In the World Trade Organisation

Before the Appellate Body

(DS322 / AB-2006-5)

United States – Measures Relating to Zeroing and Sunset Reviews ("Zeroing")

Third Participant Submission

by

Norway

Geneva

6 November 2006

TABLE OF CONTENTS

Table of cases cited in this submission

Short Title	Full Case Title and Citation
Panel Report	Panel Report in *United States – Measures Relating to Zeroing and Sunset Reviews ("US – Zeroing (Japan)")*, WT/DS322/R of 20 September 2005. Hereinafter referred to as the "Panel Report".
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Softwood Lumber V (Art. 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada. Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Japan has appealed the Panel Report[1] in this case on a number of grounds as set out in WTO-document WT/DS322/12. Norway as third party before the Panel submits this third participant submission pursuant to Rule 24(1) of the Working Procedures for Appellate Review.

2. Norway does not address all of the grounds for appeal presented by Japan.

3. The Appellate Body has already settled the question of whether zeroing is permitted in original investigations using the "Transaction-to-Transaction" (T-to-T) comparison methodology. The Appellate Body found that Article 2.4.2 of the *Anti-Dumping Agreement* (ADA) does not permit the use of zeroing in such cases, and equally that Article 2.4 does not permit such zeroing[2]. There is no reason to disturb these findings previously made by the Appellate Body, and consequently the erroneous findings by the Panel should be overturned and brought into line with previous findings by the Appellate Body.

4. Equally, the Appellate Body, in *US – Zeroing (EC),* found that zeroing using the T-to-T methodology applied by the US in periodic reviews is not permitted under Article 9.3 ADA and Article VI:2 of the GATT 1994[3]. Insofar as this case concerns the same methodology employed by the same Member in periodic reviews under Article 9.3 ADA, we consider that this issue has been settled, and that the Appellate Body should reverse the erroneous findings by the Panel. However, since the Panel chose to disregard that practice in this case, we *firstly* reiterate below some of the interpretative arguments that we believe are most important to this question

5. *Secondly*, Norway will address the prohibition of all forms of zeroing in all margin calculations, based on Article 2.4 of the *Anti-dumping Agreement* (ADA). The Appellate Body has already found that Article 2.4 and the "fair comparison requirement" prohibits zeroing in original investigations. Since Article 2.4 is applicable to <u>all</u> margin calculations, throughout the ADA, this implies that zeroing is *ipso facto* prohibited in all reviews.

[1] Panel Report in *United States – Measures Relating to Zeroing and Sunset Reviews ("US – Zeroing (Japan)")*, WT/DS322/R of 20 September 2005. Hereinafter referred to as the "Panel Report".
[2] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, see in particular paragraphs 122 and 142.
[3] Appellate Body Report, *US – Zeroing (EC)*, para 133.

II. THE PRACTICE OF ZEROING IS CONTRARY TO ARTICLES 2.1 AND 2.4.2 ADA AS IT DOES NOT TAKE INTO ACCOUNT THE PRODUCT AS A WHOLE

6. The Panel correctly found that zeroing procedures in original investigations using "Weighted-to-Weighted" (W-to-W) comparisons are not consistent with Article 2.4.2 ADA.[4] However, the Panel erred in finding that zeroing procedures in original investigations using transaction specific comparisons are permissible.[5] Furthermore, the Panel erred in finding that zeroing procedures in reviews are WTO-consistent.[6]

7. Norway is of the view that the prohibition of zeroing is not limited to original investigations using the W-to-W methodology in Article 2.4.2 ADA. Contrary to the Panel, Norway considers that all forms of zeroing in all forms of proceedings under the ADA are prohibited. This consideration is based on the obligation to establish "dumping" for the "product as a whole"[7] – which is not the case where zeroing is employed.

a) The existence and amount of dumping must be determined for the product as a whole

8. The point of departure for Norway is that there is but one definition of "dumping" in the Anti-dumping Agreement, and that this definition is applicable to all proceedings under the ADA[8].

9. The definition applicable to all calculations of dumping margins throughout the agreement can be found in Article 2.1 of the ADA, which reads:

> "For the purposes of this Agreement, a product is considered as being dumped, i.e. introduced into the commerce of another country at less than normal value, if

[4] Panel Report para. 7.86.
[5] Panel Report para. 7.143.
[6] Panel Report para. 7.216 (periodic reviews and new shipper reviews) and para. 7.257 (relying on dumping margins in sunset reviews calculated using standard zeroing procedures).
[7] The Appellate Body has ruled several times that a determination of dumping using zeroing procedures violates the definition of dumping in Article 2.1 of the ADA, as it is not made for the "product as a whole". See Appellate Body Reports in *EC- Bed Linen*, para. 53, *US – Softwood Lumber V*, para. 99, *US – Zeroing (EC)* para. 127 and *US – Softwood Lumber V (Art. 21.5 – Canada)* para. 89 and 122.

> the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." (emphasis added)

10. A number of provisions of the ADA make reference to "a product"[9], "the product" [10] or "any product"[11], using the singular form of the word, thus making clear that the comparisons between normal value and export price for purposes of calculating the dumping margin is based on the totality of the product under investigation. There is no reference in the Agreement to calculating more than one margin of dumping for sub-categories or individual transactions of the product. As stated by the Appellate Body in *EC – Bed Linen:*

11. "[...] Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the product under investigation as a whole. [...]"[12]

12. The Appellate Body in *US – Softwood Lumber V*, restated this, where it held that "dumping is defined in relation to a product"[13]. The Appellate Body went on to say that the authorities:

> „... having defined the product under investigation, the investigating authority must treat that product as a whole for, inter alia, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. [...]"[14] (emphasis added)

13. In *US – Zeroing (EC)* the Appellate Body, recalling its earlier rulings, stated that:

---

[8] There are five such instances where the authorities calculate dumping margins, those being (i) original proceedings, (ii) "assessment reviews" (ADA Article 9.3), (iii) "new shipper reviews" (ADA Article 9.5), (iv) "changed circumstances reviews" (ADA Article 11.2), and (v) "sunset reviews" (ADA Article 11.3).
[9] E.g. Article 2.6
[10] E.g. Article 2.2.
[11] E.g. Article 9.2
[12] Appellate Body Report, *EC – Bed Linen*, para. 53.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[14] Appellate Body Report, *US – Softwood Lumber V*, para. 99.

> „...the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994 … indicate clearly that "dumping is defined in relation to a product as a whole""[15].

14. The Appellate Body in *US – Softwood Lumber (Article 21.5 – Canada)* reiterated this, and also analysed the context provided by Articles 5.8, 6.10 and 9.3 ADA. It was noted that a dumping determination "under Article 5.8 requires aggregation" of multiple comparison results to establish a margin for the product as a whole.[16]

15. Furthermore, it is also evident from the provision of Article 6.10 ADA, which stipulates that there shall be but one "individual margin of dumping for each known exporter or producer concerned of the product under investigation", that the margin of dumping shall be calculated for the product as a whole In the words of the Appellate Body, this obligation "reinforce[s] the notion that the "margins of dumping" are the result of an aggregation."[17] Norway adds that Article 6.10 applies to original investigations and to reviews pursuant to Article 11 by virtue of Article 11.4.

16. In Article 9.3 it is stated that "The amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Norway holds that it is evident from this text that the Agreement foresees one single dumping margin for "the product" for each individual exporter. The Appellate Body noted that Article 9.3 ADA "suggests that the margin of dumping is the result of an overall aggregation and does not refer to the results of the transaction-specific comparisons."[18]

17. For "new shipper reviews" Article 9.5 equally foresees individual margins of dumping for each exporter for "the product".

18. Norway also refers to the provisions of GATT Article VI, which is the basis for the Anti-Dumping Agreement, and which is still the basis for permitting the imposition of anti-dumping duties – which barring this provision would have been contrary to the MFN provision of GATT Article I and the prohibition on levying of duties in excess of the

[15] Appellate Body Report, *US – Zeroing (EC)*, para. 126, quoting Appellate Body Report, *US – Softwood Lumber V* para. 92-93. See also Appellate Body Report *US – Zeroing (EC)*, paras. 125, 127-129 and 132.
[16] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 105.
[17] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 107.
[18] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 108.

scheduled bound duty under GATT Article II. The provision of GATT Article VI:2 states that:

> „In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." (emphasis added)

19. It follows from this provision firstly that the duty cannot be greater than the margin of dumping; secondly that the margin of dumping is in respect of "such product" encompassing the totality of the product; and thirdly that the margin has to be calculated in accordance with the specific provisions of paragraph 1 of GATT Article VI. (Paragraph 1 of GATT Article VI is similar to Article 2.1 ADA in respect of the calculation of the dumping margin.) Nothing in GATT Article VI permits the calculation of more than one margin of dumping per product under investigation (from each exporter) and nothing permits the imposition of duties based on a multitude of margins of dumping for each and every transaction.

20. Based on the above it is clear that the margin of dumping must be calculated for the product as a whole in all proceedings under the Anti-dumping Agreement.

b) Zeroing is contrary to the principle that the margin of dumping must be calculated for the product as a whole

21. The Appellate Body has in several rulings pointed out that the use of zeroing distorts the process of establishing dumping margins and inflates the dumping margin for the product as a whole.

22. The Appellate Body in *US-Corrosion Resistant Steel Sunset Review*, recalling its findings in the *EC-Bed Linen* case, 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."[19] (emphasis added)

23. The importance of calculating the dumping margin for the product as a whole – and not zeroing out the instances where the export price exceeds the normal value – has been reaffirmed by the Appellate Body in *US – Softwood Lumber V,* where it stated that:

> „We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types."[20]

24. The cases referred to above dealt with instances of zeroing procedures in original investigations using the W to W methodology. The principle, however, applies equally to other forms of zeroing and to other forms of proceedings. The Appellate Body has confirmed this in two recent rulings.

25. First of all, in regard to zeroing procedures in periodic reviews, the Appellate Body stated in *US-Zeroing (EC)*:

> „We note that Article 9.3 refers to Article 2. It follows that, under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established "for the product as a whole".[21]

26. The Appellate Body then went on to say that

> …if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all of the multiple comparisons, including those where the export price exceeds the normal value."[22]

[19] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para 135.
[20] Appellate Body Report, *US – Softwood Lumber V,* para. 98 (emphasis in the original)
[21] Appellate Body Report, *US – Zeroing (EC)*, para. 127.
[22] Appellate Body Report, *US – Zeroing (EC)*, para. 127.

27. As stated by Japan in its Appellate Submission para. 82, the requirement in Article 2.1 ADA to aggregate multiple comparison results to produce a margin of dumping for the product as a whole applies both when an authority conducts: multiple model-specific "W to W comparisons, multiple transactions-specific W to T comparisons and multiple transaction-specific T to T comparisons.

28. In *US – Softwood Lumber V (Article 21.5 – Canada)* the Appellate Body concluded that the definition of "dumping" and "margin of dumping" in Article 2.1 (and Articles VI:1 and VI:2 of GATT 1994) applies to zeroing procedures using "T to T" comparison in an original investigation. The Appellate Body underlined that in relation to Article 2.4.2 ADA, the W to W and T to T comparisons provide "alternative means for establishing "margins of dumping" and that they "fulfil the same function" with no "hierarchy between them". In light of this, the Appellate Body stated

> "… the term "margin of dumping" has the same meaning regardless of which of the two methodologies in the first sentence of Article 2.4.2 is used to establish them. In other words, it is a unitary concept and the two methodologies provided in the first sentence of Article 2.4.2 are alternative means to capture it."[23]

29. Based on these premises, the Appellate Body held that

> "…it would be illogical to interpret the ["T to T"] comparison methodology in a manner that would lead to results that are systematically different from those obtained under the ["W to W"] methodology."[24]

30. In Norway similarly holds that it would be illogical to interpret the ADA in a manner that will allow the investigating authorities to apply a duty in a review, where the requirements of the Anti-dumping Agreement would have made it illegal to impose the duty in the first place.

31. Based on the above, Norway holds that zeroing procedures in all forms and in all proceedings under the ADA is contrary to the principle that the margin of dumping must be established for the product as a whole.

[23] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89
[24] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para 93

III. ZEROING IS CONTRARY TO THE REQUIREMENT OF "FAIR COMPARISON" IN ARTICLE 2.4 OF THE ADA

32. The Panel erred in finding that the use of zeroing procedures is not inconsistent with the "fair comparison" requirement in Article 2.4 ADA. Specifically, the Panel erred when considering Article 2.4 as *lex specialis* in regard to Articles 2.4.2 and 9.3 ADA.

33. The Appellate Body has in three earlier cases found that zeroing is contrary to a "fair comparison" between the export price and normal value[25]. The latest, and clearest, expression of this can be found in *US – Softwood Lumber V (Article 21.5 – Canada,* where the Appellate Body first recalled its earlier rulings and then emphasised that:

> "In sum, the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of "margins of dumping", on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the "fair comparison" requirement within the meaning of Article 2.4 of the *Anti-Dumping Agreement.*" [26]

34. Norway will not in this third party submission go through all the interpretative aspects of the term "fair comparison" in Article 2.4 ADA. The Appellate Body rulings mentioned above speak for themselves: there is an inherent bias in a zeroing methodology and zeroing is not a "fair comparison". Zeroing thus implies a breach of Article 2.4 ADA. Nothing in the facts of this case or in the arguments of the Panel gives any cause to disturb the consistent Appellate Body findings in this respect.

35. Norway notes that this has so far only been specifically addressed as far as "weighted-to-weighted (W-to-W) comparisons and T-toT comparisons are concerned. Given the overarching role of the chapeau of Article 2.4 to all methodologies employed to calculate

[25] Appellate Body Report, *EC-Bed Linen*, para 55; Appellate Body Report, *US-Corrosion Resistant Steel Sunset Review*, para 135; Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.
[26] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.

dumping margins, the same interpretation should also extend to "weighted-to-transaction" comparisons.

36. Admittedly the cases cited above concerned directly zeroing used in original investigations. That does not, however, lead to the result that zeroing should be permitted in other kind of proceedings under the ADA. Article 2, og which Article 2.4 forms part, is directly applicable to reviews under Article 9.3 by virtue of the chapeau to Article 9.3 of the ADA.

37. The Appellate body, in *US – Zeroing (EC)*, found that zeroing using the T-to-T methodology applied by the US in periodic reviews is not permitted under Article 9.3 ADA and Article VI:2 of the GATT 1994[27]. In that case the Appellate Body relied *in particular* on the obligation to calculate one single margin for the product as a whole. Norway submits that zeroing is equally prohibited in such cases by virtue of the "fair comparison" requirement of Article 2.4 ADA.

38. As regards sunset reviews under Article 11.3 ADA, the Appellate Body has previously held that all margins must conform to the disciplines of Article 2.4. If the margins relied upon in a sunset review were calculated using a methodology that is inconsistent with Article 2.4, then this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3.[28] Since zeroing is contrary to Article 2.4, then logically all sunset reviews relying on margins calculated using zeroing may be contrary not only to Article 2.4 but also to Article 11.3. Contrary to the Panel's flawed reasoning[29], there is no reason to distinguish between relying on margins from original investigations or those from any periodic review. The key issue is whether the margin that the investigating authorities relied upon were calculated with or without zeroing.

39. A similar result will necessarily follow for reviews under Article 9.5 (so-called "new shippers reviews"). There is no alternative definition of "margin of dumping" in that provision, and no basis for considering that the Agreement-wide definition of dumping in Article 2.1 should not apply to Article 9.5. Consequently, the prohibition of zeroing based on Article 2.1 and 2.4 logically extends to Article 9.5.

[27] Appellate Body Report, *US – Zeroing (EC)*, para 133.
[28] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, paras. 127 and 130.
[29] Panel Report, para. 7.256.

III. CONCLUSION

40. The interpretations advanced by the Panel imply that an investigating authority can use zeroing procedures in all proceedings under the ADA, except in original investigations with the "W to W" methodology. In regard to original investigations, this *i.a.* means that an investigation authority that wants to apply zeroing procedures can continue to do this, using a transaction specific methodology in Article 2.4.2 ADA. Since W to W comparisons and T to T comparisons are normatively equal under Article 2.4.2, this interpretation is illogical. Furthermore, under the approach of the Panel, the authorities may continue to apply a duty in a review, where the requirements of the Anti-dumping Agreement would have made it illegal to impose the duty in the first place. The correct legal interpretation has previously been expounded by the Appellate Body. Norway respectfully requests the Appellate Body to overturn the errors of law and legal interpretation advanced by the Panel in this case, and to make the appropriate findings in this appeal consistent with its previous practice.

41. Norway, in this third participant submission has only touched upon some of the interpretative issues raised in this appeal. Norway reserves the right to address other issues in its oral statement before the Appellate Body.