

**UNITED STATES – CONTINUED EXISTENCE AND APPLICATION
OF ZEROING METHODOLOGY**

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 6 November 2008, from the Delegation of the European Communities, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the *DSU* the European Communities hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel report and certain legal interpretations developed by the Panel in the dispute *United States – Continued Existence and Application of Zeroing Methodology* (WT/DS350/R). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Communities simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons set out in its submissions to the Panel, and for the reasons to be further elaborated in its submissions to the Appellate Body, the European Communities appeals, and requests the Appellate Body to modify or reverse the legal findings and conclusions of the Panel and complete the analysis, with respect to the following errors of law and legal interpretations contained in the Panel Report:

- (a) With respect to each of the 18 measures, the Panel erred when finding that the European Communities failed to identify in the panel request the specific measure at issue, as required by Article 6.2 of the *DSU*, and that consequently the European Communities' claims with respect to these 18 measures did not fall within the Panel's terms of reference (paragraphs 7.40 – 7.67, particularly paragraph 7.61, and paragraph 8.1(b) of the Panel Report). The Panel also erred in law when it found that each of the 18 measures is not a measure within the meaning of Article 3.3 of the *DSU* (paragraph 7.56 of the Panel Report, final sentence). In particular, the European Communities submits that the Panel Report:
- erroneously confounds the procedural legal analysis under Article 6.2 of the *DSU* on the question of whether or not the European Communities' Panel Request identified the 18 specific measures at issue and the substantive legal analysis under Article 3.3 of the *DSU* on the question of whether or not the 18 measures at issue are measures within the meaning of that provision, susceptible to dispute settlement (particularly, but not only, at paragraphs 7.41 and 7.50 of the Panel Report);

- is inconsistent with Article 7.1 of the *DSU* regarding a panel's terms of reference; with Article 12.1, Appendix 3 and paragraphs 4 and 13 of the Working Procedures of 24 July 2007 regarding the timeliness of submissions including requests for preliminary rulings; with the rule that the United States had the burden of raising an issue under Article 3.3 of the *DSU*; and with the rule that the Panel must not make the case for the defending Member – insofar as the Panel made findings regarding the existence and precise content of the 18 measures, which relate to Article 3.3 of the *DSU*, and concern matters never raised by the United States;
- is based on an erroneous interpretation of Article 6.2 of the *DSU*, insofar as it requires, in effect, that the Article 3.3 *DSU* standard be met in the panel request (particularly, but not only, at paragraph 7.50 of the Panel Report);
- is based on an erroneous interpretation of Article 3.3 of the *DSU* (and/or Article 6.2 of the *DSU*), insofar as it effectively interpreted that provision or those provisions so as to conclude that the European Communities had not demonstrated the existence and precise content of the 18 measures at issue (particularly, but not only, at paragraphs 7.50, third sentence and paragraphs 7.50, fifth and seventh sentences of the Panel Report). The 18 measures are simply case specific instances of the application of the zeroing methodology, the *existence* and *precise content* of which has been repeatedly established. These measures are presently experienced directly by EC exporters paying anti-dumping duty rates inflated by zeroing;
- is based on an erroneous interpretation of Article 6.2 of the *DSU* insofar as it interpreted that provision so as to conclude that the European Communities' Panel Request did not identify the specific measures at issue. The 18 measures are simply more specific instances of the application of the zeroing methodology (identified by reference to particular products, a particular exporting Member and particular duties);
- is inconsistent with Article 7.2 of the *DSU* insofar as the Panel did not, with respect to this issue, address relevant provisions of the GATT 1994 (Articles II.2(b), VI.1, VI.2 and XXIII) and the *Anti-Dumping Agreement* (Articles 1, 7.2, 8.6, 9.1, 9.2, 9.3, 11.1, 11.2, 11.3, 12.2.2, 15, 17.4 and 18.3.2) cited in this dispute;
- is inconsistent with Article 11 of the *DSU*, insofar as the Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements; and
- is inconsistent with Article 12.7 of the *DSU* insofar as the Panel did not set out the basic rationale behind its findings and recommendations.

Having modified or reversed the Panel's findings, the European Communities requests the Appellate Body to complete the analysis by finding that, with respect to the 18 measures, the European Communities' Panel Request identified the specific measures at issue as required by Article 6.2 of the *DSU* and, insofar as the Appellate Body reaches the issue, that the European Communities demonstrated the existence and precise content of 18 measures within the meaning of Article 3.3 of the *DSU*. The European Communities further requests the Appellate Body to complete the analysis by finding that, because of the use of zeroing, each of the 18 measures is inconsistent with Articles VI:1 and VI:2 of the GATT 1994, Articles 2.4, 2.4.2, 9.3, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

If the Appellate Body accepts this part of the appeal and completes the analysis as requested by the European Communities, then the European Communities would accept that parts (b) and (c) of this appeal could be dealt with by the Appellate Body declaring the Panel's findings moot and of no legal effect.

- (b) The Panel erred when excluding four preliminary determinations from its terms of reference on the basis of Articles 17.4 and 7.1 of the *Anti-Dumping Agreement* (paragraphs 7.70 – 7.77, particularly paragraph 7.77, and paragraph 8.1(c) of the Panel Report). The determinations in question were not provisional measures within the meaning of Article 7, but part of the continuing application of existing definitive anti-dumping duties based on zeroing, being preliminary outcomes of one of the five types of anti-dumping proceeding.

Having modified or reversed the Panel's findings, the European Communities requests the Appellate Body to complete the analysis by finding that the administrative review preliminary determination is inconsistent with Articles VI:2 of the GATT 1994, Articles 2.1, 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*; and that each of the three sunset review preliminary determinations is inconsistent with Articles 2.1, 2.4, 2.4.2, 11.1 and 11.3 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

- (c) The Panel made factual and legal errors in violation of, inter alia, Article 11 of the *DSU* when concluding that the European Communities had not shown that simple zeroing was used in seven administrative reviews (paragraph 7.158 of the Panel Report and, by omission, paragraph 8.1(e) of the Panel Report). In particular, the European Communities contends that:

- the Panel failed to carry out an objective assessment of the facts as required by Article 11 of the *DSU* when concluding that the European Communities did not make a prima facie case that simple zeroing was used in seven administrative reviews (paragraphs 7.145 – 7.158 of the Panel Report, particularly, paragraphs 7.151, 7.152, 7.153, 7.154, 7.155, 7.156, 7.157 and (concluding) 7.158). The Panel Report ignores the totality of the evidence provided by the European Communities to show the use of zeroing in this case. For each measure the European Communities demonstrated that the methodology was part of the measure, and provided additional evidence over and above what was required to make a prima facie case. Furthermore, in essence, the Panel Report is based on the disavowing of documents imputable to the United States regarding the use of zeroing, and particularly the disavowing of paper copies or print runs of electronic documents provided directly by and imputable to the United States, which documents are expressly referenced in and form part of the measures at issue. The original documents are held on file by the United States, but the United States declines to produce or consult the originals. At the same time the United States does not assert that the documents have been improperly altered by the European Communities nor did the United States contest the accuracy of any of the relevant data contained in the copies produced by the European Communities;
- the Panel failed to apply a reasonable burden of proof (paragraphs 6.5 – 6.20, particularly paragraph 6.20, of the Panel Report); and
- the Panel made an error when disregarding the European Communities' request for the Panel to ask further information pursuant to Article 13 of the *DSU* (paragraph 6.20 and footnote 20 of the Panel Report).

Having modified or reversed the Panel's findings, the European Communities requests the Appellate Body to complete the analysis by finding that each of the seven administrative review determinations is inconsistent with Articles VI:2 of the *GATT 1994*, Articles 2.1, 2.4,

2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.

- (d) The Panel made a legal error when disregarding the European Communities' requests for suggestions (paragraph 8.7 of the Panel Report) and the European Communities requests the Appellate Body to modify or reverse the findings in the Panel Report and complete the analysis by making suggestions pursuant to Article 19.1 of the *DSU*, such as those requested by the European Communities in the Panel proceedings, or as otherwise considered appropriate by the Appellate Body.

The European Communities also makes two conditional appeals.

First, if the Panel Report is construed as finding that a panel can invoke "cogent reasons" for departing from previous Appellate Body findings on the same issue of legal interpretation (paragraphs 7.180 and 7.182 of the Panel Report), then the European Communities requests the Appellate Body to modify or reverse those findings and complete the analysis, for all the reasons set out by the Appellate Body in its report in *US – Stainless Steel from Mexico*. The European Communities considers that a panel may invoke "cogent reasons" in order to depart from previous panel findings; but only the Appellate Body can invoke "cogent reasons" in order to depart from previous Appellate Body findings.

Second, if the United States appeals the findings in paragraphs 7.183 and 8.1(e) of the Panel Report (particularly as regards what the Panel refers to as "the role of jurisprudence"); and if the Appellate Body modifies or reverses those findings in whole or in part; then the European Communities requests the Appellate Body to modify or reverse (and complete the analysis) with respect to the substantive findings or the exercise of false judicial economy in the Panel Report on the substantive issue of zeroing in administrative reviews.¹ In such eventuality, the European Communities submits that the measures are inconsistent with Articles VI:2 of the *GATT 1994*, Articles 2.1, 2.4, 2.4.2, 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*, for the reasons set out in full in its pleadings before the Panel, and in the separate opinion (paragraphs 9.1 to 9.10 of the Panel Report).

¹Panel Report, para. 7.162, seventh sentence; para. 7.163, fourth sentence; para. 7.164, second sentence; para. 7.165, third sentence; para. 7.166, second sentence; para. 7.167, third sentence; para. 7.168, final sentence; and para. 7.169, first sentence.