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United States – Continued Existence and Application of Zeroing Methodology

Oral Statement by Norway as Third Party

Third Party Session

Geneva
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STATEMENT BY NORWAY

1. Norway would like to thank the members of the Panel for the opportunity to make a statement at this meeting, and for opening up this part of the third party session to a public viewing.

Mr. Chairman, Members of the Panel,

2. Panels and the Appellate Body have dealt with the question of zeroing several times. The Appellate Body has in its previous cases ruled that all forms of zeroing in all forms of proceedings under the *Anti-dumping Agreement* are prohibited. This conclusion is founded on two premises: *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 contrary to the "fair comparison" requirement of Article 2.4 of the *Anti-dumping Agreement*. The Appellate Body has made clear that these arguments also apply to reviews, including sunset reviews.

3. Norway firmly supports the Appellate Body's interpretation and careful reasoning with regard to zeroing. The detailed legal arguments are set out in our written submission, and will therefore not be repeated here.

Mr. Chairman,

4. There seems to be no real disagreement as to <u>what</u> the Appellate Body has ruled on the issue of zeroing. However, the United States disagrees with the content of the rulings, and sets forward alternative arguments that it asks the Panel to adopt – even if the Appellate Body has already rejected these arguments on many occasions. The question, thus, seems to be to what degree the Panel may depart from the former rulings of the Appellate Body.

5. The Panels and the Appellate Body do not operate under the legal doctrine of *stare decisis*, and the Panel is therefore not <u>formally</u> bound to follow previous rulings. However, in the interest of legal certainty, foreseeability and equality before the law, panels and the Appellate Body should not depart from precedents laid down in previous cases without very good reasons for doing so.

6. The United States suggests that the Panel should only take into account the legal interpretations set out in Appellate Body reports "to the extent that the reasoning is persuasive".[1]

7. I would like to make three comments to this: *First*, the Appellate Body's interpretation and underlying reasoning are, in our view, far more persuasive than the allegations advanced by the United States. *Second*, applying a subjective standard of "persuasiveness" does not sit well with a system of "lower courts" and "appeal courts" as we have in the WTO with Panels and the Appellate Body. A basic premise of a system with an appeal court is that lower judicial bodies defer to the judgments of the appeal court. *Third*, "persuasiveness" is a very subjective term, which leaves a lot to the "eye of the beholder".

8. Rather, if one is to accept that earlier precedents may in certain cases be overturned, then a far more exacting standard must be applied. In our view there must be "a manifest error of legal interpretation" before a panel may depart from the legal interpretation of the Appellate Body regarding the same legal issue.

9. The panels that have departed from previous Appellate Body reports on zeroing have thereafter been overturned by the Appellate Body. It is thus eminently clear that those panels – and not the Appellate Body – committed serious errors of legal interpretation.

Mr. Chairman,

10. The United States has referred to two previous panels (*US – Zeroing (Japan) and US – Stainless Steel from Mexico)* in support of its argument that zeroing should be permitted in assessment reviews – and that there should be no methodological constraints on how the US calculate dumping margins and impose and collect duties.

11. The Panels in those two cases made a number of legal errors, two of which I would like to highlight here. Needless to say we trust that this Panel will not commit the mistakes of the two aforementioned Panels.

12. *First,* those Panels did not interpret the terms "product" or "margin of dumping" in the *Anti-dumping Agreement* in accordance with the Vienna Convention on the Law of Treaties. This is clear from the treatment in those reports.

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

13. Not only did they misunderstand the very purpose of treaty interpretation, they also ignored the elements of Articles 31 and 32 of the Vienna Convention. Rather than going through the elements of these articles they simply jumped at their own interpretation, and thereafter they declared their interpretation to be a permissible one.

14. Such an analysis completely misunderstands the purpose of treaty interpretation. The purpose of treaty interpretation is to arrive at the one and only interpretation of a term, in its context, and in light of its object and purpose. To do so, there are a number of elements that the treaty interpreter can rely upon, as specified in the various sub-paragraphs of Article 31 and Article 32. The tests in the Vienna Convention are designed to assist the treaty interpreter to arrive at *one single interpretation* of the term in question. A correct application of those tests should not allow more than one interpretation of a term except in the rarest of cases.

15. Should there still, *after* the application of the Vienna Convention, be unclear which of two interpretations is the correct one, then the principle of "in dubio mitius" - widely recognized in international law as "a supplementary means of interpretation" – would direct a treaty interpreter to prefer the meaning, which is less onerous to the party assuming an obligation.

16. By stating that there are two permissible interpretations up-front, those panels committed a legal error of treaty interpretation. By interpreting "product" and "margin of dumping" as they did, they made yet more mistakes.

17. The *second* legal error I want to highlight in those panel reports relate to the Standard of Review set out in Article 17.6 (ii) of the *Anti-dumping Agreement.*

18. What is important to always bear in mind is that the first sentence of Article 17.6 (ii) requires a Panel to apply the rules of treaty interpretation of customary international law. This means to apply the rules of the Vienna Convention. Had the two aforementioned panels applied the Vienna Convention correctly, only one interpretation should remain (that of the Appellate Body) – not two permissible ones.

19. The second sentence of Article 17.6 (ii) only kicks in *after* all the principles of treaty interpretation of public international law have been exhausted, and functions in those rare cases as would the application of the principle of "in dubio mitius".

20. Applying the second sentence up-front, before applying correctly the Vienna Convention, is a grave legal error.

21. We are, of course, confident that this Panel will not commit the errors of the two panels mentioned by the United States.

Mr. Chairman, Members of the Panel,

22. The Appellate Body has rightly pointed out that adopted reports create legitimate expectations among WTO Members, and therefore should be taken into account where they are relevant to any subsequent dispute.[2] Furthermore, the Appellate Body has underscored that it would be expected from panels that they follow the Appellate Body's conclusions in earlier disputes, especially where the issues are the same.[3]

23. It cannot be doubted that the case we are discussing today involves the same factual basis, the same methodologies and the same provisions as the Appellate Body's earlier rulings on zeroing. Hence, it would be expected that this Panel follow the legal interpretations set out by the Appellate Body in the mentioned decisions.

24. Based on this, Norway respectfully requests the Panel to examine this case in accordance with previous Appellate Body rulings in order to secure a legally correct, cohesive and predictable outcome.

Thank you for your attention.

[2] Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108 (as regards adopted panel reports) and Appellate Body Report, *US – Shrimp (Article 21.5- - Malaysia)*, paras. 107-109 (as regards adopted Appellate Body reports).
[3] Appellate Body Report, *United States – OCTG Sunset Reviews*, para. 188.