

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 On the basis of the above findings, we conclude that:

- (a) The 14 anti-dumping proceedings that were identified in the EC's panel request but not in its consultations request are within our terms of reference,
- (b) The EC's claims in connection with the continued application of the 18 anti-dumping duties are not within our terms of reference,
- (c) The EC's claims regarding the four preliminary determinations identified in its panel request are outside our terms of reference,
- (d) The United States acted inconsistently with the obligation set out under Article 2.4.2 by using model zeroing in the four investigations at issue in this dispute,
- (e) The United States acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute,
- (f) The United States acted inconsistently with its obligations under Article 11.3 of the Agreement by using, in the eight sunset reviews at issue in this dispute, dumping margins obtained through model zeroing in prior investigations.

8.2 We have applied judicial economy with regard to:

- (a) The EC's claims under Article 2.4 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994 regarding the use of model zeroing in the four investigations at issue in this dispute,
- (b) The EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.2 of the Anti-Dumping Agreement regarding the use of simple zeroing in the 29 periodic reviews at issue in this dispute,
- (c) The EC's claims under Articles 2.1, 2.4, 2.4.2 and 11.1 of the Agreement regarding the use, in the eight sunset reviews at issue in this dispute, of margins obtained in prior proceedings through the zeroing methodology.

8.3 We recommend that the DSB request the United States to bring its measures mentioned in paragraphs 8.1(d), 8.1(e) and 8.1(f) above into conformity with its obligations under the WTO Agreement.

8.4 The European Communities requests that we make a suggestion under the second sentence of Article 19.1 of the DSU. The European Communities asks the Panel to suggest that the steps that the United States might take in the implementation of the DSB recommendations and rulings following this dispute should be WTO-consistent, particularly with regard to the issue of zeroing.<sup>161</sup> The United States submits that there is no basis in the DSU for a panel to make a suggestion for the purposes of avoiding unnecessary discussions about what might or might not fall within the scope of a compliance panel. According to the United States, "[i]t is unreasonable that the [European

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<sup>161</sup> Closing Statement of the European Communities at the Second Meeting.

Communities] is even asking this Panel to start from the premise that there would be a dispute as to compliance".<sup>162</sup>

8.5 Article 19.1 of the DSU provides:

"Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." (footnotes omitted)

8.6 Article 19.1 stipulates that when a panel or the Appellate Body finds a measure to be inconsistent with a covered agreement, it shall recommend that the measure be brought into conformity with the relevant agreement. Furthermore, it states that the panel or the Appellate Body may suggest ways in which such recommendation may be implemented.

8.7 Having found that the United States acted inconsistently with certain obligations that it assumed under the Anti-Dumping Agreement and the GATT 1994 and having made our recommendation as stipulated under Article 19.1, we decline to make a suggestion on how the DSB recommendations and rulings may be implemented by the United States. In our view, it is evident under the DSU, particularly Article 19.1 thereof, that Members must implement DSB recommendations and rulings in a WTO-consistent manner. We cannot presume that Members might act inconsistently with their WTO obligations in the implementation of DSB recommendations and rulings. We therefore reject the EC's request.

#### **IX. SEPARATE OPINION BY ONE MEMBER OF THE PANEL WITH REGARD TO THE EUROPEAN COMMUNITIES' CLAIMS REGARDING ZEROING IN INVESTIGATIONS AND ZEROING IN PERIODIC REVIEWS**

9.1 I agree with the conclusions reached by the majority of the Members of this Panel regarding all the claims raised by the European Communities in this dispute. I, however, disagree with the legal reasoning developed by the majority regarding the EC's claims on simple zeroing in periodic reviews, and, in part<sup>163</sup>, model zeroing in investigations and provide my opinion below.

9.2 I recall that zeroing disputes now have a long history in WTO dispute settlement and that different panels and the Appellate Body have expressed their views on different types of zeroing on multiple occasions.<sup>164</sup> Although my views generally overlap with the Appellate Body's reasoning on zeroing, I would like to emphasize that they reflect my objective examination of the facts and the legal issues presented in this case, as required under Article 11 of the DSU, and not a simple acceptance of the Appellate Body's opinion.

9.3 Considering that the approach that I take with regard to model zeroing in investigations and simple zeroing in periodic reviews has been analysed in great detail by the Appellate Body, I do not intend to address all such details here. Instead, I shall emphasize the main points of my disagreement with the majority's reasoning in this dispute.

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<sup>162</sup> Comment of the United States on the EC's Response to Question 4 from the Panel Following the Second Meeting.

<sup>163</sup> My legal reasoning regarding model zeroing in investigations differs from that of the majority in that, unlike the majority, I consider that model zeroing in investigations is inconsistent with Article 2.1 of the Agreement because it precludes a determination of dumping for "the product under consideration as a whole", in addition to being inconsistent with Article 2.4.2 as reasoned by the majority.

<sup>164</sup> I would like to note that the approach described in footnote 112 above, also applies to my separate opinion.

9.4 The majority considers that a permissible interpretation of the Anti-Dumping Agreement is that dumping may be determined in connection with individual export transactions. I note, however, that the majority also considers the alternative interpretation, *i.e.*, that dumping may be determined for the product under consideration as a whole, to be permissible within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.<sup>165</sup> The issue, therefore, is whether the relevant provisions of the Agreement allow more than one permissible interpretation regarding the WTO-consistency of model zeroing in investigations and simple zeroing in periodic reviews.

9.5 In this regard, I agree with the view expressed by the Appellate Body that under Articles VI:1 and VI:2 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, "dumping" and "margins of dumping" can only be found for the product under consideration as a whole. Like the Appellate Body, I am of the view that there would be an anomaly if multiple margins were calculated for the same exporter. In my view, a determination of dumping for the product under consideration as a whole is also necessary in order to make a determination regarding the volume of dumped imports, injury and causal link.<sup>166</sup>

9.6 In addition, I disagree with the majority's opinion that dumping is not necessarily and exclusively an exporter-specific concept and that one can calculate an importer-specific margin of dumping. In this regard, I find convincing the Appellate Body's point of view that both Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement support the notion that dumping necessarily reflects the exporter's behaviour. Furthermore, I agree with the contextual support that the Appellate Body found in Articles 2.3, 5.2(ii), 6.1.1, 6.7, 5.8, 6.10, 9.5, 8.1, 8.2, 8.5 and 9.4(i) and (ii) of the Anti-Dumping Agreement for the exporter-specific nature of dumping. In my view, no provision in the Agreement suggests that dumping margins may be established for individual importers. Furthermore, I am of the view that the reference to "margin of dumping" in Article 9.3 indicates that dumping may only be determined consistently with the provisions of Article 2 and in relation to the product under consideration as a whole for an exporter.

9.7 I disagree with the concerns expressed by the majority in this case that the prohibition of simple zeroing in periodic reviews would favour importers with high margins *vis-à-vis* importers with low margins. How an anti-dumping duty is to be collected is for the authorities to determine, the only requirement is that the duty collected not exceed the exporter-specific margin of dumping calculated for the product under consideration as a whole.

9.8 Although the majority refers to the report of a Group of Experts that convened in 1960, I do not consider that it is necessary to have recourse to supplementary means of interpretation for the textual interpretation makes it sufficiently clear that dumping may only be determined for exporters and in connection with the product under consideration as a whole.

9.9 I do not agree with the majority that the recognition of a prospective normal value system in Article 9.4(ii) of the Anti-Dumping Agreement reinforces the argument that dumping may be determined on the basis of individual export transactions. This reasoning mixes duty collection at the time of importation with a determination of final duty liability. Article 9.3 of the Agreement makes it clear that the amount of the duty collected at the time of importation does not represent a margin of dumping. The duty collected at the time of importation, in my view, is subject to review under Article 9.3.2. I see nothing in the Agreement to suggest that the duty collected in a prospective normal value system is exempt from a review under Article 9.3.

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<sup>165</sup> *Supra*, footnote 131.

<sup>166</sup> I would like to note that my views regarding "product under consideration as a whole" apply both to model zeroing in investigations and simple zeroing in periodic reviews.

9.10 The majority expresses the view that certain questions relating to the alleged mathematical equivalence between the first and the third methodologies, in case zeroing is generally prohibited, have not been addressed by the Appellate Body. In this regard, I would recall, and agree with, the Appellate Body's explanation that, being an exception to the two methodologies set out under the first sentence of Article 2.4.2, the third methodology cannot be used as a basis to interpret such other methodologies. Secondly, as noted by the Appellate Body, one could argue that if zeroing was permitted under the first sentence of Article 2.4.2, this would enable investigating authorities to capture pricing patterns constituting targeted dumping, thus rendering the third methodology *inutile*.

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