IN THE WORLD TRADE ORGANIZATION

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea (AB-2016-2, DS464)

Third Participant Submission

by

Norway

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I. INTRODUCTION

1. Norway welcomes this opportunity to present its views on the issues raised in these proceedings before the Appellate Body. In this third participant submission, Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway has chosen to focus certain interpretative issues of importance to the Appellate Body when assessing the claims presented. Accordingly, Norway will in the following set out its view on 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.

2. However, as a point of departure, Norway would like to underline that the resort to this methodology is indeed an exception, to be applied only in very limited situations where the normal methodologies for calculating dumping margins are not appropriate. The criteria stated in the second sentence of Article 2.4.2 must be fulfilled, and the methodology must comply with Article 2.4. The United States' methodology disregards all the criteria for the application of Article 2.4.2.

II. THE USE OF ZEROING

A. Introduction

3. The Panel found that the United States' use of zeroing when applying the "weighted-average-to-transaction" methodology is both "as applied" and "as such" inconsistent with the second sentence of Article 2.4.2 and Article 2.4 of the *Anti-Dumping Agreement*.[1] The United States seeks review of these findings, and, firstly, claims that the Panel erred by failing to properly interpret the second sentence of Article 2.4.2 in accordance with the customary rules of interpretation of public international law.[2] Secondly, the United States claims that the Panel's findings under Article 2.4 are based on the flawed finding that the use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology is inconsistent with Article 2.4.2, and consequently these findings are likewise erroneous and should be reversed.[3] Additionally, the United States claims that the use of zeroing when applying this methodology is indeed "fair" and thus consistent with Article

[1] Panel Report, paras. 7.192 and 7.206.
[2] United States' Appellant Submission, paras. 79 and 209.
[3] United States' Appellant Submission, para. 211.

2.4.[4] Norway strongly disagrees with these assertions, and will set out the reasons why the Panel's findings on these issues should be upheld below.

B. Interpretation of the *Anti-Dumping Agreement*

4. 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.

5. The Appellate Body has repeatedly found that the practice of zeroing is 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 also prohibited in terms of the third comparison methodology in the context of initial investigations. Norway notes with interest that that the United States recognises that "a number of Appellate Body and panel reports include findings that bear on the interpretative questions in this dispute. Appellate Body reports addressing zeroing in other contexts, as well as the interpretation and general applicability of certain terms of the AD Agreement, are of particular relevance".[5] Norway naturally agrees with this.

6. Based on Article 2.1 of the *Anti-Dumping Agreement*, and Article VI:1 of the *GATT 1994,*[6] the Appellate Body has repeatedly found that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[7] Furthermore, the Appellate Body has underlined that the concepts of "dumping" and "margin of dumping" are exporter-specific,[8] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[9] The Appellate Body has

[4] United States' Appellant Submission, paras. 212-213.
[5] United States' Appellant Submission, para. 93.
[6] *The General Agreement on Tariffs and Trade 1994*.
[7] Appellate Body Report, *US –Zeroing (EC)*, para 126, Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.
[8] Appellate Body Report, *US – Stainless Steel (Mexico*), paras. 89-90, Appellate Body Report, *US – Zeroing (EC)*, para. 128.
[9]Appellate Body Report, *US – Continued Zeroing*, para. 283.

further clarified that these two terms must have "the same meaning in all provisions of the Agreement and for all types of anti-dumping proceedings".[10] Norway points to the wording of Article 2.4.2, which explicitly refers to the "margins of dumping" and the comparison methodology used to determine the existence of these. 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. Norway would furthermore like to highlight that the Appellate Body has found 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. 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. The investigating authority furthermore "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".[11] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is thus at odds with this and inconsistent with Article 2.4.2.

8. In this regard, Norway would like to underline that the Appellate Body has confirmed this interpretation, both in the context of the "transaction-to-transaction" methodology,[12] as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews.[13] The Appellate Body has thus found that a comparison between normal value and the prices of individual export transactions does not detract from its coherent conclusion on this matter.

9. Norway struggles to see that there is anything in the wording of the second sentence of Article 2.4.2 that would allow a different interpretation in this regard. Furthermore, the object and purpose of the provision is to address dumping targeted at particular purchasers, region or time periods. These dumping situations reflects a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining

[10] Appellate Body Report, *US - Zeroing (Japan),* para. 109.
[11] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[12] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.
[13] Appellate Body Report, *US- Stainless Steel (Mexico),* paras. 102-104.

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. It necessarily follows that dumping cannot take place at the level of each individual transaction.[14]

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.[15] As Norway understands it, the gist of the argument seems to be that communications of two delegations and minutes of a negotiating meeting can 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 one and the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only shows that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is a far cry from deducting a permission of applying zeroing when using said comparison methodology.

11. Furthermore, we note that the United States previously has 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*.[16] In this case, the United States clearly saw these two practices as two separate issues.[17] The Appellate Body did not agree with the United States in that proceeding. Similarly, the

[14] As held by the Appellate Body in *US – Stainless Steel (Mexico)*, para. 98*:* "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."
[15] United States' Appellant Submission, paras. 196-206.
[16] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[17] Appellate Body Report, *US – Softwood Lumber V,* para. 108.

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".[18] 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.[19] The Appellate Body has thus emphasised that there is an "inherent bias" in zeroing,[20] and that "this way of calculating cannot be described as impartial, even-handed or unbiased."[21] 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 more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the *Anti-Dumping Agreement*.

13. Furthermore, the United States claims that the Panel found the use of zeroing when applying the third comparison methodology inconsistent with Article 2.4 because it is inconsistent with Article 2.4.2.[22] Norway fails to see how the Panel's reasoning in any shape or form makes its finding under Article 2.4 contingent on its finding under Article 2.4.2, as the United States claims. The cited sentence simply makes it clear that the Panel has assessed the criteria of "fair comparison", and found the use of zeroing when applying the third comparison methodology inconsistent with this.[23] As shown in the previous paragraph, the Panel's interpretation is clearly in line with customary rules of interpretation of public international law and should be upheld.

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[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[19] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[20] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[21] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.
[22] United States' Appellant Submission, paras. 210-211.
[23] The United States cites the following sentence from the Panel Report, para. 7.206, as evidence of this: "We consider that the use of zeroing in the context of the W-T comparison methodology would not lead to a fair comparison, since individual pattern transactions priced above normal value would not be properly taken into account when an investigating authority has particular regard to the exporter's pricing behaviour within that pattern."

III. CONCLUSION

14. 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 emphasized 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 cannot be said to be impartial, even-handed or unbiased. The use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology is hence inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

15. Norway respectfully requests the Appellate Body to take account of the considerations set out above when evaluating the claims in this dispute.