

**IN THE WORLD TRADE ORGANIZATION**

**WT/DS429**

**United States — Anti-Dumping Measures on Certain Frozen Warmwater  
Shrimp from Viet Nam**

**Third Party Submission**

**by**

**Norway**

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Table of cases cited in this submission

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>EC – Bed Linen (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001
<i>US – Corrosion Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products From Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Softwood Lumber V (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – OCTG Sunset Reviews(AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004.
<i>US – Softwood Lumber V (Article 21.5 – Canada)(AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/AB/R, adopted 1 September 2006
<i>US – Zeroing (Japan)(AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 2 June 2009

## I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this case concerning a disagreement between the Socialist Republic of Viet Nam (Viet Nam) and the United States of America (the US), regarding the conformity with the covered agreements of anti-dumping measures imposed by the US on certain frozen warmwater shrimp from Viet Nam.
2. Norway will not in this third party submission address all the legal issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the general issues of the standard of review in the *Anti-Dumping Agreement (AD Agreement)*, the role of precedent in the WTO dispute settlement system and the use of zeroing.

## II. STANDARD OF REVIEW

### A. Introduction

3. In its first written submission, the US refers to Article 17.6(ii) of the *AD Agreement* and asserts that the Panel should find the measures at issue WTO-consistent if they rest on a permissible interpretation of the *AD Agreement*.<sup>1</sup> Norway would like to comment on certain aspects of the interpretation of Article 17.6(ii) of the *AD Agreement*.

### B. Interpretation of Article 17.6 (ii) of the AD Agreement

4. Article 17.6(ii) of the *AD Agreement* reads:

“the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”

5. The first sentence of this article contains the general rule for the interpretation of the *AD Agreement*, while the second sentence refers to the situation where there are more than one permissible interpretation of one of the provisions in the Agreement. It is important to always bear in mind that the first sentence of Article 17.6 (ii) requires a panel to apply the rules of treaty interpretation of customary international law. This

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<sup>1</sup> US FWS, paras. 58-63.

means to apply the interpretative rules of the *Vienna Convention on the Law of Treaties* (*the Vienna Convention*),<sup>2</sup> codifying customary rules of treaty interpretation.<sup>3</sup>

6. The second sentence of Article 17.6 (ii) only takes effect *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”. In *US – Continued Zeroing*, the Appellate Body underlined the need for this approach:

“First, Article 17.6(ii) contemplates a sequential analysis. The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only after engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies [...] Secondly, the proper interpretation of the second sentence of Article 17.6(ii) must itself be consistent with the rules and principles set out in the *Vienna Convention*.”<sup>4</sup> (emphasis added)

7. In *US – Continued Zeroing*, the Appellate Body gave a thorough interpretation of Article 17.6(ii) of the *AD Agreement* and its relationship with the *Vienna Convention*.<sup>5</sup> Norway fully shares the interpretation and the approach laid down by the Appellate Body in this case. We will not repeat the entirety of the Appellate Body’s reasoning here. Nevertheless, we would like to highlight what the Appellate Body said in relation to the principles of Article 31 and 32 of the *Vienna Convention*:

“The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. Nor do multiple meanings of a word or term automatically constitute “permissible” interpretations within the meaning of Article 17.6(ii).”<sup>6</sup>

“We further note that the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results.”<sup>7</sup>

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<sup>2</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969.

<sup>3</sup> *US – Continued Zeroing (AB)*, para. 267.

<sup>4</sup> *US – Continued zeroing (AB)*, paras. 271 and 272.

<sup>5</sup> *US – Continued zeroing (AB)*, paras. 265-275.

<sup>6</sup> *US – Continued zeroing (AB)*, para 268.

<sup>7</sup> *US – Continued zeroing (AB)*, para 273.

8. Norway respectfully asks that the Panel is guided by the principles laid down by the Appellate Body in *US – Continued Zeroing* in its considerations in the present case.

### III. THE ROLE OF PRECEDENT

9. On several occasions, the Appellate Body has spoken on the role of precedent in the WTO dispute settlement system. Naturally, Appellate Body reports adopted by the Dispute Settlement Body (DSB) are binding on the parties. However, the Appellate Body has also made itself very clear on the precedent adopted panel and Appellate Body Reports represent:

“adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system. The Appellate Body has further explained that adopted panel and Appellate Body reports become part and parcel of the *acquis* of the WTO dispute settlement system and that "ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." Moreover, referring to the hierarchical structure contemplated in the DSU, the Appellate Body reasoned in *US – Stainless Steel (Mexico)* that the "creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements." The Appellate Body found that failure by the panel in that case to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.”<sup>8</sup> (Footnotes omitted, emphasis added)

10. 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. The Appellate Body has repeatedly 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”.<sup>9</sup>

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<sup>8</sup> *US – Continued Zeroing (AB)*, para. 362.

<sup>9</sup> *US – Continued Zeroing (AB)*, para. 362. *US – OCTG Sunset Reviews (AB)*, para. 188.

Norway would add that following previous reports also ensures fewer disputes and preserves both the system and the systemic function of the Appellate Body.

11. Additionally, the Panel should remember that panel and Appellate Body reports are adopted by the whole Membership through their decisions in the DSB. This adoption is not just a formality, but makes the rulings and recommendations into binding international obligations for the parties to the dispute. Norway also recalls the importance given to the security and predictability of the system, as set out in Article 3.2 of the Dispute Settlement Understanding.
12. Norway further considers that if it were permissible to depart from previous legal interpretations in adopted Appellate Body reports, one enters into an uncharted territory. It exposes the whole Membership to uncertainty, and would create a situation 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 security and predictability for all economic actors.

#### **IV. ZEROING IS PROHIBITED UNDER THE AD AGREEMENT AND THE GATT 1994**

##### ***a) Introduction***

13. In its first written submission, Viet Nam claims that the US has failed to comply with Article 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 through the use of a zeroing methodology as it relates to the use of simple zeroing in administrative reviews.<sup>10</sup>
14. Norway would like to underline that we do not take a stand on the facts of this particular case. We would however like to make some of observations on the use of zeroing.
15. In line with the Appellate Body's ruling in previous cases, Norway finds that the use of all forms of zeroing in all forms of proceedings under the *AD Agreement* is prohibited. The main consideration on which this prohibition is based, is that dumping shall be

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<sup>10</sup> Viet Nam FWS, VI.B.1.a.ii.

established for the “product as a whole” – which is not the case where zeroing is employed.

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

16. In its first written submission, the US claims that the concepts of “dumping” and “margin of dumping” in Article 2.1 of the *AD Agreement* and Article VI:1 of the GATT 1994 may refer to individual transactions.<sup>11</sup> This is contrary to a consistent line of Appellate Body reports concluding that the existence and amount of dumping must be determined for the product as whole. However, as this requirement is disputed between the Parties, Norway finds it pertinent to repeat the legal reasoning behind it.
17. The point of departure for Norway is that there is but one definition of “dumping” in the *AD Agreement*, and that this definition is applicable to all proceedings under the *AD Agreement*.<sup>12</sup>
18. 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:
- “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)
19. A number of provisions of the *AD Agreement* make reference to “a product”,<sup>13</sup> “the product”<sup>14</sup> or “any product”,<sup>15</sup> 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

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<sup>11</sup> US FWS, F.1.b.

<sup>12</sup> There are five such instances where the authorities calculate dumping margins, those being (i) original proceedings, (ii) “assessment reviews” (*AD Agreement* Article 9.3), (iii) “new shipper reviews” (*AD Agreement* Article 9.5), (iv) “changed circumstances reviews” (*AD Agreement* Article 11.2), and (v) “sunset reviews” (*AD Agreement* Article 11.3).

<sup>13</sup> E.g. Article 2.6

<sup>14</sup> E.g. Article 2.2

<sup>15</sup> E.g. Article 9.2

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.”<sup>16</sup>

20. The Appellate Body in *US – Softwood Lumber V*, restated this and held that “dumping is defined in relation to a product”.<sup>17</sup> 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. [...]”<sup>18</sup> (emphasis added)

21. The Appellate Body in *US – Softwood Lumber (Article 21.5 – Canada)* reiterated that margins of dumping must be established for the product as a whole, and analysed the context provided by Articles 5.8, 6.10 and 9.3 of the *AD Agreement*. 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.<sup>19</sup> Also in *US – Zeroing (Japan)* and *US – Continued Zeroing*, the Appellate Body based its reasoning on the concept of “product as a whole”.<sup>20</sup>

22. Furthermore, it is evident from the provision of Article 6.10 of the *AD Agreement*, 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.”<sup>21</sup> Norway adds that Article 6.10 applies to original investigations and to reviews pursuant to Article 11 by virtue of Article 11.4.

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<sup>16</sup> *EC – Bed Linen (AB)*, para. 53.

<sup>17</sup> *US – Softwood Lumber V (AB)*, para. 93.

<sup>18</sup> *US – Softwood Lumber V (AB)*, para. 99.

<sup>19</sup> *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 105

<sup>20</sup> *US – Zeroing (Japan) (AB)*, para. 129, *US – Continued Dumping (AB)*

<sup>21</sup> *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 107

23. 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 of the *AD Agreement* “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.”<sup>22</sup>
24. For “new shipper reviews” Article 9.5 of the *AD Agreement* “suggests that a single margin of dumping is to be established for each individual exporter or producer”.<sup>23</sup>
25. Norway also refers to the provisions of GATT 1994 Article VI, which is the basis for the *AD Agreement*, and which is still the basis for permitting the imposition of anti-dumping duties. 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 1994 Article VI. (Paragraph 1 of GATT 1994 Article VI is similar to Article 2.1 of the *AD Agreement* in respect of the calculation of the dumping margin.) Nothing in GATT 1994 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.
26. In *US – Continued Zeroing* the Appellate Body concluded that:
- “we are unable to agree with the US’ view that “dumping” may be determined at the level of individual transactions, and that multiple comparison results are “margins of dumping” in themselves. Rather, as the Appellate Body held in *US – Stainless Steel (Mexico)*, “[a] proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter’s pricing behavior as reflected in all of its transactions over a period of time.”<sup>24</sup> (emphasis added)
27. 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*.

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<sup>22</sup> *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 108.

<sup>23</sup> *US – Continued Zeroing (AB)*, para. 283.

<sup>24</sup> *US – Continued Zeroing (AB)*, para. 287.

**c) Zeroing is contrary to the requirement that the margin of dumping must be calculated for “the product as a whole”**

28. 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. However, the US does not fully acknowledge this and Norway therefore sees the need to reiterate the main legal arguments made by the Appellate Body in this respect.
29. 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.”<sup>25</sup> (emphasis added)
30. 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.”<sup>26</sup>
31. 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 *US – Continued Zeroing*, where it concluded:

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<sup>25</sup> *US – Corrosion Resistant Steel Sunset Review (AB)*, para 135.

<sup>26</sup> *US – Softwood Lumber V (AB)*, para. 98 (emphasis in the original).

“the Appellate Body has seen no basis in Article VI:2 of the GATT 1994 or in Articles 2 and 9.3 of the ADA for disregarding the results of comparisons where the export price exceeds the normal value.”<sup>27</sup>

“In our analysis, we have been mindful of the provisions of Article 17.6(ii) of the *Anti-Dumping Agreement*. The analysis offered above, applying the customary rules of interpretation of public international law, does not allow for conflicting interpretations. We have found, by the application of those rules, that zeroing is inconsistent with Article 9.3. A holding that zeroing is also consistent with Article 9.3 would be flatly contradictory. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence.”<sup>28</sup> (emphasis added)

32. 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.

#### IV. CONCLUSION

33. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

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<sup>27</sup> *US – Continued Zeroing (AB)*, para 286.

<sup>28</sup> *US – Continued Zeroing (AB)*, para. 317.