United States – Measures relating to zeroing and sunset reviews (WT/DS322)

Third Party Intervention by Norway

Geneva, 21June 2005

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1. INTRODUCTION

1. The case before us is about the inconsistency with the *Agreement on the Implementation of Article VI of the GATT 1994 (*hereinafter the *Anti-dumping Agreement*) of using "zeroing" in the calculation of dumping margins. "Zeroing" is the practice of treating comparisons with individual negative dumping margins as zero rather than using these negative margins of dumping to offset positive margins of dumping found in comparison with other models, specifications or sales.

2. The case raises more or less identical questions as to the case registered as WT/DS 294 *United States – Laws, Regulations and Methodology for calculating Dumping Margins ("Zeroing")*. Norway is acting as a third party in that case and engages itself in the present case for exactly the same reasons;

3. Various panels and the Appellate Body have repeatedly found that zeroing generally inflates the margins calculated and can even, in some instances, turn a negative margin of dumping into a positive margin of dumping. The inherent bias in the zeroing methodology may thus distort not only the size of a margin of dumping, but also the finding of the very existence of dumping. For this reason, the panels and the Appellate Body have found, in all cases brought before them,[1] that the practice of zeroing is inconsistent with the *Anti-dumping Agreement* and Article VI of the GATT 1994.

4. However, the US continues to apply zeroing disregarding these findings in all instances where a dumping margin is calculated: in original investigations, in its "retrospective assessment of duties" ("assessment reviews" according to the *Anti-dumping Agreement* Article 9.3), in "new shipper reviews" (*Anti-dumping Agreement* Article 9.5), in "periodic reviews" (*Anti-dumping Agreement* Article 11.2), and in "sunset reviews" (*Anti-dumping Agreement* Article 11.3)

5. Japan has, in the present case, made a number of claims in respect of US laws, regulations, procedures and administrative practices, both "as applied" to particular anti-dumping duty orders imposed by the US, and "as such" – claiming that they are "as such" inconsistent with relevant provisions of the WTO Agreements.

6. Norway will not address the individual cases. The systemic interest of Norway lies in the fact that previous cases against the US have not led to a change in the methodologies (or "practices") that prescribe zeroing in the US, but only to modifications in the dumping margins in these particular cases. This illustrates the need for this Panel to deal seriously with the "as such" claims and not make use of judicial economy and deal only with the particular cases ("samples") given.

[1] See e.g. Appellate Body Report in *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India ("EC – Bed linen")* WT/DS141/AB/R, para 55; Appellate Body Report in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan ("US – Corrosion Resistant Steel Sunset Review")* WT/DS244/AB/R, paras 127-135;

2. OVERVIEW OF THE NORWEGIAN VIEWS IN THIS CASE

7. While Norway agrees with Japan in its line of argumentation with respect to the inconsistency of zeroing with Article 2 of the *Anti-dumping Agreement* –that the margin of dumping must be determined for the product as a whole and that a dumping determination must be based on a fair comparison, it is Norway's view that it has already been established by the Appellate Body in a number of cases[2] that the practice of zeroing is inconsistent with the *Anti-dumping Agreement*. The Appellate Body has clearly stated that there is only one method of calculating dumping margins in the *Anti-dumping Agreement* and that is in accordance with the provisions of Article 2.4 and 2.4.2 of the Agreement.

8. In this submission, Norway will concentrate on showing that the US anti-dumping margin program is a measure that can be challenged "as such" in a WTO dispute and that the standard zeroing procedures are *not only* in violation of the *Anti-dumping Agreement* Article 2 but, also all other articles concerning the calculation of dumping margins.

9. The calculation of dumping margins has, as argued by Japan, a bearing on the assessment that must be made under a number of the provisions of the *Anti-dumping Agreement*. When the US standard zeroing procedures in the anti-dumping margin program are in violation of Article 2.1, 2.4 and 2.4.2, this will therefore in turn lead to a number of consequential inconsistencies. Norway share the view of Japan that the use of the zeroing methodology is not only in violation with Article 2 but, also articles 3 and 5.8 with respect to *original investigations*, with Article 9 in "periodic" and "new shipper" reviews and with Article 11 in "changed circumstances" and "sunset" reviews.

3. THE AD MARGIN COMPUTER PROPGRAM CONTAINING THE ZEROING METHODOLOGIES ARE "AS SUCH" IN VIOLATION OF WTO OBLIGATIONS

3.1 There are no limitations on the types of measures that can be challenged before a WTO panel "as such"

10. The reference to measures, and types of measures, that can be challenged before a WTO panel in a case concerning the *Anti-dumping Agreement* can be found in many provisions.

11. Article 3.3 of the *Dispute Settlement Understanding* provides that:

[2] See e.g. Appellate Body Report in *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India ("EC – Bed linen")* WT/DS141/AB/R, para 55; Appellate Body Report in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan ("US – Corrosion Resistant Steel Sunset Review")* WT/DS244/AB/R, paras 127-135; Appellate Body Report in *United States – Final Dumping Determination on Softwood Lumber from Canada ("US – Softwood Lumber V"),* WT/DS264/AB/R, paragraph 101

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. *(emphasis added)*

12. The scope of Article 3.3 of the *Dispute Settlement Understanding* is very broad. It follows from the interpretation of this article by the Appellate Body in *US-Corrosion Resistant Steel Sunset Review* that in principle any act or omission attributable to a WTO Member can be assumed to be a measure by that Member for the purposes of dispute settlement proceedings.

> Article 3.3 of the *Dispute Settlement Understanding* (the DSU) refers to "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member." This phrase identifies the relevant nexus, for the purposes of dispute settlement proceedings, between the "measure" and a "Member". In principle, any act or omission attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch."[3] *(emphasis added)*

13. The wide reach of the notion of "measure" is also evident from Article 18.4 of the *Anti-Dumping Agreement*, which refers not only to laws or regulations, but also to "administrative procedures" as measures subject to the disciplines of the *Anti-dumping Agreement*:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question. *(emphasis added)*

14. Indeed, Article 17.3 of the *Anti-Dumping Agreement*, which concerns disputes relating to the agreement, only makes reference to the "effects" of any action by another Member, and not to specific types of measures. It provides that:

> "If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in

[3] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 81

writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation." ***(emphasis added)***

15. The Appellate Body has expressed itself on the reach of the notion "measure" on several occasions with specific relevance to the *Anti-dumping Agreement*. In *US-Corrosion Resistant Steel Sunset Review* the Appellate Body held that:

> "In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated."[4] ***(emphasis added)***

16. The Appellate Body stated in the same ruling that there is no threshold requirement in Article 17.3 of the *Anti-dumping Agreement* that the measure in question be of a certain type.

> "The provisions of the Anti-Dumping Agreement setting forth a legal basis for matters to be referred to consultations and thus to dispute settlement, are also cast broadly. Article 17.3 establishes the principle that when a complaining Member "considers" that its benefits are being nullified or impaired "by another Member or Members", it may request consultations. This language underlines that a measure attributable to a Member may be submitted to dispute settlement provided only that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it under the Anti-Dumping Agreement. There is no threshold requirement, in Article 17.3, that the measure in question be of a certain type."[5] ***(emphasis added)***

[4] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 82
[5] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 86

17. The Appellate Body also held that the provisions of Article 18.4 of the *Anti-dumping Agreement* have a certain relevance in relation to the question of what type of measure may be submitted to dispute settlement under the agreement. The phrase "laws, regulations and administrative procedures" has been interpreted very broadly to encompass *all* generally applicable rules, norms and standards adopted by Members in connection with anti-dumping proceedings:

> *"*The provisions of Article 18.4 of the Anti-Dumping Agreement are also relevant to the question of the type of measure that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to "take all necessary steps, of a general or particular character" to ensure that their "laws, regulations and administrative procedures" are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase "laws, regulations and administrative procedures" encompasses the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings. The scope of each element in this phrase must be determined for the purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice."[6] *(emphasis added)*

18. In the same ruling the Appellate Body concluded:

> "This analysis leads us to conclude that there is no basis, either in the practice of GATT and the WTO generally or in the provisions of the Anti-dumping Agreement, for finding that only certain types of measures can as such be challenged in dispute settlement procedures under the Anti-dumping Agreement. Hence, we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such"."[7]

19. It is quite clear from the Appellate Body's statement that there is no limitation on the type of measure that can "as such" be the subject of dispute settlement under the *Dispute Settlement Understanding* or the *Anti-dumping Agreement*. In principle even non-mandatory measures can be challenged "as such".

[6] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 87
[7] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 88

3.2 The Anti-dumping margin program containing the standard zeroing procedures (methodologies), is a measure "challengeable" under WTO law "as such".

20. Bearing in mind the conclusion in the preceding section – that in principle any type of measure can "as such" be challenged in dispute settlement procedures under the Anti-dumping Agreement – the question becomes whether the anti-dumping margin computer program must be considered to be a "measure" within the WTO and for the purpose of anti-dumping proceedings.

21. The ordinary meaning of the word "measure" is an action taken to achieve a purpose. There can be no doubt that the anti-dumping margin program containing the standard zeroing procedures qualifies as an action taken to achieve a purpose – the purpose of overstating the margin of dumping.

22. The only article in the *Anti-dumping Agreement* that mentions different types of measures is Article 18.4, which uses the term "laws, regulations and administrative procedures".

23. As explained in more detail in the preceding section, the term is interpreted by the Appellate Body in *US-Carbon Steel from Japan* to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings

> "Taken as a whole, the phrase "laws, regulations and administrative procedures" encompasses the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings."[8] ***(emphasis added)***

24. Norway is of the view that the anti-dumping margin program must be considered a norm or standard adopted by the US in connection with the conduct of anti-dumping proceedings.

25. In the same ruling the Appellate Body stated that the definition of the scope of each element in the phrase must be based on the content and substance of the instrument, and not merely on its form or nomenclature.

> "The scope of each element in this phrase must be determined for the purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from

[8] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 87

> Member to Member depending on each Member's domestic law and practice."[9] *(emphasis added)*

26. Therefore, the fact that the zeroing procedures in the anti-dumping margin program are abstract; that they not published in the Federal Register; that they do not bear the title "law" or "regulation"; that they are not adopted by Congress but by the US Department of Commerce; that the Department is entitled to change or withdraw them for the purposes of future determinations; and that they are not relevant in US courts, cannot be decisive for whether these procedures are a "measure" for the purpose of anti-dumping proceedings.

27. It must be quite clear that the anti-dumping margin computer program is a norm/standard adopted by Members in connection with the conduct of anti-dumping proceedings, and the content and substance of this instrument make this even clearer.

28. Norway believes that the anti-dumping margin program and the procedures it contains may be a set of normative rules that apply mechanistically and automatically to a given set of facts without further human intervention. There is no room for administrative or judicial interpretation. The effect of the standard zeroing procedures in future cases is utterly predictable. The standard zeroing procedures in the anti-dumping margin program provide certainty and security (at least for US industry) for the conduct of future trade. They mandate zeroing in all cases, and continue to do so until changed.

29. Norway has noted the arguments presented by the US to the effect that the Assistance Secretary of Commerce for Import Administration may change the Anti-dumping Manual, and the practices set out therein, "without notice", and that the anti-dumping margin program is "discretionary" as opposed to "mandatory". This argument is false, however, as all types of measures are subject to changes. The important issue here is that they are prescriptive for a certain WTO-inconsistent result *until* they are changed and for as long as they remain unchanged.

30. Allowing the anti-dumping margin program to be challenged "as such" is thus the only way to eliminate the root of the WTO-inconsistent conduct. As such we are squarely within the reasoning of the Appellate Body in *US – OCTG from Argentina*[10] when it determined that the US Sunset Policy Bulletin was a measure challengeable under the WTO.

31. For the above reasons, the anti-dumping margin program containing the standard zeroing procedures is a "challengable" measure under WTO law "as such".

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[9] Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 87

[10] Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina ("US – OCTG from Argentina"),* WT/DS268/AB/R, para 187.

4. ZEROING IS ALSO PROHIBITED IN "RETROSPECTIVE ASSESSMENT REVIEWS" UNDER ARTICLE 9.3 OF THE *ANTI-DUMPING AGREEMENT,* IN "NEW SHIPPER REVIEWS" UNDER ARTICLE 9.5 AND IN "CHANGED CIRCUMSTANCES" UNDER ARTICLE 11.1 AND "SUNSET REVIEWS" UNDER ARTICLE 11.3.

32. One of the questions in this case is whether articles 2.1, 2.4 and 2.4.2, of the *Anti-dumping Agreement* applies not only to original investigations but, also to reviews.

33. The US argues that this is not the case, essentially on the basis of two arguments: 1) that Article 2.4.2 is the provision that eventually prohibits zeroing, and 2) that Article 2.4.2 is not applicable to "retrospective assessment reviews" or "new shipper reviews", "changed circumstances reviews" and "sunset reviews" as they are not "investigations".

34. These arguments are without merit.

35. The Appellate Body has clearly stated that there is only one method of calculating dumping margins in the *Anti-dumping Agreement* and that is accordance with the provisions of Article 2.4 of the Agreement – which includes Article 2.4.2. This was most recently stated in the *US-Corrosion Resistant Steel Sunset Review* in connection with the interpretation of Article 11.3 of the Agreement concerning "sunset reviews":

> "However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provision in the Anti-Dumping Agreement according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement." [11](*emphasis added*)

> "It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3. Accordingly, we reverse the Panel's consequential finding, in paragraph 8(1)(d)(ii) of the Panel Report, that the US did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4."[12] (*emphasis added*)

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11 Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 127.

12 Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 128.

> "As explained above, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews. If these margins were indeed calculated using a methodology that is inconsistent with Article 2.4 – an issue that we examine below – then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3."[13] (*emphasis added*)

36. The Appellate Body in *US-Corrosion Resistant Steel Sunset Review* went on to recall its findings in the *EC-Bed Linen* case, and stated that:

> "When investigating authorities use a zeroing methodology such as that examined in EC-Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognised in the present dispute, "zeroing … may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[14] (*emphasis added*)

37. The word "otherwise" makes it particularly clear that the findings of the Appellate Body in this case are just as valid whenever a margin of dumping is calculated, and not just in original investigations.

38. With regard to "retrospective assessment reviews", this is furthermore, abundantly clear from the chapeau to paragraph 3 of Article 9, which states that "[T]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." This creates a clear and unambiguous link between the dumping duty imposed, reassessed or collected and the disciplines in Article 2 governing the calculation of dumping margins.

39. The US tries to escape the reach of this chapeau by arguing that Article 2.4 applies, but not sub-paragraph 4.2, due to the existence of the word "investigation" in Article 2.4.2, and by arguing that the disciplines on methodologies and the prohibition against zeroing are only based on this sub-paragraph.

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13 Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 130.

14 Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 135.

40. These arguments are also flawed.

41. Firstly because there is nothing in paragraph 3 of Article 9 that bars the application of Article 2.4.2. To the contrary, there is a clear reference to calculations of dumping margins, an issue squarely within Article 2.4.2.

42. Secondly, because the Appellate Body has interpreted the prohibition of zeroing based not on Article 2.4.2 as such but on the requirement of a "fair comparison" in Article 2.4. We refer to the statement by the Appellate Body in *EC-Bed Linen*:

> "Furthermore, we are also of the view that a comparison between export price and normal value that does not fully take into account the prices of all comparable export transactions – such as the practice of zeroing at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[15] *(emphasis added)*

43. Thirdly, because what the US is doing in its "retrospective assessment reviews", "new shipper reviews", "changed circumstances reviews" and "sunset reviews" is similar to what it does in original investigations. For all practical purposes it is a new investigation. If the reach of Article 2.4.2 is excluded from all but *original* investigations there would be no disciplines left to ensure fairly computed dumping margins. This would be contrary not only to the "fair comparison" requirement, but also to the explicit statement by the Appellate Body in *US-Corrosion Resistant Steel Sunset Review* (para. 135) referred to above.

44. In conclusion it is clear from the above that the prohibition on zeroing also applies to "retrospective assessment reviews" or "new shipper reviews", "changed circumstances reviews" and "sunset reviews" as they are not "investigations".

5. FINAL REMARKS

45. Although there have been a number of "as applied" cases against the US on this issue in recent years, the US continues to use zeroing. This illustrates the need for this Panel to deal seriously with the "as such" claims and not make use of judicial economy and deal only with the samples given: the "as applied" cases. As Norway has demonstrated in this submission, zeroing is implemented through the standard zeroing procedures in the anti-dumping margin computer program. Norway therefore respectfully requests this Panel to find these procedures in breach of the *Anti-dumping Agreement* "as such" when making its findings and recommendations.

15 Appellate Body Report, *EC-Bed Linen*, para 55.