation of these provisions of the Anti-Dumping Agreement, then the term "all" is either relevant, or it is not. Because the Appellate Body has rendered contradictory interpretations with regard to the same issue, it should, at a minimum, have recognized that the phrase is subject to multiple permissible interpretations.

21. According to the Appellate Body Report's reasoning, zeroing is always definitively prohibited in whatever context it has been presented. It seems, however, that in various disputes that have arisen, the various opponents of zeroing cannot agree on just *how* zeroing is prohibited. Indeed, even the Appellate Body's reasoning varies from one dispute to the next. Yet now, somehow, as with each prior Appellate Body report espousing a (different) rationale for prohibiting zeroing, the interpretation of the relevant provisions of the Anti-Dumping Agreement has been concluded to be so clear and conclusive that no other interpretation is permissible. Considering the text of the Anti-Dumping Agreement and the various contradictory interpretations offered on the issue of zeroing, the Panel in this case quite reasonably and correctly concluded that the Appellate Body's interpretation in *Softwood Lumber Anti-Dumping* was appropriate and that, consistent with that interpretation, it was not possible to extend the zeroing prohibition to other contexts without creating new obligations.

22. In this report, the Appellate Body also disagrees with the Panel (and two prior panels) when it concluded that zeroing was inconsistent with the obligation in Article 2.4 to make a fair comparison between export price and normal value. As with the issue of zeroing more generally, the Appellate Body Report simply dismisses the analysis and reasoning of the Panel, relying instead on language in its prior reports. In so doing, however, the Appellate Body Report limits its consideration of the matter to what it considered "fair". without considering it in the context of the comparison between export price and normal value. Moreover, by disregarding the context of the comparison between export price and normal value, the Appellate Body Report adopts a one-sided view of the issue, considering only what is fair to the exporter engaged in dumping and disregarding any notion of fairness to the industry found to have been injured by that dumping.

A measure need no longer be attributable to a Member

23. In addition to the Appellate Body Report's flawed zeroing analysis, the United States also wishes to comment on the Report's apparent abandonment of the requirement that, in order to find that an act or instrument is a measure subject to dispute settlement, the instrument or act must be attributable to the Member in question.[8] In this dispute, the United States has now been found to have acted inconsistently with respect to a comparison type – transaction-to-transaction – that the United States had never undertaken in any proceeding at the time Japan requested consultations, and which the United States has never at any time undertaken in any proceeding involving Japan.[9]

[8] *See* Appellate Body Report, para. 87 ("The fact that consistency of zeroing may be challenged in relation to a specific comparison methodology, or a specific type of anti-dumping proceeding, does not necessarily mean that the existence of a general rule or norm directing its use must be established through evidence of the actual application of those procedures in all possible situations, as long as they were applied every time the occasion arose."). The Appellate Body found that it is not necessary to establish "the existence of general rule or norm directing [a procedure's] use ... through evidence of the actual application of those procedures" with respect to the specific context in which it is challenged and to which the findings pertain.

[9] The Appellate Body concluded that Japan's request for consultations "should, in our view, have sufficiently alerted the United States to the fact that Japan wished to consult on zeroing in the context of all comparison methodologies, including T-T [transaction-to-transaction] and W-T [weighted average-to-transaction] comparisons in original investigations." Appellate Body Report, para. 95. Japan failed to mention

Nevertheless, the Appellate Body Report indicates that it is possible to define a "measure" to be "zeroing" in the abstract. Although the Appellate Body has said that a measure must involve an act attributable to the Member, and the United States made its non-application of this methodology known to the Appellate Body, this issue is not addressed in the Report. The Appellate Body Report simply fails to confront squarely the problem that Japan had sought to challenge a measure "as such" when that "measure" existed only in the abstract and there had been nothing attributable to the United States.

24. The Appellate Body Report's finding that zeroing in any form or context is a measure that can be challenged "as such" cannot be reconciled with the Appellate Body's reasoning in *US – Zeroing (EC)*. In that dispute, the Appellate Body concluded that "zeroing" in average-to-average comparisons in investigations was inconsistent with the Anti-Dumping Agreement "as such". In spite of its finding in the context of investigations, the Appellate Body nevertheless found that it could not complete the analysis to determine whether zeroing in assessment reviews breached the Anti-Dumping Agreement "as such". In that dispute, the Appellate Body clearly found that the text of the Agreement permitted an interpretation under which zeroing is to be treated differently with respect to the type of proceeding or comparison involved.

25. However, under the Appellate Body Report's approach, there is no longer a requirement that a "measure" be anything more than a "rule or principle" that can be described in the abstract; there is no requirement to establish a nexus between that abstract "rule or principle" and a particular Member such that it can be established that the "measure" is one "taken" by a Member. Under the Appellate Body Report's approach, panels and the Appellate Body are free to render advisory opinions on whether particular interpretations, approaches or theoretical acts would be WTO consistent. The Appellate Body Report's approach is inconsistent with the text of the DSU, including Articles 3.3 and 4.2. This approach has very troubling implications for not only the WTO dispute settlement system, but also for the relationship between the Members' exclusive authority to issue interpretations and the limited role assigned to the dispute settlement system of helping resolve specific disputes.

T-T or W-T in its consultation request, although it proved itself capable of doing so in its panel request. The approach taken by the Appellate Body would, it seems, tend to promote, rather than discourage, the very litigation tactics the Appellate Body has counselled against in dispute settlement proceedings.