

**OFFSETS FOR NON-DUMPED COMPARISONS**

Communication from the United States

The following communication, dated 1 June 2007, is being circulated at the request of the Delegation of the United States.

The focus of this paper is on the issue of "zeroing," or more appropriately, whether investigating authorities are required to provide "offsets" or otherwise reduce margins of dumping because certain comparisons between export price and normal value (regardless of the basis of comparison) indicate that the export price exceeds the normal value i.e., the particular comparison was not dumped. Although Members have identified the issue in the Rules negotiations<sup>1</sup> and, to some degree, have expressed their views, there has not been a full and serious exploration of the subject to date because of the ongoing WTO disputes and the evolving reasoning of the Appellate Body with respect to the relevant provisions of the Anti-dumping (AD) Agreement. Members lack clarity and certainty as to the full range of implications of the reasoning utilized by the Appellate Body in its reports on this matter. If anything, more questions have been raised than have been resolved as a result of this litigation, which warrants putting such questions to the Negotiating Group on Rules at this time.

Despite the recent Appellate Body reports addressing this issue in at least five separate proceedings<sup>2</sup>, Members still have different views on whether "offsets" are required, and when and under what circumstances they must be provided. The reasoning that the Appellate Body used to find that offsets are required under the AD Agreement has broad repercussions for all Members, not just those who apply a retrospective anti-dumping duty collection system. Indeed, the Appellate Body reports are contrary to what many have long understood to be consistent with the text of the AD Agreement. The fact that three panels, composed of experienced anti-dumping practitioners, administrators, and negotiators, came to conclusions different from those reached by the Appellate

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<sup>1</sup> In an earlier paper (TN/RL/W/72), the United States stated that the Agreement on Implementation of Article VI of GATT 1994 is not clear as to the manner in which investigating authorities are to calculate overall weighted average dumping margins, and raised the need for clarifications to the AD Agreement. Japan and other Members have also submitted papers (e.g., TN/RL/GEN/8 and TN/RL/GEN/126) that seek to address certain aspects of this issue.

<sup>2</sup> European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India, WT/DS141/AB/R (1 March 2001); United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (11 August 2004); United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (18 April 2006); United States – Final Dumping Determination on Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU By Canada, WT/DS264/AB/R/W (15 August 2006); United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (9 January 2007).

Body demonstrates that this issue has not been resolved in any genuine sense and underscores the reality that there remain fundamental differences among Members as to the proper interpretation and operation of the AD Agreement and the underlying concept of dumping.

There also remain many questions that have gone unanswered by the Appellate Body's findings. Just as Members have never agreed to rules governing the calculation of an overall dumping margin, neither have they ever agreed to any requirement to provide an offset or otherwise reduce the amount of dumping found because of non-dumped transactions in that calculation. Given the lack of explicit language and the differences of views, both among Members and between the Appellate Body and multiple panels, the United States considers that this is an issue ripe for clarification and improvement through the Rules negotiation process, as envisaged by the Doha Ministerial mandate.

A prohibition of zeroing, or a requirement to provide offsets for non-dumped transactions, simply cannot be found in the text of the AD Agreement. Nevertheless, the Appellate Body concluded that authorities are required to offset non-dumped comparisons against dumped comparisons, even though this conclusion is at odds with long-standing practices implementing AD Agreement provisions relating to, among other things, targeted dumping and prospective normal value systems, as well as with long-held views on the very concept of dumping itself.<sup>3</sup> The issue of zeroing, on which Members could not reach agreement in the Uruguay Round, should not be left to dispute settlement. We as Members should endeavour to reach an agreement on this issue through negotiation.

The Negotiating Group on Rules needs to evaluate openly the panel and Appellate Body reports and understand as clearly as possible the reasoning adopted, whether we agree with it or not, and what that reasoning means for different aspects of the AD Agreement as well as for the different systems recognized by the AD Agreement as legitimately operating within its rules. As negotiators responsible for clarifying and improving the provisions of the AD Agreement, it behoves us to evaluate the panel and Appellate Body reasoning and its implications and, to the extent that there is a lack of clarity with respect to the proper interpretation of the text and the proper operation of anti-dumping systems, to resolve these issues with clear, precise text. To this end, it is the view of the United States that the proper resolution of this issue requires clear text providing that margins of dumping may be determined without offsets for non-dumped transactions, consistent with the long-held concept of dumping. We therefore respectfully request that the Chairman consider undertaking consultations on this matter at the earliest opportunity. The United States reserves the right to submit additional proposals to strengthen anti-dumping enforcement, or in response to proposals by other participants, in order to ensure a balanced outcome.

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<sup>3</sup> See, e.g., The Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties, adopted on 27 May 1960, BISD 9S/194, paragraph 8 (noting that "the ideal method ... was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned ...").