IN THE WORLD TRADE ORGANISATION

United States – Certain Methodologies and their Application to Anti-Dumping Proceedings involving China

WT/DS471

Third Party Submission

by

Norway

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I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this dispute brought by China concerning the consistency with the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") and the General Agreement on Tariffs and Trade (the "GATT 1994") of certain methodologies by the United States in anti-dumping proceedings.

2. In this written submission, Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss one of the legal issues raised: the use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology referred to in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

II. THE USE OF ZEROING

A. Introduction

3. In line with the Appellate Body's consistent rulings in numerous previous cases, Norway holds that the use of all forms of zeroing in all forms of proceedings under the Anti-Dumping Agreement is prohibited. This applies regardless of the comparison methodology employed to calculate the dumping margin, including the third comparison methodology of the second sentence of Article 2.4.2.

4. The Appellate Body has repeatedly found the practice of zeroing inconsistent with the Anti-Dumping Agreement in the context of both the "weighted-average-to-weighted-average" methodology and the "transaction-to-transaction" methodology. It has furthermore come to the same conclusion in terms of the third comparison methodology in the context of administrative reviews. As Norway will show, it is clear from the principles and interpretations laid down by the Appellate Body that zeroing is prohibited also in terms of the third comparison methodology in the context of original investigations.

B. Interpretation of the Anti-Dumping Agreement

5. The Appellate Body has pointed out on several occasions that it is clear from the opening phrase of Article 2.1 – "[f]or the purposes of this Agreement" – that the definition of

"dumping" contained in that article applies to the entire Anti-Dumping Agreement.[1] The Appellate Body has therefore noted that "dumping" and "dumped imports" must have "the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews".[2]

6. The Appellate Body has repeatedly found that the texts of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 clearly indicate that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[3] Furthermore, the Appellate Body has concluded that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.

7. Moreover, Norway would like to highlight that the Appellate Body has held that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin.[6] In *US – Softwood Lumber V*, the Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. Furthermore, the investigating authority "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[7] Disregarding or artificially reducing

[1] ; Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 109; Appellate Body Report, *US - Softwood Lumber V*, para. 93; *US – Zeroing (EC)*, para. 125; *US – Stainless Steel (Mexico)*, para. 84; and *US – Zeroing (Japan)*, para. 109.
[2] Appellate Body Report, *US - Zeroing (Japan),* para. 109. See also Appellate Body Report, *US - Softwood Lumber V*, para. 93.
[3] Appellate Body Report, *EC – Bed Linen,* para. 53; Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93 and 96; Appellate Body Report, *US – Zeroing (EC)*, para 126.
[4] Appellate Body Report, *US – Stainless Steel (Mexico*), para. 94; Appellate Body Report; *US – Zeroing (EC)*, paras. 128-129.
[5]Appellate Body Report, *US – Continued Zeroing*, para. 283. See also Appellate Body Report, *US – Zeroing (EC)*, para. 128; Appellate Body Report, *US - Stainless Steel (Mexico)*, para. 89.
[6] Appellate Body Report, *EC – Bed Linen*, para, 53; and Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[7] Appellate Body Report, *US – Softwood Lumber V*, para. 98 (emphasis original).

to zero the results of intermediate comparisons, through the application of zeroing, is at odds with this and thus inconsistent with Article 2.4.2.

8. In this regard, Norway would like to stress that the Appellate Body has confirmed this interpretation, both in the context of the "transaction-to-transaction" methodology,[8] as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews.[9]

9. Norway cannot see anything in the wording of the second sentence of Article 2.4.2 that suggests a different interpretation. On the contrary, Norway agrees with China that although the second sentence of Article 2.4.2 provides an exception from the first sentence in terms of the comparison methodology used to compare normal value and export price in investigations, this is not an exception from the requirement to determine "margins of dumping".[10] Furthermore, the object and purpose of the provision is to address possible dumping targeted at particular purchasers, regions or time periods. These dumping situations reflect a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behaviour of the exporter, in order to identify this type of dumping. A logical consequence of this is that dumping cannot take place at the level of each individual transaction. This was reflected in *US – Stainless Steel (Mexico)* when the Appellate Body noted that "[a] proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time".[11]

C. The negotiating history of the Anti-Dumping Agreement

10. Norway notes that the United States claims that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of this argument seems to be that communications of two delegations and minutes of a negotiating meeting could be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as the same thing. Norway strongly disagrees with this assumption. In our

[8] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.
[9] Appellate Body Report, *US - Stainless Steel (Mexico),* paras. 102-104.
[10] First Written Submission of China paras. 217-218.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.
[12] First Written Submission of the United States, paras. 242-250.

opinion, the material only show that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is indeed very different from deducting a permission of applying zeroing when using the said comparison methodology.

11. Furthermore, we note that the United States has previously described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the Anti-Dumping Agreement addressing zeroing, that practice would continue to be consistent with the Anti-Dumping Agreement.[13] In that particular case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in those proceedings. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

C. The obligation to make a "fair comparison"

12. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the Anti-Dumping Agreement to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] Thus, the Appellate Body has emphasised that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased".[18] As with the other two comparison methodologies, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping

[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.

more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the Anti-Dumping Agreement.

III. CONCLUSION

13. In conclusion, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. This is in line with consistent findings of the Appellate Body, which has emphasised that the concepts have the same meaning throughout the Anti-Dumping Agreement. All intermediate comparison results must be aggregated in order to establish the margin of dumping for the product as a whole and for each individual exporter. Furthermore, zeroing can never on any occasion be impartial, even-handed or unbiased, and therefore not constitute a "fair comparison". Hence, the use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology in original investigations is inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement.

14. Norway respectfully requests the Panel to take account of the considerations set out above when evaluating the claims in this dispute.