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

Communication from the United States

The following communication, dated 9 May 2006, is circulated at the request of the delegation of the United States.

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1. The United States takes this opportunity to provide Members with some important observations regarding the report of the Appellate Body in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, circulated 18 April 2006 (hereinafter "Appellate Body Report").[1] There are two key aspects of the Appellate Body Report that should cause Members concern. These are: (1) the Appellate Body's "as applied" findings regarding the use of so-called "zeroing" in assessment proceedings; and (2) the Appellate Body's "as such" finding regarding the "methodology" of "zeroing" in anti-dumping investigations.

Zeroing "As Applied"

2. With respect to the "as applied" findings, the Appellate Body reversed the panel and found that the use of "zeroing" in assessment proceedings is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, reasoning that "zeroing" results in an amount of anti-dumping duty that exceeds the margin of dumping. According to the Appellate Body, Article 2.1 of the Anti-Dumping Agreement and paragraphs 1 and 2 of Article VI, when read together, lead to the conclusion that the term "margin of dumping" always refers to the margin of dumping for exporters and producers "for the product as a whole." According to the Appellate Body, the term "margin of dumping" cannot be interpreted as applying on a transaction-specific basis or on an importer-specific basis.[2]

3. The implications of the Appellate Body's conclusions, as well as the analytical route by which the Appellate Body reached those conclusions, are very troubling. These implications include rendering without effect important provisions of the Anti-Dumping Agreement and radically altering the manner in which dumping margins are calculated, in areas having nothing to do with so-called "zeroing."[3] We will first consider some of the implications.

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[1] Hereinafter, we refer to the dispute generally as "*US – Zeroing (EC)*."

[2] *See, e.g.*, Appellate Body Report, para. 126.

[3] In this regard, it is important to recognize that the Appellate Body's rationale is much more sweeping than that found in the *EC – Bed Linens* and *US – Softwood Lumber* reports. In those disputes, the Appellate Body's findings against the use of zeroing involved the use of the average-to-average comparison method in antidumping investigations, and were based on the text of Article 2.4.2 of the Anti-Dumping Agreement. The US Department of Commerce previously has announced that it no longer will engage in zeroing when using the average-to-average method in investigations.

Targeted Dumping

4. One implication of the Appellate Body's analysis concerns Article 2.4.2 of the Anti-Dumping Agreement and the so-called "targeted dumping" provision. Article 2.4.2 provides as follows:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

5. The first sentence of Article 2.4.2 sets forth the normal comparison methods that authorities should use during the investigation phase of an antidumping proceeding. These methods commonly are referred to as the average-to-average and transaction-to-transaction comparison methods. The second sentence, however, permits the use of a different comparison method "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods." In such cases (which commonly are referred to as "targeted dumping"), "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions" (*i.e.*, the average-to-transaction comparison method). Some Members who believe that the Anti-Dumping Agreement generally prohibits zeroing, nonetheless believe that the Agreement permits zeroing when the targeted dumping provision of Article 2.4.2 is invoked.

6. However, if the Appellate Body is correct that the margin of dumping always must be calculated for the product as a whole, then the use of zeroing would seem to be precluded in all circumstances, including situations in which the average-to-transaction comparison method is used to calculate margins of dumping pursuant to the targeted dumping provision of Article 2.4.2. And, if that is the case, then if margins of dumping are calculated without the use of zeroing, it is a mathematical fact that the margin of dumping calculated using the average-to-transaction comparison method will be the same as the margin of dumping calculated using the average-to-average comparison method. In other words, if the Appellate Body's reasoning and conclusion are correct, then the targeted dumping method of the second sentence of Article 2.4.2 would be deprived of any effect.

7. Disputing parties that have opposed zeroing have been unsuccessful in their efforts to explain away the mathematical equivalence problem. As the Article 21.5 panel in *US – Lumber* recently noted:

> In response to a very simple argument of mathematical equivalence, Canada and certain third parties have provided convoluted explanations of how the [average-to-transaction] comparison methodology might be applied, without zeroing, so as to give results that are mathematically different from the results of the [average-to-average] comparison methodology. Their arguments are essentially based on the notion that targeted dumping allows investigating authorities to reach their determinations on the basis of the pricing behaviour in respect of universes of transactions that are narrower than the initial scope of the investigation, and narrower than those analysed under the [average-to-average] methodology. Such an approach is at odds with the very text of

> the second sentence of Article 2.4.2 and/or other provisions of the *AD Agreement*. In other words, Canada and the relevant third parties have failed to explain how the second sentence of Article 2.4.2 might be applied, without zeroing, in a WTO-consistent manner, so as to give results that are mathematically different from the results of the [average-to-average] comparison methodology.[4]

8. However, it would be extraordinary for Members to have negotiated the specific language of the targeted dumping provision while intending that it have no meaning. The parties had discussed in the panel proceeding and on appeal the context provided by the targeted dumping provision and the manner in which it should inform the interpretation of the relevant provisions as well as the problem of rendering the targeted dumping provision "inutile." And the Panel in its report had relied on this language as part of the basis for the legal findings and conclusions that the Appellate Body reversed. Yet the Appellate Body did not examine this context and failed to address this implication of its reasoning. For these reasons, those Members whose authorities make use of the targeted dumping method should be particularly concerned with the implications of the Appellate Body Report. In addition, all Members who believe that the agreement provisions they so painstakingly negotiate must be given effect should also be concerned. It is difficult to reconcile the Appellate Body's approach with the customary rules of interpretation of public international law.

Prospective Normal Value Systems

9. A second implication of the Appellate Body's conclusions concerns prospective normal value duty assessment systems. Prospective normal value systems are expressly contemplated by Article 9.4(ii) of the Anti-Dumping Agreement, which, in pertinent part, provides as follows:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
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> ...
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined ... .

10. As the United States understands it, in a prospective normal value system, authorities assess anti-dumping duties on a transaction-specific basis as imports occur through a comparison between the export price and the prospective normal value. If the export price is lower than the prospective normal value – *i.e.*, if the transaction is made at a dumped price – the authorities assess duties. If the export price equals or exceeds the prospective normal value – *i.e.*, if the transaction is made at a non-dumped price – the authorities do not assess duties. Prospective normal value systems thus calculate the amount of dumping duties owed in a manner which will yield similar, and in some cases identical, results as the approach taken by US authorities in assessment reviews. The authorities do not make offsets to the margins of dumping calculated with respect to the dumped transactions to account for negative margins of dumping calculated with respect to the non-dumped transactions. Indeed, as noted by Canada – a Member that uses a prospective normal value system – "a prospective normal

[4] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, circulated 3 April 2006, para. 5.52 (emphasis in original) (hereinafter "*US – Lumber*"). The panel in *US – Lumber*, as well as the panel in the instant dispute – *US – Zeroing (EC)* – cited the problem of mathematical equivalence as a reason why there was no general prohibition on zeroing by virtue of the phrase "margins of dumping."

value system does not employ the practice of zeroing. ... An investigating authority assesses anti-dumping duties when the export price is lower than the weighted-average normal value, but applies no anti-dumping duties to non-dumped transactions when the opposite is true."[5]

11. However, if, as the Appellate Body posits, margins of dumping must be calculated for "the product as a whole," it would appear to be impossible for an authority to legitimately assess anti-dumping duties on a transaction-specific basis using a prospective normal value. As noted by the panel in *US – Lumber*:

> If the Appellate Body's interpretation of "margins of dumping" were to apply throughout the *AD Agreement* in the sense argued by Canada, this provision, which expressly applies in respect of prospective duty assessment systems, would mean that a refund becomes payable if an anti-dumping duty is paid in excess of the single margin of dumping for the product as a whole, calculated by aggregating the results of all intermediate comparisons, without zeroing. Again, this makes no sense in the context of a prospective normal value duty assessment system, because (as even Canada acknowledges) the "margin of dumping" at issue is a transaction-specific price difference calculated for a specific import transaction. And if other comparisons for the product as a whole were somehow relevant, offsets would have to be provided for non-dumped transactions, with the result that one importer could request a refund on the basis of a margin of dumping calculated by reference to non-dumped transactions made by other importers.[6]

12. It is doubtful that Members that use prospective normal value systems contemplated the result that would flow from the Appellate Body's interpretation when they negotiated the Anti-Dumping Agreement.

Article 2.2 of the Anti-Dumping Agreement

13. Finally, we would note the implications of the Appellate Body's conclusions for Article 2.2 of the Anti-Dumping Agreement, which also contains the term "margin of dumping." Among other things, Article 2.2 specifies when authorities shall use a constructed normal value as the basis for calculating dumping margins, and provides as follows:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (Footnotes omitted).

It is the understanding of the United States that most authorities apply Article 2.2 on a sub-group or model basis in order to minimize reliance on constructed normal values, which generally are regarded as a less accurate measure of dumping than are normal values based on domestic prices.

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[5] *US – Lumber*, para. 5.55.

[6] *US – Lumber*, para. 5.57. As with the problem of mathematical equivalence, the panel in *US – Lumber* cited the problems posed for prospective normal value systems as a reason why there was no general prohibition on zeroing by virtue of the phrase "margins of dumping." Like the problem of mathematical equivalence, the Appellate Body also was presented with the problem of prospective normal value systems, but failed to address the problem and provided no explanation as to why.

14. However, if, as the Appellate Body posits, the term "margin of dumping" always means a margin of dumping for "the product as a whole," then authorities must apply Article 2.2 with respect to "the product as a whole," and not on the basis of sub-groups or models. The result of such a different approach would be that "a constructed normal value would necessarily be used in all aspects of the determination of the margin of dumping for the product as a whole."[7] As explained by the panel in *US – Lumber*:

> In our view, Canada's suggestion that Article 2.2 may be applied on a model basis to increase the accuracy of the calculation methodology is not consistent with its view that investigating authorities must calculate a single margin of dumping for the product as a whole. For example, if there were ten models of the like product, and the Article 2.2 trigger conditions applied with respect to only one model, Canada asserts that an investigating authority may use a constructed normal value for only that one model (by making a "sub-group calculation"). However, Article 2.2 stipulates that the "margin of dumping" shall be established using a constructed normal value whenever the trigger conditions are fulfilled. If "margin of dumping" in Article 2.2 means a single margin of dumping for the product as a whole (and not for a specific model), this must mean that the margin of dumping *for the product as a whole* must be calculated using a constructed normal value for all models, even if the trigger conditions only apply in respect of one model. In other words, there would never be a "sub-group calculation" of the sort envisaged by Canada. We can see nothing in the text of Article 2.2 that would require this result, and, as Canada indicates, investigating authorities do not understand it to require this result. Indeed, the use of different methods for establishing normal value for different models or sub-groups of product is an integral part of model averaging, which itself is permitted under Article 2.4.2 of the *AD Agreement*. Moreover, such mandatory use of constructed normal value in respect of all models would run counter to the principle that constructed normal value is an alternative to be used only in the limited circumstances provided for in Article 2.2. It would also increase the burden on respondents, who would be required to produce cost data for all models, rather than just one or a few for which constructed normal value is necessary.[8]

15. These are the anomalies that flow from the Appellate Body's "product-as-a-whole" line of reasoning that neutral and impartial experts have identified thus far and with which Members should be concerned. There may be others.

The Lack of Analysis

16. Equally disturbing, however, is the fact that, as has been noted above, these anomalies were before the Appellate Body, but the Appellate Body failed to address them in its report. The Appellate Body did not confront at all the implications of its reasoning for the targeted dumping provision and Article 2.2. With respect to the implications for prospective normal value systems, the Appellate Body's discussion consists of a single sentence in a footnote, in which it merely asserts – without any explanation – that "the product as a whole" concept does not preclude assessments based on prospective normal values.[9]

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[7] *US – Lumber*, para. 5.61.

[8] *US – Lumber*, para. 5.62. As was the case with its discussion of mathematical equivalence and prospective normal value systems, the panel was discussing the implications for Article 2.2 in order to explain why "the product as a whole" interpretation of "margin of dumping" could not possibly be correct.

[9] Appellate Body Report, note 234.

17. The United States agrees with the proposition that panels and the Appellate Body are not required to respond to every argument made by a party. However, any sort of meaningful analysis requires that they deal with significant arguments raised by parties. The implications of "the product as a whole" line of reasoning described above constitute the very sort of significant arguments that the Appellate Body should have addressed. The Appellate Body's failure to do so undermines the credibility of its analysis. To paraphrase the Appellate Body itself, "[t]he brevity of the [Appellate Body's] analysis of this issue is, in our view, difficult to reconcile with its duty to conduct a critical and searching analysis."[10] It is particularly regrettable that the Appellate Body was reviewing a panel report that, on the issue of zeroing in post-investigation phases, had performed a rigorous analysis citing to multiple reasons for the conclusion. The Appellate Body appears to have ignored that rigorous analysis and decided that it need not set out a rigorous analysis of its own in overturning the panel's legal reasoning and conclusion.

18. Also of concern is the fact that the Appellate Body's legal conclusions are based on provisions that did not change as a result of the Uruguay Round. Paragraphs 1 and 2 of Article VI of the GATT 1994 were taken unchanged from the corresponding provisions of the GATT 1947, and Article 2.1 of the Anti-Dumping Agreement was taken unchanged from Article 2.1 of the Tokyo Round Anti-Dumping Code. The Appellate Body goes so far as to assert that these provisions "clearly" support the notion that "dumping" is defined in relation to "the product as a whole."[11]

19. Regardless of one's views as to the desirability of zeroing, it simply is not credible to assert that Article VI and Article 2.1 "clearly" indicate that dumping is defined in relation to the product as a whole. Indeed, with respect to Article VI, in 1960 a Group of Experts concluded that the "ideal method" for imposing anti-dumping duties was to make a dumping determination "in respect of each single importation of the product concerned."[12] If a Group of Experts familiar with anti-dumping matters concluded that a transaction-specific approach is the "ideal method" under Article VI, it is difficult to understand how the Appellate Body could conclude over forty years later that Article VI "clearly" calls for a "product as a whole" approach.

20. Moreover, if it is so clear that these provisions preclude zeroing, it is difficult to fathom why so many Contracting Parties to the GATT 1947 and signatories to the Tokyo Round Anti-Dumping Code engaged in zeroing. It is equally difficult to understand how the panel in the *Audiocassettes* case could have upheld the use of zeroing if zeroing were so clearly prohibited by Article VI and Article 2.1. Indeed, the panel rejected a claim that zeroing was inconsistent with Article 2.1 of the Tokyo Round Anti-Dumping Code.[13]

Zeroing "As Such"

21. Turning to the Appellate Body's "as such" finding, it is important to understand at the outset what the United States appealed. The panel found that the US Department of Commerce ("USDOC") applied an unwritten "norm" of zeroing that supposedly was "the root of the WTO-inconsistent behaviour". In the view of the United States, the panel's finding was in error because, among other things, the panel's finding of a "norm" was based on nothing more than a description of what the USDOC had done in the past.

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[10] Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, circulated 13 April 2006, para. 124.

[11] Appellate Body Report, para. 126.

[12] BISD 9S/194, para. 8.

[13] Panel Report, *European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, circulated 28 April 1995 (panel established under the 1979 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*) (unadopted).

22. In considering the panel's "as such" finding, the Appellate Body began its analysis with the following statement:

> We agree with the United States that a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document. If a panel were to do so, it would act inconsistently with its obligations under Article 11 of the DSU to "make an objective assessment of the matter" before it.
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> When an "as such" challenge is brought against a "rule or norm" that is expressed in the form of a written document—such as a law or regulation—there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a "rule or norm" that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged "rule or norm" may be uncertain.
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> In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[14]

23. To the extent that the analytical framework set out by the Appellate Body is read to require that the rule or norm in question is part of an act or instrument of the defending Member[15], whether written or unwritten, the United States does not disagree. Thus, the question before the Appellate Body – as articulated by the Appellate Body itself – was whether the panel had correctly applied this analytical framework. Unfortunately, the Appellate Body ignored this question, and instead embarked on its own *de novo* analysis regarding the "norm" of zeroing.

24. Recall again that the US claim of error essentially was that the panel's finding of a norm of general and prospective application was based on nothing more than evidence of what the USDOC

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[14] Appellate Body Report, paras. 196-198 (footnote omitted; italics in original).

[15] The Appellate Body recognized that any act or omission attributable to a WTO Member can be a measure of that Member for purposes of WTO dispute settlement, and that measures subject to WTO dispute settlement can include "acts setting forth rules or norms that are intended to have general and prospective application" and "instruments of a Member containing rules or norms." Appellate Body Report, para. 188. To the extent this is intended to reflect that the measure must be attributable to a Member, this is consistent with Articles 3.3 and 4.2 of the DSU, which refer to measures "taken" by a Member. At the same time, the Appellate Body's discussion appears to blur the concept of a "measure" that is of general and prospective application and a "rule or norm" of general and prospective application. Part of the difficulty may be that the Appellate Body's discussion is based on a construct by the Appellate Body – none of that discussion is based in the text of the WTO agreements. The WTO agreements do not purport to define "measure" (nor do they contain the term "rule or norm" that the Appellate Body itself puts in quotation marks).

had done in the past. In rejecting the US claim, however, the Appellate Body did not limit itself to facts that were either undisputed or had been found by the panel, but instead relied upon evidence that – according to the Appellate Body – the panel simply "had before it".[16] In particular, the Appellate Body cited the following evidence:[17]

(a) "standard computer programs used by the USDOC to calculate margins of dumping"

The panel did not rely on this fact, and the Appellate Body did not explain the relevance of this fact to the issue before it.

(b) "the USDOC Antidumping Manual"

While the panel noted that the EC had relied on the Antidumping Manual as evidence,[18] the panel itself did not cite to the Manual in its findings. Moreover, the United States contested the significance of the Antidumping Manual, explaining, with evidence, that it has no prescriptive value, and that, in fact, it refers to methodologies that the USDOC no longer uses.[19]

(c) "expert opinions"

The so-called "expert opinions" consisted of nothing more than statements as to what the USDOC had done in the past.[20] Moreover, the "expert" was nothing more than a paid employee of a consulting firm hired by counsel to one of the third parties.

(d) "the Standard Zeroing Procedures (lines of computer code)"

The panel had recognized that the lines of computer code "do not create anything" but instead "are simply a reflection of something else."[21] In other words, the fact that the USDOC had used certain computer code to implement zeroing had no explanatory value as to the measure that was causing the USDOC to use zeroing in the first place.

(e) "the fact that the United States had not contested that the USDOC's zeroing methodology reflect a deliberate policy"

However, the United States explained to the Appellate Body that the question of whether the USDOC's use of zeroing in the past reflected a "deliberate policy" never arose during the panel proceedings, and the panel did not even specify what it was in the record that the United States was supposed to contest.[22] The Appellate Body did not even bother to address this discrepancy in the panel's reasoning.

25. In short, instead of reviewing whether the panel's analysis of the EC's "as such" claim was in error, the Appellate Body made its own findings based upon its own consideration of evidence that either was not relied upon by the panel or that was contested by the parties. In so doing, the Appellate

[16] Appellate Body Report, para. 213.
[17] Appellate Body Report, para. 201.
[18] Panel Report, para. 7.107.
[19] *See Appellee Submission of the United States of America*, 13 February 2006, paras. 203, 207. *See, also*, Exhibit EC-36.8, page 95 (an Antidumping Manual reference to the discontinued "99.5% test).
[20] *Other Appellant Submission of the United States of America*, 1 February 2006, para. 36 & note 34 (hereinafter "US Other Appellant Submission").
[21] Panel Report, para. 7.97; *see also* US Other Appellant Submission, para. 37.
[22] US Other Appellant Submission, note 38.

Body deviated from the role assigned to it by the DSU. As a result, the "rigorous" standard for an "as such" claim proclaimed by the Appellate Body in paragraph 198 of the report turned out to be not so rigorous after all. At the end of the day, the identity of the measure of general and prospective application that allegedly causes the USDOC to zero remains unknown.

26. Another element of the US appeal was that the panel had improperly failed to apply the mandatory/discretionary distinction. This was a claim of *legal* error, for the mandatory/discretionary distinction is a tool for analysing whether a measure, as such, breaches a specific obligation. If a measure does not, as such, mandate a breach of a particular obligation, then it does not, as such, breach that obligation. Indeed, it is the very fact that a measure, in its application, requires a Member to breach its obligations that underpins the purpose and the value of an "as such" finding. As the Appellate Body correctly noted in paragraph 189 of the report, "complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct." However, the means by which this goal has been achieved in successful "as such" challenges to date has been a finding that a measure as such mandates *ex ante* inconsistent conduct. In other words, a measure was not considered to be the "the root of the problem" merely because a Member had in the past exercised discretion under the measure in a WTO-inconsistent manner. Rather, the measure required the Member to act in a WTO-inconsistent manner (now, and in the future).

27. Notwithstanding this critical element of the US *legal* argument and of the *legal* analysis regarding an "as such" claim, the Appellate Body never addressed it, except to note that it had not yet pronounced generally on the mandatory/discretionary distinction.[23] Moreover, the Appellate Body seemingly characterized the US argument as one relating to the panel's handling of the *facts* under DSU Article 11,[24] despite the central *legal* role played by the distinction.

28. By failing to apply the mandatory/discretionary distinction, the Appellate Body found an as-such breach without finding that the so-called "measure" actually *caused* the Member to breach its obligations. It is highly problematic as to how a Member is to respond to such a finding. If a measure is not causing a Member to breach, removing the measure will have no impact. And if there is no measure at all, how is a Member to remove or modify it?

Conclusion

29. In conclusion, we would note the observation on the Appellate Body Report from a supporter of the outcome in the dispute: "This ruling is an important development in the WTO jurisprudence. In a sense, the AB made a huge contribution to free trade, *which could not be made by negotiation alone*." (Emphasis added).[25] It is troubling that even supporters of the outcome in this dispute thus perceive that it did not result from the negotiated text of the agreement, nor could it be expected to result from subsequent negotiation among the Members. The perception that the dispute settlement system is operating so as to add to or diminish rights and obligations actually agreed to by Members, notwithstanding DSU Articles 3.2 and 19.2, is highly corrosive to the credibility that the dispute settlement system has accumulated over the past 11 years.

30. Again, the United States considers the issues presented by this report to be important not simply to the substantive outcome in this dispute, but also to the manner in which the WTO dispute settlement system is to perform its task, and to the continued effectiveness and credibility of that system. We welcome a discussion of these issues with Members.

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[23] Appellate Body Report, para. 211.

[24] Appellate Body Report, paras. 207, 212.

[25] International Economic Law & Policy Blog, Worldtradelaw.Net (visited 4 May 2006) <http://worldtradelaw.net.typepad.com/ielpblog/2006/04/a_farewell_to_z.html>.