In the World Trade Organisation
Before the Appellate Body

(DS322 / AB-2006-5)

United States – Measures Relating to Zeroing and Sunset Reviews

Oral Statement by Norway as Third Participant

Hearing of the Appellate Body

Geneva
20 November 2006

OPENING STATEMENT BY NORWAY

A. Introduction

1. Contrary to the Panel and the US, Norway considers that the prohibition of all forms of zeroing in all forms of proceedings under the Anti-dumping Agreement is based on two important considerations; *Firstly*, that "dumping" shall be established for the "product as a whole" – which is not the case where zeroing is employed - and *secondly* that zeroing is also contrary to the "fair comparison" requirement of the Anti-dumping Agreement Article 2.4. The legal arguments have been explained in detail in our written submission and I shall here only refer you to the arguments presented therein.

2. In the following, I will focus on the issue raised by the US in its appeal regarding whether the zeroing procedures are challengeable "as such".

B. Zeroing procedures are challengeable "as such"

3. The focus of the appeal by the US as set out in its notice of appeal, centres on two aspects: *First* an alleged error in the findings and legal interpretations of the Panel in respect of whether the US maintains a measure called "zeroing procedures" in W-to-T and T-to-T comparisons; and *second* an alleged failure by the Panel to make an objective assessment of the matter before it and the facts of the case, contrary to the DSU Article 11[1].

4. As regards the first alleged error by the US, it is Norway's view that the Panel properly found that the zeroing procedures are a measure challengeable "as such". The US appeals this finding – limited to zeroing procedures relating to W-to-T and T-to-T comparisons in original investigations. By distinguishing between different comparison methods, the US seems to assert that it is necessary to conduct a proceeding and comparison method-specific assessment. The argument would seem to be that although the US zeroing procedures are prohibited as such in W-to-W comparisons, this finding could not extend to W-to-T and T-to-T comparisons as the US purportedly has so far only once used these comparison methods in original investigations.

[1] See US' notice of other appeal, dated 23 October 2006.

5. Norway agrees with the Panel that the zeroing procedures must be assessed as a single measure, and that there is no reason to distinguish between comparison methods or types of proceedings when assessing whether zeroing procedures are challengeable "as such".

6. It appears from the written submission of the US, *inter alia* paragraph 33, that the US is not challenging the legal standard set up by the Panel, but rather the Panel's assessment of the facts. While being couched in terms of the existence of the measure, the disagreement centres on the *extent* of the measure and its *application* to W-to-T and T-to-T comparisons. Specifically, the US asserts that the Panel did not have a sufficient evidentiary basis for its assessment that zeroing procedures are a rule or norm challengeable as such – also when used in the context of W-to-T and T-to-T comparisons in original investigations. This assertion is not only wrong from a factual point of view as evidenced by the assessment of the Panel, but fails to address or question an issue of law or a legal interpretation by the Panel. To the extent that the US disagrees with the Panel on law or legal interpretation and not just on the assessment of facts – something that is not clear from the written submission – it has not been able to show that a different legal standard applies.

7. Norway points to the DSU Article 17.6, which limits appeals to issues of law and legal interpretations. Based on the presentation of arguments of the United States in its written submission – focussing on the assessment of evidence by the Panel – we thus question whether the US appeal on this point is within the scope of appellate review.

8. Even if the issue were properly before the Appellate Body, the arguments presented by the US does not support the existence of an error of law or legal interpretation, nor a breach of DSU Article 11 by the Panel.

9. First of all, the Panel was well aware that "[p]articular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document". And further, that "A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such".[2]

10. Thus, the Panel did not take lightly on its obligation under DSU Article 11 to conduct a *rigorous* "assessment" of the facts to determine whether there was sufficient evidence that the zeroing procedures are a rule or norm challengeable "as such".

11. Based on such a rigorous assessment of a broad range of evidence, the Panel found that "the evidence […] is sufficient to conclude that a rule or norm exists providing for the application of zeroing whenever USDOC calculates margins of dumping or duty assessments rates".[3] The Panel also maintained that "it is clear as a factual matter that the USDOC always applies zeroing".[4]

12. Even if the US asserts that the Panel should have used a proceeding and comparison method-specific assessment, the US has not in any part of this proceeding presented any evidence supporting the need for such an assessment. That is, the US has not presented any evidence as to how W-to-T and T-to-T comparisons in original investigations differ from zeroing in other contexts. The US has also not presented any evidence as to why the USDOC would not use the zeroing procedures in the context of W-to-T and T-to-T comparisons in original proceedings, when the record shows a consistent policy of applying zeroing "whenever USDOC calculates margins of dumping".[5] The Panel did not mistakenly place a burden of proof on the US in this respect. The initial burden of proof was on Japan, which managed to establish a *prima facie* case, and the issue here is simply that the US did not manage to rebut it.

13. Turning to the alleged breach of DSU Article 11, the rigorous assessment of evidence performed by the Panel clearly fulfils the requirement of an objective assessment of the facts as required by the DSU Article 11. Furthermore, it follows from Appellate Body practice that a Panel – as the trier of facts – has a "margin of discretion" to appreciate the evidence of a case. Panels are not required to give factual evidence presented by the parties the same meaning and weight as do the parties, and may within its margin of discretion determine that certain elements of evidence should be accorded more weight than other elements. Indeed, the Appellate Body has stated that it does not second-guess the Panel on the basis that it might have reached a different factual finding than the Panel did.[6]

14. Thus, it is clear that the Appellate Body cannot take into account the disagreement of the US with the Panel's assessment of the facts. The Panel has acted within its margin of discretion when concluding that the evidence demonstrated the existence of a rule or norm

[2] Appellate Body Report, *United Stated – Zeroing (EC)* para. 198, cited by the Panel in para. 7.43.
[3] Panel Report para. 7.50.
[4] Panel Report para. 7.51.
[5] Panel Report para. 7.50.
[6] *Inter alia* Appellate Body Report, *Dominican Republic – Cigarettes* para. 79.

that applies "whenever" the USDOC determines a margin of dumping, including in the context of W-to-T and T-to-T comparisons in original investigations. Likewise, the Panel has also acted within its margin of discretion when concluding that the evidentiary basis for this finding was sufficient.

15. Based on the above, it is Norway's view that the Appellate Body must uphold the Panel's finding that the zeroing procedures are a measure challengeable "as such", also in respect of the two methodologies in question.

Thank you for your attention.