DS294
United States - Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)

Second closing oral statement
by the European Communities

Geneva
27 April 2005
Mr. Chairman, Distinguished Members of the Panel.

1. There has already been much complex argument. So in this closing statement the EC will confine itself to briefly summarising the position on one key issue: the phrase “existence of margins of dumping during the investigation phase” in Article 2.4.2.

2. The EC claims that, in retrospective assessments, by making an asymmetrical comparison and zeroing, absent targeted dumping, the US acts inconsistently with various provisions of the Anti-Dumping Agreement.

3. In response, the US seeks to establish that the above phrase has a limited meaning, which is said to exclude, a contrario, retrospective assessments.

4. The starting point for the analysis must be the text of Article 2.4.2 itself.

5. The first observation is that the term “margin of dumping” is defined in Article VI:2 of the GATT 1994, which definition is implemented and further elaborated in Article 2. The same defined term, “margin of dumping”, is also used in Article 9.3, which cross-refers to all of Article 2. It also appears in Articles 9.1 and 9.5.

6. The second observation is that Article 2.4.2 states what it applies to, not what it does not apply to. Unlike the SAA, it does not contain the words “(not reviews)”. The US is therefore using a contrario reasoning in an attempt to defeat the definition of “margin of dumping” and the cross-reference in Article 9.3. If the Members had really wanted to achieve what the US asserts, it would have been a simple matter for them to have used express exclusionary language, such as that in Article 2.2.1; Article 2.7; Article 9.4(ii); or Annex II, paragraph 5. The Members did not do that.

7. The ordinary meaning of the word “investigation”, referring to a dictionary, indicates a systematic examination or inquiry or a careful study of a particular subject. The re-calculation of a margin of dumping in a retrospective assessment involves an investigation in this sense.

8. The US declines to refer to a dictionary to determine the ordinary meaning of the word “investigation”. Rather, it originally invoked as context the meaning of the word “investigation” throughout the Anti-Dumping Agreement, asserting that it always means “original investigation” and “not reviews”. The EC has refuted this, pointing to the different ways in which the word “investigation” is used in the Anti-Dumping Agreement: review investigation; injury investigation; country and company specific investigations; on-the-spot investigation; and preliminary investigation. We have drawn the attention of the Panel to numerous references to “review investigations” in the Anti-Dumping Agreement; in past panel and Appellate Body Reports; in past GATT panel reports; by USDOC itself; by the ITC itself; and even in US municipal anti-dumping legislation. What makes an investigation an investigation is the nature of the activity undertaken by the investigating authority – not the material scope of the examination. Remarkably, this morning, the United States conceded this to be so.
9. The US, narrowing its line of argument, specifically invokes Article 5 as context. The EC agrees with the US concerning the meaning of the word “investigation” in Article 5, precisely because of the express limiting words in Article 5.1. However, we do not find this “context” sufficient basis on which to find that the word “investigation” in Article 2.4.2 always has the same meaning as in Article 5.1, defeating the definition of “margin of dumping” and the cross-reference in Article 9.3. Rather, we consider that Article 2.2, which is also part of Article 2, and thus also part of the implementation of the definition of “margin of dumping”, is more immediate and relevant context. We point to the repeated use of the word “investigation” in Article 2.2. We note that these are provisions in respect of which implementation in the US also for retrospective assessments was considered “required or appropriate”. We particularly note the use of the phrases “in the course of the investigation” in Article 2.2.1.1 and “during the investigation” in footnote 6. Remarkably, this morning, the United States conceded that “at least for the purposes of these proceedings” - Article 2.2 also applies to retrospective assessments. We also cite as relevant context Article 6.

10. The US, broadening its line of argument, looks for a definition of the word “investigation” for the purposes of the Anti-Dumping Agreement not just in Article 5.1, but also in Article 1 and footnote 1 – but the search is equally fruitless. It asks the Panel to ignore the fact that the defined term “initiated” is used in other provisions of the Anti-Dumping Agreement, notably with respect to reviews; and the fact that footnote 1 refers to Article 5 only for the purposes of identifying the procedural action by which a Member formally commences an investigation. Remarkably, this morning, the United States conceded that all “reviews” are “initiated”.

11. The US invokes the word “existence” as allegedly uniquely tying Article 2.4.2 to Article 5.1. The EC again explains that this is insufficient to defeat the definition of “margin of dumping” and the cross-reference in Article 9.3. The ordinary meaning of “exist” being “having objective reality”, it does not, when used in conjunction with the phrase “dumping margin”, encompass the concept of an amount or margin somewhere between zero and infinity. We point to the references in Article 7 to the “amount” of dumping; and in Article 9.1 to the “amount” and “full margin of dumping”; and in Article 3.4 to the “magnitude of the margin of dumping”. Retrospective assessments are also concerned with both the existence and degree of dumping. We point to the use of the word “existence” elsewhere in the Anti-Dumping Agreement and the SCM Agreement, including in the provisions relating to imposition and collection. We invite the Panel not to base itself on the esoteric mathematical and philosophical meanings referred to by the US. We also invite the Panel to pay due regard to the French and Spanish texts of the Anti-Dumping Agreement, which make it clear that all of the provisions of Article 2 – including those that the US admits apply in a retrospective assessment – are concerned with the “existence” of dumping. Finally, we point out that the word “existence” does not appear in Article 2.4.1 – which is treated the same way by the US, in truth simply on the basis of an erroneous assumption that “investigation” always means “not reviews”.

12. In similar vein, we do not believe that the invocation by the US of the word “phase” can defeat the definition of “margin of dumping” and the cross-reference
in Article 9.3. We do not find the ordinary meaning of that word, especially in conjunction with “during”, indicating a stage in the passage of time, to be of any assistance to the US. We point to the fact that the word “phase” is used in the case law in many different senses. We point to several other words that appear only once in the *Anti-Dumping Agreement* without that being legally significant. We also point to several other concepts that are referred to in the *Anti-Dumping Agreement* in different ways without that being legally significant. Finally, we again point out that the word “phase” does not appear in Article 2.4.1 – which is treated the same way by the US. In any event, as the European Communities has explained, even if “phase” does not mean “period”, that does not mean that “investigation” means “original investigation”, as the US would have it.

13. The US then asserts that the EC would render the phrase in Article 2.4.2 “meaningless”. But that is not true. We have indicated a number of meanings, in each case explaining what the “value added” would be. And we observe that it is the US that would have this Panel render the words in Article 5.1 redundant; the chapeau to Article 9.3 meaningless; the elaboration of the definition of “margins of dumping” pointless; and the results of original investigations worthless.

14. The US invokes the variable duty provisions of Article 9(4)(ii). But this argument must fail, Article 9(4)(ii) being irrelevant to the interpretation of Article 2.4.2; and this intermediate possibility in the prospective assessment system being always subject to a refund under Article 9.3.2 and thus the disciplines of Article 2.

15. Having failed to make its case on the ordinary meaning or the context, the US turns to *object and purpose*. However, aside from a false analogy with import duties, it cannot articulate any alleged object or purpose to explain why, at the moment of final payment, the basic method for calculating a margin of dumping should suddenly change, and be substantially unregulated by the *Anti-Dumping Agreement*. The EC, on the other hand, points to the object and purpose of retrospective assessment, as it appears from the *Anti-Dumping Agreement*, and as set out in the Manual and confirmed by the US in these proceedings: it is just a temporal update. We also point to the object and purpose of the *Anti-Dumping Agreement*, which at the very least requires basic consistency in the application of economic concepts.

16. It is not part of the object and purpose of the *Anti-Dumping Agreement* that a Member’s choice of collection system – prospective or retrospective – should radically change the fundamental rules governing the calculation of the defined term “margin of dumping”.

17. The US argues that its approach is “permissible”. However, once the meaning of a word has been established after application of the rules in the Vienna Convention, it is not permissible for a Member to unilaterally narrow the meaning, as if a renaming exercise by a single Member could avoid an *Anti-Dumping Agreement* obligation applicable to all.

18. The US constantly makes allegations about the “drafters’ intention” – a concept that is legally irrelevant, the Vienna Convention referring to the intent of the *parties* and to the preparatory work. The error that the US makes is to consider
that what it thought at the time is the key point. However, insofar as intent is relevant at all, what matters is the state of mind of all the Members, as evidenced by the preparatory work.

19. In any event, there is nothing ambiguous or obscure about the ordinary meaning of the word “investigation” in Article 2.4.2, which meaning is confirmed by the context, object and purpose. And there is nothing manifestly absurd or unreasonable about respecting the definition of “margin of dumping” and the cross-reference in Article 9.3. Thus, as a matter of law, the preparatory work could only ever confirm the position of the EC, as it results from Article 31 of the Vienna Convention. And that is in fact precisely what it does.

20. Thus, as the third parties in this case have all confirmed, when they signed the Anti-Dumping Agreement they did not think that it meant that, when it comes to final payment, the basic disciplines governing the calculation of a margin of dumping no longer apply, investigating authorities being beyond the reach of the Anti-Dumping Agreement, and free to do as they please.

21. This view is substantially confirmed by a consideration of the subsequent practice of the parties.

22. The European Communities does not agree with the United States assertion that the Anti-Dumping Agreement is a “flying pig”. It is a carefully crafted compromise – and it is the responsibility of panels and the Appellate Body to discern its true meaning, in accordance with the Vienna Convention. The European Communities stands ready to respond to any further questions the Panel may have, in order to assist it in the execution of this task.

23. Finally, Mr. Chairman, Distinguished Members of the Panel, a word about the “as such” claims and the mandatory/discretionary doctrine. The European Communities respectfully requests the Panel to follow the guidance of the Appellate Body on this matter. The mandatory/discretionary doctrine is not a mechanistic rule.

24. Thank you for your attention.