

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

Recourse to Article 21.5 of the DSU by the European Communities

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 13 February 2009, from the Delegation of the European Commission, 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 – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, *Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/RW). 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 with respect to all matters to complete the analysis (whether or not this is specifically re-iterated in the following paragraphs), with respect to the following errors of law and legal interpretations contained in the Panel Report:

- (a) The Panel erred in failing to rule on the substance of the EC claim that the **Panel was composed** in a manner inconsistent with Articles 8.3 and 21.5 of the *DSU*, on the grounds that it did not have the "authority" to rule on a matter with respect to which, according to the Panel, the "ultimate power" rests with the Director General of the WTO.<sup>1</sup> The Panel thus failed to comply with basic requirements of due process and failed to ensure the full and proper exercise of its judicial function. The Panel also acted inconsistently with the following provisions of the *DSU*: Article 1.1 (failure to apply the *DSU* to a dispute concerning the *DSU*); Article 3.2, first sentence (failure to clarify the provisions of the *DSU* in accordance with customary rules of interpretation of public international law); Articles 3.2 and 19.2 (failure to ensure that the European Communities' *DSU* rights were not diminished); Articles 3.3 and 23.1 (failure to allow for the settlement of the dispute by recourse to the *DSU*); Article 7.2 (failure to properly address the relevant provisions of the *DSU* cited by the European Communities); Article 11 (failure to make such other findings as would assist the

<sup>1</sup>Panel Report, paras. 8.13–8.17 and 9.1(a).

DSB); and Article 12.7 (failure to set out the basic rationale behind its findings). The European Communities requests the Appellate Body to modify or reverse the Panel's findings and complete the analysis by finding that the Panel was composed inconsistently with Articles 8.3 and 21.5 of the *DSU*. One panellist remained in office at the stage of the compliance panel and was not lawfully removed by the United States or by the Director General of the WTO. The European Communities also requests the Appellate Body to reverse the Panel's finding that, if it would have agreed with the European Communities, it would have been *compelled* to rule that it had no jurisdiction to rule on any of the EC claims.<sup>2</sup>

(b) The Panel made errors relating to the legal interpretation of Articles 19.1, 21.3 and 21.5 of the *DSU*,<sup>3</sup> and failed to comply with its functions as required by Articles 7 and 11 of the *DSU* when excluding certain subsequent reviews listed in the Annex to the EC Compliance Panel Request from its terms of reference.<sup>4</sup> In particular, the European Communities claims that:

- the Panel erred in rejecting the EC claim that the subsequent reviews listed in the Annex to the EC Compliance Panel Request fell under its terms of reference because they were "amendments" to the measures at issue in the original dispute;<sup>5</sup>
- the Panel erred in failing to examine or properly examine whether the US *omissions* and *deficiencies* in the US implementation of the DSB recommendations and rulings fell under its terms of reference;<sup>6</sup> and
- the Panel erred in excluding certain subsequent reviews from its terms of reference on the basis that they did not have a *close nexus* with the measures at issue in the original dispute and the DSB recommendations and rulings in view of their *timing*.<sup>7</sup>

The European Communities requests the Appellate Body to modify or reverse the Panel's findings, and to complete the analysis by finding that, in relation to these matters, the United States failed to comply with the relevant provisions of the covered agreements cited in the pleadings before the Panel and with the rulings and recommendations of the DSB in the original proceedings.

(c) The Panel erred in finding that the European Communities had not demonstrated that the United States failed to comply with the DSB recommendations and rulings in the subsequent sunset reviews at issue.<sup>8</sup> This conclusion was based on erroneous findings on issues of law and related legal interpretations of Articles 19.1, 21.3 and 21.5 of the *DSU*. Furthermore, the Panel disregarded its mandate and failed to comply with its functions as required by Article 11 of the *DSU* when failing to address the EC claim that the United States failed to comply with the DSB recommendations in the original dispute, since certain aspects of the measures at issue in the original dispute (*i.e.*, the dumping margins based on zeroing)

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<sup>2</sup>Panel Report, para. 8.13.

<sup>3</sup>All EC claims and arguments referring to Articles 19.1, 21.3 or 21.5 of the *DSU* are to be considered in the context of Article 3.7 of the *DSU*.

<sup>4</sup>Panel Report, para. 8.119 and footnote 676, para. 8.120, para. 8.126 (by omission and by implication, only referring to certain subsequent reviews) and para. 9.1(b) (by omission and by implication, only referring to certain subsequent reviews).

<sup>5</sup>Panel Report, paras. 8.61–8.84 and para. 9.1(b) (by omission and by implication).

<sup>6</sup>Panel Report, paras. 8.85–8.86, para. 8.127 (by omission and by implication) and para. 9.1(b) (by omission and by implication).

<sup>7</sup>Panel Report, paras. 8.111–8.116, 8.119–8.124, 8.126 (by omission and by implication) and 9.1(b) (by omission and by implication).

<sup>8</sup>Panel Report, paras. 8.135–8.141 and 9.1(b)(vi).

remained in place (*i.e.*, the United States relied on those margins for the determination of likelihood of recurrence of dumping in subsequent sunset review proceedings concerning the same anti-dumping "measure").<sup>9</sup> The European Communities requests the Appellate Body to complete the analysis and find that the United States acted inconsistently with Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the *DSU*, and failed to comply with the DSB rulings and recommendations in the original proceedings.

(d) The Panel erred in rejecting the EC claims that certain **US actions or omissions based on zeroing after the expiry of the reasonable period of time** were inconsistent with the US obligation and public commitment to immediately comply with the rulings and recommendations of the DSB, and with various provisions of Article VI of the *GATT 1994*, the *Anti-Dumping Agreement* and the *DSU*.<sup>10</sup> In particular, the European Communities requests the Appellate Body:

- with respect to all cases, to modify or reverse the Panel's finding that assessment instructions and final liquidations after the end of the reasonable period of time and within the scope of the compliance panel, based on zeroing, are not inconsistent with Article VI:2 of the *GATT 1994* and Article 9.3 of the *Anti-Dumping Agreement* (with respect to administrative reviews), Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement* (with respect to sunset reviews) and Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement* (with respect to original investigations) and do not constitute a failure to comply with the rulings and recommendations of the DSB in the original case.<sup>11</sup> The European Communities requests the Appellate Body to complete the analysis, finding that assessment instructions or final liquidations after the end of the reasonable period of time and within the scope of the compliance panel, based on zeroing, are inconsistent with the above provisions and with Articles 19.1 and 21.3 of the *DSU*, and constitute a failure to comply with the rulings and recommendations of the DSB in the original proceedings;
- with respect to Case 1 (*Hot Rolled Carbon Steel from the Netherlands*), to uphold the Panel's finding that the 2004-2005 administrative review and assessment instructions (by action or omission) were inconsistent with Article VI:2 of the *GATT 1994* and Article 9.3 of the *Anti-Dumping Agreement* and a failure to comply with the DSB rulings and recommendations,<sup>12</sup> albeit on the basis of the different and more developed reasoning to be set out in the appeal; and to find that the Panel erred in failing to specifically address the same issue with respect to the final liquidations (by action or omission)<sup>13</sup> and erred in its other findings on this issue,<sup>14</sup> and to complete the analysis by making the same findings as for the administrative review and assessment instructions;
- also with respect to Case 1 (*Hot Rolled Carbon Steel from the Netherlands*), to modify or reverse the Panel's findings and conclusions<sup>15</sup> concerning the assessment

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<sup>9</sup>Panel Report, para. 8.222.

<sup>10</sup>Panel Report, paras. 8.164–8.222 and 9.1(b)(i)–(v).

<sup>11</sup>Panel Report, paras. 8.191–8.193, particularly (but not only) para. 8.191, first sentence, referring to paras. 8.170–8.185, particularly (but not only) para. 8.174, first sentence (including footnote 769); re-iterated at paras. 8.199–8.200 (including footnote 803); and Panel Report, para. 9.1(b)(iii) and (iv) and 9.1 (by omission and by implication).

<sup>12</sup>Panel Report, paras. 8.208 and 9.1(b)(i).

<sup>13</sup>Panel Report, paras. 8.208 and 9.1(b)(i) (by omission and by implication).

<sup>14</sup>Panel Report, para. 9.1(b)(iii) and (iv).

<sup>15</sup>Panel Report, paras. 8.205, 8.209 and 9.1(b)(iii) and (iv).

instructions on 16 April 2007 and the liquidation instructions on 23 April 2007, instructing liquidation for the period 1 November 2005 to 31 October 2006, on the basis of the cash deposit rate originally in force at the time of importation, and based on zeroing. The European Communities requests the Appellate Body to complete the analysis and find that these actions by the United States after the end of the reasonable period of time were inconsistent with Article VI:2 of the *GATT 1994*, Article 9.3 of the *Anti-Dumping Agreement* and Articles 19.1 and 21.3 of the *DSU*, and constitute a failure to comply with the rulings and recommendations of the DSB in the original case;

- with respect to Case 6 (*Stainless Steel Wire Rod from Sweden*), to uphold the Panel's finding that the 2004-2005 administrative review and assessment instructions (by action or omission) were inconsistent with Article VI:2 of the *GATT 1994* and Article 9.3 of the *Anti-Dumping Agreement*,<sup>16</sup> albeit on the basis of the different and more developed reasoning to be set out in the appeal; and to find that the Panel erred in failing to specifically address the same issue with respect to the final liquidations (by action or omission)<sup>17</sup> and erred in its other findings on this issue,<sup>18</sup> and to complete the analysis by making the same findings as for the administrative review and assessment instructions;
  - with respect to 12 Cases,<sup>19</sup> to modify or reverse the erroneous findings in paragraph 8.202 of the Panel Report; to uphold the correct findings in the final two sentences of paragraph 8.218 of the Panel Report; to find that the Panel has acted inconsistently with Article 11 of the *DSU*; and to the extent necessary, to complete the analysis, also with respect to the appropriate conclusions and recommendations, by finding that, by continuing to maintain in place duty or cash deposit rates with respect to these 12 Cases, the United States acted inconsistently with Article VI:2 of the *GATT 1994*, Article 9.3 of the *Anti-Dumping Agreement* (or in the case of sunset reviews with Articles 2.1, 2.4, 2.4.2 and 11.3 of the *Anti-Dumping Agreement*) and Articles 19.1 and 21.3 of the *DSU*, and that this constitutes a failure to comply with the rulings and recommendations of the DSB in the original case; and
  - to modify or reverse the Panel's findings rejecting the EC claim according to which, once an anti-dumping order is revoked pursuant to the Section 129 Determination (because absent zeroing no dumping was found) the United States was not entitled to continue adopting administrative reviews and other actions (including collection of duties) based on zeroing in relation to that revoked order after the end of the reasonable period of time; and to complete the analysis accordingly by finding that the United States violated Articles 19.1 and 21.3 of the *DSU* and the DSB rulings and recommendations in the original proceedings.<sup>20</sup>
- (e) The Panel erred with respect to the correct legal interpretations of Articles 19.1, 21.3 and 21.5 of the *DSU*, disregarded its mandate, exercised false judicial economy, and failed to comply with its functions as required by Article 11 of the *DSU* when failing to make any findings with respect to the EC claims regarding the **non-existence of measures taken to comply between 9 April and 23 April/31 August 2007.**<sup>21</sup> The European Communities requests the

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<sup>16</sup>Panel Report, paras. 8.213 and 9.1(b)(i).

<sup>17</sup>Panel Report, paras. 8.213 and 9.1(b)(i) (by omission and by implication).

<sup>18</sup>Panel Report, para. 9.1(b)(iii).

<sup>19</sup>Cases 18-24, 27-30 and 31.

<sup>20</sup>Panel Report, paras. 8.219-8.222, particularly (but not only) para. 8.222, final sentence.

<sup>21</sup>Panel Report, paras. 8.226-8.227 and 9.1(b)(vii).

Appellate Body to complete the analysis by finding that the United States acted inconsistently with Articles 19.1 and 21.3 of the *DSU* and failed to comply with the DSB rulings and recommendations in the original proceedings.

- (f) The Panel made errors relating to the legal interpretation of Article 21.5 of the *DSU* when finding that the EC claims (particularly regarding the **arithmetical error**) in respect of the Section 129 Determination concerning *Stainless Steel Sheet and Strip in Coils from Italy* (listed as Case 11 in the Annex to the EC Panel Request) were not properly before the Panel.<sup>22</sup> The European Communities requests the Appellate Body to complete the analysis by finding that the EC claims could properly be made in these compliance proceedings and that the United States acted inconsistently with Articles 2, 5.8, 6.8, 9.3, 11.1 and 11.2 of the *Anti-Dumping Agreement*, Article VI:2 of the *GATT 1994*, Articles 19.1 and 21.3 of the *DSU* and failed to comply with the DSB rulings and recommendations in the original proceedings.
- (g) The Panel erred in finding that the United States did not act inconsistently with Article 9.4 of the *Anti-Dumping Agreement* in the establishment of "**all others**" rates in the Section 129 Determinations concerning *Stainless Steel Bar from France, Italy and the United Kingdom* (listed as Cases 2, 4 and 5 in the Annex to the EC Compliance Panel Request);<sup>23</sup> moreover, the Panel erred in failing to examine the EC claim based on Article 6.8 and Annex II of the *Anti-Dumping Agreement*.<sup>24</sup> The European Communities requests the Appellate Body to complete the analysis by finding that the United States acted inconsistently with Article 9.4 of the *Anti-Dumping Agreement*, Article 6.8 and Annex II of the *Anti-Dumping Agreement*, Articles 19.1 and 21.3 of the *DSU* and failed to comply with the DSB rulings and recommendations in the original proceedings.
- (h) The Panel erred in rejecting the EC request for a **suggestion** pursuant to Article 19.1 of the *DSU*,<sup>25</sup> and the European Communities requests the Appellate Body to make appropriate suggestions in this case.

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<sup>22</sup>Panel Report, paras. 8.237–8.244 and 9.1(c)(i).

<sup>23</sup>Panel Report, paras. 8.278–8.284 and 9.1(c)(iii).

<sup>24</sup>Panel Report, paras. 8.284 and 9.1 (by omission and by implication).

<sup>25</sup>Panel Report, para. 9.3.