

IN THE WORLD TRADE ORGANISATION

Before the Appellate Body

(DS350 / AB-2008-11)

**United States – Continued Existence and Application of
Zeroing Methodology**

Oral Statement

by

Norway as a Third Participant

Hearing of the Appellate Body

Geneva

11 December 2008

Mr Presiding Member, Members of the Division,

1. Norway would like to thank you for the opportunity to make a brief statement at this meeting. We would also like to thank you for making the decision of opening up the hearing for public observation. Open hearings are in our opinion beneficial to the legitimacy of the Appellate Body's work, and hence beneficial to WTO's dispute settlement system as a whole.

Mr Presiding Member,

2. The Appellate Body has ruled on the issue of zeroing a number of times. The correct legal interpretation of *GATT 1994* and the *Anti-Dumping Agreement* has been set out, and it has repeatedly been confirmed that all forms of zeroing in all forms of proceedings under the *Anti-dumping Agreement* are prohibited.
3. It follows from these rulings that also the use of so-called simple zeroing in periodic reviews is inconsistent with WTO obligations. The Panel in the current dispute acknowledged this and concluded that the United States did not act in accordance with its WTO obligations when applying simple zeroing in periodic reviews. Two of the panellists, however, did this somewhat hesitantly, as they "generally found the reasoning of earlier panels on these issues to be persuasive".¹
4. Amongst other claims in this appeal, the United States submits that the Panel applied the customary rules of interpretation and agreed that the *Anti-Dumping Agreement* could be interpreted as permitting the use of simple zeroing in periodic review, and that the Panel thereby disregarded the standard of review in Article 17.6(ii) of the *Anti-Dumping Agreement*. Norway strongly disagrees with the United States' analysis.
5. Article 17.6(ii) of the *Anti-dumping Agreement* sets out the standard of review for panels in anti-dumping cases. The provision consists of two sentences. The first sentence corresponds with language in DSU Article 3.2, and makes it clear that

¹ Panel Report para. 7.182

- panels, when interpreting the provisions of the *Anti-dumping Agreement*, as a first step, shall do exactly the same as they would if the dispute related to another WTO Agreement.
6. The *first step* for any WTO panel is therefore to apply customary rules of interpretation of public international law to the language in the contested provisions. The Appellate Body has set out Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties as representing such customary rules.²
 7. 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. Thus, 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.
 8. The second sentence of Article 17.6(ii) will only come into play in the rare case that an interpreter of the *Anti-dumping Agreement* arrives at two “*permissible interpretations*”. Norway would like to point to the wording used: It is not referring to two *possible* interpretations; the interpretations have to be *permissible after having gone through all the elements of Articles 31, 32 and 33 of the Vienna Convention*. It is only in these rare cases, where a treaty interpreter has exhausted the factors of Articles 31 through 33 *and still* has not arrived at one interpretation of the term as employed in a treaty, that Article 17.6(ii) would come into play and direct the treaty interpreter – as a last resort - to accept an interpretation favourable to the investigating authority. As such, Article 17.6(ii) is only reflecting the principle of *in dubio mitius*, that would apply as the last resort to settle an interpretative question under public international law in any case.
 9. The Appellate Body confirmed in *US – Zeroing (Japan)* that the relevant articles in the *GATT 1994* and the *Anti-Dumping Agreement*, when interpreted in accordance with customary rules of interpretation, do *not* admit of another interpretation of these provisions as far as the issue of zeroing is concerned.

² See *inter alia*, Appellate Body Report, *United States – Gasoline and Japan – Taxes on Alcoholic Beverages II*.

10. Based on this, it must be clear that the United States should not be heard in its claim that the Panel did not apply Article 17.6(ii) of the *Anti-dumping Agreement* correctly. The Panel did not arrive at two *permissible* interpretations after the application of Articles 31 and 32 of the Vienna Convention, and thus the second sentence of Article 17.6(ii) was never applicable.

Thank you.
