IN THE WORLD TRADE ORGANISATION

USA – Continued Existence and Application of Zeroing Methodology (WT/DS350)

Third Party Submission

by

Norway

Geneva
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Table of cases cited in this submission

Short Title	Full Case Title and Citation
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
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, adopted 1 November 1996
United States – OCTG Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268/AB/R, adopted 17 December 2004.
US – Corrosion Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products From Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Shrimp (Article 21.5 – Malaysia	Appellate Body Report, *United States – import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R, adopted 21 November 2001
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 – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada*, WT/DS264/AB/R, adopted 1 September 2006
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, /DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this dispute brought by the European Communities ("EC") regarding whether the continued continued existence and application of zeroing methodologies by the United States in anti-dumping proceedings is consistent with various provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement"* or the "AD Agreement"), Article VI:1 and VI:2 of the GATT 1994 and Article XVI:4 of the WTO Agreement.

2. Norway will not discuss the concrete cases to which the EC refers in this case. Norway understands that the facts surrounding these cases are not in dispute between the EC and the United States, and that the dispute is limited to questions of legal interpretation of the various WTO instruments referred to by the EC.

3. Norway will not in this third party submission address all the legal issues raised by the EC and responded to by the United States. Rather, Norway addresses the following general issues discussed in the First Written Submissions of the EC and the United States:

- whether a Panel may depart from the legal interpretations of the Appellate Body as set out in adopted Appellate Body Reports (Section II);
- the relationship between the obligations of Article XVI:4 of the WTO Agreement and the obligation to comply with adopted reports (Section III);
- whether the practice of zeroing in all forms and in all proceedings under the *AD Agreement* is consistent with Articles 2.1 and 2.4 of that agreement (Section II);
- whether Article 2.4.2 of the *AD Agreement* applies to review proceedings in addition to original investigations (Section III); and
- whether the continuation of anti-dumping measures in a sunset review is inconsistent with the *Anti-Dumping Agreement* in cases where the practice of zeroing has been used either in the original investigation or in a assessment review (Section IV).

4. THE ROLE OF PRECEDENT

4. The Appellate Body has ruled on almost all the issues raised in this case already, and set out the correct legal interpretation to be given to the contested provisions in respect of zeroing. The United States has not advanced any new legal arguments, and all the legal arguments presented by the United States in its First Written Submission have been rejected by the Appellate Body in previous cases.

5. The United States asks the Panel to disregard the legal interpretations of the Appellate Body, claiming that the reasoning of the previous Appellate Body reports is not "persuasive". Norway will address some of these arguments as they relate to specific provisions of the Agreements later in this submission. In this Section, Norway will present certain arguments relating to the precedential value of adopted Appellate Body Reports.

6. Norway is of the opinion that it serves the development of international law and the preservation of workable international relations to build on the rulings in previous reports in subsequent cases. There is no disagreement that the legal doctrine of *stare decisis* is not mandated by WTO law. While the Appellate Body is, thus, not formally bound to follow previous rulings, it is in the interests of legal certainty, foreseeability and equality before the law that the Appellate Body or a Panel should not depart, without good reason, from precedents laid down in previous cases. In this respect, the Appellate Body's practice is entirely in line with the practice of other international tribunals.

7. The question before this Panel is both a legal question, and a practical question. Firstly, whether – and under what conditions – a Panel can depart from the legal interpretation expressed by the Appellate Body and endorsed by the Members of the WTO through the adoption of the report(s). Secondly, whether the facts of this case makes it appropriate for the Panel to exercise its competence (if any) to make such a departure.

8. Addressing the first of these issues, the Panel must bear in mind, as also underscored by the Appellate Body, that adopted reports create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[1] The Appellate Body has even submitted that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where issues are the same".[2] Norway would add that following previous reports also ensures fewer disputes ("the issue is settled") and preserves both the system and the systemic function of the Appellate Body.

9. Additionally, the Panel should remember that the reports in question have all been adopted by the whole Membership through their decisions in the Dispute Settlement Body. This adoption is not just a formality, but makes the rulings and recommendations into binding

[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, paras. 107-108 (with regard to adopted panel reports) and Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, (with regard to Appellate Body reports).
[2] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.

international obligations. Norway also recalls the central importance given to the security and predictability of the system, as set out in Article 3.2 of the *Dispute Settlement Understanding* (the "DSU").

10. The United States argues that a Panel should free itself from the legal interpretations set out in Appellate Body reports, and only take such legal interpretations into account "to the extent that the reasoning is *persuasive*".[3]

11. Norway disagrees with the standard proposed by the United States, which may be considered lax and confusing. Norway does not argue that it is never possible for a Panel to advance a legal interpretation different from that set out in adopted Appellate Body reports. It is, however, clear from the central function of the reports in the dispute settlement system as well as in the clarifications of the provisions of the covered agreements, that Panels may only do so in extreme cases. More concretely, they may only do so where following the legal interpretation of the challenged provision by the Appellate Body would lead to a manifestly absurd result in a particular case, and where the facts of that case are entirely different from those already addressed in previous reports.

12. Such is not the case here. There is nothing new for the Panel to consider, the factual basis is the same, the methodologies are the same and the contested provisions are the same.

13. Norway further considers that if it were permissible to depart from previous legal interpretations in adopted Appellate Body reports, one enters into an unchartered territory. It also exposes the whole Membership to uncertainty, and is itself creating a precedent where all cases could be perpetually reargued. Such a result would be contrary to the object and purpose of the dispute settlement system, as well as the object and purpose of a rule based multilateral trading system ensuring secutiry and predictability for all economic actors.

III. THE FUNCTION OF THE ADOPTED LEGAL REPORTS IN INTERPRETING THE AGREEMENTS

14. Where laws, regulations or administrative procedures have been found to be inconsistent with the obligations of any of the WTO agreements, this entails a breach of Article XVI:4 of the WTO Agreement, which reads:

[3] United States' First Written Submission para. 33

> "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements".

15. The obligations incumbent upon the respondent, having been found to be in non-compliance, does not seem to be in dispute between the parties to this dispute. Where a law, regulation or administrative procedure of a particular Member has been found to be inconsistent with a WTO agreement, that Member has an obligation to remedy that situation.

16. The legal issue before this Panel is whether Article XVI:4 of the WTO-Agreement implies an obligation on the respondent that is different or additional to the obligation to comply with the adopted reports. Norway believes the issue here is not whether adopted reports are binding upon Members not party to the dispute. Clearly the rulings and recommendations are addressed only to the parties to the dispute.

17. In respect of this issue, Norway submits that adopted Appellate Body reports influences the obligations of *all* Members under Article XVI:4 of the WTO – not just the obligations of the parties to the dispute subject to the Appellate Body reports.

18. This is because, in adopting or maintaining domestic laws and regulations in areas covered by the WTO agreements, Members will have to take into account the legal interpretation of the WTO provisions in adopted panel and Appellate Body reports. This obligation is a continuous obligation upon all Members. The obligation does not set in from the adoption of a particular report, contrary to what the EC seems to argue,[4] but is there since the entry into force of the WTO Agreement. Being a continuous obligation, Members are required to review their laws, regulations and administrative procedures, when appropriate, to ensure that they are continuously in conformity with their WTO obligations.

19. As such, the obligation in Article XVI:4 is different from the obligation to comply with a particular adopted panel or Appellate Body report. Article XVI:4, therefore, entails obligations that go beyond the individual dispute. A Panel, however, can only address the claims in that particular dispute and between the parties to that particular dispute.

[4] EC's FWS para 131.

IV. THE PRACTICE OF ZEROING IS CONTRARY TO ARTICLES 2.1 AND 2.4 OF THE AD AGREEMENT

4.4 Introduction

20. Panels and the Appellate Body has repeatedly found that the use of zeroing when applying a "weighted average-to-weighted average" comparison methodology to calculate the dumping margin in original investigations (so-called model zeroing) is contrary to Article 2.4.2 of the *AD Agreement*.[5] The United States acknowledges this, but contests any claims of WTO inconsistency as to Articles 2.1 and 2.4 of the *AD Agreement.*[6]

21. Norway considers that the prohibition of zeroing is not limited to cases of model zeroing under the weighted average-to-weighted average methodology in Article 2.4.2 of the AD Agreement. In line with the Appellate Body's ruling in previous cases, Norway finds that the prohibition of all forms of zeroing in all forms of proceedings under the *AD Agreement* is based on two important considerations: First, that dumping shall be established for the "product as a whole" – which is not the case where zeroing is employed. And second, that zeroing is contrary to the "fair comparison" requirement of Article 2.4 of the *AD Agreement.*

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

22. There is a consistent line of reasoning by the Appellate Body regarding the requirement that the existence and amount of dumping must be determined for the product as whole. However, as the existence of such a requirement is something that is disputed between the Parties, Norway finds it pertinent to repeat the legal reasoning behind it.

23. 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 *AD Agreement*.[7]

24. The definition applicable to all calculations of dumping margins throughout the agreement can be found in Article 2.1 of the *AD Agreement*, which reads:

[5] See e.g. Appellate Body Report, *EC – Bed Linen*, para. 66 and Appellate Body Report, *US – Lumber V*, para. 117.
[6] United States' First Written Submission para. 155-156
[7] 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).

> "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 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)

25. A number of provisions of the *AD Agreement* make reference to "a product"[8], "the product" [9] or "any product"[10], 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:*

> "[...] 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. [...]"[11]

26. The Appellate Body in *US – Softwood Lumber V*, restated this, where it held that "dumping is defined in relation to a product"[12]. 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. [...]"[13] (emphasis added)

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

[8] E.g. Article 2.6
[9] E.g. Article 2.2.
[10] E.g. Article 9.2
[11] Appellate Body Report, *EC – Bed Linen*, para. 53.
[12] Appellate Body Report, *US – Softwood Lumber V*, para. 93.
[13] 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""[14].

28. The Appellate Body in *US – Softwood Lumber (Article 21.5 – Canada)* reiterated this, and 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.[15] Also in *US – Zeroing (Japan)*, the Appellate Body based its reasoning on the concept of "product as a whole".[16]

29. Furthermore, it is 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.

30. 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]

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

32. 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

[14] 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.
[15] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 105.
[16] Appellate Body Report, *US – Zeroing (Japan)*, para. 129.
[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)

33. 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.

34. 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 *AD Agreement*.

4.4 Zeroing is contrary to the requirement that the margin of dumping must be calculated for "the product as a whole"

35. 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. The United States acknowledges this as regards the use of zeroing in original investigations where comparisons are made using the weighted average-to-weighted average methodology.[19] The United States does not however acknowledges this for any other type of proceeding or comparison methodology, and Norway sees therefore the need to reiterate the legal arguments made by the Appellate Body in this respect.

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

[19] See EC's First Written Submission para. 145, with references to relevant decisions in footnote 107. See also United States' First Written Submission para. 155.

> "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."[20] (emphasis added)

37. 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."[21]

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

39. 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".[22]

40. The Appellate Body then went on to say that

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

> …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."[23]

41. The requirement in Article 2.1 *AD Agreement* to aggregate multiple comparison results to produce a margin of dumping for the product as a whole applies equally when an authority conducts: weighted average-to-weighed average comparisons, weighted average-to-transaction comparisons and transaction-to-transaction comparisons.

42. 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 transaction-to-transaction comparison in an original investigation. The Appellate Body underlined that in relation to Article 2.4.2 ADA, the weighted average-to-weighted average and transaction-to-transaction 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."[24]

43. 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."[25]

44. In *US – Zeroing (Japan)*, the Appellate Body reiterates this line of reasoning, and thus carrying out a consistent interpretation of the various provisions involved.[26]

45. Regarding sunset reviews, Norway holds that it would not be logically consistent to interpret the *AD Agreement* in a manner that will allow the investigating authorities to apply a

[23] Appellate Body Report, *US – Zeroing (EC)*, para. 127.
[24] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 89
[25] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para 93
[26] Appellate Body Report, *US – Zeroing (Japan)*, paras. 119-129.

duty where the requirements of the AD Agreement would have made it illegal to impose the duty in the first place.

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

4.4 Zeroing is contrary to the requirement of "fair comparison" in Article 2.4 of the AD Agreement

47. The EC contends in its First Written Submission that the requirement of "fair comparison" in Article 2.4 of the *AD Agreement* is an independent and overarching obligation, which in addition to applying to original investigations, also is applicable to proceedings governed by Article 9.3. The EC further argues that the zeroing methodologies used by the United States both in original investigations and in later reviews are inconsistent with the "fair comparison" requirement.[27] The United States, on the other hand, submits that zeroing is not contrary to the "fair comparison" requirement.

48. The Appellate Body has in several cases found that zeroing is contrary to a "fair comparison" between the export value and normal value.[28] It has been found that "the use of zeroing (…) artificially inflates the magnitude of dumping resulting in higher margins of dumping and making a positive determination of dumping more likely", and further that "this way of calculating cannot be described as impartial, even-handed, or unbiased".[29]

49. In the latest case – *US – Zeroing (Japan)* – the Appellate Body referred to its earlier rulings in its interpretation of Article 2.4[30], and expressed the following when addressing the application of the requirement of "fair comparison" to assessment reviews:

[27] EC's First Written Submission para. 159, 176 and paras. 198-199
[28] 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. 42 and Appellate Body Report, *US – Zeroing (Japan)*, para. 146.
[29] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142.
[30] Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

> If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.[31]

50. The Appellate has had the opportunity to consider the "fairness" of the practice of zeroing with regard to all three comparison methodologies, and with regard to both original investigations and assessment reviews. The message from the Appellate Body in these cases has been clear: There is an inherent bias in zeroing methodology and zeroing is not a "fair comparison". Zeroing thus implies a breach of Article 2.4 of the *AD Agreement.* Nothing in this case gives any cause to disturb the consistent Appellate Body findings in this respect.

51. In light of the clear case law referred to above, Norway does not see any need to go any further into the details of the interpretation of Article 2.4 of the *AD Agreement.*

V ARTICLE 2.4.2 OF THE AD AGREEMENT APPLIES ALSO TO REVIEW PROCEEDINGS

5.1 Introduction

52. The EC submits that Article 2.4.2 of the *AD Agreement* applies not only in the context of original investigations, but also in the context of review proceedings, including administrative reviews.[32] The United States argues otherwise, contending that the express terms of Article 2.4.2 limit the application to original investigations.[33]

53. Norway is of the firm view that the methodologies provided for in Article 2.4.2 are the only permissible methodologies also for assessment reviews. Article 9.3.1 does not prescribe or permit a method for margin calculation different from those set out in Article 2.4.2 of the *AD Agreement*.

[31] Appellate Body Report, *US – Zeroing (Japan)*, para. 168.
[32] EC's First Written Submission paras. 212 and 223.
[33] United States' First Written Submission para. 99.

5.2 Administrative reviews must comply with the requirements of Article 2.4.2 of the AD Agreement

54. Article 9.3.1 does not speak to the question of the method for margin calculation in assessment reviews. The provision is silent in this regard, and thus cannot be said to imply a permission or a prohibition of any specific methodology.

55. Article 9.3 (the "chapeau") does, however, provide that "The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The reference to Article 2 must be read as a reference to the whole of that Article, without exceptions. On this basis, Norway submits that the establishment of a margin of dumping in the context of Article 9.3 must adhere to the disciplines of Article 2, including Article 2.4.2.

56. As mentioned above, the United States understands Article 2.4.2 to be limited to original investigations. It is argued that the term "the existence of margins of dumping during the investigation phase..." implies that the provision is not applicable to assessment reviews according to Article 9.3.1.[34]

57. Norway believes that a proper interpretation of the terms of Article 2.4.2, read in context and in light of the object and purpose of the treaty, leads to a different result. First of all the ordinary meaning of the word "investigation" comprises more than just the type of examination that takes place in an original investigation (…). The EC refers in its First Written Submission to how the word is defined in The New Shorter Oxford English Dictionary: "The action or process of investigating; a systematic inquiry; a careful study of a particular subject".[35] Norway submits that there are different kinds of examinations that are undertaken during the proceedings in accordance with the AD Agreement that fits this definition, including the assessment into the amount of anti-dumping duty addressed in Article 9.3.1.

58. Norway contends that also the context and the object and purpose of the treaty indicate that Article 2.4.2 is not limited to original investigations. Article 2 is the sole provision in the Agreement dealing with the "determination of dumping", and Article 2.4.2 is the sole provision in the Agreement dealing with how to calculate dumping margins.[36] If one were to interpret Article 2.4.2 in such a way as to limit its application to original investigations, one

[34] United States' First Written Submission para. 99
[35] EC's First Written Submission para. 213 and footnote 152.
[36] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127.

would implicitly say that there are no specifics as to the methodologies to be applied in determining dumping margins in reviews and thus no "security or predictability" in the system. This would effectively abolish also the "due process rights" for the exporter. Such a result would – in Norway's view - be manifestly absurd and contrary to the object and purpose of the treaty. One cannot come to the conclusion that it is for each and every Member to chose how to calculate dumping margins. This could lead to 151 different methodologies with 151 different results.

59. It is a general tenet of public international law that where a treaty may give rise to two different interpretations, the one enabling the treaty to have appropriate effects should be adopted. In the words of the International Law Commission:

> "When a treaty is open to two interpretations, on of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[37]

60. In Norway's view this requires us to adopt an interpretation of "investigation phase" in Article 2.4.2 that ensures that there are agreed methodologies applicable also to reviews, and not an interpretation that permits "a free for all" making the choice of methodology into a "black hole". Norway again refers to the object and purpose of the WTO Agreement, which *inter alia* is to establish a rules-based multilateral trading system ensuring security and predictability for Members in their trading relations.[38] Without such an interpretation, margins calculated based on the same sales may change wildly from Member to Member, leaving no security and predictability for the exporters.

61. While not entering into a detailed critique of all the interpretative arguments put forward by the United States, Norway believes that the above principle of "effectiveness" and the object and purpose of the *WTO Agreement*, the *GATT 1994* and the *AD Agreement all* imply that Article 2.4.2 must be interpreted to apply to all investigations – including those carried out for purposes of establishing dumping margins in reviews.

[37] YBILC 1966-II, page 219.
[38] See DSU Article 3.2, first sentence.

IV. SUNSET REVIEWS

62. The Appellate Body has previously held that all dumping margins in sunset reviews conducted in accordance with Article 11.3, must conform to the disciplines of Article 2.4. If the margins are 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.[39] "In such circumstances, "the likelihood[of dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3.""[40]

63. Norway notes that the Appellate Body has confirmed that this also applies where the investigating authority relies on margins calculated (with the use of zeroing) during periodic reviews: In *US – Zeroing (Japan)* the Appellate Body ruled that since it was found that zeroing was inconsistent, as such, with Article 2.4 and Article 9.3, and the likelihood-of-dumping determinations in the sunset reviews at issue in the case relied on margins of dumping calculated inconsistently with the *Anti-Dumping Agreement*, they were inconsistent with Article 11.3 of that Agreement.

64. A margin calculated with zeroing can, therefore, never be the foundation for an authority's determination regarding the likelihood of continuation or recurrence of dumping.

65. The United States argues that the Panel should reject the claim by the EC because the EC has not demonstrated that a calculation without zeroing would result in zero or *de minimis* margins.[41]

66. This is an incorrect understanding of the obligation incumbent upon the investigating authority by virtue of Article 11.3 of the *Anti-Dumping Agreement.* Article 11.3 requires of the investigating authority that it makes a reasoned determination. As the Appellate Body has set out, a determination of the likelihood of continuation or recurrence of dumping based on a finding of dumping, where the dumping margin has been calculated employing zeroing, cannot be considered a reasoned determination. It is sufficient to constitute a breach of Article 11.3 for the EC to present a prima facie case that the determination is flawed. It is not necessary for the EC, nor for this Panel, to make the correct determination for the United

[39] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 127 and 130.
[40] Appellate Body Report, *US – Zeroing (Japan)*, para. 183, referring to Appellate Body Report , *US – Corrosion Resistant Steel Sunset Review*, para. 130.
[41] United States, FWS para. 154.

States. The Panel's role is to review the determinations actually made by the United States. A panel's role is not to redo the investigation and make its own determinations.

V. CONCLUSION

67. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the *AD Agreement*.